Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015

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Contents

The Bills Digest at a glance .......................................................... 3
Purpose of the Bill ........................................................................... 4
Structure and provisions of the Bill .................................................. 4
Background ...................................................................................... 4
The EPBC Act ................................................................................... 4
Judicial review and extended ‘standing’ under the EPBC Act .............. 4
History of extended standing under section 487 .................................. 5
Past reviews relating to standing, including under the EPBC Act .......... 6
Australian Law Reform Commission ................................................. 7
Independent review of the EPBC Act ............................................... 7
Productivity Commission ................................................................. 7
Independent Commission Against Corruption .................................... 8
Statistics on public interest litigation under the EPBC Act.................. 8
The Adani Carmichael mine case ...................................................... 9
Tarkine–Shree Case ......................................................................... 11
Background ........................................................................................ 11
Recent legislation to clarify requirement to consider conservation advices ................................................................. 12
Government response to the Carmichael mine case ......................... 13
Committee consideration .................................................................. 14
Senate Environment and Communications Committee .................... 14

Date introduced: 20 August 2015
House: House of Representatives
Portfolio: Environment
Commencement: The day after Royal Assent.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website.
Policy position of non-government parties/independents... 15
Position of major interest groups ................................. 17
  Indigenous groups .................................................. 17
  Mining and industry groups ....................................... 17
  Environmental organisations ..................................... 18
  Farming groups ........................................................ 19
  Property Rights Australia .......................................... 20
  Law groups and legal experts ..................................... 21
  Department of the Environment ................................ 22
Financial implications .............................................. 23
Statement of Compatibility with Human Rights ............... 23
  Parliamentary Joint Committee on Human Rights .......... 23
Key issues .............................................................. 23
  The significance of standing and the effect of repealing section 487 ...................................................... 23
  Is section 487 unusual? ............................................ 25
  Is this about legal loopholes and minor administrative errors? ........................................................... 25
Concluding comments .............................................. 26
The Bills Digest at a glance

Background and purpose of the Bill

- The purpose of the Bill is to repeal section 487 of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (the EPBC Act).¹

- Section 487 extends the people who have ‘standing’ to seek judicial review of decisions made under the EPBC Act. It does this by expanding the definition of ‘person aggrieved’ in the Administrative Decisions (Judicial Review) Act 1977 (the ADJR Act) to include Australian individuals and organisations that have engaged in a series of activities relating to environmental protection, conservation or research at any time in the two years immediately before the decision was made.

- The aim is to limit the ability of individuals and environmental groups to challenge decisions made under the EPBC Act.

- The Government is concerned that section 487 is being used by ‘vigilante’ litigants to disrupt and delay key infrastructure projects.

- In the 15 years since the EPBC Act commenced, less than 30 cases have been brought under section 487 for judicial review of decisions under the Act.

- The Bill is a response to a successful challenge by the Mackay Conservation Group against the Minister for the Environment’s decision to grant approval under the EPBC Act for the Carmichael coal mine in Queensland (proposed by Adani Mining Pty Ltd). In that case, the parties agreed that the Minister had failed to consider the Approved Conservation Advices for two vulnerable species (the Yakka Skink and the Ornamental Snake) and the Minister’s approval decision was set aside. The Minister subsequently re-approved the Adani Carmichael mine on 14 October 2015.

- The Adani Carmichael mine case mirrored an earlier Federal Court decision, where the approval for the Tarkine Shree Minerals mine was found void due to the failure to consider an Approved Conservation Advice.

Key issues and stakeholder concerns

- The Australian Labor Party and the Australian Greens do not support the Bill. Several cross-bench Senators have also expressed reservations about the Bill.

- Mining groups support the Bill on the basis that it will reduce vexatious litigation which increases costs and delays to development projects.

- Environmental organisations and legal experts are opposed to the Bill, raising concerns that:
  - the Bill could limit access to justice and public interest litigation relating to projects affecting matters of national environmental significance
  - section 487 is used only rarely and promotes public accountability in government decision-making
  - there are already disincentives to bringing proceedings under section 487 (including adverse costs orders) and courts already have mechanisms to deal with vexatious litigation and
  - section 487 provides certainty and the Bill may actually result in more delays and costs to relevant projects as parties will need to establish standing before substantive issues are considered.

- Farming groups are also opposed to the Bill, expressing particular concern that the Bill could limit farmers and farming groups from challenging developments that adversely affect farming communities.

Concluding comments

- The proposed repeal of section 487 raises questions about accountable and responsible government. It is unclear whether the Bill will achieve its intended purpose. Parliament will need to consider carefully whether this Bill is an appropriate mechanism to achieve its intended aim, in light of the purpose, history and use of section 487 of the EPBC Act.

Purpose of the Bill
The purpose of the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 (the Bill) is to amend the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (the EPBC Act) to repeal section 487 of the EPBC Act (the standing provisions). The aim is therefore to limit the ability of individuals and environmental groups to challenge under administrative law a decision, a failure to make a decision or conduct made under the EPBC Act or Environment Protection and Biodiversity Conservation Regulations 2000 (EPBC Regulations).3

Structure and provisions of the Bill
The Bill contains only one Schedule with two items:

• Item 1 proposes to repeal the whole of section 487 of the EPBC Act and

• Item 2 of the Bill provides that the proposed repeal of section 487 of the EPBC Act only applies to an application made under the Administrative Decisions (Judicial Review) Act 1977 (the ADJR Act) after the commencement of item 1.

Background

The EPBC Act
The EPBC Act is the principal environmental legislation of the Commonwealth Government. It provides arrangements for environmental impact assessment and other mechanisms to conserve biodiversity and heritage.

Under the EPBC Act a controlled action5 will normally trigger a requirement for assessment and approval from the Environment Minister.6 However, the Environment Minister may also decide that an approval is not needed for a particular action.7 It is an offence to carry out a controlled action without approval.

The EPBC Act provides that a controlled action is an action that will have or is likely8 to have a significant impact9 on:

• a ‘matter of national environmental significance’ (NES)10

• the environment on Commonwealth land (even if the action is taken outside Commonwealth land) and on the environment in general if the action is taken on Commonwealth land or

• the environment inside or outside the Australian jurisdiction, where the actions are undertaken by the Australian Government or its agencies.11

Under section 523 of the EPBC Act, an action is defined to include ‘projects, developments, undertakings, activities or a series of activities, or an alteration to any of these’.

5. That is, an action that would be prohibited under Part 3 of the EPBC Act without approval under Part 9 of the EPBC Act: EPBC Act, section 67.
7. For example, because it is taken in accordance with an accredited management arrangement or authorisation process (EPBC Act, sections 33–36), and/or because it will not have a significant impact on a matter of national environmental significance if the action is taken in a particular manner (sections 75–77A).
8. The EPBC Act does not provide guidance on the term ‘likely’. However, the Department of the Environment’s Matters of national environmental significance Significant Impact Guideline, p. 3 states that: “To be ‘likely’, it is not necessary for a significant impact to have a greater than 50 per cent chance of happening; it is sufficient if a significant impact on the environment is a real or not remote chance or possibility”.
9. The term ‘significant impact’ is not defined in the EPBC Act or its regulations. The Department of the Environment has produced three ‘Significant Impact Guidelines’: Matters of national environmental significance, Significant Impact Guidelines, 2013, Actions on, or impacting upon, Commonwealth land, and actions by Commonwealth agencies, Significant Impact Guidelines, 2013 and Coal seam gas and large coal mining developments – impacts on water resources, Significant Impact Guidelines, 2013. The current guidelines provide information for stakeholders seeking to determine whether a specific action is an ‘action’ for the purposes of the Act, and set out criteria for judging whether the impact is likely to be significant.
10. Matters of NES are listed in EPBC Act, Chapter 2, Part 3, Division 1, sections 12–24E.
There are nine matters of NES/‘triggers’ protected under the *EPBC Act*:

- world heritage properties
- national heritage places
- wetlands of international importance (listed under the Ramsar Convention\(^\text{12}\))
- listed threatened species and ecological communities
- listed migratory species protected under international agreements
- Commonwealth marine areas
- the Great Barrier Reef Marine Park
- nuclear actions (including uranium mines) and
- a water resource, in relation to coal seam gas development and large coal mining development.\(^\text{13}\)

A person is prohibited from taking an action that has, will have or is likely to have a significant impact on a matter of national environmental significance except:

- in accordance with an approval from the Commonwealth Environment Minister
- in accordance with an approval from another Commonwealth decision-maker under a management plan accredited by the Commonwealth Environment Minister for the purposes of a Ministerial declaration or
- in accordance with an approval from a state or territory in accordance with a management plan accredited by the Commonwealth Environment Minister for the purposes of a bilateral agreement.

The unlawful taking of an action that has a significant impact on a matter of national environmental significance may attract a civil or criminal penalty.

