



The Adani Brief

What governments and financiers need to know about the Adani Group's record overseas

Environmental Justice Australia (formerly the Environment Defenders Office, Victoria) is a not-for-profit public interest legal practice. Funded by donations and independent of government and corporate funding, our legal team combines a passion for justice with technical expertise and a practical understanding of the legal system to protect our environment.

We act as advisers and legal representatives to the environment movement, pursuing court cases to protect our shared environment. We work with community-based environment groups, regional and state environmental organisations, and larger environmental NGOs. We also provide strategic and legal support to their campaigns to address climate change, protect nature and defend the rights of communities to a healthy environment.

While we seek to give the community a powerful voice in court, we also recognise that court cases alone will not be enough. That's why we campaign to improve our legal system. We defend existing, hard-won environmental protections from attack. At the same time, we pursue new and innovative solutions to fill the gaps and fix the failures in our legal system to clear a path for a more just and sustainable world.

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Executive Summary

If it proceeds, the Adani Group's Carmichael Coal Mine and Rail Project in the Galilee Basin in Queensland (**Carmichael Mine**) will be among the largest new coalmines in the world. The associated rail infrastructure and expansion of the coal export terminal at Port of Abbot Point (**Abbot Point Port**) adjacent to Queensland's Great Barrier Reef World Heritage Area would facilitate the shipping of coal through the Great Barrier Reef's waters from the Carmichael Mine.

This research briefing suggests that governments and private stakeholders should give serious consideration to:

- the Adani Group's global legal compliance record which demonstrates numerous serious breaches with adverse consequences for the environment and local people; and
- the possibility that if this track record continues in Australia, then supporting the Adani Group's Carmichael Mine and the Abbot Point Port may expose governments and private stakeholders to reputational and financial risks.

Background: the Carmichael Mine and Abbot Point Port Projects

The Carmichael Mine would add up to 120 million tonnes per year of greenhouse gas emissions to the Earth's atmosphere, mainly from the burning of the coal. Development of the mine and associated infrastructure would also enable the development of multiple other lower quality thermal export coalmines proposed for the remote and so far unexploited Galilee Basin. The urgent need to reduce greenhouse gas emissions means that the serious climate risks and the significant financial implications of those risks posed by the development of the Carmichael Mine and associated infrastructure ought to make the proposal unacceptable to potential government and private stakeholders.

In addition to the significant climate impacts of building a massive new thermal coalmine, the proposed Carmichael Mine and expansion of the Abbot Point Port carry a very high risk of direct impacts that threaten to destroy or irreparably damage unique and important wetlands, globally significant natural heritage, habitat for threatened and endangered species, and the sacred sites and traditional lands essential for the continued survival of traditional owners, the Wangan and Jagalingou people.

As a precursor to any initial or ongoing approvals to develop and operate the Carmichael Mine and the Abbot Point Port, the entities in the Adani Group ought to be able to demonstrate that they have complied with the relevant regulatory requirements in the jurisdictions in which they already operate.

Potential implications for governments and private stakeholders

The evidence set out in this research briefing raises very serious concerns about the compliance record of some entities in the Adani Group. This is problematic for governments and private stakeholders in the Carmichael Coal Mine and Abbot Point Port projects because:

1. entities in the Adani Group have a concerning history of failures to comply with environmental laws in foreign jurisdictions;
2. entities in the Adani Group have a concerning history of failures to comply with regulatory and disclosure requirements in foreign jurisdictions; and
3. there has been insufficient scrutiny of the compliance record of entities within the Adani Group prior to the Australian government issuing environmental approvals to these projects.

The Adani Group

The Adani Group describes itself as ‘one of India’s leading business houses’ and ‘an internationally integrated infrastructure business’.¹ According to the Adani Group’s website, it is India’s largest:

- coal trader;
- private thermal power producer; and
- port operator.

The Adani Group’s operations are characterised by a high level of integration across all of its businesses (described on the Adani Group’s website as ‘working across functions and businesses to create synergies’) as well as a high level of ownership by members of the Adani family.²

The structure of the Adani Group’s Australian operations is complicated, with at least 25 separate Australian incorporated entities undertaking activities across the proposed Carmichael Mine and Abbot Point Port.

These Australian entities are all:

- described on the Adani Group’s webpage as ‘Group Companies’, along with many of the Indian-based Adani companies³; and
- ultimately owned by entities registered in India, Singapore and the Cayman Islands (refer to **Adani’s Australian Corporate Structure** diagram at on the following page).

Furthermore:

- thirteen of the Australian Adani Group companies are ultimately owned by Atulya Resources Limited, a privately held company based in the Cayman Islands;⁴ and
- the Adani family is the largest shareholder of each of the Indian Adani companies that are the ultimate owners of the remainder of the Australian Adani companies.⁵ It is highly likely that the Adani family also owns the Cayman Island entity, Atulya Resources Limited.⁶

1 <http://www.adani.com/about-us>

2 See Adani’s Australian Corporate Structure diagram on page 6 of this report and Adani Ports and Special Economic Zone Ltd is 42% owned by SB Adani Family Trust, with 6% being held by Vinod Shantilal Adani and 6% by Adani Properties Private Ltd (Adani Ports and Special Economic Zone Ltd *Annual report 2015-2016*, page 98 http://www.adaniports.com/docs/download/AR_2016 (accessed 9 February 2017); Adani Enterprises Ltd is 56% owned by SB Adani Family Trust, with another 8% being held by Vinod Shantilal Adani and 9% by Adani Properties Private Ltd (Adani Enterprises Ltd *Annual report 2015-2016*, page 39 http://www.adanienterprises.com/docs/download/AR_2015-2016 (accessed 9 February 2017); Adani Power Ltd is 42% owned by SB Adani Family Trust and 11% by Adani Properties Private Ltd (Adani Power Ltd *Annual Report 2015-2016*, page 15 <http://www.adanipower.com/docs/download/AR2016> (accessed 9 February 2017); Adani Transmission Ltd is 56% owned by SB Adani Family Trust, with another 8% held by Vinod Shantilal Adani and 9% by Adani Properties Private Ltd (Adani Transmission Ltd *Annual Report 2015-2016*, page 11 <http://www.adanitransmission.com/docs/download/AR2015-16> (accessed 9 February 2017). Adani Properties Private Limited is an Indian Company one of the directors of which is Pranav Vinodbhai Adani, who is also a director of a variety of other Adani Companies (About Adani Properties Private Limited <http://corporatedir.com/company/adani-properties-private-limited> (accessed 9 February 2017). Despite not being the majority shareholder in all of these companies, the Adani family does have the largest portion in each. They also have influence over the board of directors of each company. They comprise four directors on the board of Adani Enterprises Ltd, (Adani Enterprises Ltd *Annual report 2015-2016*, page 60 http://www.adanienterprises.com/docs/download/AR_2015-2016 (accessed 9 February 2017) and two directors on each of the boards of Adani Power Ltd, Adani Ports and Special Economic Zone Ltd, Adani Transmission Ltd (Adani Power Ltd *Annual Report 2015-2016*, page 1 <http://www.adanipower.com/docs/download/AR2016> (accessed 9 February 2017), Adani Ports and Special Economic Zone Ltd *Annual report 2015-2016*, page 21 http://www.adaniports.com/docs/download/AR_2016 (accessed 9 February 2017), and Adani Transmission Ltd *Annual Report 2015-2016*, page 1 <http://www.adanitransmission.com/docs/download/AR2015-16> (accessed 9 February 2017).

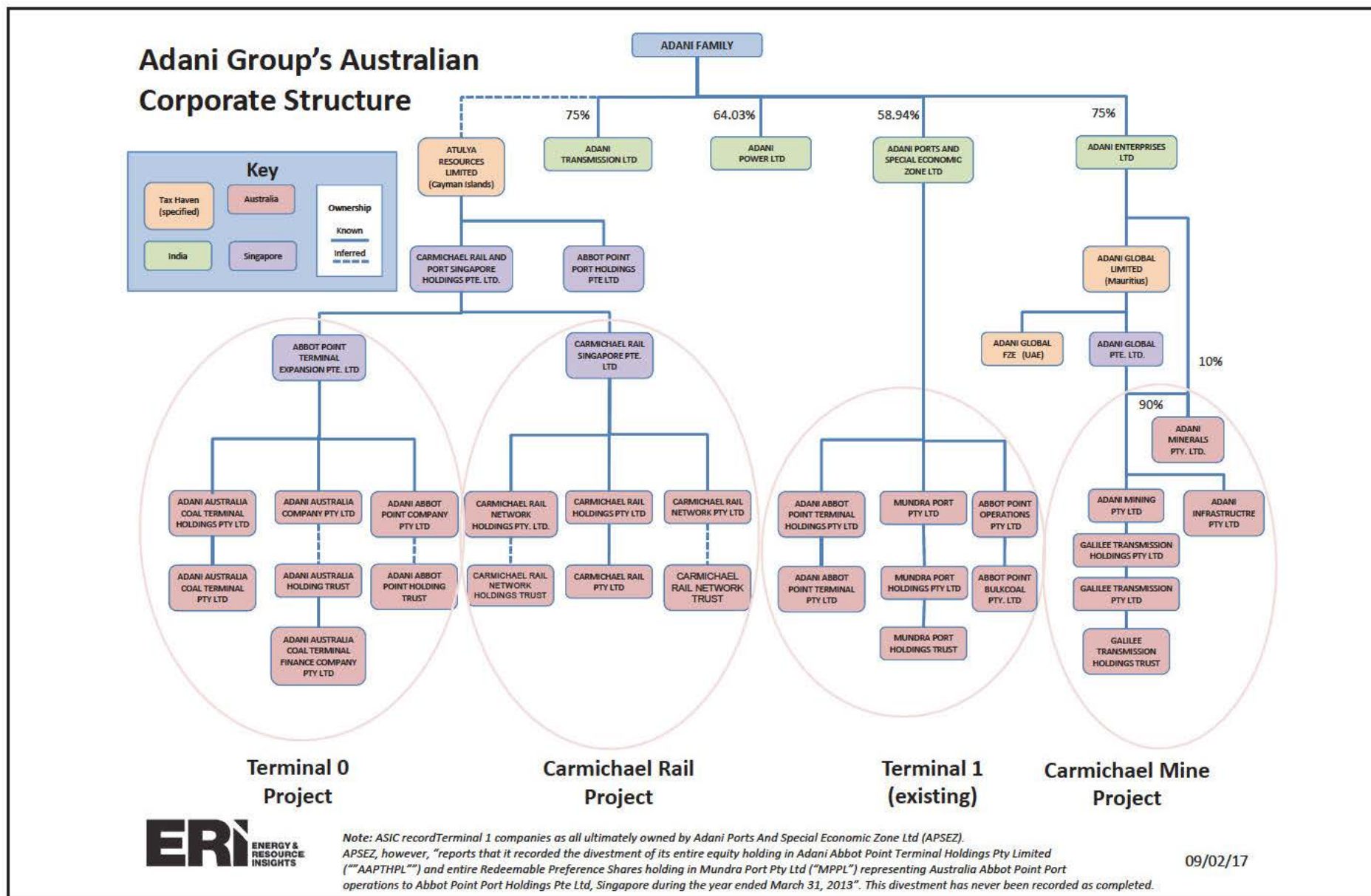
3 Adani website List of Group Companies <http://www.adani.com/businesses/companies-list> (accessed 9 February 2017).

4 ASIC Searches undertaken 10 November 2016.

5 See Adani’s Australian Corporate Structure diagram on page 6 of this research briefing and footnote 2 above.

6 Ownership of Atulya Resources Limited by the Adani Family can be inferred from the following information. In 2013 the Adani Group’s existing coal export Terminal 1 at the Abbot Point Port was sold to a Singapore entity ultimately owned by Atulya Resources Ltd - see section 2.1 ‘Background to the Ownership of Abbot Point Terminal 1’ of this research briefing below. At the time of the sale a 2013 Bombay Stock Exchange announcement stated that the Adani family was the intended recipient of the sale of Terminal 1 – see Adani Ports Corporate Announcement 28 January 2013 http://www.bseindia.com/corporates/annndet_new.aspx?newsid=7e9ae423-ab8b-4bf6-a046-46f32c9b007b (accessed 9 February 2017). A 2015 FIGG document also describes the owners as the Adani Family. FIGG was working on behalf of Adani Abbot Point Terminal Pty Ltd for a notes issuing program – see FIGG publication 9 June 2015 [https://www.figg.com.au/docs/default-source/research-attachments/adani-abbot-point-terminal-research-report---9-june-2015-\(r\).pdf?sfvrsn=2](https://www.figg.com.au/docs/default-source/research-attachments/adani-abbot-point-terminal-research-report---9-june-2015-(r).pdf?sfvrsn=2) (accessed 9 February 2017). Further, ownership by the Adani Family would explain why Atulya Resources Ltd’s Australian subsidiaries are listed as Adani Group Companies on the Adani website. List of Group Companies <http://www.adani.com/businesses/companies-list> (accessed 9 February 2017).

Adani's Australian corporate structure



Structure of this research briefing

Chapter 1 describes a number of allegations and findings against Indian-based entities in the Adani Group for illegal dealings and corruption and why this information should be of concern to Australian governments and private stakeholders. In particular, sections 1.1 and 1.2 provide recent information that may be relevant to any private financier approached to provide finance to an Adani Group entity.

- Section 1.1 sets out the evidence showing that five Adani companies in India, including Adani Enterprises Ltd, are under investigation by the Directorate of Revenue Intelligence (an Indian intelligence agency run within Indian Ministry of Finance). The Directorate of Revenue Intelligence is investigating the use of 'black money' associated with inflating the quality, and hence the value, of coal imported from Indonesia. The term 'black money' can be associated with companies that manipulate expenses to gain tax advantages or launder money.⁷ This investigation is of particular relevance to the Adani Group's operations in Australia because Adani Enterprises Ltd is the ultimate holding company of Adani Mining Pty Ltd,⁸ the proponent for the proposed Carmichael Coal Mine.⁹
- Section 1.2 sets out the evidence showing that Adani Transmission Ltd is also under investigation by the Directorate of Revenue Intelligence for the use of 'black money' associated with hiding profits by over-valuing capital equipment imports, and the use of an offshore holding company established by the Adani Group in Mauritius for receiving the extra money from the inflated invoices. It has been reported that the Mauritius company is controlled and managed by Mr Vinod Shantilal Adani,¹⁰ who is reported to be the eldest brother of Mr Guatam Adani,¹¹ the Chairman of the Adani Group.¹² This is of particular relevance to the Adani Group's operations in Australia because Mr Vinod Shantilal Adani is also the sole director of a number of Singapore companies which own nine of the Adani Group entities operating in Australia associated with the proposed Point of Abbot Port components of the proposed Carmichael Mine.¹³ These companies are ultimately owned by Cayman Islands-registered Atulya Resources Limited, which is likely to be privately held by the Adani Family.¹⁴ We note that we are not suggesting that Mr Vinod Shantilal Adani is somehow involved in or responsible for the black money transactions – we simply note the fact that there is a common director between the relevant companies.

