

# EDOs of Australia



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## Submission on EPBC Amendment (Standing) Bill 2015

11 September 2015

EDOs of Australia (Australian Network of Environmental Defenders Offices Inc.) consists of eight independently constituted and managed community legal centres located across the States and Territories.

Each EDO is dedicated to protecting the environment in the public interest. EDOs:

- provide legal representation and advice,
- take an active role in environmental law reform and policy formulation, and
- offer a significant education program designed to facilitate public participation in environmental decision making.

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## Executive Summary

Thank you for the opportunity to assist the Committee regarding the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 (**Bill**).<sup>1</sup>

EDOs of Australia is a network of independent community legal centres across Australia. Every day, we continue to help clients and local communities to protect the environment through law. We strongly oppose this Bill for the reasons outlined in this submission.

The Bill is a direct response to the Adani case in the Federal Court. The Commonwealth and other parties to that case agreed to set aside the EPBC Act approval because of the Minister's failure to consider things he was required to by law. That failure centred around two nationally-threatened species, although this and other grounds concerning the Great Barrier Reef did not proceed to hearing due to the parties' consent.

The Bill would limit review of the legality of decisions about all Matters of National Environmental Significance – such as national and world heritage areas like the Reef and Uluru, iconic species such as the Tasmanian Devil, indigenous cultural heritage and water resources affected by coal and gas projects. It is not appropriate to change the law which applies across the country to protect natural and built heritage because of a successful challenge to one coal mine, particularly one where the facts highlighted the law working well and our national laws being enforced.

The EPBC Act aims to protect Australia's natural heritage places, and unique species that are in danger of going extinct. If a project could step those species closer to extinction, or threaten the future of one of Australia's (and the world's) most spectacular natural places, then the Minister properly must take account of that in making a decision under the Act. That is the law in Australia, and all Australians are entitled to expect the law should be followed.

The extended standing rules, introduced with the EPBC Act in 1999, reflect the importance of our national environment and the wider public's role in protecting it:

*[environmental] objectives in bringing litigation – such as to prevent environmental impacts, raise issues for legislative attention and improve decision-making processes – reflect public rather than private concerns, such as protecting property and financial interests.<sup>2</sup>*

It is also far from certain that the Bill would reduce purported delay or uncertainty in projects as a result of legal proceedings. Rather, it would require additional

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<sup>1</sup> This Bill was introduced to the House of Representatives on 20 August by the Environment Minister, the Hon Greg Hunt MP. The Bill was referred to the Senate Environment and Communications Committee for report by 12 October. Further information on the Bill and its progress is here: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;page=0;query=BillId%3Ar5522%20Reconstruct%3Abillhome>

<sup>2</sup> A. Edgar (2011), 'Extended standing - Enhanced Accountability? Judicial Review of Commonwealth Environmental Decisions' FLR 38, 435-62; cited in Productivity Commission, *Major Project Development Assessment Processes* (2013), p 272.

time and resources for the courts and legal parties to initially resolve the question of standing, before proceeding to the substantive issues in dispute.

There is a strong public policy rationale for retaining broad standing provisions that allow conservation groups and individual ‘third parties’ to seek judicial review:

- First, there is a general public interest in ensuring that decision-makers lawfully comply with legislative procedures – this is the role of judicial review.
- Second, the potential for additional scrutiny promotes better decision-making, accountability and public confidence that the law will be upheld.<sup>3</sup> It is also instructive to note that where third party rights do exist, they are very rarely exercised.
- Third, broad standing means that ‘directly affected’ landholders don’t bear the entire burden of protecting the nation’s environmental icons – such as our unique threatened species or World Heritage Areas like the Great Barrier Reef. All Australians have an interest in seeing our unique natural heritage is protected.
- Fourth, many recent reviews support legal standing at least as broad as the current EPBC Act provisions. These include the:
  - Independent Review of the EPBC Act (2009) (**Hawke Review**),
  - NSW Independent Commission Against Corruption (2012) (**ICAC**),
  - Administrative Review Council (2012) and
  - Productivity Commission (2013).

