

Lawfare, Standing and Environmental Discourse: A Phronetic Analysis

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Abstract

The Adani Carmichael Coal Mine in the Galilee Basin of Queensland is one of the largest open cut coalmine proposals in the world. The development approval process for the mine has been deeply contentious, with opposition raised by environmental, farming and indigenous groups. Federal government approval of the mine has been successfully challenged in the Federal Court through judicial review. This led to a reconsideration and subsequent re-approval of the project, combined with the Federal Government proposing statutory changes to standing rules to restrict the capacity of civil society groups to bring judicial review actions. Given the broad standing provisions for judicial review that have been present in the Environment Protection and Biodiversity Conservation Act (Cth) ('EPBC Act') since its inception in 1999, what are the reasons behind this proposal for significant change in Australian environmental law? Drawing on phronetic legal enquiry methodology, this article provides a case study of the ways in which societal discourses intersect with law and political economy in shaping the ability of civil society to challenge the approval processes for major resource projects. This case study shows that the Federal Government's agenda to reduce standing under the EPBC Act represents a decisive attempt to assert power and control by reducing the capacity of dissentients to oppose economic development. In doing so, this case study highlights the value of phronetic legal inquiry as methodology for analysing processes of change, and attempted change, in law.

*'Whichever way you look at it, this little black rock provides many benefits to our economy, wages, infrastructure and everyday lifestyle. And it can now reduce its emissions by up to 40 per cent.'*¹

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¹ Coal. *It's an Amazing Thing*. <littleblackrock.com.au>.

*'Coal fired power plants are the biggest source of man-made CO2 emissions. This makes coal energy the single greatest threat facing our climate.'*²

*'I may live nowhere near the Liverpool Plains or the Great Barrier Reef. But I sure as hell am concerned they are protected. ... The latest move by the Abbott government puts at risk not just our environment but our very democracy.'*³

Keywords

Environmental Discourse; Environmental Law; Judicial Review; Phronetic Analysis; Standing

I INTRODUCTION

Biographies are not infrequently the genesis of scholarship, for the personal, as Carol Hanisch famously wrote, is political.⁴ In this paper, the authors – both of whom are legal scholars, who have lived most of their lives in Newcastle – were drawn to the problem arising out of the recent (failed) attempt by the present Liberal Coalition government to pass law abolishing the right of third party standing to challenge development approvals in the context of large-scale coal mining. The intersection of coal, law and our identities as 'Novocastrians', inspired a curiosity to inquire as to why third party standing rules, legislated nearly twenty year earlier by a previous Liberal Coalition government, had now been problematised to such an extent that the executive had recently sought their repeal. What has happened that the liberal principle of 'accountability of government' has shifted into a discourse of 'lawfare'? In the context of the relationship between the law and politics of climate change, these are critical questions.

Our initial thoughts on this were necessarily personal and experiential. We were more than familiar with the common sights of coal ships and coal trains moving in and out of the city.⁵ We had lived in a region where a significant local economy relied on mining, in both open cut and

² Greenpeace International, #Coal

<<http://www.greenpeace.org/international/en/campaigns/climate-change/coal/>>.

³ Lisa Cox, "'Quite Simply Unbelievable': Alan Jones Fronts Ad Campaign Opposing Abbott Government Plan", *Sydney Morning Herald* (online) 7 September 2015 <<https://www.smh.com.au/politics/federal/quite-simply-unbelievable-alan-jones-fronts-ad-campaign-opposing-abbott-government-plan-20150907-gjgkph.html>>.

⁴ Carol Hanisch, 'The Personal is Political' in Shulie Firestone and Anne Koedt (eds), *Notes from the Second Year: Women's Liberation* (Radical Feminism, 1970).

⁵ Newcastle, New South Wales, is one of the largest coal exporting ports in the world. In any given year hundreds of ships move in and out of the port. The rail infrastructure of the Hunter Valley is crisscrossed with links to mine sites, with coal trains exceeding 100 carriages not uncommon. For an overview, see Port Authority of New South Wales, *Newcastle Harbour*, <<https://www.portauthoritynsw.com.au/newcastle-harbour/>>.

underground forms. We knew the towns around the Hunter Valley that were totally dependent on mining, and we had relatives and friends directly employed in mining, or one of its attendant industries. But we also knew that opinions on coal mining had changed over time,⁶ and that the open conflict over working conditions that used to characterise mining protest⁷ had now shifted to more complex issues, including environmental concerns, greenhouse gas emissions,⁸ conflicts over land use between mining, farming, horse breeding and the wine industries,⁹ and the problem of high-profile corruption allegations involving corporate executives and state politicians.¹⁰

As legal scholars, our initial focus of research came to a rapid conclusion. A 'pure', doctrinal ('black letter') analysis of the law could not answer wider questions as to why third party standing law needed to be repealed, or what the forces were that were shaping the debate. These were necessarily discursive rather than legal questions. From the position of doctrinal legal analysis, there was no apparent issue, as the rule structures governing standing are operative and well developed. It was clear that doctrinal analysis was not able to capture the range of issues existing outside of the rule structures, but necessarily shaping them. What was needed was an interdisciplinary approach, sensitive to the linkages between societal discourse, law and power. Drawing upon our recent

⁶ See eg Nick Higginbotham et al, 'Environmental Injustice and Air Pollution in Coal Affected Communities, Hunter Valley, Australia' (2010) 16(2) *Health and Place* 259; Editorial, 'Land Use Conflicts on the Rise', *Newcastle Herald* (online) 21 October 2014 <<http://www.theherald.com.au/story/2640012/editorial-land-use-conflicts-on-the-rise/>>.

⁷ Industrial action in the Hunter coalfields was common, particularly in the 1920s. The Rothbury Riot is still a part of local legend, with a memorial devoted to the riot and to Norman Brown – a striking coal miner killed by police in 1929 – located close to the scene of the Rothbury lockout. See Miriam Dixon, 'Rothbury' (1969) 17 *Labour History* 14; Richard Evans, 'Murderous Coppers' (2012) 9(1) *History Australia* 176; James Bennett, Nancy Cushing and Erik Eklund (eds), *Radical Newcastle* (NewSouth Books, 2015).

⁸ Greenpeace and community activist group 'Rising Tide' have taken direct and legal action against the coal industry in Newcastle on several occasions. See *Haughton v New South Wales* [2011] NSWLEC 217; *DPP v Fraser* [2008] NSWSC 244; Alison Branley, 'Rising Tide Activists Win', *Newcastle Herald* (online) 3 March 2011 <<http://www.theherald.com.au/story/467306/rising-tide-activists-win/>>; ABC News, *Police Trying to Block Newcastle's Oldest Port* (28 March 2010) <<http://www.abc.net.au/news/2010-03-28/protesters-trying-to-block-newcastles-coal-port/383074>>.

⁹ Michelle Harris, 'Mining Hits Back at Thoroughbred Horse Breeding Industry', *Newcastle Herald* (online) 9 April 2015 <<http://www.theherald.com.au/story/3001540/mining-hits-back-at-thoroughbred-horse-breeding-industry/>>; Sophie Frazer, *Maintaining Diversity in the Hunter Valley Landscape* (24 October 2014) ABC Open <<https://open.abc.net.au/explore/80774>>.

¹⁰ Operation Jasper, for example, saw adverse corruption findings made by the Independent Commission Against Corruption in NSW against a number of politicians in that state, including Mr Edward Obeid, and a number of business associates, including Mr Travers Duncan. See, eg, *Duncan v Ipp* [2013] NSWSC 314; *Duncan v Ipp* [2013] NSWCA 189; *Duncan v New South Wales*; *NuCoal Resources Limited v New South Wales*; *Cascade Coal Pty Limited v New South Wales* [2015] HCA 13; *Obeid v Ipp* [2016] NSWSC 1376.

work on sociolegal methodology, and our own doctoral work on the various ways in which discourse shapes law,¹¹ we began by selecting a rich case study that would allow us to explore both the standing provisions of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act'), and the complex array of discourses intersecting with the law. Here we selected the proposed Adani Carmichael Coal Mine in Queensland as the exemplar, and decided to apply the phronetic approach to this case study.

The proposed Adani Carmichael Coal Mine provides a recent and very sharp example of the kind of conflicts that now arise over coal mining in Australia. The proposed mine, located in the coal-rich Galilee Basin of Central Queensland, will be situated 160 km north-west of Clermont. When initially proposed, the Environmental Impact Statement (EIS) for the project estimated the mine would involve a minimum AUD16.5 billion investment, with a lifespan of 60 years, and a capacity to produce more than AUD2 billion worth of coal annually, with production estimated at an average 60 million tonnes per annum.¹² The area of the proposed mine is enormous, estimated at 44 000 hectares of land, including open-cut and underground mines, large waste dumps and tailing dams. The infrastructure requirements for the mine are extensive, including 189 kilometres of rail, most of which would be publicly financed.¹³ Following widespread public protest about the links between coal and climate change, and the cost to the public, in late 2018 Adani announced a major reduction in the intended scale of the operation to an AUD2 billion investment, wholly self-funded. The stated intention was to downsize the opening scale of the project, but then expand production over time.¹⁴

¹¹ Brendon Murphy, *Zone of Impeachment: A Post-Foucauldian Analysis of Controlled Operations Law and Policy* (PhD Thesis, University of Newcastle, 2015); Jeffrey McGee, *The Asia-Pacific Partnership and Contestation for the Future of the International Climate Regime* (PhD thesis, Macquarie University, 2010).

¹² Department of State Development, Manufacturing, Infrastructure and Planning, Queensland Government, *Environmental Impact Statement: Carmichael Coal Mine and Rail Project* <<https://www.statedevelopment.qld.gov.au/assessments-and-approvals/carmichael-coal-environmental-impact-statement.html>>.

¹³ Full disclosure and commentary available at Adani Mining, *Executive Summary* (Report) <<http://eisdocs.dsdp.qld.gov.au/Carmichael%20Coal%20Mine%20and%20Rail/EIS/EIS/Project%20Wide/executive-summary-project-wide.pdf>>.

¹⁴ Michael Slezak, *Adani Says a Scaled-Down Version of its Carmichael Coal Mine Will Go Ahead; Environmentalists Express Scepticism* (29 November 2018) ABC News <<https://www.abc.net.au/news/2018-11-29/adani-carmichael-coal-mine-go-ahead-plans-to-self-fund/10567848>>; Mark Ludlow, 'Adani Moves to Slash Costs to Get Carmichael Mine Across the Line', *Financial Review* (online), 13 September 2018 <<https://www.afr.com/news/politics/adani-moves-to-slash-costs-to-get-carmichael-mine-across-the-line-20180913-h15b2l>>; EDO Queensland, *Latest Adani Carmichael Mine and Rail Project News* (27 September 2018) <https://www.edoqlld.org.au/update_adani_mine_project>.

The number of jobs the project will create is not clear. Initial estimates of the proponent suggested 10 000, but this was revised after complaints were made to the Australian Securities Exchange that the figure was inflated.¹⁵ The current EIS estimates 2 475 jobs during the construction phase and 3 800 jobs during operation.¹⁶ It is estimated that by 2021, the mine will generate over AUD900 million in economic activity for the Mackay regional economy, and in excess of AUD2.9 billion for the wider Queensland economy.¹⁷ Despite the potential economic benefits, the mine proposal has been strongly opposed by a number of civil society groups, largely on environmental grounds. This opposition has taken several forms, including direct action, political lobbying and legal challenges. Consequently, the Adani project is a rich field for exploring the intersections between societal discourses and power.

