Annika Reynolds, Nicholas Bulbeck, Sarah Norgrove, Shelby O'Connor and Andrew Ray

Australian National University, Law Reform and Social Justice ANU College of Law

SUBMISSION TO THE EPBC ACT INDEPENDENT REVIEW

Contents

GreenLaw

The Australian National University GreenLaw Law Reform and Social Justice Project (GreenLaw) welcomes the opportunity to provide a submission in response to the statutory review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

The ANU Law Reform and Social Justice (LRSJ) is a program at the ANU College of Law that supports the integration of law reform and principles of social justice into teaching, research and study across the College. LRSJ provides opportunities for students to explore and interrogate the complex role of law in society, and the part that law and lawyers play in promoting both change and stability.

GreenLaw is a student research and policy reform group formed within the LRSJ program with the academic supervisory support of Associate Professor Vivien Holmes and Dr Peter Burnett.

This submission reflects the views of GreenLaw researchers and is not intended to be institutional submission by of The Australian National University nor is it intended to represent the views of our respective employers.

Executive Summary

We welcome the opportunity to make a submission to the independent review of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (‘*EPBC Act*’). Our submission addresses community involvement in decision-making under the EPBC Act (Question 20) and decision-making structures (Question 21).

Our submission is based on the empirical review our team undertook of litigation under the *EPBC Act* between 2009 – 2019. The results of this review have also been submitted for publication and we will inform the Review of the final publication when it occurs.

In recent years there has been an increased concern by industry and commentators that the extended standing provisions of the EPBC Act are facilitating green lawfare. Previous empirical research of alleged abuse of court processes by public interest litigants is no longer contemporary and has methodological gaps when assessing the ways public interest litigants use court processes.

Our review aimed to address these methodological gaps and provide a contemporary empirical assessment of litigatory patterns under the EPBC Act. We reviewed not only the number of public interest cases and their success rates, but directly assessed how public interest litigants may be using court processes to allegedly disrupt and delay proponents.

The review found a total of 32 public interest cases file in the review period. Of these, 19 went to judgment and 13 were discontinued prior to judgment. This amounts to approximately 3.2 public interest cases filed per year, a negligible portion of both the Federal Court’s caseload and the total annual number of decisions made by the Environment Department.

Our review found strong evidence that public interest litigants are not abusing court processes to disrupt and delay proponents. The study demonstrated that major projects subject to public interest litigation were generally economically viable after litigation. There was no direct link between the cost or delay or litigation and a proponent deciding to not commence a project.

Instead, our review demonstrated that public interest litigation and the rights of third parties to be involved in the decision-making processes relating to matters of national environmental significance, is critical. The extended standing provided by s 487 of the *EPBC Act* has positive outcomes for public participation and public trust in institutions. Moreover, it plays a key role in upholding Australia's transparent and non-corrupt federal decision-making systems. To undermine such a system would erode public and investor confidence.

As a result of our review, we make the following recommendations:

Summary of Recommendations

Recommendation 1

> *The Reviewer proposes that s 487 of the EPBC Act be retained in its current form.*

Recommendation 2

> *The Reviewer proposes that the public be given greater opportunities to be involved in the approval process. This could include longer periods of time for public submissions and a mandatory call for public submissions for every major decision made.*

Recommendation 3

> *The Reviewer proposes specific measures be taken to increase the transparency of assessments and decision-making by the Environment Department. For example, by mandating publication of reasons for decisions and recommendation reports, as well as permanent public access to environmental impact statements.*

Recommendation 4

> *The Reviewer proposes the creation of an Independent Commission or other merits review avenue to address public interest concerns regarding environmental decision-making.*

Background

'Lawfare' in the environmental context refers to public interest litigants, predominantly non-government organisations (NGOs), using vexatious litigation to sabotage and disrupt major development projects.[1] The terminology became mainstream following the setting-aside of the approval of the Carmichael Coal Mine on 4 August 2015 after a Federal Court case brought by a public interest litigant. [2] The approval was set aside with the consent of all parties, including the Commonwealth. However, the federal government has since argued that the standing provisions of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)[3] ('*EPBC Act*') are facilitating vexatious litigation, allegedly costing businesses and communities.[4]

Proponents have emphasized that lawfare causes major delays, costing the proponent and making Australia less attractive for foreign investment.[5] However, there is no empirically robust evidence supporting the argument that projects are more likely to become economically unviable if a judicial review challenge occurs and no evidence linking investment patterns to incidents of public interest litigation.[6]

Although public interest litigants assert lawfare is not an accurate reflection of judicial review actions brought under the *EPBC Act*,[7] there are documents in the public domain indicating NGOs have litigation strategies. In 2011, Greenpeace, Coalswarm and the Graeme Wood Foundation developed a strategy called the *Stopping the Australian Coal Export Boom* that included running 'legitimate arguable cases' to disrupt and delay 'key projects.'[8]
In response to concerns regarding alleged lawfare under s 487 of the *EPBC Act*, the federal government drafted the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 (Cth) ('*Bill*'). The Environment Minister indicated the Bill aimed to

[1] Business Council of Australia, Submission No 111 to Senate Standing Committees on Environment and Communications, *Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015* (September 2015) 1; Chris McGrath, 'Myth drives Australian Government Attack on Standing and Environmental "Lawfare"' (2016) 33(1) *Environmental and Planning Law Journal* 324, 325.
[2] *Mackay Conservation Group Incorporation Number: IA03355 (Incorporated pursuant to the Associations Incorporation Act 1981 (Qld)) v The Commonwealth of Australia* (NSD33/2015).
[3] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 487 ('*EPBC Act*').
[4] Commonwealth, *Parliamentary Debates*, House of Representatives, 20 August 2015, 8989 (Greg Hunt, Minister for the Environment).
[5] Business Council of Australia (n 1) 2.
[6] Ibid 2.
[6] See, eg, Rachel Pepper and Rachael Chick, 'Ms Onus and Mr Neal: Agitators in an Age of "Green Lawfare" (2018) 35 *Environment and Planning Law Journal* 177; Nicola Pain and Rachel Pepper, 'Legal Costs Considerations in Public Interest Climate Change Litigation' (2019) 30(2) *King's Law Journal* 211.
[7] For discussion see, eg, Josh Taylor, 'Call in the Green Army! Threat of 'green lawfare' takes down … wait … only two projects?', *Crikey* (online, 19 August 2015) <https://www.crikey.com.au/2015/08/19/call-in-the-green-army-threat-of-green-lawfare-takes-down-wait-only-two-projects/>; Cristy Clark, 'The government vs the environment: lawfare in Australia', *The Conversation* (online, 18 August 2015) <http://theconversation.com/the-government-vs-the-environment-lawfare-in-australia-46205>.
[8] John Hepburn, Bob Burton and Sam Hardy, *Stopping the Australian Coal Export Boom: Funding proposal for the Australian anti-coal movement* (Report, November 2011) 6.

prevent 'US style top-down litigation' designed to 'disrupt' economic activity[9] by bringing the standing provisions of the EPBC Act in line with the *Administrative Decisions (Judicial Review) Act 1977*.[10] This was to be achieved by repealing s 487.[11] It is unclear how the Bill would prevent lawfare, given NGOs have successfully argued they have standing on environmental law matters.[12]

It is evident that lawfare, including questions around its true prevalence and its impact on proponents, is contentious in Australia. However, empirical analysis concerning lawfare is limited. The most recent empirical analysis is Andrew Macintosh, Heather Roberts and Amy Constable's review of citizen suits under the *EPBC Act* from 2000-15.[13] In this review they assessed:

- how many suits had occurred;
- their success rates;
- whether successful citizen suits were undermined by subsequent executive action; and,
- to what extent the suits caused delays.[14]

This analysis found that only 0.3% of all *EPBC Act* decisions were challenged in court[15] and concluded that 'concerns around open standing and citizen suits have been overblown'.[16] Other empirical reviews also found no evidence of lawfare, including research undertaken by Dr Chris McGrath in 2008.[17]

Although the quantitative research to date has demonstrated there has not been a flood of lawfare style litigation in Australia as asserted,[18] previous research has not addressed whether public interest litigants are taking advantage of court proceedings to maximise delays and economic disruptions for select projects. For example, the use of interlocutory applications and interim injunctions to delay proponents has not been assessed, nor has empirical research tracked whether public interest litigants are filing vexatious claims simply to cause delay and then withdrawing them before reaching judgment. These are potential indicators of litigation being used as part of a lawfare based strategy.

[9] Commonwealth, *Parliamentary Debates*, House of Representatives, 20 August 2015, 8989 (Greg Hunt, Minister for the Environment).
[10] s 5 ('*ADJR Act*').
[11] Text of Bill.
[12] See, eg, *Tasmanian Conservation Trust Inc v Minister for Resources* (1995) FCR etc. This fact was noted in the Australian Business Council Submission to the 2015 Bill, see Australian Business Council (n 1).
[13] Andrew Macintosh, Heather Roberts and Amy Constable, 'An Empirical Evaluation of Environmental Citizen Suits under the Environment Protection and Biodiversity Conservation Act 1999 (Cth)' (2017) 39(1) *Sydney Law Review* 85.
[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] Chris McGrath, 'Flying Foxes, Dams and Whales: Using Federal Environmental Laws in the Public Interest' (2008) 25(5) *Environmental and Planning Law Journal* 324.
[18] See contra Business Council of Australia (n 1).

Scope of Submission

It is clear the *EPBC Act* faces challenges regarding accountability and the involvement of the public in decision-making. Specifically, because the Act is required to balance the interests of the community, environmental protection and business. This submission aims to address these challenges by undertaking a comprehensive review of public interest litigation filed from 1 January 2009 – 31 December 2019. The review will assess whether lawfare is occurring in any form and analyse other explanations for the judicial review patterns that emerge.