### **Details of the EPBC Amendment (Standing) Bill**

The Bill, introduced on 20 August, aims to remove extended standing for certain community members (including environment groups) to seek judicial review of decisions made under the EPBC Act. Standing would in future be restricted to a person ‘whose interests are adversely affected by the decision’, as interpreted by the courts from time to time.

This is problematic for community members who are seeking to review the legality of decisions in the public interest. Existing rights of standing are vital because ‘the effects of major projects can be felt beyond neighbouring landowners... which implies that broader standing is warranted.’<sup>4</sup>

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<sup>3</sup> E.g. NSW planning laws provide ‘open standing’ for judicial review and civil enforcement. This has widespread support including from an independent review panel in 2012. Further, ‘*expanding third party merit appeals*’ was one of six key safeguards in ICAC’s report, *Anti-corruption safeguards in the NSW planning system* (2012).

<sup>4</sup> Productivity Commission, *Major Project Development Assessment Processes* (2013), p 274.

## Removing extended standing for environment groups

The Bill repeals s. 487 of the EPBC Act ('extended standing for judicial review').<sup>5</sup> Section 487 expands who has standing to challenge the legality of decisions made under the EPBC Act and Regulations, recognising the broad public interest in conserving Australia's environment, and more generally, the rule of law.

This section extends standing to an Australian individual (or an Australian organisation with environmental objects or purposes) who has 'engaged in a series of activities... for protection or conservation of, or research into, the environment' at any time in the two years before the decision under challenge.

If the Bill were passed, an interested individual or conservation group would need to demonstrate they have standing on a case-by-case basis, with reference to the common law.

It is worth briefly noting the historical reasons why extended standing emerged. Under the Westminster system of representative government, it was the Attorney-General – the Commonwealth's first legal officer and protector of the rule of law – who represented citizens who cannot legally protect themselves. Only the Attorney-General could run what we now called public interest cases, or give others the right to do so.<sup>6</sup> The extension of public rights to directly access the courts was in part a response to the changing nature of Australian politics, where Attorneys-General may be unlikely to bring, or authorise, cases against the government.

## The common law test for standing would apply

The repeal of s. 487 would mean that any applicant for judicial review of an EPBC Act decision would have to demonstrate standing under the test set out in the *Administrative Decisions (Judicial Review) Act 1977 (ADJR Act)*, as interpreted by the Courts (common law). In brief, the ADJR Act limits standing to a 'person aggrieved' by the decision. This test only grants standing to those 'whose interests are adversely affected by the decision'. The common law has taken this to require a 'special interest'.<sup>7</sup>

Before the introduction of the EPBC Act, those wishing to challenge Federal Government decisions faced a difficult hurdle in showing they had a special interest. For example, they had to show they had something more than 'a mere

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<sup>5</sup> Bill, Schedule 1 item 1.

<sup>6</sup> See for example, the Hon Justice Peter McClellan, Chief Judge at Common Law, Supreme Court of NSW, 'Access To Justice In Environmental Law – An Australian Perspective', Commonwealth Law Conference 2005, London, 11-15 September 2005, p 2, at [www.leg.justice.nsw.gov.au/Documents/mcclellan\\_commonwealth%20law%20conference%2005.pdf](http://www.leg.justice.nsw.gov.au/Documents/mcclellan_commonwealth%20law%20conference%2005.pdf).

<sup>7</sup> E.g. *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493; *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492.

intellectual or emotional concern,<sup>8</sup> and that they would be ‘likely to gain some advantage, other than the satisfaction of righting a wrong’ in commencing proceedings.<sup>9</sup>

Interpretations of the ‘special interest’ rule were not always consistent, and ambiguous boundaries to the definition sometimes led to conflicting judgments.<sup>10</sup> Given that the EPBC Act replaced the common law test 15 years ago, there is considerable uncertainty as to how future Courts would define standing if s. 487 were repealed.