In this article, we examine some of the intersections between legal doctrine and policy in the field of environmental law, using the societal discourses surrounding the Adani Carmichael mine proposal as the exemplar. From the outset, it is important to emphasise that this article is not so much concerned with the Adani project, as with the complex ways in which discourses shape law and public policy and the deployment of a methodology adapted to that application. We begin by setting out components of the methodology employed in this case. Our methodology draws on the work of the founder of phronetic research in the social sciences, Bent Flyvbjerg¹⁸, and our own extension of this approach to legal research.¹⁹ In doing so, we explain some of the core aspects of phronetic legal research and its application in this example. We then turn

¹⁵ Jorge Branco, 'Adani Carmichael Mine to Create 1464 Jobs not 10 000', *Brisbane Times* (online), 28 April 2015 <<http://www.brisbanetimes.com.au/queensland/adani-carmichael-mine-to-create-1464-jobs-not-10000-20150428-1mumbg.html>>; Lucy Cormack and Lisa Cox, 'Complaint Lodged with ASX Over Adani Job Claims for Carmichael Mine', *Sydney Morning Herald* (online), 13 May 2015 <<http://www.smh.com.au/business/mining-and-resources/complaint-lodged-with-asx-over-adani-job-claims-for-carmichael-mine-20150513-gh0tbl.html>>; Rod Campbell, 'Fact Check: Will Adani's Coal Mine Really Boost Employment by 10 000 Jobs?', *Business Spectator* (online), 31 August 2015 <<http://www.businessspectator.com.au/article/2015/8/31/policy-politics/fact-check-will-adanis-coal-mine-really-boost-employment-10000>>.

¹⁶ Coordinator General, Department of State Development, Infrastructure and Planning, *Carmichael Coal Mine and Rail project: Coordinator-General's Evaluation Report on the Environmental Impact Statement* (Report, May 2014) 205.

¹⁷ *Ibid* x.

¹⁸ Bent Flyvbjerg, *Making Social Science Matter: Why Social Inquiry Fails and How It Can Succeed Again*, tr Steven Sampson (Cambridge University Press, 2001); Bent Flyvbjerg, Nils Bruzelius and Werner Rothengatter, *Megaprojects and Risk: An Anatomy of Ambition* (Cambridge University Press, 2003); Bent Flyvbjerg, 'Five Misunderstandings About Case-Study Research' (2006) 12(2) *Qualitative Inquiry* 219; Bent Flyvbjerg, 'Case Study' in Norman Denzin and Yvonna Lincoln (eds), *The Sage Handbook of Qualitative Research* (SAGE, 4th ed, 2011) 301; Bent Flyvbjerg, Todd Landman and Sanford Schram (eds), *Real Social Science: Applied Phronesis* (Cambridge University Press, 2012).

¹⁹ Brendon Murphy and Jeffrey McGee, 'Phronetic Legal Inquiry: An Effective Design for Law and Society Research?' (2015) 24(2) *Griffith Law Review* 288.

to the doctrinal law operating in this case, namely the standing provisions in s 487 of the EPBC Act, and its associated relationship with the *Administrative Decisions (Judicial Review) Act 1977* (Cth). In part three, we then analyse the discourses linked to the Adani Carmichael mine proposal and how this is manifest in wider law and policy debates over reform of the law on standing under s 487 of the EPBC Act. Drawing on discourse theory,²⁰ we identify the main features of the contesting policy discourses surrounding efforts to repeal the extended standing provision of s 487. Finally, in part four, in drawing on the rich empirics of the s 487 reform debate, we discuss how phronetic legal enquiry offers a methodology that extends our understanding of the relationship between legalities and their underlying policy and political economy in ways that traditional doctrinal legal analysis cannot.

A The Adani Carmichael Coal Mine Exemplar

In Australian law, approvals for new coal mining projects are primarily in the hands of the relevant state government under state environmental, planning and pollution legislation.²¹ This is the case even when land is privately owned. However, if a proposed mine will likely have an impact upon a matter of ‘national environmental significance’,²² it will also trigger operation of the EPBC Act and must receive approval from the Commonwealth Minister for the Environment.²³ Because the Adani Carmichael mine project will likely have an impact on several matters of national environmental significance, it required approvals from both the Commonwealth and Queensland governments. In addition to the significant infrastructure investment outlined above, the Adani Carmichael mine proposal included an application for a Queensland water licence to draw 12.5 gigalitres of water per year from the Belyando River, together with stated intent to also draw on subterranean water.²⁴ The impact on water is likely to be very significant. Adani’s own estimate indicated a reduction in the water table at the open cut mine site ‘in excess of 300 [metres]’, with groundwater reduction in surrounding areas ranging between one and four metres.²⁵ Water resources impacted by large coal mining developments are listed as a ‘matter of national environmental significance’.²⁶ The proposed mine site was also identified

²⁰ John Dryzek, *Politics of the Earth: Environmental Discourses* (Oxford University Press, 2005).

²¹ In Queensland, this is determined pursuant to the *Environmental Protection Act 1994* (Qld).

²² EPBC Act ch 2 pt 3.

²³ EPBC Act ch 2.

²⁴ Adani Mining, *Carmichael Coal Mine and Rail Project: Supplementary Environmental Impact Statement Volume 4, Appendix C4e – Application to Take Water from the Belyando River* (Environmental Impact Statement).

²⁵ Adani Mining, *Carmichael Coal Mine and Rail Project: Report for Mine Hydrogeology* (Report, 13 November 2013) 102.

²⁶ EPBC Act s 24D.

as straddling koala and echidna habitat, as well as being the location of several endangered animal and plant species. Federally listed protected species are also matters of national environmental significance under the EPBC Act.²⁷

In addition to these issues, concerns were raised about the contribution that coal from the mine will make (when used) to anthropogenic climate change over the 60-year life of the mine.²⁸ Carbon dioxide from coal combustion will remain in the atmosphere for hundreds of years, so will contribute to global warming for a period well beyond the mine's production life. Finally, concerns were raised by the Wangan and Jagalingou indigenous peoples that the mine would 'devastate their ancestral lands and waters, totemic animals and plants, and cultural heritage'.²⁹

It is therefore no surprise that the Adani Carmichael mine proposal has been the subject of several legal challenges. The mine proposal has been before the Native Title Tribunal on multiple occasions.³⁰ Those applications have so far been unsuccessful, but have escalated to the Federal Court,³¹ and may proceed to the High Court in due course. The mine proposal was subject to a judicial review application in the Federal Court by the Queensland Environmental Defenders Office (QEDO) in 2015. In the end, consent orders were made on 4 August 2015 that EPBC Act approval for the Adani Carmichael coal mine had been made in error, due to a failure on the part of the then Minister for Environment (The Hon Gregory Hunt) to properly consider material relating to the impact of the proposed mine on endangered species.³² It was accepted by the Commonwealth that in making a decision to approve the mine, Minister

²⁷ EPBC Act ch 2 pt 3 sub-div C.

²⁸ Figures vary, depending on the intensity of the burn and the concentration of carbon in coal deposits. The Energy Information Administration (US) estimates that 1 tonne of coal will produce, on average, 2.8 tonnes of CO₂. If the expected volume of coal from the mine is two billion tonnes, this when burnt would equate to at least 5.6 billion tonnes (i.e. six gigatonnes) of carbon dioxide equivalent. See B D Hong and E R Slatick, *Carbon Dioxide Emission Factors for Coal* (1994) US Energy Information Administration <https://www.eia.gov/coal/production/quarterly/co2_article/co2.html>.

²⁹ Lisa Cox, 'Native Title Battle Shaping Up Over Adani Coal Mine' *Sydney Morning Herald* (online) 26 March 2015 <<http://www.smh.com.au/federal-politics/political-news/native-title-battle-shaping-up-over-adani-coal-mine-20150326-1m8esn.html>>.

³⁰ *Adani Mining Pty Ltd v Burragubba* [2015] NNTTA 16; *Adani Mining Pty Ltd and Diver and Queensland* [2013] NNTTA 52; *Adani Mining Pty Ltd and Diver and Queensland* [2013] NNTTA 30; *Burragubba v Queensland* [2016] FCA 984.

³¹ *Kempier v Queensland* [2017] FCA 902; *Kempier v Adani Mining Pty Ltd* [2018] FCA 105; *Kempier v Adani Mining Pty Ltd (No 2)* [2017] FCA 1086; *Kempier v Adani Mining Pty Ltd (No 3)* [2018] FCA 40; *Kempier v Adani Mining Pty Ltd (No 4)* [2018] FCA 1245; *Miller v Queensland* [2016] FCA 271; *Lampton v Queensland* [2014] FCA 736; *Burragubba v Queensland* [2016] FCA 1525; *Juru Enterprises Ltd v Adani Australia Company Pty Ltd* [2018] FCA 870; *Burragubba v Queensland* [2017] FCA 373.

³² *Mackay Conservation Group v Commonwealth* (Federal Court of Australia, NSD33/2015).

Hunt had failed to consider information in possession of the Commonwealth relating to likely impacts upon two species of fauna, the yakka skink and the ornamental snake.³³ The result was the EPBC Act approval was overturned. The result of these Federal Court judicial review proceedings was publicly criticised by Northern Queensland conservative Federal MP, the Hon George Christensen, who called for the Federal Environment Minister to expedite a reconsideration of the Adani Carmichael mine proposal.³⁴ On 15 October 2015, Federal Ministerial approval for the mine was provided addressing these concerns.³⁵ This decision was also the subject of a further judicial review application in the Federal Court by the Australian Conservation Foundation ('ACF'), for an alleged failure by the Minister to consider the impact of the mine on driving climate change and thereby causing damage (such as coral bleaching) to the world heritage listed Great Barrier Reef.³⁶ A key aspect of this case was the 'water trigger' impact provisions arising under s 527E of the EPBC Act. The case itself is significant, because of the detailed way in which the court was asked to consider evidence of climate change as part of the proceedings. In the end, the application for judicial review was dismissed³⁷ and the ACF was required to pay a substantial costs order.³⁸

B An Agenda to Restrict Third Party Standing

In the wake of these proceedings, the federal government publicly criticised the capacity of 'green groups' to oppose large-scale developments in the courts, describing the 'tactic' of legal opposition by 'radical green groups' as 'vigilante litigation'³⁹ and 'lawfare'.⁴⁰ The

³³ *Approval of Adani's \$16 Billion Carmichael Mine in Queensland's Galilee Basin Set Aside by Federal Court* (6 August 2015) ABC News <<http://www.abc.net.au/news/2015-08-05/federal-court-overturms-approval-of-adani's-carmichael-coal-mine/6673734>>; Primrose Riordan, 'Federal Court Intervenes Over Adani "Lawfare"' *Financial Review* (online) 9 August 2015 <<http://www.afr.com/news/federal-court-intervenes-over-adani-lawfare-20150819-gj2w2q>>.

³⁴ 'Adani Mine Decision: Federal Court Ruling Shifts Environmental Approval Goal Post, MP Says' (7 August 2015) ABC News <<http://www.abc.net.au/news/2015-08-06/adani-decision-court-shifted-goal-posts-christensen/6676450>>.

³⁵ Minister for the Environment, Greg Hunt MP, 'Carmichael Coal Mine and Rail Infrastructure Project' (Media Release, 15 October 2015) <<http://www.environment.gov.au/minister/hunt/2015/pubs/mr20151015.pdf>>.

³⁶ Jessica von Vonderen, 'Australian Conservation Foundation challenges Adani Carmichael Coal Mine in Federal Court' (9 November 2015) ABC News <<http://www.abc.net.au/news/2015-11-09/adani-mine-australian-conservation-foundation-court-challenge/6923598>>.

³⁷ *Australian Conservation Foundation v Minister for the Environment* [2016] FCA 1042. It is worth noting that standing was not an issue in this case.

³⁸ *Australian Conservation Foundation v Minister for the Environment (No 2)* [2016] FCA 1095.

