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# REVIEW OF CLIMATE CHANGE POLICIES

Daniel Wild  
Research Fellow



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## About the author

**Daniel Wild** is a Research Fellow at the Institute of Public Affairs. He specialises in red tape, regulation, economic policy, the philosophy of free enterprise, and criminal justice. Daniel has authored a number of research papers, and has published op-eds in *The Australian*, *The Daily Telegraph*, *The Sydney Morning Herald*, *The Courier Mail*, and *the Spectator*.

Daniel has also appeared as a policy commentator on *Sky News PM Agenda* and *Channel 7 News*.

Daniel previously worked at the Commonwealth Department of the Prime Minister and Cabinet (2013-2016), where he analysed global and domestic macroeconomic policy. Prior to that he worked at the Commonwealth Department of Finance (2010-2013) where he worked on deregulation. Daniel holds an honours qualification in economics and a degree in international studies from the University of Adelaide.



# Introduction

The primary obligation of the Australian government is to serve the Australian people. This means that policies should only be enacted where they are in Australia's national interest.

Unfortunately, the Discussion Paper appears to take it as a given that pursuit of international emissions reduction policies is in Australia's national interest. However, the drafters of the document have failed to demonstrate this is the case. Indeed, the document doesn't use a net benefit framework, and implicitly assumes that actions by Australia can have tangible effects on the global climate. In effect this is assuming the result.

The lack of a net benefit assessment is a part of a growing and worrying trend in public policy making. Policy makers largely assume that there is an inevitable arch of history, which, in the environment context, will end in a net zero emissions world. The role of government, in this view, is to push Australia as hard and fast to that perceived inevitable end point. Because the objective of a net zero emissions economy is presented in moral terms, even as a do-or-die ultimatum, tangible costs incurred along the arch are not considered relevant.

Instead, the proposition that it is in Australia's national interest to have an emissions reduction target is high contestable. Specifically:

- Australia accounts for just 1.8% of total greenhouse gas emissions. This is forecast to drop to 1% without any policy interference. This means Australia makes no noticeable difference to the global climate.
- The economic costs of reducing greenhouse gas emissions are significant and irreparable.

Greenhouse gas reduction policies have:

- Contributed to Australia having amongst the highest energy prices in the world, despite having over 1000 years' worth of coal and 30% of global uranium supplies.
- Contributed to electricity prices increasing by 115% since 2006.
- Negatively impacted on economic growth, wages, and productivity growth.
- Discouraged private business investment, which is currently 12.2% of GDP – a rate lower than during the Whitlam-era.

The best available evidence demonstrates that Australia's pursuit of emissions reductions has resulted in a permanent reduction to our living standards, while providing no noticeable environmental dividend. The best approach for the Government to take is to withdraw from the Paris Climate Agreement. Instead, focus should be placed on adapting to climatic changes as needed and where cost effective.

The IPA recommends:

- The Government rule out a carbon tax or an emissions intensity scheme.
- Future analysis of emissions reductions policies should be based on a net benefit test.
- The Government withdraw from the Paris Climate Agreement, without implementing a replacement emissions reductions framework.
- The Government abolish the Renewable Energy Target to put downward pressure on energy prices and improve reliability of energy supply.

Also attached is analysis the IPA has prepared on environmental matters, including

- Attachment A: The Need to Abolish the RET
- Attachment B: Declining Levels of Business Investment
- Attachment C: Why Section 487 of the EPBC Act must be Repealed
- Attachment D: Growth to Environmental Law

# The National Interest Test

The Discussion Paper states that “climate change is a global problem which requires a global solution.” This implicitly assumes that it is in Australia’s national interest to be a part of global initiatives to reduce greenhouse gas emissions. However, because a net benefit test is not used, the document is unable to substantiate this assumption.

Assessing the net benefits of emissions reduction policy would involve analysing the extent to which Australia can reduce global greenhouse gas emissions and make a contribution to the reduction to global temperatures, against the economic and social costs of these policies.

The best available evidence suggests that the costs by far outweigh the benefits, and, consequently, Australia should not have an emissions reduction policy.

## What Australia Does Makes no Noticeable Difference to the Global Temperature

According to the Commonwealth Department of Environment, Australia accounts for just 1.8% of global greenhouse gas emissions.<sup>1</sup> And the Garnaut Review into Climate Change estimated that this contribution would fall to 1% by the year 2100.<sup>2</sup> This means that actions by Australia to reduce greenhouse gas emissions, even if ambitious and successful, will make no noticeable difference to the global temperature.

We can examine the Renewable Energy Target (RET) to understand this point. The RET is the Federal Government’s central emissions reduction policy. According to the Climate Change Authority “the legislative objects of the RET reflect a view that the renewable energy industry must be expanded and developed to promote greenhouse gas emissions reductions.”<sup>3</sup> However, since the RET was implemented in 2002, it has reduced global emission by just 0.005%.<sup>4</sup> This means the RET has made no noticeable difference to global emissions, the global climate, or the global temperature.

Further, there is evidence to suggest that Australian emissions reduction policies are causing net increases to greenhouse gas emissions, particularly in relation to coal-fired power electricity.

A large body of evidence demonstrates that Australia has some of the cleanest coal in the world.<sup>5</sup> However, policies which discourage the development of coal in Australia do not result in fewer coal mines on a global scale. Rather, these mines are set up in other countries which have lower quality coal, meaning more coal needs to be burned to achieve the same amount of electricity generation. This results in more, rather than fewer, carbon emissions on a global scale.

The logic of this argument was made clear in a 2016 ruling by the Queensland Supreme Court concerning a proposed mine near Alpha in central Queensland. In that case the Court noted that stopping the mine would not have made any difference to global carbon emissions or global warming – “power stations would burn the same amount of thermal coal and produce the same amount of greenhouse gases whether or not the proposed Alpha Mine proceeded.”<sup>6</sup>

Otherwise stated, if a power station in India does not get coal from Australia it will get coal from another country.

In summary, Australia makes no noticeable difference to global environmental conditions. The benefits of emissions reduction policies are either infinitesimally small, or are actually leading to more emissions on a global scale.

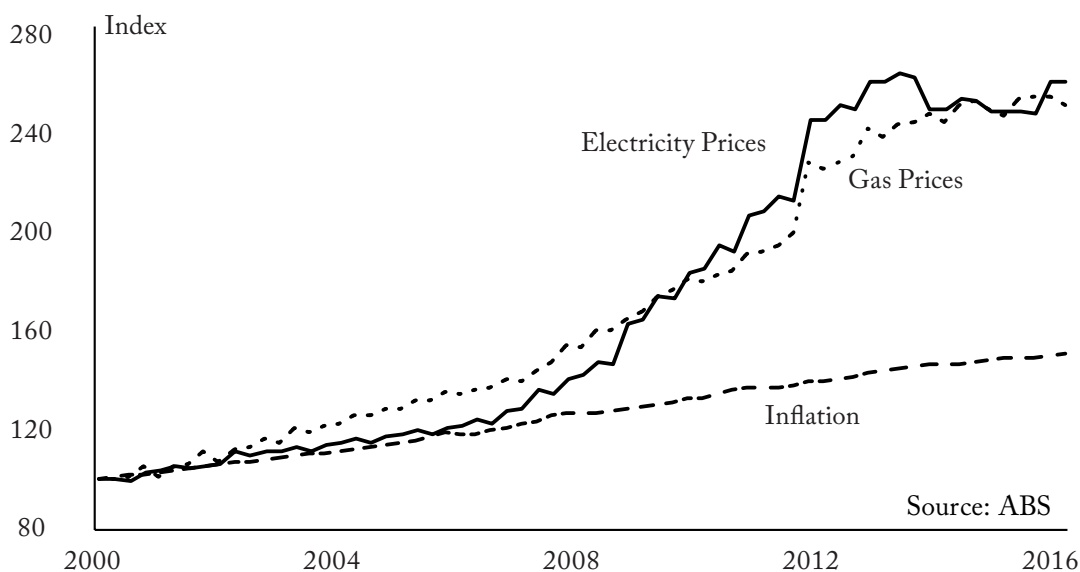
### **Greenhouse Gas Reduction Policies are Resulting in a Significant and Permanent Reduction to the Living Standards of Australians**

While emission reduction policies provide little environmental benefit, they have resulted in a permanent reduction to the living standards of Australians by imposing substantial and irreparable economic damage.