**Judicial review and extended ‘standing’ under the *EPBC Act***

Administrative decisions made under the *EPBC Act* are subject to judicial review by the Federal Court of Australia. In simple terms, judicial review operates as a practical mechanism for resolving disputes between citizens and government by allowing ‘persons aggrieved’ by a decision made by a government official to have that decision scrutinised by an independent reviewer. In judicial review, the court is concerned only with the legal process by which the decision was made, as opposed to a review of the merits of the decision (‘merits review’). If the court finds an error of law in the making of the decision, or a breach of procedural fairness, the court can set the decision aside and it is then up to the original decision-maker to make a new decision.\(^\text{14}\)

The *ADJR Act* sets out a framework for judicial review by the Federal Court of administrative decisions made under Commonwealth legislation. Among other things, the *ADJR Act* specifies who can commence proceedings, when a third party can join proceedings, which decisions are reviewable and the grounds for review.

Before an individual or organisation can commence legal proceedings in a court, they must be recognised by that court as having the right to instigate those proceedings. This is known as ‘standing’. The significance of standing is discussed further later in this Digest. Under the *ADJR Act* only ‘persons aggrieved’ by a government decision have the legal right or ‘standing’ to challenge that decision. Subsection 3(4) of the *ADJR Act* currently provides that a ‘person aggrieved’ is a person whose interests would be ‘adversely affected’ by the relevant administrative decision or conduct. The meaning of this provision has been the subject of a considerable amount of judicial interpretation. As a general rule, only those whose interests are directly affected by a particular

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\(^{13}\) Department of the Environment, ‘What is protected under the *EPBC Act*’, op. cit.

\(^{14}\) Note that conduct and the failure of a government official to make a decision required to be made under legislation can also be challenged. Administrative review is generally designed to safeguard the rights and interests of people who interact with government agencies. Source: ‘Governance arrangements for decision making’, chapter 20, in A Hawke, *Interim Report: The Australian environment act: report of the independent review of the Environment Protection and Biodiversity Conservation Act 1999* (Hawke Review), p. 310 and see also p. 313.
decision or outcome have standing.15 Applicants need to show a ‘special interest’, which is beyond that of a member of the general public.16

The EPBC Act contains two provisions which provide for certain Australian individuals and organisations to have ‘standing’ to bring legal proceedings in relation to the EPBC Act.

The first is section 487, which extends the people who have legal ‘standing’ to seek judicial review of decisions made under the EPBC Act under the ADJR Act. Section 487 expands the definition of ‘person aggrieved’ in the ADJR Act to specifically include Australian individuals and organisations engaged in a series of activities relating to environmental protection, conservation or research at any time in the two years immediately before the decision was made. In the case of an organisation or association, the objects or purposes of that organisation or association must also include environmental protection, conservation or research.17

Other provision in the EPBC Act for extended standing is section 475, which is not being amended or repealed by the Bill. Section 475 provides for public interest litigation to enforce the EPBC Act by allowing for ‘interested persons’ to apply to the Federal Court for an injunction to prevent a person from engaging in conduct that constitutes an offence or other contravention of the EPBC Act or EPBC Regulations. ‘Interested person’ is defined to include individuals and organisations:

– whose interests have been, are, or would be affected by the conduct or proposed conduct or
– who have engaged in a series of activities for the protection or conservation of, or research into the environment, at any time in the two years prior to the conduct or the application for the injunction.18

Section 487 is proposed to be repealed by the Bill. Section 475 is not being amended or repealed by the Bill. Interestingly, the drafting and history of section 487 is not one of an ‘open to all’ approach to standing but rather an ‘extended’ and ‘representative’ approach to standing. Indeed it is subject to conditions as mentioned.

History of extended standing under section 487

Section 487 of the EPBC Act was included in the original Environment Protection and Biodiversity Conservation Bill 1999 (EPBC Bill).19 The Explanatory Memorandum to that Bill explained:

This clause extends (and does not limit) the meaning of the term ‘person aggrieved’ in the Administrative Decisions (Judicial Review) Act 1977. A person or organisation will have standing under these provisions only if the person or organisation has engaged in a series of activities (including research) for the protection or conservation of the environment. There must be a genuine and consistent pattern of such activities for there to be ‘a series’ of activities.20

The Senate Committee inquiry into the original EPBC Bill discussed the standing provisions in section 487 (and section 475). The Committee did not agree with claims made during that inquiry that these provisions would ‘open the floodgates’ of litigation. The Committee also considered that ‘there are adequate safeguards to prevent vexatious litigation’, noting that courts ‘have the capacity to screen out vexatious and frivolous applicants’ and the ability for courts to award costs against such applicants is also a deterrent.21 The Committee concluded that:

17. Note that section 488 of the EPBC Act also provides that the ADJR Act applies in relation to a person acting on behalf of an unincorporated association that is a ‘person aggrieved’ under the ADJR Act as if they were the ‘person aggrieved’.
18. EPBC Act, subsections 475(6) and (7). Again in the case of an organisation, the objects or purposes of that organisation must also include environmental protection, conservation or research.
... the 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.22

Past reviews relating to standing, including under the EPBC Act
A number of reviews have commented on the issue of ‘standing’, including the EPBC Act provisions.

Australian Law Reform Commission
The issue of standing in public interest litigation has been considered at length by the Australian Law Reform Commission (ALRC) in two separate reports. In 1985, the ALRC report on Standing in Public Interest Litigation identified the common law rules relating to standing as ‘confused, unclear and restrictive’.23 In May 1995, the ALRC was asked to examine whether changes should be made to the recommendations and draft legislation contained in the previous ALRC Report in light of subsequent developments in law and practice. That second report confirmed the 1985 findings and called for broader rules of standing in cases that have a public element so as to ensure accountability and compliance to the law in decision making.24

Independent review of the EPBC Act
An independent review of the EPBC Act chaired by Dr Allan Hawke in 2009 (the Hawke Review) found that the extended standing provisions in the EPBC Act in sections 487 and 475 have ‘created no difficulties and should be maintained’. In fact, the report considered that ‘the question is whether these provisions should be expanded further’.25 The Hawke Review noted that other legislation, both at the Commonwealth and state or territory level, contains ‘open standing’ provisions that confer standing on all members of the public for all actions. The review noted that:

Despite all the fears that the above types of provisions would engender a ‘flood’ of litigation, they have been unproblematic. There is no evidence of them being abused and the number of cases to date has been modest.26

The Hawke Review further recommended that the review provisions under the EPBC Act be extended to allow for merits review of certain decisions, and 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.27

Productivity Commission
The Productivity Commission’s report on Major Project Development Assessment Processes in 2013 also considered the issue of review processes, including ‘standing’ for third parties.28 The Commission 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.29 It further recommended that, in exceptional circumstances, the relevant review body should be able to grant leave to other persons if a denial of natural justice would otherwise occur.30 The Commission observed that ‘review processes can ensure accountability but they can also delay projects through vexatious review applications’. However, the Commission noted that courts have the power to ‘summarily dismiss an action due to it being vexatious, frivolous, or an abuse of process’ and can also

22. Ibid., para 11.41.
26. Ibid.
27. Ibid., pp. 259–260 (recommendations 49 and 50).
29. Ibid., p. 276 (recommendation 9.2).
30. Ibid.
award legal costs against vexatious applicants, which can help discourage vexatious litigation. The Commission found that ‘under the EPBC Act, there are no examples of summary dismissal for vexatious litigation’. In its 2014 report titled Access to Justice Arrangements, the Productivity Commission borrowed the thoughts of Justice Sackville who stated:

Like other catchphrases, such as ‘fairness’ and ‘accountability’ (if not ‘democracy’ itself), the expression ‘access to justice’ survives in political and legal discourse because it is capable of meaning different things to different people.

The Productivity Commission’s point of commencement was that ‘promoting access to justice’ basically meant, ‘making it easier for people to resolve their disputes’. Standing would therefore seem to play a key role in facilitating access to justice.

Independent Commission Against Corruption

In 2012, in New South Wales, the Independent Commission Against Corruption (ICAC) issued a report titled Anti-corruption safeguards and the NSW planning system. In this report, ICAC stated that:

Third party appeal rights have the potential to deter corrupt approaches by minimising the chance that any favouritism sought will succeed. The absence of third party appeals creates an opportunity for corrupt conduct to occur, as an important disincentive for corrupt decision-making is absent from the planning system.