³⁹ Attorney-General, George Brandis MP, 'Government Acts to Protect Jobs from Vigilante Litigants' (Media Release, 18 August 2015) <<https://www.attorneygeneral.gov.au/MediaReleases/Pages/2015/ThirdQuarter/18-August-2015-Government-acts-to-protect-jobs-from-vigilante-litigants.aspx>>.

federal government also proposed legislative change to restrict the standing of members of the public to bring similar judicial review proceedings in federal courts. Then Attorney-General, the Hon George Brandis, released a press statement on 18 August 2015, stating:

The government has decided to protect Australian jobs by removing from the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) the provision that allows *radical green activists* to engage in *vigilante litigation* to stop important economic projects. ...Section 487 of the EPBC Act provides a *red carpet for radical activists* who have a *political, but not a legal interest*, in a development to use aggressive litigation tactics to *disrupt and sabotage* important projects. ... The activists themselves have declared that that is their objective – to *use the courts not for the proper purpose* of resolving a dispute between citizens, but for a *collateral political purpose* of bringing developments to a standstill, and sacrificing the jobs of tens of thousands of Australians in the process... (emphasis added).⁴¹

The government wasted no time in introducing to Parliament the *Environment Protection and Biodiversity Conservation Amendment (Standing) Bill* ('the repeal Bill'), which had the sole purpose of repealing s 487 of the EPBC Act.⁴² The repeal Bill was referred to the federal Senate for consideration and approval on 14 September 2015.⁴³ It was subsequently referred to the Senate Environment and Communications Legislation Committee and public submissions invited on its merits and substance. The repeal Bill remained in Committee through the remainder of 2015, but eventually lapsed in April 2016, when Parliament was prorogued.⁴⁴

However, the agenda motivating the repeal Bill's introduction has not disappeared in the wake of this prorogation of Parliament. In October 2016, the then Prime Minister, the Hon Malcolm Turnbull, indicated that the proposed changes to the EPBC remained government policy. However, the policies linked to it have expanded and transformed to include a review of the funding mechanisms which civil society groups use for legal challenges. Changes to the EPBC Act have therefore morphed to include notions of amendments to taxation and charity laws that would remove or restrict the tax-exempt status of some NGOs

⁴⁰ Riordan, above n 33.

⁴¹ Brandis, above n 39.

⁴² Commonwealth, *Parliamentary Debates*, House of Representatives, 20 August 2015, 8987 (Hunt).

⁴³ Commonwealth of Australia, *Parliamentary Debates*, Senate, 14 September 2015, 65 (Ryan).

⁴⁴ Sophie Power and Juli Tomaras, *Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015*, No 37 of 2015-16, 3 November 2015; Parliament of Australia, *Environment Protection and Biodiversity Conservation Amendment (Standing) Bill* 2015

<http://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=r5522>.

involved in climate litigation.⁴⁵ The result is a distinction the federal government wishes to make between ‘legitimate conservation’ work and the ‘political activism’ of NGOs.⁴⁶ It appears that the repeal of s 487 forms part of a larger federal government agenda aimed at limiting, or preventing, the capacity of environmental groups problematised as ‘vigilante’ to challenge major resource development projects by removing their statutory standing and the financial resources needed for large-scale litigation.

By proposing to repeal s 487, the federal government is seeking to make a major alteration in the character of Australian environmental and administrative law to seriously restrict the capacity of the public and civil society to challenge the legality of decisions made about developments. This represents a significant retreat from the widening of standing that had been characteristic of Australian administrative and environmental law since the late 1970s. In an attempt to understand the political economy of this example, and its associated legal character, we deployed phronetic legal research as our methodology.

II PHRONETIC LEGAL RESEARCH

Recently, the authors articulated a methodology for socio-legal research we termed *legal phronesis*.⁴⁷ This method is an adaptation of Flyvbjerg’s case-study model, published in *Making Social Science Matter*.⁴⁸ Legal phronesis is an adaptation of this methodology, in that we advocate for the retention of the core doctrinal analytic which is the essential component of legal research method, but extend that research focus beyond the boundaries of legal rules (as contained in legislation, cases and treaties) to interrogate empirical elements relating to the formation, change in, and effects of law that are external to its doctrinal aspects. This approach to law and society research deploys a constructionist epistemology to inform a legal phronetic methodology. This methodology informs a doctrinal and discourse analysis technique, ultimately based on a case study and documentary analysis as its core research and analytical practice.⁴⁹ The result is a theoretical framework sensitive to the technical, epistemic and normative components of law, as well as its sociological dimensions, and particularly the power dynamics present in the phenomena being examined.

⁴⁵ Dennis Shanahan, ‘Turnbull Moves to Shut Court Doors on Anti-Coal Activists’, *The Australian*, 25 October 2016, 6; Dennis Shanahan, ‘Activists Must Come Clean on Foreign Funds’, *The Australian*, 26 October 2016, 5; Kerri-Anne Mesner, ‘PM Says ‘Lawfare’ Legislation Back on the Agenda’, *The Morning Bulletin* (Rockhampton, Australia), 28 October 2016, 7.

⁴⁶ ‘Donation Rethink for Green Activist Groups’, *Courier Mail* (Brisbane), 12 April 2017, 14.

⁴⁷ Murphy and McGee, above n 19.

⁴⁸ Flyvbjerg, *Making Social Science Matter*, above n 18.

⁴⁹ Michael Crotty, *The Foundations of Social Research* (Allen and Unwin, 1998) 2-5.

This is a research design necessarily interested in case study, particularly of unusual or significant events. The current push to repeal third party standing provisions is unusual, as there is no significant evidence in the doctrinal legal literature that justifies repeal of s 487. This approach offers a deeper understanding of the subject than traditional legal scholarship, because it sensitises the analysis to the driving power dynamics outside the rule structures. The federal government reform agenda to repeal s 487 is an unusual event, given the substantial public support for government accountability and expanded standing rules, and (as discussed later) the undoubted economic bias of the public submissions in favour of its repeal. To understand this case study, legal scholarship must go beyond the doctrinal logics of the legislation and previous court decisions⁵⁰ and engage with the wider societal processes driving the reform agenda, hence our use of Flyvbjerg.

There are, of course, many ways of tackling a subject of this kind. The very word ‘discourse’ invites a multitude of problems and methods. At the very least, the central problem is there are different theories as to what ‘discourse’ means: in effect, there is now something of a ‘discourse of discourse’. These theories often overlap and/or draw from one another. For example, Foucault certainly popularised the term, but his approach to discourse analysis is complex and totalising in the sense that knowledge systems, discourse and power are inseparable and largely governed by an overarching ‘episteme’ that shapes social understanding of an issue in a given historical period.⁵¹ Habermas also uses the concept of discourse in his writing, but his focus draws on the linguistic philosophy of Searle and Austin to propose a normative model for the public sphere based on the rational exchange of ideas.⁵² More recently, Dryzek also uses discourse analysis, although his work is more concerned with charting the argumentative process of contestation between discourses which shapes social understanding of policy fields.⁵³

Why, then, did we deploy something else? The answer lies in the distinction between technique and framework for interpretation. Our purpose was to adopt a model that simply allowed us to identify, systematically, the core themes of contestation relevant to a discussion on law and policy. Our purpose was not to engage in detailed structural

⁵⁰ For a scholarly, but otherwise traditional, legal analysis of s 487 and judicial review, see Matthew Groves, ‘The Evolution and Reform of Standing in Australian Administrative Law’ (2016) 44 *Federal Law Review* 167.

⁵¹ See, eg, Michel Foucault, *The Archaeology of Knowledge* (Alan Sheridan Smith trans, Routledge, 2003) [trans of: *L'Archeologie Du Savoir* (first published 1972)]; Michel Foucault, ‘Questions of Method’ in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality* (Harvester Wheatsheaf, 1991) 73-86.

⁵² Jurgen Habermas, *Between Facts and Norms* (Polity Press, 1996). For a general overview, see Stephen White (ed), *The Cambridge Companion to Habermas* (Cambridge University Press, 1995).

⁵³ Dryzek, above n 20.

analysis of the rationalities themselves. That potential remains, but it is properly beyond the scope of this paper.

Phronetic methodology⁵⁴ is guided by four key questions directed at descriptive, analytical and normative concerns:

- 1) Where are we going within the field of enquiry?
- 2) Who gains, and who loses, by which mechanisms of power?
- 3) Is it desirable?
- 4) What should be done?⁵⁵

There is a merger in this methodology between techniques, assumptions, and underlying theoretical foundations, notably of Habermas and Foucault.⁵⁶ Central to this methodology is the sensitive place of values and power in the research. These are regarded as critical aspects of phronetic inquiry because they are often overlooked in social science and legal research, but are fundamental components of social life and institutional relations.⁵⁷

Both of these concepts require further elaboration. Broadly, the idea of values is located within ethical philosophy, psychology and sociology, and is essentially concerned with desire, the perception of right, and an associated willingness to act to promote or defend the subject of the value.⁵⁸ In some instances, value-laden decisions direct action, even when those actions defy logic, norms or the interests of the actor. Weber suggests that human social action is often ‘determined by a conscious belief in the value for its own sake of some ethical, aesthetic, religious, or other form of behaviour, independent on its prospects of success’.⁵⁹ However, Weber also argues that value-based decisions can be not only intellectually driven by the promotion of certain values, but *affective* and emotionally driven, as well as habitual. In this way, values may impact on decision-making in ways that service the intellectual, unconscious and social position of the actor. And because values can be so strong on some topics, they can result in an *affective* rather than purely *rational* decision. The semantic meaning of ‘value’ attests to a social and psychological

⁵⁴ Broadly, Flyvbjerg articulated nine principles in phronetic analysis: (1) Pay attention to values; (2) Locate power at the heart of the research; (3) Immersion in reality and primary sources; (4) Pay attention to local detail through thick description; (5) Movement between practice and discourse; (6) Isolation of cases in context; (7) Mobilise ‘how’ and ‘why’ questions; (8) Identifying specific actors and institutions; (9) Identify and engage with the polyphony of voices. See Flyvbjerg, *Making Social Science Matter*, above n 18, 129.

⁵⁵ Flyvbjerg, *Making Social Science Matter*, above n 18.

⁵⁶ Bent Flyvbjerg, ‘Habermas and Foucault: Thinkers for Civil Society?’ (1998) 49(2) *British Journal of Sociology* 210; Flyvbjerg, *Making Social Science Matter*, above n 18.

⁵⁷ Flyvbjerg, *Making Social Science Matter*, above n 18.

⁵⁸ Shalom H Schwartz, ‘Universals in the Content and Structure of Values: Theoretical Advances and Empirical Tests in 20 Countries’ (1992) 25 *Advances in Experimental Social Psychology* 1.

⁵⁹ Max Weber, *Economy and Society*, tr Gunther Roth and Claus Wittich (University of California Press, 1978) vol 1, 24-5.

attachment of the desirability and qualitative evaluation of the object. A focus on values is necessarily connected to what an actor regards as worthwhile, desirable and, fundamentally, necessary to protect and promote. Kant would argue that this combination of intellectual, affective and social value forms the foundation of a moral 'imperative' that must not only be protected, but promoted, if not insisted upon.⁶⁰ Values are complicated by personal, social and contextual factors, and although they are fundamentally concerned with what we feel and believe is important, it has been recognised that values tend to be conceptually ordered in a hierarchy, further complicated by the fact that some values are concrete, while others are ephemeral, and others change over time.⁶¹ Ultimately, Flyvbjerg suggests that values can be identified based on what the actor is promoting or defending as an 'ought', normative claim of right, or correction action.

