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Section 487

of the Environment Protection and Biodiversity Conservation Act:

How activists use red tape to stop development and jobs

Daniel Wild

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of the Environment Protection and Biodiversity Conservation Act:

How activists use red tape to stop development and jobs

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About the author

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TONY ABBOTT IS FAILING TO PROTECT US FROM CLIMATE CHANGE
No one shall be subjected to arbitrary arrest or detention
TURN LEFT AT NEXT ELECTION TONY IS A PHONEY!
TONY A BUTT!
DIRTY COAL
ANGRY SIGN
LIBERTY AND FREEDOM ARE NOT YOURS TO GIVE OR TAKE
Misogynistic
WHAT A JERK
MORE DECENCY COMPASSION ACCOUNTABILITY
EVERYTHING IS OKAY JUST KEEP ON SHOPPING JUST KEEP ON WATCHING TV JUST KEEP ON WORKING 9-5 JUST KEEP ON VOTING FOR RIPERS AND THANK YOU FOR BELIEVING IN THE GREAT ILLUSION

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Summary

Section 487 (s. 487) of the Environment Protection and Biodiversity Conservation (EPBC) Act extends special legal privileges to green groups to challenge federal environmental project approvals, even when their private rights are not directly affected by that project.

Since the introduction of the EPBC Act in 2000, major projects have spent approximately 7,500 cumulative days, or 20 years, in court as a result of challenges brought under s. 487.

The Institute of Public Affairs estimates these delays have cost the Australian economy as much as $1.2 billion.

Eighty-seven per cent (four out of thirty-two) of s. 487 challenges which have proceeded to judgement have been rejected in court. Of those four challenges that have been successful, three resulted in only minor changes to the Minister's original approval.

Environmental groups have used s. 487 to carry out an ideological anti-coal, anti-economic development agenda, as outlined in the 2011 Greenpeace strategy document *Stopping Australia's Coal Export Boom*.

Holding projects up in court reduces profitability, employment, investment and government revenue and royalties. Some projects never go ahead due to heightened risk of legal challenges and consequent higher capital costs.

Delaying or preventing projects in Australia harms the environment: Australia has cleaner coal than the rest of the world. Fewer coal mines in Australia means more coal mines overseas, which will result in a lower quality environment. Delaying or preventing projects – if applied on a global scale – can also affect the dependable and affordable supply of energy to developing nations.

Introduction

Australia has experienced 25 years of unprecedented unbroken economic growth. That growth has been driven in part by the success of our primary industries such as mining. This period has not only enabled us to enjoy some of the highest living standards in the world, but also contribute to pulling millions out of poverty by exporting the potential for cheap and reliable energy.

As a nation we are lucky to hold some of the world's cleanest resource deposits. But to transform those resources into income Australian producers must enjoy the freedom to productively and efficiently do business. Unfortunately, Australian environmental law allows activist environmental groups to delay and disrupt the development that underpins that prosperity.

'Lawfare' – the use of the legal system for ideological anti-development activism – is enabled by section 487 (s. 487) of the *Environment Protection and Biodiversity Conservation (EPBC) Act*. Section 487 extends legal standing to environmental groups to challenge Ministerial approvals under the EPBC Act. The result has been a long line of frivolous and vexatious lawsuits — most of which have been rejected by the courts — that stymie Australian investment, opportunity and employment.

This paper begins by outlining the details of federal environmental approvals, and the processes for challenging those approvals (part 2). To shed light on the nature of environmental approvals, we then outline some of the successful and unsuccessful cases (part 3).

The avenue of appeal opened by s. 487, we demonstrate, is a tool of ideological 'lawfare' that seeks to increase project costs (part 4). We then demonstrate the economic cost of those delays, which we calculate, based on the number of days held up in court, at between $534 million and $1.2 billion (part 5).

What's more, delayed projects may lead to worse environmental outcomes by pushing mining projects to dirtier coal reserves overseas (part 6), are unethical because they hold back the capacity of cheap energy to pull people out of poverty (part 7), and goes against the basic principle of the rule of law because all groups should need to establish a basic modicum of interest before challenging (part 8).

The case for repealing s. 487 of the EPBC Act is clear cut. The enormous economic cost of delays could be invested in the next wave of Australian mining, thereby driving future decades of growth and prosperity, all while other avenues for legitimate challenge of the environment remain open (part 9).

The Australian government must redouble efforts to repeal s. 487 and close this avenue of lawfare that does nothing to protect the environment, but unnecessarily stops development and employment.

The Environment Protection and Biodiversity Conservation Act

The *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act) is the Australian Government's central piece of environmental legislation. It regulates activities that affect a range of flora, fauna, ecological communities and heritage places — defined in the EPBC Act as matters of national environmental significance.[1]

The nine matters of national environmental significance to which the EPBC Act applies are: world heritage properties; national heritage places; wetlands of international importance (often called 'Ramsar' wetlands after the international treaty under which such wetlands are listed); nationally threatened species and ecological communities; migratory species; Commonwealth marine areas; the Great Barrier Reef Marine Park; nuclear actions (including uranium mining), and; water resources in relation to coal seam gas development and large coal mining development.

Where a project could have a significant impact on a matter of national environmental significance, that project must go through the approvals process outlined in the EPBC Act.

Typically project proponents refer their project to the Federal Environment Department for an assessment of if the project could impact a matter of national environmental significance. The Minister then decides if the likely environmental impacts of the project are such that it should be assessed under the EPBC Act.[2]

Approval by the Minister is typically contingent on the provision of an Environmental Impact Assessment (EIA) by the project proponent. A central component of the EIA is to outline key risks posed to the environment from a project and how those risks would be managed. Final approval by the Minister is almost always subject to a range of conditions and requirements.

Challenging Ministerial decisions

The approval of a project by the Minister can be challenged in court. If the court finds the approval was invalid, then the approval can be overturned. [3] This means the Minister must either re-approve the project subject to a different set of conditions, or the project cannot proceed.

The question of who can take a project to court is determined by who has 'legal standing'. In most cases legal standing is defined under Section 5 of the *Administrative Decisions (Judicial Review) Act 1977*, or, less commonly, section 39B of the *Judiciary Act 1903*.[4]

Under section 5 of the ADJR Act, a person or organisation is said to have standing where they are aggrieved by a decision made by the responsible decision-maker. To be classed as aggrieved typically means a person's interests are adversely affected by the decisions, or would be

1 See the Department of Environment's website, https://www.environment.gov.au/epbc

2 Ibid

3 Environment and Communications Legislative Committee, *The Senate Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 [Provisions]*, November 2015, pg. 2

4 Ibid

adversely affected if a decision were, or were not, made in accordance with a relevant report or recommendation.[5] The applicant typically needs to have a private right (such as a property right) that would be affected by a project approval. A farmer whose crops would be damaged by a nearby mine, for example.