Chapter 2 provides evidence that suggests that the ultimate ownership of Terminal 1 at Abbot Point Port is opaque. Accounts lodged in India have removed Abbot Point Port from publicly listed Adani Ports and Special Economic Zone Ltd and attribute ownership of the coal port to a private Singapore company, ultimately owned by Atulya Resources Limited. However, Australian financial accounts suggest the listed Indian company retains ownership of Abbot Point Port.

If Abbot Point Terminal 1 is owned by Adani Ports and Special Economic Zone Limited, actual or potential lenders' security is tied (either overtly or by implied endorsement/connection) to an Indian publicly listed company with substantial additional assets and relatively transparent accounts. If not, the profile of the security may change, including corresponding implications to related party security and deeds. The risks are ultimately borne by lenders, their shareholders, others with financial interests in the lenders and employees.

Chapter 3 provides a research briefing of the many current and past court cases filed in Indian courts against entities in the Adani Group with respect to their compliance with environmental approvals. It also details court findings in India and Zambia relevant to the environmental history of Adani's Australian corporate entities, including Adani Mining Pty Ltd, the proponent of the proposed Carmichael Coal Mine.

7 Ministry of Finance, Department of Revenue, Central Board of Direct Taxes, New Delhi, *Black Money: White Paper* (May 2012), page 5, <http://pib.nic.in/archieve/others/2012/may/d2012052101.pdf> (accessed 9 February 2017).

8 ASIC Search conducted 26 October 2016.

9 See generally, Queensland Government, Department of State Development, *Carmichael Coal Mine and Rail Project*, <http://statedevelopment.qld.gov.au/assessments-and-approvals/carmichael-coal-mine-and-rail-project.html> (accessed 9 February 2017).

10 Jay Mazoomdaar *Panama Papers: Two months after Adani brother set up firm in Bahamas, a request to change name to Shah* (*The Indian Express* 5 April 2016) <http://indianexpress.com/article/india/india-news-india/panama-papers-india-2-months-after-adani-brother-set-up-firm-in-bahamas-a-request-to-change-name-to-shah/> (accessed 9 February 2017).

11 Jay Mazoomdaar *Panama Papers: Two months after Adani brother set up firm in Bahamas, a request to change name to Shah* (*The Indian Express* 5 April 2016) <http://indianexpress.com/article/india/india-news-india/panama-papers-india-2-months-after-adani-brother-set-up-firm-in-bahamas-a-request-to-change-name-to-shah/> (accessed 9 February 2017).

12 Adani, *Chairman's corner*, <http://www.adani.com/gautam-adani> (accessed 9 February 2017).

13 These companies are Adani Australia Coal Terminal Finance Company Pty Ltd, Carmichael Rail Pty Ltd, Carmichael Rail Holdings Pty Ltd, Carmichael Rail Network Holdings Pty Ltd, Carmichael Rail Network Pty Ltd, Adani Australia Coal Terminal Pty Ltd, Adani Australia Coal Terminal Holdings Pty Ltd, Adani Abbot Point Company Pty Ltd, and Adani Australia Company Pty Ltd.

14 Searches conducted 10 November 2016 and see footnote 5 above.

- Section 3.1 describes the findings made by the Indian National Green Tribunal against Adani Enterprises Ltd (the ultimate parent company of Adani Mining Pty Ltd – proponents of Carmichael Mine) in August 2016. The Honourable Justices Kumar and Salvi and two Expert Members found Adani Enterprises Ltd and several other non-Adani entities liable for failing to clean up after the unseaworthy coal ship Adani Enterprises Ltd chartered sank off the coast of Mumbai in 2011. Adani Enterprises Ltd were fined the equivalent of AU\$975,000. The Judicial members raised that both the sinking itself and the fact that it had not been cleaned up for over five years were causes of serious damage, including damage to the tourism industry.

This particular example is of concern for two reasons:

1. This past conduct with respect to managing the shipping of coal is relevant when considering the Adani Group's plan to ship Carmichael coal out of Abbot Point Port and through the fragile Great Barrier Reef World Heritage Area; and
 2. There is currently no emergency response plan nor any availability of emergency funding for dealing with damage to coral reefs following a shipping incident in the Great Barrier Reef, as demonstrated by the Shen Neng 1 coal ship grounding, which has still not been cleaned up six years later.¹⁵
- Section 3.5 details the failure of an Adani entity, Adani Mining Pty Ltd, to disclose relevant information about the company's environmental history to the Australian Government. In 2010 Konkola Copper Mines (**KCM**), which is not an Adani Group entity, caused harm to the environment in violation of Zambian law, and later pleaded guilty to environmental offences and was fined. This information is relevant to the environmental history of Adani Mining Pty Ltd because the offence occurred when one of Adani Mining Pty Ltd's directors, Mr Jeyakumar Janakaraj, was the Director of Operations of KCM.

The Australian Federal Environment Minister did not consider this information about the environmental history of Adani Mining Pty Ltd's executive officer when giving approvals for the Carmichael Mine and Rail Project and the North Galilee Basin Rail Project to Adani Mining Pty Ltd because Adani Mining Pty Ltd failed to provide that information, even though it was specifically requested to do so.¹⁶

¹⁵ Great Barrier Reef Marine Park Authority, *Statement on out-of-court settlement with owners of Shen Neng 1* (19 September 2016) <http://www.gbrmpa.gov.au/media-room/latest-news/corporate/2016/statement-on-out-of-court-settlement-with-owners-of-shen-neng-1> (accessed 9 February 2017); and Michael Slezak, *The Guardian* Australia failing to protect Great Barrier Reef from shipping disasters, say lawyers 22 November 2016, <https://www.theguardian.com/environment/2016/nov/22/australia-failing-to-protect-great-barrier-reef-from-shipping-disasters-say-lawyers> (accessed 9 February 2017).

¹⁶ Mark Willacy, *ABC News* Adani boss Jeyakumar Janakaraj failed to disclose link to African pollution disaster before Carmichael coal mine was approved (10 December 2015), <http://www.abc.net.au/news/2015-12-10/adani-boss-failed-to-disclose-link-to-african-pollution-disaster/7012554> (accessed 9 February 2017).

1. Adani Group entities in India under investigation for corruption and illegal dealings

This chapter details a number of allegations and findings against Indian-based Adani Group companies for illegal dealings and corruption. Investigations are ongoing into the Indian Adani Group companies' alleged unlawful over-invoicing activities typical of trade-based money laundering, as we explain below. In these circumstances, private stakeholders should be concerned about the reputational risk of being associated with such a group of companies.

With respect to money laundering, we expect best practice for potential Australian financiers would require that such financiers enquire of Indian authorities as to the status of their investigations and that provision of finance should be deferred until the Indian investigations into entities within the Adani Group are completed.

The need to monitor corruption proceedings in India has been recognised in at least one other case involving an Indian miner operating in Australia that is the parent company of Wollongong Coal Ltd. In this case the NSW Minister for Industry, Resources and Energy, responsible for overseeing the fit and proper person requirements of the *Mining Act 1992* (NSW), has instructed his department to actively monitor corruption proceedings in India and to provide advice upon the resolution of those proceedings which concern persons connected to Jindal Power and Steel Ltd (India), the ultimate owner of Wollongong Coal Ltd¹⁷.

For these reasons, information in this chapter should be of concern to potential Australian financiers to the Carmichael Mine and the Abbot Point Port. For example, Australian private banks identify and assess a broad range of risks to their business. These risks include financial risks, such as the risk of default on loans, and extend to reputational risk, which is the risk to brand and customer loyalty by being associated with particular clients or sectors. Banks also screen for environmental, social and governance (**ESG**) risks associated with clients and projects.

In assessing risks, the big four Australian banks analyse a wide variety of information to determine whether or not to deal with particular clients. In doing so, they should be fully cognisant of the information in this research briefing and the potential impacts of dealing with Adani Group entities. Australian laws also require banks to comply with anti-money laundering and counter-terrorism legislation by reporting suspicious activity.

The Northern Australia Infrastructure Facility (**NAIF**) is required to have regard to Australian best practice corporate governance for commercial financiers.¹⁸ We expect it would have similar screening processes as the big four banks, and would apply these to any applications for finance by any Adani Group entities. On 3 December 2016 two news articles printed in *The Courier-Mail* reported that it had obtained information that a preliminary analysis by the NAIF of the 'rail corridor connecting Adani's Carmichael megamine to the coast' is positive and meets key economic, financial and employment requirements. We would expect that an Adani Group entity would be the applicant for any NAIF loan, as the owners and operators of the Carmichael Mine and associated rail corridor.¹⁹

¹⁷ Anthony Roberts MP letter to Sue Higginson, EDO NSW, 1 April 2016: A number of the allegations you have raised regarding Mr Naveen Jindal and Jindal Steel & Power Limited are of a serious nature. I have directed DRE to continue to monitor the corruption proceedings commenced against Mr Jindal and others in India, and to provide me with advice should the ongoing proceedings result in adverse findings.

¹⁸ NAIF Investment Mandate Direction 2016 s 17(1)

¹⁹ NAIF Investment Mandate Direction 2016, s4 definition of Investment Proposal, s4 definition of Project Proponent and s15 Regulatory and environmental approvals

1.1 'Black money' – illegally inflating imported coal's value and pushing up electricity prices for Indian consumers

IN BRIEF

Five Adani Group companies in India, including Adani Enterprises Ltd, are under investigation by the Directorate of Revenue Intelligence (an Indian intelligence agency run within the Indian Ministry of Finance) for the use of 'black money' associated with inflating the quality, and hence the value of coal imported from Indonesia. The term 'black money' can be associated with companies that manipulate expenses to gain tax advantages or launder money.²⁰

Adani Enterprises Ltd is the ultimate holding company of Adani Mining Pty Ltd²¹, the proponent for the proposed Carmichael Mine.²²

In April 2016 a number of Indian media outlets reported the investigation of a major coal import scam in India.²³ Several companies, including five Adani Group companies, are accused of inflating the quality, and hence the value, of coal imported from Indonesia. This allowed the companies to siphon funds out of India and to claim higher power tariff compensation from regulators – resulting in higher power prices for consumers.²⁴

On 31 March 2016, the Directorate of Revenue Intelligence issued a circular to senior customs commissioners.²⁵ This alerted them that '[i]ntelligence developed by the DRI, indicated that certain importers of Indonesian Coal were artificially inflating the import value as compared to the actual value'. The circular describes how:

...the objective of the overvaluation appears to be twofold

- (i) siphoning-off money abroad; and
- (ii) to avail higher power tariff compensation based on artificially inflated cost of the imported Coal.

The circular stated that from the investigation conducted so far, it appears to the Directorate of Revenue Intelligence that 'Indonesian coal was shipped directly from Indonesian ports to India whereas suppliers invoices are routed through one or more intermediary invoicing agents based in a third country, for the sole purpose of creating layers **(typical of Trade Based Money Laundering)** [our emphasis] and artificially inflating its value' and that 'the import invoices were routed through one or more intermediaries based in Singapore, Dubai, Hong Kong, British Virgin Islands (U.K.)'.

The Directorate of Revenue Intelligence found evidence to 'suggest huge over-valuation to the extent of about 50% to 100%'. The alert describes how:

in a significant number of cases, two sets of Test Reports (certificate of sampling and analysis) issued at the Load Port by two different testing agencies for the same consignment of coal have been recovered – one showing lower Gross Calorific Value (GCV) and the other higher GCV. The test report with the lower GCV appears in conformity with the contract between subsidiary company or intermediary agent of Indian importer and Indonesian suppliers, reflecting the actual value of the coal. The test report with higher GCV, appears to be in conformity with the supply contract between the power generation companies/Indian importers and subsidiary company or intermediary agent of the Indian importers, reflecting the inflated value of the coal.

20 Ministry of Finance, Department of Revenue, Central Board of Direct Taxes, New Delhi, *Black Money: White Paper* (May 2012), page 5, <http://pib.nic.in/archieve/others/2012/may/d2012052101.pdf> (accessed 9 February 2017).

21 ASIC Search conducted 26 October 2016.

22 See generally, Queensland Government, Department of State Development, *Carmichael Coal Mine and Rail Project*, <http://statedevelopment.qld.gov.au/assessments-and-approvals/carmichael-coal-mine-and-rail-project.html> (accessed 9 February 2017).

23 Paranjay Guha Thakurta & Aman Malik, How Over-Invoicing of Imported Coal has Increased Power Tariffs, *Economic & Political Weekly* (Vol. 51, Issue No. 14, 2 April 2016), <http://www.epw.in/journal/2016/14/web-exclusives/how-over-invoicing-imported-coal-has-increased-power-tariffs.html> (accessed 9 February 2017).

24 Paranjay Guha Thakurta, Power Tariff Scam gets Bigger at Rs 50,000 crore, *Economic & Political Weekly* (Vol. 51 Issue No. 20, 14 May 2016), <http://www.epw.in/journal/2016/20/web-exclusives/power-tariff-scam-gets-bigger-rs-50000-crore.html> (accessed 9 February 2017).

25 Directorate of Revenue Intelligence, *Modus-Operandi / General Alert Circular No. 11 / 2016-CI, Sub: Import of Coal from Indonesia by resorting to Over-valuation*, (Directorate of Revenue Intelligence F.No. Directorate of Revenue Intelligence/HQ-CI/50D/Misc-33/2016-CI (31 March 2016), http://www.epw.in/system/files/pdf/2016_51/14/Coal%20Alert_1%20PGT.pdf (accessed 9 February 2017).

The alert listed 40 major importers of coal currently being investigated by the Directorate of Revenue Intelligence. The list included state- and privately-owned companies including five Adani Group companies:

- Adani Enterprises Ltd;
- Adani Power Ltd;
- Adani Power Rajasthan Ltd;
- Adani Power Maharashtra Ltd; and
- Adani Wilmar Ltd.