Flyvbjerg also emphasises the role of power in analysis. The centralisation of power offers a major focus of enquiry in both the 'realist' tradition in the social sciences⁶² and in the critical tradition of legal research and the practice of law itself.⁶³ Lawyers tend to think about power in terms of the coercive power of the state. However, drawing on Habermas and Foucault, Flyvbjerg advocates a broader and more nuanced understanding of power. This conceptualises power beyond the law and state, inviting attention to the operation and circulation of power through and within organisations, individuals, institutions, and knowledge systems. Given the importance of power to the current analysis, it is worth setting out Flyvbjerg's synthesis of power in detail:

- (1) Power is...productive and positive and not only...restrictive and negative.
- (2) Power is viewed as a dense net of omnipresent relations and not only as localised in 'centres' and institutions, or as an entity one can 'possess'.
- (3) [P]ower is...ultradynamic; [it] is not only something one appropriates, but also something one reappropriates and exercises in a constant back-and-forth movement in relations of strength, tactics and strategies.
- (4) Knowledge and power, truth and power, rationality and power are analytically inseparable from each other; power produces knowledge, and knowledge produces power.

⁶⁰ Immanuel Kant, *Groundwork of the Metaphysic of Morals*, tr Mary Gregor (first published 1785, 2013 ed, Cambridge University Press).

⁶¹ Milton Rokeach, *The Nature of Human Values* (Free Press, 1973); Edward Bond, *Reason and Value* (Cambridge University Press, 1983).

⁶² Duncan Bell (ed), *Political Thought and International Relations: Variations on a Realist Theme* (Oxford University Press, 2009).

⁶³ Ian Ward, *Introduction to Critical Legal Theory* (Routledge/Cavendish, 2004).

- (5) The central question is how power is exercised, and not only who has power, and why they have it; the focus is on process in addition to structure.
- (6) Power is studied with a point of departure in small questions, 'flat and empirical', not only...in 'big questions'.⁶⁴

This sensitisation of the research to the central role of values and power in the empirical case being examined are major components and strengths of Flyvbjerg's phronetic approach.

Indeed, we suggest that *legal phronesis* locates the primary focus of the study on the legalities within the case, rather than being part of the general context of phronetic social inquiry. Our position is to begin with legal doctrinal analysis, before moving into the social context of the doctrine (i.e. its formation, change and effects) giving emphasis to values, power and discourse. Fundamentally, we believe this approach has the potential to situate research of this kind at the intersection between law and social inquiry,⁶⁵ opening insights in both directions that may otherwise not have been apparent. With this in mind, we now turn to doctrinal history of s 487.

III STANDING AND JUDICIAL REVIEW IN ENVIRONMENTAL LAW

'Standing' is the legal recognition of a person to bring action in a court of law. It is a concept derived from the Latin *locus standi*, which literally refers to a place to stand on, or in, but it has come to refer to the recognition of the rights of a person to lawfully bring an action before a court to enforce the law.⁶⁶ The legal test for standing at common law relates to the nexus between the person and the cause of action, with standing arising only where the person has some direct interest in law affected by the respondent. Such rules generally exclude others from bringing an action to enforce the law, in the absence of some exception, such as reliance on a prerogative writ (such as habeas corpus), a 'special interest', or statutory right.⁶⁷

The common law legal rules relating to standing are complex, and tend to be shaped by the field of law that they occupy. While almost exclusively

⁶⁴ Flyvbjerg, *Making Social Science Matter*, above n 18.

⁶⁵ There is a distinction to be made between 'social science' and 'social inquiry'. Social science implies the research is rooted in a 'scientific' empiricism as a key technique or paradigm that is interested in identifying specific and general principles or laws able to describe causal connections of existing phenomena, with a view to predicting future social phenomena. 'Social inquiry', on the other hand, is more closely aligned with the interpretation and meaning, and less with empiricism.

⁶⁶ This is reflected in standard definitions of 'standing' and 'locus standi' in legal dictionaries.

⁶⁷ For commentary, see Australian Law Reform Commission, *Standing in Public Interest Litigation* (Report No 27, 1985).

limited to the specific affected party in the context of private law (especially tort and contract), there are signs that the scope of standing is generally widening, a trend which has been the subject of explicit academic commentary,⁶⁸ as well as Law Reform recommendation.⁶⁹ The High Court has also signalled a more general willingness to extend the categories of special interest standing in appropriate cases.⁷⁰ This expansion is, however, conservative, and necessarily enmeshed with questions of public policy, the available remedy, and the capacities of the plaintiff in the particular context. It is fair to say that while the law of standing is primarily a limiting provision, and does have the effect of causing delay, it is not a 'loophole' that invites litigation by any party. Indeed, the outcome in most cases is closer scrutiny of government decision making, accountability of the executive, and tighter controls over the project. Arguably, even where the challenge to development 'fails', the result is a better outcome because of the scrutiny involved.

Standing in the context of environmental law has always presented something of a quandary. The general principle is that standing is narrowly construed to restrict the class of plaintiffs. For environmental cases, this essentially means that only those actors with a special interest, in the sense of being directly linked to the particular dispute, have standing at common law. The potential difficulty for environmental cases is that the class of affected individuals is extending in the face of large-scale developments, and particularly in the face of global scale environmental concerns, such as climate change.

This dilemma is illustrated by Gibbs J in *Australian Conservation Foundation v Commonwealth*,⁷¹ when he comments:

I would not deny that a person might have a special interest in the preservation of a particular environment. However, an interest, for present purposes, does not mean a mere intellectual or emotional

⁶⁸ Elizabeth Fisher and Jeremy Kirk, 'Still Standing: An Argument for Open Standing in Australia and England' (1997) 71(4) *Australian Law Journal* 370; Groves, above n 50.

⁶⁹ Australian Law Reform Commission, above n 68; Australian Law Reform Commission, *Beyond the Door-Keeper – Standing to Sue for Public Remedies* (Report No 78, February 1996).

⁷⁰ *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493; *Onus v Alcoa* (1981) 36 ALR 425; *Truth About Motorways v Macquarie* (2000) 200 CLR 591.

⁷¹ This case concerned an independent body, the Australian Conservation Foundation, challenging the grant of a development application by the Iwasaki Company to purchase and develop land as a tourist resort in central Queensland in 1978. The ACF took action against the Commonwealth, seeking injunction and declaratory orders against the Ministers involved in the decision making on the grounds there had been inaccurate information provided in Environmental Impact Statements. Iwasaki and the Commonwealth sought orders the matter be struck out as the ACF had no standing in the present case, having no 'special interest in the subject matter'. The High Court ruled against ACF, finding the ACF had no standing in this case. Here the nexus between the ACF and the project was insufficient, and accordingly the threshold standing issue had not been met.

concern. A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor locus standi. If that were not so, the rule requiring special interest would be meaningless. Any plaintiff who felt strongly enough to bring an action could maintain it.⁷²

The result of this general principle is that standing is generally restricted to those whose rights, interests or legitimate expectations have been compromised, typically in the form of loss, although there is recognition that in some cases this category may be broad if falling within the ‘zone of interests’.⁷³ This is a recognition that standing can arise in ‘special’ cases where the plaintiff has a personal interest in the case, but is not otherwise directly affected by the factual matrix. Characterising what ‘special interests’ are in this context is difficult. Since the ACF case was decided, the Federal Court has considered a range of factors that may constitute the ‘special interests’ necessary to provide standing, including the size of the organisation, the cause, governmental recognition of the organisation in question, and the capacity in and integrity with which the organisation represents the public interest.⁷⁴ The High Court in *Argos v Corbell* held that the ‘special interest’ necessary to extend standing was to be determined, on a case by case basis, and not interpreted narrowly:

The focus of the inquiry required by the words is upon the connection between the decision and interests of the person who claims to be aggrieved. The interests that may be adversely affected by a decision may take any of a variety of forms. They include, but are not confined to, legal rights, privileges, permissions or interests. And the central notion conveyed by the words is that the person claiming to be aggrieved can show that the decision will have an effect on his or her

⁷² (1980) 146 CLR 493, 531 (‘ACF’).

⁷³ *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493, 509.

⁷⁴ *Onus v Alcoa* (1981) 36 ALR 425; *Australian Conservation Foundation v South Australia* (1990) 53 SASR 349, 360 (Cox J); *Australian Conservation Foundation v Minister for Resources* (1989) 76 LGRA 200; *Tasmanian Conservation Trust Inc v Minister for Resources* (1995) 85 LGERA 296; *North Coast Environment Council v Minister for Resources* (1994) 85 LGERA 270; *Animals’ Angels v Secretary, Department of Agriculture* [2014] FCAFC 173.

interests which is different from ('beyond') its effect on the public at large.⁷⁵

Simply stated, the common law establishes two categories of standing: (i) those with a *direct interest*, and (ii) those purporting to act in the *public interest*. Similarly, leading commentators on legal standing, such as Cane⁷⁶ and Edgar,⁷⁷ describe the first approach as a 'private interest model' of standing, which responds to protect private interests in property and person. Cane and Edgar describe the second category as an 'enforcement model' of standing which, consistent with rule of law concerns, seeks to empower citizens and other societal actors to ensure that the executive acts only in accordance with legitimate power under public law.⁷⁸ It is the latter category of 'enforcement model' of standing where much of the contention over the limits of standing lies. This creates problems for some environmental disputes, where the key issue is one of large-scale or public concern, with the result that a good deal of legal argument and energy can be directed to arguments over standing. The simplest solution, recognised in the *ACF* decision, is that the common law position on standing be extended by legislation.⁷⁹

The Australian Law Reform Commission ('ALRC') has previously recommended a regime of circumscribed open standing heavily influenced by the enforcement model of standing. In 1996, the ALRC considered reform to the rules relating to standing to initiate proceedings in public law cases.⁸⁰ The Commission recommended that the 'special interest' approach to standing from *ACF* be replaced by legislated open standing for public law cases, unless there was contrary legislative intent present, or such standing would provide unreasonable interference with private interests.⁸¹ This open standing approach dispensed with the need for a plaintiff in judicial review proceedings to prove a private interest adversely affected by the decision under challenge. The Howard (Coalition) government failed to act on these recommendations,

⁷⁵ *Argos Pty Ltd v Minister for the Environment and Sustainable Development* (2014) 254 CLR 384 [61] (Hayne and Bell JJ). In this case approval had been given for the development of a supermarket in Canberra, proximate to two existing supermarkets. The operators of these supermarkets, and their landlord, sought judicial review of the Minister's decision. Standing was challenged in both cases. Here the High Court held that supermarkets had standing, due to the likely loss of profit, while the landlord did not have standing, as their interests were not dependent on the profitability of the tenants, but on the lease agreement.

⁷⁶ Peter Cane and Leighton McDonald, *Principles of Administration Law* (Oxford University Press, 2nd ed, 2012) 177-8.

⁷⁷ Andrew Edgar, 'Extended Standing-Enhanced Accountability: Judicial Review of Commonwealth Environmental Decisions' (2011) 39(3) *Federal Law Review* 433.

⁷⁸ Cane and McDonald, above n 76; Edgar, above n 77.

⁷⁹ *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493, 526.

⁸⁰ Australian Law Reform Commission, *Beyond the Door-keeper: Standing to Sue for Public Remedies* (Report No 78, 1996).

⁸¹ *Ibid* 57.

however.⁸² Whilst the ALRC recommended a path of open standing, there was significant concern that the exception to guard against unreasonable interference with private interests might unwittingly make it more difficult for environmental groups to bring public interest actions than under the common law standing rules of *ACF*.

