

Turnbull wants to change Australia's environment act - here's what we stand to lose

Written by Samantha Hepburn, Director of the Centre for Energy and Natural Resources Law, Deakin Law School, Deakin University

Prime Minister Malcolm Turnbull is seeking changes to Australia's national environment act to stop conservation groups from challenging ministerial decisions on major resource developments and other matters of environmental importance.

Turnbull is reviving a bid made by former Prime Minister Tony Abbott to abolish Section 487 of the [Environment Protection and Biodiversity Conservation Act](#) (EPBC Act) - a bid rejected in the Senate in 2015. If it goes ahead, the change will significantly diminish the functionality of the act.

The EPBC Act, introduced by the Howard government in 1999, has an established record of success. Judicial oversight of ministerial discretion, enabled by expanded standing under Section 487, has been crucial to its success.

Section 487 allows individuals and groups to challenge ministerial decisions on resources, developments and other issues under the EPBC Act. An organisation can establish standing by showing they have engaged in activities for the "protection or conservation of, or research into, the environment" within the previous two years. They must also show that their purpose is environmental protection.

Repealing this provision would remove the standing of these groups to seek judicial review of decisions. Standing would then revert to the common law position. That means parties would need to prove they are a "person aggrieved" by showing that their interests have been impacted directly.

Many environmental groups will be unable to satisfy the common law test, leaving a [very small group of people](#) with the right to request judicial review – essentially, the right to check that federal ministerial power under the EPBC Act has been exercised properly.

This is likely to have a devastating impact on fragile ecological systems and biodiversity conservation strategies.

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This is particularly concerning given the dramatic changes affecting the environment from the expansion of onshore resource development and the [acceleration of climate change](#).

Why do we have the EPBC Act?

The EPBC Act was designed to promote the introduction of ecologically sustainable resource development. This means federal environment ministers must take into account the economic, environmental and social impacts of proposals.

The EPBC Act is triggered and developments require Federal approval when they affect:

- World heritage sites
- National heritage sites
- Wetlands
- Threatened species and ecological communities
- Migratory species
- Nuclear actions, and
- Commonwealth marine areas.

Since its implementation, Section 487 has proved critical to the success of significant achievements in environmental protection and management. Here are just a few examples.

The Nathan Dam case

The [Nathan Dam case](#) handed down in 2004 tested the protective scope of the EPBC Act.

Using Section 487, the Queensland Conservation Council and WWF Australia challenged the Federal Environment Minister's decision to approve the construction of a large dam in central Queensland.

The dam was built to supply water for crop irrigation and other developments in the catchment of the Great Barrier Reef World Heritage Area. The issue was whether the minister, in granting approval, was required to take into account the impact of pollution from farmers using water supplied by the dam.

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The Full Federal Court held that adverse impacts such as downstream pollution by irrigators did need to be taken into account by the minister. The importance of this decision lay in the finding that the scope of the EPBC Act was very broad, requiring the minister to consider indirect environmental impacts, including the acts of third parties where those acts could be reasonably anticipated.

The decision also resulted in an [amendment](#) to the definition of “impact” set out in the act.

The Wielangta Forest case

In the 2006 [Wielangta Forest case](#) Senator Bob Brown of the Australian Greens argued that Forestry Tasmania's operations were having a significant impact on three threatened species: the [Tasmanian Wedge-Tailed Eagle](#), the [broad-toothed stag beetle](#) and the [Swift Parrot](#).

The Federal Court held that the loss of habitat was cumulative and had a dramatic impact on the three protected species. The court concluded that the objectives of the EPBC Act were to protect threatened species as well as restore populations so they were no longer threatened.

Forestry Tasmania had not complied with the Regional Forestry Agreements Act, because there was insufficient protection provided for threatened species. This meant that Forestry Tasmania could not claim an exemption from the application of the EPBC Act.

The decision is important because it highlights the ability of the Act, where judicial review is sought under Section 487 by an interested party, to determine the suitability of state practices for the protection and restoration of endangered species.

The Japanese whaling case

[The case](#) brought by Humane Society International Inc (HSI) against Kyodo Senpaku Keisha Ltd (Kyodo) tested the scope of the EPBC Act to protect endangered species in international waters.

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HSI sought to stop the Japanese company from scientific whaling in the Australian Whale Sanctuary. In response, Japan claimed it did not recognise Australia's sovereignty over the Antarctic waters that lay within the sanctuary.

The Federal Court declared that Kyodo was in breach of the EPBC Act and granted HSI an injunction restraining Kyodo from committing further breaches. HSI's standing under Section 487 was critical - without it, the case would not have been brought.

The Carmichael coal mine cases

In 2014 and 2015 two cases were brought challenging the decision of the Federal Environment Minister, Greg Hunt, to [approve the Carmichael coal mine](#). The coal mine, one of the world's largest, was to be developed by a subsidiary of the Indian company, Adani.

In early 2015 the Mackay Conservation Group brought an action in the Federal Court arguing that the Minister had failed to consider two listed threatened species, the [yakka skink](#) and the [ornamental snake](#).

No judgement was issued, but the court issued a statement that the Minister had failed to take these species into account when making the approval.

In 2016, the Australian Conservation Foundation brought a further case arguing that Hunt had failed to take account of the climate impact from the mine. It's estimated the burning of coal from these mines will generate approximately 4.7 billion tonnes of greenhouse gas emissions.

In *ACF v The Minister for the Environment*, the Federal court concluded that the decision of the Environment Minister was legal, did not breach the EPBC Act and did not contravene the precautionary principle because there was no threat of serious or irreversible environmental damage to the Great Barrier Reef National Park.

ACF then sought an appeal from this decision to the Full Federal Court on the 16th of

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September, 2016. When handed down, the decision will be crucially important for the future of climate governance in Australia.

None of these decisions would have been possible without the groups' standing under Section 487 of the EPBC Act. Removing these provisions undermines the foundational objectives of Australia's national environmental act at a time when its protective capabilities are needed most.

Samantha Hepburn does not work for, consult, own shares in or receive funding from any company or organisation that would benefit from this article, and has disclosed no relevant affiliations beyond the academic appointment above.

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