Statistics on public interest litigation under the EPBC Act

In terms of the use of the extended standing provisions under the EPBC Act since it commenced in July 2000, there have been few cases brought under section 487 relative to the numbers of projects referred under the EPBC Act. For example, according to the Australia Institute:

• there have been approximately 5,500 projects referred to the Minister under the environmental impact assessment provisions
• approximately 33 actions have been commenced in the Federal Court by third parties in relation to the EPBC Act’s environmental impact assessment process
• these proceedings related to 27 projects or matters (in several instances, there were multiple court proceedings in relation to the same action—for example, the Bell Bay pulp mill and Port Phillip Bay dredging)
• most relevantly, the proceedings taken by third parties only related to 22 projects that had been referred under the environmental impact assessment process (several related to non-referrals and one related to a policy document issued by the Minister). This means that third party appeals to the Federal Court only affected 0.4% of all projects referred under the legislation
• of the 33 actions, four were discontinued or resolved with the consent of the parties
• of the 33 actions, six were ‘legally successful’, in the sense that the applicant received a judgment and/or orders in its favour. In one of these six, Mees v Roads Corporation, the applicant was successful but the court decided on discretionary grounds not to issue any relief. In one other, Mackay Conservation Group Inc v Commonwealth of Australia (the Adani case), the applicant received consent orders in its favour
• all other cases were legally unsuccessful and

33. Ibid.
35. Note that the submission from the Department of the Environment indicates that more cases than this have been discontinued: see Department of the Environment, Submission to the Senate Environment and Communications Legislation Committee, Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015, 135, 11 September 2015, Attachment A, pp. 9–10, accessed 2 October 2015.
in only two of the six ‘legal successes’ did the third party applicant achieve their apparent desired substantive environmental outcome (that is, stopping or substantially modifying projects they believed would significantly harm the environment). The first was the *Booth v Bosworth* (2001) flying fox case (which stopped the operation of an overhead electrical grid that was killing flying foxes) and the second was the Nathan Dam case (*Queensland Conservation Council Inc v Minister for the Environment and Heritage*). However, the Nathan Dam was re-referred and as it is currently undergoing assessment for the second time, it may still go ahead.

As discussed earlier in this Digest, the *EPBC Act* contains two provisions which provide extended standing allowing third parties to bring legal proceedings in relation to the Act. This Bill proposes to repeal only one of those provisions: section 487. However, the Australia Institute’s statistics include cases brought under section 487 and those brought under section 475 of the *EPBC Act*, and therefore fewer than 33 cases have been brought under section 487. It is also worth noting that even where third party cases have been unsuccessful, the cases themselves may still have been legally useful in helping to clarify the application of the *EPBC Act*.

In his submission to the Senate inquiry into the Bill, Dr Chris McGrath identifies 25 cases brought by third parties using section 487 for judicial review of decisions on actions referred for assessment under the *EPBC Act*. The Department of the Environment identifies 37 third party legal challenges to decisions made under the *EPBC Act*. However, the Department has separately counted the initial proceedings and any subsequent appeals relating to the same decisions and involving the same parties. For example, in the Nathan Dam case, a single judge of the Federal Court found in favour of the Queensland Conservation Council. The Commonwealth unsuccessfully appealed that decision in the Full Court of the Federal Court. The Department has counted this as two separate legal challenges, even though both proceedings were related to the same challenge by the Queensland Conservation Council in response to the same decision.

### The Adani Carmichael mine case

The Bill is a response to a successful challenge by the Mackay Conservation Group against the Minister for the Environment Greg Hunt’s decision to grant approval under the *EPBC Act* for the Carmichael coal mine proposed by Adani Mining Pty Ltd, reportedly worth $16.5 billion. The proposal includes development of an open cut and underground coal mine (reportedly the largest coal mine in Australia, situated in Queensland’s Galilee Basin), rail link and associated infrastructure in central Queensland.

The Environment Minister approved that project on 24 July 2014, subject to certain conditions. On 12 January 2015, the Mackay Conservation Group filed an application in the Federal Court for judicial review of that decision. According to the New South Wales Environmental Defender’s Office (EDO NSW), the Mackay Conservation Group’s challenge was based on three grounds:

1. that the Minister incorrectly assessed the Carmichael project’s climate impacts, including failing to take into account the greenhouse gas (GHG) emissions that will result from the burning of the coal that is...
mined, and the impact of those emissions on the World Heritage listed Great Barrier Reef.\textsuperscript{47} The Minister is argued to have unlawfully confined his consideration of GHG emissions from the mine to only:

\[\ldots\] those that are reportable under the \textit{National Greenhouse and Energy Reporting Act 2007}, which covers only emissions from mine operations.

However, emissions from the burning of the coal once it is exported to India will by far eclipse any emissions generated in Australia by the mining process itself.\textsuperscript{48}

2. the Minister ignored Adani’s poor environmental record:

In 2013 the Indian government found Adani guilty of serious breaches of Indian environmental law, including illegally clearing mangroves and destroying tidal creeks. Indian Courts had also found in 2012 that infrastructure associated with the Adani’s port in Mundra had been built without environmental approvals. The case alleged that the Minister ignored that evidence, instead relying on an earlier statement made by Adani in 2010 that it has a good environmental record overseas.\textsuperscript{49}

3. the Minister failed to consider Approved Conservation Advice from his own Department on the impact of the mine on two vulnerable species: the Yakka Skink and the Ornamental Snake. ‘The conservation advices were approved by the Minister in April last year, and describe the threats to the survival of these threatened species, which are found only in Queensland.’\textsuperscript{50} Under subsection 139(2) of the \textit{EPBC Act}, the Minister was required to have regard to the Conservation Advice in making his decision to approve a project/controlled action that will or is likely to have an impact on a listed threatened species or a listed threatened ecological community.\textsuperscript{51} The EDO NSW explained that:

The law requires that the Minister consider these conservation advices so that he understands the impacts of the decision that he is making on matters of National Environmental Significance, in this case the threatened species.\textsuperscript{52}

On 4 August 2015 the Federal Court made orders with the consent of the parties, setting aside the Minister’s decision to approve the project.\textsuperscript{53} Thus, the orders were made with the agreement of the parties to the litigation. The Federal Court took the rather unprecedented move of releasing a statement on 19 August 2015 ‘to correct media reports about the making of orders by the Court affecting the proposed Carmichael coal mine project’.\textsuperscript{54} In short, it was pointed out to the Minister that there was legal error affecting the decision he had made relating to the approval of the mine. The Minister reportedly ‘conceded that an error was made and wrote himself to the Federal Court seeking for his approval to be set aside’.\textsuperscript{55} Thus, the Federal Court’s media statement clarified and confirmed that the parties had agreed the Commonwealth Environment Minister had failed to have regard to approved conservation advices for two listed threatened species, the Yakka Skink and the Ornamental Snake, contrary to the requirements of subsection 139(2) of the \textit{EPBC Act}.\textsuperscript{56}

\textsuperscript{47} Department of the Environment, ‘\textit{The Great Barrier Reef, Queensland—world heritage values}’, The Department website, accessed 15 September 2015.

\textsuperscript{48} EDO NSW, ‘\textit{Mackay Conservation Group v Commonwealth of Australia and Adani Mining}’, EDO NSW website, accessed 20 September 2015. As noted above (see footnote 38 and related text), legal challenges can play an important role in clarifying and developing the law. This limb of the Mackay Conservation Group’s argument illustrates this potential as, if considered by a court, that court will have the opportunity to decide whether the Minister is required to consider indirect emissions caused not by the operation of the mine itself, but by the burning of the coal for energy production, which is the ultimate outcome of the mine’s operation. Such a decision would have consequences for the approach taken to other environmental approvals. Without extended standing, the likelihood of such issues being considered by courts may be limited. For further information on the greenhouse gases that are reported (and not reported) under the \textit{National Greenhouse and Energy Reporting Act 2007}, see Clean Energy Regulator (CER), ‘\textit{Greenhouse gases and energy}’, CER website, 10 June 2015, accessed 26 October 2015.

\textsuperscript{49} Ibid.

\textsuperscript{50} EDO NSW, ‘\textit{Court overturns approval of Adani’s Carmichael coal mine}’, op. cit.

\textsuperscript{51} \textit{Environment Protection and Biodiversity Conservation Act 1999}, subsection 139(2).

\textsuperscript{52} EDO NSW, ‘\textit{Court overturns approval of Adani’s Carmichael coal mine}’, op. cit.

\textsuperscript{53} Mackay Conservation Group v Commonwealth of Australia (unreported order, Federal Court of Australia, Katzmann J, 4 August 2015), accessed 20 October 2015.

\textsuperscript{54} Federal Court of Australia, ‘\textit{Statement re NSD33/2015 Mackay Conservation Group v Minister for Environment}’, Federal Court website, 19 August 2015, accessed 3 September 2015.

\textsuperscript{55} T Jones, ‘\textit{Panel debate: Michael Roche, Executive Director of the Queensland Resources Council and Jeff Smith, Executive Director of the Environmental Defenders}’, Lateline, transcript, Australian Broadcasting Corporation (ABC), 18 August 2015, accessed 15 September 2015.