With over 1000 years' worth of coal and 30% of the world's uranium supplies<sup>7</sup>, Australia should have some of the lowest energy prices in the world. Yet in 2016, consulting firm CME Australia found Victoria, New South Wales, and South Australia had amongst the highest electricity prices in the world.<sup>8</sup> Electricity prices in Australia have increased by 115% since 2006, which far outstrips inflation (chart 1).

Rising prices both makes households worse off, by reducing their disposable income, and discourage business creation and international investment by increasing the costs of doing business in Australia compared with other nations.

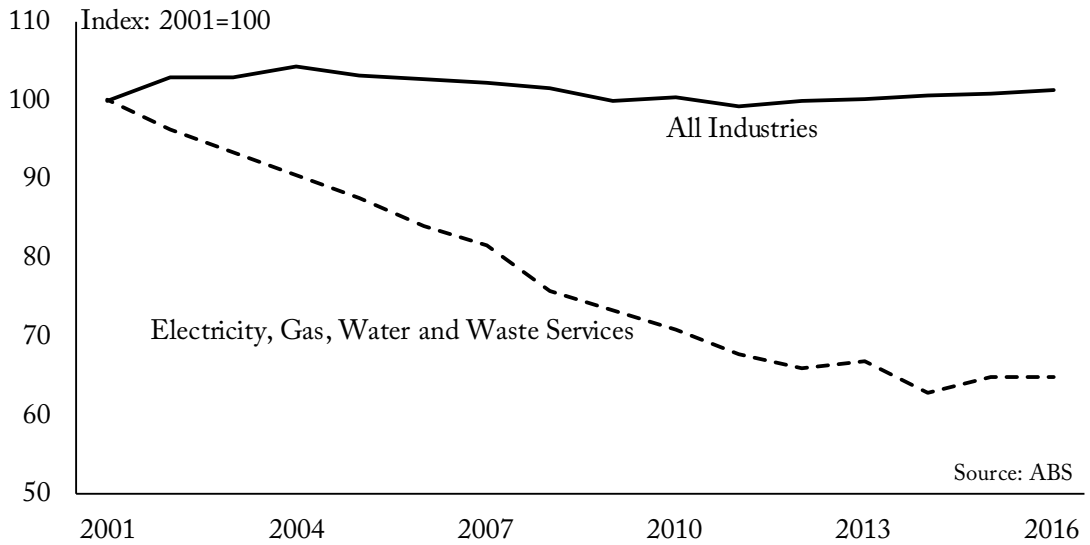
**Chart 1: Electricity Prices up 115% for Households since 2006**



Emission reduction policies have also reduced national productivity. Since 2000-01 Australia's multifactor productivity growth has averaged just 0.15 per cent per year. This is far below the long run average and is a central source of declining wages growth and living standards.

A key contributing factor to this trend is a sharp decline in productivity growth in the energy generation sector where productivity has decreased by 2.7 per cent per year on average since 2000-01 (chart 2).<sup>9</sup> The RET and other emission reduction policies contributes to this problem by forcing the generation of energy from less efficient and costlier sources. This means more resources are needed to generate a given amount of energy, which reduces productivity and causes economic inefficiencies which permeate through the economy.

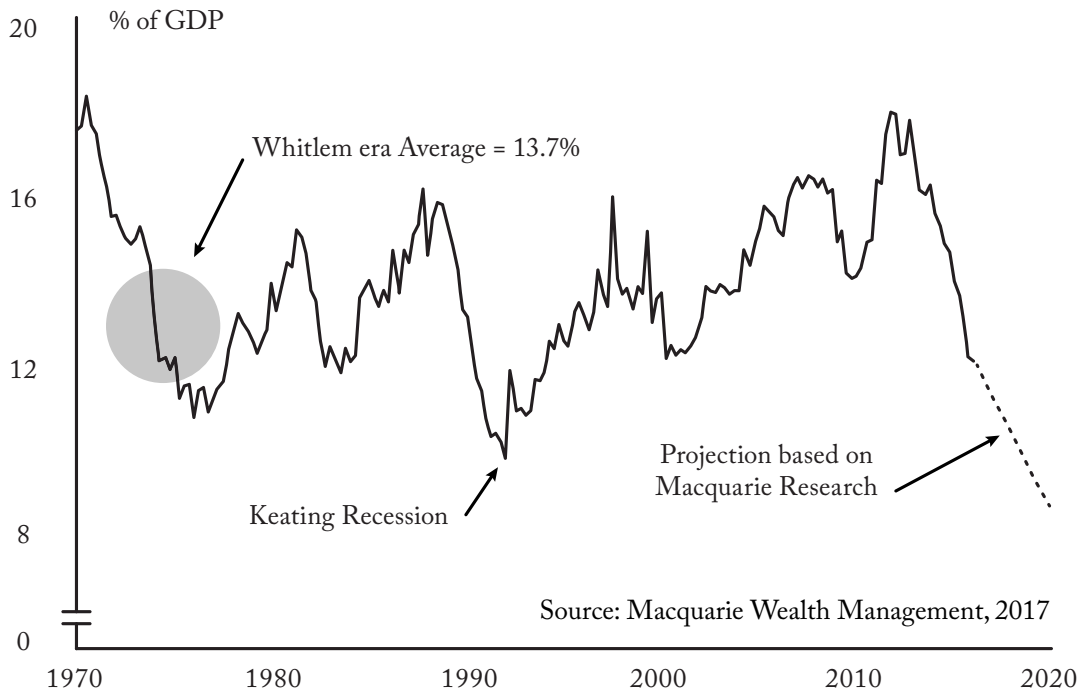
**Chart 2: Electricity Sector Productivity Declining**



One of the major threats to Australia’s future prosperity is declining levels of business investment. Private business investment in Australia is 12.2% of GDP, which is below the rate that prevailed during the Whitlam-era. And business investment is forecast to fall further to just 9% of GDP by 2020 (chart 3).<sup>10</sup>

