



13 July 2017

Christine McDonald
Secretary
Environment and Communications Legislation Committee

Adani Submission to the Senate Environment and Communications Legislation Committee on the *Environment and Infrastructure Legislation Amendment (Stop Adani) Bill 2017 (Cth)*.

Dear Christine,

Adani makes the following submission to the Senate Environment and Communications Legislation Committee (Committee) on the *Environment and Infrastructure Legislation Amendment (Stop Adani) Bill 2017 (Cth)* (Bill) on behalf of Adani Mining Pty Ltd and Adani Abbot Point Terminal Pty Ltd.

Adani Mining Pty Ltd is the proponent for both the Carmichael Coal Mine and Rail Project (EPBC 2010/5736) and the North Galilee Basin Rail Project (EPBC 2013/6885). Both projects are approved controlled actions under the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (Act).

Adani Abbot Point Terminal Pty Ltd is the proponent for the Abbot Point Coal Terminal O Project (EPBC 2011/6194) also an approved controlled action under the Act.

Since 2010, Adani has undertaken extensive environmental impact assessment studies across these projects and subsequently received approvals under Commonwealth and Queensland Legislation. It is our view that the proposed Bill is simply an attempt to invalidate the approvals processes undertaken to date under the Act with respect to these Adani projects.

Our submission below sets forth the reasons why the Bill should not be recommended for approval by the Committee.

Yours sincerely,

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1. LEGAL OVERVIEW

The Bill has the effect of singling out Adani's approvals for retrospective reconsideration by the Minister.

The Bill should not be recommended for approval by the Committee on the bases that Schedule 1, section 12:

- (a) violates the fundamental legal principle of non-retrospectivity;
- (b) violates the principal that laws should be of general application;
- (c) is invalid under section 99 of The Constitution because it gives preference to other States over Queensland;
- (d) discriminates against Adani, a company of Indian origin, in violation of the *Racial Discrimination Act 1975* (Cth);
- (e) interferes with judicial proceedings underway in the Full Federal Court; and
- (f) requires public disclosure of information, which is likely to include Adani's trade and commercial secrets, inconsistently with the *Freedom of Information Act 1982* (Cth).

The Committee should also consider whether the Commonwealth is liable to pay compensation to Adani under the Act with respect to any revocation, amendment or suspension of Adani's approvals.

2. THE BILL VIOLATES THE PRINCIPLE OF NON-RETROSPECTIVITY

Schedule 1, section 12 of the Bill retrospectively applies the proposed 'suitable person test' to Adani's approvals.

The Bill thereby violates the fundamental legal principle that legislation should not adversely affect rights and liberties, or impose obligations, retrospectively.

The principle against retrospectivity is founded on the rule of law. Individuals must know the fixed content of rules beforehand in order to act in accordance with them.

No justification has been provided for the retrospective nature of Schedule 1, section 12 of the Bill and no attempts to minimise its effects are apparent. Indeed, from the very name of the Bill and from Senator Waters' statement in her second reading speech that the Bill is "the next step in the movement to stop Adani", the clearly-intended effect of the Bill is to cause harm to Adani.

It is submitted that any retrospective operation of the Bill must be rejected.

3. THE BILL VIOLATES THE PRINCIPLE OF GENERAL APPLICATION

Schedule 1, section 12 of the Bill subjects Adani to a liability unique to it and inescapable by it.

As mentioned in paragraph 2 above, the clearly-intended effect of the Bill is to cause harm to Adani. Harm will be caused to Adani:



- (a) by subjecting the approvals to further processes;
- (b) by compelling the public disclosure of information relating to Adani – information that would otherwise be subject to the processes of and protections available under the *Freedom of Information Act 1982* (Cth); and
- (c) potentially, by taking the rights that Adani currently holds, perhaps without compensation.

To this extent, the Bill is punitive and effectively singles out Adani for a punishment to which no other person is subject.

The Bill thereby violates the fundamental legal principle that legislation should apply objective standards of general application.

It is submitted that any operation of the Bill which applies solely to Adani must be rejected.

4. THE BILL GIVES PREFERENCE TO ALL OTHER STATES AS AGAINST QUEENSLAND

The Project represents a significant long term social and economic investment in Queensland, involving many other stakeholders including the Queensland Government.

Section 99 of The Constitution provides that the Commonwealth must not give preference to one State or any part thereof over another State or any part thereof. As stated by the High Court in *James v The Commonwealth* (1928) 41 CLR 442 in relation to section 99:

if a law is not applicable to all States alike, then it operates unequally between the States, and discriminates as a law between them

Schedule 1, section 12 of the Bill specifies a review of existing approvals solely over areas of land within the State of Queensland. In other words, the Act approvals relating to a significant part of Queensland are treated differently to Act approvals relating to other States. By singling out Adani's approvals, the effect of Schedule 1, section 12 of the Bill is to give preference to other States' major projects, over those in Queensland.