Media reporting that 'show cause' notices have been issued against Adani Group entities

In September 2016, it was reported that 'show cause' notices had been issued against ten energy companies in relation to the coal imports over-valuation discussed above. Companies in the Adani Group were among the companies involved in an alleged total net over-valuation of Rs 1,100 crore (approx. AUD 214 000 000²⁶) on coal imports.²⁷ On 15 September 2016, Adani Power Ltd in response to a request notified the Bombay Stock Exchange that, contrary to media reporting, it had 'not received any "show cause" notice from the Directorate of Revenue Intelligence in respect of over-invoicing capital goods imports other than those issued more than two years ago'.²⁸ This statement is a denial by the Adani Group that they were issued with a 'show cause' notice for the allegations of over-valuation of capital equipment described at item 1.2 below. We are not aware of any statement by the Adani Group denying that they been issued a 'show cause' notice from Directorate of Revenue Intelligence with respect to the coal imports over-valuation, however in our research we have not seen nor obtained any 'show cause' notices that have been issued against Adani Group companies in relation to the coal imports over-valuation.

We note that there has been confused reporting from some Indian newspapers; the two issues of coal imports over-valuation and capital equipment imports over-valuation appear to have been conflated. Some news outlets reported that Adani Group entities had been issued with a 'show cause' related to capital equipment imports but discussed the coal imports over-valuation.²⁹ Others – such as the one cited by the Bombay Stock Exchange³⁰ – clearly state that the fresh 'show cause' relates to coal imports not capital goods.³¹

²⁶ Crore currency conversion made using <http://www.xe.com/currencyconverter/convert/?Amount=1&From=INR&To=USD> (accessed 9 February 2017).

²⁷ Shrimi Choudhary & Dev Chatterjee, *Business Standard* DRI notices against 10 power companies, 13 September 2016, http://www.business-standard.com/article/prINTER-friendly-version?article_id=116091300001_1 (accessed 9 February 2017).

²⁸ Adani – Written Correspondence, *Clarification in terms of Listing Regulations on news appearing in 'Business Standard'* (15 September 2016), http://corporates.bseindia.com/xml-data/corpfiling/AttachLive/7FAA2A7E_303A_4C19_A782_8EBE48E1B7FB_172912.pdf (accessed 9 February 2017).

²⁹ Energy World, *Adani, Essar get DRI notice for overvaluing imports of cap goods* (13 September 2016), <http://energy.economicstimes.indiatimes.com/news/power/adani-essar-get-dri-notice-for-overvaluing-imports-of-cap-goods/54303033> (accessed 9 February 2017); Khushboo Narayan, *The Indian Express*, DRI notices to ADAG, Essar, Adani for alleged violation of norms (13 September 2016), <http://indianexpress.com/article/business/companies/dri-notices-to-adag-essar-adani-for-alleged-violation-of-norms-3028071/> (accessed 9 February 2017); C Unnikrishnan, *The Times of India* (Delhi), Adani, Essar get DRI notice for overvaluing imports (13 September 2016), <http://epaperbeta.timesofindia.com/Article.aspx?eid=31808&articlexml=Adani-Essar-get-DRI-notice-for-overvaluing-imports-13092016011033> (accessed 9 February 2017).

³⁰ The Bombay Stock Exchange cited the *Business Standard* article. <http://www.bseindia.com/corporates/ann.aspx?scrip=533096%20&dur=A>

³¹ Shrimi Choudhary & Dev Chatterjee, *Business Standard*, DRI notices against 10 power companies 13 September 2016, http://www.business-standard.com/article/prINTER-friendly-version?article_id=116091300001_1 (accessed 9 February 2017).

1.2 'Black money' – capital equipment imports over-valuation

IN BRIEF

Adani Transmission Ltd, an India-based Adani Group company, is under investigation by the Directorate of Revenue Intelligence for the use of 'black money' associated with capital equipment imports over-valuation, and the use of an off-shore holding company established by the Adani Group in Mauritius for receiving the extra money from the inflated invoices. The term black money can be associated with companies that manipulate expenses to gain tax advantages or launder money.³² It has been reported that the Mauritius company is controlled and managed by Mr Vinod Shantilal Adani,³³ who is reported to be the eldest brother of Mr Guatam Adani,³⁴ the Chairman of the Adani Group.³⁵ Mr Vinod Shantial Adani is also the sole director of a number of Singapore companies which own nine Adani proprietary companies in Australia associated with the Carmichael Mine and Abbot Point Port.³⁶ These companies are ultimately owned by Cayman Islands-registered Atulya Resources Limited.³⁷ We note that we are not suggesting that Mr Vinod Shantial Adani is somehow involved in or responsible for the black money transactions – we simply note the fact that there is a common director between the relevant companies.

Adani Transmission Ltd, an India-based Adani Group company, is under investigation by the Directorate of Revenue Intelligence with regard to the use of 'black money'³⁸ associated with capital equipment imports over-valuation. In May 2014, the Directorate of Revenue Intelligence is reported to have issued a 'show cause' notice to some Adani Group companies alleging that the total declared value of imported power and infrastructure equipment, which attracted zero or less than five per cent duty, was inflated.³⁹ The reporting does not clarify whether there are other non-Adani Group companies who are also involved in the investigation. The notice is reported to state:

...evidence gathered suggests that the total value declared for the goods imported was Rs 9,048.8 crore whereas the actual value was Rs 3,580.8 crore; a difference of Rs 5,468 crore which has been siphoned.

...the goods (power generation and transmission equipment) are being shipped directly to India by the original equipment manufacturers (based in China and South Korea), the documents are routed through an intermediary entity (M/S Electrogen Infra FZE, UAE) created in Dubai ... The actual invoice value of the OEM is remitted to the supplier while the inflated extra amount is sent to accounts held in subsidiary / holding company established by Adani Group in Mauritius.

The *Indian Express* article also reported that:

[T]he notice also said, Mauritius entity Electrogen Infra Holdings Pvt Ltd, is an entity allegedly 'controlled and managed by Vinod Shantilal Shah, alias Vinod Shantilal Adani'. Vinod Shantilal Shah is reported to be the eldest of the Adani brothers.⁴⁰

32 Ministry of Finance, Department of Revenue, Central Board of Direct Taxes, New Delhi, *Black Money: White Paper* (May 2012), page 5, <http://pib.nic.in/archieve/others/2012/may/d2012052101.pdf> (accessed 9 February 2017).

33 Jay Mazoomdaar *Panama Papers: Two months after Adani brother set up firm in Bahamas, a request to change name to Shah* (The Indian Express 5 April 2016) <http://indianexpress.com/article/india/india-news-india/panama-papers-india-2-months-after-adani-brother-set-up-firm-in-bahamas-a-request-to-change-name-to-shah/> (accessed 9 February 2017).

34 Jay Mazoomdaar *Panama Papers: Two months after Adani brother set up firm in Bahamas, a request to change name to Shah* (The Indian Express 5 April 2016) <http://indianexpress.com/article/india/india-news-india/panama-papers-india-2-months-after-adani-brother-set-up-firm-in-bahamas-a-request-to-change-name-to-shah/> (accessed 9 February 2017).

35 Adani, *Chairman's corner*, <http://www.adani.com/gautam-adani> (accessed 9 February 2017).

36 These companies are Adani Australia Coal Terminal Finance Company Pty Ltd, Carmichael Rail Pty Ltd, Carmichael Rail Holdings Pty Ltd, Carmichael Rail Network Holdings Pty. Ltd., Carmichael Rail Network Pty Ltd, Adani Australia Coal Terminal Pty Ltd, Adani Australia Coal Terminal Holdings Pty Ltd, Adani Abbot Point Company Pty Ltd, and Adani Australia Company Pty Ltd.

37 Searches conducted 10 November 2016.

38 Ministry of Finance, Department of Revenue, Central Board of Direct Taxes, New Delhi, *Black Money: White Paper* (May 2012), page 5, <http://pib.nic.in/archieve/others/2012/may/d2012052101.pdf> (accessed 9 February 2017).

39 Appu Esthore Suresh, *The Indian Express* (24 July 2014), *SIT, CBI to look into Adani Group case*, <http://indianexpress.com/article/business/companies/sit-cbi-to-look-into-adani-group-case/> (accessed 9 February 2017).

40 Jay Mazoomdaar *Panama Papers: Two months after Adani brother set up firm in Bahamas, a request to change name to Shah* (The Indian Express 5 April 2016) <http://indianexpress.com/article/india/india-news-india/panama-papers-india-2-months-after-adani-brother-set-up-firm-in-bahamas-a-request-to-change-name-to-shah/> (accessed 9 February 2017).

The July 2016 Adani Transmission Ltd prospectus⁴¹ confirms media reports of this issue and states the following:

There are claims of alleged customs violations against us, which if adversely determined, could have a material adverse effect on our business. In 2014, the Directorate of Revenue Intelligence in India (the 'DRI') issued a show cause notice against MEGPTCL [Maharashtra Eastern Grid Power Transmission Company Limited]. The notice alleges that MEGPTCL, in relation to the procurement of equipment and machinery from outside India, inflated invoices above the actual value of the goods, in violation of the Customs Act, 1962. Notwithstanding certain media allegations regarding relationships between us and Electrogen Infra FZE, a subcontractor for the equipment and machinery that is the subject of the DRI notice, we believe our procurement of the equipment and machinery that is the subject of the DRI notice was conducted on an arm's length basis in accordance with all applicable laws. This matter is still pending with the DRI.

Vinod Shantilal Adani is the sole director of a number of Singapore companies which own a number of Australia-based Adani Group companies. Searches of the Singapore Accounting and Corporate Regulatory Authority database show Vinod Shantilal Adani as sole director of:

- Abbot Point Port Holdings Pte. Ltd;⁴²
- Abbot Point Terminal Expansion Pte. Ltd;⁴³
- Carmichael Rail and Port Singapore Holdings Pte. Ltd;⁴⁴ and
- Carmichael Rail Singapore Pte. Ltd.⁴⁵

We note that we are not suggesting that Mr Vinod Shantilal Adani is somehow involved in or responsible for the black money transactions – we simply note the fact that there is a common director between the relevant companies. The companies listed above collectively own nine proprietary companies in Australia associated with the Carmichael Mine and Abbot Point Port⁴⁶ and searches of the Accounting and Corporate Regulatory Authority and the Australian Securities and Investment Commission (**ASIC**) reveal the companies to be ultimately owned by the Cayman Islands-registered Atulya Resources Limited.⁴⁷

⁴¹ *Adani Transmission Limited – Prospectus – U.S.\$500,000,000 4.0% Senior Secured Notes due 2026* (28 July 2016), <http://infopub.sg.com/FileOpen/Project%20Rapid%20Final%20OC.ashx?App=Prospectus&FileID=29673> (accessed 9 February 2017).

⁴² Memorandum of Association, Abbot Point Port Holdings Pte. Ltd, page 2.

⁴³ ACRA Biz file Abbot Point Terminal Expansion Pte. Ltd page 2.

⁴⁴ ACRA Biz file Carmichael Rail and Port Singapore Holdings Pte. Ltd. page 2.

⁴⁵ Biz Check Carmichael Rail Singapore Pte. Ltd. page 2.

⁴⁶ These companies are Adani Australia Coal Terminal Finance Company Pty Ltd, Carmichael Rail Pty Ltd, Carmichael Rail Holdings Pty Ltd, Carmichael Rail Network Holdings Pty. Ltd., Carmichael Rail Network Pty Ltd, Adani Australia Coal Terminal Pty Ltd, Adani Australia Coal Terminal Holdings Pty Ltd, Adani Abbot Point Company Pty Ltd, and Adani Australia Company Pty Ltd.

⁴⁷ Searches conducted 10 November 2016.

1.3 Illegal exports of iron ore in Karnataka, India

IN BRIEF

Adani Enterprises Ltd – the ultimate parent company of Adani Mining Pty Ltd, which is the proponent of the Carmichael Mine – stands accused of active involvement in large-scale illegal iron ore exports. In July 2011, the Lokayukta (Ombudsman) of the Indian state of Karnataka reported that Adani Enterprises Ltd, which was a service provider at a port from which iron ore was exported, had:

- bribed customs officials, the police, the State Pollution Control Board, local politicians and others in return for favours for illegal exports; and
 - routinely accepted iron ore from traders who were not permitted to supply the ore, or did so in excess of the permitted quantity. The Lokayukta concluded that this scam, in which other companies also participated, resulted in the illegal export of around 7.7 million tonnes of ore between 2006 to 2010.
-

In July 2011, the Ombudsman of the Indian state of Karnataka (called the Lokayukta) reported on illegal mining and export of iron ore between around 2000 and 2010.⁴⁸ The report found that Adani Enterprises Ltd was ‘actively involved in large scale illegal exports of iron ore causing huge loss to the Government’.⁴⁹

Adani Enterprises Ltd was one of four operators at the port of Belekeri (**Belekeri**) in Karnataka.⁵⁰ Iron ore was transported from the mines to Belekeri where it was loaded onto ships for export. Port operators were required to maintain records of the amount of iron ore received by truck at Belekeri, the quantity of iron ore loaded onto ships for export, and relevant payments.⁵¹ The Lokayukta found that Adani Enterprises Ltd:

- paid bribes to officials at the Belekeri port department, customs officers, police, the State Pollution Control Board, local politicians and others to receive ‘undue favour for illegal exports’;⁵²
- received iron ore from suppliers without permits to supply that ore,⁵³ and
- routinely received trucks that were loaded with iron ore above the allowable amount.⁵⁴ For example, the average truckload of iron ore received at Adani’s plots was 20.26MT, but the permitted load was only 16 MT.⁵⁵ Indeed, ‘over loading of trucks carrying iron ore is a routine practice leading to substantial iron ore theft’.⁵⁶

In February 2010, police raided Belekeri and seized documents from Adani Enterprises Ltd’s offices, including forged permits.⁵⁷ Based on the information seized, around 7.7 million tonnes of iron ore was illegally exported from Belekeri between 2006 and 2010.⁵⁸

The report recommended that Adani Enterprises Ltd, and the other port service providers, should be stripped of their rights to operate the port at Belekeri and be banned from further business dealings with the government.⁵⁹

48 Karnataka Lokayukta, *Report on the Reference made by the Government of Karnataka under section 7(2-A) of the Karnataka Lokayukta Act, 1984 (Part – II)* (27 July 2011), <https://publicintelligence.net/indian-karnataka-lokayukta-peoples-commissioner-report-on-mining-industry-corruption/> (accessed 9 February 2017).

49 *Id.*, page 55.

50 *Id.*, page 32.

51 *Id.*

52 *Id.*, pages 54–55.

53 *Id.*, pages 46–49.

54 *Id.*, pages 23 and 34.

55 *Id.*

56 *Id.*, page 34.

57 *Id.*, page 34.

58 *Id.*, pages 20 and 34.

59 *Id.*, page 55.