Alternatively, an applicant can establish they have a 'special interest' in the project that goes above and beyond the interest of an ordinary member of the public.[6] 'Special interest' is a more liberal definition than a strict property right, but stricter than open public standing, which would provide standing to anyone in the public. An example of how the 'special interest' criteria has been applied is in the *Environment East Gippsland Inc v VicForests* (2010) 30 VR 1 case.

Section 487 of the EPBC Act extends legal standing

Section 487 extended the meaning of the term aggrieved to explicitly include green groups.[7] This enabled green groups to challenge projects in court without having to be directly affected by, or having a 'special interest' in, the project.

In particular, under s. 487 a person is defined as aggrieved where[8]:

- the individual is an Australian citizen or ordinarily resident in Australia or an external Territory; and
- at any time in the 2 years immediately before the decision, failure or conduct, the individual has engaged in a series of activities in Australia or an external Territory for protection or conservation of, or research into, the environment.

Similarly, an organisation is defined as aggrieved where[9]:

- the organisation or association is incorporated, or was otherwise established, in Australia or an external Territory;
- at any time in the 2 years immediately before the decision, failure or conduct, the organisation or association has engaged in a series of activities in Australia or an external Territory for protection or conservation of, or research into, the environment; and
- at the time of the decision, failure or conduct, the objects or purposes of the organisation or association included protection or conservation of, or research into, the environment.

In essence, this means the privilege to challenge a decision has been extended exclusively to 'environmental groups', without regard to a personal or organisation stake in the outcome.

5 Administrative Decisions Judicial Review Act 1977 – Section 3, paragraph 4(a)

6 Public Law and Research Policy Unit *Submission to the Senate Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill*, 2015

7 Commonwealth Department of Environment, *Environment protection and Biodiversity Conservation Act 1999 (Cth), Policy Statement: Statement of reasons*, pg. 4

8 Commonwealth Government, *Environment Protection and Biodiversity Conservation Act 1999*, Section 487

9 Commonwealth Department of Environment, *Environment Protection and Biodiversity Conservation Act 1999* (Cth) Policy Statement, Statement of Reasons.

Section 487: a tool for vexatious litigation

Section 487 was intended to provide a safeguard on the approvals process. A type of oversight mechanism to ensure Ministers' were following approvals requirements correctly. However, the system isn't working as intended.

Since the introduction of the EPBC Act in 2000:

- Thirty-two cases have proceeded to judgement.
- Four of these thirty-two cases have been successful; twenty-eight have been unsuccessful.
- Eight legal challenges were discontinued or withdrawn.

This means just thirteen per cent (four out of thirty-two) of cases that have proceeded to judgement were successful for green groups. And of those successful cases, only one has resulted in a substantial alteration to the original Ministerial approval.

Successful Cases

Three of the four successful legal cases were in relation to technical or administrative matters. In two cases, one relating to the Adani coal mine[10] and another relating to a proposed iron ore mine in north west Tasmania[11] the court found that the Minister's approval decision was invalid because certain conservation advices were not in his briefing material provided to him from the bureaucracy. This is despite the fact that the Minister made it clear that advice was in place and had been read.

In these cases, the Minister was simply provided with the information again and re-approved the projects subject to minor variations to the conditions of the original approval.

A similar case involved the expansion of a mine in the Northern Territory[12] where the court found the Minister's approval to be invalid because he had not taken into account conditions imposed by the Northern Territory Government when he gave his approval. Again, the project was re-approved subject to relatively minor alterations to the conditions of the original approval.

The fourth case in which the applicant was successful was in relation to the construction of the Nathan Dam, located near Taroom in Queensland. In 2003 the Environment Minister limited the assessment of the impacts of the dam to the direct impacts of the construction and operation of the dam. But the court found the Minister was also required to consider the potential flow-on effects arising from agricultural use of the water made possible by the dam. This included the potential for pollutants to flow into the Dawson river as a result of irrigation and ultimately into the Great Barrier Reef catchment.

This case did result in a significant change to the underlying requirements that needed to be considered by the Minister in approving the dam.

10 NSD33/2015 Mackay Conservation Group v Commonwealth of Australia and Others

11 Tarkine National Coalition Inc v Minister for SEWPAC [2013] FCA 694

12 Lansen v Minister for Environment & Heritage [2008] FCAFC 189

Unsuccessful Cases

Twenty-eight out of thirty-two (87 per cent) cases which have proceeded to judgement have been unsuccessful. Many of these cases have been frivolous.

For example, two challenges related to draft amendments rather than an actual Ministerial decision that would result in a tangible project occurring.[13] In one of the cases the presiding Judge noted that

> the mere submission of such a draft to the Minister is, by itself, incapable of having any impact on the environment...in the present case I cannot conceive how inserting a firm black line on Figure 1 to denote an arterial road or redefining on Figure 24 by a heavy black line the boundary of a Designated Area could possibly be a proposal for action susceptible to consideration.

And in the other case, the presiding Judge noted that

> it is patently obvious that such activity would not have a significant impact on the environment: the mere preparation and promulgation of amendments to the National Capital Plan could not have a significant impact on the environment.

A component of a third challenge hinged on the use of the word 'and'.[14] A fourth challenge contested that the proponents of the construction of a freeway needed to be held account for potential hypothetical future roads that could be constructed as a result of the freeway.[15]

Judges have noted the propensity of green groups to launch legal challenges simply because they do not approve of a project. For example, in a case relating to the construction of coal mine near Boggabri the presiding Judge noted 'ultimately, the Northern Inland Council for the Environment's argument amounts to no more than an expression of dissatisfaction with approval of the project by the Minister.'[16]

State governments have not been able to escape legal challenges; the Victorian Government's construction of the desalination plant was challenged under s. 487.[17]

13 Save the Ridge Inc v Commonwealth of Australia [2005] FCA 17 and Save the Ridge Inc v Commonwealth [2005] FCAFC 203

14 Blue Wedges Inc v Minister for the Environment, Heritage & the Arts [2008] FCA 399

15 Mees v Kemp [2004] FCA 366. Note the logic of this case is qualitatively different the Nathan Dam case. The intent of constructing Nathan Dam was to make irrigation along the Dawson River more attractive. The construction of the freeway was only intended to result in the construction of the freeway.

