



Environment Institute
of Australia and
New Zealand Inc.

The Senate

Environment and Communications Legislation Committee

**Environment Protection and Biodiversity Conservation
Amendment (Standing) Bill 2015**

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Executive Summary

On all issues and all projects the Environment Institute of Australia and New Zealand Inc (EIANZ) advocates ethical good practice environmental management delivered by competent and well credentialed environmental practitioners.

The EIANZ notes with concern the *Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015* (the Bill), which seeks to repeal Section 487 of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). The EIANZ understands that the effect of the proposed amendment is to reduce the range of parties that have standing under the EPBC Act, and thus restrict the range of circumstances in which judicial review of decisions under the EPBC Act can be initiated.

EIANZ understands and appreciates the general need for any legal system to limit frivolous and vexatious challenges. It would, however, appear that the existing provisions of the EPBC Act are already adequately preventing such challenges. The Australia Institute has identified that 33 actions have been brought under the EPBC Act since its introduction in 2000, representing a very small proportion of the total number of proposals assessed under the Act.¹

The standing provisions of the EPBC Act have been subject to previous review, first in 2009 in *The Australian Environment Act – Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (Hawke 2009, pgs261-265), and then again in the *Major Project Development Assessment Processes* report (Productivity Commission 2013, pgs 249-283). Both reports have favoured the retention of the extended standing provisions of the EPBC Act.

The EIANZ is concerned that any reduction in the extent to which decisions made under the EPBC Act can be challenged, undermines the robustness and validity of the environmental assessment processes under the Act. In this regard, the EIANZ submits that national and international good practice in environmental assessment dictates that formal, legislated review processes be in place, and that the standing of public interest groups be recognised.

The EIANZ considers that procedural oversight and the standard of work that contributes to the administration of the EPBC Act, can be substantially improved by requiring professional oversight and certification of documentation by 'suitably qualified and experienced persons'.

¹ Key administration statistics – 3rd Party Appeals and the EPBC Act, The Australia Institute, <http://www.tai.org.au/content/key-administration-statistics-%E2%80%93-3rd-party-appeals-and-epbc-act> (Accessed 08/09/2015).

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1. Background

The EIANZ champions good science as the foundation of good practice environmental management. It also champions the rule of law.

Important aspects of the environmental impact assessment process are under challenge because there has been a court decision, on grounds largely related to technical failure of administrative procedure, to overturn an approval for a major new project. An amendment is being proposed to the EPBC Act that would remove the extended standing for parties to take decisions under the Act to judicial review.

An important treatise, *Should trees have standing?* (Stone 2010), is relevant to the current debate. This important work was a rallying point for the world-wide debate on the legal rights of the environment and nature. At the heart of the book is a compelling argument that the environment should be granted legal rights. It remains a definitive and respected statement about why the environment should have legal rights, so that the voiceless elements in nature may have guardians for their protection for future generations.

The provision in Section 487 of the EPBC Act is the very kind of provision that Christopher R Stone refers to as providing guardianship rights to citizens for the protection of the environment for future generations. In the case of Section 487, the guardianship rights are not sweeping, being limited to the judicial review of decisions made, failed to be made, or conduct engaged in for the purpose of making a decision. They are important in giving rights to the community to ensure that decisions relating to the protection of the environment have been taken in accordance with the law.

2. Environmental assessment and legal rights

Environmental assessment, in Australia and internationally, has always been envisaged as an open and strongly participatory process, intended to bring about transparency and accountability in decision making about the environment (see for example Hollick (1986); Bartlett & Kurian (1999); Caldwell (1998)). That the process has always been open to involvement by a wide range of participants also reflects the significant connection between maintaining and protecting environmental resources and human wellbeing (Caldwell 1998).

The ability for third party review of government decisions is considered as fundamental to democratic processes generally, and to good procedure and governance in relation to environmental decision making (Wood 2003; Mcgrath 2008; European Commission 2009; Kolhoff et al. 2013).

The *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* reinforced this issue, stating that “public interest litigation is one of the most significant means of enforcing environmental law and in enhancing the transparency, integrity and rigour of government decision-making about activities which impact on the environment” (Hawke 2009, p.261).

International studies support this and have identified that where procedural compliance matters are not subject to independent scrutiny, the robustness of the environmental assessment process is compromised (see for example Owens et al. (2004); Ortolano et al. (1987)(Kolhoff et al. 2013)).

It is clear that there is national and international recognition of the importance of adequate legal remedies to decisions about environment and development.

Australian and international best practice also supports a wide interpretation of legal standing in relation to environmental decisions, and particularly that third party “public interest” challenges should be available. In its review of major project development assessment processes in Australia, the Productivity Commission supported public interest standing in relation to challenges to decisions about environment and development, writing that “[the Commission] also recognises that there are representative organisations that might have a legitimate interest in the major project DAA process that may not be granted standing at common law (for example, species protection groups)” (Productivity Commission 2013, p.275).

The Productivity Commission’s report recommends that standing should include “those who have taken a substantial interest in the assessment process”, for example as demonstrated by making a substantive submission during any public comment phase of the environmental assessment process. Earlier, the *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* had recommended not just that the existing standing provisions of Section 487 be retained, but that the definition of standing under the EPBC Act should be expanded (Hawke 2009).

