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Précis Paper

Environmental Law Reform

This video is on the legality of the highly controversial Adani Carmichael mine. We should all watch.

Discussion Includes

- Proposed amendments to the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) ('the EPBC Act')
- *Environmental Protection and Biodiversity Conservation Amendment (Standing) Bill 2015*
- Extended standing for Judicial Review
- Judicial review of Federal decisions
- Testing the need for amendments to the *EPBC Act 1999* (Cth)
- Constitutional Rights for Judicial Review
- Environmental Assessment at Federal and State levels

Précis Paper

Environmental Law Reform

1. In this edition of BenchTV, Mark Seymour (Barrister) and Janet McKelvey (Barrister) discuss the proposed amendments to standing under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) ('the EPBC Act') in the context of the Adani Carmichael Coal Mine. Mr Seymour and Ms McKelvey specialize in Environmental and Planning Law. Mr Seymour has recently authored an article entitled "Environmental law reform takes a wrong turn" in the Law Society Journal in relation to these issues.

Background: the Adani Carmichael Coal Mine & the *Environmental Protection and Biodiversity Conservation Amendment (Standing) Bill 2015*

2. In July 2013, the Adani Carmichael Coal mine received approval from the Federal Environment Minister under the mechanisms of the EPBC Act. Subsequently, the approval was challenged by the Mackay Conservation Group in January 2015 on the basis that the Minister had failed to undertake a proper environmental assessment of the coal mine. This assertion was premised on three grounds, namely:
    a. The Minister's failure to take into account greenhouse gases that would result from the coalmine;
    b. The Minister's failure to take into account a record of the environmental management of the company's mines in India;
    c. The Minister's failure to consider internal advice relating to two endangered species, the yakka skink and the ornamental snake.

3. Primarily on the basis of the third ground, the Minister agreed to set aside the approval in August 2015. Almost immediately after the orders were made to set aside the approval by the Federal Court, the Prime Minister (Tony Abbott) disclosed in question time that the Government would seek to repeal s 487 of the EPBC Act (via the *Environmental Protection and Biodiversity Conservation Amendment (Standing) Bill 2015*), as s 487 gave activists the standing to "sabotage decisions".

4. This view of the actions of environmental groups has been repeated by the Prime Minister and the Environment Minister since, who consider that our legal system has become 'American-ised' and that such groups are engaging in 'law-fare'. Law-fare is what certain commentators allege environmental and other groups engage in, by instituting legal proceedings solely for the purpose of delaying essential projects. However, at least in Australia, there have been no factual instances of such activity and, according to Mr Seymour, this has been agreed to by all sides making submissions to the Senate Committee. Dr McGrath, in one such submission, noted that in no reported decision had the allegation

been made, let alone sustained, that the claimant was bringing the case for any frivolous or vexatious purpose. Furthermore, a Report published by the Australia Institute found that claims by third party groups such as environmental groups occur very rarely and are often successful before the Federal Court - of the 5,500 projects that have undergone some form of scrutiny under the *EPBC Act* only 22 were by third party groups taking action due to the standing provided under s 487 and 6 of the 22 actions were successful.

5. On a related note, one wonders whether the Government's decision to use the successful challenge to the Adani approval as the vehicle for such an amendment was a wise decision because the applicant's challenge was found to be successful and appropriate by the Minister. As such, the Government is arguing to remove a provision because it has been misused in the same breath as it has been used rather effectively. Ms McKelvey suggests that this reveals the true intent behind the Government's proposed reforms was political and simply retaliatory against the actions of an environmental group to stall a major mining development, however justly.

6. As yet, the Bill has not reached the Senate floor for a vote. That said the Bill has been considered by the Senate Standing Committee for the Security of Bills which expressed a concern relating to the amendment suggesting that it might interfere with the Constitutional function of Ch.3 courts. The concern was that the function of courts is to provide a check on the powers of the executive branch of government and the section which was to be removed was in aid of that function. Contrastingly, the Senate Committee that was responsible for specifically examining the Bill recommended that it be adopted. Admittedly, the Committee was split 3:3.