\textsuperscript{56} \textit{Environment Protection and Biodiversity Conservation Act 1999}, section 139(2).
While the Mackay Conservation Group also argued that ‘the Minister failed to consider global greenhouse emissions from the burning of the coal, and Adani’s environmental history, these matters are left unresolved before the Court’. 57

In essence, the Adani case was similar to the 2013 case Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities [2013] FCA 694 (the Tarkine–Shree case). 58

Tarkine–Shree Case

Background

On 18 December 2012, the then Minister Tony Burke approved a proposal by Shree Minerals Limited to develop and operate an open cut iron-ore mine in the Tarkine region in Tasmania. 59 The decision was made under the EPBC Act and was subject to 29 conditions including conditions relating to compensation for unavoidable impacts on Tasmanian devils and their habitat.60

The Tarkine is home to several threatened species, including the Tasmanian devil. The Tarkine is also one of the few remaining Tasmanian devil populations not affected61 by the presently incurable Devil Facial Tumour Disease, which is predicted to result in the Tasmanian devil becoming extinct within 25-35 years.62

The Tarkine National Coalition Incorporated (TNCI) applied to the Federal Court for judicial review of the decision, in relation to the proposal’s impact on Tasmanian devils, which are protected under the EPBC Act as an endangered species.63 TNCI relied on four main grounds, one of which was that the Minister had failed to comply with a mandatory requirement under subsection 139(2) of the EPBC Act that he consider an Approved Conservation Advice regarding listed threatened species. The issue was raised that the approved conservation advice was not provided to the Minister at all for the purposes of making his decision, even though in his decision he made reference to taking into account ‘any relevant conservation advice’. TNCI thus argued that the Minister did not genuinely and in good faith properly consider the actual approved conservation advice. The Minister and Shree argued that TNCI’s case unhelpfully elevated the importance of the Conservation Advice to the Minister for the Environment, Heritage and the Arts, and operated an open cut iron ore mine in the Tarkine region in Tasmania.64

The Court stated that not all acts done in breach of a legislative requirement which require the prior performance of a condition are invalid. However, in this case, the Court pointed to indications from the legislative scheme that support the view that the Minister must have regard to the actual Conservation Advice and that it was not relevant that most of that advice was available to the Minister by other means. In this case, the actual Approved Conservation Advice was not looked at itself and given genuine consideration by the Minister. The Court held that:

49. The Minister’s failure to have regard to the document for the purpose of making his decision is fatal to its validity.

50. The failure may be characterised as a failure to comply with a statutory obligation in the sense described in Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 335 at [92] and [93] per McHugh, Gummow, Kirby and Hayne JJ. In accordance with Project Blue Sky, it is the intention of the provisions of the Act dealing with

57. EDO NSW, ‘Court overturns approval of Adani’s Carmichael coal mine’, op. cit.
59. For further information on the Tarkine region, see Department of the Environment, ‘The Tarkine’, Department of the Environment website, accessed 14 October 2015.
62. Department of the Environment, ‘Advice to the Minister for the Environment, Heritage and the Art from the Threatened Species Scientific Committee (the Committee) on Amendment to the list of Threatened Species under the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)’, The Department website, p. 3, accessed 2 September 2015.
the protection of threatened species that an act done in breach of the requirement imposed by s 139(2) should be invalid.\(^6^4\)

The Court emphasised and explained that approved conservation advice is given an important status in the EPBC Act. It is a document which is approved by the Minister after advice from a scientific committee. Such an advice, prepared specifically in relation to a threatened species, would ordinarily be expected to be a significant document to take into account in making a decision which has the capacity to affect that species.

The Court stated that the Conservation Advice was a ‘pivotal element’ in the protection of the Tasmanian devil, and that the Minister’s obligation to give genuine consideration to the Conservation Advice ‘deals with a fundamental aspect of the Minister’s role’. The drafting of the EPBC Act explicitly requires the Minister to consider the Conservation Advice, thus the Minister’s failure to do so resulted in the decision being found void for jurisdictional error and thus set aside by the Court.\(^6^5\)

The Court’s decision suggests that the obligation on the Environment Minister to consider Approved Conservation Advices, and potentially other similar documents under the EPBC Act, cannot be discharged other than by the Minister specifically considering the document itself. Approved Conservation Advices are scientific and legal documents that essentially go to explaining the conservation requirements of species to avoid their extinction. In the Tarkine–Shree case, the Court basically stated that a failure to consider them was a fundamental error of law.

Recent legislation to clarify requirement to consider conservation advices

In November 2013, the Coalition government introduced legislation into the Parliament to deal with the Federal Court’s decision in the Tarkine case. The purpose of Schedule 1 of the Environment Legislation Amendment Bill 2013 was to amend the EPBC Act so as to clarify that a failure by the Minister to have regard to any relevant approved conservation advice when making decisions under the EPBC Act will not render such decisions, taken prior to the commencement of the Bill, invalid.\(^6^6\) The Bill was retrospective in its operation and did not seek to deal with future decisions made by the Minister where the Minister might fail to have regard to any relevant Approved Conservation Advice. Schedule 1 of that Bill was rejected by an amendment in the Senate and did not proceed.\(^6^7\) Notably, the Department of the Environment assured the Senate Committee during the inquiry into that Bill:

Since the Federal Court declared the environmental approval given to Shree Minerals Limited invalid on 17 July 2013, the Department has ensured that relevant approved conservation advices are included in the package of information considered by the Minister when making relevant decisions.\(^6^8\)

Further, during the parliamentary debate on that Bill, the Environment Minister, Greg Hunt, told the House of Representatives:

... I can guarantee that every decision I have taken and every decision I will take is made with reference to expert conservation advice, in the presence of the conservation advice and after consideration of the conservation advice. This was a position inherited as a consequence of the previous legal decision. So I can give the guarantee on the floor of this House—again, subject to all of the strictures which apply to ministerial statements on the floor of this House—that all decisions that are relevant to date have been taken with consideration of the conservation advice,


\(^{65}\) The decision was subsequently re-made by the Minister and a new approval granted on 29 July 2013: M Butler (Minister for Sustainability, Environment, Water, Population and Communities), Decision under section 130 and section 131 of Environment Protection and Biodiversity Conservation Act 1999: approval with conditions of Nelson Bay River magnetite and hematite mine, Department of the Environment, 29 July 2013, accessed 29 October 2015.


\(^{67}\) Although note that unrelated amendments to the EPBC Act in Schedule 2 of that Bill were agreed to by both Houses and have now passed into law in the Environment Legislation Amendment Act 2015 (Cth). See further Parliament of Australia, “Environmental Legislation Amendment Bill 2013 homepage”, op. cit.

in the presence of the conservation advice and through examination of the conservation advice and that will continue to be my practice. 69

Nevertheless, it appears that this did not occur in relation to the Carmichael coal mine approval decision.

Government response to the Carmichael mine case
Following the orders by the Federal Court to set aside the Minister’s approval of the Carmichael Coal Mine and Rail Project, it was announced that the Minister would reconsider approval for the project. The Department of the Environment (the Department) has reportedly explained that reconsideration of the decision in the Adani case would not require revisiting the entire approval process. The Environment Minister would need to reconsider one aspect of the approval process under the EPBC Act regarding the potential impact on two threatened species—the Yakka Skink and the Ornamental Snake. 70

On 18 August 2015, Federal Attorney-General George Brandis announced plans to repeal section 487 of the EPBC Act stating that it:

...provides a red carpet for radical activists ... to use aggressive litigation tactics to disrupt and sabotage important projects. 71

On 20 August 2015, the Federal Government introduced the Bill, with the Minister for the Environment explaining in his second reading speech:

The EPBC Act standing provisions were always intended to allow the genuine interests of an aggrieved person whose interests are adversely affected to be preserved ... [but] ... were never intended to be extended and distorted for political purposes as is now occurring ... Changing the EPBC Act will not prevent those who may be affected from seeking judicial review. It will maintain and protect their rights. However, it will prevent those with no connection to the project, other than a political ambition to stop development, from using the courts to disrupt and delay key infrastructure where it has been appropriately considered under the EPBC Act. 72

On 14 October 2015 the Minister re-approved the Carmichael Coal Mine and Rail Project, making the approval ‘subject to 36 of the strictest conditions in Australian history’ to minimise its potential for environmental impacts. 73

In a recent Senate Estimates hearing, Senator Birmingham explained:

In fairness, after the ‘re-decision’, the government recognised that there was always an ongoing risk in relation to minor administrative oversights jeopardising the validity of an approval, and has sought, but sadly has been unsuccessful in obtaining, passage of legislation that could have prevented this type of instance occurring. 74

Indeed, conservation organisations are still not happy with the decision and it may yet be the subject of further legal challenges. According to the Australian Conservation Foundation (ACF), for example, ‘scrutiny of those conditions shows the plans that must be developed to mitigate the project’s environmental impacts can be

73. G Hunt (Minister for the Environment), ‘Carmichael coal mine and rail infrastructure project’, media release, 15 October 2015, accessed 15 October 2015. A statement of reasons has been posted on the Department of the Environment’s website. For details of the conditions of approval granted on 14 October 2015 see Department of the Environment, Approval: Carmichael coal mine and rail infrastructure project, Queensland (EPBC 2010/5736), Department of the Environment, Canberra, 14 October 2015. For details of the approval granted on 24 July 2014 see Department of the Environment, Approval: Carmichael coal mine and rail infrastructure project, Queensland (EPBC 2010/5736), Department of the Environment, Canberra, 24 July 2014, all accessed 27 October 2015.
changed by the company without getting the Minister’s approval.” 75  ACF has also raised concerns that ‘the conditions do nothing about the climate pollution that will result from burning the coal, which would be more than Victoria’s entire annual emissions.’ 76

The successful ground of challenge in the Tarkine Shree case and the basis on which the Minister’s original approval of the Carmichael coal mine was set aside, was a failure to comply with subsection 139(2) of the EPBC Act. That provision requires the Minister, when considering whether to approve a proposed action that has, will have or is likely to have a significant impact on a listed threatened species or ecological community, to have regard to any relevant approved conservation advice. If dissatisfied with the outcome of these cases, an option available to the Government is to amend subsection 139(2) of the EPBC Act. While the Government has chosen a different response, it is possible that the amendments to standing proposed by the Bill may impact on the ability of concerned individuals and groups to independently test whether there has been good faith application of, and proper compliance with, the requirements of subsection 139(2) of the Act.

