

Chapter 2

Key issues

2.1 This chapter examines the evidence received by the committee in submissions to this inquiry.

2.2 Arguments present in support of the bill included that it would ensure stronger oversight of actions under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and decisions made by the Northern Australia Infrastructure Facility (NAIF).

2.3 Submitters who raised concern in relation to the bill argued that it does not provide any additional protections beyond existing Commonwealth and state and territory legislative frameworks and that it is therefore unnecessary. In addition, submitters highlighted that it violates the fundamental legal principle of non-retrospectivity by triggering a review of existing approvals.

Evidence supporting the bill

2.4 Submitters in support of the bill raised concern with Adani's environmental record, the potential environmental impacts of a new coal mine in Australia, and the appropriateness of the NAIF providing funding for Adani's projects.

Proposed amendments to the EPBC Act

2.5 Many of the submitters who expressed support for the bill argued that the bill would strengthen the existing protections offered by the EPBC Act by making consideration of environmental history mandatory rather than discretionary. In addition, submitters expressed support for the broadening of the categories of people which are included under the suitable person test.

Strengthening existing protections

2.6 The Australian Conservation Foundation (ACF) submitted that the suitable person test currently included in the EPBC Act is a discretionary consideration. It stated that the ACF supports both the expansion of the suitable person test, and its 'transformation to a mandatory, rather than discretionary consideration'. It also stated that:

The amendments in this Bill would ensure stronger oversight of actions covered by the Act by ensuring that an applicant's compliance and environmental management record is always considered by the Minister before making an approval decision.¹

1 Australian Conservation Foundation, *Submission 4*, p. 2.

2.7 The ACF also submitted that 'left as a discretionary consideration, the suitable person test may be applied to applicants at the whim of the Minister'. It argued that:

...an assessment of a proponent's suitability to hold an EPBC Act approval licence should form an integral component of the approval process. Australians have a right to expect that approval holders will comply with the conditions of their approval.²

2.8 Similarly, Environmental Justice Australia expressed its support for the bill's proposal to make it mandatory for the decision maker to consider past conduct of those seeking approvals under environmental legislation. It submitted that a failure to do so undermines public confidence in decision making. It also submitted that:

Consideration of an applicant's environmental history as part of the approval process is consistent with a preventative and risk based approach to decision making, where all relevant factors are considered and weighed at the earliest possible opportunity rather than left to be dealt with once an approval has been granted.³

Environmental and corporate record

2.9 Many of the submissions which offered support for the bill highlighted concerns regarding the environmental record of companies that make up the Adani Group. For example, the ACF submitted that the Adani Group has a 'worrying lack of compliance with overseas environmental laws'.⁴ Environmental Justice Australia highlighted the work undertaken by Earthjustice, a US based environmental law organisation, in investigating the environmental and corporate record of Adani in overseas jurisdictions.⁵

2 Australian Conservation Foundation, *Submission 4*, p. 2.

3 Environmental Justice Australia, *Submission 7*, p. 1.

4 Australian Conservation Foundation, *Submission 4*, p. 2.

5 Environmental Justice Australia, *Submission 7*, Attachment 1 and Attachment 2. See also Farmers for Climate Action, *Submission 5*, pp. 2–3; Australian Conservation Foundation, *Submission 4*, p. 3; Birds Queensland, *Submission 2*, p. 2.