1.4 Other allegations of illegal dealings

1.4.1 Allegations of tax evasion and money laundering while trading in diamonds

A journal article published in the Indian social science journal, *Economic and Political Weekly*,⁶⁰ in December 2016 states that for more than a decade the Directorate of Revenue Intelligence has been investigating a group of entities in the Adani Group for allegations of deliberately evading taxes and laundering money while trading in cut and polished diamonds and gold jewellery by misusing an export import policy.⁶¹

The journal article states that the authors are reporting from copies of various show-cause notices issued by the Directorate of Revenue Intelligence to Adani Group companies.⁶²

The journal article summarises the allegations by stating the following:

“A set of firms in the Adani Group apparently misused various export incentive schemes through a complex web of front companies located in different parts of the world. These shell companies, which indulged in high-velocity “circular trading” among related corporate entities, were also used to launder money, the DRI has claimed. All the corporate entities were directly or indirectly controlled by, or associated with, Adani Enterprises Limited (AEL), a flagship firm of the Adani Group which was called Adani Exports Limited before 2007. The DRI has alleged that AEL flagrantly misdeclared the freight on board (FOB, also called free on board) values of cut and polished diamonds (CPD) and gold jewellery.”⁶³

The journal article details how the Directorate of Revenue Intelligence alleged that after the announcement of a particular export promotion schemes initiated by the Directorate General of Foreign Trade, entities within the Adani Group formed a consortium with different corporate entities to artificially inflate its exports to take advantage of the scheme.⁶⁴

The journal article states that the authors put questions about the allegations to the Adani Group and the Chief Legal Officer of the Adani Group responded by stating that the Customs, Excise and Service Tax Appellate Tribunal had dealt with all the allegations made by the Directorate of Revenue Intelligence including those relating to circular trading and the relationships with overseas buyers and suppliers, and had set those aside, and that the Supreme Court had dismissed an appeal filed by the Customs Department, which therefore “affirmed the validity/genuineness of transactions of imports and exports ...”⁶⁵

The journal article notes that a review petition of the Supreme Court ruling is available to the Ministry of Finance and states that questions are being raised as to what has dissuaded the Ministry of Finance from filing this review petition even though more than nine months have gone by.⁶⁶

In a related court case in 2015 the Supreme Court of India ruled in favour of the Director General of Foreign Trade in a civil case against Adani Exports Ltd and other export companies who were seeking approval for their use of the export import policy.⁶⁷ In that case the Union of India alleged there was evidence to suggest that:

- Adani Export Ltd (the former name for Adani Enterprises Ltd)⁶⁸ and several other non-Adani companies indulged in inflating their exports by 1,135% during 2003/2004 when national growth of export was just 18%,⁶⁹ when for the previous six past years their exports were declining;⁷⁰

⁶⁰ *Economic and Political Weekly*, About Us <http://www.epw.in/about-us.html> (accessed 9 February 2017)

⁶¹ Paranjay Guha Thakurta, Advait Rao Palepu and Shinzani Jain, Adani Group Accused of Evading ₹1,000 Crore Taxes in Diamond Trade *Economic and Political Review* (Vol. 51, Issue No. 53, 31 Dec, 2016) <http://www.epw.in/journal/2016/53/web-exclusives/adani-group-accused-evading-1000-crore-taxes-diamond-trade.html> (accessed 9 February 2017).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Director General of Foreign Trade and Anr. V M/S. Kanak Exports and Anr.*, (judgment of 27 October 2015) Civil Appeal No. 554 OF 2006 before the Supreme Court of India.

⁶⁸ Adani, *Our Business*, <http://www.adani.com/businesses> (accessed 9 February 2017) *Business Standard*, *Adani Enterprises Ltd (Adanient) – Company History*, www.business-standard.com/company/adani-enterp-4244/information/company-history (accessed 9 February 2017).

⁶⁹ *Director General of Foreign Trade and Anr. V M/S. Kanak Exports and Anr.*, (judgment of 27 October 2015) Civil Appeal No. 554 OF 2006 before the Supreme Court of India, page 64.

⁷⁰ *Id.*, page 65.

- the growth rate was achieved on account of a number of activities including export of rough diamonds by Adani, 'even though India is not a rough diamond producing country';⁷¹ and
- cut and polished diamonds were imported, stored inside a bond and re-exported with artificial value addition.⁷²

The Supreme Court of India set aside the direction of the Bombay High Court which had granted Adani Exports Ltd and the other exporters benefits of incentive schemes that had accrued in the past, concluding that 'it was a pernicious and blatant misuse of the provisions of the Scheme...This Court, or for that matter the High Court in exercise of its writ jurisdiction, cannot come to the aid of such petitioners/exporters who, without making actual exports, play with the provisions of the Scheme and try to take undue advantage thereof'.⁷³

1.4.2 Undue benefit gained allegedly from political connections

Media reports suggest that members of the Adani Group have used political connections with the then Modi state government of Gujarat to secure land for the Mundra Special Economic Zone at a fraction of market value. Mundra Port and Special Economic Zone Limited is the previous name of Adani Ports and Special Economic Zone Limited⁷⁴, which ASIC filings indicate is the the ultimate owner of Terminal 1 at the Abbot Point Port in Australia.⁷⁵

According to news articles, the Gujarat government has indicated that it sold 14,305 acres of land at Mundra to an unspecified corporate entity within the Adani Group at between 1 and 32 rupees per square metre (which appears to be below market value).⁷⁶ A Comptroller and Auditor General of India report found that incorrect classification of two pieces of forest land (1,840 hectare and 168.42 hectare) resulted in an undue benefit to Mundra Port and Special Economic Zone Limited.⁷⁷

1.4.3 Alleged collusion to shut out competition

According to media reports, some Adani Group entities including Adani Enterprises Ltd (the ultimate owner of Adani Mining Pty Ltd, the proponent of the Carmichael Mine) colluded with the Gujarat state power authority to supply electricity at rates higher than offered by competing electricity providers. The power authority prevented the Adani Group entities' competitors from having an equal opportunity to bid for supply contracts.

In addition, the power authority was buying short-term power from the relevant Adani Group entities at extremely high prices as Gujarat was suffering from power shortages, while refusing the tenders of the Adani Group's competitors for cheaper, long-term supply. The Adani Group's competitors subsequently brought litigation against the power authority.⁷⁸

⁷¹ *Id.*, page 66.

⁷² *Id.*, page 70.

⁷³ *Id.*, paragraph 114, page 112.

⁷⁴ Adani Enterprises Limited, 20th Annual Report 2011-2012, page 79, http://www.adani.com/Common/Uploads/FinanceTemplate/1_FFReport_Annual%20Report%202011-12.pdf (accessed 22 January 2015; no longer available).

⁷⁵ According to ASIC reports, Adani Mundra is the ultimate owner of Terminal 1 at the Port of Abbot Point in Queensland (see Chapter 2 of this research briefing).

⁷⁶ See generally, NDTV, *Does Gujarat government's own data show Adani group got land cheap?* (29 April 2014), <http://www.ndtv.com/elections/article/election-2014/does-gujarat-government-s-own-data-show-adani-group-got-land-cheap-515451>; DNA India, *Gujarat state government gifts Adani Group land in Kutch for peanuts* (1 March 2012), <http://www.dnaindia.com/india/report-gujarat-state-government-gifts-adani-group-land-in-kutch-for-peanuts-1656997> (both accessed 9 February 2017).

⁷⁷ The Indian Express, *Wrong classification of forest land caused Rs 58.64 cr benefit to Adani company: CAG report* (2 April 2015), <http://indianexpress.com/article/cities/ahmedabad/wrong-classification-of-forest-land-caused-rs-58-64-cr-benefit-to-adani-company-cag-report/> (accessed 9 February 2017); *Report of the Comptroller and Auditor General of India on Economic Sector for the year ended 31 March 2014* (Report No. 1 of 2015), page 70, http://cag.gov.in/sites/default/files/audit_report_files/Gujarat_Report_1_2015.pdf.

⁷⁸ Gulail, *How Adani got contracts for supplying power despite being the most expensive* (7 October 2013), <http://gulail.com/how-adani-got-contracts-for-supplying-power-despite-being-the-most-expensive/> (accessed 7 November 2014; no longer available); Gulail, *People of Gujarat will bear the brunt of the Modi-Adani nexus* (7 October 2013), <http://gulail.com/the-people-of-gujarat-will-bear-the-brunt-of-the-modi-advani-nexus/> (accessed 7 November 2014; no longer available); Gulail, *Adani-Modi nexus to cost 23,625 cr* (9 September 2013), <http://gulail.com/adani-modi-nexus-to-result-in-loss-of-rs-23625-crore-to-gujarat-in-one-deal-alone/> (accessed 7 November 2014; no longer available); The Economic Times, *Gujarat Urja Vikas Nigam moves SC against PTC* (4 November 2007), http://articles.economictimes.indiatimes.com/2007-11-04/news/27667046_1_ptc-award-contract-jindal-power (accessed 9 February 2017).

2. Irregularities in the ownership of Abbot Point Coal Terminal T1

IN BRIEF

The ultimate ownership of Abbot Point Terminal T1 is opaque. Accounts lodged in India have removed Abbot Point Terminal T1 from publicly listed company Adani Ports and Special Economic Zone Ltd and attribute ownership of the coal port to a private Singapore company, ultimately owned by the Cayman Islands entity associated with the Adani family. However, Australian financial accounts suggest the listed Indian company retains ownership of Abbot Point Terminal T1.

The implications of ownership and control are of paramount importance in relation to financial services. If Abbot Point Terminal 1 is owned by Adani Ports and Special Economic Zone Limited, actual or potential lenders' security is tied (either overtly or by implied endorsement/connection) to an Indian publicly listed company with substantial additional assets and relatively transparent accounts. If not, the profile of the security may change, including corresponding implications to related party security and deeds. The risks are ultimately borne by lenders, their shareholders, others with financial interests in the lenders and employees.

2.1 Background to the ownership of Abbot Point Terminal T1

Australian-registered Adani Abbot Point Terminal Pty Ltd (**AAPT**) 'owns and operates the Abbot Point X50 Coal Terminal which has a capacity of 50 MTPA'.⁷⁹ The terminal is known as Abbot Point Terminal T1.

The consolidated gross assets of AAPT and its controlled companies is \$2.12 billion.⁸⁰ It has \$1.73 billion in financial liabilities.⁸¹ AAPT's immediate parent company is another Australian company Adani Abbot Point Terminal Holdings Pty Ltd (**AAPTH**).

AAPT's ultimate parent, according to its most recent financial report lodged with ASIC, is Adani Ports and Special Economic Zone Limited (**APSEZ**), a company listed on the Bombay Stock Exchange.⁸²

However, APSEZ's own documents cast doubt on this. The company's 2015–2016 annual report states 'During the Financial Year 2012–13, the Company has divested its stake in Abbot Point Coal Terminal'.⁸³ APSEZ's statement of financial position reflects this 'divestment' such that neither AAPT or AAPTH are listed as subsidiaries, and APSEZ's consolidated financial accounts do not include any of their relevant assets or liabilities.

Notes to APSEZ's 2015/2016 financial statements state:⁸⁴

The Company had initiated and recorded the divestment of its entire equity holding in Adani Abbot Point Terminal Holdings Pty Limited ('AAPTHPL') and entire Redeemable Preference Shares holding in Mundra Port Pty Ltd ('MPPL') representing Australia Abbot Point Port operations to Abbot Point Port Holdings Pte Ltd, Singapore during the year ended March 31, 2013. The sale of securities transaction was recorded as per Share Purchase Agreement ('SPA') entered on March 30, 2013 including subsequent amended thereto, with a condition to have regulatory and lenders approvals. The Company has all the approvals except in respect of approval from one of the lenders who has given specific line of credit to MPPL. The Company received entire sale consideration except AUD 17.17 Million as on reporting date. The Company also has outstanding corporate guarantee to a lender of USD 800 million against

⁷⁹ Adani Abbot Point Terminal Pty Ltd 2015 annual report, 30 March 2016, page 4.

⁸⁰ Adani Abbot Point Terminal Pty Ltd 2015 annual report, 30 March 2016, page 1 (Form 388).

⁸¹ *Id.*, page 24.

⁸² *Id.*, page 11.

⁸³ Adani Ports and Special Economic Zone Limited, 17th Annual Report, 2015/2016, page 15

⁸⁴ *Id.*, pages 131, 132

line of credit to MPPL, which is still outstanding and has also pledged its entire equity holding of 1,000 equity shares of AUD 1 each in MPPL at the reporting date in favour of lender. Outstanding loan against said corporate guarantee as on March 31, 2016 is USD 450.00 million.

Since financial year 2013–14, the Company has received corporate guarantee ('Deed of Indemnity') against the above outstanding corporate guarantee from Abbot Point Port Holding Pte Limited, Singapore which is effective till discharge of underlying liability.

While this information goes some way to explaining issues with the transaction, it does not resolve the contradiction between the Australian and Indian accounts with respect to ownership and the associated guarantees. Importantly still, the issue of who controls Abbot Point T1 and is ultimately responsible is unclear. The situation is unsatisfactory for regulators, the public and users of the critical infrastructure in Northern Australia.

2.2 Error or omission in company extracts

The AAPT and AAPTH company extracts available from ASIC collectively reveal that 100% of AAPT shares are held by AAPTH, and 100% of AAPTH's shares held by APSEZ. Given that APSEZ has, according to its disclosures on the Bombay Stock Exchange, 'divested' its stake in AAPT, there appears to be, at minimum, an omission with respect to noting the actual potential ownership of AAPT by the private Singapore company, Adani Abbot Point Port Holdings Pte Ltd (**AAPPH**).

2.3 Concerns about the adequacy of Adani Abbot Point Terminal Pty Ltd's financial statements

AAPT's most recent financial report lodged with ASIC did not disclose its immediate parent company and provided no detail about the actual or potential transfer of the ownership or control of AAPTH from APSEZ (India) to AAPPH (Singapore).

3. Evidence about the Adani Group's environmental law compliance record

IN BRIEF

New and concerning information has arisen relevant to an assessment of the environmental history of Adani Mining Pty Ltd, the proponent of the proposed Carmichael Mine and Rail Project. There has been a recent court finding in India against Adani Mining Pty Ltd's parent company, Adani Enterprises Limited. Details of the courts finding are at section 3.1 below.