16 Northern Inland Council for the Environment Inc v Minister for the Environment [2013] FCA 1418

17 Your Water Your Say Inc v Minister for the Environment, Heritage & the Arts [2008] FCA 670

Section 487 is a tool to pursue ideological 'lawfare'

Given the high failure rate and frivolous nature of many legal challenges, it is clear s. 487 hasn't been applied in the way initially intended. Rather, s. 487 has been persistently abused by green groups whose primary motivation is to progress an anti-coal agenda.

The former Environment Minister, Greg Hunt, has noted that

> the EPBC Act standing provisions were always intended to allow the genuine interests of an aggrieved person whose interests are adversely affected to be preserved ... The standing provisions were never intended to be extended and distorted for political purposes as is now occurring with the US style litigation campaign to 'disrupt and delay key projects and infrastructure' and 'increase investor risk' ... Changing the EPBC Act ... will prevent those with no connection to the project, other than a political ambition to stop development, from using the courts to disrupt and delay key infrastructure where it has been appropriately considered under the EPBC Act.'[18]

This has been evidenced by green groups themselves. Geoff Cousins, President of the Australian Conservation Foundation, stated 'let me be absolutely clear about our aims. We have no desire or intention to simply delay the Adani Carmichael mine. We want to stop it in its tracks.'[19]

There are simply no conditions under which green groups accept project approvals. Their objective is not to improve the environmental conditions of a project; limit the effect the project could have on the environment; or come to a compromise position with project proponents. It is to delay and, ideally, prevent projects from occurring in the first instance.

The comments by Mr Cousins reflect a strategy prepared by Greenpeace Australia and other environmental groups outlined in *Stopping the Australian Coal Export Boom*.[20] That strategy outlines exactly how radical green groups would use the law to shut down Australia's coal industry.

The document notes that 'our vision for the Australian anti-coal movement is that it that functions like an orchestra, with a large number of different voices combining together into a beautiful symphony (or a deafening cacophony!).'

The key strategy outlined is to 'disrupt and delay' key projects, while gradually eroding public and political support for the industry. To do this, green groups will 'get in front of the critical projects to slow them down in the approval process' by undertaking 'significant investment in legal capacity' in order to engage in sustained legal battles.

18 Environment and Communications Legislative Committee, *The Senate Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 [Provisions]*, November 2015

19 See, http://www.smh.com.au/comment/legality-of-approval-of-adani-carmichael-mine-queried-in-court-in-light-of-threat-to-reef-20151110-gkvtt8.html

20 Greenpeace Australia, Pacific *Stopping the Australian Coal Export Boom: Funding Proposal for the Australian Anti-Coal Movement* November 2011

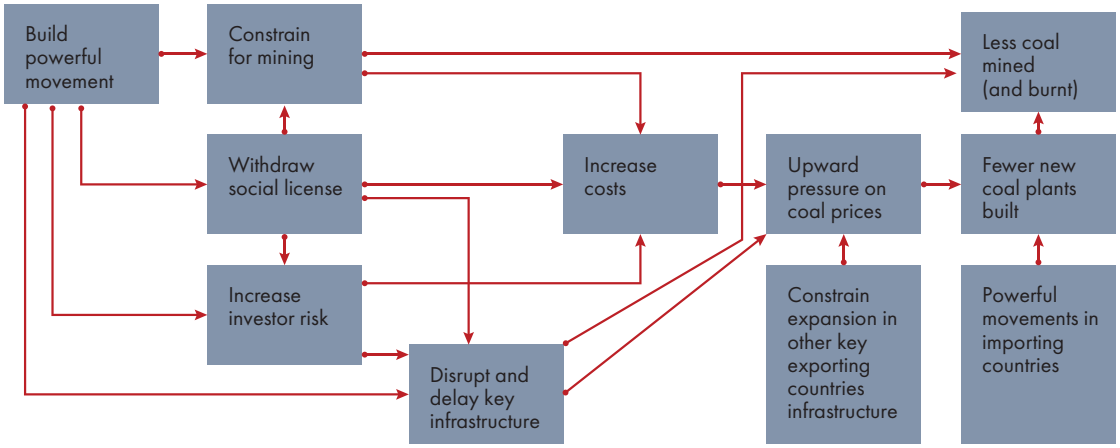
It is worth quoting other aspects of the strategy at length:

> Legal challenges can stop projects outright, or can delay them in order to buy time to build a much stronger movement and powerful public campaigns. They can also expose the impacts, increase costs, raise investor uncertainty, and create a powerful platform for public campaigning.
>
> We are confident that, with the right resourcing for both legal challenges and public campaigning, we can delay most if not all of the port developments by at least a year, if not considerably longer, and may be able to stop several port projects outright or severely limit them.
>
> While it is not yet possible to quantify the long-term impact we might have, we aim to severely reduce the overall scale of the coal boom by some hundreds of millions of tonnes per annum from the proposed 800Mtpa increase.

The document outlines six key parts of the strategy:

1. Disrupt and delay key infrastructure.
2. Constrain the space for mining by building on the outrage created by coal seam gas to win federal and state based reforms to exclude mining from key areas, such as farmland, nature refuges, aquifers, and near homes.
3. Increase investor risk by creating a heightened perception of risk over coal investments.
4. Increase the cost of coal, which is fundamental to the long-term global strategy to phase out the industry.
5. Withdraw the social license of the coal industry.
6. Build a powerful movement by developing stronger networks and alliances and building the power necessary to win larger victories over time.

Figure 1 The figure below outlines the process and ultimate goal of the strategy.



The stopping coal document gives more detail to the election plans outlined by the Greens. For example, the NSW Greens 2015 policy sought to:

- Phasing out existing coal mines and coal export.
- Opposing the development of any new coal mines or the expansion of existing coal mines.
- Opposing the expansion of coal-handling infrastructure.
- Opposing development consent and export licences for all new coal mines.
- Supporting a levy on existing coal mines.[21]

Fossil Free, a project of the radical left climate group 350.org, notes that disrupting coal and fossil fuel is just the beginning: '[T]here are many more companies that contribute indirectly to climate change — the multinationals that build drilling equipment, lay oil pipelines, transport coal, and utilities that buy and trade electricity. But right now, we're focused on these 200 (i.e. international coal, oil and gas) companies.'[22]

A key strategy used in legal challenges, tried on least five occasions[23], is to link the emissions produced from the end use of coal (such as generating electricity in India) to the construction and extraction of coal in Australia. The claim is that coal burnt overseas will cause global warming, sea level rise and damage the Great Barrier Reef. But as Michael Roche, Chief Executive of the Queensland Resources Council, noted this strategy is the equivalent to claiming 'Saudi Arabia needs to take responsibility for the emissions of Australian motorists using their oil.'[24]

Even Federal Court Judges have noted that this is a strategy designed to shut down coal, not improve the environment. For example, Judge Dowsett noted 'the applicant's case is really based upon the assertion that greenhouse gas emission is bad, and that the Australian government should do whatever it can to stop it including, one assumes, banning new coal mines in Australia.'[25]

The illogical nature of these arguments has been made clear in a ruling the by Queensland Supreme Court concerning a proposed mine near Alpha in central Queensland. In that case the Court noted that stopping the mine would not have made any difference to global carbon emissions or global warming – 'power stations would burn the same amount of thermal coal and produce the same amount of greenhouse gases whether or not the proposed Alpha Mine proceeded.'[26] In other words, if a power station in India does not get coal from Australia it will get coal from somewhere else.