### **The Bill is a direct response to the Adani Carmichael coal mine case**

The Bill to limit third party standing has been introduced following the outcome – by consent orders between all parties – of the *Mackay Conservation Group v Commonwealth of Australia and Adani Mining* case. It is important to note that this case did not proceed to hearing. On the request of the parties, the Federal Court set aside the decision of the Federal Environment Minister because his decision under the EPBC Act was legally flawed.

The EPBC Act seeks to protect Australia’s endangered species and natural heritage. Listing plays an important role in drawing attention to the status of a species or our heritage, and a means of protecting them for present and future generations. Under the EPBC Act, all of the impacts on matters of national environmental significance need to be considered, including the conservation advices designed to protect nationally threatened species. That is the law, and Australians are entitled to expect the law should be followed.

It is perplexing that the Government’s subsequent reaction to this outcome – which was agreed by the Commonwealth itself as well as the mining company and the Mackay group – has been to attempt to reduce scrutiny of government decision-making and narrow the scope of access to justice in the courts. This sends a signal that public rights to ensure the rule of law is enforced, and the national environment protected, are more theoretical than practical – as the very exercise of those rights may lead to their removal.

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<sup>8</sup> *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552.

<sup>9</sup> *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493 at 530.

<sup>10</sup> EDO Queensland, *Explainer: why we need public standing* (20 August 2015) [http://www.edoqld.org.au/news/explainer-why-we-need-public-standing/#\\_ftn4](http://www.edoqld.org.au/news/explainer-why-we-need-public-standing/#_ftn4).

### **Case study – Mackay Conservation Group v Commonwealth of Australia and Adani Mining<sup>11</sup>**

The MCG v Commonwealth and Adani case did not proceed to hearing because the parties agreed that the approval was flawed.

In fact, the Mackay group, which has existed to protect the environment for 30 years, challenged the Minister's decision to approve the mine on a number of legal bases. These included:

- The failure to take into account the greenhouse gas emissions that will result from the burning of the coal that is mined (scope 3 emissions), and the impact of those emissions on the World Heritage-listed Great Barrier Reef;
- The failure to take into account Adani's poor environmental history in India;
- The failure to take into account two Approved Conservation Advices<sup>12</sup> for two nationally threatened species that will be significantly impacted by the mine – the Yakka Skink and the Ornamental Snake.

The Minister and Adani conceded defeat on the last ground. They did this because this is a significant legal error that could not be simply overcome. The Minister can remake a decision about the Adani Carmichael mine. He has the power to refuse the mine and he has the power to approve the mine again, as long as this is done in accordance with the laws of Australia, and with full regard to the relevant evidence and information.

### **Why broad legal standing rules serve the public interest**

This part of the submission details a number of reasons why the Bill should be rejected and broad standing, at a minimum, should be retained. Namely:

- Public appeal rights protect the rule of law and access to justice;
- Third party appeals have not opened the 'floodgates';
- Landholders should not bear the entire burden of protecting national icons; Broad standing upholds Australia's reputation for openness, public scrutiny and environmental justice;
- Independent Hawke Review supported existing extended standing rules;
- Hawke Review recommended additional 'merits review' of key decisions;
- Productivity Commission supports broad standing and existing court safeguards to protect against frivolous and vexatious litigation;
- Senate review (1998) found that extended standing struck a fair balance;
- The NSW ICAC believes third party appeal rights deter corruption risks.

<sup>11</sup> Mackay Conservation Group was represented in the Federal Court by EDO NSW. See further [http://www.edonsw.org.au/current\\_cases](http://www.edonsw.org.au/current_cases)

<sup>12</sup> Approved Conservation Advices are scientific and legal documents that essentially explain the conservation requirements of species to avoid their extinction. The failure to consider them has been determined by the Australian Courts to be a fundamental error of law.

## Public appeal rights protect the rule of law and access to justice

Judicial review is a fundament of the rule of law in Australia. By allowing the courts to oversee the activities of the executive, judicial review is an important safeguard against legal errors and decisions that go beyond the powers granted to the decision-maker.