However, three years later a significant reform of the common law standing rules did occur with the Howard government's passing of s 487 in the 1999 EPBC Act. This section extended the meaning of the words 'person aggrieved' for the purposes of standing in respect of applications for judicial review brought under ss 5-7 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('AD(JR) Act'). Broadly, this combination of legislative provisions permits applications for judicial review of decisions affecting persons and organisations who are Australian citizens, ordinarily resident in Australia, either directly impacted by an administrative decision, and who:

...at any time in the *[two] years immediately before the decision*, failure or conduct, [has] engaged in a *series of activities* in Australia or an external Territory for *protection or conservation of, or research into, the environment* (emphasis added).⁸³

The inclusion of s 487 extends standing beyond the common law position to individuals or civil society organisations who have an interest in the environment, whether from a research, environmental protection or conservation perspective. Section 487 thereby provides standing to third parties who might otherwise have no direct or private interest in the proceedings. This approach favours the enforcement model of standing, in that rights to commence proceedings are determined not by the applicant's private interest in the decision in question, but rather by their scientific expertise and/or background in environmental protection, which are status-based prerequisites to protect the public interest by seeking enforcement of the law.⁸⁴

The third party standing provision of s 487 also supported Australia's increasing involvement in international action on environmental protection and responding to climate change. For example, Principle 10 of the *Rio Declaration on Environment and Development* (1992) requires, inter alia, '[e]ffective access to judicial and administrative proceedings, including redress and remedy...'.⁸⁵ Australia agreed to the *Rio*

⁸² Cane and McDonald, above n 76.

⁸³ EPBC Act s 487(2)(b), s 487(3)(b).

⁸⁴ Cane and McDonald, above n 76.

⁸⁵ *Rio Declaration on Environment and Development*, UN GAOR, UN Doc A/CONF.151/26 (vol 1) (12 August 1992). It is important to note that the *Rio Declaration* is not binding, and is best understood as a statement of principles or 'soft law'.

Declaration on Environment and Development and has implemented a national strategy on ecological sustainable development.⁸⁶

One of the misconceptions about third party standing is that it provides a licence for anyone to interfere with, or block, development applications. This is not the case. The EPBC Act imposes internal limitations on the nature of the matters that the Environment Minister may consider in providing approval to a project.⁸⁷ The EPBC Act is directed towards protecting ‘matters of national significance’, by requiring ministerial approval of specific kinds of projects. Projects which do not trigger the EPBC Act are governed by relevant state development control and various other legislation. Consequently, the extension of standing under s 487 relates to the limited range of usually large-scale development projects that are specifically governed by Commonwealth law.

The standing question in this context is further limited by the restriction on the cause of action. Section 487 relates specifically to an extension of standing for *judicial review*, not a blanket extension of any cause of action arising at law. While s 487 makes it easier for scientists and environmental groups to bring actions for judicial review, that review relates only to those matters governed by the EPBC Act, and also confines the parties to the remedies available under the AD(JR) Act.⁸⁸ Broadly, the most common order made in these cases is to quash the original decision and order the decision be re-made, by the Minister or their delegate, according to law. The result in most judicial review cases is that the project is delayed, but ultimately goes ahead, after receiving Ministerial approval.

The fact that the standing provisions are relatively limited to certain kinds of projects, and that the ultimate result is usually approval, may well explain why the actual use of s 487 is, in fact, relatively low. In the 15 years since inception of s 487 there have been over 5500 projects approved under the EPBC Act, but only 22 were formally challenged by third parties pursuant to s 487.⁸⁹ Further, of the 33 actions for judicial

⁸⁶ Richard Marlin, ‘The External Affairs Power and Environmental Protection in Australia’ (1996) 24(1) *Federal Law Review* 71.

⁸⁷ EPBC Act ch 2 pt 3.

⁸⁸ AD(JR) Act s 16.

⁸⁹ Chris McGrath’s submission observed that ‘[t]he number of judicial review challenges based on s 487 of the EPBC Act is very, very low in comparison to the number of referrals, which indicates that the widened standing has not resulted in a flood of litigation. Based on the figures presented in the Appendix, only 25 judicial review cases have been brought by third parties under the EPBC Act in the 15 years since it commenced. This means that only 0.46% of the 5399 referrals made under the Act (as at 27 August 2015) have been the subject to judicial review challenges and the average rate of such challenges is less than two per year.’ See Chris McGrath, Submission No 96 to Senate Standing Committee on Environment and Communications, *Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015*, 11 September 2015, [3].

review of the EPBC Act under the AD(JR) Act in that time, only six have required formal reconsideration by the Minister.⁹⁰ A 10-year review of the EPBC Act carried out for the Commonwealth by Dr Allan Hawke indicated that s 487 had only been used conservatively.⁹¹ The Hawke Review made no recommendations for significant change to s 487.

Fundamentally, s 487 of the EPBC Act provides a statutory extension of the common law standing rules consistent with a wider international movement towards the enforcement model which pursues a public interest of enhanced executive accountability. Section 487 was introduced into Australian law during the late 1990s, a time in which a Coalition government had sufficient political leverage to weaken the private interest foundations of standing law and pursue an enforcement model of standing, without significantly alienating key supporters in the business sector. This was not, however, a blanket extension, and actually restricts the kinds of remedies available to parties. By any measure, the operation of s 487 has been modest and minimal – at least in terms of the litigated matters that have relied upon it. Doctrinal analysis of standing and s 487 therefore suggests there is no significant problem with the operation of the enforcement model of standing embodied in s 487 that requires its repeal, or even substantial amendment. The recommendations of Dr Hawke's review and academic analysis have also not raised significant reasons for repeal of s 487. Whilst doctrinal analysis is a useful starting point for legal research into the agenda for repeal of s 487, it clearly misses the wider social forces at play that are agitating for its repeal. In the next section, we show how the theoretical framework of phronetic legal research, by providing a bridge between legal doctrinal and the social context behind its formation and change, can illuminate the reasons why s 487 has come under threat.

III PHRONESIS IN ACTION: DISCOURSE, POWER AND THE POLITICS OF ACCESS TO THE COURTS

If the extended standing provided by s 487 is limited from a doctrinal standpoint, and the available evidence suggests that actual use of s 487 is minimal, why has standing been problematised as requiring repeal? This is a question that might only be answered outside the methods of doctrinal research. Doctrinal method, confined to its core, would focus on the mechanisms for repeal, any controversies in the common law standing rule and mechanics of judicial review, and the hitherto unspoken constitutional limitations on the Commonwealth to make laws governing

⁹⁰ The Australia Institute, *Key Administration Statistics – 3rd Party Appeals and the EPBC Act*, Statistical Review Briefing, August 2015.

⁹¹ Allan Hawke, *The Australian Environment Act: Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (Final Report, October 2009) ch 15 [15.78]–[15.85], recommendation 50 260–1.

the environment. This approach is admirably demonstrated by Groves in his recent analysis of the role of the external affairs power, standing and the EPBC Act.⁹² After engaging in a scholarly analysis of largely judicial considerations of the standing rule, with reference to s 487, Groves concludes that an expanded standing rule is desirable. The article is an excellent piece of doctrinal scholarship, and although it recognises, and to some extent is critical of the Liberal Government repeal agenda for s 487, it does not closely engage with the competing voices driving policy and the architecture of law. Similarly, a recent academic debate on the issue involving then Attorney-General Brandis and a prominent Australian environmental lawyer is largely limited to doctrinal and legal policy arguments.⁹³ This analysis does not carefully consider the wider social context which has seen the public interest, enforcement model of standing come under significant pressure.⁹⁴ It is here that the phronetic interdisciplinary methodology offers a way forward.

On 20 August 2015, the Commonwealth Senate referred the *Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015* (Cth), containing the s 487 repeal provisions, for inquiry and report. The original reporting date for the committee was 12 October 2015, however, this was extended to the second last sitting day in February 2016.⁹⁵ However, this reporting period was shortened and the committee delivered its report on 18 November 2015,⁹⁶ with the government majority on the committee supporting repeal of s 487.⁹⁷

The following analysis of the policy discourses surrounding efforts to repeal s 487 draws on analysis of (i) media statements from the Attorney General's office, (ii) the second reading speech for the repeal Bill for repeal of s 487;⁹⁸ (iii) submissions made by key stakeholders to the Senate inquiry, and (iv) the Senate inquiry report. The purpose of our analysis of this secondary material is to bring to light the discourses used by key stakeholders in public debate over the proposed repeal of s 487. Analysis of these discourses provides important insights on the key social

⁹² Groves, above n 50.

⁹³ George Brandis, "Green Lawfare" and Standing: the View from Within Government' (2017) 90 *Australian Institute of Administrative Law Forum* 12; Andrew Macintosh, 'Lawfare, Liberal Standing Rules and Environmental Citizen Suits: A Reply to the Attorney-General' (2017) 90 *Australian Institute of Administrative Law Forum* 19.

⁹⁴ Ibid.

⁹⁵ Parliament of Australia, *Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015* <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/EPBC_Standing_Bill>.

⁹⁶ Ibid.

⁹⁷ Senate Environment and Communications Legislation Committee, Parliament of Australia, *Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 [Provisions]* (2015).

⁹⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 20 August 2015, 8987 (Hunt).

drivers of the proposed repeal of s 487, including the apparent pressure for retreat from the enforcement model of standing to the earlier private interest approach of the common law.

A Second Reading Speech

The *Environment Protection and Biodiversity Conservation Act (Standing) Bill 2015* (Cth) was introduced to Parliament on 20 August 2015 by the then Minister for the Environment, the Hon Greg Hunt MP. The associated second reading speech set out the government's formal reasons for the repeal of s 487.⁹⁹ The EPBC Act is portrayed in this speech as a model piece of environmental legislation, providing certainty for investment and environmental management through a rational and efficient system of ministerial approval of large development projects. The speech claims that since inception, the EPBC Act has seen approval of more than \$1 trillion in investment in Australia, reduced transaction costs, and consolidation of approvals of major projects at the federal level; described as 'world-class environmental standards' combined with 'world-class administration'.¹⁰⁰

However, the speech also claims this system of 'world class administration' is under threat from the 'Americanisation' of administrative law. This transformation in administrative law is alleged to represent 'the worst features of the American litigation industry': mounting legal challenges to Ministerial approvals for the primary purpose of 'disrupting' and 'delaying' infrastructure projects. 'Green activists' are acting for political purposes, intentionally increasing 'investor risk', for the purpose of frustrating and preventing private infrastructure projects.¹⁰¹ The speech claims this transformation is part of an orchestrated campaign, promoted by a range of local and international activist groups, notably Greenpeace, NSW and QLD Environmental Defenders Offices, and the Australia Institute.¹⁰² The extended standing provisions in s 487 are described as a 'legal loophole'¹⁰³ that permits instability. The Minister's speech claims the intention behind repealing s 487 is to 'normalise' the standing provisions of the EPBC Act by reducing the class of persons with standing to only those 'with a genuine and direct interest in a matter'.¹⁰⁴ It states:

The EPBC Act standing provisions were never intended to be extended and distorted for political purposes as is now occurring with the US

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Ibid 8988.

¹⁰³ Ibid 8989.

¹⁰⁴ Ibid 8988.

style litigation campaign to 'disrupt and delay key projects and infrastructure' and 'increase investor risk'.¹⁰⁵

The major themes within the second reading speech relate to the importance of economic development and capital investment; the importance of certainty and security for investors, economic growth and public policy; the primacy of reason and rational decision-making; and notably an insider/outsider dichotomy of legitimate and illegitimate persons and conduct in using s 487, and even the threat presented by a 'foreign' set of litigation practices that have been 'imported' from the United States with perverse affect. The explicit purpose of the amendment to repeal s 487 was the removal of a device from the EPBC Act that permitted 'outsiders', being activist litigants, from using the courts as a vehicle to challenge private economic interests.

¹⁰⁵ Ibid 8989.