Even so, there is a real risk that eventually a ruling that such considerations would need to be taken into account. If so, this would mean practically all major projects would come under the EPBC Act and therefore face the risk of legal challenges by green groups.

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21 http://nsw.greens.org.au/policies/nsw/coal-and-coal-seam-gas

22 Go Fossil Free website, gofossilfree.org/frequently-asked-questions

23 The cases are: Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment & Heritage & Ors [2006] FCA 736, Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources [2007] FCA 1480, Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources [2008] FCAFC 3, Australian Conservation Foundation Incorporated v Minister for the Environment [2016] FCA 1042, Mackay Conservation Group Inc v Commonwealth of Australia (NSD33/2015)

24 Sky News *Challenge to Stop Adani Mine Dismissed,* 29 August 2016. Available at http://www.skynews.com.au/news/national/qld/2016/08/29/case-to-stop-adani-mine-dismissed.html

25 Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment & Heritage & Ors [2006] FCA 736

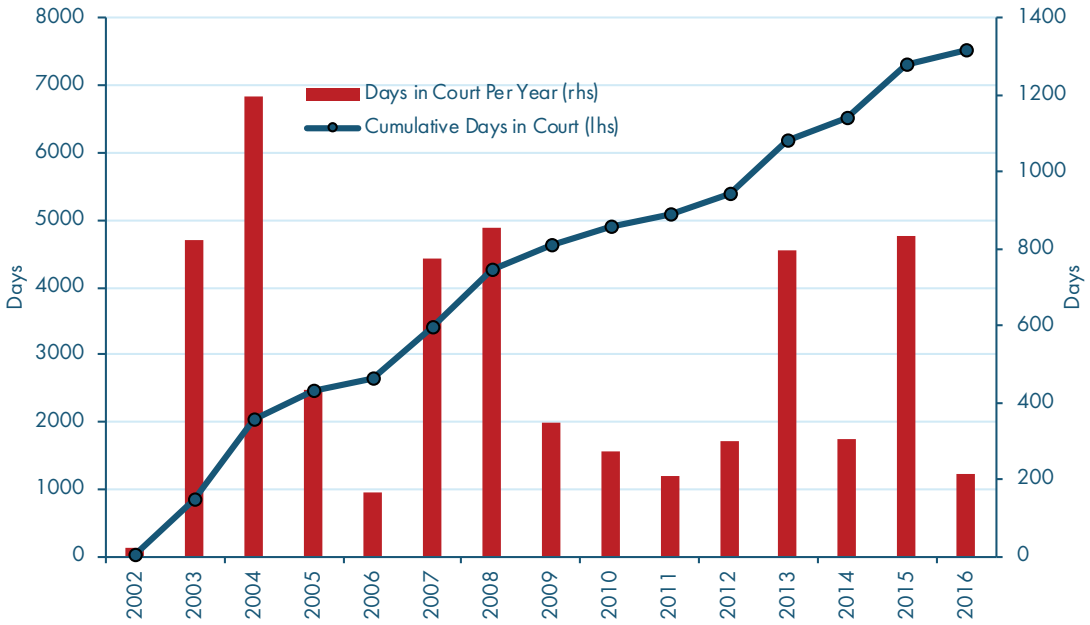
26 Coast and Country Association of Queensland Inc v Smith & Ors [2016] QCA 242

Lawfare increases project costs and reduces employment

Since the introduction of the EPBC Act in 2000, the costs of legal challenges have been growing. In total, project proponents have spent more than 7,500 days, or 20 years, in court. To quantify this cost, the IPA has drawn on calculations by the Productivity Commission which found that a one-year delay to a major project could reduce the net present value of that project by $26 million to $59 million.[27] These estimates relate to costs borne by the project proponent (from delayed profits) and the wider community (through delayed royalty and tax revenue).

Based on these figures, it is estimated that use of s. 487 has cost the economy between $534 million and $1.2 billion.

Figure 2



This estimate is likely to underestimate the total cost to Australia from s. 487 as it doesn't capture all flow-on effects to employment, investment and higher capital costs to future projects as a result of heightened risk. As the Business Council of Australia noted 'these costs [of project delays] are ultimately borne by the community in economic activity is foregone, which leads to lower income and employment.'[28]

In estimating flow-on costs, BAEconomics found that reducing project delays by one year would add $160 billion to national output by 2025 and add 69,000 jobs across the economy over that period.[29] Many of these jobs would be in rural and regional areas.

27 Productivity Commission *Major Project Development Assessment Process* December 2013

28 Business Council of Australia, *Submission to the Environment and Communications Legislative Committee*, 2015

29 BAEconomics *The Economic Gains from Streamlining the Process of Resource Approvals Projects* July 2014 pg. 4

Similarly, research by Price Waterhouse Coopers (PWC) estimated that a delay of 12 months is the tipping point 'at which up to a third of planned mining projects would be cancelled, leading to significant reduction in creation of jobs, investment, revenue and royalties.'[30]

In a scenario where projects were delayed by 12 months or more the potential losses to New South Wales alone over a 20 year period were estimated as: 6,445 direct jobs in mining and 22,400 indirect jobs would not be created; $10.3 billion in investment in 2013 dollars would be forgone; and the NSW government would miss out on $600 million per year in direct revenue from mining royalties.[31] In Queensland PWC estimated that over the next decade, an additional delay of one year would reduce Gross State Product by $1.2 billion and result in 2665 fewer jobs.[32]

In total, the proposed projects in the Galilee Basin in central Queensland are expected to attract more than $28 billion in investment and create more than 15,000 jobs during construction and 13 000 jobs once operational.[33] All of this is put a risk by judicial delay.

The Minerals Council of Australia has argued that some delays have been so extensive and expensive as to require companies to set aside contracts which has an immediate economic effect on these contractors and the regional and broader economy.