To address the gaps in existing empirical research on this topic and to inform our recommendations regarding reform to the *EPBC Act*, we aim to determine if lawfare is occurring by considering the following questions:

- whether the number of public interest cases can be characterized as a 'flood';
- whether public interest cases are without merit;
- whether public interest litigants are disproportionately filing interlocutory applications or interim injunctions to restrain commercial activity and cause delays;
- whether public interest litigants are filing vexatious cases to cause delays, then discontinuing them before judgment;
- whether public interest cases have resulted in proponents withdrawing their referral or otherwise made the project economically unviable; and,
- whether public interest litigants are bringing judicial review decisions against decisions that have not caused broader public concern, inferring a tactical intent.

Methodology

Our review relies on primary sources and databases for the data we collected. Specifically:

- the Federal Court Portal and Commonwealth Courts Portal; [19]
- judgments published directly on the Federal Court website;[20]
- Environment Department's Public Notices – Referrals database;[21] and,
- reports or media releases published on the relevant proponent's website.

We cross-referenced all our data through the Environment Department's[22] Annual Reports,[23] the Federal Court Annual Reports,[24] and by utilizing four databases on AUSTLII: Federal Court of Australia 1977 – Current; Federal Court of Australia – Full Court – 2002 – Current; Federal Magistrates Court of Australia 2000–2013; and the Federal Circuit Court of Australia 2013 – Current.[25]

Our review captures cases filed from 1 January 2009 – 31 December 2019. Of these, there is one ongoing case. We selected cases on the basis that they either contained the Minister for the Environment (or a derivative)[26] as a party to the case, or they listed the *EPBC Act* as relevant legislation. We then eliminated any cases from our sample that solely concerned legislation other than the *EPBC Act*, for example the *Environment Protection (Sea Dumping) Act 1981* (Cth). We also eliminated any cases where the *EPBC Act* was used merely as an example in the judgment. No cases that could be characterized as public interest were eliminated by our refinement.

[19] Federal Court of Australia, *Search Judgments* (Web Page) <https://search2.fedcourt.gov.au/s/search.html?form=&collection=judgments&query=>.
[20] Federal Court of Australia, *Search Judgments*, (Web Page) <https://search2.fedcourt.gov.au/s/search.html?form=&collection=judgments&query=>.
[21] Australian Government Department of Agriculture, Water and the Environment, *EPBC Act Public Notices* (Web Page) <http://epbcnotices.environment.gov.au/publicnoticesreferrals/>.
[22] Note: 'Environment Department' is used here as a catch-all term for the federal government department responsible for the environment. This Department has had numerous forms and names during the period covered by this review.
[23] The Reports may be accessed on a Department of environment web page or via the NLA archive, see, Australian Government Department of Agriculture, Water and the Environment, *Annual report* (Web Page) <https://www.awe.gov.au/about/reporting/annual-report>.
[24] The Reports may be accessed at the Federal Court of Australia website, see, Federal Court of Australia, *Annual Reports* (Web Page) <https://www.fedcourt.gov.au/digital-law-library/annual-reports>.
[25] AUSTLII, *All Databases* (Web Page) <http://www.austlii.edu.au/databases.html>.
[26] Including: Minister for the Environment, Heritage and the Arts; Minister for the Environment and Energy; Minister for Environment Protection, Heritage and the Arts; Minister for Sustainability, Environment, Water, Population and Communities; The Secretary of the Department Administering the Environment Protection and Biodiversity Conservation Act 1999; Hon Josh Frydenberg, Minister for Environment and Energy; The Hon Greg Hunt, Minister for the Environment; Commonwealth Minister for the Environment.

We recorded and analysed every case that had a unique federal court filing number or separate judgment. However, many of these cases were in fact connected, with the same parties and legal issues. For example, *Australian Conservation Foundation Incorporated v Minister for the Environment (No 2)*[27] is a judgment on the costs for *Australian Conservation Foundation Incorporated v Minister for the Environment*,[28] rather than a separate legal challenge. We have used 'connected' cases for every finding under our results except for findings in relation to the use of injunctions, as applicants are able to apply for injunctions between each judgment in a chain of cases.

[27] [2016] FCA 1095.
[28] [2016] FCA 1042.

Results of Empirical Review

Overall, we found that none of the data confirms, or even indicates, that public interest litigants are abusing court processes to engage in lawfare. There is no evidence suggesting the introduction of the *EPBC Act* has opened the floodgates for public interest litigation, nor that public interest litigants are abusing any judicial processes to delay proponents. Instead the evidence demonstrates that public interest litigants are likely motivated by genuine public concern and are contributing to the pursuit of holding government accountable, as the *EPBC Act* intended.

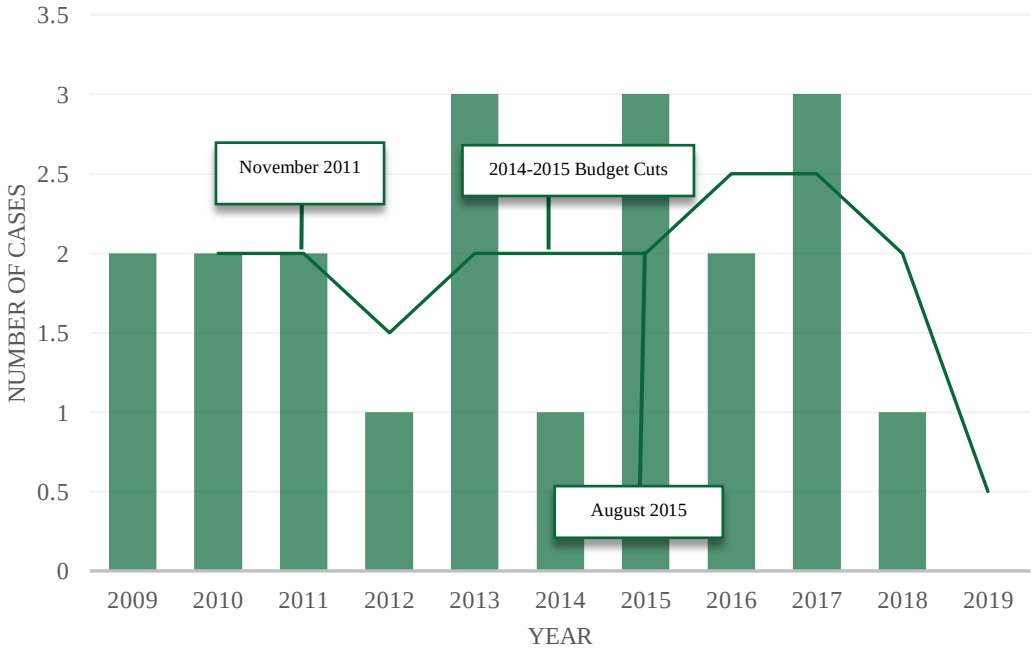
Results – Number of Public Interest Cases

In total there were 19 cases that went to judgment in our sample. Six of these legal challenges were brought by individuals and 13 were brought by NGOs.

The average number of annual public interest cases across the relevant period represents 0.06% of the Federal Court's average yearly workload of 5,142 cases. This is a far cry from the 'flood' of public interest environmental litigation warned of by certain parties.

Below is a graphical representation of our findings:

Figure 1 Number of Public Interest Cases Filed by Year



It is notable that there was no spike in cases during November 2011, or immediately afterwards, when the *Stopping the Australian Coal Export Boom*[29] was developed. This is contrary to arguments made by both the Business Council of Australia[30] and the federal government in their justification for the 2015 Bill.

The 2015 Bill also does not correlate with a spike in the number of public interest cases, as described in government justifications for the Bill.[31] Although the legislature may have been responding to the slight increase in cases filed from 2014 to 2015.

We also compared our data to the number of annual decisions made by the Environment Department. These include decisions on: assessment approach, whether the action is a 'controlled action' and approvals. Only 0.11% of the average number of decisions made by the Department each year (1,879) were challenged by public interest litigation. As was the case when comparing public interest litigation to the total number of federal court cases, comparing public interest litigation to the number of decisions made by the Department each year demonstrates that a very small percentage of decisions are actually subject to this form of litigation. In this context, claims of a 'flood' of 'lawfare-style' litigation would seem to be a gross exaggeration.

[29] Hepburn, Burton and Hardy (n 8).
[30] Business Council of Australia (n 1).
[31] Commonwealth, *Parliamentary Debates*, House of Representatives, 20 August 2015, 8989 (Greg Hunt, Minister for the Environment). For further discussion see, eg, McGrath, 'Myth Drives Australian Government Attack' (n 1).

Results – Whether Public Interest Cases are Without Merit

However, *Stopping the Australian Coal Export Boom*,[32] which was the basis for arguments by the federal government and Business Council of Australia to repeal s 487 of the *EPBC Act*,[33] did not advocate for a 'flood' of litigation. Rather, as represented by the federal government, the document demonstrates public interest litigants are using 'legal challenges where the goal is not to win, but to disrupt and delay.'[34] If such a strategy had been implemented, it could be expected that public interest cases would have low success rates (<10%),[35] and be more likely to be dismissed as vexatious by the Federal Court. This would demonstrate the purpose of litigation was to impact the proponent rather than ventilate genuine legal questions.

Success Rates of Public Interest Cases

In the decade reviewed, we found that public interest cases were successful[36] 26% of the time. If we only assess public interest cases brought by NGOs rather than local residents, we found that 45.5% of those cases were successful.