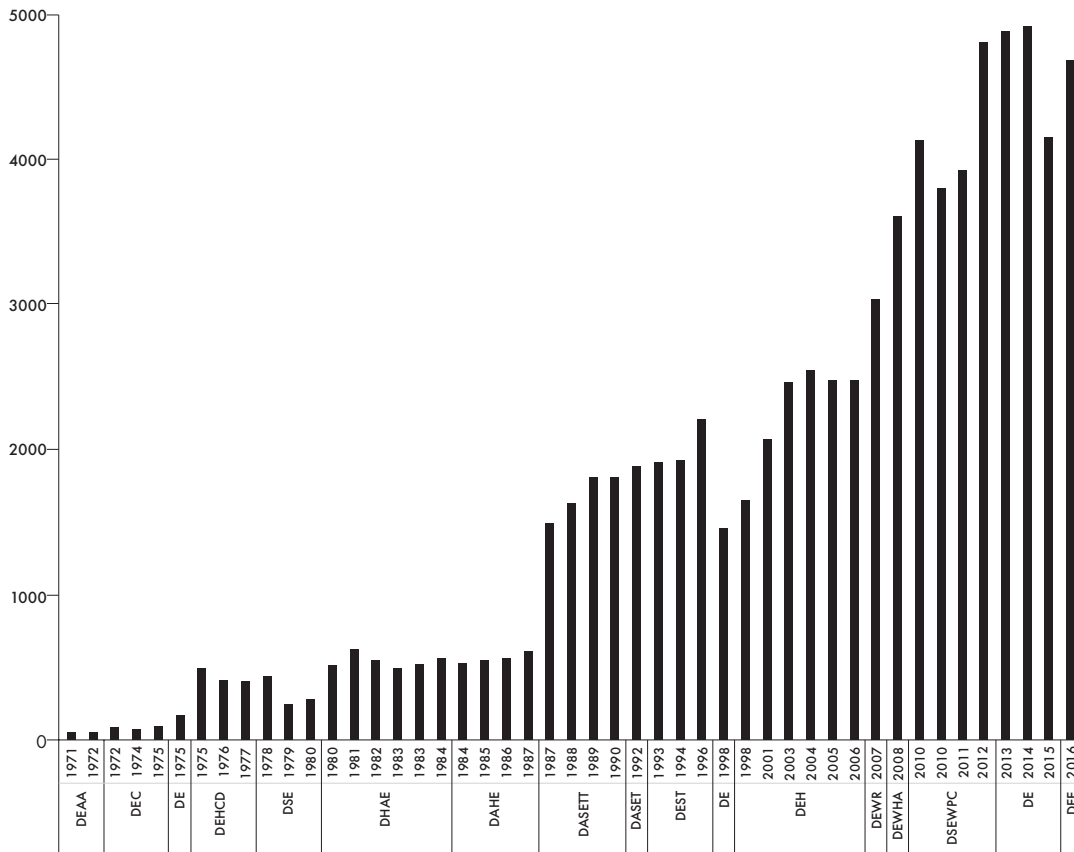
Declining business investment reduces the national capital stock, which lowers labour productivity and reduces wages growth, which is currently at a record low of 1.9% per year.

**Chart 3: Business Investment Declining**



A key contributing factor to declining business investment is environmental regulation, which increases the costs of doing business in Australia. Since 1971, total pages of environmental legislation have grown 80-fold, from 57 pages to 4,669 pages in 2016.<sup>11</sup>

**Chart 4: Environmental Legislation has Increased 80-fold Since 1971**



The effects of the expansion of green tape can be seen in projects around Australia.

- The Roy Hill iron ore mine in the Pilbara required more than 4000 separate licences, approvals, and permits for the pre-construction phase alone.<sup>12</sup>
- The Tads Corner Project, the first mining pit to ship coal from the Galilee Basin in Queensland, needed 5000 approvals, permits, and licenses.<sup>13</sup>
- The Adani coal mine in central Queensland has spent seven years in the approvals process, endured more than 10 legal challenges, and prepared a 22,000 page Environmental Impact Statement.<sup>14</sup>
- In a 2013 report the Productivity Commission gave the example of a project which was required to meet 1500 government imposed primary conditions and 8000 sub-conditions.<sup>15</sup>

On top of this are costs incurred as a result of vexatious and frivolous litigation brought forward by green groups. IPA research found that Section 487 of the Environment Protection and Biodiversity Conservation Act resulted in project proponents spending a cumulative 20 years in court, at a cost of \$1.2 billion.<sup>16</sup> In estimating flow-on costs, BAEconomics found that reducing project delays by one year would add \$160 billion to national output by 2025 and add 69,000 jobs across the economy over that period. Many of these jobs would be in rural and regional areas.<sup>17</sup>

# Conclusion and Recommendations

It is not in Australia's national interest to have an emissions reduction policy.

Policies which reduce greenhouse gas emissions make no noticeable effect to the global temperature, but impose significant and irreparable economic damage.

The IPA recommends:

- The Government rule out a carbon tax or an emissions intensity scheme.
- Future analysis of emissions reductions policies should be based on a net benefit test.
- The Government withdraw from the Paris Climate Agreement, without implementing a replacement emissions reductions framework.
- The Government abolish the Renewable Energy Target to put downward pressure on energy prices and improve reliability of energy supply.

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## 5 Reasons to Abolish the RET

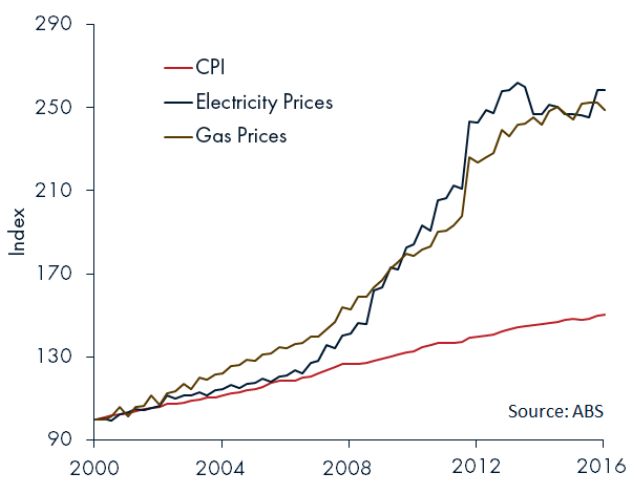
The Renewable Energy Target (RET) mandates that 33,000 GWh of electricity – 24 per cent – be generated from renewable sources by 2020. To do this, wholesale energy users, mostly retailers, are required to purchase a certain amount of wholesale energy from renewable sources.

Because renewables are typically costlier and less efficient than non-renewables, the RET causes energy prices to rise but productivity, growth, wages and employment to fall. This undermines Australia's international competitiveness. These costs are incurred with no noticeable benefit to the environment.

### 1. The RET Increases Energy Prices

Energy prices have been increasing rapidly over the past 10 years, with electricity prices up by 115 per cent since 2006.<sup>1</sup> In 2016, consulting firm CME Australia found Victoria, New South Wales, and South Australia had amongst the highest electricity prices in the world.<sup>2</sup>

#### Energy Prices Have Been Increasing Much Faster than Inflation



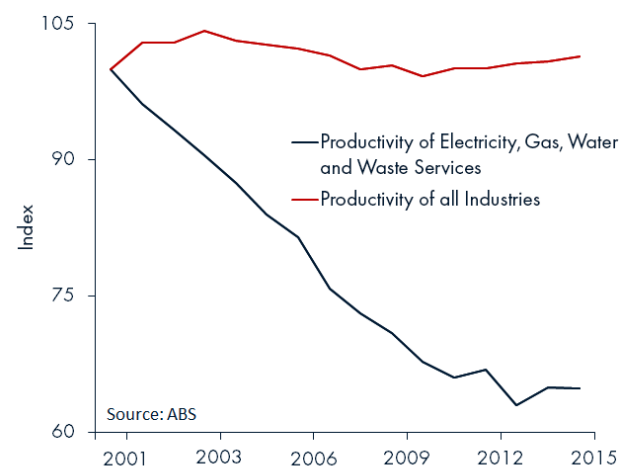
There are many factors causing higher prices, including state-based restrictions on gas and coal exploration and development. But the RET also causes higher prices for two key reasons: firstly, energy retailers are

required to purchase more energy than they otherwise would from renewable sources, the added cost of which is passed on through higher prices. Secondly, the RET forces extra energy supply regardless of demand. In the short-run this lowers wholesale prices. But by depressing revenue many coal-fired stations are forced to shut down or mothball, causing both a reduction to long-run supply and higher prices.

Based on analysis by ACIL Allen, it is estimated that total energy prices for end-users would be approximately \$30 billion higher over 2014-2030 as a result of the RET.<sup>3</sup>

### 2. The RET Reduces Productivity

#### Electricity Sector Productivity Declining



Since 2000-01 Australia's multifactor productivity growth has averaged just 0.15 per cent per year.<sup>4</sup> A key contributing factor to this trend is a sharp decline in productivity growth in the energy generation sector where productivity has decreased by 2.7 per cent per year on average since 2000-01.<sup>5</sup>

The RET contributes to this problem by forcing the generation of energy from less efficient and costlier sources. This means more resources are needed to generate a given amount of energy.