And it's not just large mines facing substantial delays who are most affected. Even small delays can have a 'disproportionate impact on the cost of the project, particularly if it limits the window for investment decision-making, which is often already short'.[34]

In a globalised world where capital is mobile legal challenges aimed at stalling or delaying projects increases sovereign risk, making Australia less attractive for investment. This diverts investment offshore, impacting the broader economy through reduced national output.[35]

Capital costs for projects in Australia are rising faster than elsewhere. A 2012 report, for example, estimated that capital costs for iron ore projects were already 30% more expensive than the global average.[36]

In addition to the costs of project delays, there are untold and unquantifiable costs associated with all of the projects that simply do not commence in the first instance.

As Ports Australia has noted '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.'[37] Faced with this prospect many companies decide not to invest in the first instance – precisely an aim outlined by Greenpeace and the Australian Conservation Foundation.

30 Referenced in Ibid

31 BAEconomics *The Economic Gains from Streamlining the Process of Resource Approvals* Projects July 2014

32 Referenced in https://www.australianmining.com.au/news/project-approval-delays-costing-queensland-3-9bn-report/

33 Office of the Chief Economist (2015), *Coal in India*, The Department of Industry, Innovation and Science, Commonwealth Government of Australia

34 Business Council of Australia, *Submission to the Environment and Communications Legislative Committee*, 2015

35 Ibid

36 Port Jackson Partners *Opportunity at Risk: Regaining our Competitive Edge in Minerals Resources*, September 2012, pg. 27

37 Ports Australia, *Submission to the Environment and Communications Legislative Committee*, 2015, pg. 2

Delayed projects can lead to worse environmental outcomes

Delays from legal challenges can also result in worse outcomes for the environment. On average Australia's coal is of higher quality than the coal sourced from other countries. The Federal Department of Industry's 2015 report on Coal in China noted

> the ash content of coal can range between 3–50 per cent. Australian coal is typically at the lower end of this spectrum and is usually washed prior to export. Washing reduces ash and improves the overall quality of the coal.'

The report also argued that Australian coal is typically low in sulphur.[38]

According to the Australian Coal Association Research Program (ACARP) in a report based on research carried out by CSIRO Energy Technology, Australian thermal coals 'generally contain low levels of toxic trace elements in comparison to thermal coals from other countries traded on the international market'. Furthermore, 'Australian thermal coals contain substantially lower levels of arsenic, mercury and boron.'[39]

The ACAPR also found that 'the leaching of environmentally sensitive trace elements from stockpiles of Australian coals was found to be substantially below water quality guidelines.'[40]

This fact has been noted by politicians and the media. In October 2015 Prime Minister Turnbull noted 'our coal, by and large, is cleaner than the coal in many other countries.'[41] The ABC's Fact Check report supported this statement, noting that 'experts say Australian export coal is of a higher quality on average compared with other countries, meaning less is needed to generate the same amount of energy.'[42] For example in India, 1.5 tonnes of local coal is needed to generate the energy of one tonne of Australian coal.[43]

Legal challenges which increase the cost of setting up mines in Australia will result on more mines being set up overseas. The consequence is that, for the world as a whole, there will be roughly the same amount of coal produced, but of a lower quality. Therefore, by diverting mines offshore, judicial reviews lead to a lower quality environment.

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38 Office of the Chief Economist (2015), *Coal in India*, The Department of Industry, Innovation and Science, Commonwealth Government of Australia

39 Dale, Les (2006), Trace Elements in Coal, The Australian Coal Association Research Program, October 2006. Available at http://www.acarp.com.au/Media/ACARP-WP-3-TraceElementsinCoal.pdf

40 Ibid

41 Prime Minister Malcolm Turnbull *Joint Press Conference: Announcement of appointment of Dr Alan Finkel AO as next Chief Scientist* (27 October, 2015). Available at: http://www.malcolmturnbull.com.au/media/joint-press-conference-announcement-of-appointment-of-dr-alan-finkel-ao-as

42 Australian Broadcasting Corporation, *Fact check: Does Australia export cleaner coal than many other countries?* 27 November, 2015. Available at http://mobile.abc.net.au/news/2015-11-27/fact-check-is-australias-export-coal-cleaner/6952190

43 The Minerals Council of Australia (2015), *Confirmed: High Quality Australian Coal to Drive Economic Prosperity and Reduce Emissions* (November 2015). Available at http://www.minerals.org.au/news/confirmed_high_quality_australian_coal_to_drive_economic_propserity_and_reduce_emissions

Legal challenges which cause delay are unethical

More importantly, project delays, when applied on a global scale, also reduce the dependability and affordability of energy which has negative effects on the world's poorest. Fossil fuels are central to economic development and poverty alleviation. Alex Epstein, President of the Centre for Industrial Progress, argues to the extent energy is affordable, plentiful, and reliable, human beings thrive. To the extent energy is unaffordable, scarce, or unreliable, human beings suffer.[44]

Yet, according to the International Energy Agency some 1.2 billion people are without access to electricity and more than 2.7 billion people are without clean cooking facilities. More than 95 per cent of these people are either in sub-Saharan Africa or developing Asia.[45]

If energy is too expensive or if people are prohibited or restricted from accessing energy from sources such as coal, the outcome can death, sickness and a severely debilitated quality of life. Affordable and dependable electricity enables access to safe storage of food, clean drinking water, the ability to heat and cool homes and businesses, access to and safe storage of medicine, and the ability to transport people around local neighbourhoods, cities, countries and internationally.[46]

Fossil fuels and coal have helped people access these basic necessities. Around 830 million people around the world gained access to electricity for the first time between 1990 and 2010 due to coal-fired generation, with significant progress made in sub-Saharan Africa and Asia.[47] China and India together accounted for 88 per cent of the growth in the consumption of coal in 2013 and India experienced its largest ever increase by volume in 2014.[48]

And the need for dependable energy is increasing. The United Nations has predicted that the world's urban population will increase from 3.9 billion people in 2014 to 6.4 billion people by 2050.[49] India is expected to have an extra 404 million city dwellers in 2050, China 292 million and the African continent over 800 million.[50]

But, according to the Federal Department of Industry, 'India's per person electricity use is very low compared with advanced economies and still low relative to other emerging economies.'[51]This is partly due to infrastructure, network grids, generation capacity and energy supply.

Australia has an opportunity to change this. Research by the Institute of Public Affairs estimated that increasing the supply of Australian coal to India could allow at least 82 million Indian people

44 Alex Epstein *Senate Testimony to Examining the Role of Environmental Policies on Access to Energy and Economic Opportunity*, April 2016

45 International Energy *Agency Energy Poverty*, 2016; available at https://www.iea.org/topics/energypoverty/

46 Brett Hogan *The Life Saving Potential of Coal: How Australian Coal Could Help 82 Million Indians Access Electricity* The Institute of Public Affairs, June 2015, pg. 3

47 Ibid, pg. 5

48 Ibid, pg. 6

49 Ibid, pg. 7

50 Ibid, pg. 7

51 Office of the Chief Economist (2015), *Coal in India*, The Department of Industry, Innovation and Science, Commonwealth Government of Australia

each year to access a regular and reliable source of electricity.[52]

Just the Adani coal mine plans to produce 60 million tonnes of coal per year[53], much of this would go to India and China, and potentially other developing nations such as Taiwan and Vietnam.