By specifically including extended standing to seek judicial review in the Courts, the EPBC Act recognises that all Australians have an interest in seeing our unique natural heritage is protected. Section 487 recognises the importance of conservation groups, researchers and educators in safeguarding these interests.

McGrath (2008) notes that extended standing provisions for judicial review and to restrain offences under the EPBC Act have played a critical role in facilitating public interest environmental law. However, the threat of adverse costs orders, the significant cost of legal action, and lack of merits review remain considerable barriers to litigation. These obstacles serve to disprove the ‘floodgates’ argument often raised when extended standing provisions are included in a law.<sup>13</sup>

## Third party appeals have not opened the ‘floodgates’

In 2009, the predecessor to this Committee noted ‘an extremely low level of litigation’ under the EPBC Act, according to the federal Department’s statistics.<sup>14</sup> The most recent figures bear out this trend, with 22 judicial review cases out of around 5,400 federal project referrals – a litigation rate of *half of one percent*.<sup>15</sup>

While the federal Government seeks to curtail broad standing for judicial review, more than a dozen NSW environmental and planning laws contain *open standing* for *any person* to seek judicial review of a legal error, or bring enforcement proceedings where someone has breached the law.<sup>16</sup>

Reflecting on a decade’s experience in the NSW Land and Environment Court, then Chief Justice Cripps noted:

*It was said when the legislation was passed in 1980 that the presence of section 123 [in the NSW planning law] would lead to a rash of harassing and vexatious*

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<sup>13</sup> Dr Chris McGrath, ‘Flying Foxes, Dam and Whales: using Federal Environmental Laws in the Public Interest’ (2008) 25 *Environmental and Planning Law Journal* 324.

<sup>14</sup> *The operation of the Environment Protection and Biodiversity Conservation Act 1999* First Report by the Senate Standing Committee on Environment, Communications and the Arts (2009): *there is little litigation initiated under the [EPBC] Act – either by third parties, proponents of actions, or permit applications. In approximately eight years since the Act commenced, there have been just eight applications to courts for injunctions, 21 applications for judicial review of decisions, and 12 applications for merits review of decisions. When it is considered that this is Australia’s main national environmental legislation... this appears to be an extremely low level of litigation.* [para 6.43]

<sup>15</sup> See for example, Dr Chris McGrath, ‘List of EPBC cases’, 25 August 2015 (in publication); The Australia Institute, ‘Key administration statistics – 3rd Party Appeals and the EPBC Act’ (August 2015); <http://www.tai.org.au/content/key-administration-statistics-%E2%80%93-3rd-party-appeals-and-epbc-act>.

<sup>16</sup> See for example *Environmental Planning and Assessment Act 1979* (NSW), s 123: ‘Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act...’

*litigation. That has not happened and, with the greatest respect to people who think otherwise, I think that that argument has been wholly discredited.*<sup>17</sup>

In 2005, another former Chief Judge of that Court reinforced the value of open standing in NSW over the previous 25 years:

*Any fears that open standing will encourage proceedings which have the potential to destabilise orderly government have been unfounded.*

*...there has been no suggestion that the open standing provisions have led to litigation which adversely impacts upon the well-being of the whole community. The contrary is undoubtedly true.*<sup>18</sup>

Overall there is no credence to the floodgates argument, and standing should not be restricted on this basis. In the EDOs' view *open standing* should be given as a matter of course in order to facilitate important proceedings in the public interest.

### **Landholders should not bear the entire burden of protecting national icons (or Matters of National Environmental Significance)**

The Government and other proponents of the Bill have noted that it will not affect the rights of 'a person whose interests are adversely affected by the decision' to seek judicial review under the ADJR Act and common law.

EDOs have a proud history of working with and assisting directly affected landholders where their concerns raise environmental issues of public interest (as distinct from purely private interests such as property values). In addition, many EDOs run workshops and write legal guides for farmers and other landholders about environmental protection, development, legal rights and the law.<sup>19</sup> However, EDOs can only assist in a limited number of cases.