In the meantime, regardless of the existence of the extended standing provision, the Government has been able to re-approve the Carmichael mine with stricter conditions to address the concerns of environmentalists. However, the practical effect of the additional conditions may be impacted by the ability of Adani, under condition 33 of the Approval, to revise approved plans or strategies (including plans for managing direct and indirect impacts of the mine on listed threatened species and communities and certain water resources) without the approval of the Minister, if Adani considers that the revised plan or strategy ‘would not be likely to have a new or increased impact’ on the relevant matters of national environmental significance.77

Committee consideration

Senate Environment and Communications Committee

The Bill has been referred to the Senate Environment and Communications Legislation Committee for inquiry, initially with a reporting date of 12 October 2015. On 12 October, the reporting date was extended to February 2016. Details of the inquiry can be found here. 78 At the time of writing, the Committee had received 135 submissions, which are discussed further in the section below on ‘Position of major interest groups’.

Senate Standing Committee for the Scrutiny of Bills

On 9 September 2015 the Senate Standing Committee for the Scrutiny of Bills published its comments on the Bill. 79 The Committee noted that the Bill will result in restricted standing to bring proceedings for judicial review of decisions made under the EPBC Act, limiting it to the general standing requirement under the ADJR Act. The Committee stated:

> It is well accepted that restrictive standing rules pose particular problems in the area of environmental decision-making. Although environmental decisions affect the public generally insofar as the protection of the environment is a matter of established public interest, there may be no single person or group who can show that their interests are affected in a special way that is distinct from the interests of other members or classes of the public. The result is that there may be cases where decisions that breach important legal obligations which have been placed on government decision-makers (enacted to protect the public interest in the environment) cannot in practice be reviewed because no person or group’s interests are affected in a manner which is distinct from the public generally. 80

The Committee therefore expressed concern that:

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75. Australian Conservation Foundation, Carmichael coal mine conditions are not ‘strict’, media release, 20 October 2015, accessed 21 October 2015. For a detailed discussion of this point, see Environmental Defenders Office (Queensland) (EDO Qld), ‘Hunt’s re-approval of Carmichael includes a weakened condition’, EDO Qld website, 21 October 2015, accessed 26 October 2015.

76. Australian Conservation Foundation, op. cit. See footnote 46 for further information on emissions raised by burning the coal obtained from the mine.

77. Department of the Environment, Approval: Carmichael Coal Mine and Rail Infrastructure Project, Queensland (EPBC 2010/5736), op. cit., condition 33.


80. Ibid., p. 3.
... more restrictive standing rules may result in the inability of the courts, in at least some cases, to undertake their constitutional role (i.e. to ensure that Commonwealth decision-makers comply with the law).\(^{81}\)

The Committee further observed that there is a risk that the amendment ‘will not substantially reduce litigation given the uncertainty as to the circumstances in which environmental NGOs [non-government organisations] will be granted standing’. The Committee explained that this was because the ‘case law lacks clear principles for determining when environmental NGOs will be accorded standing under the general law and under the ‘person aggrieved’ test of the ADJR Act’.\(^{82}\)

The Committee was also concerned that ‘the Explanatory Memorandum does not include any detailed justification for the proposed amendment’ nor ‘any evidence that indicates section 487 has led to inappropriate litigation or has led [to] an inappropriately high number of review applications’.\(^{83}\)

The Committee noted that an independent review of the \textit{EPBC Act} in 2009 found that section 487 had ‘created no difficulties and should be maintained’.\(^{84}\) The Committee pointed out that, in fact, the Independent Review considered that the real question was whether the extended standing provisions in the \textit{EPBC Act} ‘should be expanded further’.\(^{85}\)

Given its concerns that public interest litigation brought by environmental NGOs may in many situations be the only effective practical mechanism for enforcing laws enacted to protect the public interest in the environment, and the possibility that the proposed amendment may re-direct litigation to the issue of standing, rather than whether \textit{EPBC Act} requirements have been complied with, the Committee has sought detailed advice from the Minister ‘as to why this limitation on the availability of judicial review of decisions under the \textit{EPBC Act} is justified’.\(^{86}\)

\textbf{Policy position of non-government parties/independents}

In response to the Government’s announcement on 18 August 2015, the Shadow Minister for Environment, Climate Change and Water, Mark Butler and the Shadow Attorney-General, Mark Dreyfus stated that the ALP ‘won’t support weakening environmental protections or limiting a community’s right to challenge Government decisions’.\(^{87}\) They described the proposed changes to the \textit{EPBC Act} as a ‘rash reaction to the Government’s incompetence’, suggesting that the Government ‘has been caught out for not properly managing the approval process for the Adani Mine’. They further suggested that ‘the Government’s claims that the \textit{EPBC Act} is costing jobs is just outrageous’ and that:

\begin{quote}
Since being passed by the Howard Government 15 years ago, the \textit{EPBC Act} has been the overriding national environmental protection law, including throughout the mining boom—and environmental groups are required to operate within this law.\(^{88}\)
\end{quote}

The ALP has also expressed concern that the Bill will have ‘adverse consequences’ on farmers and farming groups, suggesting that if the repeal of section 487 is successful, ‘the only path to appeal farmers could possibly have is under common law. Any such action would expose them to the risk of very significant adverse cost orders’.\(^{89}\) In particular, Joel Fitzgibbon, Shadow Minister for Agriculture, has suggested that the Agriculture...
Minister, Barnaby Joyce, should explain to farming communities ‘why he is denying them in the future the right to appeal against projects like Shenhua’.  

The ALP voted against the Bill in the House of Representatives on 10 September 2015.  

The Australian Greens are opposed to the Bill and Adam Bandt, member for Melbourne, voted against the Bill in the House of Representatives.  

In response to the Attorney-General’s media release announcing the proposed change (outlined above), Senator Larissa Waters, Australian Greens deputy leader, described plans to limit public enforcement of environmental law as an ‘attack on democracy’. Senator Waters stated that ‘public enforcement of laws is a crucial tenet of our democracy’ and ‘when governments fail to enforce or comply with their own laws, it falls to community groups to hold them to account’. The Australian Greens have also suggested that the Bill will ‘put big mining companies above the law and stop Australians who care about the environment and climate from upholding the law’.  

Independent members, Andrew Wilkie and Cathy McGowan also voted against the Bill in the House of Representatives.  

The Palmer United Party (PUP) has expressed concerns about the proposals in the Bill. Clive Palmer, PUP leader, has stated ‘I don’t think we want to throw out our court system and blame the system because there’s been a decision you don’t agree with’. Senator Wang of the Palmer United Party is reportedly concerned the proposed changes would impact on farmers and community groups with serious concerns about other developments such as the Shenhua Watermark coal mine in the Liverpool plains.  

Independent Senator Glenn Lazarus does not support the repeal of section 487, stating that the EPBC Act:  

... is working well in ensuring projects are properly assessed and the community has the opportunity to challenge projects. There is absolutely no basis for a change or watering down of the legislation.  

The Newman Government removed the rights of third parties to appeal resource projects in Queensland and the impact was disastrous for the people of Queensland.  

Media reporting prior to the introduction of the Bill indicated that Independent Senator Madigan would vote against the proposal ‘in its current form’, but suggested that ‘there may be some scope to ensure federal environment laws struck a balance between the legitimate role played by environment and community groups and the need to give projects investment certainty’.  

Senator Xenophon also suggested he could vote against the proposal, telling reporters he was ‘wary’ of any move to reduce the rights of community groups. However, he also reportedly said he was ‘waiting to see the government’s Bill before making a decision’.  

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93. L Waters (Australian Greens Deputy Leader), Stifling community enforcement of environment law is an attack on democracy, media release, 17 August 2015, accessed 10 September 2015.  
94. L Waters (Australian Greens Deputy Leader) and A Bandt, Senate must stop Abbott from putting mining companies above the law, joint media release, 9 September 2015, accessed 10 September 2015.  
100. Ibid.
Senator Muir of the Australian Motoring Enthusiast Party has welcomed the Senate inquiry into the Bill, stating that ‘being from Gippsland my natural instinct after many conversations with local farmers who fear being affected by unconventional gas mining was to sit on the side of caution’. 101

At the time of writing, Senator Lambie’s position on the Bill is unclear. She has stated that she is happy to have discussion with the Government about the proposed changes but will not ‘rush into any decision’. 102

Senators Leyonhjelm and Day reportedly support the changes proposed by the Bill ‘in-principle’. 103

**Position of major interest groups**

**Indigenous groups**

The Kimberley Land Council has expressed strong opposition to the changes proposed by the Bill, stating that:

The *EPBC Act* is the keystone for protection and conservation of matters of national significance in Australia, places and species that, by their very nature, enliven the interests of all Australians. It is entirely appropriate that Australians are enabled, through current section 487, to play an active role in upholding the protection of these matters of national significance. 104

People for the Plains is concerned that:

... it is frequently the case that Indigenous communities who have strong cultural heritage connections to country are not physically, directly connected to mining developments. Therefore under the repeal of section 487, it would seem that many Indigenous people who have cultural connection would have no right to seek judicial review of decisions made under the *EPBC Act*. 105

**Mining and industry groups**

The Queensland Resources Council has welcomed the Government’s announcement of changes to the *EPBC Act*, calling for bipartisan support to fix a ‘legal loophole’:

It is important that a spotlight is shone onto the current flaws in the Environment Protection and Biodiversity Conservation (EPBC) Act and consideration is given to correcting those flaws.