In Australia, the Federal Minister for the Environment is empowered to consider the environmental history of a project proponent and their executive officers in considering whether to issue approvals under federal environmental protection legislation, when a proposed project will impact on a matter of national environmental significance. Section 136(4) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) provides that the Minister, when deciding whether to grant an approval under that Act, 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^[85] 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.⁸⁶

The Federal Department of the Environment has issued a policy statement noting that information relevant to a person's environmental history includes information that 'will indicate whether a person is likely to comply with the conditions of an approval'.⁸⁷

New and concerning information has arisen about the environmental history of the parent entities of Adani's Australian corporate entities. However, the Adani Group's proposed fossil fuel projects in Australia have already received most, if not all, of their EPBC approvals. The EPBC Act currently provides no mechanism for fresh scrutiny of their environmental history in the face of this new information. In our view, the EPBC Act should be amended to insert a provision to empower the Federal Minister for the Environment (**Minister**) to reconsider the environmental history of a proponent who already holds EPBC approvals, as new information arises. That provision should include a power allowing the Minister to suspend or cancel any EPBC approvals held by that proponent, where the Minister makes a finding that the proponent is not a suitable person.

Such a provision would not be without precedent. Provisions with a similar effect operate in Queensland under the *Environment Protection Act 1994* (**EP Act**), and allow the Director-General of the Department of Environment and Heritage Protection to cancel or suspend the 'suitable operator' registration of a proponent when a 'disqualifying event' occurs, and the Director-General is satisfied the proponent is no longer fit to be registered as a suitable operator because of their environmental record.⁸⁸

⁸⁵ An *executive officer* of a body corporate means a person, by whatever name called and whether or not a director of the body, who is concerned in, or takes part in, the management of the body. *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 493.

⁸⁶ *Id.*, s 136(4).

⁸⁷ Australian Government Department of the Environment, *EPBC Act Policy Statement – Consideration of a person's environmental history when making decisions under the EPBC Act* (2013), page 2, available to download at <http://www.environment.gov.au/resource/epbc-act-policy-statement-consideration-persons-environmental-history-when-making-decisions> (accessed 9 February 2017).

⁸⁸ *Environment Protection Act 1994* (Qld) s318K. Note that this provision does not operate to cancel or suspend any existing environmental authorities held by proponents under this Act, however, they are unable to apply for new environmental authorities without their suitable operator registration.

Even without such an amendment to the EPBC Act, if certain circumstances arise, the Minister will still have the opportunity to consider the environmental history of the Adani Group as it applies to their Australian fossil fuel projects.⁸⁹

Opportunities include:

- if grounds to suspend or revoke an approval arise (EPBC Act s144 and s145); or
- if members of the Adani Group/Adani Mining Pty Ltd need to apply for further approvals under the EPBC Act to progress their Australian fossil fuel projects.

If one of these circumstances does arise, the Minister will also have the opportunity to consider the environmental history of Adani Mining Pty Ltd that was not previously declared (detailed in Chapter 3.5 of this research briefing). The Minister did not consider that pollution incident when giving approvals for the Carmichael Coal Mine and Rail Project, and the North Galilee Basin Rail Project, to Adani Mining Pty Ltd because Adani Mining Pty Ltd failed to provide that information, even though it was specifically requested to do so.

This Chapter provides a research briefing of the many current and past court cases filed in Indian courts against members of the Adani Group. The cases are often brought by local community groups, who express significant concerns about harm to local communities, people's livelihoods and the environment. Although some of these cases have been dismissed, it is evident from the analysis below that this often occurred because of jurisdictional issues between different courts, or because the courts held that the concerns of local communities were being addressed by government investigations (such as the investigation described in section 3.3 below), not because the courts found that the Adani Group had not committed the acts in issue.

3.1 Damage to the Mumbai tourism industry, beaches and marine life – Adani Enterprises Ltd held liable for the sinking of a coal ship

IN BRIEF

In August 2016 the Indian National Green Tribunal made finding against Adani Enterprises Ltd (the ultimate parent company of Adani Mining Pty Ltd – proponents of Carmichael Mine and Rail), as well as several other non-Adani entities. The Honourable Justices Kumar and Salvi, and two Expert Members, found Adani Enterprises Ltd and other entities liable for failing to clean up after the unseaworthy coal ship they chartered sank off the coast of Mumbai in 2011 resulting in a massive oil spill which destroyed mangroves, polluted beaches and saw the spilling of coal into the sea. Adani Enterprises Ltd was fined the equivalent of AU \$975 000. The Judicial members recognised that both the sinking itself and the fact that it had not been cleaned up for over five years were causes of serious damage, including damage to the tourism industry and local people.

With this international track record, the Adani Group's plan to ship Carmichael coal out of Abbot Point port and through the fragile Great Barrier Reef World Heritage Area is of serious concern, especially given the current lack of an emergency response plan nor availability of emergency funding for dealing with damage to coral reefs following a shipping incident in the Great Barrier Reef, as demonstrated by the Shen Neng 1 coal ship grounding, which has still not been cleaned up six years later.⁹⁰

⁸⁹ EPBC Act [Section 143](#) s144 s145 and s145B.

⁹⁰ Great Barrier Reef Marine Park Authority, *Statement on out-of-court settlement with owners of Shen Neng 1* (19 September 2016) <http://www.gbrmpa.gov.au/media-room/latest-news/corporate/2016/statement-on-out-of-court-settlement-with-owners-of-shen-neng-1> (accessed 9 February 2017).

In August 2011, a ship travelling from Indonesia to Dahej, India sank in the Arabian Sea, about 20 nautical miles off the coast of Mumbai. This resulted in a massive oil spill that, among other things, destroyed mangroves and polluted beaches. The ship was carrying 60,054MT of coal owned by the Adani Group, which was also spilled.

In August 2016 the Indian National Green Tribunal found that, as owner of the coal, Adani Enterprises Ltd was responsible for the pollution caused by the coal, along with several other companies who are not Adani entities.⁹¹ The National Green Tribunal fined Adani Enterprises Ltd 5 crore (approximately AUS \$975 000⁹²) for its role in the environmental pollution caused by the dumping of coal into the marine environment. The judgment makes clear that the ship was not seaworthy at the time it sank, and states that Adani is 'liable for environmental compensation for chartering a ship of this kind'.⁹³

Key findings of the judgment specifically relevant to the particular findings against Adani Enterprises are:

- the persistent lying of the ship in the sea along with its cargo, the coal, would, besides having immediate adverse impact on the marine environment, with the passage of time negatively impact the marine environment as well, in different ways. The coal may contain hazardous substances like arsenic, mercury, thallium and asbestos, which will eventually enter the food chain.... the pollution is not limited to an individual or a singular item. It is a problem of multiple sources of pollution, resulting from oil spill, sinking of the ship and its cargo. It will affect the marine environment that includes sea water, aquatic life, shore, seabed, mangroves, tourism and public life of the people living at the shore. The adverse impacts were not seen only at a singular point but at multiple beaches...⁹⁴
- Adani Enterprises Ltd, is liable for environmental compensation for chartering a ship of this kind, dumping of 60054 MT of coal in the Contiguous zone of Indian waters.⁹⁵
- While Respondent no.6, Adani Enterprises Ltd, who had chartered the ship is responsible and liable for damage and pollution resulting from the cargo, for which, despite the fact that years have gone by, it has made no effort either to remove the cargo or even take the minutest preventive or pre-cautionary measures for controlling and preventing pollution of marine environment.⁹⁶
- The Respondents in different capacities, i.e. owner, charterer, manager, a party interested and responsible, were under specific obligation to take appropriate measures and protect the marine environment. They have miserably failed to do so.⁹⁷

⁹¹ See National Green Tribunal, Principal Bench, New Dehli, Original Application no 24 of 2011 *In the matter of Samir Mehta vs Union of India Ministry, State of Maharashtra, Maharashtra State Pollution Control Board, Maharashtra Maritime Board, Delta Shipping Marine Services SA, Adani Enterprises Ltd, Delta Navigation WLL, Union of India Ministry of Defence, Astra Asigauri Insurance, Interport Marine Services Pvt Ltd, Delta Group International, GAC Shipping India Pvt Ltd, Ministry of Shipping. Pronounced on the 23 August 2016, at page 199.*

⁹² Crore currency conversion made using <http://www.xe.com/currencyconverter/convert/?Amount=1&From=INR&To=USD> (accessed 9 February 2017).

⁹³ See National Green Tribunal, Principal Bench, New Dehli, Original Application no 24 of 2011 *In the matter of Samir Mehta vs Union of India Ministry, State of Maharashtra, Maharashtra State Pollution Control Board, Maharashtra Maritime Board, Delta Shipping Marine Services SA, Adani Enterprises Ltd, Delta Navigation WLL, Union of India Ministry of Defence, Astra Asigauri Insurance, Interport Marine Services Pvt Ltd, Delta Group International, GAC Shipping India Pvt Ltd, Ministry of Shipping. Pronounced on the 23 August 2016, at page 205.*

⁹⁴ *Id.*, page 200.

⁹⁵ *Id.*, page 205.

⁹⁶ *Id.*, page 214.

⁹⁷ *Id.*, pages 215–216.

3.2 Adani Hazira Port Private Ltd fined AUD 4.8 million for depriving 80 families at Hajira Port, Surat of access to their fishing grounds

IN BRIEF

In January 2016 the Indian National Green Tribunal cancelled the environmental approval of Adani Hazira Port Private Ltd that it held for the development of port activities in the Hajira district, Surat. Adani Hazira Port Private Ltd is a subsidiary of Adani Ports and Special Economic Zone Ltd, which ASIC filings indicate is the ultimate owner of Terminal 1 at the Abbot Point Port in Australia.⁹⁸

Justice Kingaonkar found Adani Hazira Port Private Ltd liable for illegally undertaking work without an environmental approval at Hajira, Surat. This blocked the access of 80 fishing families from the traditional village of Hajira to their traditional fishing zones. Adani Hazira Port Private Ltd was ordered to pay 25 crore (approx. AUD 4.8 million⁹⁹) for compensation and restoration.

If the directors of Adani Ports and Special Economic Zone are concerned with, or take part in the management of Adani Hazira Port Private Ltd, and are therefore executive officers, these findings will form part of those directors' environmental history under the EPBC Act. If those directors are also concerned with and take part in the Adani Group companies which own and operate Terminal 1 at Abbot Point Port, the Indian National Green Tribunal decision will be relevant to an assessment of the environmental history of the subsidiary Adani Group companies who own Terminal 1 at Abbot Point Port, should those companies require any EPBC Act approvals.¹⁰⁰ Currently Terminal 1 does not operate under any approvals under the EPBC Act, because the existing port activities were found not to trigger the EPBC Act.¹⁰¹

Hajira fishermen, speaking on behalf of 80 fishing families from Hajira, challenged the Environmental Clearance granted to Adani Hazira by the Ministry of Environment and Forests regarding 'developments of port activities in Hajira district, Surat'.¹⁰² The Hajira fishermen argued that developments undertaken by Adani Hazira would hinder 'appropriate, safe and proper access to seawater for the traditional fishermen of village Hajira, to undertake traditional fishing in inter-tidal zone'¹⁰³ and that Adani Hazira 'has already caused massive destruction of Mangroves, in order to construct Port Berths as well as for the purpose of reclamation of land in the area'.¹⁰⁴

Justice R.V. Kingaonkar of the National Green Tribunal made the following findings against Adani Hazira Port Private Ltd on the 8th January 2016.

- In regard to mangrove clearance: 'The maps filed on record go to show that most of Mangroves area, is destroyed.'¹⁰⁵ '...this area, which once had abundance of Mangroves stretches... presently do not have any Mangrove vegetation, clearly indicating the environmental degradation and damage.'¹⁰⁶
- 'undaunted by absence of EC [Environmental Clearance] and absence of CRZ [Coastal Regulation Zone] clearance, the AHPPL proceeded with expansion work after 2007 and did not care for any adverse order or adverse impact on environment. Such irresponsible attitude of the AHPPL, must be deprecated.'¹⁰⁷

98 See Adani Ports and Special Economic Zone Limited, *Annual Report 2015-16*, pages 29, 30, 117, 145, 181, available to download under the heading Annual Report at <http://www.adaniports.com/investors/financials> (accessed 9 February 2017).

99 Crore currency conversion made using <http://www.xe.com/currencyconverter/convert/?Amount=1&From=INR&To=USD> (accessed 9 February 2017).

100 See definition of executive officer under the EPBC Act at note 68 above, and section 136(4)(b) of the EPBC Act.

101 EPBC Referral 2005/2154 PORTS CORPORATION OF QUEENSLAND/Transport – Water/ Abbot point Stage 3 Expansion of Abbot Point Coal Terminal, near Bowen.

102 *Hajira Fishermen Committee v Adani Hazira Port Private Ltd*, before the National Green Tribunal (Western Zone) Bench, Pune 8 January 2016, paragraph 1, pages 4 and 6.

103 *Id.*, paragraph 1, page 5.

104 *Id.*

105 *Id.*, paragraph 9, page 15.

106 *Id.*, paragraph 9, page 16.

107 *Id.*, paragraph 13, page 19.

- In regard to impeding fishing activities by narrowing the river mouth: 'The creek situated in north-east corner is narrowed down due to reclamation of land, as a result of port/cargo activities and Port expansion activities'.¹⁰⁸
- Adani 'shall be restrained from closing/narrowing down mouth of the creek or narrowing down access of the boats of traditional fishermen in the seawater through mouth of the creek'.¹⁰⁹
- The environmental clearance was set aside,¹¹⁰ and Adani Hazira was ordered to pay 25 crore (approx. AUD 4.8 million¹¹¹) for compensation and restoration.¹¹² Adani Hazira was prohibited from narrowing the mouth of the creek.¹¹³

Adani Hazira Port Private Ltd appealed the decision to the Supreme Court of India and was unsuccessful. On 18 January 2016 it was reported that:

In a major setback to Gujarat-based Adani Hazira Port Private Ltd. (AHPPL), the Supreme Court on Thursday refused to vacate the cancellation of environmental clearance, which was granted earlier. The apex court also issued notice to the Ministry of Environment and Forests on cancellation of environment clearance to Adani Hazira Port and also restrained it from carrying out any construction activity.¹¹⁴

3.3 Litigation regarding environmental harm at Mundra Port and Special Economic Zone

IN BRIEF

At Mundra, in the Indian state of Gujarat, APSEZ – which ASIC filings indicate is the ultimate owner of Terminal 1 at Abbot Point Port – operates one of the world's largest coal-fired power plants, together with a port and special economic zone (the **Mundra SEZ**). There is significant evidence of harm to the environment and local communities related to the development of the Mundra SEZ, and of violations of environmental laws and development permits.