By removing standing for third parties other than landholders – conservation groups and individuals concerned about the environment – the Bill *increases* the burden of responsibility on affected landholders to 'put the farm on the line' to obtain private legal advice and challenge the legality of a government decision.

By seeking to draw a hard line between standing for landholders and conservationists, the Bill overlooks the primary role of the EPBC Act – to protect the national environment – which necessarily involves 'the community, landholders and indigenous peoples'.<sup>20</sup>

The apparent justification for the Bill also misconstrues the role of the EPBC Act and the Courts. The Act's standing provisions were not enacted for 'resolving a

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<sup>17</sup> Justice J.Cripps, "People v The Offenders", Dispute Resolution Seminar, Brisbane, 6 July 1990.

<sup>18</sup> The Hon Justice Peter McClellan, 'Access To Justice In Environmental Law – An Australian Perspective', Commonwealth Law Conference 2005, London, 11-15 September 2005, pp.

<sup>19</sup> See [http://www.edo.org.au/legal\\_guides](http://www.edo.org.au/legal_guides). For example, a high proportion of EDO NT clients are indigenous peoples; and two-thirds of calls to the EDO NSW legal advice line (around 1200 calls a year in total) are from rural and regional areas.

<sup>20</sup> EPBC Act 1999 (Cth) objects, s. 3.

dispute between citizens'.<sup>21</sup> Rather they provide a right under public law to protect the environment for all Australians.

The Bill therefore seems to suggest one of two things:

- either it seeks to transfer the burden of overseeing government protection of our national environmental icons onto individual landholders (instead of expert individuals or conservation groups who monitor these issues); or
- it implies that protection of these public assets – as distinct from private interests – is simply not worth third party oversight.

In either case, the Bill would be a retrograde step for access to justice and the rule of law.

***Case study – Paterson v Minister for the Environment and Heritage & Anor [2004] FMCA 924<sup>22</sup>***

In this case, a grazier did not have standing to protect Queensland Bluegrass on her property even under the current broad standing provisions in the EPBC Act.

The development in question was for a high voltage transmission line which traversed Paterson's property. The proposal was not deemed a 'controlled action' by the Minister under the EPBC Act, meaning no federal approval was required.

In seeking to challenge this decision, the applicant was not able to establish a required history of engagement in activities for the protection of the environment in order to be granted standing under s 487(2), nor was she deemed to be an 'aggrieved person' under s 5 of the ADJR Act.

This case demonstrates that it is far from clear that farmers will be able to protect the environment on their own land if conservation groups cannot. As well as facing uncertain prospects of success and significant costs risks, landholders must also be prepared to be personally liable in order to take action.

**Broad standing upholds Australia's reputation for openness, public scrutiny and environmental justice**

The expanded standing rules in the EPBC Act demonstrate the openness of Australia's democratic and legal systems – including the government's openness to public and judicial scrutiny. Broad standing reflects Australia's commitment to international laws and principles like the International Covenant on Civil and

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<sup>21</sup> Senator George Brandis, Attorney-General, media release, 18 August 2015: <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2015/ThirdQuarter/18-August-2015-Government-acts-to-protect-jobs-from-vigilante-litigants.aspx>.

<sup>22</sup> (26 November 2004) [http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FMCA/2004/924.html?stem=0&synonyms=0&query=title\(Paterson%20and%20Minister%20for%20the%20Environment%20and%20Heritage%20\)](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FMCA/2004/924.html?stem=0&synonyms=0&query=title(Paterson%20and%20Minister%20for%20the%20Environment%20and%20Heritage%20))

Political Rights (**ICCPR**), the Rio Declaration on Environment and Development (1992) and related UNEP Guidelines (2010).<sup>23</sup>

The Explanatory Material notes that the Bill 'engages... but does not limit' the 'right to a fair hearing in Article 14 of the [ICCPR].'<sup>24</sup> But there is no denying that the Bill limits public access to justice. This not only reflects on Australia's attitude to oversight of its national and international obligations under the EPBC Act. It also makes it more difficult for Australia to support legal standing and the rule of law in countries with developing legal systems.