The current flaws enable activists to repeatedly launch vexatious litigation against industry projects...

We applaud the government’s move to close legal loopholes that are being abused to hold up multibillion dollar projects and call on bipartisan support for closing those loopholes. 106

In an interview on ABC’s *Lateline* program on 18 August 2015, Michael Roche, the executive director of the Queensland Resources Council, stated that the technical loophole in the legislation first appeared in 2013 in the Tarkine–Shree case. Mr Roche explained his understanding of the legislative loophole stating:

[... it] relates to the fact that the minister, under the legislation as current[ly] framed, has to have regard to every single piece of paper that might be relevant to the decision. 107

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102. J Lambie, *Absent Environment Minister has questions to answer over proposed changes to EPBC*, Senator Jacqui Lambie website, 19 August 2015, accessed 11 September 2015.


The Minerals Council of Australia has expressed its disappointment with the Carmichael mine decision and what it also describes as a ‘loophole’ which it argues the conservation group has exploited. The Council has called on the Federal Government to close that loophole, citing the economic consequences of the decision.108

In its submission to the Senate inquiry, the Minerals Council of Australia expressed support for the Bill, suggesting that it ‘will reduce the opportunity for frivolous or vexatious legal challenges to delay development projects that have met all regulatory requirements, without compromising the ability of genuinely interested parties to pursue their legitimate interests’.109 In particular, the Minerals Council expressed concern that court challenges ‘provide little environmental benefit, yet cost the proponent in terms of delay and expenses’ and that ‘the acceleration of vexatious legal appeals in recent years has put at risk a number of significant projects’.110

The Minerals Council also pointed to the formal public consultation processes in the EPBC Act as providing opportunities for community input into environmental approval processes.111

Ports Australia, while supporting the removal of section 487, noted:

... we are not convinced that the removal of this section will significantly limit the number of legal challenges and hence delays to projects. Any challenge may become more complicated when its gets to arguments of standing or persons aggrieved as was often the case in public interest environment matters prior to the introduction of the legislation.112

Environmental organisations

As indicated in the multitude of submissions to the Senate inquiry into the Bill, many conservation and environmental organisations are opposed to the Bill. Following the Attorney-General’s announcement (outlined above), leaders of peak conservation organisations, including the Australian Conservation Foundation, WWF Australia, The Wilderness Society, the NSW Nature Conservation Council and the Humane Society International, issued a joint media release condemning the proposed changes to the EPBC Act.113

The Australian Conservation Foundation (ACF), for example, does not support the Bill, stating that ‘communities have a right to a healthy environment’ and to ‘defend that right when a law hasn’t been followed’.114 The ACF has suggested that the Bill will:

...limit access to justice and complicate and prolong those few legal actions that are brought under the EPBC Act, creating add[ed] costs in the system and delays for proponents of developments that are affected by such actions.115

The ACF also recently commissioned a poll which showed that only 22 per cent of Australians support the proposals in the Bill and that 59 per cent considered that changing the law to prevent legal challenges would undermine the independent role of the courts.116

Environment Victoria also strongly opposes any moves to remove the right of individuals or groups to challenge environmental approvals under EPBC legislation, suggesting that the Bill would be a backwards step and would:


110. Ibid., p. 2.

111. Ibid., p. 5.


113. Australian Conservation Foundation (ACF), Conservation leaders, lawyers say no to Abbott and Brandis’ attempt to trash environmental law, media release, 19 August 2015, accessed 14 September 2015.

114. ACF, An attempt to strip communities of right to defend nature, media release, 18 August 2015, accessed 14 September 2015.


...remove a key function of public scrutiny of projects affecting matters of national environmental significance, and prevents environmental organisations providing an important role as environmental watchdogs in public interest environmental matters.\textsuperscript{117}

The Lock the Gate Alliance considers that the Bill will ‘drastically limit who can go to court to challenge Federal environmental approvals’ and is ‘designed to prevent communities from going to court to challenge bad government decisions, and restrict objection rights only to individuals who can prove that they are directly aggrieved by a mining project’. The Lock the Gate Alliance has responded to the Bill with a television advertising campaign featuring broadcaster Alan Jones, who suggests that the proposed amendment ‘puts at risk not only our environment but our very democracy’.\textsuperscript{118}

The NSW Environmental Defender’s Office (EDO NSW), which represented the Mackay Conservation Group in the Federal Court challenge to the Adani Carmichael mine project, has published a briefing note in relation to the Bill.\textsuperscript{119} The EDO NSW supports ‘open standing’ for any person to seek judicial review of government decisions and civil enforcement of breaches, which is even wider than the current provisions in the EPBC Act. The EDO NSW notes:

The extended standing provisions as they currently appear in the EPBC Act are more restrictive than the open standing provisions in many NSW environmental and planning laws. Yet they are clearer and far preferable to the common law test for standing under the ADJR Act.

There is no evidence that open standing provisions “open the floodgates” to litigation or increase the likelihood of vexatious litigation. Rather, there are strong arguments for broad judicial review rights, and for extending standing under the EPBC Act to include merits review.\textsuperscript{120}

Conservation groups have also responded to the claim that the result in the Carmichael mine case was made possible by a ‘loophole’ and that it represents a technical glitch by pointing out that the decision to approve the mine itself was flawed when one takes into account all of the evidence. They have stated:

The mine’s impact on vulnerable species shows up just one of many problems that the assessment process failed to properly address and that Adani has done its best to conceal.\textsuperscript{121}

\section*{Farming groups}

Farming groups have expressed concern that the Bill could limit farmers and farming groups who might wish to make use of section 487 to challenge particular developments.\textsuperscript{122} Another key concern for farming groups is apparently the potential for adverse costs orders to be awarded against them if they bring a public interest case, which could ‘risk the farm’.\textsuperscript{123}

The National Farmers’ Federation (NFF) reportedly questioned the timing of the proposed amendments in the Bill. In particular, the changes were apparently announced shortly after the Environment Minister, Greg Hunt, received letters from farming groups, including the New South Wales Farmers Association, Cotton Australia, the Irrigators Council and the Caroona Coal Action Group, requesting reasons for his decision to approve the Shenhua Watermark coalmine in New South Wales.\textsuperscript{124}

\begin{thebibliography}{99}
\bibitem{117} Environment Victoria, Submission to the Senate Environment and Communications Legislation Committee, Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015, 14, 1 September 2015, p. 1, accessed 11 September 2015.
\bibitem{118} Lock the Gate Alliance,\textit{ Alan Jones puts Government on notice: moves to strip objection rights to mines puts democracy at risk}, media release, 7 September 2015, accessed 11 September 2015.
\bibitem{119} EDO NSW,\textit{ EPBC Amendment (Standing) Bill 2015: who should have standing to protection Matters of National Environmental Significance in Court?}, Briefing note, September 2015, accessed 14 September 2015.
\bibitem{120} Ibid., p. 5.
\bibitem{121} Mackay Conservation Group,\textit{ ‘Adani Carmichael court defeat no mere technicality: court cases reveal deep flaws in modelling, devastating impacts’}, media release, 3 August 2015, accessed 12 October 2015.
\bibitem{122} C Bettles and M Foley,\textit{ ‘Farmers brace for ‘lawfare’ battle’}, \textit{The Land (NSW)}, 28 August 2015, p. 14, accessed 10 September 2015.
\bibitem{123} L Taylor,\textit{ ‘Farm groups furious at Coalition move to restrict environmental challenges’}, \textit{Guardian Australia}, (online edition), 19 August 2015, accessed 10 September 2015.
\end{thebibliography}
Brent Finlay, NFF President, initially called for the law to be delayed until the impact on farmers was understood, suggesting that ‘it is critical that farmers have access to the court system to ensure their interests are fully considered during the EPBC assessment process’.  

However, the Minister for Agriculture, Barnaby Joyce, has reportedly assured farmers that the proposed changes ‘would not affect local agricultural producers with a stake in the productivity and health of land impacted by a development’. He has been reported as saying that farmers can ‘still use their organisation and resources — such as those employed on occasion by the NFF, through their fighting fund — to support individuals affected by decisions’.  

