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EPBC Amendment (Standing) Bill 2015

Who should have standing to protect Matters of National Environmental Significance in Court?

Briefing Note – September 2015

*EDO NSW is a community legal centre specialising in public interest environmental law**

SUMMARY

The Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 (**the Bill**) was introduced to the House of Representatives on 20 August by the federal Environment Minister, Greg Hunt MP. The Bill has been referred to the Senate Environment and Communications Committee for report by 12 October.[1]

The Bill aims to remove extended standing for community members (including environment groups) to seek judicial review of decisions made under the EPBC Act. Standing would then be restricted to a person 'whose interests are adversely affected by the decision'.

This is problematic for community members who are seeking to review the legality of decisions in the public interest. This is because 'the effects of major projects can be felt beyond neighbouring landowners… which implies that broader standing is warranted.'[2]
In addition:

> *[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.*[3]

If the Bill were passed, the Courts would need to consider whether a particular individual or group had standing on a case-by-case basis, with reference to common law cases. It is therefore 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 time and resources for the Courts and legal parties to initially resolve the question of standing, before proceeding to the substantive issues in dispute.

[1] See Bill progress and explanatory material at: http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;page=0;query=BillId%3Ar5522%20Recstruct%3AbillhomeHome
[2] Productivity Commission, *Major Project Development Assessment Processes* (2013), p 274.
[3] 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.

* Please note: This briefing note provides general information only, not legal advice.

There is a strong rationale for retaining broad standing provisions that allow third parties to seek judicial review:

- First, there is a general public interest in ensuring that decision-makers lawfully comply with legislative procedures.
- Second, where third party rights do exist, they are very rarely exercised. But the additional scrutiny promotes better decision-making, accountability and public confidence that the law will be upheld.[4]
- Third, broad standing means that individual 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.
- Fourth, a number of recent reviews support broad legal standing. These include the independent review of the EPBC Act (2009), the NSW Independent Commission Against Corruption (2012), the Productivity Commission (2013) and others.

DETAILS OF THE BILL

Removing standing for environment groups

The Bill would repeal s. 487 of the EPBC Act ('extended standing for judicial review').[5]

Section 487 expands who has standing to challenge decisions made under the EPBC Act and Regulations, recognising the broad public interest in conserving Australia's environment.

This includes an Australian individual (or an Australian organisation with environmental objects or purposes) that 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.

The common law test for standing would apply

If passed, the repeal 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'.[6]

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 intellectual or emotional concern,"[7] and

[4] 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).
[5] Bill, Schedule 1 item 1.
[6] E.g. *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493; *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492.
[7] *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552.

that they would be "likely to gain some advantage, other than the satisfaction of righting a wrong" in commencing proceedings.[8]

Interpretations of the 'special interest' rule were not always consistent, and ambiguous boundaries to the definition sometimes led to conflicting judgments.[9]

Commencement and some retrospectivity

The Bill states that the removal of extended standing would apply to any application challenging an EPBC Act decision that is made after the Bill commences.[10] For example, after this time, an applicant asking the Federal Court for judicial review of an EPBC Act decision would need to prove standing under the common law test.

The Bill would affect standing even if the *decision* under the EPBC Act was made *before* the Bill commenced. So there is an element of retrospectivity in the Bill which may affect people's rights to bring legal action.

BACKGROUND

Commentary on the importance of extended standing

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.[11]

Hawke Review support for extended standing and additional merits review

The independent review of the EPBC Act (2009) (Hawke Review) supported the extended standing provisions for judicial review in the EPBC Act. The Review noted that, in the 10-year operation of the Act, '[t]hese provisions have created no difficulties and should be maintained' [15.81].

Indeed, the Hawke Review considered whether the EPBC Act should be further expanded to afford 'open standing' to any concerned individual (as in NSW planning laws). While it found there is no evidence that such provisions would 'engender a "flood" of litigation', it took the view that there is equally no suggestion that the current provisions in the EPBC Act 'have stymied public interest litigation' [15.84-15.85].

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[8] *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493 at 530.
[9] EDO Queensland, Explainer: why we need public standing (20 August 2015) http://www.edoqld.org.au/news/explainer-why-we-need-public-standing/#_ftn4.
[10] i.e. The day after the enactment receives Royal Assent (Bill, clause 2).
[11] Chris McGrath, 'Flying Foxes, Dam and Whales: using Federal Environmental Laws in the Public Interest' (2008) 25 *Environmental and Planning Law Journal* 324.

While judicial review is an important safeguard against legal errors, some laws increase 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.

Merits review is not available for any key decisions about environmental impact assessment or project approval under the EPBC Act (Hawke Review, 15.38). The Hawke Review recommended that standing for *merits review* be extended to persons who made a formal comment during the decision-making process (Recommendation 50). However, the former Government's 2011 response to the Hawke Review rejected this recommendation.[12]

Productivity Commission supports broad standing and existing court safeguards

In 2013 the Productivity Commission conducted a wide review of *Major Project Development Assessment Processes*. In brief, the Commission noted that a balance needed to be struck between allowing legitimate interests 'while discouraging undesirable and vexatious reviews and appeals.' (p 272)

> *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)

Furthermore, 'As the [Administrative Review Council 2012] noted, "standing is not the only barrier to access to review. Costs and other issues also play a role".'

The Productivity Commission's relevant reform recommendation[13] (in the context of major projects) was 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).

Senate 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

[12] http://www.environment.gov.au/system/files/resources/605a54df-7b33-4426-a5a8-51de24b29c71/files/epbc-review-govt-response.pdf
[13] Productivity Commission (2013) Recommendation 9.2, p 276.

ensuring that decisions under the Bill are not unnecessarily delayed or impeded by vexatious litigation."[14] The rarity of challenges suggests that this balance continues to be achieved.[15]

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.

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".[16]

CONCLUSION

As a starting point for both State and Federal laws, EDO NSW 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.

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.

[14] 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].
[15] 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.
[16] Independent Commission Against Corruption (2012) *Anti-Corruption Safeguards and the NSW Planning System*, p. 22.