4 August 2017

Senate Environment and Communications
Legislative Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Via email: ec.sen@aph.gov.au

Dear Sir/Madam

The Minerals Council of Australia (MCA) welcomes the opportunity to provide comments on the Inquiry into Environment and Infrastructure Legislation Amendment (Stop Adani) Bill 2017 (the Bill).

The MCA is the peak industry organisation representing Australia's exploration, mining and minerals processing industry, nationally and internationally, in its contribution to sustainable development and society. The MCA's strategic objective is to advocate public policy and operational practice for a world-class industry that is safe, profitable, innovative, and environmentally and socially responsible attuned to its communities' needs and expectations.

The Bill is unworkable, unnecessary and potentially counterproductive. It will generate considerable risk for existing and future businesses, affecting investment in the minerals industry but other sectors of the economy. Accordingly, the MCA recommends the Bill be rejected.

Concerns with the intent of the Bill

The MCA holds significant concerns over the title of Bill, which singles out one company (Adani) and associated developments that have already been approved under both state and Commonwealth law. Furthermore, these approval decisions have already been subject to review by the Courts, including one Federal Court process which is ongoing.

The Bill title is part of a campaign currently being run by opponents of the development. It is more a political statement than a genuine attempt to reform and improve the operation of the Northern Australia Infrastructure Facility (NAIF) or national environmental law. The explanatory memorandum further highlights the discriminatory nature of the Bill:

> The Environment and Infrastructure Legislation Amendment (Stop Adani) Bill 2017 (the Bill):
>
> - Proposes to make sure the Australian Government cannot hand out $1 Billion to Adani…via the *Northern Australia Infrastructure Facility Act, 2016*.
> - Trigger an automatic review of Adani's existing approvals in light of damning evidence that has emerged…

The MCA has serious concerns with the above statements. Firstly, it is incorrectly implied the current NAIF application will somehow proceed as an untied grant rather than as a concessional loan.

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Secondly, the allegation that 'damning evidence' exists is unsubstantiated, and simply calculated to harm the reputation of an individual company. These statements are misleading and raise concerns the Bill and its implications have not have been properly considered prior to its introduction into Parliament.

COAG principles of best practice regulation

The Council of Australian Governments' (COAG) principles of good regulation should be used to guide the development and implementation of new regulation. The MCA is concerned that many of these principles have not been given consideration in the development of the Bill which stress:

- Establishing a case for action before addressing a problem
- Considering a range of feasible policy options
- Consulting effectively with key stakeholders
- Consistency and proportionality.[1]

It is unclear whether the development of the Bill satisfies any of the above COAG requirements for good regulation as the explanatory memorandum fails to address these principles.

Retrospectivity and sovereign risk

The retrospective nature of the Bill with respect to the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) contradicts the common law principle that 'laws should not retrospectively change legal rights and obligations, or create offences with retrospective application'.[2]

Should the Bill be passed, it would set a poor precedent and raise sovereign risk concerns for companies considering investing in Australia. The Law Council of Australia makes the following observations with respect to the effects of retrospective laws on business:

> …retrospective laws can cause a 'number of practical difficulties for business, and the wider economy' including: actual and reputational damage to the market (sovereign risk); disruption to business planning processes resulting in high compliance costs; and unintended consequences from increased regulatory complexity.[3]

Given the significant impact of retrospective changes to national environmental law, we believe retrospective legislation should only be introduced where there is a compelling, evidence-based case to support its introduction. Furthermore, the potential impacts on broader industry and future investment must also be carefully evaluated.

The reforms are unworkable

The Bill may have broader impacts on existing and future activities regulated under the EPBC Act – including but not limited to mining. Specifically, processes outlined in Schedule 1, Part 1 of the Bill will prove unworkable, and provide little certainty for the regulated entity or company involved. This is discussed in more detail below.