### 3. The RET Lowers Growth, Employment, and Wages

The RET reduces economic efficiency by requiring more resources go to the energy generation sector than what would otherwise be required. This means scarce economic resources are being put to sub-optimal use, which reduces productivity and economic growth.

Deloitte, for example, estimated that real GDP would be \$29 billion larger in 2030 if the RET were to be abolished.<sup>6</sup> Most of the increase to GDP comes from increased household consumption (due to increased disposable income from lower retail prices) and higher export volumes from expanded output.

Because of higher output there is extra labour demand which puts upward pressure on wages and employment. Deloitte estimates that abolition of the RET would lead to 5,000 more full-time jobs and increase average yearly earnings by \$1,300 per person by 2030.<sup>7</sup>

A larger economy also means more revenue would be collected by the Government.

### 4. The RET Undermines Competitive Advantage

Based on economically demonstrated reserves, Australia has 1570 years' worth of energy production, including 1022 years of brown coal.<sup>8</sup> This relative abundance means that Australia should be one of the lowest cost energy nations in the world.

By forcing an artificial transition away from abundant energy sources, the RET adds to the cost base of energy-intensive businesses, such as aluminium smelting and manufacturing. This makes such operations less commercially viable and hampers their ability to compete with businesses from other countries.

The negative effects on Australia's international competitiveness is taking place in the context of an already relatively uncompetitive economy. According to the World Economic Forum, Australia is 22<sup>nd</sup> in the world in terms of competitiveness, which is behind the majority of competitor nations with a similar level of economic development. For example, Singapore is 2<sup>nd</sup>, the United States is 3<sup>rd</sup>, the United Kingdom is 7<sup>th</sup>, Japan is 8<sup>th</sup>, Hong Kong is 9<sup>th</sup>, New Zealand 13<sup>th</sup> and Canada is 15<sup>th</sup>.<sup>9</sup>

### 5. The RET Makes no Noticeable Difference to the Global Climate

According to the International Energy Agency, approximately 400 billion tonnes of carbon were emitted globally from fuel combustion from 2001-2014.<sup>10</sup> Over the same period the Climate Council of Australia, a renewable energy lobby group, estimated the RET reduced emissions by just 22.5 million tonnes.<sup>11</sup>

This means the RET resulted in 0.005 per cent fewer carbon emissions globally over a 14-year period. This is the equivalent of a reduction of 0.0004 per cent per year on average, equating to effectively no change to global temperatures.

It is simply not in Australia's national interest to have an energy policy predicated on emissions reductions.

Some claim that abolishing the RET would result in 'sovereign risk' as people have made investment decisions based on current policy settings. But the RET promises renewables corporations access to a stream of subsidies through an effective tax on consumers. This is different to privately earned investment returns which are subsequently reduced through policy changes. No individual or business has a moral claim on other people's income indefinitely.

### Conclusion and Recommendation

The RET should be abolished in its entirety. This would ensure that the optimal mix of energy generation emerges from a competitive market process where companies respond to the needs of consumers and businesses rather than interest groups.

#### Endnotes

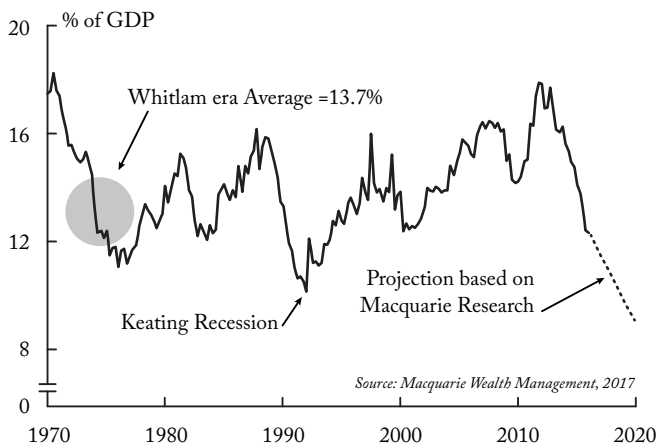
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# Business investment in Australia now lower than under Whitlam

Business investment in Australia is 12.2% of GDP<sup>1</sup> and is forecast to fall to a record low nine per cent of GDP by 2020, according to Macquarie Research.<sup>2</sup> During the Whitlam era of economic crisis business investment averaged 13.7% of GDP.

## Business Investment as a Percentage of GDP is Approaching Record Lows



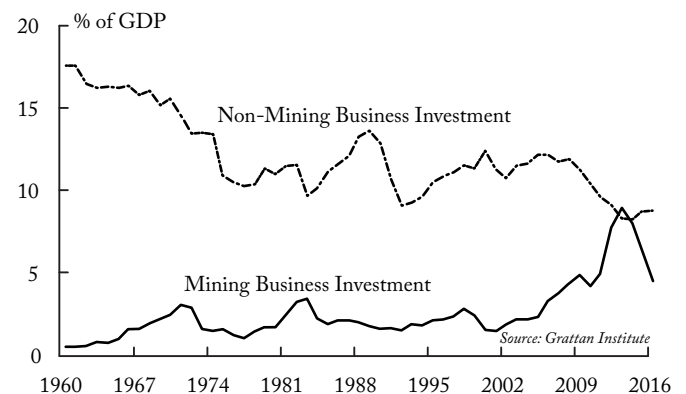
Declining investment is a key cause of record low wage growth: less investment reduces the economy’s capital stock, which lowers labour productivity and puts downward pressure on wages.

Business investment is decreasing because the mining investment boom has tapered off without an offsetting increase to non-mining investment. Even though “economists and policymakers have assumed that a lift in non-mining business investment was forthcoming,” according to Gareth Aird, Economist at the Commonwealth Bank.<sup>3</sup>

But despite record low interest rates and an exchange rate which has depreciated by 25% from its July 2011 peak, non-mining business investment as a percentage of GDP remains close to historic lows.<sup>5</sup>

Even the International Monetary Fund said low investment, suppressed price and wage growth and high underemployment are symptoms of the ‘new mediocre’ where long term growth malaise is becoming the norm.<sup>6</sup>

## Mining and non-mining Business Investment as a Percentage of GDP



## Why is Investment Weak?

It has been argued that weak business investment in Australia is due to changing economic fundamentals. A recent report by the Grattan Institute argued that about two-thirds of the decline in non-mining business investment was “due to benign long-term structural changes to the economy”, which include:

- The non-mining sector becoming less capital intensive.
- The economy moving toward capital-light services.
- The non-mining sector declining as a share of GDP.<sup>7</sup>

The remaining one-third of the decline is explained by low economic growth.

The Grattan Institute concludes that today’s level of non-mining business investment is “about what should be expected”<sup>8</sup> and that Australia is “moving toward the advanced economy average.”<sup>9</sup>

But this analysis downplays the negative effect that public policy has had on declining business investment. Australia has a high corporate tax rate, restrictive regulations and red tape, and an inflexible labour market, all of which discourage business investment.

## Investing in Australia is Unattractive

Surveys and analysis constantly show that Australia has a policy environment which discourages investment.

For example, Australia's corporate tax rate of 30% for businesses with more than \$10 million in annual turnover is one of the highest in the developed world. Singapore's rate is 17%. The UK's rate will be 17% by 2020. And the rate in the US is expected to drop to 15%.

