

Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015

Senate Environment and Communications Legislation Committee

10 September 2015

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Acknowledgement

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Executive summary

The Law Council regards s 487 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) as an important standing provision that contributes to the realisation of the objects of the Act, which include:

- protection of matters of national environmental significance,
- involving stakeholders in the implementation of the Act; and
- assisting in the co-operative implementation of Australia's international environmental responsibilities.

This submission assesses the Bill against several Rule of Law policy principles and finds that:

- its retrospective operation is undesirable;
- s 487 has contributed to improving statutory compliance and ensuring the accountability of the Executive Government; and
- it has contributed to Australia's compliance with its multilateral human rights and environmental obligations and undertakings.

Standing provisions have been reviewed in numerous research and inquiry reports in recent years. The report of the review of the EPBC Act chaired by Dr Alan Hawke AC (2009) noted that s 487 had operated effectively, had not opened the floodgates to litigation, and should be maintained. Other inquiry reports have suggested that the law of standing be harmonised across Australia and be extended to those who have shown a substantial interest in a development. The Law Council regards this as an overdue access to justice law reform. The Courts have mechanisms for managing frivolous and vexatious applications and there are numerous disincentives to litigate.

Introduction

1. The Law Council of Australia welcomes the opportunity to comment on the [Environment Protection and Biodiversity Conservation Amendment \(Standing\) Bill 2015](#) introduced to the House of Representatives on 20 August 2015. The Bill, after its [second reading](#), has been referred to the Senate Environment and Communications Legislation Committee for inquiry and report by 12 October 2015.
2. The Law Council of Australia is the peak national representative body of the Australian legal profession and represents some 60,000 legal practitioners nationwide. [Attachment A](#) outlines further details in this regard.
3. At least two of the Law Council's Constituent Bodies have expressed concerns about the proposed repeal of s 487.
 - The Law Institute of Victoria (LIV) has warned that restricting who can bring a legal challenge to projects with environmental consequences will increase litigation costs as parties argue narrower grounds for standing, or leave unlawful government decisions unchecked. The LIV noted that Courts already have powers to ensure cases are not brought for improper purposes - including the power to summarily dismiss frivolous and vexatious cases;¹ and
 - The Law Society of New South Wales has warned, similarly, that the Bill erodes fundamental legal principles and has the potential to undermine public faith in government because it seeks to limit Court oversight of Executive decision-making and transparency.²
4. The Bill proposes to repeal [s 487](#) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) that provides a statutory test for standing for Australian individuals and organisations in relation to applications for judicial review of decisions made under the Act.
5. Section 487 defines 'person aggrieved' in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (AD(JR) Act) as including Australian individuals and organisations who, in the two years prior to a challenged decision, failure or conduct, have engaged in a series of activities in Australia or an external territory for the protection or conservation of, or research into, the environment; and for organisations, where the objects or purposes of the organisation or association include protection or conservation of, or research into, the environment.
6. The effect of the amendment would be that only 'aggrieved persons' (as defined by s 5 of the *Administrative Decisions (Judicial Review) Act 1977*) (other than those acting for unincorporated associations ([s 488](#)) and those seeking an injunction under the Act ([s 475\(6\)](#) and [s 475\(7\)](#)) may make an application for judicial review of decisions made under the EPBC Act. The High Court takes a wide view of standing provided interests are affected directly.³

¹ Law Institute of Victoria, 'LIV says court oversight of environmental projects must continue', [Media release](#), 20 Aug 2015.

² Law Society of New South Wales, 'Environment Act amendment erodes fundamental legal principles', [Media release](#), 21 August 2015.

³ *Argos Pty Ltd & Ors v Simon Corbell, Minister for the Environment and Sustainable Development* [2014] HCA 50. Argos considered ACT legislation that at the time mirrored the Commonwealth AD(JR) Act.

