2 September 2015

Senate Environment and Communications Legislation Committee
Department of the Senate
Parliament of Australia

By email: ec.sen@aph.gov.au

Dear Secretary

Submission: Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015

I thank the Committee for the opportunity to make a submission to the inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015. I am strongly opposed to the repeal of s 487 of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (EPBC Act).

Section 487 of the EPBC Act moderately extends, and, more importantly, clarifies the right of individuals and environmental groups to have ‘standing’ to initiate actions for judicial review of powers exercised under the Act. Section 487 extends standing to:

(a) individuals who are Australian citizens or ordinary residents in Australia and, at any time in the two years immediately before the decision, failure or conduct, the individual has engaged in a series of activities in Australia or an external Territory for protection or conservation of, or research into, the environment; and

(b) organisations and associations where they are incorporated or established in Australia and at any time in the two years immediately before the decision, failure or conduct, the organisation or association has engaged in a series of activities in Australia or an external Territory for protection or conservation of, or research into, the environment, and at the time of the decision, failure or conduct, the objects or purposes of the organisation or association included protection or conservation of, or research into, the environment.

Section 487 of the EPBC Act is an important reflection of the legitimate interests that many individuals and community groups have in environmental protection and therefore who might wish to bring proceedings to ensure that the government is complying with the requirements of the Act. Attorneys-General at both Commonwealth and State level are no longer appropriate plaintiffs to enforce breaches of public rights, such as those in the EPBC Act. Without the extension and clarity in relation to standing that s 487 achieves, such breaches may go unremedied, an unsatisfactory position in a constitutional system that values the rule of law.
Many individuals and community groups have legitimate interests in environmental protection and ensuring compliance with the EPBC Act

The EPBC Act creates a federal assessment and approval framework for activities that may harm the environment, and particularly areas of national environmental significance. To ensure this framework is complied with, s 487 creates an important, albeit moderate, extension and clarification of the law of standing in Australia.

It is important to recognise that by expressly granting certain individuals and groups standing to challenge actions under the EPBC Act, s 487 does not drastically increase the numbers of individuals and groups who may otherwise have standing under the general law to bring these actions. Indeed, there remain many disincentives for individuals and groups that fall within these categories to bring proceedings to enforce the EPBC Act, including the possibility of adverse costs orders, orders for security for costs and undertakings as to damages. There is no evidence that the courts have been swamped by applications for judicial review of decisions under the Act.

The provision does not give ‘open standing’ to any person with an interest in the environment to challenge decisions under the EPBC Act. When the Act was introduced in 1998, the government rejected arguments that an ‘open standing’ test should be introduced, that is, that anyone should be able to challenge the legality of a decision under the EPBC Act. While open standing would appear to be an obvious way to facilitate compliance with the rule of law, there is a general reluctance on the part of governments to adopt it on the basis that it would encourage litigation and lead to cost and delay, both in government and in the courts. This is often referred to as the ‘floodgates’ argument. Section 487 therefore represents a compromise between the recognition that many individuals and community groups have legitimate interests in environmental protection and ensuring compliance with the EPBC Act, without conferring open standing on anyone to bring an action under the Act.

Section 487 does not drastically change the general law of standing for environmental groups. Under the general law, an individual, organisation or association who may be active in campaigning for the protection or conservation of the environment, or research into the environment, would have to demonstrate that they are ‘aggrieved’ to bring a challenge to an action taken under the EPBC Act. This requires them to demonstrate that they have a special interest in the decision made under the Act that is beyond the interests that the general public have in the decision. That is to say, while the general public may have a passing interest, or even feel strongly and passionately about whether the Commonwealth Minister grants permission under the legislation for a mining operation that may threaten an environmental landmark such as the Great Barrier Reef, that does not give a member of the public standing to challenge that decision. The leading High Court case on standing in Australia remains that of Australian Conservation Foundation v Commonwealth. In that case, Gibbs J said:

A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor locus standi. If that were not so, the rule requiring special interest would be meaningless. Any plaintiff who felt strongly enough to bring an action could maintain it.