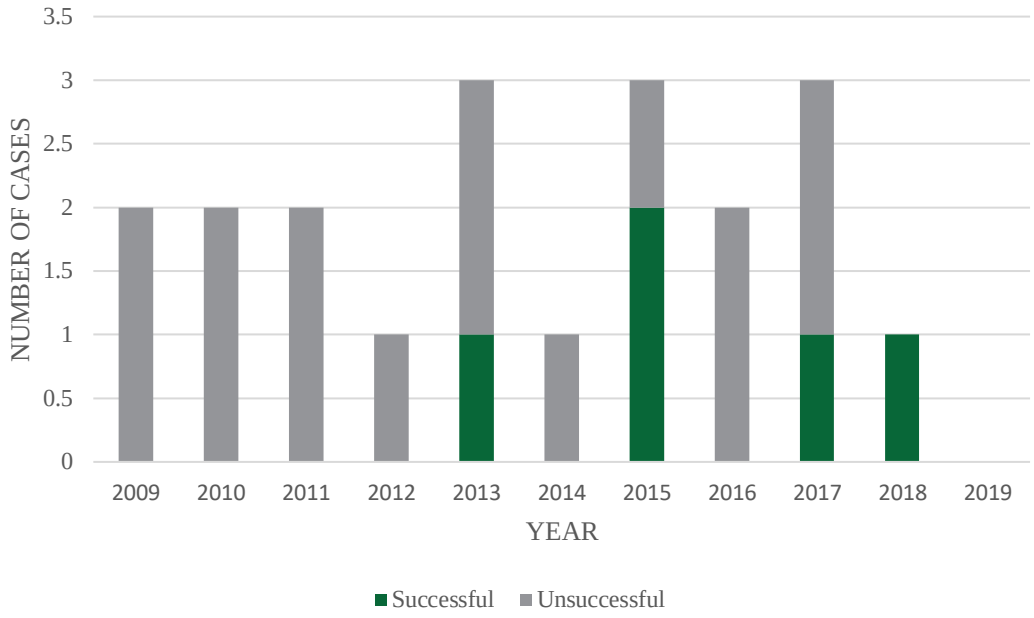
Although these rates are not particularly high, they do highlight that NGOs are bringing legitimate cases. These rates of success are comparable with how often the Administrative Appeals Tribunal ('*AAT*') overturns government decision-makers, roughly 28% of AAT cases each year.[37]

This demonstrates that public interest litigants are bringing genuine cases with the intention of ensuring proper government decision-making and accountability.

[32] Hepburn, Burton and Hardy (n 8).
[33] See Business Council of Australia (n 1). See also comments attributed to government: Clark (n 7). See further Ports Australia, Submission No 52 to Senate Standing Committees on Environment and Communications, *Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015* (September 2015).
[34] Commonwealth, *Parliamentary Debates*, House of Representatives, 20 August 2015, 8989 (Greg Hunt, Minister for the Environment).
[35] See discussion below, especially nn 38–9 and accompanying text.
[36] 'Successful' was determined by whether the applicant was successful in at least one substantive pleading.
[37] Administrative Appeals Tribunal, 'AAT Caseload Report For the period 1 July 2019 to 29 February 2020' (Report) <https://www.aat.gov.au/AAT/media/AAT/Files/Statistics/AAT-Whole-of-Tribunal-Statistics-2019-20.pdf>. Previous years' data may be found on the AAT website, see, Administrative Appeals Tribunal, *Statistics* (Web Page) <https://www.aat.gov.au/about-the-aat/corporate-information/statistics>.

Below is a graphical representation of our findings:

Figure 2 Success of Public Interest Litigant's Case By Judgment Per Year



The success rates of public interest cases do not correlate with the alleged rise of vexatious litigation that the 2015 Bill was aimed at addressing. In reality the Bill, introduced in August 2015, occurred in a year with a high rate of success for public interest litigants (66% success rate in 2015). This suggests the Bill was introduced either to prevent these successes from continuing or was purely based on anecdotal evidence or media perceptions of lawfare rather than actual rates of tactical public interest cases.[38]

It is interesting to note that the majority of successful public interest cases occurred after July 2014 (80% of successful cases) after the Environment Department experienced budget cuts.[39] However a definitive conclusion on this point is beyond the scope of the data we collected and determining a causative relationship would require further research.

There is no evidence that lawfare is occurring in a tactical manner when assessing success rates.

[38] See, eg, Clark (n 7); Oliver Milman and Nick Evershed, 'Australia has denied environmental approval to just 18 projects since 2000', *The Guardian* (online, 12 August 2015) <https://www.theguardian.com/environment/2015/aug/12/australia-has-denied-environmental-approval-to-just-11-projects-since-2000>.

[39] See further, Adam Morton, 'Environment funding slashed by third since coalition took office', *The Guardian* (online, 13 December 2017) <https://www.theguardian.com/australia-news/2017/dec/13/environment-funding-slashed-by-third-since-coalition-took-office>.

Rates of Vexatious Cases

The *Federal Court Rules 2011*[40] provide mechanisms for judges of the Federal Court to prevent vexatious actions during a case or to dismiss the case summarily. Rule 16.21 allows the Court to strike out any pleading, by request of a party or on its own volition,[41] that:

- contains scandalous material;
- contains frivolous or vexatious material;
- is evasive or ambiguous;
- is likely to cause prejudice, embarrassment or delay in the proceedings;
- fails to disclose a reasonable cause of action or defence or other case appropriate to the nature of the pleading; or,
- is otherwise an abuse of process of the Court.[42]

In non-*EPBC Act* litigation, we found evidence the Court is willing to strike out vexatious pleadings either by request of a party or on its own initiative. In 2018 alone there were 10 successful applications to strike out pleadings across the workload of the Federal Court.

Additionally, rule 26.01 allows a party or the Court to dismiss the proceedings with a summary judgment. This allows a party subject to vexatious litigation to have the case resolved before hearing, avoiding the cost and delay of the full case.[43] An application for summary judgment can occur at any point after the originating application is filed. This means the proponent or Environment Department may file to have a case dismissed based on the originating application alone, potentially within one business day of the submission of the request for judicial review.

The Court can dismiss a proceeding with summary judgment if:

- the applicant has no reasonable prospects of succeeding;
- the proceeding is frivolous or vexatious;
- no reasonable action is disclosed;
- the proceeding is an abuse of Court process; or,
- the applicant has no reasonable prospect of successfully defending the proceedings.[44]

In the period we reviewed, we found three separate cases filed where the Federal Court addressed or dismissed a pleading of a public interest litigant or dismissed the case because it was vexatious under rule 26.01. All three of these cases were brought by individuals rather than NGOs. In one instance an individual, Mr Krajniw, had three separate pleadings dismissed for being vexatious in the same connected proceedings.

[40] ('*Federal Court Rules*'). The Rules may be accessed here: Federal Register of Legislation, *Federal Court Rules 2011* (Web Page) <https://www.legislation.gov.au/Series/F2011L01551>.
[41] *Federal Court Rules* (n 40) r 16.21(2).
[42] Ibid r 16.21(1).
[43] Ibid r 26.01(1).
[44] Ibid r 26.01.

All three of the individuals who brought these actions were local residents who did not have consistent legal representation and were concerned about environmental actions that were unconnected to major developments. For example, Kr Krajniw brought a case regarding inadequate local government, State and Federal protections for Squirrel Glider Possums. [45] Another example is *Milne v Rally Australia Pty Ltd*, where Milne brought an application for an injunction preventing a local rally car event that had already occurred. [46]

In *Milne v Rally Australia Pty Ltd* and *Henderson v Corporation of the City of Adelaide*,[47] which did involve private actors who had an economic interest, the Judge acknowledged that part of the reason for summary dismissal was that the proceedings would impose economic harms on those private actors.[48] This demonstrates that the Federal Court is considering and protecting the economic interests of proponents in *EPBC Act* related cases.

In our analysis, no cases brought by NGOs were dismissed under rule 26.01. This means none of the NGO ran *EPBC Act* cases before the Federal Court during the decade from 2009 to 2019 that were vexatious or an abuse of process. This is strong evidence to suggest that environmental activists have not been using a 'lawfare' strategy in the courts to obstruct and undermine economic development.

Furthermore, the Environment Department or proponent only submitted an application for dismissal or striking-out pursuant to rule 16.21 or rule 26.01 in three cases. All three of these cases were against unrepresented individuals rather than NGOs, and in all instances, as discussed above, the Federal Court upheld the application and dismissed the proceedings as vexatious.[49]

This suggests that legal advice provided to the Department or proponent recognises that public interest cases are raising genuine legal questions in the majority of cases, and in all cases brought by NGOs. It also suggests that where cases are not raising genuine legal questions, or are frivolous or vexatious, government and corporate parties may have the ability to have those cases dismissed by the court.

There is no evidence, contrary to concerns raised in the media and in previous reviews, that public interest litigants are bringing cases with the intention of causing economic harm rather than addressing genuine legal questions and ensuring government accountability.

[45] *Krajniw v Minister for the Environment* [2016] FCA 141; *Krajniw v Newman (No 2)* [2015] FCA 673.
[46] *Milne v Rally Australia Pty Ltd* [2009] FCA 1101 ('*Milne*').
[47] [2011] FCA 705.
[48] *Milne* (n 46) [16]–[17] (Stone J) (although this was not a deciding factor in the case).
[49] *Henderson v Corporation of the City of Adelaide (No 2)* [2012] FCA 9; *Krajniw v Minister for the Environment* [2016] FCA 141; *Krajniw v Newman (No 2)* [2015] FCA 673.

Results – Use of Interlocutory Applications and Interim Injunctions

Applications for interim and interlocutory injunctions are another way an applicant may restrain a proponent from engaging in commercial actions. Section s 475 of the EPBC Act allows the Federal Court to make interlocutory applications of a prohibitory and mandatory nature.[50] An interim injunction may be granted by the court before a decision, is made on application by one of the parties.[51] Therefore, interim and interlocutory injunctions can be used tactically to delay a proponent's commercial activities and cause them economic detriment. The Federal Court has the power to dismiss interlocutory injunctions as vexatious, however, if the Court considers the case has merit, it is likely to approve an application for an interlocutory application until the case is decided.[52] Therefore, a clear indicator of tactical lawfare would be the excessive use of injunctions. Another potential manifestation of lawfare is if public interest litigants consistently filed for injunctions and then at the expiry of the injunctions discontinued the case, as this clearly shows the purpose of the litigation is to disrupt and delay, rather than ventilate genuine legal concerns.