7. The s 487 test is broader and clearer than that under the AD(JR) Act, and has the potential to reduce disputes about whether an applicant has standing, and therefore also the cost and length of litigation.
8. The grounds upon which judicial review can be sought under both the EPBC Act and the AD(JR) Act are narrow, and are concerned with due process and the lawfulness of decision-making. Judicial review is not a review of the merits of a decision and the possible re-making of the decision by the reviewer. Matters such as a breach of the rules of natural justice, failure to follow correct procedures, jurisdictional error, error of law, and improper exercise of power (taking into account irrelevant considerations, unreasonableness, bad faith, improper purpose etc) are grounds for seeking judicial review.
9. The Law Council does not support the proposed repeal of s 487.
10. The [second reading speech for the Bill](#) says that the amendment is necessary to prevent American-style litigation strategies disrupting and delaying infrastructure projects in Australia.
11. The Bill was introduced in the wake of consent orders being issued in [NSD33/2015 Mackay Conservation Group v Minister for Environment](#). On 4 August 2015 a judge of the Federal Court set aside a decision of the Commonwealth Environment Minister under the EPBC Act to approve proposed action to develop an open cut and underground coal mine, rail link and associated infrastructure in central Queensland, subject to certain conditions. The Minister had breached the Act by not having regard to approved conservation advices that were not in the material before him at the time he made his decision concerning the impacts that the project would impact on the listed threatened species, the Yakka Skink and the Ornamental Snake. The decision is expected to be re-made.

History of s 487

12. Section 487 of the original Environment Protection and Biodiversity Conservation Bill 1998 (Cth) (EP&BC Bill) was examined during a Senate Committee inquiry on that bill and its operation has been reviewed often since, without recommendation that it be narrowed, as noted below.
13. The objects in s 3 of the EPBC Act include:
 - (a) *to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance*
 - (d) *to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples; and*
 - (e) *to assist in the co-operative implementation of Australia's international environmental responsibilities.*
14. The Law Council recommended in 1998 that cl 487 of the EP&BC Bill be broadened. It submitted:

The provisions for legal standing for judicial review (causes 475 and 487) should be amended to remove the arbitrary two year limit on involvement in environmental activities and to ensure there is no diminution of the principles of legal standing in environmental matters accepted by the Federal and High Courts. The Bill would have the effect of removing the standing of a recently formed group with a legitimate grievance in relation to a particularly site-specific or issue-specific approval from becoming involved in appropriate legal action... Preferably the Bill should allow standing to "any person" (as already exists, for example, in NSW Environmental legislation), as this broadening of standing in environmental matters has not led to abuse of judicial process.⁴

15. The Law Council re-stated this position in oral evidence to the inquiry.⁵

16. The 1999 Senate Committee's inquiry report concluded:

[T]he standing provisions of the Bill reach a fair balance between enabling public involvement in enforcement of the Bill and ensuring that decisions under the Bill are not unnecessarily delayed or impeded by vexatious litigation. The Bill also provides certainty as to which persons have standing.⁶

Current scope of standing under s 487

17. The case law on s 487 indicates that it is not always construed in favour of those with private concerns about environmental matters, as it is aimed at protecting the public interest.

18. In *Paterson v Minister for the Environment and Heritage & Anor* [2004] FMCA 924, the applicant contended she had standing as she had made a series of submissions in relation to a development proposal and because endangered species existed on her land. Baumann FM found she did not have standing, agreeing with the Minister's contention that Parliament did not intend s 487 to provide 'open standing'. Baumann FM said, at [15]:

*The purpose, in my view, of s 487 is to offer a right to seek review on a matter involving national environmental significance, to an extended class of aggrieved persons. The careful way in which the qualifying criteria are set out in s 487(2), coupled with the objects at s 3(1)(a) and s 3(2)(d), mean **a distinction is drawn between individuals with a long standing and demonstrated interest in environmental issues, and a person who holds a strong "one off" opposition or concern about a particular action.** Because it is an extension of the rights given under the ADJR Act, s 487 should be construed more narrowly.*

⁴ Law Council of Australia, Submission to the Senate Environment Recreation Communications and the Arts Legislation Committee in respect of the Environment Protection and Biodiversity Conservation Bill 1998, October 1998, and

⁵ Australian Senate, Environment, Communications, Information Technology and the Arts Legislation Committee, [Transcript of evidence 04/03/99 - Environment Protection and Biodiversity Conservation Bill 1998](#).