In response to questioning, the Attorney-General told the Senate:

Any farmer, any landholder, any businessman who is affected by any environmental decision will have the standing to challenge that decision, to seek administrative review of that decision. They do not rely, they do not depend, upon section 487 of the EPBC Act for that standing. They do not. It is very simple ... If they are affected, then, as a matter of ordinary common-law principles, they have a standing in the court and they have a right to challenge that decision. If they are not affected then they rely on section 487. But section 487 is not the basis on which a person affected by a decision can challenge it. They can challenge it under the ordinary law.  

The submissions from NFF and Cotton Australia to the Senate inquiry into the Bill indicate that they do not support the removal of section 487 from the EPBC Act. The NFF states that this is ‘due to the risk of denying farming groups and individual farmers the right to appeal against government decisions that they believe are going to adversely affect farming communities or individual operations’. In particular, the NFF notes that it:  

... has not to date received sufficient assurances from government that the passing of this Amendment will not impact on farmers and their representative bodies’ ability to have continued access to the court system to ensure their interests are fully considered during the EPBC assessment process.  

... Having to meet a more complex test of standing under the ADJR Act would also lead to increased legal costs associated with the need to first resolve the question of standing, before the substantive issues in a dispute can be resolved.  

Limiting the test of legal standing to landholders who are subject to immediate impacts is also not sufficient as the effects of some major projects can be felt beyond the immediate vicinity of neighbouring farms, which implies that broader standing is warranted.  

Property Rights Australia  
According to Property Rights Australia (PRA), the scope of the discussion and considerations around the issue of standing are unhelpfully confined and the need for the government to ‘bring balance and fairness for all land uses and local communities where these resource projects are located’ is long overdue:  

PRA believes that s. 5 ADJR Act provides no clear pathway for landowners directly impacted, near neighbours and local communities a simple and cost-effective route to “standing” as a “person who is aggrieved by a decision.”

125. L Taylor, ‘Farm groups furious at Coalition move to restrict environmental challenges’, op. cit.  
126. C Bettles and M Foley, op. cit.; see also L Taylor, ‘Farm groups furious at Coalition move to restrict environmental challenges’, op. cit.; J Fitzgibbon, Joyce needs to stand up and explain his position on EPBC amendment, media release, 9 September 2015, accessed 10 September 2015.  
130. Ibid.  
Law groups and legal experts

The Law Council of Australia does not support the proposed repeal of section 487, noting that the test in the section is ‘broader and clearer’ than that under the ADJR Act, and has the potential to reduce disputes about whether an applicant has standing and ‘therefore also the cost and length of litigation’.132 The Law Council stated that there have been very few cases successfully brought under section 487 and ‘certainly no avalanche of “vigilante litigation”’.133 The Law Council described section 487 as an ‘important safeguard for the rule of law, for accountable and responsible government, and as an anti-corruption safeguard’.134 The Law Council further pointed out that the courts have ‘mechanisms for managing frivolous and vexatious applications and there are numerous disincentives to litigate’.135

The Law Society of New South Wales is concerned that the proposed amendments ‘seek to limit Court oversight of executive decision-making’ which would:

...constitute a serious erosion of fundamental principles of public accountability of the executive arm of government, and of the transparency of decision-making... Such an approach is likely to undermine public faith in government by limiting the Courts' ability to guard against the arbitrary exercise of executive power in decision-making about major development projects at the Federal level.136

The Law Institute of Victoria (LIV) warned that restricting those 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 has further 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.137

A former federal court judge, Murray Wilcox, argued in his submission to the Senate inquiry that ‘the Bill is futile’ and if the Bill is passed:

The only change from the present situation will be that the parties, and so the courts, will spend time examining the details of the applicant’s association with the relevant issue or place. And people wonder why litigation is so expensive.138

Professor Rosemary Lyster, Director of the Australian Centre for Climate and Environmental Law, submitted:

Public interest litigation is a feature of litigation all around the world as environmental organisations, community groups and individuals seek the protection of the law to remedy, or apprehend, a breach of the law which is likely to result in environmental degradation.

Indeed, environmental legislation is in a category of its own for the reason that a breach of environmental law does not usually directly impact any particular individual, and the environment is not able to represent itself in legal proceedings.139

Furthermore:

...in the modern era, public interest litigation, including environmental litigation, is regarded as part and parcel of a functioning democracy under the Rule of Law. In fact, as Dr Edgar submits:

133. Ibid., p. 8.
134. Ibid.
135. Ibid., p. 3.
137. LIV, LIV says court oversight of environmental projects must continue, media release, 20 August 2015, accessed 14 September 2015.
139. Australian Centre for Climate and Environment Law, University of Sydney, Submission to the Senate Environment and Communications Legislation Committee, Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015, 55, 8 September 2015, pp. 1–2, accessed 14 September 2015.
Along with other commentators, lawyers Stephen Keim SC and Chris McGrath have pointed to the low number of legal challenges being made to decisions under the EPBC Act, suggesting that there has only been a ‘trickle’ of litigation rather than open floodgates. They explain that ‘one reason for the lack of litigation by conservationists under federal environmental laws is that going to court is very difficult, stressful and costly’. They also note:

Another reason is that, because decision makers know that they may be open to scrutiny in the courts, they are careful to make sure that they apply the procedural requirements laid down in our federal environmental legislation. Removing this potential scrutiny will encourage both public servants and ministers to be less careful about complying with the law’s requirements.  

Chris McGrath finds it notable that:

There is no evidence of actual litigation (as opposed to claims made in the media or the Minister’s second reading speech) in which the widened standing provided by s 487 has been abused by taking frivolous or vexatious action, or action merely to delay a project proceeding.

Stephen Keim SC has also provided a valuable reminder of the realities of decision making in the public service:

It is assumed that public servants and decision makers are committed to applying the environmental legislation which Parliaments have passed. However, the environment, the legislation and development proposals are all complex. It is easy for decision makers (and the public servants who assist them) to make errors so that particular decisions fail to apply the law in important respects.

It is also the case, as in all areas of activity, that public servants and decision makers can misread, misunderstand and, as a result, misapply the law.

A healthy level of litigation in any area of human activity ensures that the law is understood; it is applied appropriately; and problems with the existing law are revealed so that Parliament may attempt to correct and update the law in accord with societal and technological changes.  

Department of the Environment

In its submission to the Senate Inquiry into the Bill, the Department of the Environment provided additional context for the proposed amendment. The Department accepted that ‘legal challenges [are] a necessary and appropriate discipline in the EPBC Act decision-making process’. The Department nonetheless pointed out that ‘every legal challenge comes at a significant cost – whether or not justified – to the Commonwealth and the broader community’. The Department reported that where the court has ordered third party applicants to pay the Commonwealth’s costs, the costs have been recovered in seven out of 25 cases. Citizen participation in public accountability has a price, although the precise cost since 2000 was not included in the Department’s submission.

The Department of the Environment emphasised the following points:

140. Ibid., p. 3.
145. Ibid.
The repeal of section 487 would not prevent a person or environmental or community group from applying for judicial review of a decision made under the **EPBC Act**. Any person or organisation that can establish they have standing will continue to have the ability to commence proceedings for judicial review, either under the **ADJR Act** or the **Judiciary Act**.

... The repeal of section 487 does not change the assessment and approval provisions of the **EPBC Act** as set out in Chapter 4, nor does it alter the matters that the Minister must have regard to when deciding whether to grant an approval.

The **EPBC Act** contains expansive public consultation requirements in its referral and assessment processes.\(^{146}\)

**Financial implications**

The Explanatory Memorandum states that the Bill does not have a financial impact.\(^{147}\)

**Statement of Compatibility with Human Rights**

As required under Part 3 of the **Human Rights (Parliamentary Scrutiny) Act 2011** (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.\(^{148}\)

**Parliamentary Joint Committee on Human Rights**

The Parliamentary Joint Committee on Human Rights commented on the Bill in its report on 8 September 2015.\(^{149}\) The Committee assessed the removal of extended standing for judicial review of decisions or conduct under the **EPBC Act** against article 12 of the **International Covenant on Economic, Social and Cultural Rights**, which contains a guarantee to the right to health including a healthy environment.\(^{150}\) The Committee questioned whether the measures contained in the Bill limit that right, and if so, whether that limitation is justifiable. The Committee noted that the statement of compatibility in the Explanatory Memorandum to the Bill does not justify that possible limitation for the purposes of international human rights law. The Committee has therefore sought the advice of the Minister for the Environment as to whether the Bill limits the right to a healthy environment and, if so:

- whether the proposed changes are aimed at achieving a legitimate objective
- whether there is a rational connection between the limitation and that objective and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.\(^{151}\)

**Key issues**

**The significance of standing and the effect of repealing section 487**

The legal doctrine of ‘standing’ basically refers to the right of a person or organisation to commence legal proceedings so as to challenge a decision or outcome. Thus without standing a court will not hear a person’s case. As a general rule, only those whose interests are directly affected by a particular decision or outcome have standing and can challenge that decision in the courts on administrative law grounds.\(^{152}\) Applicants need to show a ‘special interest’, which is beyond that of a member of the general public.\(^{153}\) It is basically only persons or

\(^{146}\) Ibid., p. 6.
\(^{148}\) The Statement of Compatibility with Human Rights can be found at page 3 of the Explanatory Memorandum to the Bill.
\(^{151}\) Parliamentary Joint Committee on Human Rights, op. cit., p. 7.
organisations who fall into this category (potentially a much narrower group of persons) that would have standing if section 487 were repealed.