Schedule 1, section 12 of the Bill is comparable to the legislation considered by the High Court in *Cameron v Deputy Federal Commissioner of Taxation* (1923) 32 CLR 68 in relation to the taxation and valuation of cattle. In concluding that the relevant provisions in that case offended section 99 of The Constitution, the High Court stated:

... stock in Queensland and stock in New South Wales are, by reason solely of their State situation, 'treated differently', by the mere fact that different standards are applied to them respectively. It does not matter whether those legal standards are arbitrary or measured, whether dictated by a desire to benefit or to injure, the simple fact is they are 'different'

The application of Schedule 1, section 12 of the Bill solely to Adani's approvals in Queensland and not to other proponent's approvals necessarily means States are 'treated differently'.



The Bill, in its current form, may therefore infringe section 99 of The Constitution. Any review of Adani's approvals under the Bill would thereby be unconstitutional.

5. THE INVALIDITY OF THE BILL UNDER THE RACIAL DISCRIMINATION ACT

Section 10 of the *Racial Discrimination Act 1975* (Cth) provides:

If, by reasons of, or of a provision of, a law ..., persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

Section 10 of the *Racial Discrimination Act 1975* (Cth) has been recognised by the High Court in *Gerhardy v Brown* (1985) 159 CLR 70 at 94 as giving effect to the principle of equality. To the extent that legislation interferes with this fundamental right and treats peoples or different ethnic or national origins differently, it is invalid under section 10.

In *Gerhardy v Brown* (at 97-99), the High Court also concluded that legislation which has a discriminatory operation or effect will be invalid even if a distinction is not expressly based on race, colour or national or ethnic origin.

Consequently, while the Bill does not expressly single out Adani based on race, colour or national or ethnic origin, the effect of Schedule 1, section 12 is to deny Adani, a company well-known to have Indian origins, a right to rely on its approvals granted under the Act. The Bill does not treat Adani on an equal footing with other holders of Act approvals and its effect could be to deny Adani a right to pursue lawful and legitimate activities in Australia.

It is submitted that Schedule 1, section 12 of the Bill is thereby invalid under section 10 of the *Racial Discrimination Act 1975* (Cth) and must be rejected.

6. THE BILL INTERFERES WITH JUDICIAL PROCEEDINGS IN THE FEDERAL COURT

The approval referred to in Schedule 1, section 12(1)(c) of the Bill is currently being judicially reviewed by the Full Court of the Federal Court, on appeal from the decision of the Federal Court in *Australian Conservation Foundation Incorporated v Minister for the Environment* [2016] FCA 1042. The Federal Court, following an application for judicial review brought by Australian Conservation Foundation, found the Minister had properly made his decision to grant the relevant approval.

The appeal was heard by the Full Court of the Federal Court on 3 March 2017. The Court has reserved its judgment.

Schedule 1, section 12 of the Bill requires the review of a decision, using new criteria, on a matter presently before the courts. Chapter III of The Constitution draws a distinct line between the exercise of legislative power by the Commonwealth and the exercise of judicial power. Significantly, the Commonwealth must not interfere with the judicial functions of a court. As was noted by the High Court in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 116:



One of the basic principles which underlie Ch III and to which it gives effect is that the judges of the federal courts must be, and must be perceived to be, independent of the legislature and the executive government.

It would therefore be inappropriate for the Bill to interfere with the judicial review process currently underway in the Full Court of the Federal Court.

7. THE PUBLICATION OF TRADE AND COMMERCIAL INFORMATION SHOULD BE RESTRICTED

If the submissions for the rejection of Schedule 1, section 12 of the Bill are not accepted by the Committee, then at the very least the Committee should recommend amendments to ensure that any publication of the report prepared by the Secretary is subject to at least the same restrictions imposed on the Minister under Schedule 1, section 12(10). In other words, the Secretary must be prohibited from publishing:

- (a) exempt documents under section 47 of the *Freedom of Information Act 1982* (Cth); and
- (b) conditionally exempt documents under 47G of the *Freedom of Information Act 1982* (Cth).

Such amendments are required not only to protect Adani's trade and commercial secrets, but also for legislative consistency.

8. COMPENSATION PAYABLE

The Bill's Explanatory Memorandum does not consider any fiscal consequences of the Bill.

Section 519 of the Act provides for the payment of compensation when the operation of the Act results in the acquisition of property. The term "property" has been given a broad meaning, with the High Court concluding in *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 that the concept of property extends to "every species of valuable right and 'property'", which is "the most comprehensive term that can be used".

Any revocation, amendment or suspension of Adani's approvals (ie, of Adani's current rights which are "property") as a result of Schedule 1, section 12 of the Bill may constitute an acquisition triggering a compensation liability under the Act.

To date, Adani has invested significantly in the Abbot Point terminal and Carmichael Mine and Rail projects. Given the significance of these Projects, if compensation were to become payable, it would be a substantial figure.

If the Committee does not accept the submissions regarding the rejection of any retrospective operation of the Bill (see paragraph 2 above), then at the very least the Bill should include clear provisions that Adani is entitled to just terms compensation. The clarification of compensation entitlements would go some way to minimise the effects of the retrospective operation of the Bill.