⁶ Australian Senate, Environment, Communications, Information Technology and the Arts Legislation Committee, *Environment Protection and Biodiversity Conservation Bill 1998 and Environmental Reform (Consequential Provisions) Bill 1998 (Cth): Report*, 1999, 179–181, [11.41]

Support for this view is found in the explanatory note which provides “there must be a genuine and consistent pattern of such activities for there to be ‘a series’ of activities. (emphasis added)

19. In *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* [2007] FCA 1480, Stone J held, at [2]:

*By virtue of [its] objects and activities, by the application of s 487 of the Act, the applicant falls within the extended meaning of “person aggrieved” for the purposes of s 5 of the AD(JR) Act and thus has standing to bring this application. **The extended standing accorded under s 487 is an indication of the importance the legislature attached to the involvement and input of concerned members of the community — an importance that reflects the objects set out in s 3 of the Act.** (emphasis added)*

20. In *Lawyers for Forests Inc v Minister for Environment, Heritage and the Arts (No 2)* [2009] FCA 466, Tracey J noted, at [5]:

Section 487 of the Act extends standing to organisations with an active interest in the conservation of the environment which wish to challenge decisions made under the Act. If such organisations were to be required to pay costs in proceedings initiated by them in which they were unsuccessful this would, so it was said, discourage or prevent them from initiating proceedings. This would, in turn, undermine a Parliamentary intention that such organisations should be involved in the administration of the Act and be able to participate in testing decisions made under it.

Issues

Rule of law

21. The Law Council’s [Policy Statement on Rule of Law Principles](#) (adopted by its Directors in March 2011) provides several principles of relevance:

- Principle 1 – ‘The law must be both readily known and available, and certain and clear’.
- Principle 6 – ‘The Executive should be subject to the law and any action undertaken by the Executive should be authorised by law’, and:
 - (c) where the Executive has acted unlawfully, anyone affected should have access to effective remedy and redress.
 - (d) Executive decision making should comply with the principles of natural justice and be subject to meaningful judicial review.
- Principle 8 – ‘States must comply with their international legal obligations whether created by treaty or arising under customary international law. ... States must avoid inconsistencies between their international legal obligations and their domestic laws and policies.’

Principle 1 – ‘The law must be both readily known and available, and certain and clear’.

22. Under Schedule 1 of the Bill, the application of the repeal of s 487 will operate retrospectively, contrary to Principle 1. It says:

2 Application of amendment

*The repeal of section 487 of the Environment Protection and Biodiversity Conservation Act 1999 by this Schedule applies in relation to any application made under the Administrative Decisions (Judicial Review) Act 1977 after this item commences (**whether the decision, failure to make a decision or conduct to which the application relates occurs before or after this item commences**). (emphasis added)*

23. Whilst there have been Commonwealth laws enacted with retrospective operation, this causes uncertainty which is undesirable from a rule of law standpoint. The Executive ought to leave it to the Courts to determine if a claim is frivolous or vexatious or being brought for ulterior motives.

Principle 6 – ‘The Executive should be subject to the law and any action undertaken by the Executive should be authorised by law’

24. The extended standing conferred under s 487 was intended to broaden access to justice in the environmental law sphere, where numerous constraints militate against public interest litigation. These include but are not limited to:

- the limited grounds for review⁷
- other limitations on relief in administrative law, for example laches;
- the cost, and risk of adverse costs orders;
- often limited access to information;
- the justiciability of a particular matter or claim; and
- limited access to experienced, expert lawyers.

25. Even under s 487 (and s 475 in the case of applications for injunctive relief) there have been very few cases successfully brought – and certainly no avalanche of ‘vigilante litigation’.⁸

26. As noted above, the provision of access to remedies is an important safeguard for the rule of law, for accountable and responsible government, and as an anti-corruption safeguard.⁹ The EPBC Act was enacted at a time of multiple corruption investigations, particularly in relation to development activities.¹⁰ It confers broad powers on the Commonwealth to approve development applications affecting matters of national environmental significance, and it is appropriate that interested

⁷ A Edgar, [‘Public and Private Interests in Australian Administrative Law’](#) (2013) 36(1) *University of New South Wales Law Journal* 202).

⁸ The Australia Institute, [‘Key administration statistics – 3rd party appeals and the EPBC Act’](#).

⁹ Broad standing provisions are also consistent with Directive 2003/35 on access to justice in environmental law and the Aarhus Convention: Eva Julia Lohse, ‘Unrestricted access to justice for environmental NGOs?’, (2011) 2 *Elni Review* 96–103.