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1 See Senate Committee on Environment and Communications, The Operation of the Environment Protection and Biodiversity Conservation Act 1999 (First Report, 18 March 2009) [635].
2 Ibid [6.52]. And see also approximation of numbers of challenges by Stephen Keim and Chris McGrath, ‘Chicken Little Abbott and Brandis Wrong on “Lawfare”’ Canberra Times, 21 August 2015 http://www.canberratimes.com.au/comment/chicken-little-abbott-and-brandis-wrong-on-lawfare-20150821-gidhtj.html?stb=twt. They state that only 30 challenges to projects assessed under the Act have been brought in the 15 years of the Act’s operation.
Subsequent cases have accepted that community organisations and associations may have the requisite ‘special interest’ where they are long-established, well-recognised (and particularly when they are recognised by the government), and engaging in the specific subject matter of the action they are seeking to challenge.\(^5\)

Section 487 does not drastically alter this standing test as it has developed under the general law. However, proving the requisite standing under the general test is a challenge for environmental groups and is often a hotly contested issue, to be determined on a case-by-case assessment. Thus, s 487 represents an important clarification of who will have standing under the Act, reducing the need for this point to be contested in each case.

Further, s 487 does not extend to merits review: it is limited to actions that challenge the legality of the exercise of powers under the Act. It does not allow individuals or groups simply to ask for a new decision to be made because they disagreed with the first decision. To brand individuals and groups seeking judicial review under this provision as ‘vigilantes’, as engaging in ‘sabotage’ or ‘lawfare’ misses the point that they are simply seeking to enforce the law as enacted by the Commonwealth Parliament. The compliance of the government with its own laws is a foundational tenet of the rule of law.

*Unsatisfactory to rely upon Attorneys-General to enforce the EPBC Act*

Historically, the protection of public rights – which would include breach of statutory provisions by the government, such as those in the *EPBC Act* – was the responsibility of the Attorney-General. The Attorney-General has an obligation to act in a non-partisan manner in determining whether to bring actions in defence of public law rights, or whether to grant a private individual his or her ‘fiat’ to bring a relator action in the Attorney’s name. As Justice Isaacs explained in the *Union Labels Case*:

> If a public right is infringed, and the whole community is thereby affected, the Attorney-General may protect the public interests by appropriate action. If the public interests involved are State interests, the State Attorney-General may sue; if Commonwealth interests are involved, then the Commonwealth Attorney-General, representing the larger community, may sue.\(^6\)

Thus, the Commonwealth Attorneys-General had standing to sue on behalf of the wider Australian community and State Attorneys-General may bring cases where the decisions or actions affect the ‘public interests’, including the legal territory, of the State.\(^7\)

However, relying on the Attorneys-General of the Commonwealth or the States to bring actions that breach the law, such as the *EPBC Act*, is unsatisfactory, and creates the real likelihood that the actions of the Commonwealth under that Act will go unchallenged. The Attorney-General in modern government in Australia is not the appropriate plaintiff to bring these challenges. The modern Australian Attorney is a highly politicised ministerial office. The Australian Attorney-General will ordinarily sit in Cabinet and often holds a number of other political portfolios. At the Commonwealth level, the Attorney has a poor record of bringing public interest cases that challenge the actions of his or her own government.\(^8\) In 1994, as shadow Attorney-General, the Daryl Williams QC argued that the convention that the Australian Attorney-General had obligations to act independently of the

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6 *Attorney-General (NSW); Ex rel Tooth & Co Ltd v Brewery Employee’s Union of New South Wales (Union Label Case)* (1908) 6 CLR 469, 557.

7 *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319, 330 (Isaacs CJ).

interests of his or her government interests in the ‘public interest’ was ‘erroneous or at least eroded’.9 State Attorneys-General are also unlikely to bring proceedings against the Commonwealth: the Commonwealth’s actions must first affect their legal territory for them to have standing at all; politically, a State Attorney-General is unlikely to challenge the actions of a Commonwealth Minister of the same political party.

The Australian Law Reform Commission has recognised that relying on the Attorney-General to protect public rights is no longer appropriate: in its previous consideration of the restrictions on standing and recommended that any person be given standing to commence public law proceedings.10

The Commonwealth Parliament has, to date, not adopted an open standing test for the enforcement of public rights such as those under the EPBC Act. However, the modest widening and clarification of the law of standing in relation to individuals and groups under s 487 of the EPBC Act recognises the importance of the framework the Act establishes for protecting Australia’s environmental heritage, the legitimate interests of the Australian public in seeing that framework enforced, and the unacceptable idea that the Attorney-General will do so.

Yours sincerely

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