This environmental compliance record should be a red flag for the Adani Group's proposal to build the Carmichael Mine. Governments and financiers must be absolutely confident that projects such as the Carmichael Mine will be implemented with the utmost caution so as to ensure full compliance with all relevant laws and conditions, and to minimise harm to the environment, local communities, and indigenous culture. Unfortunately, the available evidence shows that there should be serious concerns about the Adani Group's environmental law compliance record.

'Irreversible and irreparable damage has been done to the area by the Adani Port and it is difficult to monitor the extent of the damage today. The mangroves have been destroyed and it has created an environmental disaster. ...The fisherfolk and common people affected by this degradation cannot fight such a big company.' – Mahesh Pandya, an Ahmedabad-based environmentalist.¹¹⁵

108 *Id.*, paragraph 9, page 15.

109 *Id.*, paragraph 13, page 19.

110 *Id.*, paragraph 13, page 20.

111 Crore currency conversion made using <http://www.xe.com/currencyconverter/convert/?Amount=1&From=INR&To=USD> (accessed 9 February 2017).

112 See note 109 above.

113 *Id.*

114 DNA Daily News and Analysis, *Setback for Adani Port as Supreme Court refuses to stay NGT Order* (28 January 2016), <http://www.dnaindia.com/money/report-setback-for-adani-port-as-supreme-court-refuses-to-stay-ngt-order-2171157> (accessed 9 February 2017) see also Ashmit Kumar, CNBC, *Setback for Adani Port: SC refuses to stay NGT Order* (28 January 2016), <http://www.moneycontrol.com/news/cnbc-tv18-comments/setback-for-adani-port-sc-refuses-to-stay-ngt-order-5189841.html> (accessed 9 February 2017).

115 Arindam Mukherjee, Outlook Magazine, *Mundra: The port of no call* (1 August 2016), <http://www.outlookindia.com/magazine/story/mundra-the-port-of-no-call/297572> (accessed 9 February 2017).

In the coastal town of Mundra in India, APSEZ (which was previously called Mundra Port and Special Economic Zone Ltd)¹¹⁶ operates one of the world's largest coal-fired power plants, together with a port and special economic zone (the **Mundra SEZ**).¹¹⁷ Investigations of the Mundra SEZ by Indian officials and independent committees reveal a record of environmental destruction, harm to local communities, and a failure to comply with environmental regulation and development permits.

The environmental record of the Mundra SEZ raises serious questions about the attitude of APSEZ to the protection of the environment and the health and welfare of local communities, and to compliance with laws intended to assure such protection. This should be of significant concern to governments and financiers in relation to the Adani Group's proposed Carmichael mine, particularly in light of the integrated relationship between the Australian-based Adani Group companies and the broader Adani Group generally.

3.3.1 Harm to communities and the environment, and development without approval, at the Mundra SEZ

Investigations into harm to communities and the environment at the Mundra SEZ

In December 2010, following a complaint by a local group that works with fishing communities around Mundra, officials from the Indian Ministry of Environment and Forests (later the Ministry of Environment, Forests and Climate Change) (**Ministry**) visited the Mundra SEZ.¹¹⁸ The Ministry officials found evidence of large-scale destruction of mangroves near APSEZ's North Port caused at least in part by reclamation using dredged material, obstruction of tidal flow by a dredging disposal pipeline, obstruction of creek systems and natural seawater flow by reclamation along creeks, and development of a township, airport and hospital without the proper environmental approvals.¹¹⁹

Following this investigation, on 15 December 2010, the Ministry issued a notice stating that it was of the opinion that APSEZ had violated certain environmental regulations and not complied with the conditions of its environmental approval.¹²⁰ The notice also required APSEZ to show cause why its environmental approval should not be cancelled, and why it should not rectify the damage caused.¹²¹ In addition, it seems that on 23 February 2011, the Ministry issued directions to 'project authorities' (presumably APSEZ) not to undertake any reclamation activity and not to initiate any new construction work in the coastal regulation zone.¹²²

In April 2013, an independent Committee for Inspection (**Inspection Committee**) constituted by the Ministry to investigate complaints about the environmental impacts of APSEZ's operations¹²³ issued a report finding 'incontrovertible evidence of violation[s] of [environmental clearance] condition[s] and non-compliance', including failure to protect mangroves resulting in the loss of 75 hectares of mangroves in the Bocha Island conservation area and around Navinal creek, and allowing changes to creeks and creek mouths due to construction activities.¹²⁴ The Inspection Committee noted that APSEZ attempted to bypass statutory procedures, including public hearings. The company:

- failed to protect mangroves, resulting in the loss of 75 hectares of mangroves in the Bocha Island conservation area and other losses around Navinal creek and the Baradi Mata mouth;
- allowed changes to creeks and creek mouths due to construction activities;
- allowed construction of an airstrip without an environmental approval and failed to ensure that all projects within the Mundra SEZ have an environmental clearance;
- failed to line its storage pond and intake/outlet channel to protect against salinity intrusion into groundwater, in violation of its environmental approvals;

¹¹⁶ Adani Enterprises Limited, 20th Annual Report 2011-2012, page 79, available to download at <http://www.adanienterprises.com/investors/financials> (accessed 9 February 2017).

¹¹⁷ See generally, Adani, *Mundra Port*, <http://www.adaniports.com/businesses/ports-and-terminals/mundra-port> (accessed 9 February 2017).

¹¹⁸ Site visit to M/s Mundra Port & SEZ Ltd Port site at Mundra and M/s OPG Power Gujarat Private Limited on 6th – 7th December 2010.

¹¹⁹ *Id.*, pages 2-4.

¹²⁰ Ministry, *Show Cause Notice under Section 5 of Environment (Protection) Act, 1986 for violation of the provisions of the Coastal Regulation Zone Notification 1991 by M/s Mundra Port & SEZ Ltd* (15 December 2010).

¹²¹ *Id.*, paragraph 20.

¹²² Ministry, *Office Memorandum – Constitution of Committee for inspection of M/s Adani Port and SEZ Ltd, Mundra, Gujarat* (14 September 2012), paragraph 2, http://www.Ministry.nic.in/sites/default/files/01_order_AdaniPort14092012.pdf (accessed 9 February 2017).

¹²³ See *id.*, paragraphs 4–6.

¹²⁴ *Report of the Committee for Inspection of M/s Adani Port & SEZ Ltd, Mundra, Gujarat* (April 2013), pages 77–79, <http://www.Ministry.nic.in/sites/default/files/adani-report-290413.pdf> (accessed 9 February 2017).

- failed to comply with the monitoring and reporting requirements of its environmental approvals, including failing to monitor groundwater for salinity and pollution; and
- may have dumped potentially toxic fly ash leading to air and water pollution, in violation of its environmental approvals, and had failed to conduct regular monitoring around the ash pond area.¹²⁵

The Inspection Committee recommended that APSEZ be required to establish an 'environment restoration fund' for environmental protection and to support local communities, comprised of the higher of 1% of the project cost or Rs 200 crore (which is around AUD 40 million).¹²⁶ The committee also recommended that the environmental clearance for APSEZ's North Port be cancelled, and that specific remediation actions be undertaken.¹²⁷

The Adani Group has refuted the findings in the report. According to an article in Forbes, the 'Adani Group said salinity ingress was a local phenomenon and that its power plant used technology to ensure that there was no stray fly ash. It also refuted the observations of the [independent] committee and said while any large development would affect the environment, it was certain that its net impact was positive. Also, all government requirements were followed in setting up its various projects.'¹²⁸

In September 2013, the Ministry placed APSEZ's 'environmental clearance' for its North Port in 'abeyance', and asked APSEZ to show cause why the environmental clearance should not be cancelled.¹²⁹ The Ministry also required the establishment of the environment restoration fund (although, as of December 2016, it appears that the environmental restoration fund has still not yet been established),¹³⁰ the rehabilitation of all creeks, water bodies and reclaimed land, and the creation of a plan to protect the livelihood of fishermen whose catch and access to the sea had been seriously affected by APSEZ's environmental violations.¹³¹

Litigation challenging the operation of the Mundra SEZ without environmental approval

On at least two occasions, the High Court of Gujarat has found that APSEZ has been operating the Mundra SEZ without prior environmental approvals.

First, in May 2012, in a case brought by farmers from Navinal Village in Mundra, the court found that APSEZ did not have an environmental clearance for the Mundra SEZ.¹³² The court ordered two companies to whom APSEZ had leased parts of the Mundra SEZ to establish power-generating infrastructure to cease construction until APSEZ obtained an environmental clearance.¹³³

Second, in a similar case decided on 13 January 2014, the court found that APSEZ still did not have an environmental clearance for the Mundra SEZ.¹³⁴ The court directed the government to decide whether to grant an environmental clearance, and suspended any further activity, including construction and operating of generating units, until that time.¹³⁵

¹²⁵ *Id.*, pages 76–81.

¹²⁶ *Id.*, pages 81–82. We understand this to be approximately USD30 million, which is approximately AUD40 million): see <http://www.kshitij.com/utilities/LnCtoMnB.shtml> and <http://www.xe.com/currencyconverter/convert/?Amount=30%2C000%2C000&From=USD&To=AUD> (accessed 9 February 2017).

¹²⁷ *Id.*, pages 82–85.

¹²⁸ Megha Barea, Forbes, *Doing Big Business in Modi's Gujarat* (13 March 2014), page 2, <http://www.forbes.com/sites/meghabahree/2014/03/12/doing-big-business-in-modis-gujarat/#13f786577e61> (accessed 9 February 2017).

¹²⁹ Ministry, *Issue of Show Cause Notice for alleged violations* (30 September 2013), page 3, <http://www.Ministry.nic.in/sites/default/files/Adani%20SCN.pdf> (accessed 9 February 2017).

¹³⁰ In July 2016, the Ministry released a statement noting that it had not cancelled the fine, although the imposition of such a fine may not be within its power. Instead, the Ministry stated that the government has passed an order in a legally correct framework and also imposed more serious responsibility upon [APSEZ] without any cost limit, and had directed for more stringent conditions with [an] open-ended financial commitment by [APSEZ] for financing the study, restoration and integrated conservation for protected of creeks, mangrove areas [and] conservation of Bocha island. This was because the Ministry was satisfied with the necessity to undertake restoration of degraded components and further conservation as recommended by the Inspection Committee. See The Ministry of Environment, Forests and Climate Change, quoted in Nitin Sethi, Business Standard, *Inference on Adani fine cancellation wrong, says environment ministry* (7 July 2016), http://www.business-standard.com/article/economy-policy/inference-on-adani-fine-cancellation-wrong-says-environment-ministry-116070700026_1.html (accessed 9 February 2017). See also, Nitin Sethi, Business Standard, *Govt cancels Rs 200-crore green fine on Adani* (2 July 2016), http://www.business-standard.com/article/current-affairs/govt-cancels-rs-200-crore-green-fine-on-adani-116070101477_1.html; The Indian Express, *Reports on waiver of Rs 200 crore fine on APSEZ 'incorrect': Government* (4 July 2016), <http://indianexpress.com/article/india/india-news-india/reports-on-waiver-of-rs-200-crore-fine-on-apsez-incorrect-government-2892450/> (both accessed 9 February 2017).

¹³¹ Ministry, *Issue of Show Cause Notice for alleged violations* (30 September 2013), page 2, <http://www.Ministry.nic.in/sites/default/files/Adani%20SCN.pdf> (accessed 9 February 2017).

¹³² *Ranubha Rajmali Jadeja and others v Union of India and others*, Writ Petition (PIL) No. 194 of 2011 before the High Court of Gujarat (judgment of 9 May 2012), pages 2–4, 42–43.

¹³³ *Id.*, pages 35, 42–43.

¹³⁴ *Gajubha (Gajendrasinh) Bhimaji Jada and others v Union of India and Others*, Writ Petition (PIL) No. 21 of 2013 before the High Court of Gujarat (judgment of 13 January 2014), pages 184–185.

¹³⁵ *Id.*

The High Court's decision was appealed to the Supreme Court of India, which, on 27 January 2014, confirmed the order of the High Court requiring the Ministry to decide whether to grant an environmental clearance for the Mundra SEZ.¹³⁶

Eventual grant of an environmental approval for the Mundra SEZ

In July 2014, in compliance with the orders of the High Court and Supreme Court, the Ministry issued the environmental clearance.¹³⁷ The clearance imposed a number of conditions on APSEZ, including that it properly conserve the creeks, rivers and mangroves in the area, not disturb the sand dunes, ensure a buffer between the mangroves and any development, and undertake specific remediation actions.¹³⁸

Although not entirely clear, it appears that this environmental clearance retroactively legalises the previous actions that APSEZ had taken without the proper environmental clearance. However, this does not diminish the concern that APSEZ had caused serious environmental harm, and had undertaken significant development for many years, without the required approvals.

3.3.2 Litigation in relation to the Mundra SEZ

The Mundra SEZ has been the subject of significant litigation (in addition to that discussed above), demonstrating serious concerns of local villagers about its impact on their lives and the environment. Some of these cases are discussed below.

Accusations of destruction of fertile farming lands and 'systematic slaughtering' of mangroves

In 2011, the Kheti Vikas Seva Trust – an association of more than 200 villagers in the vicinity of the Mundra SEZ – alleged that APSEZ and Adani Power Ltd (which operates the power plant at Mundra SEZ) were undertaking development that was causing environmental and human harm, including extensive destruction of mangroves (which provide a natural barrier against salinity, hurricanes and tsunamis), filling of creeks, seepage of saline water into groundwater, mishandling fly ash, and destroying sand dunes.¹³⁹ The Trust also argued that this pollution had damaged the land's fertility and destroyed valuable agricultural crops.¹⁴⁰ Furthermore, in September 2014, the Trust told the court that, 'at the instance of the respondent companies' (i.e., APSEZ and Adani Power Ltd), it was being 'wrongly implicated in fake criminal cases', and that members of the Trust were 'apprehending [a] threat to their life'.¹⁴¹

The High Court of Gujarat dismissed the case in April 2015, finding that most of the issues raised by the Trust formed part of the matters investigated by the Inspection Committee (see above at section 3.3.1), which, in April 2013, had recommended actions to the government to address the issues.¹⁴²

In a related case that is currently pending, the Trust alleged that Adani Power Ltd and Mr Gautam Adani (as chairman of APSEZ) were in contempt of court, because they were burying mangroves under a thick layer of dredged material in breach of an interim order of the High Court prohibiting the destruction of mangroves or other forest while the Trust's complaint (described above) was pending.¹⁴³

In late 2015, the court concluded that development in the region had damaged the mangroves, although it did not determine who caused the damage.¹⁴⁴ It ordered Adani Power Ltd and APSEZ to plant compensatory mangroves, and appointed an independent committee to recommend locations for such plantings.¹⁴⁵ Although we could not locate

¹³⁶ *Skaps Industries India Pvt Ltd v Gajuba (Gajendrasinh) Bhimji Jadeja & Ors*, Petition for Special Leave to Appeal (Civil) No. 1526/2014 before the Supreme Court of India (order of 28 January 2014).