All of the instruments noted above promote access to justice and the courts. For example:

**ICCPR, Article 14:**<sup>25</sup>

*1. All persons shall be equal before the courts and tribunals. In the determination of ... rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. ...*

**Rio Declaration, Principle 10** (emphasis added):<sup>26</sup>

*Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have ... the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.*

**UNEP Guidelines, Guidelines 17 and 18** (emphasis added):

*States should ensure that the members of the public concerned<sup>[27]</sup> have access to a court of law or other independent and impartial body or administrative procedures to challenge any decision, act or omission by public authorities or private actors that affects the environment or allegedly violates the substantive or procedural legal norms of the State related to the environment.*

...

*States should provide broad interpretation of standing in proceedings concerned with environmental matters with a view to achieving effective access to justice.*

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<sup>23</sup> UNEP Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (2010), available via [www.unep.org](http://www.unep.org). In Europe, environmental rights of transparency, participation and 'the right to review procedures to challenge public decisions' ('access to justice') are specifically protected under the Aarhus convention: <http://ec.europa.eu/environment/aarhus/>.

<sup>24</sup> Explanatory Memorandum to the EPBC Amendment (Standing) Bill 2015, p 3. The ICCPR is an international instrument for the purposes of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). Section 8 of that Act requires an MP who is introducing a Bill to prepare a Statement of Compatibility assessing whether that Bill is compatible with human rights.

<sup>25</sup> See: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>. The remainder

<sup>26</sup> <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163&l=en>

<sup>27</sup> Note to UNEP Guideline 8 states the 'public concerned' should include environmental NGOs.

## **Independent Hawke Review supported the current extended standing rules**

In 2008-09, an independent expert panel conducted an exhaustive review of the EPBC Act and consulted widely on its operation before drawing its conclusions. The Hawke Review supported the current standing provisions for judicial review in the EPBC Act. The panel noted that, in the 10-year operation of the Act, '[t]hese provisions have created no difficulties and should be maintained' [15.81].

The Hawke Review also considered whether judicial review should be *further* expanded to afford 'open standing' to any concerned individual (as in NSW planning laws). The panel found there is no evidence that such provisions would 'engender a "flood" of litigation'. However, it also took the view that the current provisions in the EPBC Act have not 'stymied public interest litigation' [15.84-85].

## **Hawke Review recommended additional 'merits review' of key decisions**

Separate to judicial review, some laws further increase executive accountability by allowing arms length 'merits review' of key decisions. Merits review allows a Court or tribunal to stand in place of the decision-maker and make a fresh decision based on the evidence and the law.

Merits review is *not* available for any key decisions about environmental impact assessment or project approval under the EPBC Act.<sup>28</sup> The Hawke Review recommended that *merits review* rights be extended to those who made a formal comment during the decision-making process (Recommendation 50).

EDOs of Australia support this recommendation.

## **Productivity Commission supports broad standing and existing court safeguards**

In 2013 the Productivity Commission conducted a wide review of *Major Project Development Assessment Processes* under state planning laws and the EPBC Act. On the issue of standing, the Commission noted that a balance needed to be struck between allowing legitimate interests 'while discouraging undesirable and vexatious reviews and appeals.' (p 272) It concluded:

*The Commission considers there is a public interest in allowing third parties to bring judicial review applications, as it allows the legality of the process to be enforced, providing an important 'safety valve' in the system. This suggests the need for broad standing provisions, but completely open standing is not appropriate – having some restrictions on standing provides a means for managing unmeritorious review applications (ARC 2012). Courts also have the inherent ability to strike out vexatious claims (p 274)*

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<sup>28</sup> Hawke Review (2009), [15.38].