To date, the Australian Government also appears to have recognised the importance of extended standing, at least as is currently provided for under Section 487 of the EPBC Act. In its *Draft Framework of Standards for Accreditation of Environmental Approvals under the Environment Protection and Biodiversity Conservation Act 1999*, the Australian Government requires that State and Territory systems include “rights of review by courts together with extended standing under State or Territory law at least equivalent to those existing for decisions under the EPBC Act” (Australian Government 2014).

Internationally, the EIANZ notes similar precedents in this regard:

- Agenda 21, an action plan for sustainable development that arose from the 1992 UN Conference on Environment and Development held in Rio de Janeiro, Brazil, and to which Australia is a signatory, promotes the broadest possible involvement in all aspects of public participation and decision making. Item 1.3 states that “the broadest public participation and the active involvement of the non-governmental organizations and other groups should also be encouraged”, and Item 8.3 requires parties “to develop or improve mechanisms to facilitate the involvement of concerned individuals, groups and organizations in decision-making at all levels”.
- In the European Community, EU Directive 2011/92/EU *on the assessment of the effects of certain public and private projects on the environment*; Article 1 (2) requires Member States to provide for “wide access to justice” and specifically states that “non-governmental organisations promoting environmental protection and meeting any requirements under National law shall be deemed to have an interest”.

The EIANZ considers, therefore, that providing extended rights to standing, and particularly allowing “public interest” appeals is consistent with international and national good practice in environmental assessment legislation.

3. Restriction of standing

The EIANZ considers that restricting standing to directly affected parties will inappropriately decrease the level of scrutiny over and accountability of decision makers under the EPBC Act.

Though few in number, it is self-evident from successful judicial reviews, that the present provisions of the law have usefully revealed deficiencies in the process of making decisions about the environmental consequences of major projects.

International studies have demonstrated that affected individuals and communities struggle to deal with the complexity of environmental assessment processes, and the voluminous and technical nature of information generated by the process (see for example (Devlin & Yap 2008; Devlin et al. 2005; Richardson 2005; Partidario & Sheate 2013)).

Given that only judicial review, and not merit reviews, are available under the EPBC Act, anyone wishing to bring a legal challenge under the legislation requires specific legal knowledge to be able to identify the precise basis for review.

Individuals such as affected landowners have limited resources and investigative capability and are unlikely to be aware of their rights in this regard. That this poses a barrier to bringing cases under the EPBC Act appears to be supported by examination of the applicants in cases. In at least 26 of 33 cases identified by the

Australia Institute, the litigants were “public interest” applicants.² The EIANZ considers that this analysis both reinforces the importance of maintaining public interest standing, and the difficulty of directly affected individuals in accessing the system

4. ‘Suitably qualified and experienced’ persons

Noting that the successful judicial review cases brought under the provisions of Section 487 of the EPBC Act, have highlighted procedural failures; the EIANZ considers that there are other more important measures that ought to be considered as means for improving the reliability and performance of the EPBC Act, rather than the removal of the extended standing provisions.

The EIANZ considers that procedural oversight and the standard of work that contributes to the administration of the EPBC Act, can be substantially improved by requiring professional oversight and certification of documentation by ‘suitably qualified and experienced’ persons.

Certification of environmental assessments to attest to the work being in accordance with regulatory requirements and government policy; being scientifically and technically accurate; and that proposed measures for avoidance, mitigation, remediation and offsetting will, if implemented, materially assist in ensuring that lawful and scientifically well-founded decision making processes are followed.

The term ‘suitably qualified and experienced’ is deliberately used, because it implies multiple criteria for providing quality assurance of documentation, and does not presume that certification can only be provided by a person from a particular discipline or profession.

The EIANZ suggests that one of the key ways of recognising a person as being suitably qualified is through their professional grade membership of an organisation that holds its members accountable to a code of ethics and professional conduct.

The EIANZ believes that such an approach will provide a higher level of assurance to project proponents, decision-makers, regulators, and the community, that appropriate and competent standards of ethical good practice environmental management are being used under the EPBC Act.

The EIANZ believes that the EIANZ Certified Environmental Practitioner Scheme provides an effective basis for professional environmental practitioners to be recognised as ‘suitably qualified and experienced’.

²Key administration statistics – 3rd Party Appeals and the EPBC Act, The Australia Institute, <http://www.tai.org.au/content/key-administration-statistics-%E2%80%93-3rd-party-appeals-and-epbc-act> (Accessed 08/09/2015).

5. Conclusion

The EIANZ is the leading professional body for environmental practitioners in Australia and New Zealand, promoting independent and interdisciplinary discourse on good practice environmental management, and holding its members accountable to the EIANZ *Code of Ethics and Professional Conduct*.

The EIANZ considers that the proposal to amend the EPBC Act to remove Section 487 is inconsistent with good practice in environmental assessment. It reduces transparency, rigour and accountability which in turn weakens governance in relation to environmental decision making. The EIANZ considers that the proposed repeal of Section 487 undermines the objectives of the EPBC Act, and is contrary to international good practice standards.

The EIANZ considers that if amendments are to be made to the EPBC Act, then certification of documentation and process by 'suitably qualified and experienced' persons would provide greater reliability of process, and assurance to project proponents, decision-makers, regulators, and the community, that appropriate standards of ethical good practice environmental management were being achieved.

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