¹³⁷ Ministry, *EC for proposed Multi-Product SEZ and CRZ clearance for Desalination, sea water intake, outfall facility and pipeline, at Mundra by M/s Adani Port and SEZ Ltd* (15 July 2014).

¹³⁸ *Id.*, paragraph 11.

¹³⁹ See *Kheti Vikas Seva Trust and Others v State of Gujarat and Others*, Writ Petition (PIL) No. 12 of 2011 before the High Court of Gujarat (judgment of 17 April 2015), paragraphs 1–20, 24–26.

¹⁴⁰ *Id.*, paragraphs 5–12.

¹⁴¹ *Id.*, paragraph 43.

¹⁴² *Id.*, paragraphs 49–62, 65.

¹⁴³ *Kheti Vikas Seva Trust and Others v State of Gujarat and Others*, Civil Application No. 9124 of 2011 in the High Court of Gujarat (oral order of 15 October 2015), paragraphs 1–3.

¹⁴⁴ *Id.*, paragraphs 16, 25.

¹⁴⁵ *Kheti Vikas Seva Trust and Others v State of Gujarat and Others*, Civil Application No. 9124 of 2011 in the High Court of Gujarat (oral order of 5 November 2015), paragraphs 3–5.

a copy of the committee report, which was submitted in June 2016,¹⁴⁶ media coverage indicates that the committee recommended that APSEZ replant mangroves on at least 200 hectares where it has caused 'extensive environmental abuse' and 'remove all embankments, bunds or obstructions to creeks' in the mangrove forest at Mundra and in forest land in nearby Dhrab.¹⁴⁷ One of the committee members, Claude Alvares (an environmental expert), told a media outlet that much of the approximately 7,000 hectares of mangroves in the area had been destroyed because of the port construction,¹⁴⁸ and the committee is also reported as having found that 'about 5,000 hectares of the Adani Port area was declared as reserved forest and this information was never disclosed to any of the authorities who were approving the land. The remaining areas were mangroves. In fact, the main Adani building and headquarters in that area was also constructed in a non-development zone'.¹⁴⁹ Another source quoted in the media said, 'By blocking the creeks which provided nutrition to the mangroves, the company has systematically slaughtered the mangroves. This cannot be reforested or relocated to another area'.¹⁵⁰

Litigant claims destruction of sand dunes and vegetation

In 2014, a public interest litigant called Mr Chauhan asked the Gujarat High Court to order APSEZ to stop illegally flattening sand dunes (which act as a natural barrier between the ocean and local villagers) in and around Mundra.¹⁵¹ Mr Chauhan argued that APSEZ claimed that the flattened land was created by reclamation activities, not illegal flattening, and had fraudulently created maps that excluded the sand dunes.¹⁵² According to media reports, Mr Chauhan also alleged that APSEZ destroyed vegetation (including mangroves) and obtained environmental clearances based on false facts.¹⁵³

In February 2015, the High Court of Gujarat dismissed the case, noting that the issues raised by Mr Chauhan had been addressed by the Inspection Committee (see above at section 3.3.1) which had already recommended specific actions to the government.¹⁵⁴

Villagers' pastoral land allegedly taken over for APSEZ employee accommodation

In 2013, residents of a village near Mundra asked the court to order APSEZ to stop encroaching on 40 acres of the village's pastoral land.¹⁵⁵ Media reports indicate that APSEZ was using the land to build employee accommodation in spite of the villagers' protests.¹⁵⁶ In September 2014, the court heard that APSEZ had demolished the construction and removed the debris, and, consequently, the case was dismissed.¹⁵⁷

146 See *Kheti Vikas Seva Trust and Others v State of Gujarat and Others* (oral order of 14 June 2016), Civil Application No. 9124 of 2011 in the High Court of Gujarat, page 1.

147 Satish Jha, The Indian Express, *Gujarat HC panel pulls up Adani Group over damage to mangroves* (24 June 2016), <http://indianexpress.com/article/india/india-news-india/gujarat-hc-panel-pulls-up-adani-group-over-damage-to-mangroves-2872247/> (accessed 9 February 2017).

148 Arindam Mukherjee, Outlook Magazine, *Mundra: The port of no call* (1 August 2016), <http://www.outlookindia.com/magazine/story/mundra-the-port-of-no-call/297572> (accessed 9 February 2017).

149 *Id.*

150 *Id.*

151 *Pravinsingh Bhurabha Chauhan v State of Gujarat and Others*, Writ Petition (PIL) No. 210 of 2014 (order of 18 February 2015), before the High Court of Gujarat, paragraph 1.

152 *Id.*, paragraphs 2, 3, 20.

153 The Indian Express, *HC orders Kutch Collector to appear before it over PIL against Adani group* (25 July 2014), <http://indianexpress.com/article/cities/ahmedabad/hc-orders-kutch-collector-to-appear-before-it-over-pil-against-adani-group/>; Times of India, *Save Mundra dunes, HC tells forest dept* (29 July 2014), <http://timesofindia.indiatimes.com/city/ahmedabad/Save-Mundra-dunes-HC-tells-forest-dept/articleshow/39191150.cms> (both accessed 9 February 2017).

154 *Pravinsingh Bhurabha Chauhan v State of Gujarat and Others*, Writ Petition (PIL) No. 210 of 2014 (order of 18 February 2015), before the High Court of Gujarat, paragraph 20.

155 See *Pravinsingh Bhurabha Chauhan and Others v State of Gujarat and Others*, Writ Petition (PIL) No. 137 of 2013 before the High Court of Gujarat (order of 30 September 2014); The Indian Express, *PIL accuses Adani SEZ of land grab, HC issues notices* (21 June 2013), <http://archive.indianexpress.com/news/pil-accuses-adani-sez-of-land-grab-hc-issues-notices/1131956/> (accessed 9 February 2017).

156 The Indian Express, *PIL accuses Adani SEZ of land grab, HC issues notices* (21 June 2013), <http://archive.indianexpress.com/news/pil-accuses-adani-sez-of-land-grab-hc-issues-notices/1131956/> (accessed 9 February 2017).

157 *Pravinsingh Bhurabha Chauhan and Others v State of Gujarat and Others*, Writ Petition (PIL) No. 137 of 2013 before the High Court of Gujarat (order of 30 September 2014), pages 2–3.

3.4 Litigation in relation to Kandla Port, Gujarat

Writ Petition (PIL) No. 63 of 2013

Around December 2012, the Kandla Port Trust (**KPT**) awarded Adani Kandla Bulk Terminal Pvt Ltd (**Adani Kandla**) (which is a 74% subsidiary of APSEZ)¹⁵⁸ a concession (i.e., the right to develop a port at Kandla).¹⁵⁹ APSEZ, which ASIC filings indicate is the ultimate owner of Terminal 1 at the Port of Abbot Point in Australia. If the directors of APSEZ are concerned with, or take part in the management of, Adani Kandla, and are therefore executive officers of Adani Kandla, these findings would form part of those directors' environmental history under the EPBC Act and would be relevant to an assessment of the environmental history of the subsidiary Adani companies who own Terminal 1 in the event that an approval was required.¹⁶⁰

In 2013, public interest litigants brought litigation with respect to the construction of a barge jetty with connected infrastructure, undertaken by KPT with participation from Adani Kandla, alleging that the construction causes environmental damage to the fragile coastal ecosystem.¹⁶¹ According to a news article, the petitioners argued that Adani Kandla did not have environmental clearance to construct the bulk jetty at Kandla, had not followed norms related to the coastal regulation zone, and had filled the creeks and cut mangroves.¹⁶² The petitioners described the acts of Adani Kandla and other defendants as amounting to a 'gross violation of environmental law' that would cause 'thousands of inhabitants ... to lose their livelihood and shelter'.¹⁶³

On 12 February 2014, the Ministry – having looked into environmental concerns at Kandla Port – required KPT to, among other things, implement certain measures to protect mangroves prior to commencing further work.¹⁶⁴ The Ministry was clear that, although KPT was ultimately responsible to ensure compliance with the environmental clearance, the concession agreement with Adani Kandla must incorporate the Ministry's requirements.¹⁶⁵ In addition, a news article indicates that in February 2014, an expert government committee gave a report on the 'alleged contravention of green and other norms' by Adani Kandla in relation to the Kandla Port, and a notice was issued under the Environment Protection Act directing Adani Kandla to stop its activities at Kandla Port 'till it gets the environmental nod'.¹⁶⁶

On 21 August 2014, the Gujarat High Court found that an affidavit filed by the Ministry did not clearly identify whether KPT had complied with the directions in the Ministry's letter from 12 February 2014.¹⁶⁷ The Court ordered the Ministry to file an additional affidavit to identify to what extent the directions had been complied with – in particular, in relation to the measures to protect mangroves.¹⁶⁸

On 17 November 2014, the Court dismissed the case, finding that, one week earlier, the environmental clearance issued in 2011 to KPT had been transferred to Adani Kandla.¹⁶⁹ Also, the Court noted it had received an affidavit from the Ministry stating that a staff member of the Ministry had observed free flow of tidal water at the bridges and culverts of the railway line and road at Kandla Port, and that KPT and Adani Kandla were required to maintain the present conditions of free flow of tidal water.¹⁷⁰

158 Adani Ports and Special Economic Zone Limited, *Annual Report 2015-16*, pages 29, 145, 181, available to download under the heading Annual Report at <http://www.adaniports.com/investors/financials> (accessed 9 February 2017).

159 *Ibrahim Amad Gadh and Others v Union of India and Others* (oral order of 21 August 2014), Writ Petition (PIL) No. 63 of 2013 in the High Court of Gujarat, page 2.

160 See definition of executive officer under the EPBC Act at note 68 above, and section 136(4)(b) of the EPBC Act.

161 *Id.*, pages 1–2. See also *Ibrahim Amad Gadh and Others v Union of India and Others* (oral order of 17 November 2014), Writ Petition (PIL) No. 63 of 2013 in the High Court of Gujarat, paragraphs 2–3.

162 The India Times, *Gujarat High Court: New panel to probe green 'breach' by Adani Group at Kandla* (21 August 2014), http://articles.economictimes.indiatimes.com/2014-08-21/news/53073213_1_adani-group-gujarat-high-court-environmental-norms (accessed 9 February 2017).

163 *Ibrahim Amad Gadh and Others v Union of India and Others* (oral order of 17 November 2014), Writ Petition (PIL) No. 63 of 2013 in the High Court of Gujarat, paragraph 3.

164 *Ibrahim Amad Gadh and Others v Union of India and Others* (oral order of 21 August 2014), Writ Petition (PIL) No. 63 of 2013 in the High Court of Gujarat, page 2.

165 *Id.*, page 3.

166 The India Times, *Gujarat High Court: New panel to probe green 'breach' by Adani Group at Kandla* (21 August 2014), http://articles.economictimes.indiatimes.com/2014-08-21/news/53073213_1_adani-group-gujarat-high-court-environmental-norms (accessed 9 February 2017).

167 *Ibrahim Amad Gadh and Others v Union of India and Others* (oral order of 21 August 2014), Writ Petition (PIL) No. 63 of 2013 in the High Court of Gujarat, pages 4–5.

168 *Id.*, page 5.

169 See also *Ibrahim Amad Gadh and Others v Union of India and Others* (oral order of 17 November 2014), Writ Petition (PIL) No. 63 of 2013 in the High Court of Gujarat, paragraph 7.

170 *Id.*, paragraphs 5, 8.

3.5 Adani Mining Pty Ltd fails to disclose river poisoning to Australian Government

IN BRIEF

In 2010 Konkola Copper Mines (KCM), which is not an Adani Group entity, caused harm to the environment in Zambia in violation of Zambian law, and later pleaded guilty to environmental offences and was fined.

1,800 Zambian villagers have filed a lawsuit against KCM in the UK to recover damages for injuries resulting from water pollution caused by the company.¹⁷¹ In May 2016, a judge of the High Court of Justice in London determined that UK courts have jurisdiction to hear the case¹⁷² with the judge stating the claim against KCM has a real prospect of success.

At the time the 2010 offences occurred Mr Jeyakumar Janakaraj (Mr Jankaraj) was the Director of Operations at KCM. Since September 2013 Mr Jankaraj has been the CEO and a director¹⁷³ of Adani Mining Pty Ltd in Australia and 'oversee[s] all Adani operations in Australia, including the implementation of the Carmichael Coal Mine and Rail Project and the port operations and expansion'.¹⁷⁴

In November 2015, Environmental Justice Australia and Earthjustice wrote to Australian authorities detailing new information that had come to light concerning the actions of KCM, because of its relevance to the assessment of the environmental track record of Adani Mining Pty Ltd, due to Mr Janakaraj having been an executive officer of both companies.

The Federal Environment Minister did not consider this information about the environmental history of Adani Mining Pty Ltd's executive officer when giving approvals for the Carmichael Mine to Adani Mining Pty Ltd because Adani Mining Pty Ltd failed to provide that information, even though it was specifically requested to do so.

3.5.1 Criminal charges for polluting the Kafue River in Zambia

The Kafue River is a source of life and livelihood in much of Zambia, relied upon by local communities for drinking, cooking and other domestic uses, and for fishing and agricultural irrigation. On or around 29–31 October 2010 Konkola Copper Mines¹⁷⁵ (KCM), one of Africa's largest integrated copper producers, with mining operations in Zambia's Copperbelt and Central Provinces¹⁷⁶, discharged 'pregnant liquor solution' – highly acidic, metal-laden water generated from leaching in copper mining¹⁷⁷ – into the river, which caused the river to change colour.¹⁷⁸ According to documents filed by the government in court proceedings against KCM, KCM failed to report the pollution, professing ignorance at first but later

171 John Vidal, *The Guardian*, *Zambian villagers take mining giant Vedanta to court in UK over toxic leaks* (August 1, 2015), <http://www.theguardian.com/global-development/2015/aug/01/vedanta-zambia-copper-mining-toxic-leaks> (accessed 9 February 2017).

172 See *Dominic Liswaniso Lungowe & Others v Vedanta Resources Plc and Konkola Copper Mines Plc* [2016] EWHC 975 (27 May 2016 in the High court of Justice, Queen s Bench Division, Technology and Construction Court).

173 Australian Securities & Investments Commission, Current Company Extract for Adani Mining Pty Ltd, ACN: 145 455 205 (search performed October 9, 2015).

