Senate Committee on Environment and Communications

Inquiry into repeal of s487 of the *Environment Protection and Biodiversity Conservation Amendment (Standing) Bill* 2015

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NATIONAL ENVIRONMENTAL LAW ASSOCIATION

Submission to the Inquiry into repeal of s487 of the *Environment Protection and Biodiversity Conservation Amendment (Standing) Bill* 2015

1. INTRODUCTION – ABOUT NELA

The National Environmental Law Association (NELA) is Australia's leading environmental law organisation with a membership base of professionals in environment and resources law and related disciplines.

NELA's vision is that ecological sustainability is a guiding principle in regulating energy and resources, utilities, pollution control, protecting biodiversity and cultural values, and land use planning and infrastructure.

We seek to protect the environment by shaping the law through information sharing, analysis and debate.

2. ABOUT THIS SUBMISSION

NELA welcomes the opportunity to provide a submission to the inquiry into the *Environment Protection and Biodiversity Conservation Amendment (Standing) Act* 2015. In the absence of terms of reference for this Inquiry, our submission is structured as follows:

1. The statutory context in which s487 operates
2. The operation of s487 in practice since the EPBC Act commenced
3. The consequences of s487's repeal.

In summary,

- NELA supports the retention of s487 of the EPBCA. Ensuring environmental groups have access to the courts to challenge the legality of government decisions is fundamental to environmental good governance, a strong democracy and a resilient economy.
- The matters of national environmental significance listed in the EPBC Act that are typically the subject of applications for judicial review relate largely to Australia's international obligations. The protection of those matters is of national, if not international, interest and importance. Legislative third party standing rights reflect the national relevance of these issues, regardless of where a person or group is resident, or conducts their business.
- Judicial review seeks only to ensure that decisions are made according to law. Even when successful, judicial review applications do not prevent developments from proceeding; they merely require decision-makers to follow the law in approving them. The principles of accountability and good governance militate in favour of standing laws that tend to promote compliance with the law, rather than rules that tend to curtail judicial scrutiny.
- Removal of s487 may have unintended consequences in terms of protracted delays and litigation because the preliminary matter of standing will have to be argued in full in every case.

1. The statutory context in which s487 operates

1.1 The EPBC Act

The EPBC act gives effect to Australia's obligations under a range of international conventions and agreements, including:

- World Heritage Convention
- Convention on Biological Diversity
- Convention on Wetlands of International Importance
- Apia Convention
- Migratory Bird Treaties.

The Act establishes a regime that requires careful assessment of activities that would undermine Australia's international obligations – the "matters of national environmental significance". This assessment process is required in order to determine whether approval should be granted, and on what conditions. The Act stipulates detailed decision-making processes and criteria that are essential for protecting these MNES.

1.2.International context for s487

Section 487 formed a key part of the EPBC Act when it was enacted in 1999. It sought to overcome traditional common law limits on who could apply for judicial review of administrative decisions. In enacting the EPBC Act, the Howard Government recognised that Australia's new generation of national environmental laws should embrace the principles of public participation and access to justice found in Principle 10 of the *Rio Declaration on the Environment and Development* and the UNECE *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention).*

1.3 Application of s487 to applications for judicial review

The effect of s487 was to extend the meaning of "a person who is aggrieved" for the purposes of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) (ss5-7). These provisions relate to judicial review of administrative decisions. In the context of the EPBC Act, they relate primarily to the decisions of the Environment Minister to approve a proposed activity that is likely to have a significant impact on a prescribed matter of national environmental significance, and the conditions attaching to those approvals. Judicial review applications are limited only to the lawfulness of a decision, determined by reference to the criteria set out in ss5-7 of the ADJR Act. They are not a review of the merits of a decision. The result is not a replacement of the original decision with that of the Court. Rather, the decision is merely returned to the decision-maker to be determined again, this time in compliance with legislative requirements. The litigation that prompted this amendment is an excellent case in point. The decision in *Mackay Conservation Group v Commonwealth*[1] (the Carmichael Coal Mine case) was in fact a consent order. The Minister himself acknowledged that he had erred in failing to consider the Conservation Advices in respect of two national listed species, so the Court was merely adding its imprimatur to the parties' agreement that

[1] *Mackay Conservation Group v Commonwealth of Australia and Others,* FCA, https://www.comcourts.gov.au/file/Federal/P/NSD33/2015/3715277/event/28181487/document/607760

the Minister reconsider the matter, in accordance with the law. The decision does not preclude the Minister from arriving at the same decision to approve the mine, provided he complies with the legal requirements specified in the Act. Thus, s487 cannot be said to prevent development from proceeding *unless* allowing such development is contrary to the procedural or substantive requirements of the EPBC Act.