B Environment and Communications Legislation Committee Report

As part of the inquiry into the repeal Bill, conducted by the Environment and Communications Legislation Committee, public submissions were invited. There were 292 written submissions made, and over 21 000 form letters.¹⁰⁶ Public hearings were initially tabled, but later cancelled. The Committee instead decided to report based on the written submissions.¹⁰⁷ The report set out the arguments in favour and against the repeal. The report split 3:3 down party lines,¹⁰⁸ and therefore cannot be characterised as a unanimous position. The case for repeal of s 487 involved five elements: (i) the detrimental effect to business certainty; (ii) the extensive involvement of community groups in consultation; (iii) the availability of alternative review processes through administrative review; (iv) the absence of measurable outcomes through the use of s 487; and (v) the continuity of environmental protections under the EPBC Act.¹⁰⁹ The case for retention of s 487 involved seven elements: (i) limited evidence of vexatious or frivolous litigation; (ii) the fact that repeal would actually complicate litigation, as it would instead require interlocutory judicial determination of standing; (iii) that fact that repeal would reduce access to justice as a public good; (iv) the fact that repeal would challenge the rule of law by reducing scrutiny of administrative decisions; (v) consensus views on standing which favoured the expansion, rather than reduction, of standing provisions; (vi) the fact that the repeal purported to have retrospective application; and (vii) the fact that the repeal challenged Australia's international obligations.¹¹⁰

The 'committee view' (i.e. that of the three government Senators), recommended the Bill repealing s 487 be passed. The opposition Australian Labor Party and the Greens opposed the repeal Bill. Notably, Senator Larissa Waters (Greens) made nine recommendations intended to expand the protections for standing on environmental grounds, noting that 'of the 5500 projects referred for assessment under the EPBC... only 22 projects were subject to legal challenge, and only two projects have ever been stopped by legal challenges.'¹¹¹

It is also worth noting that the repeal Bill was the subject of two concurrent Senate Committee evaluations, first by the Scrutiny of Bills

¹⁰⁶ Ibid.

¹⁰⁷ These submissions are available in PDF form at Parliament of Australia, *Submissions* <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/EPBC_Standing_Bill/Submissions>.

¹⁰⁸ The Standing Committee at the time was made up of six senators: three Liberals (the Hon Senators Linda Reynolds (Western Australia), Chris Back (Western Australia) and Michael Ronaldson (Victoria); two Labor (the Hon Senators Anne Urquhart (Tasmania) and Lisa Singh (Tasmania); and one Green (the Hon Larissa Waters (Queensland)).

¹⁰⁹ Senate Environment and Communications Legislation Committee, above n 97, 9-15.

¹¹⁰ Ibid 17-26.

¹¹¹ Ibid 4.

Committee, and then by the Parliamentary Joint Committee on Human Rights. Both Committees raised objections with the Bill, and asked for comment from the Minister for the Environment. The Scrutiny of Bills Committee observed that standing in environmental cases was an area of particular public importance, because it raises ‘matters of general rather than individual concern’.¹¹² In addition, ‘restrictive standing rules may mean that decisions relating to environmental regulation are, in practice, beyond effective judicial review’.¹¹³ This combination of issues had, in the Scrutiny of Bills Committee’s view, constitutional implications, as reduced standing rules have the capacity to prevent judicial scrutiny of administrative decisions (thereby preventing the courts from ensuring the legality of decisions made by Commonwealth ministers), and for increasing the complexity of litigation as courts would be required to assess standing on common law grounds as a threshold issue. Accordingly, the Scrutiny of Bills Committee sought advice from the Minister on the justification for the repeal. Reasons were not provided, other than a statement that the purpose of the repeal was to bring the standing rules ‘into line with the standard arrangements’, and reference to an ‘emerging risk of the extended standing provisions being used to deliberately disrupt and delay key projects’.¹¹⁴

In addition, the Parliamentary Joint Committee on Human Rights identified the proposed repeal as being at odds with art 12 of the International Covenant on Economic, Social and Cultural Rights, which declares a right to health and a healthy environment.¹¹⁵ This Committee

¹¹² Ibid 6.

¹¹³ Ibid.

¹¹⁴ Ibid 7.

¹¹⁵ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report: 35th Report of the 44th Parliament* (2016) 8, 9, 11. It is worth noting, however, that the concept of a ‘right to a healthy environment’ is a contested and nuanced concept. Article 12 provides that ‘[t]he States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health ... [that t]he steps to be taken by the States Parties to the present Covenant to achieve the full realisation of this right shall include those necessary for ... [t]he improvement of all aspects of environmental and industrial hygiene’. *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976). Some caution is needed here in interpreting this provision as declaring a ‘right to a healthy environment’. The Parliamentary Committee reported: ‘The statement of compatibility does not explore whether the right to health and a healthy environment is engaged by this measure. While the text of the ICESCR does not explicitly recognise a human right to a healthy environment, the UN Committee on Economic, Social and Cultural Rights has recognised that the enjoyment of a broad range of economic, social and cultural rights depends on a healthy environment. The UN Committee has recognised that environmental degradation and resource depletion can impede the full enjoyment of the right to health. The UN Committee has also drawn a direct connection between the pollution of the environment and the resulting negative effects on the right to health, explaining that the right to health is violated by ‘the failure to enact or enforce laws to prevent the pollution of water, air and soil by extractive and manufacturing industries’. As such, the removal of a right of a

was also critical of the ‘statement of human rights compatibility’ annexed to the Bill,¹¹⁶ noting that the annexure failed to properly address international and domestic human rights implications. The Committee subsequently requested and received particulars from the Minister. The letter presented the Minister’s opinion that ‘the removal of the extended standing provisions [did] not engage the right to health in art 12 of the International Covenant of Economic, Social and Cultural Rights’, because the Bill did not prevent those with a ‘legitimate objective’ from bringing judicial review action¹¹⁷. Nor did the Bill affect the environmental protections available under the Act, which preserved the environment.¹¹⁸ In other words, the Minister’s response was to reinforce the distinction between legitimate and illegitimate persons who might challenge executive decisions on environmental matters.

C Themes in Public Submissions

The submissions to the Senate Committee were sharply divided between those parties in favour of repeal, and those against it. The voices in favour of repeal that had the greatest impact were the Business Council of Australia,¹¹⁹ the Minerals Council of Australia,¹²⁰ and Ports Australia.¹²¹ The impact of these three submissions on the Senate committee findings appears considerable and disproportionate, given the overwhelming majority of submissions favoured retaining s 487. This is demonstrable in the repeated use of material from those submissions in the inquiry’s report, and the essential endorsement of the views within these submissions by the Senate Committee. The voices in favour of retaining

person or bodies who are committed to environmental protection from seeking to enforce the protections in the Environment Act, may engage and limit the right to a healthy environment. This was not addressed in the statement of compatibility. The committee therefore sought the advice of the Minister for the Environment as to whether the bill limits the right to a healthy environment and, if so, the legitimate objective, rational connection and proportionality of the measures. ... The committee agrees that there is no standalone right to a healthy environment. The committee also agrees with the minister’s statement that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life including access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions and access to health-related education and information, including on sexual and reproductive health.’

¹¹⁶ Required by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

¹¹⁷ Parliamentary Joint Committee on Human Rights, above n 115, 9-11.

¹¹⁸ Ibid 9-10.

¹¹⁹ Business Council of Australia, Submission No 111 to Senate Environment and Communications Legislation Committee, *Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015*, September 2015.

¹²⁰ Minerals Council of Australia, Submission No 97 to Senate Environment and Communications Legislation Committee, *Inquiry into Environment Protection and Biodiversity Conservation (Standing) Bill 2015*, 14 September 2015.

¹²¹ Ports Australia, Submission No 52 to Senate Environment and Communications Legislation Committee, *Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015*, 9 September 2015.

extended standing were drawn from a diverse array of actors, but are principally identifiable as environmentalists, legal professionals/academics, and concerned citizens. These submissions were influential in the dissenting reports. In analysing the values and the unspoken or implied themes within the submissions, a series of themes emerge, as identified in the following table:

Interest group	Basic position	Reasons
Environmental	Opposes repeal	<p>Individuals and communities have a right to a healthy environment, and the right to challenge government decisions affecting them.</p> <p>Repeal will increase litigation costs and complexity, and erode confidence in government decision making.</p> <p>Repeal reduces the capacity of the public to scrutinise development applications and government decision making.</p> <p>There is no evidence that third party standing rules have been abused or out of control.</p> <p>The potential environmental problems are devastating.</p>
Farming	Opposes repeal	<p>Repeal restricts the ability of farmers and the farming industry to oppose developments that affect collective or community farming interests.</p> <p>Large scale open-cut mining in certain areas affects water quality, availability and fertility.</p>
Indigenous	Opposes repeal	<p>Section 487 facilitates capacity of the public to protect matters of national significance.</p> <p>Connection with land is cultural. Section 487 allows for challenge in cases where there is no direct physical link to the development, but otherwise a historical and cultural connection.</p>

Legal	Opposes repeal	<p>Section 487 enables public accountability and scrutiny of the actions of the executive arm of government.</p> <p>Repeal of s 487 will not eliminate third party challenge. It will complicate standing proceedings in courts as parties litigate standing, even before concentrating on the core issue.</p> <p>The courts possess a range of powers to prevent vexatious or abuse of process.</p>
Mining	Supports repeal	<p>Section 487 is a ‘loophole’ that allows activists to launch vexatious litigation for the purpose of creating investment risk.</p> <p>Delayed decisions have negative economic consequences.</p>

Table 1: Summary of submissions to overview of the submissions of interest groups prepared as a part of the Parliamentary Bills Digest for the repeal Bill.¹²²

Like most areas of public policy, the arguments that emerge out of a multitude of voices are complex and interwoven. However, what is clear is that the majority of submissions were opposed to repeal of s 487. We suggest that the complexity of these submissions might be usefully viewed as crystallising around three key discourses of ‘economic primacy’, ‘environmental harm’ and ‘government accountability’.

1 *The ‘Economic Primacy’ Discourse*

The case for repeal is dominated by economic and capital investment values and interests. Given the nature of the projects governed by the EPBC Act, the economic weight of these interests is substantial. The Business Council of Australia, for example, claims that the value of ‘committed projects’ in Australia in 2015 exceeded \$220 billion.¹²³ It claims that delays to major projects from ‘legal obstruction’ present a direct threat to future investment and profits. The Business Council, relying on Productivity Commission analysis, suggests that a one-year delay in a natural gas project, for example, could involve costs to investors of up to \$2 billion.¹²⁴ Similarly, the Minerals Council of Australia claims (again, relying on the Productivity Commission) that ‘unnecessary delays can add costs of \$46 million per month to a major green fields mining project.’¹²⁵ These costs, it is argues, constitute an unacceptable risk to investment and ‘sovereignty’, with consequences for

¹²² See Power and Tomaras, above n 44, 17-22.

¹²³ Business Council of Australia, above n 119, 5.

¹²⁴ Ibid.

¹²⁵ Minerals Council of Australia, above n 120, 2.

employment and infrastructure investment. When the total number of approvals and the number of judicial review actions arising under s 487 are considered, the number of projects actually affected seems insignificant. However, for any single major project, the reality of delay becomes substantial to those involved, and their associated investors. Actual and potential losses caused by delay (direct and indirect) thus become far more important than an aggregate figure would otherwise suggest.

Delays of this kind, and the uncertainty they create, give rise to a climate where a *single* episode of legal challenge imports significant financial risk, essentially tied to investment decisions. But of equal importance to the financial aspect of economic reasoning is the challenge that s 487 provides to the ability of economic actors to make investment decisions and assert economic autonomy. The notion of ‘sovereign risk’, or risk to the profits of overseas investors from government decision making, is an explicit element of this discourse. This position is curious, given that the empirical evidence on approvals demonstrates that most proposals that trigger application of the EPBC Act are ultimately approved.