¹⁰ Western Australia, *Royal Commission into Commercial Activities of Government and Other Matters*, (WA Govt. Printer, 1992) M Sawyer, N Aborjorensen, and P Larkin, *Australia: The State of Democracy* (Federation Press, 2009) 185 – 86; JD Dodson, EJ Coiacetto, CE Ellway, ‘Corruption in the Australian Land Development Process: Identifying a research agenda’, *Governance* 09, 1–25; H Lunn, *Joh: The Life and Political Adventures of Sir Johannes Bjelke-Petersen* (University of Queensland Press, 1987).

stakeholders can ensure that those powers are exercised responsibly and with accountability.

27. As Guy Dwyer has suggested:

Under the Diceyan model of government, the will of the people is reflected by the Legislature, the actions of the Executive are controlled by the Legislature, and the Executive is accountable to the Legislature for its actions, which, in turn, is responsible to the people. Writing extra-curially, Sir Gerard Brennan noted that such ideals are obsolete in the context of modern Australian governance, where, apart from elections, the people have little influence over the Legislature's modus operandi and the Legislature exercises little control over the Executive. As a result, the courts have become an increasingly important forum in environmental law for the public to enforce legal obligations and review administrative action.¹¹

28. Dwyer suggests that effective review mechanisms are needed to ensure the public's perception of the credibility, transparency and accountability of the EPBC Act decision-making process; maintaining institutional integrity and promoting the progressive and principled development of environmental law and policy.¹²

Principle 8 – 'States must comply with their international legal obligations whether created by treaty or arising under customary international law.'

29. Many multilateral environmental instruments, both binding and non-binding, recognise the importance of public participation in environmental protection 'by all concerned citizens'. Participation includes public access to information and remedial procedures.

- Principle 10 of the Rio Declaration on Environment and Development provides that '[e]ffective access to judicial and administrative proceedings, including redress and remedy, shall be provided'.
- Other instruments creating binding obligations similarly recognise the rule of law benefits of public participation in decision-making and review.¹³

30. An emerging principle of international environmental law, drawn from human rights law, is 'non-regression'. This principle suggests that public authorities should avoid amending legislation to reduce applicable protections. Decision-makers should be striving to enhance, rather than weaken, environmental protections.¹⁴ The Law

¹¹ From Guy Dwyer, '[Standing, Adaptive Management and the Queensland Lungfish: Wide Bay Conservation Council v Burnett Water Pty Ltd](#)' (2011) 7(1) *Macquarie Journal of International and Comparative Environmental Law* 81, 87–88.

¹² Ibid. See also: Justice Brian Preston, 'The role of public interest environmental litigation' (2006) 23 *Environmental and Planning Law Journal* 337, 340–342; Chris McGrath, 'Flying Foxes, dams and whales: Using federal environmental laws in the public interest' (2008) 25 *Environmental and Planning Law Journal* 324, 328–329.

¹³ Including the Convention on Climate Change, the Desertification Convention, the 1995 Agreement on Fish Stocks and the Vienna Declaration adopted by the World Conference on Human Rights: United Nations, Economic and Social Council, Commission on Sustainable Development, *Rio Declaration on Environment and Development: application and implementation: Report of the Secretary General*, Fifth session, 7–25 April 1997, 10 February 1997, [UN Doc E/CN.17/1997/8](#): Principle 10 and [60]–[66]. See also the more recent non-binding Rio+ 20 outcome document: *The Future We Want, Resolution* adopted by the General Assembly on 27 July 2012 (A/66/L.56) UNDoc A/RES/66/288.

¹⁴ M Prieur, 'Non-regression in environment law', in [\(2012\) 5\(2\) S.A.P.I.EN.S.](#)

Council suggests that the non-regression principle is particularly apposite in this instance.¹⁵

31. Other relevant principles of international environmental law concern the precautionary principle and intergenerational equity. Citizens ought to have the legal right to assess the impact of planned projects on the environment so that future generations may see that there was rigorous discussion on a project's effects, and that action are not approved in the absence of scientific consensus unless proponents have established that suspected risks have been addressed. The effective use of the precautionary principle and ecologically sustainable development considerations should be part of effective environmental law and is needed for effective resource management. This is best achieved with broad standing provisions.