Further, according to the World Economic Forum, out of 138 nations, Australia ranks:

- 96th for the negative effect taxation has on the incentive to invest.
- 100th for how much business profit is taken by tax.
- 118th for workplace relations efficiency.
- 111th for labour market flexibility.<sup>11</sup>

Red tape and overregulation are also constantly re-emerging concerns. Specifically:

- The Sensis Business Index found that small and medium sized businesses are “worried about excessive bureaucracy and red tape and would like to see more done by the Government to address these issues.”<sup>12</sup>
- The most recent National Red Tape survey by the Australian Chamber of Commerce and Industry (ACCI) found “nearly half of the respondents reported that the impact of regulation had prevented them from making changes to grow their business.”<sup>14</sup>
- In his recent speech to the National Press Club, Ken Henry referenced research by the National Australia Bank which revealed that businesses believe less red tape, less regulation and a simpler tax system would support business growth.<sup>16</sup>

- Danny Gilbert AM, chair of the Business Council of Australia's Ease of Doing Business Committee, recently said “we are being held back by a noxious culture of overregulation that has infiltrated almost every aspect of our lives.”<sup>17</sup>

Several examples highlight Australia's red tape problem:

- The Roy Hill iron ore mine in the Pilbara required more than 4000 separate licences, approvals, and permits for the pre-construction phase alone.<sup>18</sup>
- The Adani coal mine in central Queensland has spent seven years in the approvals process, endured more than 10 legal challenges, and prepared a 22,000 page Environmental Impact Statement. And the project may be stymied by more legal challenges.<sup>19</sup>
- In a 2013 report the Productivity Commission gave the example of a project which was required to meet 1500 government imposed primary conditions and 8000 sub-conditions.<sup>20</sup>

As the Institute of Public Affairs said in “Be like Gough: 75 radical ideas to transform Australia”, the Federal Government should formalise a one-in-one-out rule to cut red tape, and reduce the corporate tax rate to a globally competitive 25%.<sup>21</sup>

## Conclusion

Policy makers have a choice. They can either sit back and watch decline unfold. Or they can implement structural reforms to make Australia a more attractive investment destination by reducing tax and regulation, cutting red tape, and making Australia's labour market more flexible.

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October 2016

# Section 487

of the Environment Protection and  
Biodiversity Conservation Act:

How activists use red tape  
to stop development  
and jobs

Daniel Wild

An Institute of Public Affairs **Research Essay**

 **Institute of  
Public Affairs**  
THE VOICE FOR FREEDOM  
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# Section 487

of the Environment Protection and  
Biodiversity Conservation Act:

## How activists use red tape to stop development and jobs

Daniel Wild

### About the author

**Daniel Wild** is a Research Fellow at the Institute of Public Affairs. He previously worked at the Commonwealth Department of the Prime Minister and Cabinet where he analysed global and domestic macroeconomic and competition policy. Prior to that he worked at the Commonwealth Department of Finance where he worked on deregulation.

Daniel holds an honours qualification in economics and a degree in international studies from the University of Adelaide.



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# Summary

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

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

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

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

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

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

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

# Introduction

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

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

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

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

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

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

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

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

# The Environment Protection and Biodiversity Conservation Act

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

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

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

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

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

## Challenging Ministerial decisions

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

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

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

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

2 Ibid

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

4 Ibid

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

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

## Section 487 of the EPBC Act extends legal standing

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

In particular, under s. 487 a person is defined as aggrieved where<sup>8</sup>:

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

Similarly, an organisation is defined as aggrieved where<sup>9</sup>:

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

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

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

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

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

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

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

# Section 487: a tool for vexatious litigation

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

Since the introduction of the EPBC Act in 2000:

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

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

## Successful Cases

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

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

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

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

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

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

<sup>11</sup> Tarkine National Coalition Inc v Minister for SEWPAC [2013] FCA 694

<sup>12</sup> Lansen v Minister for Environment & Heritage [2008] FCAFC 189

## Unsuccessful Cases

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

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

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

And in the other case, the presiding Judge noted that

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

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

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

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

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

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

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

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

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

## Section 487 is a tool to pursue ideological 'lawfare'

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

The former Environment Minister, Greg Hunt, has noted that

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

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

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

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

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

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

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

19 See, <http://www.smh.com.au/comment/legality-of-approval-of-adani-carmichael-mine-queried-in-court-in-light-of-threat-to-reef-20151110-gkvt8.html>

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

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

Legal challenges can stop projects outright, or can delay them in order to buy time to build a much stronger movement and powerful public campaigns. They can also expose the impacts, increase costs, raise investor uncertainty, and create a powerful platform for public campaigning.

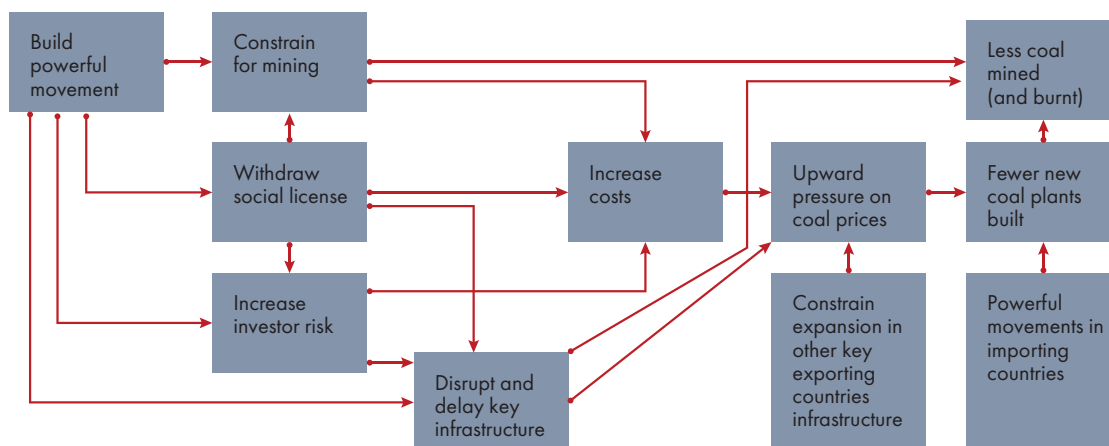
We are confident that, with the right resourcing for both legal challenges and public campaigning, we can delay most if not all of the port developments by at least a year, if not considerably longer, and may be able to stop several port projects outright or severely limit them.

While it is not yet possible to quantify the long-term impact we might have, we aim to severely reduce the overall scale of the coal boom by some hundreds of millions of tonnes per annum from the proposed 800Mtpa increase.

The document outlines six key parts of the strategy:

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

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



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

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

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

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

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

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

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

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

22 Go Fossil Free website, [gofossilfree.org/frequently-asked-questions](http://gofossilfree.org/frequently-asked-questions)