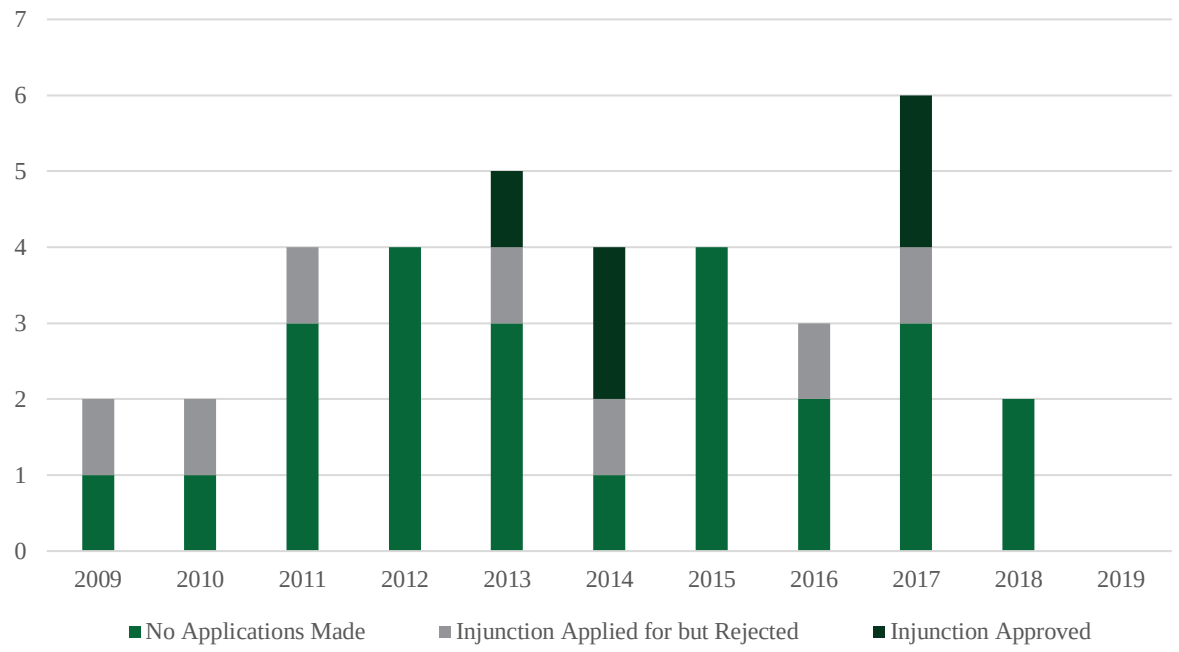
An injunction is the only way a public interest litigant can ensure the proponent does not engage in commercial action during litigation. If a court ordered injunction has not been issued, it is up to the proponent to decide if they want to continue the development or pause commercial action because the case has merit and an approval may be set aside.

Thus, if lawfare is occurring in judicial review of *EPBC Act* decisions, we would expect a high rate of injunctions in an attempt to prevent commercial action by the proponent.

[50] *EPBC Act* (n 3) s 475.
[51] Ibid s 475(5)
[52] *Federal Court Rules* (n 40) r 6.02.

Below is a graphical representation of our findings:

Figure 3 Public Interest Litigants' use of Interlocutory Applications and Interim Injunctions By Each Judgment Delivered Per Year



As demonstrated above it is evident that public interest litigants are not filing injunctions at rates that would suggest lawfare is occurring. The number of filings represents 16.7% of public interest cases and is lower than rates of interlocutory applications to the Federal Court on all matters (30%).[53] If only the cases brought by NGOs are assessed, the number of cases where an injunction was filed falls to 8%.[54]

In the data it was more common for public interest litigants who were individuals to file for an interlocutory application or interim injunction. Although individual litigants only make up 36% of connected cases, they represent 50% of filed injunctions.

Furthermore, the graph demonstrates that there is no correlation between either the November 2011 Greenpeace document or the lead-up to the 2015 Bill and rates of injunctions being applied for.

There is no evidence that lawfare is occurring in a tactical manner when assessing the use of interlocutory applications and interim injunctions by public interest litigants. This also demonstrates that there is no direct relationship between alleged economic costs of delays to the proponent and public interest litigation. In only a few instances over the last decade, the

[53] This includes interlocutory applications that do not seek to restrain commercial actions. The Federal Court does not provide more detailed statistics on the use of interlocutory applications or interim injunctions. - Calculated by comparing interlocutory applications filed in the 2016-17 year to total actions in that year Federal Court of Australia, 'Annual Report 2016-2017' (Annual Report, 2017) 141 <http://www.fedcourt.gov.au/__data/assets/pdf_file/0013/46210/Annual-Report-2016-17-v2.pdf>.
[54] These statistics have been generated on the basis that each public interest litigant may file apply for both an interim injunction and an interlocutory application during different stages of a proceedings. Thus, a connected chain of judgments provides a public interest litigant with the opportunity to file for multiple injunctions.

proponent has been legally restrained from commencing commercial action even whilst litigation is occurring.

Beyond a small number of cases, any delays to the development are therefore because the proponent has assessed the legal risk and determined that the Environment Department's decision may be set aside by the Court.

Results – Discontinued Public Interest Cases

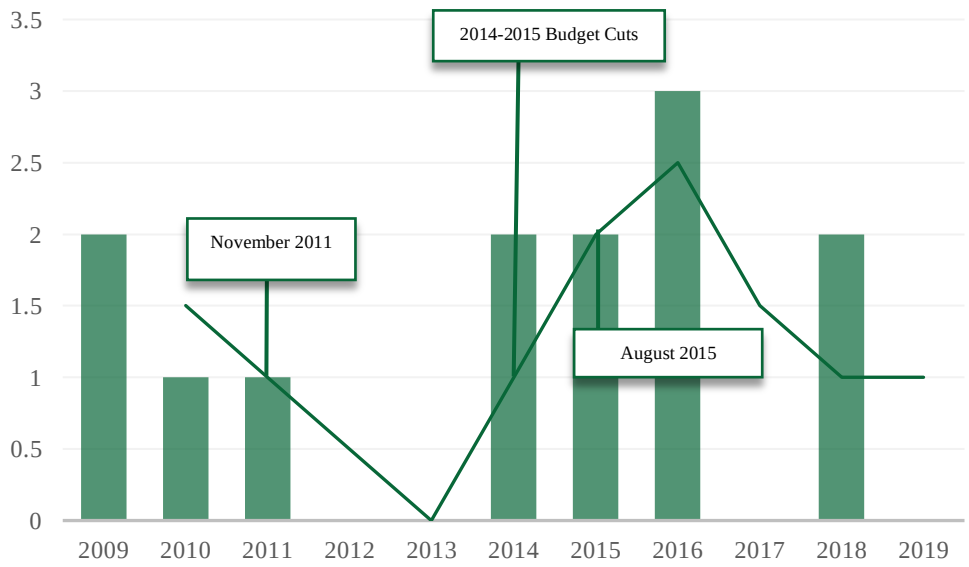
We also looked at the possibility that discontinued public interest litigation could be indicative of lawfare. Focusing on cases resolved via withdrawal of an application or by consent, we analysed whether there is a comparatively high rate of discontinued cases in this area where the result was not obviously in the interests of the applicant. This could indicate public interest litigants are 'flooding' the courts with cases and then discontinuing before they become too costly as a means of delaying and disrupting approval processes. We also assessed if discontinued cases demonstrate characteristics of tactical lawfare, for example, through the use of interlocutory applications or filing cases that are found to be vexatious.

Number of Discontinued Cases and Success Rates

In the period reviewed, we found that public interest litigants filed 13 cases that were discontinued prior to judgment.

Below is a graphical representation of our findings:

Figure 4 Number of Cases Filed But Discontinued Prior to Judgment By Year



Discontinued public interest cases had a high success rate, with 77% of cases being resolved by consent. In the majority of cases this was because the Minister conceded they had made the decision unlawfully or conceded to a variation to the approval conditions.

It is clear that over the review period, no cases we assessed were discontinued by a public interest litigant for tactical reasons or because there were no reasonable prospects of success.

Rates of Vexatious Cases and Abuse of Process in Discontinued Cases

In our survey, we found that no discontinued public interest case was labelled as vexatious by the Judge in preliminary orders or that the Minister, or proponent, had clearly filed that the case should be dismissed as vexatious.[55]

Additionally, we found that only in one case did an applicant file for an interlocutory application or interim injunction. In that case the Court rejected the request for an interlocutory application, but the public interest litigant was ultimately successful with the case being resolved by consent.[56]

In no case was an interlocutory application or interim injunction filed, allowing the public interest litigant to delay proceedings before discontinuing.

In conclusion, there is no evidence public interest litigants are filing vexatious cases to economically harm the proponent, only to later discontinue the case to avoid significant expense. Instead, the data indicates that public interest litigants tend to discontinue cases when they have achieved the substantive aim of the litigation. The most common reason for this is if the Minister concedes they have made an unlawful decision. If public interest litigants were filing cases that could be considered 'tactical' lawfare, we would expect that concessions by the Department would be minimal and that the public interest litigant would seek to prevent resolutions by consent that would mean litigation would be completed quickly. There was no evidence of these tactics in our data, either as a trend or isolated instances.

Consequently, there is no evidence that discontinuing cases has been used as a strategy by public interest litigants to economically harm proponents and delay approvals only to later withdraw to minimize their losses. This further undermines the argument that public interest litigants have been engaging in lawfare.

[55] This judgment is made from what is discussed in orders made by the Court.
[56] *Alliance to Save Hinchinbrook Inc v Minister for the Environment* (QUD8/2015).