Proposed amendments to the NAIF Act

2.10 It was argued that funds should not be made available through the NAIF to companies that have a poor environmental and corporate record.⁶ The proposed inclusion of a suitable person test in the NAIF Act was supported with Farmers for Climate Action arguing that it would ensure that funding is only provided to projects that are in the public interest.⁷ ACF also supported to the proposed inclusion of the suitable person test and stated:

ACF believes that the insertion of a suitable person test is an appropriate and vital safeguard for northern Australia. Given the enormous environmental, social and economic value of the north to the rest of Australia, and indeed the world, it is incumbent on the Commonwealth Government to ensure that only operators with strong track records in compliance and environmental management are provided with financial assistance.⁸

2.11 In addition, mandatory consultation with the Australian Securities and Investment Commission and the Australian Criminal Intelligence Commission was supported with Farmers for Climate Action stating that it would be an 'act of due diligence'.⁹

Review of existing EPBC approvals

2.12 Submitters expressed support for the bill's requirement that the EPBC Act approvals for the Carmichael Coal Mine and Rail Project and its associated infrastructure projects including the Abbot Point Coal Terminal 0 and North Galilee Basin Rail Project, be immediately reviewed.¹⁰

Other issues

2.13 A number of submitters who offered support for the bill also cited concerns in relation to the 'impact of thermal coal extraction and use on global carbon emissions'¹¹

6 Protect the Bush Alliance, *Submission 1*, p. 2.

7 Farmers for Climate Action, *Submission 5*, pp. 2–3. See also Mackay Conservation Group, *Submission 12*, p. 2.

8 Australian Conservation Foundation, *Submission 4*, p. 6.

9 Farmers for Climate Action, *Submission 5*, pp. 2–3. See also Environment Council of Central Queensland, *Submission 6*, p. 4; Mackay Conservation Group, *Submission 12*, pp. 23; Ms Maggie Mckeown, *submission 22*, p. 1; Wide Bay Burnett Environment Council, *Submission 33*, p. 1.

10 Farmers for Climate Action, *Submission 5*, p. 2; Lighter Footprints, *Submission 8*, p. 2; Birdlife Southern Queensland, *Submission 9*, p. 1.

11 Farmers for Climate Action, *Submission 5*, p. 2. See also Environment Council of Central Queensland, *Submission 6*, p. 2; Mackay Conservation Group, *Submission 12*, p. 1.

and argued that Australia should not providing subsidies to expand its coal extraction industry.¹²

Evidence opposing the bill

2.14 Submitters who provided evidence in opposition to the bill argued that the amendments to the EPBC Act and the NAIF Act are both unnecessary and unreasonable, and that the retrospective nature of the amendments breach fundamental legal principles. In addition, some submitters described the bill as a 'campaign' rather than a mechanism to afford genuine improvement in the assessment process required under the EPBC Act.¹³

Intent of the bill

2.15 A number of submitters expressed significant concern with the intent of the bill. Both the Minerals Council of Australia (MCA) and the Queensland Resources Council (QRC) highlighted that the title of the bill indicates that the purpose of the bill is to stop development projects in Queensland rather than being 'a genuine attempt to reform and improve the operation of the Northern Australia Infrastructure Facility (NAIF) or national environmental law'.¹⁴

2.16 The QRC further submitted that "'Stop Adani" is a crude campaign slogan more suited to a bumper sticker than as the basis of enacting legislative amendments to important environmental laws'.¹⁵

2.17 The MCA also expressed concern with statements included in the Explanatory Memorandum. The MCA contended that the Explanatory Memorandum 'incorrectly implied the current NAIF application will somehow proceed as an untied grant rather than as a concessional loan'. Further, it contended that the Explanatory Memorandum includes an unsubstantiated allegation that 'damning evidence' exists in relation to Adani and submitted that this is 'simply calculated to harm the reputation of an individual company'. The MCA concluded that 'these statements are misleading and raise concerns the Bill and its implications have not been properly considered prior to its introduction into Parliament'.¹⁶

12 Environment Council of Central Queensland, *Submission 6*, p. 4; Queensland Conservation Council, *Submission 11*, p. 1; The Australia Institute, *Submission 10*, p. 4–5. See also Lighter Footprints, *Submission 8*, pp. 2–3

13 Queensland Resources Council, *Submission 13*, p. 3.

14 Minerals Council of Australia, *Submission 17*, p. 1. See also Queensland Resources Council, *Submission 13*, p. 3.

15 Queensland Resources Council, *Submission 13*, p. 1. See also Minerals Council of Australia, *Submission 17*, p. 1.

16 Minerals Council of Australia, *Submission 17*, pp. 1–2.

Proposed amendment of the EPBC Act

Suitable person test

2.18 The committee received evidence that the bill's proposed 'suitable person test' is both impractical, and that it is unnecessary given the EPBC Act's existing powers.