Section 487 of the *EPBC Act* & Standing in Relation to Judicial Review

7. Section 487 of the *EPBC Act* provides extended standing for judicial review beyond that granted under s 5(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the 'ADJR Act'). The ADJR Act provides that a "person aggrieved" by a decision made by a Federal Minister can be challenged in the Federal Court on very specific grounds:

SECTION 5:

Applications for review of decisions

(1) A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Federal Court or the Federal Circuit Court for an order of review in respect of the decision on any one or more of the following grounds:

(a) that a breach of the rules of natural justice occurred in connection with the making of the decision;

(b) that procedures that were required by law to be observed in connection with the making of the decision were not observed;

(c) that the person who purported to make the decision did not have jurisdiction to make the decision;

(d) that the decision was not authorized by the enactment in pursuance of which it was purported to be made;

(e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made;

(f) that the decision involved an error of law, whether or not the error appears on the record of the decision;

(g) that the decision was induced or affected by fraud;

(h) that there was no evidence or other material to justify the making of the decision;

(i) that the decision was otherwise contrary to law.

8. Section 487 does not provide 'open standing' but instead expands the notion of a "person aggrieved" to include individuals or organisations who have a demonstrated record of being associated with environment protection, conservation or research into the environment, to bring proceedings in their name or in the name of the organisation:

SECTION 487:

Extended standing for judicial review

(2) This section extends (and does not limit) the meaning of the term person aggrieved in the Administrative Decisions (Judicial Review) Act 1977 for the purposes of the application of that Act in relation to:

(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.

(3) An individual is taken to be a person aggrieved by the decision, failure or conduct if:

(a) the individual is an Australian citizen or ordinarily resident in Australia or an external Territory; and

(b) 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.

(4) An organisation or association (whether incorporated or not) is taken to be a person aggrieved by the decision, failure or conduct if:

(a) the organisation or association is incorporated, or was otherwise established, in Australia or an external Territory; and

(b) 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

(c) 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.

9. As previously noted, the Bill which is the subject of this presentation seeks to completely remove s 487 in order to prevent environment groups such as the applicant challenging the Adani mine from having standing to seek judicial review. But this objective is unlikely to be met by merely removing s 487 because of the availability of other options for both individuals and organisations to establish standing, not least via the ADJR Act. Additionally, claimants may rely upon s 75(v) of the *Constitution* which guarantees to everyone at all times the ability to take an action against an officer of the Commonwealth for remedies such as prohibition, mandamus or injunction. That said, the section provides an action in the original jurisdiction of the High Court which may be less than ideal on a practical level. However, s 39B of the *Judiciary Act 1903* (Cth) resolves this issue by providing for a similar proceeding in the Federal Court or the Federal Circuit Court. Admittedly, both of these routes require the applicant to establish standing to bring either claim. However, the requirements for both are largely the same as the tests introduced under s 487. Specifically, it is necessary under s 75 and s 39B that an applicant demonstrate a special interest in the subject matter of the litigation. A series of Federal Court decisions in the 1980's (*Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493; *Onus v Alcoa of Australia Limited* (1981) 149 CLR 27) determined that environmental groups can have standing if they show a demonstrated history of lawful activism in the environmental field and that there is some connection between what they do in terms of the activism and the actual decision involved.

10. Even aside from the *ADJR*, s 75 of the *Constitution* and s 39 B of the *Judiciary Act*, *the EPBC Act* itself has another route for environmental groups to demonstrate standing to challenge Ministerial approval of projects such as the Adani mine. Section 475 of the *EPBC Act* entitles people to bring actions for injunction under the *EPBC Act* for any breach of the Act. Thus, if there is a breach of the *EPBC Act* such as the Minister not adequately exercising his discretion, notwithstanding that such a breach would give rise to proceedings under the *Judiciary Act* and the ADJR Act, it would also be the basis for obtaining an injunction under s 475. Significantly, s 475 has included in the groups which can bring that action the same type of people as in s 487. Hence, those people who the government has labelled as law-fare activists can simply change the nature of the remedies they seek and will remain subject to the extended standing provided by the *EPBC Act* over the *ADJR Act*.

11. Accordingly, whilst the Government proposed the *Environmental Protection and Biodiversity Conservation Amendment (Standing) Bill 2015* for the purpose of removing the standing of environmental groups to bring challenges to Ministerial decisions it would utterly fail to achieve that goal in simply removing s 487 of the *EPBC Act*. However, as at the time of the presentation, it does not seem likely that the Bill will be before the Senate in the near future and it is possible that following the election, the Government of the day will not seek to push on with this Bill.

Law-fare

12. Beyond the issue, of whether environmental groups will continue to have standing if s 487 is removed, such a change would actually increase the complexity and delay involved in judicial review proceedings because courts will have to consider other legislation including the *Constitution* and the *Judiciary Act*. This is directly at odds with the Federal Government's concern about law-fare activists. Putting to one side whether environmental groups actually engage in law-fare, the concern with law-fare is that the proceedings are complex, expensive and cause significant delay to major projects. So, if law-fare groups were actually utilising the provision then all the government has done is to make it easier for them to fulfil their task of disrupting the process.