And when fossil-fuel enabled electricity is too expensive or not available, many rely on alternatives. The alternatives are not wind and solar power. But the burning of biomass such as dung, wood and crop waste. According to a 2016 report by the World Health Organisation (WHO) some 3 billion people still cook and heat their homes using open fires and simple stoves burning biomass.[54]

The burning of biomass is highly hazardous to human health. It produces high levels of household air pollution with a range of health-damaging pollutants, including small soot particles that penetrate deep into the lungs. The WHO estimates that 'over 4 million people die prematurely from illness attributable to the household air pollution from cooking with solid fuels.'[55] And 'more than 50 per cent of premature deaths due to pneumonia among children under five are caused by the particulate matter (soot) inhaled from household air pollution.'[56]

The WHO also notes that 'exposure is particularly high among women and young children, who spend the most time near the domestic hearth.'[57]

For many in developing countries life is not as simple as coming home from an air-conditioned, well-lit office building filled with appliances, going home on an air-conditioned train or car and switching the lights and TV on at home and cooking dinner with gas or electric cooking facilities. Many people in developing nations must gather their fuel at frequent intervals. As the WHO notes, this gathering

> consumes considerable time for women and children, limiting other productive activities (e.g. income generation) and taking children away from school. In less secure environments, women and children are at risk of injury and violence during fuel gathering.[58]

Delaying projects jeopardises the ability of the world's poorest to access energy in a way we all take for granted. There is a dark irony that the vexatious lawsuits are drawn up by green groups using the same fossil fuel-enabled energy that they seek – unashamedly and explicitly – to deprive others access to.

52 Ibid pg. 17

53 Department of State Development Queensland *Carmichael Coal mine and Rail Project, Project Overview*, April 2016; available at http://statedevelopment.qld.gov.au/assessments-and-approvals/carmichael-coal-mine-and-rail-project.html

54 World Health Organisation *Household Air Pollution and Health*, February 2016. Available at http://www.who.int/mediacentre/factsheets/fs292/en/

55 Ibid

56 Ibid

57 Ibid

58 Ibid

Repealing section 487 is consistent with the rule of law

The environmental group 350.org said 'removing section 487 and abolishing this extended standing will effectively make it impossible for environmental groups to seek judicial review'.[59] This is false.

According to the Department of Environment

> The repeal of section 487 would not prevent a person or environmental or community group from applying for judicial review of a decision made under the EPBC Act. Any person or organisation that can establish they have standing will continue to have the ability to commence proceedings for judicial review, either under the ADJR Act or the Judiciary Act.[60]

In most cases, legal standing requires an applicant to have a 'private right' that would be affected by a decision (such as a property right). Over recent decades this requirement has been substantially liberalised. Now it is sufficient for a person or group to establish they have a 'special interest in the subject matter'. 'Special interest' would generally require that the applicant show an interest in the subject matter of the action which is beyond that of any other member of the public.[61]

Repealing s. 487 would return the definition of 'legal standing' to the common law. There is a substantial body of precedent on this matter.

For example, the 1980 court case *Australian Conservation Foundation v Commonwealth* broadly defined what would and what would not constitute special interest:

- 'mere intellectual or emotional concern for the preservation of the environment is not enough to constitute such an interest'.
- 'the asserted interest must go beyond that of members of the public in upholding the law ... and must involve more than genuinely held convictions'.
- 'an organisation does not demonstrate a special interest by formulating objects that demonstrate an interest in and commitment to the preservation of the physical environment.' [62]

However, a special interest:[63]

- does not have to involve a legal or pecuniary right or that the plaintiff and no-one else possess the particular interest.
- exists where the plaintiff can show actual or apprehended injury or damage to his or her proprietary rights, business or economic interests and perhaps social or political interests.
- in the preservation of a particular environment may also suffice.

59 350.org *Submission to the Environment and Communications Legislative Committee*, 2015

60 Commonwealth Department of Environment, *Submission to the Environment and Communications Legislative Committee*, 2015

61 Ibid

62 High Court of Australia *Australian Conservation Foundation v The Commonwealth (1980) 146 CLR 493* 13 February 1980

63 Queensland Public Interest Law Clearing House Incorporated *Standing in Public Interest Cases* July 2005, pg. 8/9

An example of how the 'special interest' criteria has been applied is in the *Environment East Gippsland Inc v VicForests* (2010) 30 VR 1 case.

The Supreme Court of Victoria found that Environmental East Gippsland (EEG) had the requisite 'special interest' because:

- It had been involved with the formation of a relevant forest management plan.
- Was and continued to be an actual user of a walking path through the forest.
- Made submissions to the Department of Sustainability and Environment which resulted in a moratorium with respect to logging at Brown Mountain in 2009.
- The Government had recognised EEG's status as a body representing a particular sector of the public interest by financial grant and by the award previously referred to above.[64]

And the Minerals Council of Australia notes that prior to the introduction of the EPBC Act, a number of environmental organisations successfully brought appeals in several cases under the ADJR Act, including:[65]

- Friends of Hinchinbrook Society Inc v Minister for Environment & Ors (1996) 45 ALD 532
- Tasmanian Conservation Trust Inc v Minister for Resources (1995) 55 FCR 516
- Northcoast Environmental Council Inc v Minister for Resources (1994) 55 FCR 492
- Australian Conservation Foundation Inc v Minister for Resources (1989) 76 LGRA 2000

Repealing s. 487 would not remove the ability of environmental or community groups to challenge project approvals incur. But it would mean these groups would need to establish a basic modicum of interest in a prospective project before it could be challenged.

64 Environment East Gippsland Inc v VicForests [2009] VSC 386 (14 September 2009)

65 Minerals Council of Australia *Submission to the Environment and Communications Legislative Committee,* 2015

There are other avenues for political participation than legal challenges

There are many other avenues for environmental and community groups to participate in the environmental approvals process – at both the state and federal level – that will not be affected by repeal of s. 487.

