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# Common sense demands we take on green lawfare warriors

Comment

Josh Frydenberg

In 1974, Gough Whitlam's minister for the environment and predecessor to Bill Shorten in the seat of Maribyrnong, Dr Moss Cass, rose in the House of Representatives.

His task that day was to introduce new environmental impact procedures, which in his own words were "the most important piece of environmental legislation to be considered by the Parliament".

In developing these procedures, he said, "we have noted difficulties that have accompanied its use in the United States ... which result in too-frequent a resort to the courts".

The answer, he said, was a more targeted approach that would seek to "avoid these difficulties".

Just as practicality was then the order of the day, so to it should be now as we seek to improve the operation of the judicial review provisions in the Environmental Protection and Biodiversity Conservation (EPBC) Act.

The problem that we need to solve is simple: a growing number of major projects in Australia are being disrupted, frustrated and delayed by lengthy and costly legal battles over environmental approvals.

It's not that these project proponents and the federal government, as the national environmental decision maker, are not winning the overwhelming majority of cases, as they are; it is the rise of vexatious litigation and the damage that is being done in the process.

Months turn into years as engineers, mechanics and truck drivers wait for the call to start work on a new mine, port or road while the approval goes through another round of legal debate.

The numbers speak for themselves. Since the passage of the EPBC Act by the Howard government in 1999 there have been 43 third-party proceedings challenging the decision of the minister.

Thirty-four of these went to hearings, with the Commonwealth winning all but four cases and three leading only to subsequent amendments, in two cases quite minor.

In 26 of the proceedings, costs were awarded in favour of the Commonwealth, more than four times the incidence of costs being awarded against it.

In these cases, more often than not the litigants were not seeking the addition or strengthening of a specific condition in the approval; rather, they were objecting to the project itself. No condition could be imposed to satisfy them.

In a document titled *Stopping the Australian Coal Export Boom*, the real intentions of these activist groups were revealed. It encourages activists to "get in front of these critical projects to slow them down in the approval process" and use legal challenges to "delay them in order to buy time to build a much stronger movement ... increase costs, raise investor uncertainty and create a powerful platform for public campaigning".

The cost of these tactics is enormous, with a BAE Economics study showing that a reduction of one year in project delays would boost the economy by $160 billion by 2025 and create 69,000 jobs, predominantly in regional Australia.

No surprise then, that former Queensland Labor treasurer of seven years standing Keith De Lacy said last year that the cost of developing a mine had increased tenfold due to green activist groups. He said that a development that took just over a year in 2008 would now take up to five years.

For this reason, he said, "I agree with everything the federal government is doing".

This is why the Coalition – which has already established one-stop shops for environmental assessments, reduced approval times by up to 50 per cent and approved more than $1 trillion worth of projects – wants to go one step further.

Last year, the Coalition sought to redefine the categories of individuals and organisations that would have standing to seek judicial review under the EPBC Act by reverting to the standard definition under federal law where a direct interest is required.

The definition now grants standing to any Australian citizen, or resident, or an organisation that is incorporated or established in Australia who can show that in the two years prior to the decision in question that they had been engaged in the protection/conservation of or research into the environment. It is too broad.

It goes further than similar provisions in other pieces of legislation, including the Administrative Decisions (Judicial Review) Act, the Judiciary Act and the Biodiversity Act.

This is why the complete repeal of section 487 as originally proposed remains on the table, but at the same time alternatives need to be explored.

These could include an early and speedy hearing within 60 days of filing a challenge to an EPBC claim to let the court decide whether the challenge has merit; and a codification of what is known as the Shree Minerals defence, whereby administrative errors alone cannot invalidate a decision.

These ideas and others could be the start of a constructive conversation with the opposition and crossbenchers on how we can find a better way.

At the same time, it is important that Labor be exposed for the straw man arguments it continues to make.

The opposition spokesman on the environment, Tony Burke, has said changing the EPBC Act makes it "possible for an environment minister to ignore the impact on" the Great Barrier Reef, "a threatened species like the koala" or "an endangered wetland".

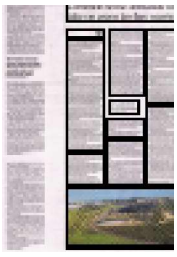
This is simply not the case, as these are clearly covered by the nine matters of environmental significance the minister needs to take into account as laid out under the act.

Tony Burke has also said such changes to the act would create a situation where "a minister for the environment makes an illegal decision [and] they want it to be able to stand".

He should know from this own experience that this is not the case.

As environment minister in 2012, Burke approved an open-cut iron ore mine in the Tarkine Region in Tasmania, only for the decision to be declared void by the court for his failure to appropriately consider conservation advice regarding the Tasmanian Devil, a listed threatened species.

Burke rightly acknowledges that this was



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more an error of paperwork than a substantive mistake, but then goes on in a fit of rage to attack the government's handling of the Carmichael case.

The problem for Burke is that what happened in Carmichael was virtually the same situation as in Shree, except this time it was the fabled Yakka Skink and Ornamental Snake, and the failure of the minister's department to provide him the relevant documents.

When the documents were subsequently considered, there was no change to the outcome of the initial decision. This was always a legal game with no relevance to genuine environmental considerations.

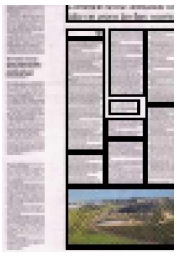
The rest of the extensive delays in the Adani case were caused by a barrage of litigation launched by the project's opponents in state and federal courts.

We must not allow misleading and polemic arguments from the opposition to distract us from the real challenge: namely, to protect our environment with the most rigorous standards while encouraging and welcoming investment as a means to national jobs and wealth creation.

These objectives need not be mutually exclusive. But only if the Coalition, Labor and crossbenchers seek and find common ground can we improve the system and alleviate some of the challenges we face.

*Josh Frydenberg is the federal Minister for the Environment and Energy.*

*These ideas and others could be the start of a constructive conversation.*



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