



Australian Government
**Department of Industry,
Innovation and Science**

A/g Secretary

Ms Christine McDonald
Committee Secretary
Senate Standing Committee on
Environment and Communication
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Dear Secretary

Thank you for your invitation to provide a submission to the Senate Standing Committees on Environment and Communications concerning the inquiry into the Environment and Infrastructure Legislation Amendment (Stop Adani) Bill 2017.

The Department of Industry, Innovation and Science (the department) provides the enclosed submission in response to your invitation. This focuses on the proposed changes to the *Northern Australia Infrastructure Facility Act 2016* (the NAIF Act).

It is my understanding that the Department of the Environment and Energy will be providing a submission, focused on proposed amendments to the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act).

Yours sincerely

Sue Weston

18 July 2017



Australian Government
**Department of Industry,
Innovation and Science**

Submission to the Standing Committees on Environment and Communications - *Environment and Infrastructure Legislation Amendment (Stop Adani) Bill 2017*

Department of Industry, Innovation and Science

14 July 2017

Introduction

The *White Paper on Developing Northern Australia: Our North, Our Future* sets the Government's policy framework for developing the north. The Northern Australia Infrastructure Facility (NAIF) is a key initiative of this agenda.

The NAIF will offer up to \$5 billion over five years in concessional finance to support the construction of significant infrastructure including airports, communications, energy, ports, rail and water. It seeks to complement private sector investment for major infrastructure projects.

The NAIF Board is responsible for making investment decisions and to focus on market conditions and financial viability of proposals. The *Northern Australia Infrastructure Facility Act 2016* (the Act), establishes the NAIF as an independent statutory body, subject to the requirements of the Act. It also provides for the *Northern Australia Infrastructure Facility Investment Mandate Direction 2016* (the Investment Mandate), which is a legally binding Ministerial Direction regarding how NAIF is to perform its functions.

The Department of Industry, Innovation and Science (the department) was responsible for supporting the development of this framework and for its ongoing administration. It is on this basis that it offers the observations below to assist the Committees' deliberation of the Bill. In summary, the department is of the view that the Act offers a robust and effective regulatory system which already supports this commercial activity in a manner consistent with Australia's economic, environmental and social interests.

Proposed amendments to the *Northern Australia Infrastructure Facility Act (2016)*

The department notes the *Environment and Infrastructure Legislation Amendment (Stop Adani) Bill 2017* (the Bill) seeks to introduce a "suitable person" test under the Act. This would require the NAIF to make an assessment of a project proponent's character prior to making an Investment Decision and reach a conclusion about whether that proponent is a suitable person to receive NAIF finance. This would cover a proponent's environmental history and prior commercial dealings. Further, the Bill would require the relevant Minister to veto a particular project proposal if the NAIF Board concludes that the proponent is not a suitable person to receive NAIF finance.

Environmental history

For the purposes of assessing whether a project proponent is a "suitable person" in relation to their environmental performance, the Bill proposes that the NAIF have regard to:

...whether within or outside Australia:

- (a) the person's history in relation to environmental matters;*
- (b) if the person is a body corporate—the history of its executive officers in relation to environmental matters;*
- (c) if the person is a body corporate that has an associated entity—the history in relation to environmental matters of the associated entity and the entity's executive officers.*

In the department's view such considerations are already covered by the Investment Mandate. Section 15(2) of the Investment Mandate requires that financial assistance to projects cannot be provided until all relevant regulatory, environmental and Native Title approvals have been received.

This includes requirements under relevant state and territory environmental legislation, and under the Environmental Protection and Biodiversity Conservation Act 1999 (EPBC Act). Under the EPBC Act, Section 136 (4) provides that:

In deciding whether or not to approve the taking of an action by a person, and what conditions to attach to an approval, the Minister may consider whether the person is a suitable person to be granted an approval, having regard to:

- (a) the person's history in relation to environmental matters; and*
- (b) if the person is a body corporate – the history of its executive officers in relation to environmental matters; and*
- (c) if the person is a body corporate that is a subsidiary of another body or company (the parent body) – the history in relation to environmental matters of the parent body and its executive officers.*

It is therefore the department's view that the proposed amendments relating to environmental performance do not provide any additional protection beyond existing Commonwealth and state or territory frameworks, and are therefore unnecessary.