Evidence-based law reform

32. Standing provisions have been reviewed in numerous research and inquiry reports in recent years.
33. The report of the review of the EPBC Act chaired by Dr Alan Hawke AC (2009) noted that s 487 had operated effectively, had not opened the floodgates to litigation, and should be maintained. That report recommended that legal standing for the purpose of merits review applications be extended to include those persons who made a formal public comment during the relevant decision making process.¹⁶
34. Of most direct relevance to this Bill is the Productivity Commission's [report on Major Project Development Assessment Processes](#) (2013). It noted the differences in standing rules in Canada, the United Kingdom and Australia, and across the Australian states and territories. The Commission recommended that harmonized provisions be agreed for merit and judicial review applications. It recommended that standing to initiate judicial or merits review should be available to proponents; those whose interests have been, are, or could potentially be directly affected by the project or proposed project; and those who have taken a substantial interest in the assessment process. In exceptional cases, it recommended that the review body should be able to grant leave to other persons if a denial of natural justice would otherwise occur.¹⁷
35. The Productivity Commission's report considered the recommendations of a number of earlier reports,¹⁸ and recommended that standing be granted to those who had

¹⁵ Tumai Murombo, '[Strengthening locus standi in public interest environmental litigation: Has leadership moved from the United States to South Africa?](#)' (2010) 6(2) *Law Environment and Development Journal* 163, 172.

¹⁶ Australian Government, Department of the Environment, Heritage and the Arts, *The Australian Environment Act: Report of the Independent review of the Environment Protection and Biodiversity Conservation Act 1999* (Dr Allan Hawke AC: Chair) (2009), Chapter 15, [15.78]–[15.85], Rec 50, 260–261.

¹⁷ Australian Government, Productivity Commission, *Research Report: Major Project Development Assessment Processes* (2013), Rec. 9.2 and text 271–283, citing Australian Government, Attorney-General's Department, Administrative Review Council, [Federal Judicial Review in Australia: Report No 50](#) (ARC, 2012) and other inquiry reports.

¹⁸ Australian Government, Australian Law Reform Commission, *Standing in Public Interest Litigation* (AGPS, 1985); Australian Law Reform Commission, *ALRC Report 78: Beyond the Door-keeper: Standing to Sue for Public Remedies* (AGPS, 1996); Australian National Audit Office, *What Decisions should be subject to Merits Review?* (1999); Administrative Review Council (ARC), *Environmental decisions and the Administrative Appeals Tribunal: Report No 36* (AGPS, 1994); ARC, *What decisions should be subject to merits review?* (1999); ARC, *Federal Judicial Review in Australia* (2012); Queensland Electoral and Administrative Review Commission, *Report on Judicial Review of Administrative Decisions and Actions*

shown a 'substantial interest' in the consultation process by lodging a substantive submission.¹⁹ The Productivity Commission noted the public interest in broad standing provisions.

36. The Commission noted that misuse of the 'substantial interest' provision would be constrained by costs provisions and courts' inherent power to strike out vexatious litigation. It recommended that in exceptional circumstances, the review body should be able to grant leave to persons seeking review if a denial of natural justice would occur if they were not granted standing.²⁰
37. The Productivity Commission in its more recent draft report on *Access to Justice Arrangements* urged government agencies to develop dispute resolution plans and to use ADR in appropriate disputes, greater use of pre-litigation protocols, and more effective case management within courts.²¹

(1990); Law Reform Commission of Western Australia, *Report on Judicial Review of Administrative Decisions* (2002).

¹⁹ Substantial is commonly defined as being 'real or of substance, as distinct from ephemeral or nominal': *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 27 ALR 367.

²⁰ Productivity Commission, above n 2, 273–276.

²¹ Australian Government, Productivity Commission, *Access to Justice Arrangements*, esp Ch 8.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents its constituent bodies consisting of 16 Australian State and Territory law societies and bar associations and the Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2015 Executive as at 1 July 2015 are:

- Mr Duncan McConnel, President
- Mr Stuart Clark, President-Elect
- Ms Fiona McLeod SC, Treasurer
- Mr Morry Bailes, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.