Constitutional Rights for Judicial Review

13. A separate issue beyond the effectiveness of the Bill at meeting the Government's objectives is whether the Bill conforms to contemporary democratic notions of the Rule of Law.

14. Over many years, the High Court has established a jurisprudence that the *Constitution* protects the rights of citizens to have judicial review. This view has largely been premised on High Court's original jurisdiction for judicial review entrenched in the *Constitution*. The effect of this provision is that nothing the Parliament could do would take away the rights of the people to challenge administrative actions of Officers of the Commonwealth, which include Ministers. That along with a long history of Courts applying judicial review, finding administrative decisions to have been incorrectly made and applying remedies, suggests that any policy of the government which seeks to remove such rights will need to be carefully evaluated. Whilst the section here was an expansion of the rights to seek judicial review, to suggest that its removal would clearly not contravene constitutional rights would be to ignore the fact that the common law changes over time and the rules of standing are firmly based in the common law.

15. Thus, in the light of the standards of the Rule of Law and democratic government, the amendment Bill really leaves a lot to be desired - not to mention the fact that the Bill is unlikely to fulfil the objectives the government set.

The Continuing Adani Proceedings

16. Quite distinctly from the developments in relation to the *EPBC Act*, on 16 October, the Minister was able to grant a fresh approval for the Adani coal mine. In April 2016, final Mining Leases have been granted by the Qld Government which means that the mine is capable of operation.

17. However, fresh challenges to the new approvals have been made by the Australian Conservation Foundation ('ACF') under the *EPBC Act* and some traditional owners have lodged a separate claim in the Federal Court alleging that Adani made misleading representations to the National Native Title Tribunal. These challenges are before the courts today and will need to be resolved before the operations of the mine can properly commence. It should be noted that even if the amendments to the *EPBC Act* are made in the next few months it is doubtful that they will have any effect on the challenged approval proceedings.

18. The presenters understand that the new approvals were challenged by the ACF on the basis that the Federal Government would be in breach of certain international obligations if the project was to go ahead. Mr Seymour highlighted that standing should not be an issue for the ACF because they have a long history of association with environmental conservation/research and also with taking claims in the national interest (they were a party in previous High Court authority, *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493). However, Mr Seymour notes that their substantive claim may confront significant difficulties as no Court has yet found that Australia was in breach of its international obligations by approving a particular project, primarily due to the abstract nature of most international obligations. Irrespective of the success of the ACF, the presenters argue there remains significant public benefit from such proceedings because they represent a badly needed public forum where these matters can be debated using experts in the field.

19. As a further aside, the presenters understand that the Adani coal mine may not go ahead irrespective of the result of the challenge because the plummeting coal price has made the mine utterly uneconomic.

Environmental Concerns and the Approval Process

20. It should also be noted that the preceding discussion only considered the downstream challenges that can be made to already complete administrative processes, but one should

also remember that environmental concerns are part of the considerations assessed at an earlier upstream stage. For example, the presenters note that there are bilateral agreements between the Commonwealth and the States whereby the States can undertake their own environmental assessments under the Federal Act and those assessments must be considered by the Federal Minister. Proponents of these bilateral agreements suggest that this system is likely to ensure that environmental concerns are identified early on and projects can be stopped or conditionally approved without the need for environmental groups to make subsequent challenges.

21. However, these systems have their own concerns. Firstly, it is arguable that a State authority may not be appropriately considering national environmental issues in their assessment e.g. because the State may want to push a project for its employment consequences. A further consequence of these bilateral arrangements is that the Federal Minister, democratically elected and validly appointed to ensure national environmental protections, may be unable to perform that task where the State assessment is partially binding on them.

BIOGRAPHY

Mark Seymour

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Mark Seymour was admitted as a Solicitor in 2002 and called to the NSW Bar in 2004. He was named the Law Council of Australia NSW Young Environmental Lawyer of the year in 2008. He is the co-author of Annotated *Local Government Act 1993* and was a lecturer at the University of NSW.

Janet McKelvey

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Janet McKelvey was admitted as a Solicitor in 2006 and was called to the NSW Bar in 2013.She is a member of the Environmental Planning Law Association, Editorial Panel, Local Government Reporter, Lexis Nexis and the Commissioning Editor, Local Government Reporter, Lexis Nexis. She has written articles about Environmental Planning and reform including: *Let the reform begin: NSW Planning Reform Green Paper* released (2012) 10(9) LGovR 134.

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