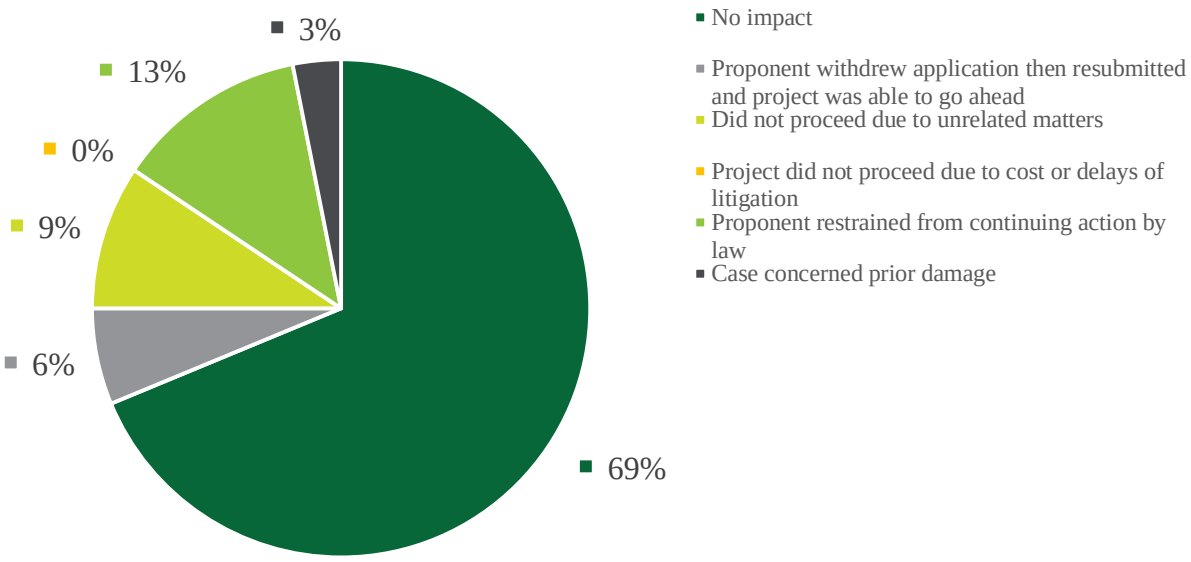
Results – Impacts on Proponents

Although the evidence above demonstrates that public interest litigants are not abusing court processes to engage in lawfare, it is important to assess whether the litigation that is occurring is having a disproportionate economic impact on major developers. If there is evidence that one industry is being disproportionately impacted or that proponents are frequently unable to commence actions because court enforced delays are too costly, this could suggest lawfare is occurring.

Subsequent Economic Viability of Projects

Below is a graphical representation of our findings:

Figure 5 Impact of Litigation on Economic Viability of Project



Overall, seven cases resulted in the proponent not being able to continue with their proposed development. In all instances it was not evident that litigatory delays caused the project to become financially unviable. Instead the main reasons for discontinuance could be traced to:

- the proponent being permanently restrained by law from commencing or continuing the action. For example, the proponent was engaging in illegal fishing;[57] or
- the Environment Department, after successful public interest litigation, did not approve the development in a timely manner. The proponent went into voluntary

[57] *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2015] FCA 1275.

liquidation after a shareholder class actions against its directors before the project could commence.[58]

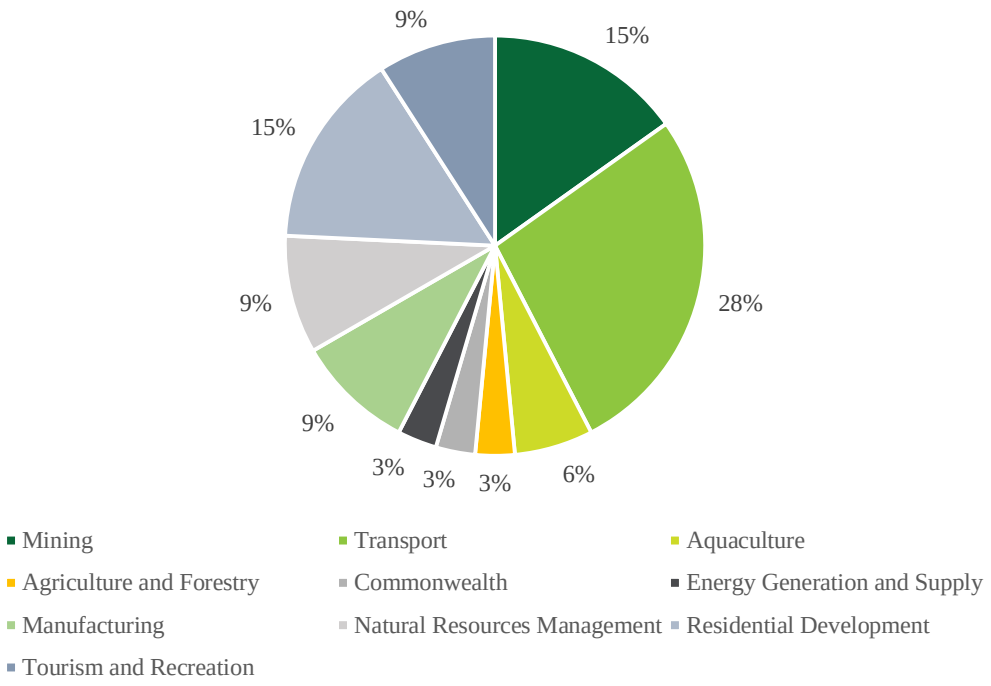
Contrary to submissions made by the Business Council of Australia and other industry representatives,[59] the empirical evidence does not link delays imposed by litigation (if delays even occurred) to projects becoming unviable. It may be argued that delays have resulted in some economic losses but if the developer is still able to commence the action it is unlikely that litigation-imposed economic costs are significantly disrupting Australian industries.

Industries Affected by Public Interest Litigation

Further, the percentage of projects affected by industry reflects the spread of projects by industry that submit referrals to the Environment Department each year.

Below is a graphical representation of our findings, showing the percentage of cases by industry:

Figure 6 Public Interest Cases Filed by Affected Proponent's Industry

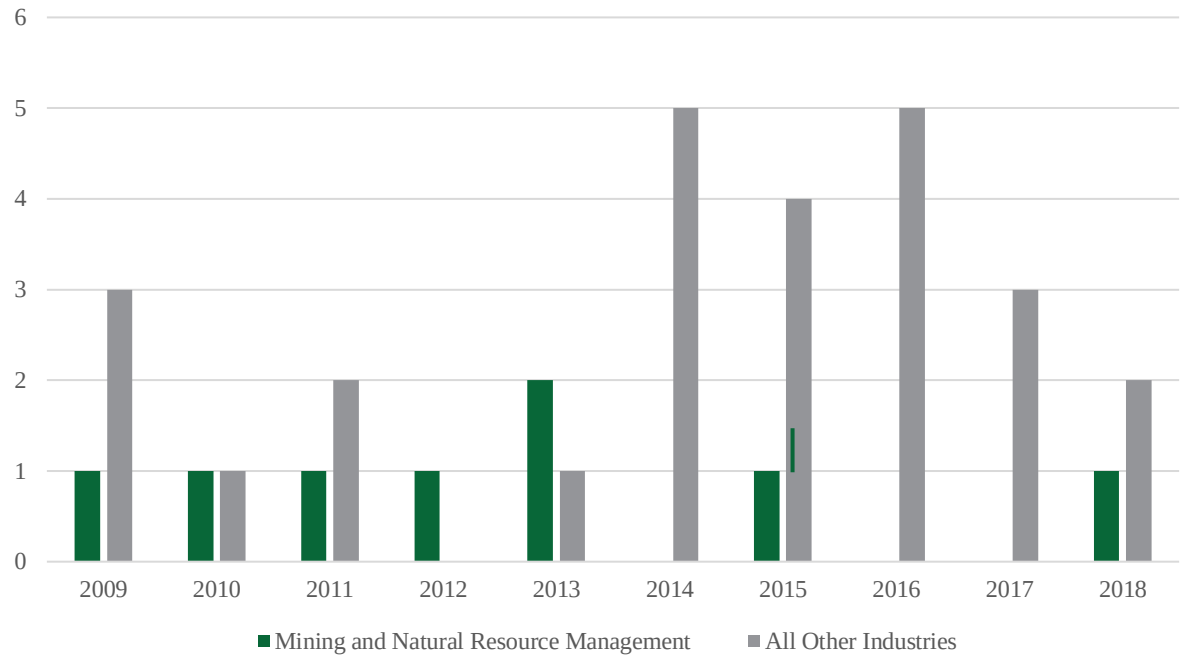


The most common industry to be impacted by public interest litigation is Transport. This is reflective of the Environment Department's data. The second most common industries, Mining and Residential Developments (both 15%) also reflect Environment Department data.

[58] *Tasmanian Conservation Trust Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* (ACD24/2011).
[59] Business Council of Australia (n 1); Ports Australia (n 33).

Below is a graphical representation of the spread of industries by year:

Figure 7 Comparison of Public Interest Cases Affecting Mining Proponents Compared to All Other Industries by Year



As demonstrated above, there was not a spike of Mining projects challenged by public interest litigants after November 2011, which would be expected if NGOs were engaging in concerted lawfare to stop Australia's coal export boom.[60]

Overall, the economic impact of public interest litigation does not correlate with clear economic costs to major developers. On average the project is still able to go ahead, and economic unviability, in the rare instances it occurs, appears to be more closely linked to delays within the Environment Department.

[60] Hepburn, Burton and Hardy (n 8).

Results – Public Interest Nature of Litigation

We also assessed whether the cases brought before the Federal Court involved projects had no local or regional public interest. This was to determine whether non-local NGOs were taking advantage of s 487 to challenge decisions for tactical reasons, rather than responding to genuine issues of community concern.

Public Engagement with the Challenged Development

To measure public engagement, we looked at the number of public submissions for each referral process. This was chosen as an appropriate method of gauging public interest because public submissions are open, do not cost money and are often accessible online and in local physical locations (for example, in a town hall). Additionally, the Environment Department will sometimes indicate if public submissions were lodged by an NGO, individual, unincorporated association or a local or State government body.

However, this measure is not perfect. We note public submissions may only be open for 10 days in some cases,[61] which is a very tight deadline for ordinary community members to comment. Moreover, neither the proponent nor Environment Department are required to advertise, beyond publishing the decision on their respective website. This may limit the spread of information to the public.

[61] *EPBC Act* (n 3) s 74(3)(b).