174 Adani, *Media release – Adani Group appoints Australian CEO* (September 10, 2013), http://www.adanimining.com/Common/Uploads/MediaTemplate/Download_10092013_AdaniCEO.PDF (accessed 8 October 2015; no longer available).

175 KCM is not an Adani Group entity. It is a subsidiary of Vedanta Resources Plc, a company listed on the London Stock Exchange.

176 Konkola Copper Mines plc, *Corporate profile*, <http://kcm.co.zm/corporate-profile/> (accessed 9 February 2017).

177 Pregnant liquor solution is also known as pregnant leach solution. US Forest Service, *Rosemont Copper Project Environmental Impact Statement – Glossary – Pregnant Leach Solution*, <http://www.rosemonteis.us/glossary/term/285>; US Environmental Protection Agency, *Technical Resource Document – Extraction And Beneficiation Of Ores And Minerals, Volume 4, Copper*, (1994), <https://archive.epa.gov/epawaste/nonhaz/industrial/special/web/pdf/copper.pdf> (both accessed 9 February 2017).

178 *The People v Konkola Copper Mines Plc – Statement of Facts* (In the Subordinate Court of the First Class for the Chingola District Holden at Chingola (Criminal Jurisdiction) (November 25, 2010). See also *Mines and Communities, Vedanta: serial offending in Zambia too?* (December 27, 2010), <http://www.minesandcommunities.org/article.php?a=10613> (accessed 9 February 2017).

agreeing that the pollution came from its tailings leach plant.¹⁷⁹

In November 2010, the Government of Zambia brought a successful criminal prosecution against KCM for this pollution and the harm it caused.¹⁸⁰ The government charged KCM with four offences relating to the pollution:

1. Polluting the environment contrary to section 91(1) of the Environmental Protection and Pollution Control Act No. 12 of 1990 Cap 204 of the Laws of Zambia;
2. Discharging poisonous, toxic, ecotoxic, obnoxious or obstructing matter, radiation or other pollutant into the aquatic environment contrary to sections 24 and 91(1) of the Environmental Protection and Pollution Control Act No. 12 of 1990 Cap 204 of the Laws of Zambia;
3. [W]illfully failing to report an act or incident of pollution of the environment contrary to section 86 subsections (1) and (3) of the Environmental Protection and Pollution Control Act No. 12 of 1990 Cap 204 of the Laws of Zambia; and
4. [F]ailure to comply with the requirements for discharge of effluent contrary to Regulation 12(b) of the Environmental Protection and Pollution Control [Water Pollution (Effluent and Wastewater)] Regulations Statutory Instrument No. 172 of 1993.¹⁸¹

KCM pleaded guilty to all four charges before the Subordinate Court of the First Class for the Chingola District Holden at Chingola, Zambia, and the court imposed a monetary fine.¹⁸²

This was not an isolated pollution incident, as reports and court documents indicate that KCM has a history of pollution in the region. For example, only a few months later in January 2011, a newspaper in Zambia reported that KCM had again polluted the Kafue River, that a member of parliament had expressed irritation about KCM's continuing pollution, and that the environmental authorities were investigating.¹⁸³

There have been at least two other lawsuits filed against KCM for water pollution. First, in April 2015, the Supreme Court of Zambia agreed with a judgement of a lower court in 2011 (namely, the High Court of Zambia) that KCM was liable for polluting water with sulphuric acid and other chemicals in Chingola in 2006, which led to the sickness of local residents.¹⁸⁴

According to news reports, 1,800 Zambian villagers have filed a lawsuit against KCM in the UK to recover damages for injuries resulting from water pollution caused by the company.¹⁸⁵ The villagers say that because of the pollution, people have become sick and died, the soil has become non-productive, and the water smells foul and is orange-coloured.¹⁸⁶ The BBC and *The Guardian* report that leaked documents, including a report by a Canadian engineering company retained by KCM in 2010, indicate that KCM has been discharging sulphuric acid and other toxic chemicals into water sources in Zambia.¹⁸⁷ *The Guardian* states that this engineering report refers to 'constant contamination' of streams by KCM, and says that KCM's reservoirs overflow and there are pipe leakages and a lack of spare parts.¹⁸⁸ Furthermore, a scientist who

¹⁷⁹ *Id.*

¹⁸⁰ See *The People v Konkola Copper Mines Plc* (1C/232/2020) (In the Subordinate Court of the First Class for the Chingola District Holden at Chingola (Criminal Jurisdiction) (November 25, 2010).

¹⁸¹ *The People v Konkola Copper Mines Plc – Statement of Facts* (In the Subordinate Court of the First Class for the Chingola District Holden at Chingola (Criminal Jurisdiction) (November 25, 2010).

¹⁸² See *The People v Konkola Copper Mines Plc* (1C/232/2020) (In the Subordinate Court of the First Class for the Chingola District Holden at Chingola (Criminal Jurisdiction) (November 25, 2010).

¹⁸³ Lusaka Times, *KCM Kafue river pollution irritates MP* (January 17, 2011), <https://www.lusakatimes.com/2011/01/17/kcm-kafue-river-pollution-irritates-mp/>; Lusaka Times, *ECZ investigating KCM pollution of Kafue River* (January 15, 2011), <https://www.lusakatimes.com/2011/01/15/ecz-investigating-kcm-pollution-kafue-river/> (both accessed 9 February 2017).

¹⁸⁴ *Konkola Copper Mines PLC and James Nyasulu and 2,000 Others* (Appeal No.1/2012) (In the Supreme Court for Zambia Holden at Lusaka) (April 2, 2015), <http://www.zambialii.org/zm/judgment/supreme-court/2015/33-0>; *James Nyasulu and 2000 Others and Konkola Copper Mines PLC* (2007/HP/1286) (In the High Court of Zambia at the Principal Registry at Lusaka), <http://www.zambialii.org/zm/judgment/high-court/2010/86>; Lusaka Times, *The Supreme Court upholds KCM's High Court guilty verdict of water pollution which poisoned more than 2000 people in 2006* (April 3, 2015), <https://www.lusakatimes.com/2015/04/03/the-supreme-court-upholds-kcms-high-court-guilty-verdict-of-water-pollution-which-poisoned-more-than-2000-people-in-2006/>; Foil Vedanta, *Zambia Supreme Court holds Vedanta guilty of water poisoning* (April 1, 2015), <http://www.foilvedanta.org/uncategorized/call-out-protest-at-zambia-high-commission-2nd-april/> (all accessed 9 February 2017).

¹⁸⁵ John Vidal, *The Guardian*, *Zambian villagers take mining giant Vedanta to court in UK over toxic leaks* (August 1, 2015), <http://www.theguardian.com/global-development/2015/aug/01/vedanta-zambia-copper-mining-toxic-leaks> (accessed 9 February 2017).

¹⁸⁶ *Id.* See also John Vidal, *The Guardian*, *I drank the water and ate the fish. We all did. The acid has damaged me permanently* (August 1, 2015), <http://www.theguardian.com/global-development/2015/aug/01/zambia-vedanta-pollution-village-copper-mine>; Nomsa Maseko, *BBC News*, *'Rivers of acid' in Zambian villages* (September 8, 2015), <http://www.bbc.com/news/world-africa-34173746> (both accessed 9 February 2017).

¹⁸⁷ *Id.* See also, Nomsa Maseko, *BBC News*, *Rivers of acid in Zambian villages* (September 8, 2015), <http://www.bbc.com/news/world-africa-34173746> (accessed 9 February 2017).

¹⁸⁸ John Vidal, *The Guardian*, *Zambian villagers take mining giant Vedanta to court in UK over toxic leaks* (August 1, 2015), <http://www.theguardian.com/global-development/2015/aug/01/vedanta-zambia-copper-mining-toxic-leaks> (accessed 9 February 2017).

worked for more than 15 years with KCM in Zambia is reported to have revealed that KCM has cut corners to save costs, and that

[t]here have been heavy spillages and massive leakages. Acid has been leaking all over the place. The pollution control pond is handling too much material. No effort has been made to correct this scenario. Only one of four [waste] pipelines is running – the rest are in disrepair. ...The company has very good plans on paper that have not materialised on the ground for the last 10 years. It is absolutely clear that there is a massive problem.¹⁸⁹

In May 2016, a judge of the High Court of Justice in London determined that UK courts have jurisdiction to hear the case.¹⁹⁰ Notably, in allowing the claim to proceed in the UK courts, the judge stated that he was ‘in no doubt that the claim against KCM has a real prospect of success,’ because, among other things, ‘[t]here have been, as a matter of record, discharges of toxic effluent from the mine into relevant waterways’ and ‘[t]here is no attempt, in the evidence served on behalf of KCM, to challenge the underlying basis’ of the villagers’ claim against KCM.¹⁹¹

3.5.2 Failure to declare criminal charges as required under Australian law

Australian laws recognise that environmental matters connected with a company’s executive officers, and of other un-related companies those executive officers have been in charge of, are relevant when assessing the environmental history of a company to determine whether that company should be entrusted with potentially risky operations in Australia.

The Federal Minister for the Environment is empowered to consider the environmental history of a project proponent and its executive officers in considering whether to issue an approval under federal environmental protection legislation. Section 136(4) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) provides that the Minister, when deciding whether to grant an approval under that Act, may consider whether the person is 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^[192] 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.¹⁹³

The Federal Department of the Environment has issued a policy statement noting that information relevant to a person’s environmental history includes information that ‘will indicate whether a person is likely to comply with the conditions of an approval.’¹⁹⁴

From 2008 until he joined the Adani Group in September 2013, Mr Janakaraj was Director of Operations and later CEO of KCM in Zambia.¹⁹⁵ Mr Janakaraj was ‘responsible for overall operations of KCM’.¹⁹⁶ Accordingly, Mr Janakaraj was Director of Operations of KCM at the time of the 2010 offences,¹⁹⁷ and subsequent prosecution, guilty plea, and fine.

Although the 2006 pollution incident predated Mr Janakaraj’s management of KCM, the High Court’s decision was made

¹⁸⁹ *Id.*

¹⁹⁰ See *Dominic Liswaniso Lungowe & Others v Vedanta Resources Plc and Konkola Copper Mines Plc* [2016] EWHC 975 (27 May 2016 in the High Court of Justice, Queen’s Bench Division, Technology and Construction Court).

¹⁹¹ *Id.*, paragraph 99. See also Leigh Day, *Zambian villagers allowed to take legal action against mining giant in UK* (27 May 2016), <https://www.leighday.co.uk/News/News-2016/May-2016/Zambian-villagers-allowed-to-take-legal-action-aga> (accessed 9 February 2017).

¹⁹² An **executive officer** of a body corporate means a person, by whatever name called and whether or not a director of the body, who is concerned in, or takes part in, the management of the body. *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 493.

¹⁹³ *Id.*, s 136(4).

¹⁹⁴ Australian Government Department of the Environment, *EPBC Act Policy Statement – Consideration of a person’s environmental history when making decisions under the EPBC Act* (2013), page 2, available to download at <http://www.environment.gov.au/resource/epbc-act-policy-statement-consideration-persons-environmental-history-when-making-decisions> (accessed 9 February 2017).

¹⁹⁵ *Vedanta Resources Annual Report 2009*, page 37, http://www.vedantaresources.com/media/11649/ar2009final_website.pdf; *Vedanta Resources Annual Report 2010*, page 15, <http://www.vedantaresources.com/media/11705/vedantaar2010.pdf>; *Vedanta Resources Annual Report 2011*, page 27, <http://www.vedantaresources.com/media/11675/vedanta2011ar.pdf>; *Vedanta Resources Annual Report and Accounts 2012*, page 61, http://www.vedantaresources.com/media/11708/vedantafy2012ar_final.pdf; *Vedanta Resources Annual Report and Accounts 2013*, page 75, <http://www.vedantaresources.com/media/126374/vedantafy2013ar.pdf>; *Vedanta Resources Annual Report and Accounts 2014*, page 79, <http://www.vedantaresources.com/media/164998/VedantaAR2014.pdf> (all accessed 9 February 2017).

¹⁹⁶ *Vedanta Resources Annual Report 2009*, page 37, http://www.vedantaresources.com/media/11649/ar2009final_website.pdf (accessed 9 February 2017).

¹⁹⁷ None of the offences made any allegations against Mr Janakaraj personally.

during Mr Janakaraj's tenure there. Whether Mr Janakaraj was aware of the 2006 incident, and what actions he took to improve KCM's environmental record and prevent further incidents, are issues that should be addressed by Australian regulators in undertaking a proper assessment of the environmental history of Adani Mining Pty Ltd and its executive officers.

Mr Janakaraj is now an executive officer of Adani Mining Pty Ltd (and indeed oversees all of the Adani Group's operations in Australia). Those in executive roles at mining companies – as Mr Janakaraj was at KCM and now is in relation to the Adani Group's Australian operations – have a critical role in ensuring that mining operations like those of KCM and of the Adani Group in Australia operate in compliance with laws that protect the environment and communities. The evidentiary record of harm to the environment by KCM – before and during Mr Janakaraj's leadership as Director of Operations and later CEO – raises serious questions about KCM's environmental and regulatory compliance and its corporate culture in relation to the environment, local communities and the law.

Following Environmental Justice Australia and Earthjustice's writing to the Federal Minister for the Environment concerning the events in Zambia, correspondence between the Federal Environment Department and Adani Mining Pty Ltd was released. It revealed that Adani Mining Pty Ltd was specifically asked for details of the environmental history of Adani executive officers, but that Adani had failed to disclose the link to the Zambian pollution disaster in its response.¹⁹⁸

The Federal Environment Department made inquiries into the omission and found that it was likely 'due to a mistake'.

¹⁹⁹ The ABC reported that the Federal Environment Department told the media outlet that they have 'elected to not take further compliance action on this matter ... [but] Adani Mining Pty Ltd has been reminded of its obligations under the Act to provide accurate information to departmental officers'.²⁰⁰

¹⁹⁸ Mark Willacy, *ABC News* Adani boss Jeyakumar Janakaraj failed to disclose link to African pollution disaster before Carmichael coal mine was approved (10 December 2015), <http://www.abc.net.au/news/2015-12-10/adani-boss-failed-to-disclose-link-to-african-pollution-disaster/7012554> (accessed 9 February 2017).

¹⁹⁹ Mark Willacy, *ABC News* Adani's failure to disclose Jeyakumar Janakaraj history with African pollution disaster a mistake : Environment Department (21 Jan 2016), <http://www.abc.net.au/news/2016-01-21/adani-s-non-disclosure-of-ceo-s-pollution-history-a-mistake/7102270> (accessed 9 February 2017).

²⁰⁰ *Id.*

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