The project assessment and approval processes for major projects include comprehensive environmental impact assessment (EIAs) requirements. EIAs are not trivial documents. They are long, detailed, can take many years to complete and are undertaken in an open and transparent manner. An environmental impact assessment for the Santos GLNG project took more than two years to write and another one-and-a-half years to review. It took four days to print and, weighing 65 kilograms, a wheelbarrow was needed to move it.[66] A separate EIA prepared for the Adani mine was 20,000 pages, which is 15 times longer than *War and Peace*.

There are multiple opportunities at both the federal and state level for opponents to lodge objections and have their concerns considered.[67] The Department of Environment notes that once a matter has been referred under the EPBC Act, the referral will be published and the public has an opportunity to comment on whether or not the action is a 'controlled' action. The Minister must take into account any comments made by the public in making the controlled action decision. If a controlled action decision is made, the public has an opportunity to comment on the assessment documentation prepared by the proponent. Any comments received by the proponent must be taken into account in the finalisation of the assessment documentation.

Following submission of the assessment documentation to the Minister, the EPBC Act enables the Minister to seek public comment on the proposed decision and conditions (if any), which must be taken into account by the Minister before deciding whether to grant an approval and what conditions (if any) to impose on the approval.[68]

And when projects are approved they are typically subject to a wide-range of conditions and requirements design (at least notionally) to protect the environment. For example, the Productivity Commission noted an approval of a major project came attached with 1,500 conditions which had a further 8,000 sub-conditions.[69] Repeal of s. 487 would not affect any of these processes or requirements.

66 Joint submission by the Australian Petroleum Production and Exploration Association, the Business Council of Australia and the Minerals Council of Australia *Submission to the House of Representatives Environment Committee Inquiry Into Streamlining Environmental Regulation, 'Green Tape', and One-Stop-Shops*, April 2014, pg. 3

67 Ibid

68 Commonwealth Department of Environment, *Submission to the Environment and Communications Legislative Committee*,2015

69 Productivity Commission *Major Project Assessment Processes*, December 2013, pg 302

Conclusion

The repeal of s. 487 would not change the assessment and approval provisions of the EPBC Act, nor would it alter the matters that the Minister must have regard to when deciding whether to grant an approval.[70]

As then Environment Minister Greg Hunt noted, repealing s487 would 'make the minimum change necessary to mitigate the identified emerging risk. Australia has some of the most stringent and effective environmental laws in the world. The proposed amendments [to repeal s487] do not change Australia's high environmental standards, or the process of considering and, if appropriate, granting approvals under the EPBC Act. The amendments also do not limit what decisions are reviewable'.[71]

This paper has outlined the heavy cost of delayed projects to the Australian economy, the environment, and prosperity.

70 Commonwealth Department of Environment, *Submission to the Environment and Communications Legislative Committee*, 2015

71 The Australian Senate, Environment and Communications Legislation Committee, *Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 [Provisions]*, 2015, pg. 7

Appendix A – List of Legal Challenges[72]

	Case	Project	Date Referred to Court	Date Resolved	Appeal Issue
	Cases which proceeded to Judgement				
1	Humane Society International Inc v Minister for the Environment & Heritage [2003] FCA 64	Agreement between Commonwealth and States to allow fruit growers to shoot flying foxes without approval under the EPBC Act	13/12/2002	12/02/2003	Whether the action should have been a 'controlled action' under the EPBC Act
2	Queensland Conservation Council Inc v Minister for the Environment & Heritage [2003] FCA 1463	Nathan Dam Construction	24/12/2002	19/12/2003	Minister did not consider flow-on effects from the contruction of Nathan Dam in giving approval
3	Mees v Kemp [2004] FCA 366	Construction Mitcham Frankston Freeway in Victoria	10/06/2003	31/03/2004	Whether the action should have been a 'controlled action' under the EPBC Act
4	Paterson v Minister for the Environment & Heritage & Anor [2004] FMCA 924	Construction of a high voltage transmission line	4/03/2004	26/11/2004	Effect of the transmission line on Queensland Bluegrass
5	Save the Ridge Inc v Commonwealth of Australia [2005] FCA 17	Amendment of arterial roads policy in National Capital Plan	10/06/2004	20/01/2005	Whether the action should have been a 'controlled action' under the EPBC Act
6	Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment & Heritage & Ors [2006] FCA 736	Coal mine near Moranbah and coal mine near Collinsville	22/07/2005	15/06/2006	Minister did not consider the flow-on consequences of greenhouse gas emissions in giving approval
7	The Investors for the Future of Tasmania Inc v Minister for the Environment and Water Resources [2007] FCA 1179	Gunns' Pulp Mill in Tasmania	8/06/2007	9/08/2007	Minister took into account an irrelevant consideration when providing approval, namely the company's construction timeline
8	The Wilderness Society Inc v The Hon Malcolm Turnbull, Minister for the Environment and Water Resources [2007] FCA 1178	Gunns' Pulp Mill in Tasmania	3/08/2007	9/08/2007	Gunns did not withdraw the second referral in accordance with s 170C of the EPBC Act. The applicant also contended that the EPBC Act does not permit the referral of a proposal to take an action where a referral of the same proposed action has been withdrawn.
9	Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources [2007] FCA 1480	Open-cut coal mine in Hunter Valley	17/05/2007	20/09/2007	Minister did not consider the flow-on consequences of greenhouse gas emissions in giving approval
10	Blue Wedges Inc v Minister for the Environment, Heritage & the Arts [2008] FCA 8	Deepen shipping channels in Port Philip Bay and the Yarra River	16/11/2007	15/01/2008	Time between approval and commecement of project too long so the original approval was invalid

72 Sourced from Commonwealth Department of Environment, *Submission to the Environment and Communications Legislative Committee*, 2015 and https://jade.io/t/home