The economic primacy discourse clearly is consistent with a return to a private interest model of standing, which it considers more amenable to restricting the class of potential challengers. This private interest model is thought to better facilitate development projects and the protection of economic growth, corporate profits and future investment. Whilst the alignment of business lobbyists (such as the Business Council of Australia and the Minerals Council of Australia) with private interests and protecting corporate profits is unsurprising, the blind spot in this discourse appears to be that a return of standing to the private interest position (i.e. the position in *ACF*) may reduce the costs and delay of standing disputes.

2 The ‘Environmental Harm’ Discourse

As one would expect in cases involving environmental dissent, the case for retention of s 487 is firmly linked to an overarching concern for protection of the environment. Indeed, concern regarding the environmental impact of the Carmichael mine is an overwhelming frequently-held position, not only in the detailed submissions presented to the Senate inquiry, but particularly in the large number of letters sent to the inquiry.¹²⁶ It would be an error, however, to assume that the ‘environmental harm’ discourse has a single dimension. Indeed, there are multiple aspects of this discourse. Indigenous groups, for example, locate

¹²⁶ Parliament of Australia, *Additional Documents*, <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/EPBC_Standing_Bill/Additional_Documents>.

environmental issues to local conceptions of land, place and culture – as well as wider concerns for the longevity of species of flora and fauna.¹²⁷ Many submissions are narrower in focus, but necessarily linked to environmental issues under the umbrella of matters of ‘national significance’.¹²⁸ In addition to what might be classified as traditional concerns about the protection of local biodiversity, however, numerous complex submissions focus on the global issue of the impact of fossil fuel extraction from the mine and its eventual consumption as a major contributor to anthropogenic climate change.¹²⁹ These submissions are rarely singular in their composition, articulating a mixture of local, regional and global environmental concerns. They overlap with an equally forceful claim for the right to challenge government decisions to protect the public interest in these matters.

The environmental harm discourse clearly seeks to maintain the status quo of the enforcement model of standing embodied in s 487 of the EPBC Act. The various environmental and indigenous interests articulating this discourse are concerned to maintain expertise-based status (i.e. expertise in environmental research or advocacy) as the key indicia of the right to bring a judicial review action under the EPBC Act. The environmental harm discourse articulates the importance of ‘the public’ in that specific expertise-based plaintiffs are tasked with the capacity to pursue the public interest of protecting and conserving the natural environment for all citizens. It is also unsurprising that the environmental harm discourse is emanating from an alignment of social actors less concerned with capital accumulation and more embodied in place-based environmental and/or heritage protection.

3 The ‘Government Accountability’ Discourse

These submissions primarily emphasise the importance of judicial review as a major public law device for ensuring the accountability of executive decisions and action. The ability of actors (citizens and NGOs) to hold the executive to account through judicial review is described as a fundamental ‘democratic right’ and a clear manifestation of the rule of law in a contemporary liberal democracy. Indeed, some submissions assert that this ‘democratic right’ performs an important anti-corruption

¹²⁷ Kimberly Land Council, Submission No 118 to Senate Environment and Communications Legislation Committee, *Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015*.

¹²⁸ Wide Bay Burnett Environment Council, Submission No 20 to Senate Environment and Communications Legislation Committee, *Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015*, 3 September 2015.

¹²⁹ Environment Victoria, Submission No 14 to Senate Environment and Communications Legislation Committee, *Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015*, 1 September 2015.

function,¹³⁰ plays a key role in building and maintaining confidence in planning decisions,¹³¹ and allows public organisations to properly scrutinise and protect matters of public interest.¹³² These discourses contain an important, but essentially implied, power dynamic. That dynamic is that in the absence of direct action against government and corporations (which is routinely unlawful), standing provisions provide a vehicle through which powerful interest groups can be held to account. This accountability is not just about ensuring the integrity of decision-making. It is also the modern expression of liberal dissent transformed into a legal form. The ability for individuals and communities to change and shape the past, present and future, is a major and important underlying theme of the accountability discourse. Not only does the law play a major role in political economy, it also plays a major role in the ability of individuals to assert control over their futures.

Interestingly, this public accountability argument is not openly challenged in the submissions of those voices sympathetic to repeal. This is not surprising, since the ability of corporate interests to challenge government decisions is an equally, if not vociferously, defended right, and central to liberal political ideology. However, there is a clear bifurcation of views from the ‘repealers’. Those views distinguish between a broad democratic right to challenge executive decisions, where standing is offered to parties with a link to the issue being decided, and a narrow view that only those with a ‘legitimate’ (i.e. a ‘direct’ interest in the decision) have a right to bring a judicial review challenge. This position necessarily rejects the claim that a ‘third party’ has any right to intervene. This argument relies on a rhetorical position that ‘third party’ intervention is not only costly, but part of an orchestrated strategy of economic ‘disruption’ or ‘lawfare’. Here we find submissions that often present evidence that directly challenges the argument that s 487 is being abused. Indeed, the empirical evidence clearly establishes that judicial review actions under s 487 are, on the whole, unsuccessful.¹³³ However, the argument in favour of repeal also suggests that standing provisions do not actually result in positive environmental outcomes, tend to escalate costs, and fundamentally succeed in delaying projects in such a way as to discourage capital

¹³⁰ Friends of the Earth (Australia), Submission No 46 to Senate Environment and Communications Legislation Committee, *Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015*, 8 September 2015.

¹³¹ The Wilderness Society, Submission No 44 to Senate Environment and Communications Legislation Committee, *Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015*, 11 September 2015.

¹³² Environment Victoria, Submission 14 to Senate Environment and Communications Legislation Committee, *Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015*, 1 September 2015.

¹³³ The Australia Institute, Submission No 39 to Senate Environment and Communications Legislation Committee, *Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015*, 10 September 2015; The Wilderness Society, above n 131.

investment.¹³⁴ Ports Australia supports repeal, but also concludes that it is likely that standing is well entrenched in Australian common law. Repeal of s 487 is therefore likely to result in an *increase* in more complex and costly litigation, and be counterproductive.¹³⁵ While the ‘right’ to challenge government decisions is commonly asserted or recognised by all parties, what differs is the scope of who should possess that right.

The government accountability discourse represents an alignment of public lawyers, environmental groups and state government regulators concerned with protection and expansion of the enforcement model of standing as a bulwark against unlawful executive decision making. The key concern is not with the substantive value of environmental protection per se, but rather protection of rule of law in holding executive government to account. Interestingly, some of submissions to the Senate inquiry also display elements of a third model of standing identified by Edgar as one of ‘public participation’.¹³⁶ Edgar explains this model of standing, which has its roots in United States jurisprudence, is designed ‘to ensure fair representation of a wide range of interested persons and groups in administrative decision-making processes’¹³⁷. This is a significantly wider ambit for standing that has not yet been supported in Australian case law, yet still represents an important further articulation of the possibility of standing as means for expansion of democratic political process. The business lobby groups are clearly on uneasy ground in responding to the government accountability discourse. On the one hand, business lobby groups are usually strong supporters of vigilant checks upon government power. On the other hand, business lobby groups are here supporting a winding back of the rights of citizens to challenge government power. This unease is sought to be navigated by the distinction these groups make between ‘legitimate’ and ‘illegitimate’ purposes for which checks on government power might be exercised. However, the difficult tension between upholding and eroding liberal values still remains in these submissions.

IV DISCUSSION

The repeal Bill remains lapsed and has not yet been tabled in this term of Parliament. However, as observed above,¹³⁸ it played an important role in anchoring economic primacy in Australian public discourse and its use of the pejorative term of ‘lawfare’. The overall aim of the repeal Bill appeared to be one concerned with restricting the capacities of environmental groups to challenge large-scale development projects

¹³⁴ Business Council of Australia, above n 119.

¹³⁵ Ports Australia, above n 121.

¹³⁶ Edgar, above n 77.

¹³⁷ Ibid.

¹³⁸ See discussion in Section I(B).

through controlling the threshold standing issue. It is hard not to conclude that the repeal agenda for s 487 forms part of a larger agenda aimed at limiting, or preventing, the capacity of environmental groups to challenge development by removing statutory standing and the financial resources needed for litigation. The 'economic primary' discourse supporting repeal of s 487 has been met by well-organised and powerfully articulated 'environmental protection' and 'accountability of government' discourses. Even the corporate and government interests in favour of repeal have found it difficult to counter the weight of legal and public articulation of the 'government accountability' discourse. It is decidedly awkward for a purportedly liberal government to be advocating discourses that have the rather illiberal character of potentially reducing accountability of government decision making.

To be fair, it is important to recognise that in the context of major projects, even a single challenge in the courts can result in substantial costs, not only in terms of the costs associated with legal proceedings, but also opportunity costs and investment uncertainty. In this context it is easy to understand why some business interests advocate for removal of the mechanism that allows for legal challenge in that forum. The kind of capital necessary for projects of this kind is significant; it is capital that can easily be reallocated to alternative options. It is no surprise advocates are sensitive to third party standing. In that context, the statistics associated with the restrained use of s 487 means little, when individual cases threaten, or seem to threaten, multi-billion-dollar investments that have the potential to generate significant regional economic benefits. However, legal policy decisions, made through a process of contestation between the three discourses described above, will often involve both 'winners' and 'losers'. Individual actors can often point to the 'unfairness' of being a 'loser' from a particular legal policy decision. However, the more interesting aspect of the discursive approach to analysis is to demonstrate how this contestation between discourses provides an ongoing process of trade-offs and accommodations between competing legal policy positions.

On the assumption that both Habermas¹³⁹ and Haines¹⁴⁰ are correct, it seems that the debate concerning s 487 represents an enduring problem in contemporary democratic governance: the effect of risk consciousness. Habermas and Haines both argue that democratic governments are particularly vulnerable to risk as a conceptual and pragmatic aspect of government. The financial and social pressures associated with creating 'jobs and growth' are directly linked with an associated political economy. Not only does financial investment play a role in the creation of

¹³⁹ Jürgen Habermas, *Legitimation Crisis* (Heinemann, 1979).

¹⁴⁰ Fiona Haines, *The Paradox of Regulation: What Regulation Can Achieve and What it Cannot* (Edward Elgar Publishing, 2011).

employment, it also widens the tax-base. In areas of low employment, large-scale capital investment tends to increase local economic activity. This not only tends to improve local living standards, it also has a direct link to the re-election prospects of politicians. The overarching political interest in that context is the retention of government, achieved by improving constituents' standard of living. Political parties of whatever denomination are faced with a major dilemma in the context of fossil fuels. On the one hand, they have a vested interest in the retention of government and are naturally interested in the improved standard of living of their electorates. On the other hand, they are under increasing pressure to facilitate investment in modes of lower carbon energy production due to the problem of climate change.

To return to the core questions of phronetic method, let us consider the following. *Where are we going with third party standing?* The basic answer is the agenda to repeal third party standing is part of federal government policy, but is currently stalled. Legally, the repeal amendment would need to be tabled again within the life of the current Parliament, and be passed by both houses of Parliament, to become valid law. In this respect, the politics of the repeal Bill keep the repeal agenda alive as 'nascent' law; that is, as a statement of potentiality, rather than a matter of legal doctrine. Pragmatically, there would need to be the numbers in both houses. As the present government does not have the numbers in the Senate needed to pass the law, it would need to rely on support from unaligned Senators to pass the repeal Bill. Given the popularity of the perceived right to standing, it seems unlikely the law would pass given the political backlash likely to emerge in the various electorates. In this respect, the repeal forms a part of the contested ground of discourse and power between the various actors.