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

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

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

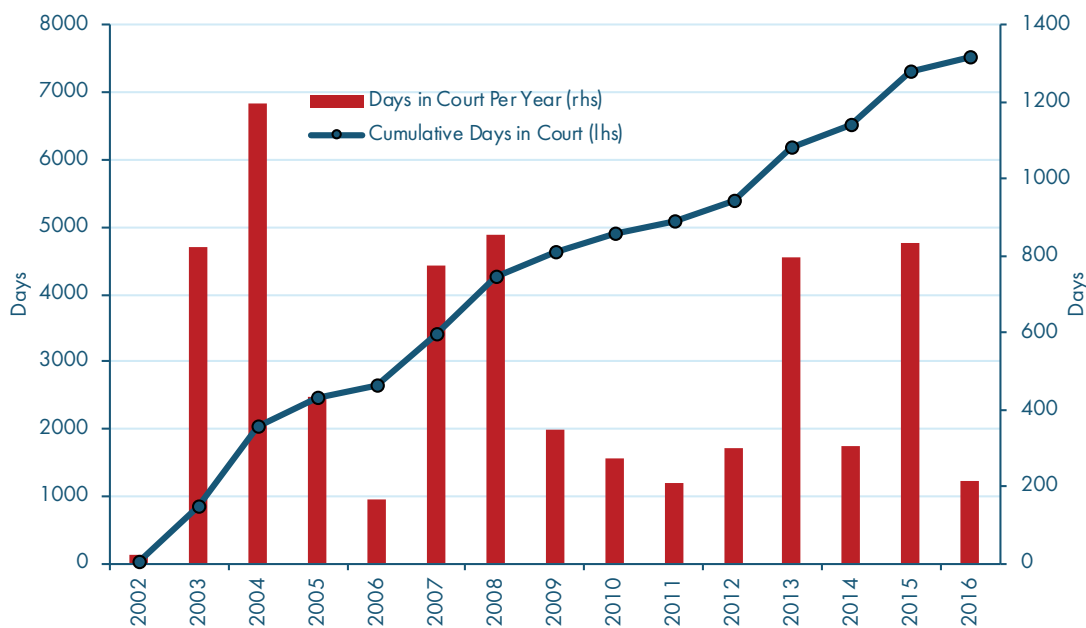
26 Coast and Country Association of Queensland Inc v Smith & Ors [2016] QCA 242

# Lawfare increases project costs and reduces employment

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

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

**Figure 2**



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

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

<sup>27</sup> Productivity Commission *Major Project Development Assessment Process* December 2013

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

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

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

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

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

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

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

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

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

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

As Ports Australia has noted 'virtually every major coal project or coal enabling infrastructure project in recent years in Australia has been the subject of lengthy and costly legal proceedings.'<sup>37</sup> Faced with this prospect many companies decide not to invest in the first instance – precisely an aim outlined by Greenpeace and the Australian Conservation Foundation.

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30 Referenced in Ibid

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

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

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

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

35 Ibid

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

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

# Delayed projects can lead to worse environmental outcomes

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

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

The report also argued that Australian coal is typically low in sulphur.<sup>38</sup>

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

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

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

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

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

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

40 Ibid

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

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

43 The Minerals Council of Australia (2015), *Confirmed: High Quality Australian Coal to Drive Economic Prosperity and Reduce Emissions* (November 2015). Available at [http://www.minerals.org.au/news/confirmed\\_high\\_quality\\_australian\\_coal\\_to\\_drive\\_economic\\_prosperity\\_and\\_reduce\\_emissions](http://www.minerals.org.au/news/confirmed_high_quality_australian_coal_to_drive_economic_prosperity_and_reduce_emissions)

## Legal challenges which cause delay are unethical

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

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

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

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

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

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

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

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

45 International Energy Agency *Energy Poverty*, 2016; available at <https://www.iea.org/topics/energy-poverty/>

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

47 Ibid, pg. 5

48 Ibid, pg. 6

49 Ibid, pg. 7

50 Ibid, pg. 7

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

each year to access a regular and reliable source of electricity.<sup>52</sup>

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

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

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

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

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

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

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

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52 Ibid pg. 17

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

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

55 Ibid

56 Ibid

57 Ibid

58 Ibid

# Repealing section 487 is consistent with the rule of law

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

According to the Department of Environment

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

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

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

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

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

However, a special interest:<sup>63</sup>

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

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

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

61 Ibid

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

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

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

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

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

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

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

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

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<sup>64</sup> *Environment East Gippsland Inc v VicForests* [2009] VSC 386 (14 September 2009)

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

# There are other avenues for political participation than legal challenges

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

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

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

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

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

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

<sup>67</sup> Ibid

<sup>68</sup> Commonwealth Department of Environment, *Submission to the Environment and Communications Legislative Committee*, 2015

<sup>69</sup> Productivity Commission *Major Project Assessment Processes*, December 2013, pg 302

# Conclusion

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

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

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

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<sup>70</sup> Commonwealth Department of Environment, *Submission to the Environment and Communications Legislative Committee*, 2015

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

## Appendix A – List of Legal Challenges<sup>72</sup>

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

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

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

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


## Cases which did not proceed to Judgement

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





An Institute of Public Affairs **Research Essay**



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# THE GROWTH OF FEDERAL ENVIRONMENTAL LAW 1971 TO 2016

Morgan Begg, Research Fellow

 **Institute of  
Public Affairs**  
SECURING FREEDOM FOR THE FUTURE  
1943 - 2018



# THE GROWTH OF FEDERAL ENVIRONMENTAL LAW 1971 TO 2016

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## About the authors

**Morgan Begg** is a Research Fellow at the Institute of Public Affairs.

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# Executive Summary

Red tape costs the Australian economy at least \$176 billion, or 11 per cent of GDP, each year in foregone economic output.

Environmental red tape and regulation in particular has grown significantly in recent decades.

This report provides an objective measure of the growth of federal environmental legislation since the creation of the first Commonwealth environmental department in 1971. The extent of federal environmental legislation is calculated by counting the number of pages of legislation that are administered by the various Commonwealth environmental departments since 1971.

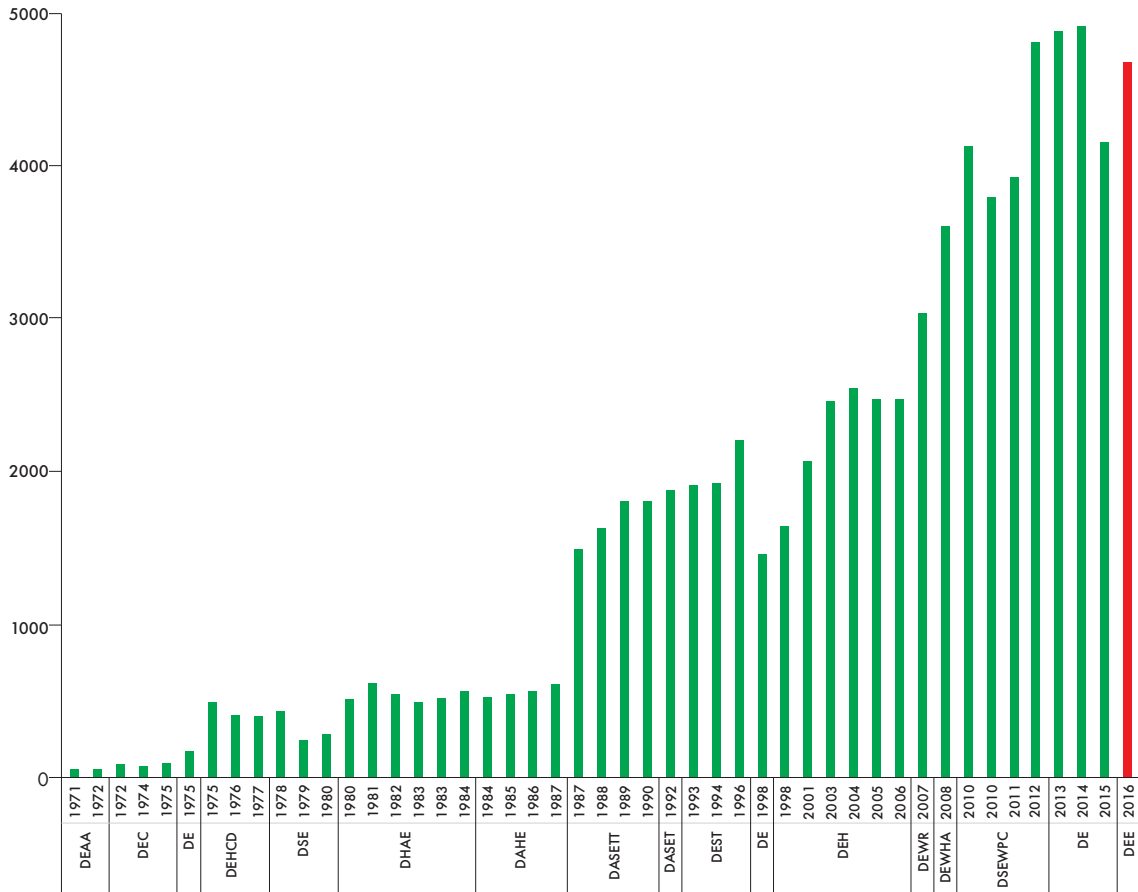
In 1971, the Department of Environment, Aborigines and the Arts administered 57 pages of federal legislation. In 2016, the Department of Environment and Energy administered 4,669 pages of legislation. The chart on page 4 demonstrates how environmental legislation has grown over time.