In an accountable and robust democracy, it is reasonable to expect administrative decision-makers to follow to the requirements of the law, as enacted by Parliament. The ability to expose decision-making to judicial scrutiny is fundamental to ensuring that our decision-makers act in accordance with the law. Removal of rights granting access to the court undermines these fundamental expectations of good governance. As the High Court notes in *Argos,* referring to the ACT ADJR Act:

> The availability of judicial review serves to promote the rule of law and to improve the quality of administrative decision-making as well as vindicating the interests of persons affected in a practical way by administrative decision-making. Accordingly, the scope of s 3B(1)(a) of the ADJR Act should not be artificially narrowed by glosses upon its broad language.[2]

1.4 The scope of the Common Law test for Standing

Section 487 extends the test for standing - "a person who is aggrieved"- under the AD(JR) Act. A person is aggrieved if their "interests are adversely affected". The seminal High Court decision interpreting the scope of "person aggrieved" and the "special interest" test in relation to environment groups is *ACF v the Commonwealth*[3]. The High Court held that the "special interest" in the subject matter of the decision required more than a mere intellectual or emotional interest. The Australian Conservation Foundation, whose advocacy work spanned a range of environmental issues, lacked an economic or proprietary interest.

This decision is now over 35 years old, and subsequent Courts in a series of cases have taken a more expansive view of the operation of the "special interest" test. In addition to economic and proprietary interests, social and cultural interests have been recognized as provided as giving rise to standing in some cases.[4] In 2014, the High Court again emphasized that impacts on a "special interest" required an interest "different from ('beyond') its effect on the public at large"[5] and that this should not be interpreted narrowly, but did not need to clarify what would constitute such an interest in an environmental group context.

Several features have been identified as pointing to the existence of a "special interest" in the subject matter of the dispute, including the extent to which the organization may be said to "adequately represent the public interest".[6] The Federal Court has considered the "national importance" of the issue in question; whether the group is recognized publicly as the "peak body" on a certain matter; their history of engagement on a topic; whether

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[2] *Argos P/L v Minister for the Environment and Sustainable Development* [2014] HCA 50, Per French CJ & Keane J, at [48]
[3] (1980) 146 CLR 493.
[4] E.g. *Onus v Alcoa (1981) 36 ALR 425.*
[5] *Argos P/L v Minister for the Environment and Sustainable Development* [2014] HCA 50, per Hayne & Bell JJ at [61].
[6] *ACF v South Australia* (1990) 53 SASR 349, per Cox J at 360.

government itself recognizes the representative status of the group, through funding or inclusion in consultation processes; the way in which the objectives of the group are articulated in its Articles of Association.[7] This reasoning has been applied to give standing to national groups such as the ACF, as well as regional bodies and local environment groups.

De-funding of environmental activities and attempts to remove the tax-deductible status of environmental advocacy groups may make it harder to satisfy the indicium of Commonwealth government recognition of these groups. However, it would not be hard to imagine a Court being willing to recognize other forms of special interest, for example, *historical* recognition by Commonwealth government or present recognition by state governments, or a long-track record of public advocacy on matters of national environmental significance in the form of wide national membership, funding etc.

These laws developed at a time when Court were concerned that open standing provisions would encourage a flood of vexatious litigants and busybodies. The high cost of litigation today and the power courts have to make costs orders that reflect the legitimacy of the action serve as powerful disincentives to such actions. As the statistics on the use of s487 bear out (see below), only those with deep commitment to protecting matters of national environmental significance and a strong belief that the law has not been followed will contemplate legal action.

2. The operation of s487 in practice since the EPBC Act commenced

Despite the expansion of third party rights under the EPBC Act, only a tiny fraction of approvals has been the subject of an application for judicial review. Of the 5500 projects that have undergone some form of scrutiny under the EPBC Act, only 22 have been the subject of third party proceedings. Only six out of 33 actions for judicial review (in respect of 22 projects) have succeeded in requiring the Minister to correct his decision.[8] The modest use of s487 to initiate judicial review proceedings suggests that environmental NGOs have not abused third party standing rights. Indeed, the Independent "Hawke" review of the EPBC Act in 2010 concluded that third party standing rights had not created any problems under the Act and recommended that they be retained.[9]

3. The consequences of s487's repeal

Section 487 obviates the need for persons with a two-year record of research or activity in relation to environmental protection, to demonstrate that they have any financial or property interest. Repeal of s487 would mean that all applications for judicial review of decisions made under the EPBC Act will involve a two-phase process. First, applicants will have to demonstrate that they possess the requisite "special interest" in the subject matter of the decision to give them standing. Only then will the court consider the substantive claim that the decision was somehow in error. Making such a change will impose additional cost on both parties and introduce further delay in judicial proceedings. In addition to the risks to

[7] *ACF v Minister for Resources* (1989) 76 LGRA 200; *Tasmanian Conservation Trust Inc v Minister for Resources* (1995) 85 LGERA 296; *North Coast Environment Council v Minister for Resources* (1994) 85 LGERA 270.
[8] The Australia Institute, *Key administration statistics – 3rd Party Appeals and the EPBC Act,* August 2015.
[9] Australian Government, Department of the Environment, Heritage and the Arts, *The Australian Environment Act: Report of the Independent review of the Environment Protection and Biodiversity Conservation Act 1999* (Dr Allan Hawke AC: Chair) (2009), Chapter 15, [15.78]–[15.85], Rec 50, 260–261.

good governance that may flow from reduced accountability of Ministerial decisions, this may well have the unintended consequence of imposing longer delays on the commencement of new projects, which is precisely the "ill" which this Bill is supposed to cure.

FURTHER INFORMATION

For any inquiries about matters raised in the submission please contact Jan McDonald, NELA President on 0418 320196 or c/o secretariat@nela.org.au