The Productivity Commission's relevant reform recommendation, in the context of major projects, supported broad standing rights for judicial review (and merits review) beyond those 'directly affected'.<sup>29</sup>

It is important to emphasise that the Courts have existing powers and procedures to identify and prevent vexatious litigation, and to strike out frivolous or vexatious pleadings. This includes under the *Federal Court Act 1976* (Cth), the Federal Court Rules 2011, and state laws such as the *Vexatious Proceedings Act 2008* (NSW).<sup>30</sup>

Finally, as the Productivity Commission and the Administrative Review Council (2012) note, 'standing is not the only barrier to access to review. Costs and other issues also play a role'.<sup>31</sup>

### **Senate review (1998) found that extended standing struck a fair balance**

Extended standing has been available since the Howard Government introduced the EPBC Act. In 1998, the Senate Committee reviewing the EPBC Bill heard arguments that the standing provisions were both too wide and too narrow. The Committee concluded that the Bill contained "adequate safeguards to prevent vexatious litigation" and that the standing provisions "reach a fair balance between enabling public involvement in enforcement... and ensuring that decisions under the Bill are not unnecessarily delayed or impeded by vexatious litigation."<sup>32</sup> The rarity of challenges suggests that this balance continues to be achieved.<sup>33</sup>

### **NSW ICAC believes third party appeal rights deter corruption**

ICAC has noted that third party appeal rights provide "an important check on executive government", particularly in relation to the development approvals process. These rights reduce the likelihood of any undue favouritism being afforded to developers.

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<sup>29</sup> Productivity Commission (2013) Recommendation 9.2, p 276. It proposed that standing to initiate judicial review and merits reviews of approvals should include:

- Proponents of a project,
- those whose interests are directly affected,
- those who have taken a substantial interest in the assessment process (e.g. objectors), and
- others in exceptional circumstances with leave from the court (e.g. where there is a denial of natural justice if not granted).

<sup>30</sup> See for example, s. 37AO of the *Federal Court Act 1976* (Cth), Division 6.1 of the Federal Court Rules 2011, and ss. 8(8) and 12, *Vexatious Proceedings Act 2008* (Land & Environment Court).

<sup>31</sup> Productivity Commission (2013), p 275. See also UNEP Guidelines (2010), Guideline 20, on cost barriers.

<sup>32</sup> Senate Standing Committee on Environment and Communications, Report on [Environment Protection and Biodiversity Conservation Bill 1998 & Environmental Reform \(Consequential Provisions\) Bill 1998](#) [11.38], [11.41].

<sup>33</sup> See e.g. Australia Institute, 'Key administration statistics – 3rd Party Appeals and the EPBC Act' (August 2015). <<http://www.tai.org.au/content/key-administration-statistics-%E2%80%93-3rd-party-appeals-and-epbc-act>>.

NSW planning laws provide 'open standing' for any person to seek judicial review, and limited standing for merits review. ICAC supports further expanding merit appeal rights in NSW. The absence of third party appeal rights "creates an opportunity for corrupt conduct to occur".<sup>34</sup>

## CONCLUSION

EDOs of Australia strongly oppose the EPBC Amendment (Standing) Bill 2015.

In our view, passage of the Bill would:

- reduce oversight of executive actions that affect the national environment – oversight that has operated successfully since the EPBC Act began;
- disadvantage both conservationists and landholders (as landholders would bear an increased burden for protection of the national environment);
- diminish public confidence in major environmental decision-making and the rule of law; and
- further erode the national response to the independent Hawke Review of the EPBC Act (2009) – which supported existing standing rights for judicial review, and proposed that standing be further *expanded* in other ways.

As a starting point for both State and Federal laws, EDOs of Australia supports 'open standing' for *any person* to seek judicial review of government decisions and civil enforcement of breaches.

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, as was recognised when they were brought in 15 years ago.

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, as all Australians are entitled to expect the law should be followed and to have confidence in sound decision-making.

We also believe there are good arguments to include *merits review* rights for objectors under the EPBC Act, as available under some state laws, to ensure that decision-makers make the best decision on the merits.

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<sup>34</sup> Independent Commission Against Corruption (2012) *Anti-Corruption Safeguards and the NSW Planning System*, p. 22.