S136 of the EPBC Act includes a suitable persons 'test' for environmental matters. Specifically, the Minister may consider the environmental history of the person (entity) prior to making an approval decision, when varying conditions of approval (s143) and in decisions to suspend (s144), revoke

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[1] Council of Australian Governments, *Best practice regulation – A guide for ministerial councils and national standard setting bodies*, Department of Prime Minister and Cabinet, October 2007
[2] Australian Law Reform Commission, *Traditional Rights and Freedom – Encroachments by Commonwealth Laws (ALRC Interim Report 127)*, Section 9 – Retrospective Laws – a common law principle, published 3 August 2015, p. 249.
[3] Law Council of Australia, submission 75 in Australian Law Reform Commission, *Traditional Rights and Freedom – Encroachments by Commonwealth Laws (ALRC Final Report 129)*, p. 364.

(s145) or transfer (s145B) an approval. The suitable persons 'test' applies to both individuals and executive officers of the body corporate and the parent company (body).

Schedule 1, Part 1 of the Bill mandates the suitable persons test for Ministerial approval decisions and for decisions to vary conditions and suspend, revoke or transfer approvals under Part 9 of the Act.

The Bill extends the reach of the current suitable persons test to include the assessment of associated entities and their executive officers. This is to include the environmental history of all, both within Australia and overseas. The MCA considers implementation of this requirement would be complex, resource intensive and time consuming while adding little value to EPBC Act processes.

Section 10 of the Bill provides that an 'associated entity' has the same definition as that under the *Corporations Act 2001*. Under the *Corporations Act* section 50AAA an associated entity captures a broad range of corporate relationships. These include among other things, where the principal (e.g. the entity seeking approval under the EPBC Act) and the associate are related bodies corporate, where the principal controls the associate and its operations and resources are material to the associate, where a qualifying investment has been made in the associate by the principal and where both entities are controlled by a third entity etc.

For a large multinational company, there may be more than a dozen of these associated entities, located in Australia and around the globe. As provided above, the process would involve scrutinising the environmental history of executive officers – which may be multiple given the broad definition in the *Corporations Act* - for each associated entity. Whether any of these individuals have operational or managerial influence over the Australian project and if so, whether the environmental history is relevant to that project is given little regard in this process.

This requirement raises concerns over the breadth of specific individuals and associated entities assessed under the requirement and their relevance to the decision at hand. The MCA would also question the reliance and standing of sources of environmental history information, the weighting of such evidence, and dealing with claims and appeals.

This complex and unwieldy process would create considerable uncertainty for proponents. It would be highly problematic not only for new approvals, but put at risk current operations seeking simply to extend or vary an existing EPBC Act approval. This is particularly acute for time critical approvals, which are often the case in the minerals sector.

There are many reasons approval conditions may be varied, not all of which are significant. These can range from removing conditions made redundant by mine planning changes or adding conditions to include new ancillary activities (e.g. new roads etc.) to major variations to accommodate more significant mine expansion activities. Accordingly, it would be nonsensical that a mine seeking to vary a pre-existing EPBC Act approval, including minor changes, would require a potentially global review of executive officers and associated entities. It would serve only to create significant uncertainty for these operations while unnecessarily complicating the EPBC Act operation.

The reforms are unnecessary

The MCA contends that existing provisions in the EPBC Act already allow for the minister to account for a proponent's environmental history where appropriate, (for example, when a mine is purchased). The adequacy of these powers has been reinforced by the Department of Environment and Energy's submission to the inquiry:

> The Department considers the EPBC Act provides all the powers necessary to assess the history of people and entities in relation to environmental matters (within or external to Australia).[4]

[4] Department of Environment and Energy, *Submission to Senate Environment and Communications Legislative Committee Inquiry into Environment and Infrastructure Legislation Amendment (Stop Adani) Bill 2017*, 16 July 2017.

The Bill also requires the Minister to consider any 'relevant' matter without restriction. This clause is ambiguous, yet the obligation to consider these matters may make these contestable creating greater uncertainties for proponents and existing approval holders.

The Bill may be counterproductive

The MCA considers the sum of the proposed changes to the suitable persons 'test' may ultimately prove counterproductive, tying up the resources of both the Minister and the administering authority in process. This may inadvertently result in diverting attention away from those issues most material to the approval decision, creating a risk that those issues are not given sufficient attention or even overlooked. The nebulous administrative processes created by the Bill may only hinder effective operation of the EPBC Act.

Yours sincerely

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