Commercial dealings

For the purposes of assessing whether a project proponent is a "suitable person" in relation to their prior commercial dealings, the department notes the Bill further proposes that the NAIF have regard to:

...whether within or outside Australia:

- (a) subject to the regulations, whether any of the following has been convicted of, or investigated in relation to, an offence:*
 - i. the person;*
 - ii. if the person is a body corporate—its executive officers;*
 - iii. if the person is a body corporate that has an associated entity—the associated entity and the entity's executive officers;*

- (b) any other matter prescribed by the regulations;*
- (c) any other matter the Facility considers to be relevant.*

The Explanatory Memorandum for the Bill suggests that the primary consideration of the suitable person test would be:

...investigations and findings against members or executive officers of the Adani corporate group for ... fraud, money laundering, tax minimisation and corruption.

Section 7(2)(b) of the Investment Mandate sets out that the Board must be satisfied that the Commonwealth will be repaid, or that the investment can be refinanced. Prior instances of financial misconduct present material risks to finance providers and are considered when assessing the risk of default.

To this extent, and in assessing the ability of repayment, the NAIF will undertake assessment of a project proponent's corporate history (including that of its executives) in its due diligence processes. As such, the department is of the view that the NAIF Board will already have regard to the matters described in this provision when making investment decisions.

In addition, the previously referenced Section 15(2) of the Investment Mandate requires proponents to comply with all Commonwealth, State and Territory regulations, this includes legislation relating to corporate activities such as the:

- *Corporations Act 2001* (the Corporations Act);
- *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*;
- relevant tax legislation; and
- anti-corruption regulations.

The department also notes Mandatory Criteria 5 of Schedule 1 in the Investment Mandate requires that the Facility's loan monies are not the majority source of debt funding. This requirement ensures that where NAIF proposes to make a loan, other investors must be involved and that NAIF participation will be as part of a syndicate of lenders. Other syndicate members will also conduct an assessment of proponents to determine the risk of default.

In summary, the department considers that the proposed amendments relating to suitability will not provide additional assurances beyond those already associated with the Act, and are therefore unnecessary.

Ministerial Consideration

The department notes the Bill proposes to introduce a binding requirement on the Minister under Section 11 of the Act:

The Minister must give the rejection notice before the end of the Minister's consideration period if the Facility's assessment under subsection (2A) is that the entity responsible for the project for which the financial assistance is proposed to be provided is not a suitable person to benefit from the financial assistance.

The provision appears to contemplate a scenario where the NAIF Board both considers a recipient as unsuitable and recommends to the Minister an offer of financial assistance. If this situation did eventuate, the department notes Section 11 of the existing Act provides the Minister for Resources and Northern Australia with an opportunity to reject Investment Decisions of the NAIF Board on the grounds that the financial assistance would:

- (a) be inconsistent with the objectives and policies of the Commonwealth Government; or*
- (b) have adverse implications for Australia's national or domestic security; or*
- (c) have an adverse impact on Australia's international reputation or foreign relations.*

In the department's view, the Act's provisions already provide scope for the Minister to act in this situation.

Conclusion

The department understands the intent of the Bill is to introduce additional steps to assess the environmental history of a proponent and to identify instances of financial misconduct.

The department is of the view that this intent is already fulfilled by the existing legislation. In particular, the Investment Mandate's existing requirement that the NAIF ensure projects have received all relevant regulatory approvals requires that projects must comply with the EPBC Act, the Corporations Act, relevant tax legislation and all relevant State and Territory regulation. The department also notes that the Ministerial Consideration period established under the Act also provides an additional opportunity to make a decision on whether a project is suitable for public support.

It is therefore the department's view that these regulations sufficiently identify and address concerns related to a proponent's environmental history or commercial dealings, and the provisions of the Bill are unnecessary.