Below is a graphical representation of our findings:

Figure 8 Number of Public Submissions per Referral, Prior to Public Interest Case Being Filed

Overall, we found that public interest cases generally arose from referral processes that had significant public engagement. For example, *The Environment Centre Northern Territory Incorporated v The Minister for the Environment (NTD3/2016)* challenged a decision for referral 2015/7510, which had 393 separate submissions. In this case public submissions were only open for 14 days.[62] In cases where there were less than 20 public submissions, we found that public submissions were open for short periods of time and there was no evidence the referral had been advertised to the community.

In 15 instances we were unable to determine the number of public submissions because the Environment Department had not published the information.

In 11 instances the case concerned decisions where no public submissions had been sought, either because the Minister had elected not to seek submissions or because that part of the process does not include public submissions. This means that a judicial review challenge is the only way the public would be able to view or challenge the reasoning for the decision.

In the period reviewed, there is a correlation between broader public concern and subsequent legal action. This suggests public interest litigants are representing genuine public concerns. Moreover, in 11 cases no information was available to the public regarding the reasoning of the Environment Department, suggesting public interest litigation may have been partially motivated by the community's desire for more information about the decision and for greater government accountability.

[62] Bruce Edwards, 'Statement of Reasons' (EPBC Notice, 2015) 3 <http://epbcnotices.environment.gov.au/_entity/annotation/065cb96f-10a5-e511-8a4b-005056ba00a8/a71d58ad-4cba-48b6-8dab-f3091fc31cd5?t=1581230405588>.

Alternative Explanations for Public Interest Litigation

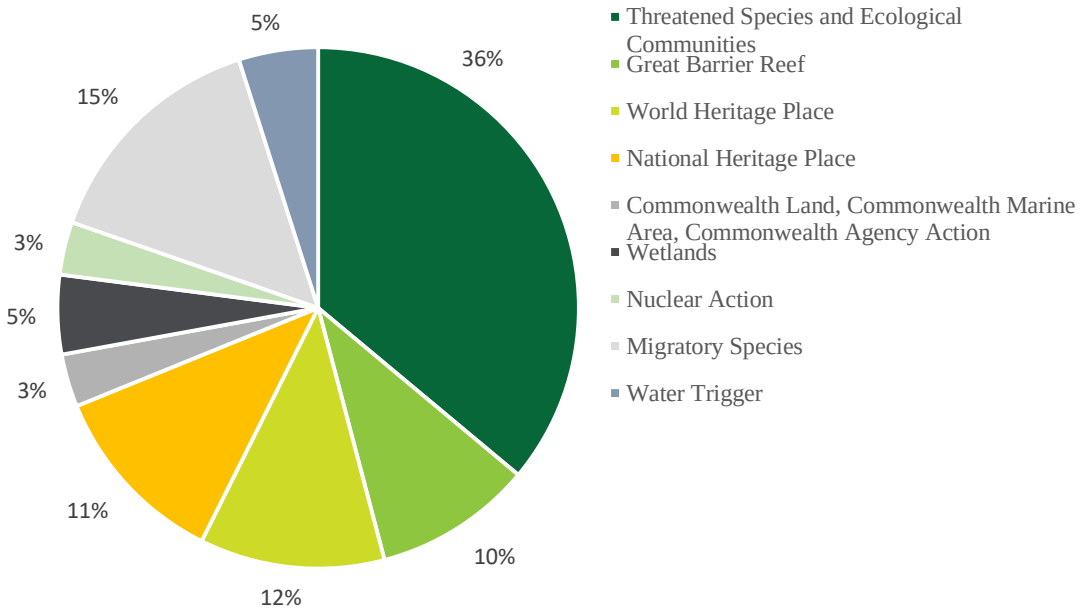
The above evidence has assessed whether the standing provisions of the *EPBC Act* are encouraging, or resulting in, 'American-style' litigation that is designed to disrupt and delay major developments rather than ventilate genuine legal concerns. The evidence above clearly demonstrates that public interest litigation is not motivated by, nor demonstrates characteristics of, lawfare. Thus, it is important to assess what other explanations are available to understand litigation patterns of the last decade.

We found that the most common ground of review brought by public interest litigants was that the Minister had failed to consider a relevant consideration (12 cases). The second most common ground of review was that the decision involved an error of law (nine cases). Both grounds indicate concerns with the quality of decision-making by the Environment Department.

Another common concern raised in public interest cases was issues of statutory interpretation, including: whether a project had been properly characterized, whether the *EPBC Act* was internally inconsistent, and whether a mandatory consideration required the consideration of certain information. Statutory interpretation concerns of some kind were raised in 10 cases. This suggests another potential motivation for public interest litigation is the structure of the *EPBC Act* and how it regulates activities.

We also assessed which environmental triggers were the subject of public interest litigation. Below is a graphical representation of our findings:

Figure 9 Public Interest Cases Filed by Environmental Trigger Under the EPBC Act



The graph is comparable to the spread of triggers in all Environment Department referrals. Threatened species and ecological communities are the most common trigger across all referrals, and also the most common trigger in public interest cases. Overall, the public interest cases appear to reflect the broad range of national environmental issues dealt with under the *EPBC Act.*

In conclusion, there is broad public interest in the protection of the environment as expressed by the *EPBC Act*. This also demonstrates that the *EPBC Ac*t is regulating matters that are of importance to the public, as was intended by the Act and its structure.[63]

[63] See, eg, Department of the Environment, 'Matters of National Significance' (Guidelines) <https://www.environment.gov.au/system/files/resources/42f84df4-720b-4dcf-b262-48679a3aba58/files/nes-guidelines_1.pdf>.

Discussion of Results

Discussion of Results – Public Interest under the EPBC Act

Section 487, as one form of public accountability mechanism, upholds the purpose of the *EPBC Act* and the broader public interest in environment regulation. It also plays a key role in protecting government and industry from corruption as well as the perception of corruption.

The Purpose of the EPBC Act

The *EPBC Act*'s primary object is:

> *To provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance*[64]

The Act recognizes matters that have a national significance are also matters that have a significant public interest.[65] The Commonwealth's role in environmental regulation is solely focused on national matters that are of interest to the Australian community.[66]

The *EPBC Act* was partially enacted to fulfil Australia's obligations under the *World Heritage Convention*[67] and *Convention on Biological Diversity*.[68] Both these conventions are also mandatory considerations under the *EPBC Act*.[69] Both conventions impose aspirational and legal obligations on Australia to ensure communities and individuals are able to:

- access information regarding developments and the protection of world heritage sites and threatened species, and
- have their views heard and taken into consideration by government decision-makers.[70]

Moreover, Australia voted in favour[71] of the *World Charter for Nature*[72] which contains strong statements about the importance of individuals and communities participating in environmental decisions. Principle 23 states that 'all persons … shall have the opportunity to

[64] EPBC Act (n 3) s3(1)(a).
[65] For example the enshrined notice period see EPBC Act (n 3) s 74(3)(b).
[66] EPBC Act (n 3) s3(2)(a).
[67] *Convention concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975) *('World Heritage Convention*').
[68] *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).
[69] See, eg, EPBC Act (n 3) ss 34D(1)(a)(i), 137.
[70] *World Heritage Convention* (n 69) arts 10, 13, 27; *Convention on Biological Diversity* (n 70) arts 13, 14(1)(a).
[71] United Nations, *World Charter for Nature: resolution / adopted by the General Assembly* (Web Page) <https://digitallibrary.un.org/record/609285?ln=en>.
[72] *World Charter for Nature*, GA Res 37/7, UN Doc A/RES/37/7 (28 October 1982).

participate…and shall have access to means of redress' in environmental decision-making and in cases of environmental damage.[73]

It is critical to recognize that public interest litigation is aligned with the purpose of the *EPBC Act* and Australia's obligations regarding environmental decision-making. If the *EPBC Act* is to uphold its purpose, it must maintain avenues for the public to be involved in decision-making.

Public Accountability of Decision-Makers

The purpose of s 487 within the *EPBC Act* is to facilitate public accountability of government decision-makers. The Howard government recognised the *EPBC Act,* as a piece of regulation designed to preserve environmental matters that are the right of all Australians, should have extended standing provisions.[74] In the period reviewed (and the lifetime of the *EPBC Act*),[75] s 487 has been solely used by public interest litigants to bring judicial review challenges.

Judicial review is the legal mechanism that allows the public to ensure government decision-makers are acting lawfully.[76] If a judicial review case is successful, it means that the court has found the government acted unlawfully not that the court agrees with the philosophy of the public interest litigant.

Judicial review allows the public to scrutinize government decisions, increasing public confidence and resulting in better decision-making. It also allows approved developments to claim a level of legitimacy and demonstrate that they have complied with the approval process, cooperated with government decision-makers and are not engaging in corrupt behaviour.

Additionally, the capacity for public interest litigants to launch judicial review challenges increases transparency. In the discovery process public interest litigants can request:

- internal emails and correspondence;
- recommendation reports;
- conservation advice; and,
- technical documents provided by independent scientific experts or the proponent.[77]

Moreover, in undertaking our review, we searched the Environment Department's public referrals database and found that 21.4% of Reasons for Decisions that were provided under s 130 and s 133 of the *EPBC Act*[78] were requested for the purpose of supporting a judicial

[73] *World Charter for Nature* (n 74) Principle 23.
[74] Commonwealth, *Parliamentary Debates*, Senate, 12 November 1998, 209–212 (Rod Kemp, Assistant Treasurer) <https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/1998-11-12/0024/hansard_frag.pdf;fileType=application%2Fpdf>.
[75] See empirical reviews by Macintosh, Roberts and Constable (n 13).
[76] Robert French, 'Constitutional Review of Executive Decisions – Australia's US Legacy' (Speech, John Marshall Law School – Chicago Bar Association, 25 and 28 January 2010) discussed in Andrew Ray, 'Implications of the Future Use of Machine Learning in Complex Government Decision Making in Australia' (2020) 1(1) *ANU Journal of Law and Technology*.
[77] Non-Exhaustive list.
[78] EPBC Act (n 3) ss 130, 133.

challenge.[79] This demonstrates that a substantive portion of information the public has access to is as a direct result of public interest litigation.