Federal parliament should address the red tape problem identified in this report in two ways:

- By repealing onerous regulations, such as section 487 of the *Environment Protection and Biodiversity Conservation Act 1999*, which gives green groups a special legal privilege to challenge federal environmental project approvals; and
- By eliminating duplication and devolving to the state governments the responsibility for administering environmental laws.

# Growth of environmental law since 1971

This chart measures the growth of federal environmental legislation over time by counting the number of pages that have been administered by federal environment departments since 1971. The methodology used and its limitations are described on page 7.



- DEAA: Environment, Aborigines and the Arts (May 1971-Dec 1972)
- DEC: Environment and Conservation (Dec 1972-April 1975)
- DE : Environment (Apr-Dec 1975; Oct 1997-Oct 1998; Sept 2013-July 2016)
- DEHCD: Environment, Housing and Community Development (Dec 1975-Dec 1978)
- DSE: Science and Environment (Dec 1978-Nov 1980)
- DHAE: Home Affairs and the Environment (Nov 1980-Dec 1984)
- DAHE: Arts, Heritage and Environment (Dec 1984-July 1987)
- DASET: Arts, Sports, the Environment, Tourism and Territories (July 1987-Dec 1991)
- DASET: Arts, Sports, the Environment and Territories (Dec 1991-March 1993)
- DSET: Environment, Sports and Territories (March 1993-Oct 1997)
- DEH: Environment and Heritage (Oct 1998-Jan 2007)
- DEWR: Environment and Water Resources (Jan 2007-Dec 2007)
- DEWHA: Environment, Water, Heritage and the Arts (Dec 2007-Sept 2010)
- DSEWPC: Sustainability, Environment, Water, Population and Communities (Sept 2010-Sept 13)
- DEE: Environment and Energy (July 2016-)
- DCC: Climate Change (Part of the Prime Minister and Cabinet Portfolio) (Dec 2007-March 2010)
- DCCE: Climate Change and Energy Efficiency (March 2010-March 13)

# History of Commonwealth environmental regulation

The framers of the Australian Constitution did not insert into that document a specific environmental power. While the states were the dominant regulators in this area, the Commonwealth commonly introduced regulations which had an incidental environmental object.

For instance, the Quarantine Act introduced in 1908 had a conservation purpose by introducing measures for the exclusion, detention, observation, segregation, isolation, protection, and disinfection of vessels, persons, goods, animals, or plants, and having as their object the prevention of the introduction or spread of diseases or pests affecting man, animals, or plants.<sup>1</sup>

The post war environmental movement argued that environmental protection required a direct legislative approach at the national and transnational level. This led to the establishment of the first Commonwealth department (partly) devoted to the environment, when the McMahon Coalition government in 1971 established the Department of Environment, Aborigines and the Arts.

The 1970s saw the introduction of significant environmental legislation, such as the *Environment Protection (Impact of Proposals) Act 1974*, the *National Parks and Wildlife Conservation Act 1975* and the *Great Barrier Reef Marine Act 1975*.

This increased legislative activity from the Commonwealth has been enabled by the High Court. Although no explicit head of power is found in the Constitution to support Commonwealth environmental legislation, the High Court has construed the present heads of power widely to enable environmental laws to be passed.<sup>2</sup>

Since 1971, the size of the environmental bureaucracy has grown persistently larger. This report measures the extent of the burden of federal environmental law by calculating how many pages of legislation were administered by various environmental departments since 1971. This report finds that over this period the burden of environmental laws has grown considerably, contributing to the significant red tape problem.

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1 *Quarantine Act 1908* (Cth) s 4.

2 See for instance *Commonwealth v Tasmania* (1983) 158 CLR 1, where a majority of the Court held that the Commonwealth's *World Heritage Properties Conservation Act 1983* was constitutionally permitted by the external affairs power.

# Environmental regulation and the red tape problem

Red tape is one of the primary factors restraining growth and prosperity in Australia. Research by the Institute of Public Affairs in May 2016 found red tape was costing the Australian economy \$176 billion each year, or 11 per cent of Gross Domestic Product (GDP), in foregone economic output.<sup>3</sup> The burden of red tape is incurred across all industries and results in a range of economic costs.

Several examples highlight how red tape discouraging domestic investment and major projects in Australia:

- The Roy Hill iron ore mine in the Pilbara required more than 4,000 separate licences, approvals and permits for the pre-construction phase alone;
- In a 2013 report, the Productivity Commission gave the example of a project which was required to meet 1,500 government imposed primary conditions, and 8,000 sub-conditions;
- The Adani coal mine in central Queensland has spent seven years in the approvals process, endured more than 10 legal challenges, and prepared a 22,000 page Environmental Impact Statement.<sup>4</sup>

Environmental law is a significant part of this regulatory framework. Adani's Carmichael Coal Mine and Rail Project in particular highlights how environmental laws are used to delay major projects. The environmental impact statement process was initiated by Adani in October 2010, but was not given initial approval by the federal environment minister until 24 July 2014. In August 2015, the project was delayed again when the Federal Court formally set aside the initial approval under the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act).

The EPBC Act is the largest and most significant piece of federal environmental law, currently spanning two volumes and 1,117 pages. The EPBC Act requires federal environmental approval where actions, such as a proposed development, are likely to have a 'significant impact' on listed protected species of flora and fauna. A forthcoming paper by the IPA's Darcy Allen calculates that the number of listed species of flora and fauna protected by the EPBC Act has grown by approximately 40 per cent since 2000, and now numbers approximately 1,900. As Allen explains, this is not without cost: expanding the list of protected flora and fauna delays projects and imposes duplication costs, as the states have their own protected flora and fauna lists.<sup>5</sup>

The provision relied on by the Federal Court in to overturn the initial approval of the Adani project was section 487 of the EPBC Act. Section 487 imposes significant red tape costs by extending special legal privileges to green groups to challenge federal environmental project approvals. A paper by the IPA's Daniel Wild in October 2016 found that since its introduction in 1999, section 487 has imposed \$1.2 billion in costs to the Australian economy.<sup>6</sup>

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3 Dr Mikayla Novak, 'The \$176 Billion Tax on our Prosperity' (Occasional paper, Institute of Public Affairs, 2016) <http://ipa.org.au/portal/uploads/The-176-Billion-Tax-On-Our-Prosperity.pdf>

4 Daniel Wild, 'Business Investment in Australia now Lower than under Whitlam' (Parliamentary Research Brief, Institute of Public Affairs, 2017).

5 Darcy Allen, 'Reform Directions for Threatened Species Listings' (Occasional paper, Institute of Public Affairs, unpublished).

6 Daniel Wild, 'Section 487 of the Environment Protection and Biodiversity Conservation Act: How Activists use Red Tape to Stop Development and Jobs' (Occasional paper, Institute of Public Affairs, 2016)

# Environmental regulation should be left to the states

If we take it as given that government should administer environmental regulations, the question is then which jurisdiction can impose it most effectively, while imposing minimal costs on business and development. One-size-fits-all centralised regulation can be an inappropriate approach and should be rejected in favour of environmental federalism.