Whether an individual or organisation has standing will depend on the identity of the person, the type and subject matter of the proceedings and the relationship the person has to those proceedings. In Australia, the common law test for standing to bring judicial review or civil enforcement proceedings generally requires the person to have a private right that is interfered with or a ‘special interest’ in the subject matter of the action. The standing test thus has the potential to restrict the range of individuals that can bring environmental public interest litigation.  

Section 487 of the EPBC Act provides automatic standing to Australian individuals and organisations who can demonstrate that they were engaged in activities relating to environmental protection, conservation, or research at any time in the two years immediately before the decision, failure to make a decision, or conduct being challenged. This means that such persons or organisations are able to challenge an EPBC Act decision, failure or conduct under the ADJR Act. In simple terms, these challenges involve a review by the courts of the legal process by which the decision was made, as opposed to a review of the merits of the decision. Thus the court is concerned only with whether there has been an error of law in the making of the decision, or whether there has been breach of procedural fairness. If the court finds an error of law based on the grounds listed in the ADJR Act, the court can set the decision aside and it is then up to the original decision-maker to make a new decision.

Sections 487 and 488 of the EPBC Act clarify and extend the meaning of the term ‘person aggrieved’ under the ADJR Act, to individuals and organisations engaged in protection, conservation or research into the environment within Australia and its territories. Section 487 was included in the EPBC Act so as to remove uncertainty about whether environmental groups and persons undertaking activities relating to environmental protection or conservation are persons aggrieved and could have an automatic right to bring an administrative law action under the ADJR Act in relation to decisions made under the EPBC Act.

In an interview on the ABC Insiders program, Attorney-General George Brandis explained:

Section 487 of the EPBC Act is a very unusual, indeed unique, provision. It says that although you are a person who is not affected, either directly or indirectly, by a decision, nevertheless you have standing to seek review of a ministerial decision in court if you happen to be interested in the environment in purely an academic or public policy way. Now, that is a variation of the position at common law. The ordinary orthodox position at common law is that the only people with standing to approach the courts to contest a decision are people who are either directly or indirectly affected by it. And all the Bill does is seeks to restore the ordinary common law position.  

The obvious aim of repealing section 487 of the EPBC Act is to reduce the number of challenges to decisions made regarding approval of projects under the EPBC Act. Given that section 487 was inserted into the EPBC Act to remove uncertainty about who is a person ‘aggrieved’ under the ADJR Act and in light of a number of High Court decisions which discuss the status of environmental groups and standing in environmental law cases, it is unclear that this will be the case. It is likely that environmental groups will launch action to test their standing under the ADJR Act. In this case, the proposed amendment may have the perverse result of resulting in more delays to projects as environmental groups and individuals have their standing tested on a case-by-case basis.

The proposed amendment could also have implications in terms of Australia’s ability to give good faith practical effect to obligations under international environmental treaties to which Australia is party. The objects of the EPBC Act include the promotion of ecologically sustainable development and the conservation of biodiversity, as well as ‘to assist in the co-operative implementation of Australia’s international environmental responsibilities’. The courts have previously taken the view that the legislation should be given a wide


156. EPBC Act, section 3.
interpretation, and that as far as its language permits, a construction that is in conformity and not in conflict with Australia’s international obligations should be favoured.\textsuperscript{157} The two past International Conferences on Environmental Enforcement in Budapest, Hungary (1992) and in Oaxaca, Mexico (1994) established the principle that citizen participation is an important supplement to governmental enforcement efforts.\textsuperscript{158}

Is section 487 unusual?

As noted above, the Attorney-General has stated that the extended standing provisions in the \textit{EPBC Act} are ‘very unusual, indeed unique’. Similarly, the Minerals Council of Australia has suggested that ‘no other Commonwealth Act has a similarly broad definition for standing in judicial appeals’.\textsuperscript{159}

However, similar provisions can be found in other Australian legislation, such as section 58A of the \textit{Hazardous Waste (Regulation of Exports and Imports) Act 1989} (Cth),\textsuperscript{160} section 140 of the \textit{Marine Parks Act 2004} (Qld)\textsuperscript{161} and section 173O of the \textit{Nature Conservation Act 1992} (Qld).\textsuperscript{162}

There is also other legislation at both the Commonwealth and state level that provides ‘open’ standing for ‘any person’ to commence certain proceedings. In New South Wales, most environmental laws have ‘open standing’ provisions which allow \textit{any person} to bring civil enforcement or judicial review proceedings. For example, any person can bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of the \textit{Environmental Planning and Assessment Act 1979} (NSW),\textsuperscript{163} the \textit{Native Vegetation Act 2003} (NSW),\textsuperscript{164} the \textit{Protection of the Environment Operations Act 1997} (NSW),\textsuperscript{165} and the \textit{Heritage Act 1977} (NSW)\textsuperscript{166}

Expanded standing is also found in other countries. In England and Wales for example, the law in relation to standing already complies with the \textit{Aarhus Convention} (to which Australia is not a party). Article 9(2) of that Convention provides that non-governmental organisations shall be deemed to have a sufficient interest to challenge the substantive and procedural lawfulness of a decision, as long as they promote environmental protection and meet any requirements of national law.\textsuperscript{167}

Is this about legal loopholes and minor administrative errors?

As discussed earlier in this Digest, cases involving the failure of the Minister for the Environment to consider approved conservation advices have been described as exploiting a ‘legal loophole’ or as involving ‘minor administrative oversights’. The \textit{ADJR Act} sets out grounds of review of administrative decisions which specifically include failure to take a relevant consideration into account in making that decision.\textsuperscript{168} The Court found in the Tarkine–Shree case that Approved Conservation Advices are a relevant consideration, and emphasised their significance in the Minister’s decision making process in the \textit{EPBC Act}. Indeed, the Federal Court described the requirement to have regard to any approved conservation advice relevant to a threatened species before

\begin{thebibliography}{99}
\bibitem{ADR} Starting in 1990 as a collaborative effort between the US Environmental Protection Agency and the Netherlands Ministry of Housing, Spatial Planning and the Environment, the International Conference on Environmental Enforcement has become an international collaboration to build effective environmental compliance and enforcement programs. Already in the 1992 Budapest Conference, the citizens’ role in enforcement was a central theme, focusing on why citizen involvement was important and on the techniques developed in the United States and Western Europe to facilitate this involvement. See \textit{International Network for Environmental Compliance and Enforcement}, accessed 20 October 2015.
\bibitem{Minerals} Minerals Council of Australia, Submission 97, op. cit., p. 1.
\bibitem{Hazardous} \textit{Hazardous Waste (Regulation of Exports and Imports) Act 1989} (Cth), section 58A, accessed 2 October 2015.
\bibitem{Marine} \textit{Marine Parks Act 2004} (Qld), section 140, accessed 2 October 2015.
\bibitem{Environmental} \textit{Environmental Planning and Assessment Act 1979} (NSW), subsection 123(1). However, section 115ZX restricts certain third party appeal and judicial review rights in relation to ‘critical State significant infrastructure’, by requiring the Minister’s approval for an application to the Court.
\bibitem{Native} \textit{Native Vegetation Act 2003} (NSW), section 41, accessed 30 September 2015.
\bibitem{Heritage} \textit{Heritage Act 1977} (NSW), section 153, accessed 30 September 2015.
\bibitem{ADJR} \textit{ADJR Act}, sections 5 and 6, and in particular subsections 5(2)(b) and 6(2)(b).
\end{thebibliography}
approving action which may have impact on that species as a 'pivotal element of that system of protection'.

The issue in the Adani case was again that the Minister for the Environment failed to have regard to approved conservation advice. The Federal Court in the Tarkine–Shree case clarified that the EPBC Act placed an obligation on the Minister to look at and give genuine consideration to the actual Approved Conservation Advice. It seems that this obligation cannot be discharged other than by the Minister specifically considering the document itself, especially where substantive detail of significant matters is not adequately contained in other material before the Minister.

Concluding comments

It is unclear whether the Bill will achieve its intended purpose of preventing disruptions and delays to projects approved under the EPBC Act. There is a risk that, if section 487 is repealed, the resulting uncertainty could have the perverse consequence of causing more delays and costs to projects as third parties will first need to establish standing before the substantive issues can be considered by the court.

Less than 30 judicial review proceedings have been brought under the EPBC Act by third parties in the past 15 years since the Act commenced. No evidence has been advanced to suggest that these proceedings have been frivolous or vexatious, and courts have mechanisms available to them to deal with such litigation.

Finally, section 487 serves as a mechanism to help ensure that decision-makers lawfully comply with legislative procedures. As such, its proposed repeal raises questions about accountable and responsible government.

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