2 September 2015

Ms Christine McDonald,
Secretary,
Environmental and Communication Legislation Committee
Australian Senate

Dear Ms McDonald,

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

I have received your invitation to make a written submission concerning the above Bill. I am pleased to do so.

I suggest the Committee recommend the Bill not be adopted. It will serve no useful purpose; on the contrary, it will complicate and prolong those few legal actions that are brought under the Principal Act, the *Environment Protection and Biodiversity Conservation Act 1999* ("the EPBC Act").

I have been associated with environmental law for over fifty years, since soon after my admission to the New South Wales Bar in 1963. In my early days, there was often a real question about whether the applicant had standing to sue; that is, whether he or she was an appropriate person to bring the case. The question always turned on whether the applicant had a personal financial or property interest in the administrative decision, the legal validity of which the court was asked to review. This test was inherited by Australian courts from 19th century English cases.

As time went on, Australian judges came to think this test too narrow. They recognised that people sometimes felt deeply about an administrative decision, including a decision regarding land use or development, even though it did not adversely affect their pockets; but the person thought the decision contrary to the public interest. Over a series of cases, judges gradually decided it was reasonable to allow such people to test the legal validity of the decision that gave rise to their concern. Consequently, they accorded standing to applicants able to demonstrate a genuine interest, not necessarily financial, in the issue or place under consideration. The significant cases commence with the High Court decision in *Onus v. Alcoa*, in about 1981 from memory. (As I have now retired, and lack a legal library, I cannot give the Committee a list of the cases, but no doubt a researcher could provide that information, if required.)

The problem about this approach was that its application was uncertain. How much concern was necessary? Judges found themselves examining the minutiae of the applicant's involvement in the problem, instead of getting on with the legal issue about the validity of the administrative decision. It was in order to end the expensive side-issue about standing, that section 487 was inserted into the EPBC Act. A clear test was laid down in that section. Henceforth the court would rarely need to spend any time on standing; it could get on with the case itself.

Section 487 has worked well. As anticipated, the section has eliminated arguments about standing, with consequential savings in cost and time. As others have pointed out, section 487 has not opened any floodgates; only about one-half of one per cent of decisions under the EPBC Act have been subjected to an application for judicial review. After 15 years of successful operation, why now the fuss? Apparently because a respected north Queensland conservation organisation had the temerity to point out to the Federal Court (correctly) that the Minister had made a decision approving Galilee Basin coal-mining without taking into account information (that his Department held) about the possible effect of mining on two endangered reptile species. When this was pointed out, the Minister very properly conceded that the omission rendered his decision legally invalid and, supported by the proposed miner (Adani), asked the Court to make a Consent Order setting aside his decision, so that he could look at it again. What was so terrible

about that? Is species extinction unimportant? If so, the biodiversity provisions should be removed from the EPBC Act. While they are there, they ought to be observed. That would not necessarily mean the coal mine should not go ahead. It may be possible to redesign the proposal in such a way as to obviate or reduce the impact on the two endangered species; or the Minister might decide that other considerations outweigh any unavoidable effect on these species. At least he now has the opportunity knowingly to reconsider the matter. Mackay Conservation Society has helped the Minister do his job.

I read the Minister's Second Reading Speech, in the House of Representatives. It contains many quotations from a paper apparently prepared some time ago at a meeting of environmental activists. The quotes are very gung-ho, full of bluster about the use of litigation to stymie unwanted developments. Well, I know something about litigation instigated by environmental bodies. I spent 22 years at the Bar before my appointment to the Federal Court in 1984. Over almost six of those years I was President of the Australian Conservation Foundation. Either in that role or as counsel, I participated in many meetings during which some enthusiast raised the possibility of legal action against a particular unwanted development. I had to point out the sober facts. If the action failed, the applicant would be ordered to pay the legal costs incurred by the other parties, the amount of which might be devastating. It was my often-expressed view that environmental organisations should not bring a legal action unless first advised, by a specialist lawyer, that they had a strong legal case. Having recently (2007-2013) served as Chair of the NSW Environmental Defender's Office, I am aware this advice continues to be given. That is why section 487 is so sparingly used. That is why environmental N.G.Os have such a high success rate in litigation. If there is a strong legal case, where is the public interest in preventing it being put before the court? Surely we all favour a system that encourages adherence to the law.

The Ministers who have spoken on the Bill concede that some third parties ought to have standing, but only those who suffer loss of amenity through dust, noise etc. They really want to go back to the 19th century English rule. But times have changed. Today we have a better - educated, more civically-aware populace. For many of us, public issues matter, even though we are not financially affected. Millions of Australians care deeply about climate change. Millions care about the health of the Barrier Reef. Are they to be refused the same access to the court that would be enjoyed by a person adversely affected by dust?

Finally, the Bill is futile. The Minister apparently assumes the court will apply the standing rule laid down in section 5 of the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act). That section allows a "person aggrieved" to seek review of a decision. The ADJR Act does not define this term and there is no reason to read it as being limited to a person with a financial interest in the decision. It is a safe bet, if this Bill is passed, that the courts will interpret section 5 in a similar way to their adaptation to modern Australian conditions of the old English rule. The only change from the present situation will be that the parties, and so the courts, will spend time examining the details of the applicant's association with the relevant issue or place. And people wonder why litigation is so expensive.

I respectfully urge the Committee to conclude that this Bill is a retrograde step and ought not be passed into law.

Yours sincerely,
Murray Wilcox AO QC