Regulatory differences at different but equal jurisdictions is beneficial. Environmental federalism would mean states would be able to test their own regulatory systems and will be more likely to develop a set of rules appropriately tailored for that jurisdiction. Different rules being trialled simultaneously will enable the rules that best balance economic growth and environmental conservation to emerge. As Randy T Simmons wrote in *The Independent Review* in relation to federal species protection in the US, biodiversity protection efforts should be decentralised "to states and private organisations. Many competing answers are better than one, especially inasmuch as no one knows what the right answer is."<sup>7</sup>

There are number of benefits to devolving responsibility for environmental regulation. One benefit is that federalism enables the different jurisdictions to test the efficacy of new policies without imposing them on the whole country.

The appropriate use of decentralized environmental decision making can have further benefits. In a federal system, state and local governments have the opportunity to introduce new and innovative regulatory measures. They can serve as laboratories in which to conduct experiments that can provide valuable lessons on the potential of new approaches to public policy.<sup>8</sup>

A decentralised environmental regulatory system also reduces the capacity for rent-seeking. As Simmons explains with reference again to the US:

Environmentalists tend to push for centralized policies. If a preferred solution is imposed nationally, lobbyists do not have to deal with fifty state legislatures and the local interest groups of each state.<sup>9</sup>

Assuming environmental legislation is required, the ideal manner of environmental protection is still unknown. As Hayek explains, society suffers from a knowledge problem.<sup>10</sup> Only by trying multiple different sets of rules across multiple jurisdictions will political solutions arrive at the optimal point between protecting the environment and enabling economic growth.

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7 Randy T. Simmons, 'Fixing the Endangered Species Act' (1999) 3(4) *The Independent Review* 511, 512.

8 Oates, Wallace E. "Environmental Federalism." *Resources for the Future*, Policy Commentary, 21 September 2009 <http://www.rff.org/blog/2009/environmental-federalism-wallace-e-oates>

9 Simmons (1999), 524.

10 See for instance Friedrich Hayek, 'The Pretense of Knowledge' (1989) 79(6) *The American Economic Review*.

# Methodology and limitations

The measurement of environmental legislation over time was calculated by adding up the number of pages of legislation administered by federal environmental departments at multiple points in time. This information is collected in a series of Administrative Arrangements Orders, which lists each government department, the principal matters those department deal with and the legislation that department administers. These Orders are collected at the website of the National Archives of Australia.

The number of pages of that legislation is found predominantly at the Federal Register of Legislation, the official Commonwealth government archive of legislation and regulations.

To calculate the extent of total environmental legislation at a single point in time, each act of parliament had to be measured at that point in time. This would include the principal Act (the legislation as it was originally introduced) plus the effect of later amendments. The most efficient way to measure the size of a piece of legislation including amendments is to find a compilation version of the Act, which incorporates the amendments.

In this respect, the Federal Register of Legislation has a number of shortcomings. Compilations of some Acts in the 1990s and earlier are not available in a downloadable format. To calculate an approximate size of Acts in certain years, it was necessary to take the size of the principal legislation and add the size of substantial amending acts that were in force at that time. For example, at 24 July 1987, the Department of Arts, Sport, the Environment, Tourism and Territories administered the *Environment Protection (Impact of Proposals) Act 1974*. However, no compiled version of that law as at 24 July 1987 is available on the Register to download. To approximate the size of the *Environment Protection (Impact of Proposals) Act 1974*, the length of its most significant amendments (in 1975 and 1987<sup>11</sup>) have been added to the size of the principle 1949 Act to arrive at its approximate size at that point in time.

Our figures also include legislation administered by the Department of Climate Change (December 2007 to March 2010) and the Department of Climate Change and Energy Efficiency (March 2010 to March 2013) on the basis that their objectives were purely environmental in nature, but had been separated from the general environmental departments.

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<sup>11</sup> *Environment Protection (Impact of Proposals) Act 1975*; *Environment Protection (Impact of Proposals) Amendment Act 1987*.

# Conclusion

The extent of federal environmental law has grown significantly since 1971.

This economic burden must be reduced by repealing particularly burdensome laws such as section 487 of the *Environment Protection and Biodiversity Conservation Act 1999*.

The general administration of environmental regulations should also be devolved to the states. By decentralising regulation, the rules will be more likely to arrive at the optimal point between environmental protection and economic growth.

# Appendix A

Administrative Arrangements Orders give government departments responsibility for administering a list of legislation. This table lists the Administrative Arrangements Orders that were used in this report, and the calculated number of pages of legislation administered by those departments at that point in time.

Date of order	Name of department	Pages
31 May 1971	Department of the Environment, Aborigines and the Arts	57
6 March 1972	Department of the Environment, Aborigines and the Arts	59
20 December 1972	Department of the Environment and Conservation	94
2 October 1974	Department of the Environment and Conservation	81
10 February 1975	Department of the Environment and Conservation	97
1 July 1975	Department of Environment	173
22 December 1975	Department of Environment, Housing and Community Development	501
5 October 1976	Department of Environment, Housing and Community Development	415
20 December 1977	Department of Environment, Housing and Community Development	403
28 September 1978	Department of Environment, Housing and Community Development	441
12 September 1979	Department of Science and the Environment	253
3 September 1980	Department of Science and the Environment	287
3 November 1980	Department of Home Affairs and Environment	517
21 December 1981	Department of Home Affairs and Environment	626
7 May 1982	Department of Home Affairs and Environment	548
11 March 1983	Department of Home Affairs and Environment	496
1 July 1983	Department of Home Affairs and Environment	519
1 March 1984	Department of Home Affairs and Environment	564
13 December 1984	Department of Arts, Heritage and Environment	528
30 July 1985	Department of Arts, Heritage and Environment	551
30 January 1986	Department of Arts, Heritage and Environment	564
30 January 1987	Department of Arts, Heritage and Environment	613
24 July 1987	Department of the Arts, Sport, the Environment, Tourism and Territories	1498
4 March 1988	Department of the Arts, Sport, the Environment, Tourism and Territories	1632
13 March 1989	Department of the Arts, Sport, the Environment, Tourism and Territories	1806
3 July 1990	Department of the Arts, Sport, the Environment, Tourism and Territories	1808
31 January 1992	Department of the Arts, Sport, the Environment and Territories	1889
24 March 1993	Department of the Environment, Sport and Territories	1932
6 June 1994	Department of the Environment, Sport and Territories	1926
11 March 1996	Department of the Environment, Sport and Territories	2209
24 June 1998	Department of the Environment	1493
22 October 1998	Department of the Environment and Heritage	1650
26 November 2001	Department of the Environment and Heritage	2075
18 December 2003	Department of the Environment and Heritage	2458
27 October 2004	Department of the Environment and Heritage	2544
21 July 2005	Department of the Environment and Heritage	2480
21 September 2006	Department of the Environment and Heritage	2478

Table continued...

30 January 2007	Department of the Environment and Water Resources	3040
25 January 2008	Department of Climate Change (Part of the Prime Minister and Cabinet Portfolio)	211
	Department of the Environment, Water, Heritage and the Arts	3395
8 March 2010	Department of Climate Change and Energy Efficiency	251
	Department of the Environment, Water, Heritage and the Arts	3882
14 October 2010	Department of Climate Change and Energy Efficiency	420
	Department of Sustainability, Environment, Water, Population and Communities	3383
14 December 2011	Department of Climate Change and Energy Efficiency	492
	Department of Sustainability, Environment, Water, Population and Communities	3437
9 February 2012	Department of Climate Change and Energy Efficiency	1455
	Department of Sustainability, Environment, Water, Population and Communities	3347
18 September 2013	Department of the Environment	4871
23 Dec 2014	Department of the Environment	5004
9 July 2015	Department of the Environment	4143
1 Sept 2016	Department of the Environment and Energy	4669