Indeed, our findings across this submission also support the general argument that a well-resourced Environment Department is critical to public accountability. It is difficult for public officials to discharge their obligations, both in terms of quality decision-making and transparency, when they do not have sufficient resources or staff to meet the needs of proponents, other government actors and the public. Judicial review sheds light on these challenges by highlighting poor decision-making practices and filling the gaps in transparency and information-sharing.

Finally, it is important to note that judicial review provides a mechanism for the public to ensure that the government actually considers public submissions (the only other mechanism for public involvement in the *EPBC Act*). In *Australian Conservation Council Foundation Incorporated v Minister for the Environment (NSD2268/2018)* the public interest litigant was successful because the Minister conceded they did not consider public submissions.[80] Without judicial review avenues it is likely public faith in the submissions process will deteriorate.

Thus, s 487 provides avenues for the public to scrutinize government decisions and improve government accountability. This increases the quality of decision-making and improves general transparency.

Preventing Perceptions of Corruption

In Australia, public faith in the government to act legally and in an appropriate manner is deteriorating. The Corruption Perceptions Index has tracked a steady increase in public perceptions that the Australian public service is corrupt.[81] One key measure of corruption is the public's access to information and capacity to hold government decision-makers accountable.[82] The NSW Independent Commission Against Corruption highlighted the interrelationship between limited public involvement in decision-making and corruption:

> *The absence of an appeal right for objectors means that if an approval can be secured by corrupt means, it can be acted on.*[83]

In the environmental regulatory space, the referrals process already carries significant corruption perceptions because many proponents are major developers who regularly donate

[79] We were unable to determine whether additional Reasons for Decisions were requested because a public interest litigant was considering a judicial review challenge. We also did not track if a Reasons for Decision was used in proceedings primarily concerning native title considerations or proceedings in a State court.
[80] Federal Court of Australia, Orders Australian Conservation Foundation Incorporated v Minister for the Environment (Commonwealth) (Document, 12 June 2019) <https://www.comcourts.gov.au/file/Federal/P/NSD2268/2018/3843263/event/29891085/document/1409471>.
[81] Transparency International, 'Corruptions Perceptions Index 2019' (Report, 2020) <https://www.transparency.org/cpi2019>.
[82] Ibid 26.
[83] Independent Commission Against Corruption, 'Corruption Risks in NSW Development Approval Processes: Position Paper' 47 <https://www.icac.nsw.gov.au/about-the-nsw-icac/nsw-icac-publications/all-nsw-icac-publications>.

to political parties.[84] It is critical to preserve regulatory processes that enable transparency and accountability mechanisms to prevent corruption and public perceptions of corruption.

Perceptions of corruption have significant impacts on the public and thus government. Empirical research commissioned by the World Bank has demonstrated that increased corruption perceptions correlate with increased social friction, distrust in government processes, a willingness to engage in non-violent and violent civil disobedience and increased emigration.[85] This suggests that the Australian government has a strong interest in protecting accountability mechanisms that push back against any perception that there is corruption involved in federal environmental approvals.

Additionally, increased corruption perceptions have a significant long-term cost on proponents. It is important to recognize that developers across Australia (the vast majority of who are never implicated or impacted by public interest litigation) have an interest in ensuring corruption perceptions in Australia do not deteriorate. For example, one study based on a data set drawn from 49 countries between 2004 and 2008 demonstrated that corruption can have a significant economic cost.[86] For instance, in this study the authors found that corruption was associated with an average contraction of national equity markets by 77.2%. Investors are unwilling to risk the uncertainty and information asymmetry of seemingly corrupt regulatory regimes.

[84] Ibid; Productivity Commission, 'Major Project Development Assessment Process' (Productivity Commission Research Report, November 2013) <https://www.pc.gov.au/inquiries/completed/major-projects/report/major-projects.pdf>.

[85] Bianca Clausen, Aart Kraay and Zsolt Nyiri, 'Corruption and Confidence in Public Institutions Evidence from a Global Survey' (Policy Research Working Paper No 5157, World Bank, December 2009) <https://openknowledge.worldbank.org/bitstream/handle/10986/19959/WPS5157.pdf?sequence=1&isAllowed=y>.

[86] See generally, Pankaj K. Jain, Emre Kuvvet, Michael S. Pagano, 'Corruption's impact on foreign portfolio investment' (2017) 26(1) *International Business Review* 23.

A key example of the impact of corruption perceptions in Australia is the protracted development time of Adani's Carmichael Mine. The project has been subject to three successful judicial review challenges,[87] meaning the Minister has made multiple unlawful decisions regarding this development. Adani also admitted on 6 February 2020 that they misled a government administrative body, resulting in criminal penalties.[88] Adani has technically been fully approved and is not pending any federal or state approvals. However, the development is still lagging. This is because Adani has been unable to generate sufficient investment. In statements explaining why they did not invest, Credit Agricole indicated:

> *Due to the number and magnitude of issues linked to the planned coal development projects in the Galilee Basin, Credit Agricole SA does not intend to finance these projects or their associated facilities.*[89]

In a similar vein, Goldman Sachs has also indicated they will not invest in the Carmichael Mine because they are not confident in the environmental regulation of the development:

> *Specific to Abbot Point, we will not finance any project or initiate loans where the specified use of the proceeds would significantly convert or degrade critical natural habitat.*[90]

This demonstrates there are real economic costs to proponents when Australia's regulatory system is perceived as opaque, which has a chilling effect on the development of future projects.

According to the Productivity Commission's 2013 Report, *Major Project Development Assessment Processes*,[91] retaining extended standing provisions and other accountability mechanisms (including increased transparency) is critical to combatting corruption perceptions of major developments.[92]

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[87] *Mackay Conservation Group Inc v Minister for the Environment* (Federal Court of Australia, Katzmann J, 4 August 2015); *Australian Conservation Council Foundation Incorporated v Minister for the Environment* (Federal Court of Australia, Perry J, 12 June 2019); *Mackay Conservation Group Incorporation Number: IA03355 (Incorporated pursuant to the Associations Incorporation Act 1981 (Qld)) v The Commonwealth of Australia* (Federal Court of Australia, Katzmann J, 4 August 2015).

[88] Josh Robertson and Jessica Rendall, 'Adani pleads guilty to giving 'false or misleading documents to an administering authority', fined $20k', *ABC News* (online, 6 February 2020) <https://www.abc.net.au/news/2020-02-06/adani-fined-after-pleading-guilty-court-qld/11932640>.

[89] Lisa Cox, 'Galilee Basin: three more banks rule out financing coal projects', *The Sydney Morning Herald* (online, 8 April 2015) <https://www.smh.com.au/politics/federal/galilee-basin-three-more-banks-rule-out-financing-coal-projects-20150408-1mgvu0.html>.

[90] Dow Jones Newswires, 'Adani to sell Abbot Point stake', *The Australian* (online, 28 October 2014) <https://www.theaustralian.com.au/business/business-spectator/news-story/adani-to-sell-abbot-point-stake/cb294e1ee89f6ee4c0ef9c6a01dabfc9>.

[91] Productivity Commission, 'Major Project Development Assessment Process' (Productivity Commission Research Report, November 2013) <https://www.pc.gov.au/inquiries/completed/major-projects/report/major-projects.pdf>.

[92] Ibid 260, 767.; See also Transparency International (n 83).

Discussion of Results – Impact of repealing s 487

Overall the empirical evidence provided in this submission demonstrates that lawfare is not a concern under the *EPBC Act.* Moreover, it is likely the repeal of s 487 will have unintended consequences, possibly increasing the perception of corruption in Australia, increasing delays to proponents during litigation, and leading to economic costs on secondary industries.

Corruption Perceptions and Perceived Illegitimacy of Reform

Arguments surrounding 'lawfare' did not enter the mainstream media or the reform agenda of the federal government until 2015, after the Minister conceded in *Mackay Conservation Group Incorporation Number: IA03355 (Incorporated pursuant to the Associations Incorporation Act 1981 (Qld)) v The Commonwealth of Australia (NSD33/2015)* that they had made an unlawful decision in relation to the Carmichael Mine. Discussions of 'lawfare' did not emerge when the 2011 Greenpeace document was leaked (6 March 2012) nor did it emerge in 2013, the year that had the most public interest cases filed according to our data (three cases).

As outlined above, if s 487 is repealed and available standing under the *EPBC Act* reduced, this could contribute to a perception of corruption in Australia's federal environmental regulatory system. Such a perception would have negative consequences for public trust in government and have a detrimental impact on the economy.

Moreover, the history of 'lawfare' is likely to contribute to corruption perceptions. Proposals to amend s 487 did not arise out of a genuine issue with industry being crippled by environmental litigation or lawfare. Instead, the proposed removal of that section is directly linked to a case in which the government was held accountable for making an unlawful decision. To repeal s 487 could contribute to community perceptions that government is solely acting in the interests of private developers, rather than the Australian people as a whole.

Increased Delays to Public Interest Litigation

Further, it is unlikely repealing s 487 would address lawfare concerns. The standing test under both the common law and *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*') is broad enough to include NGOs. On the 19 December 2014 the Federal Court granted standing to Animals' Angels e.V, a German based organisations with no Australian members, for a judicial review challenge under the *Australian Meat ad Live-Stock Industry Act 1997* (Cth).[93] This means that the removal of s 487 is unlikely to prevent public interest groups from challenging decisions. It will only change the means by which they do so and the specific legal arguments they rely upon.

[93] *Animals' Angels e.V v Secretary, Department of Agriculture* [2014] FCAFC 173.

The *EPBC Act* has been governed by s 487 for the last 20 years. Consequently, in case of repeal, this means the Courts would have limited *EPBC Act* specific precedents to determine standing, introducing significant uncertainty for government, industry and the public.

A change in the standing rules means that standing becomes another point to be argued in court. This means the Court will have to specifically address standing in many judicial review challenges before turning to the substantive issues such as whether the Minister acted within the parameters of the law. While this may provide an additional argument during litigation for the proponent, it would also have the effect of increasing the costs and length of litigation.

