

9 September 2015

Committee Secretary
Senate Standing Committee on the Environment & Communications
PO Box 6100
Parliament House
Canberra ACT 2600
ec.sen@aph.gov.au

Dear Sir/Madam,

[Ports Australia Submission to the Senate Inquiry into the EPBC Amendment \(Standing\) Bill 2015](#)

Ports Australia - Representation

Ports Australia is the peak industry body representing port authorities and corporations, both publicly and privately owned, at the national level. Ports Australia is a constituted company limited by guarantee with a Board of Directors, comprising the CEOs of 10 member ports. Our website is at www.portsaustralia.com.au

All ports are fundamentally important across our nation and serve vital industries including export, import and domestic trade, agriculture, mining, tourism, defence, research and community access. Our ports also form part of a national network around the country, ensuring Australia is well placed to service domestic and international markets. Port growth will be required in the future to support increasing population and enable development of industry.

It is well established that Australia is a highly trade exposed country whose economic fortunes and ability to create jobs is highly reliant on the competitiveness of our ports community which are in effect our largest freight hubs. Ports Australia is very concerned about the increasing intensity of disruption to port operations posed by some environmental activist groups using vexatious litigation to delay development and thereby deliberately undermining both our export and import industries and confidence in this country as a good place to do business.

Ports Australia's Position

We support the Australian Government's position to remove s. 487 from the EPBC Act.

In 2011, a funding proposal for the Anti-Coal Movement entitled "*Stopping the Australian Coal Export Boom*" was released. The strategy behind the proposal was to:

"... 'disrupt and delay' key projects and infrastructure while gradually eroding public and political support for the industry and continually building the power of the movement to win more."

Litigation was clearly outlined as one of the key means through which to “disrupt and delay”.

Ports Australia supports the right of people who are genuinely affected by development to have significant input into the approvals process for major infrastructure projects. Indeed, all of our members recognise that major projects can be a cause of community interest and sometimes concern. To address these concerns, ports undertake comprehensive engagement and assessment processes designed to identify key community issues and address environmental risks. Unfortunately, this process is often challenging given the level of misinformation that activist groups circulate.

Despite undertaking extensive approvals processes that last several years and being supported by significant consultation, virtually every major coal project or coal enabling infrastructure project in recent years in Australia has been the subject of lengthy and costly legal proceedings. In most instances where a court has found in favour of a proponent, these decisions are immediately appealed or taken to a higher court. Further, the activist groups often continue to create more disruption and political pressure, reflecting a lack of willingness to accept decisions made in court.

Ports Australia supports the undertaking of rigorous assessment processes for major development proposals and recognises the need to ensure any consideration of new projects occurs in line with the principles of Sustainable Development. However, it is crucial that our members are afforded certainty and consistency with respect to regulatory and policy processes.

The use of legal processes to stymie the efficient and legislated regulatory process does not result in any environmental benefit. Further, it presents significant sovereign risk to Australia as a place to do business and is threatening our international reputation.

Sections 487 and 488

Section 487 automatically extends “standing” as “person aggrieved” to conservation groups amongst others, by a decision in the administrative law sense. Of itself, the section does not provide for judicial review, only access to judicial review under the *Administrative Decisions (Judicial Review Act) 1977* (ADJR Act) by extending standing.

Generally, under the ADJR Act a person has standing to seek judicial review if they are “*a person who is aggrieved*” by the decision, conduct or failure for which they seek review (ADJR Act, ss 5, 6 and 7). A “*person aggrieved*” is defined in the ADJR Act to include a person whose interests are adversely affected by the decision, conduct or failure (ADJR Act, s 3(4)). Section 487 was introduced in the EPBC Act to clarify the standing of environmental groups to give them access to the ADJR Act for review as a matter of public interest, as the courts in past cases invariably could not agree on whether they had standing or cases were resulting in inconsistent interpretation and precedents.

The section defines those who can bring court actions to stop a project on the grounds of environmental or endangered species protection. Individuals and organisations can only bring an action if they are Australian and have, for the previous two years, engaged in activities for the protection or conservation of, or research into, the environment. These activities must be included in the objects of the organisation seeking to sue. The effect of the removal of s 487 will be to preclude various environmental groups from acting on behalf of communities affected by a decision under the EPBC Act simply by virtue of them being established as an environmental group.

The removal of s. 487 will introduce the requirement for additional legal argument in an application around whether a conservation group has "standing". Ports Australia submits that the change will not simply stop environmental groups from legally challenging a decision but require them, in the first instance, to prove they have sufficient standing as a person aggrieved by a decision to bring an application for review.

The Committee will be aware that the courts have the discretion whether to determine standing as a preliminary issue, or in conjunction with the merits of the case. Then there is always the inherent jurisdiction of the court, the concept being that a superior court has the jurisdiction to hear any matter which comes before it unless a statute or rule specifically limits its authority or grants exclusive jurisdiction to another (usually) higher court or tribunal. Depending on the way an application is treated by a court, and judicial activism is not out of the question as it was in the past with public interest cases, Ports Australia believes that the removal of s 487 will have little or indeed no noticeable effect on delays to projects.

We have argued that the removal of s 487 will not stop legal challenges to EPBC Act approvals. It will not stop those who are intent on deliberately misleading the public on the environmental or health impacts of, for example, capital dredging in ports. Such people can use other provisions in the EPBC Act – such as s 488 - to deliberately damage industry and regrettably destroy job opportunities.

Section 488 reads:

“Applications on behalf of unincorporated organisations

(1) A person acting on behalf of an unincorporated organisation that is a person aggrieved (for the purposes of the [Administrative Decisions \(Judicial Review\) Act 1977](#)) by:

(a) a decision made under this Act or the regulations; or

(b) a failure to make a decision under this Act or the regulations; or

(c) conduct engaged in for the purpose of making a decision under this Act or the regulations;

may apply under that Act for a review of the decision, failure or conduct.

(2) The [Administrative Decisions \(Judicial Review\) Act 1977](#) applies in relation to the person as if he or she were a person aggrieved.”

In the absence of section 487(3) the same arguments as to standing would apply as they would to an individual. Section 488 is there simply because unincorporated organisations do not have a legal identity hence it allows for an individual to apply on behalf of the organisation. The same issues of standing discussed above would still apply. The activities of aggressive and unethical activist groups will therefore not be prevented by the removal of s. 487.

Summary

In summary, Ports Australia supports the removal of s 487, however, we are not convinced that the removal of this section will significantly limit the number of legal challenges and hence delays to projects. Any challenge may become more complicated when it gets to arguments of standing or persons aggrieved as was often the case in public interest environment matters prior to the introduction of the legislation.

Yours sincerely,



David Anderson
Chief Executive Officer