11	Blue Wedges Inc v Minister for the Environment, Heritage & the Arts [2008] FCA 399	Deepen shipping channels in Port Philip Bay and the Yarra River	29/01/2008	28/03/2008	Alleged to have not taken into account principles of ecological sustainability
12	Your Water Your Say Inc v Minister for the Environment, Heritage & the Arts [2008] FCA 670	Victorian Desaliniation Plant	2/04/2008	16/05/2008	Minister allowed the commencement of preliminary works before completion of the EPBC Act approvals process
13	Lawyers for Forests Inc v Minister for the Environment, Heritage & the Arts [2009] FCA 330	Gunns' Pulp Mills in Tasmania	29/11/2007	9/04/2009	Minister failed to take into account the "precautionary principle" when giving approval
14	Lansen v Minister for Environment & Heritage [2008] FCA 903	Convert an underground lead and zinc mine to an open cut mine in the Northern Territory	13/02/2007	3/06/2008	Minister failed to take into account conditions imposed by the Northern Territory Government
15	Bat Advocacy NSW Inc v Minister for Environment, Heritage & the Arts [2011] FCA 113	Dispersal of grey-headed flying-foxes from the Royal Botanic Gardens in Sydney.	16/07/2010	17/02/2011	The Minister did not consider the impact the removal of the flying foxes from a 'critical habitat' would have on the species
16	Buzzacott v Minister for SEWPAC (No 2) [2012] FCA 403	Expansion of Olympic Dam in South Australia	13/02/2012	20/04/2012	Conditions imposed by the Minister left too much of the proposed action to be defined by plans and studies not yet undertaken
17	Northern Inland Council for the Environment Inc v Minister for the Environment [2013] FCA 1418	Boggabri Open Cut Mine	8/07/2013	20/12/2013	The Minister took into account an alleged disclosure of sensitive information by the New South Wales Government in making his decision
18	Northern Inland Council for the Environment Inc v Minister for the Environment [2013] FCA 1419	Maules Creek Coal Mine Project	18/07/2013	20/12/2013	The Minister took into account an alleged disclosure of sensitive information by the New South Wales Government in making his decision
19	Tarkine National Coalition Inc v Minister for SEWPAC [2013] FCA 694	Hematite mine in the Tarkine area of north-western Tasmania	2/04/2013	17/07/2013	The Minister failed to have regard to the approved conservation advice for the Tasmanian Devil
20	Tarkine National Coalition Inc v Minister for the Environment [2014] FCA 468	Approval of a mine (proposed by Venture Minerals Ltd)	2/10/2013	15/05/2014	The Minister failed to have regard to considerations likely to be imposed by the Tasmanian Resource Management and Planning Tribunal
21	Minister for the Environment and Heritage v Queensland Conservation Council Inc [2004] FCAFC 190	Commonwealth Appeal to Queensland Conservation Council Inc v Minister for the Environment & Heritage [2003] FCA 1463	28/01/2004	30/07/2004	Commonwealth Appeal of the Nathan Dam case
22	Mees v Kemp [2005] FCAFC 5	Applicant Appeal to Mees v Kemp [2004] FCA 366	21/05/2004	11/02/2005	Applicant appeal to Mees v Kemp [2004] FCA 366
23	Save the Ridge Inc v Commonwealth [2005] FCAFC 203	Appeal to Save the Ridge Inc v Commonwealth of Australia [2005] FCA 17	8/02/2005	6/09/2005	Applicant appeal to Save the Ridge Inc v Commonwealth of Australia [2005] FCA 17

24	Wilderness Society Inc v The Hon Malcolm Turnbull, Minister for the Environment and Water Resources [2007] FCAFC 175	Appeal by applicant to The Wilderness Society Inc v The Hon Malcolm Turnbull, Minister for the Environment and Water Resources [2007] FCA 1178	14/08/2007	22/11/2007	Applicant appeal to The Wilderness Society Inc v The Hon Malcolm Turnbull, Minister for the Environment and Water Resources [2007] FCA 1178
25	Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources [2008] FCAFC 3	Large coal mine in New South Wales, the Anvil Hill Project	11/10/2007	14/02/2008	Minister did not consider the flow-on consequences of greenhouse gas emissions in giving approval
26	Lawyers for Forests Inc v Minister for the Environment, Heritage & the Arts [2009] FCAFC 114	The Gunns' Bell Bay Pulp Mill in Tasmania	30/04/2009	3/09/2009	The applicant claimed that although the project had been approved, the conditions applied to the project required a separate approval
27	Lansen v Minister for Environment & Heritage [2008] FCAFC 189	Commonwealth Appeal to Lansen v Minister for Environment & Heritage [2008] FCA 903	30/06/2008	17/12/2008	Commonwealth appeal to Lansen v Minister for Environment & Heritage [2008] FCA 903
28	Bat Advocacy NSW Inc v Minister for Environment, Heritage & the Arts [2011] FCAFC 59	Approval regarding dispersal of flying foxes	10/03/2011	6/05/2011	Minister failed to take into account a relevant consideration, namely, the impact that the removal of the colony from the Gardens would have on the flying-foxes as a species
29	Buzzacott v Minister for SEWPAC [2013] FCAFC 111	Appeal to Buzzacott v Minister for SEWPAC (No 2) [2012] FCA 403	11/05/2012	8/10/2013	Appeal to Buzzacott v Minister for SEWPAC (No 2) [2012] FCA 403
30	Tarkine National Coalition Inc v Minister for the Environment [2015] FCAFC 89	Hematite mine in the Tarkine area of north-western Tasmania	5/06/2014	26/06/2015	Applicant appeal to Tarkine National Coalition Inc v Minister for SEWPAC [2013] FCA 694
31	NSD33/2015 Mackay Conservation Group v Commonwealth of Australia and Others)	Adani Coal Mine	24/07/2014	4/08/2015	Minister did not consider the flow-on consequences of greenhouse gas emmissions in giving approval
32	Australian Conservation Foundation Incorporated v Minister for the Environment [2016] FCA 1042	Adani Coal Mine	28/01/2016	29/08/2016	Minister did not consider the flow-on consequences of greenhouse gas emmissions in giving approval

Cases which did not proceed to Judgement

33	Tasmania Conservation Trust v Minister for Environment & Heritage (NSD2007/2003 – costs addressed by [2004] FCA 883)	Construction and operation of the Meander Dam	26/11/2003	7/07/2004
34	Save the Ridge Inc v Minister for the Environment and Heritage (ACD33/2003)	Gungahlin Drive extension in the ACT	12/12/2003	6/02/2004
35	Sweetwater Action Group Inc v Minister for the Environment, Heritage and the Arts & Anor (NSD1136/2009)	Concept Plan for the new Huntlee Town Centre in the Lower Hunter	8/10/2009	7/12/2009
36	Alan Oshlack v Minister for Environment, Heritage & the Arts & Anor (NSD1271/2009)	Extension of Beverly Uranium Mine	29/10/2009	13/04/2010
37	Tasmanian Conservation Trust Inc v Minister for SEWPAC (ACD24/2011)	Pulp Mill in Tasmania	6/06/2011	19/09/2011
38	Mackay Conservation Group Inc v Commonwealth of Australia (NSD33/2015)	Adani coal mine	12/01/2015	4/08/2015
39	Alliance to Save Hinchinbrook Inc v Minister for the Environment (QUD8/2015)	Expansion of the Abbot Point Coal Terminal	8/01/2015	16/03/2015
40	Green Wedges Guardians Alliance Inc v Minister for the Environment (VID779/2014)	Actions associated with urban development in the south-east growth corridor approved under the endorsed program Delivering Melbourne's Newest Sustainable Communities.	19/12/2014	18/06/2015

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