In our review we found that the average public interest case (that went to judgment) under the *EPBC Act* went for 251 days. In contrast, the 2018-2019 Federal Court annual reports noted that the average time of a judicial review decision was 456 days.[94]

Thus, it is likely public interest groups would still have standing, but turning standing into a live legal argument would likely make litigation more expensive and lengthy. This is not in the interests of proponents or any of the other relevant parties.

Risk of Economic Harm to Secondary Industries

Finally, the repeal of s 487 and imposition of *ADJR Act* standing provisions does not adequately protect communities and individuals that may have an economic interest in the protection of the environment.

Australians rely on the environment for economic stability, either through employment or to ensure manageable living costs. Much of Australia's tourism industry (3.1% of GDP, employs 5.2% of working population)[95] relies on the environment, for example the Great Barrier Reef. Australia's agricultural industry (2.8% of GDP, employs 2.5% of working population)[96] requires sustainable water sources and a healthy environment.

However, the *ADJR Act*'s standing provisions only extend to a 'person aggrieved' by the decision.[97] If an individual or community are geographically remote, or only affected indirectly, they may not qualify for standing. This is a particular risk for industries that rely on large areas, for example tourism operators on the Great Barrier Reef or World Heritage Wet Tropics Area.

Currently, s 487 allows these industries to have their interests represented by NGOs as both have an interest in preserving the environment. Moreover, s 487 allows NGOs to shoulder the legal and economic burden of judicial review challenges that would otherwise be unviable for individual farmers or small businesses.

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[94] Federal Court of Australia, 'Annual Report 2018-2019' (Annual Report, 2019) 26–8.
[95] Australian Bureau of Statistics, *5249.0 – Australian National Accounts: Tourism Satellite Account, 2018-19* (Web Page, 12 December 2019) <https://www.abs.gov.au/AUSSTATS/abs@.nsf/MF/5249.0>.
[96] Department of Industry, Innovation and Science (Office of the Chief Economist), 'Industry Insights Flexibility and Growth' (Report, January 2018) <https://publications.industry.gov.au/publications/industryinsightsjune2018/documents/IndustryInsights_1_2018_ONLINE.pdf>.
[97] *ADJR Act* (n 10) s 5(1).

There is already evidence that the *ADJR Act* standing provisions will not result in better outcomes for secondary industries that may be affected by poor government decision-making under the *EPBC Act.* In 2004, a grazer brought an action against the Environment Minister for a decision that a high voltage transmission line on her property was not a controlled action.[98] The Federal Court found that the farmer, whose land was directly impacted by the project, was not an aggrieved person under the *ADJR Act.* [99]

The consequences of poor environmental regulation have the potential to hamstring Australia's economy and impose economic harm on secondary industries. Whilst we have explored caselaw above that demonstrates NGOs may still have standing under *ADJR Act*, this is speculative and does not recognise the risks imposed on secondary industries. The *EPBC Act* currently has a mechanism that allows secondary industries to be represented through NGOs, allowing their interests to be upheld without being forced to undertake costly litigation where they may not meet standing requirements. This suggests that attempts to prevent NGOs from having standing under the *EPBC Act* could have significant negative consequences for these secondary industries.

[98] *Paterson v Minister for the Environment and Heritage & Anor* [2004] FMCA 924.
[99] Ibid [36]–[39].

Recommendations

Recommendation 1

> *The Reviewer proposes that s 487 of the EPBC Act be retained in its current form.*

The evidence we have collected demonstrates s 487 is being utilized for its proper purpose. It is also clear that there is significant public interest in environmental decision-making and that NGOs are representing community interests rather than engaging in tactical, 'American-style' lawfare.

The standing provisions in the *EPBC Act* reflect the purpose of the Act and the Commonwealth's involvement in protecting matters of national environmental significance. Section 487 is not overly broad either in principle or in application. There has not been a flood of environmental litigation or tactical lawfare enabled by the provision.

If s 487 is repealed it will undermine the purpose of the Act. It may cause further reductions to the number of public interest cases. It will not address public concerns regarding the need for transparent decision-making or that the Environment Department make decisions according to law.

The limitations on judicial review may contribute to deteriorating perceptions of federal environmental regulation in the community, less trust in the federal government's ability to protect the environment and increase the perception that federal environmental regulation enables corruption.

Recommendation 2

> *The Reviewer proposes that the public be given greater opportunities to be involved in the approval process. This would include longer periods of time for public submissions and a mandatory call for public submissions for every major decision made.*

There was a strong correlation between limited opportunities for public involvement, restricted access to reasoning for decisions, and public interest cases. Moreover, a common ground of review raised was failure to consider a relevant consideration, suggesting public concern with Environment Department decision-making processes.

The Environment Department needs to increase the transparency of its decision-making processes to address these public concerns. If the public are able to access relevant

information and have an opportunity to be heard prior to a decision, it may reduce the rates of public interest challenges.

To achieve this, we recommend the *EPBC Act* be amended to:

- increase the period of time for public submissions from a minimum of 10 days to a month (30 days);
- mandate that information regarding public submissions be published on the Environment Department's website, the proponent's website, and advertised in some form locally; and,
- make a call for public submissions mandatory for all major decisions made under the *EPBC Act*.

In particular, we recommend specific public submission processes be developed for the following major decisions: controlled action decisions, decision to approve, variations to approvals and for the Department's reconsideration of a decision under s 78. Currently, the last two processes do not have any mandated public involvement.

Recommendation 3

> *The Reviewer proposes specific measures be taken to increase the transparency of assessments and decision-making by the Environment Department. For example, by mandating publication of reasons for decisions and recommendation reports, as well as permanent public access to environmental impact statements.*

Over the course of this review it was apparent that the Environment Department's lack of transparency may have contributed to public interest litigation. We found that the most common ground of review concerned a failure to consider relevant considerations, which could be reduced if the Environment Department was required to publish reasoning for its decisions. Increased transparency would encourage the Environment Department to ensure they carefully consider all relevant considerations for every decision. The Environment Department is currently required to write reasoning for the Minister to review so the publication of those reasons should not be a major diversion of resources.

Moreover, our data suggested that there are transparency concerns with the Environment Department. In 15 cases there was no data available regarding public submissions, and in 11 cases there was no opportunity for public submissions. Moreover, the Department's annual environment report did not accurately record proceedings involving the Environment Department. In our collection of data from the Federal Court Portal and Commonwealth Courts Portal we found 17 judgments or discontinued cases that were not discussed in any

annual environment report between 2008 – 2009 and 2018 – 2019.[100] This suggests that internal data-collection practices require reform.

We recommend that the following documents be made permanently available on the Department's website:

- reasons for decisions;
- recommendation reports drafted by the Department for the Minister to consider; and,
- environmental impact statements.

This enables the public to determine whether a decision has considered all relevant considerations without needing to commence litigation. It will also encourage broader transparency and accountability within the Environment Department.

Recommendation 4

> *The Reviewer proposes the creation of an Independent Commission or other merits review avenue to address public interest concerns regarding environmental decision-making.*

Our review has demonstrated that there is significant public interest in environmental matters and concerns that government decision-making is not considering all the relevant matters. To resolve these concerns and potentially minimise future public interest litigation and uncertainty for proponents, we recommend a merits review model by adopted under the *EPBC Act*.

The Productivity Commission supported merits review models in its 2013 report, *Major Project Development Assessment Processes*,[101] stating:

> *"It is preferable that merits review be [provided in a] limited [form] … limited merits review emphasizes the primacy of the assessments and approval processes. It allows the review body to provide an accountability mechanism."*[102]

A merits review mechanism or Independent Commission, similar to the Independent Planning Commission in NSW, provides third parties with an avenue to appeal decision that have raised genuine community concerns. The Productivity Commission also noted that merits review processes encourages transparency and public consultation by the original decision-maker to limit subsequent review.[103] In the context of the *EPBC Act*, where so few decisions are challenged already, a merits review system could positively inform Department practices

[100] The 2019 – 2020 report has not yet been published.
[101] Productivity Commission (n 93).
[102] Ibid 267.
[103] Ibid.

and ensure public involvement during the consultation period resulting in reductions in public interest challenges over the long-term.

The creation of a merits review mechanism would also bring the *EPBC Act* in line with State environmental protection legislation. This increases certainty for proponents and increases perceptions of accountability for investors, ensuring they have confidence in the approvals process for major projects.

Finally, merits review processes would alleviate any delays a proponent may actually face when the Minister's decision is set aside and remitted back to the Department. In these circumstances, when a decision to approve has been set aside, the proponent is restrained from commercial action. In our review we found instances where the Department took longer to remake the decision than the length of the case itself.[104] A merits review allows a second decision-maker to reconsider the decision in full. If the merits reviewer still approves the decision, the proponent would be able to commence action as soon as the review was complete rather than being subjected to further delays and uncertainty when a decision is remitted back to the Department.

[104] For example, *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694.

Conclusion

This empirical review of all cases involving the *EPBC Act* from 1 January 2009 – 31 December 2019 demonstrates that public interest litigation is not being utilized to engage in lawfare. We found that the number of public interest cases is too low to be characterized as a flood of litigation or lawfare. We also found that the way public interest litigants are engaging with court processes does not support the lawfare characterization. Public interest litigants are not filing vexatious cases, nor disproportionately utilizing interlocutory applications or interim injunctions to prevent commercial action

Over this period, public interest litigation has been rarely struck down as vexatious. Instead, public interest cases have had a success rate of 25% indicating that genuine public concerns are being ventilated, and that the Environment Department's limited transparency is impacting community concerns and potentially motivating further challenges. Moreover, public interest litigation that is discontinued before judgment had an 84.6% success rate, demonstrating that the Environment Department also acknowledges that the decision-making process is flawed and is willing to concede.

In reality, public interest litigation reflects the purpose of the *EPBC Act* and the Australian public's stake in the preservation and responsible regulation of matters of national environmental significance.

Contrary to providing evidence for the repeal of s 487, this evidence demonstrates that public interest litigation is providing needed government accountability in a federal regulatory scheme that is worryingly opaque without public intervention.