Who gains, and who loses, by which mechanisms of power? Our analysis shows that the business lobbies, despite a weak doctrinal position and lacking strong empirical evidence of lost development, were able to marshal enough discursive power through a supportive federal government and the Senate committee process to significantly influence the majority report which found in favour of repeal of s 487. However, this discursive power is limited, and has not (yet) overcome the opposing 'environmental protection' and 'government accountability' discourses sufficiently to allow passage of the repeal Bill. The discursive coalition built around the economic primacy discourse (comprising the Business Council of Australia, the Mining Council of Australia, Ports Australia and the federal government) has been unable to overcome the discursive coalition of actors (environmental groups, public lawyers, academic lawyers) that have coalesced around environmental protection and government accountability discourses. This case study illustrates the importance of viewing highly contested legal reform through the lens of

competing discursive coalitions of social actors. Power here is not primarily material or financial, but discursive, in the sense of arguing and contesting ideas within the public sphere.¹⁴¹

Third party standing continues to operate as a vehicle of dissent. Arguably, the current ‘loser’ in this scenario is anyone frustrated by litigation seeking judicial review. The power manifested in this context is mobilised through the courts; it is the complex reification of dissent, protest and values enlivened through the text of law to become the orchestrated conflict within the process of litigation and courtroom drama. But loss has to be understood as more than one party not achieving a goal; loss can also be understood as the potential economic and financial benefits that can flow from large-scale projects. The ‘gain’ is similarly complex. Gain can be linked to the person or community that succeeds in their course of action; in the prevention of the losses flowing from destruction of the environment and species, and even from preventing catastrophic climate change. Equally, the ‘gain’ is the recognition of the right, in law, for concerned citizens to take their case before a court for judicial review. Even in cases where parties are not successful in the action itself, success may come from the scrutiny and controls placed over developments. A dialectic operates in conflict, such that there can be a reconciliation of opposites, with something new emerging from it. A development may still proceed, but with sufficient controls in place that immediate environmental losses are minimised, or rectification undertaken.

Is repeal desirable? Ultimately, answering this question inevitably entails a value judgment. Like the discourses around repeal, there will be a variety of answers. When we consider the values at play around repeal, it is tempting to polarise the repeal debate as a contest between greed and altruism. But to do so would be simplistic. A great deal of public benefit can arise out of capital investment, even when there are (private) profits being made. Conversely, the absence of economic development can ensure the impoverishment of communities, even when the environment is otherwise pristine. There appears to be an emerging set of legal principles in international law concerned with ‘non-regression’ and ‘progression’. The former is the principle that once a human right has been recognised, it should not be eroded. The latter is the principle that state actors work towards developing and supporting the various articles agreed to by parties to the agreement.¹⁴² Accordingly, repeal of standing

¹⁴¹ Habermas, above n 52.

¹⁴² *Gaps in International Environmental Law and Environment-Related Instruments: Towards a Global Pact for the Environment: Report of the Secretary-General*, UN GAOR, 73rd sess, Agenda Item 14, UN Doc A/73/419 (30 November 2018) [22]. ‘The principle of non-regression is relatively new to the field of environmental law, while its underlying idea of disallowing backtracking is well understood in systems that protect human rights and in labour law. The idea that once a human right is recognised, it cannot be restrained,

provisions is notably regressive, and likely an emergent contravention of international human rights norms. What is desirable, in our view, is a retention of the ability of communities and individuals to challenge decisions affecting rights, liberties and interests in the courts. People must have the capacity to shape and mobilise a dignified future. In that respect, we do not consider it desirable to repeal s 487. To do so would likely result, in our opinion, in one of two things. Either it would mean that litigation becomes more complex, or it would create a climate where even more direct action is contemplated or certain. There are, in effect, consequences for the stability of government and the accountability of decision makers evident in the absence of third party standing provisions. It is a net public good for individuals, groups and communities beyond the immediate nexus of development to have the capacity to challenge decisions. We agree with the concluding comments of Power and Tomaras:

There is a risk that, if s 487 is repealed, the resulting uncertainty could have the perverse consequence of causing more delays and costs to projects as third parties will first need to establish standing before the substantive issue can be considered by the court...[and] s 487 serves as a mechanism to help ensure decision-makers lawfully comply with legislative procedures. As such, its proposed repeal raises questions about accountable and responsible government.¹⁴³

What, then, should be done? This is another value-laden question, that requires vision. At one level, simply leaving s 487 in place will be regarded as problematic by those most interested in capital investment. For capital accumulation, there is nothing quite like being able to make decisions and executing them uninhibited; but that kind of sovereign power has rarely existed, and where it has the results have always been problematic. The rule of law has evolved out of the very real experiences of conflict that tends to arise out of state attempts to do whatever is desired, and the perverse (i.e. unequal) distribution of wealth and power that tend to go with this.

Ultimately, this is a complex political question, but its resolution will undoubtedly involve ensuring that the interests of those affected by development control decisions are genuinely considered. And in the context of climate change, it will also require a shift in energy systems

destroyed or repealed is shared by all major international instruments on human rights. The corollary to the principle of non-regression is the principle of progression. Non-regression aims at ensuring that environmental protection is not weakened, while progression aims at the improvement of environmental legislation, including by increasing the level of protection, on the basis of the most recent scientific knowledge. The Paris Agreement is explicit in this regard and provides, in article 4, paragraph 3, that each successive nationally determined contribution “will represent a progression beyond the Party’s then current nationally determined contribution and reflect its highest possible ambition”.

¹⁴³ Power and Tomaras, above n 44, 26.

away from reliance on combustion of fossil fuels. There is no reason why capital investment cannot be shifted into new economies, technologies and projects that may, in the end, provide a point of consensus for most concerned, and ensure that anthropogenic climate change does not, in the end, make those decisions for all of us. Those decisions would of course be without repeal or review.

V CONCLUSION

Simply stated, doctrinal legal scholarship cannot adequately explain the reform agenda for removing third party standing rules under the EPBC Act. The reason for this is twofold. The first relates to the epistemological foundations of law as a discipline. The second is because the topic itself exists at the intersection of law and political economy. With the repeal agenda, we see an example of the reform of law being mobilised as an instrument of power. Indeed, we contend that the ultimate explanation for the push for repeal of s 487 is a highly complex one, resting at the junctions of local, regional, national and international politics. In that context, there will be competing versions of truth. For some, the repeal of s 487 simply represents an attempt by the fossil fuel industry and its associated allies to decisively deal with a threat to economic interests. For others, the repeal represents an attempt to balance competing social, political and economic interests in ways that seek to address all concerns.

By using phronetic legal inquiry, we conclude that the reason the agenda for repeal of s 487 defies doctrinal legal logics is because the debate exists outside of doctrinal law. It is a discursive contest between competing coalitions of societal actors, operating at the intersection of political economy. Business, environmental, public law and indigenous groups seek to exercise discursive power, through membership of these discourse coalitions, to shape understanding of the need (or not) for law reform. We have seen this discursive contestation in this case centring on the model (i.e. private interest or enforcement) which should shape public law on standing. Legal rules here are simply the instrument of this discursive contestation. But this is not to say that legal analysis makes little contribution to the debate. The fact that the standing rules, public insistence and legal systems are willing to hold government decision making to account, regardless of the presence of s 487, is of fundamental importance. Consistent with Flyvbjerg's hypothesis that values are fundamentally ingrained in power contests, we agree that the discursive contestation over repeal of s 487 is very much alive with the contestation of values. These discourses are nascent expressions of a struggle for power, as much as law. And because values are at the heart of the debate, it is almost certain that even in the absence of s 487, this kind of environmental debate will be the inevitable trigger of alternative forms of struggle – both inside and outside the courtroom.

Understanding this link between law and power is, we suggest, of fundamental importance, and justification for the retention of s 487. The political economy of s 487, we suggest, raises questions of fundamental importance as to the role and function of law in democracies. And those questions are linked not only to the use of law as an instrument to provide economic benefits and security, but also to provide a vehicle whereby conflict can be properly channelled, adjudicated and managed. In so doing, s 487 actually plays a significant role in maintaining confidence in our system of law and government. That, we suggest, is grounds alone for retaining it. As observed by the Australian Panel of Experts on Environmental Law, the capacity for legal challenge plays a central role in finding the balance between economic, social, Indigenous and environmental needs and interests, and in so doing functions to give practical effect to being trustees for the environment for future generations. Accountability, integrity and explicit concern for the proper management of the environment are fundamental to a healthy democracy.¹⁴⁴

In this case study we have demonstrated how the phronetic methodology can expand our understanding of law, in multiple ways. First, the analysis identifies the natural limits of purely doctrinal approaches to legal analysis. Second, the case study opens a window into the complex intersections that shape and determine the substance of law, including both its operative and principled core. Third, we suggest the case study operates as an example of the ways in which a phronetic approach can be utilised as a methodology in socio-legal analysis. In other words, this technique is not only useful in terms of expanding the pragmatic and theoretical aspects of its topic; it is also useful in identifying important intersections between law and other disciplines and practices. For example, in this case there is a rich field identified as operating at the junction between law and politics. We would suggest that further study can be undertaken exploring the discursive and political aspects of major resource projects and public dissent. In addition, we would suggest legal phronesis provides a useful model for articulating a methodology offering assistance to scholars contemplating multi-disciplinary research on legal reform.

There are, of course, limitations in this work. The phronetic model merges the boundaries between a number of disciplines, notably law and politics. It also makes a series of assumptions about the nature of legal epistemology that is open to debate. On the one hand a narrow view can be taken, similar to the European/Kelsen tradition that sees law sharply linked to the interpretation and characterisation of legislation and

¹⁴⁴ Australian Panel of Law Experts on Environmental Law, *Blueprint for the Next Generation of Australian Environmental Law* (Report, August 2017).

cases.¹⁴⁵ On the other hand, legal scholarship, particularly in the sociolegal/realist tradition, is much broader in perspective, situating law firmly within a complex web of social, economic and political themes.¹⁴⁶ It is important, therefore, to assume either (i) that doctrinal legal scholarship is somehow defective (which clearly it is not), or (ii) that phronetic method promises answers that are not otherwise open to traditional legal research. This is a valid and important debate that is a defining feature of the sociology of law, that we cannot address here. We are mindful of the danger in treating law too narrowly. The approach presented here aims to isolate the rule structures at the outset, with a view of re-immersion in context.

In the end, while we have used the Adani Carmichael coal mine as an entry point into the agenda for repeal of s 487, we suggest that the issues, discourses, power and political economies that example has generated are likely to be present in many, if not all, large-scale mining projects. To be clear, we are not ‘anti-mining’ as such. As scholars, we necessarily have our own views on this, which we feel are appropriately kept personal in this forum. We recognise the social and economic benefits that might be had from mining, but equally, there are voices in this debate that need to be heard – and those voices rightly include third party challengers, as well as those who advocate for investment in new forms of energy in ways that will not contribute to catastrophic climate change.

¹⁴⁵ Hans Kelsen, ‘The Pure Theory of Law: Its Methods and Fundamental Concepts’ (1934) 50(4) *Law Quarterly Review* 474; Hans Kelsen, ‘The Pure Theory of Law’ (1935) 51(3) *Law Quarterly Review* 517; Hans Kelsen, ‘The Pure Theory of Law and Analytical Jurisprudence’ (1941) 55(1) *Harvard Law Review* 44; Geoffrey Samuel, ‘Interdisciplinarity and the Authority Paradigm: Should Law be Taken Seriously by Scientists and Social Scientists?’ (2009) 36(4) *Journal of Law and Society* 431; Mark van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing, 2011).

¹⁴⁶ Eugen Ehrlich, ‘The Sociology of Law’ (1922) 36(2) *Harvard Law Review* 130; Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, tr Walter Moll (Transaction Publishers, 2009); Neil Littlefield, ‘Eugen Ehrlich’s Fundamental Principles of the Sociology of Law’ (1967) 19(1) *Maine Law Journal* 1; David Nelken, ‘Law In Action Or Living Law? Back to the Beginning in Sociology of Law’ (1984) 4(2) *Legal Studies* 157; Alex Ziegert, ‘A Note on Eugen Ehrlich and the Production of Legal Knowledge’ (1998) 20(1) *Sydney Law Review* 108.