2.19 QRC questioned the practicality of ensuring that the Minister 'must' have regard to any other matter the Minister considers to be relevant and submitted that 'it is difficult to see why the Bill would aim to compel a Minister not to ignore matters they already consider as relevant'. The QRC further noted that in the case of approvals granted to Adani 'the Minister has already considered many of the issues that the bill seeks to compel the Minister to consider'.¹⁷

2.20 The Department of the Environment and Energy (the department) similarly submitted that the EPBC Act already 'provides all the powers necessary to assess the history of people and entities in relation to environmental matters (within or external to Australia)'. It further noted that the EPBC Act already enables the Minister to consider the environmental history of all individuals and entities in a position to control or influence the actions of a proponent.¹⁸ The department noted that under existing provisions, it:

...generally requests that proponents include information in referral or assessment documentation about their environmental history and, where relevant, information about the environmental history of the proponent's executive officers, any parent body of the proponent, and the executive officers of a parent body.¹⁹

2.21 The department explained that information relevant to a person's environmental history may include: details of previous environmental approvals or permits; compliance and enforcement actions; audits, courts or tribunal proceedings; and corporate policies and plans.²⁰

2.22 The department concluded that 'the Bill will increase the regulatory burden on business and administrative costs for the Department without materially improving the environmental outcomes for nationally protected matters'.²¹

Associated entities

2.23 As previously noted, the bill proposes to extend the 'suitable person test' to include the assessment of associated entities and their executive officers whenever an

17 Queensland Resources Council, *Submission 13*, p. 2.

18 Department of the Environment and Energy, *Submission 16*, p. 2.

19 Department of the Environment and Energy, *Submission 16*, p. 3.

20 Department of the Environment and Energy, *Submission 16*, p. 3.

21 Department of the Environment and Energy, *Submission 16*, p. 2.

EPBC Act approval is granted, varied, revoked or extended. The committee received evidence that implementing this requirement 'would be complex, resource intensive and time consuming while adding little value to EPBC Act processes'.²²

2.24 The MCA noted that section 10 of the bill provides that an associated entity has the same definition as that under the *Corporations Act 2001*. It stated that:

Under the *Corporations Act* section 50AAA an associated entity captures a broad range of corporate relationships. These include among other things, where the principal (e.g. the entity seeking approval under the EPBC Act) and the associate are related bodies corporate, where the principal controls the associate and its operations and resources are material to the associate, where a qualifying investment has been made in the associate by the principal and where both entities are controlled by a third entity etc.²³

2.25 The MCA expressed concern that for a large multinational company there might be a large number of these associated entities both in Australia and around the world. Under the bill, the environmental histories of the executive officers of each of these entities would need to be scrutinised regardless of whether these individuals have operational or managerial influence over an Australian project.²⁴

Review of existing EPBC approvals

2.26 A number of submitters were particularly critical of Schedule 1 Section 12, which would amend the EPBC Act to require the bill's proposed 'suitable person test' be applied to those approvals previously granted to the Adani Group. The QRC described this item as 'undoubtedly the most troubling of the Bill'²⁵ while Adani Mining Pty Ltd described this section as violating a number of legal principles including the fundamental principle of non-retrospectivity.²⁶

2.27 The MCA noted that the common law principle of non-retrospectivity states that 'laws should not retrospectively change legal rights and obligations, or create offences with retrospective application'.²⁷

2.28 The QRC submitted that the retrospective nature of 'reopening project approvals would seem to fly in the face of both fundamental legislative principles and Council of Australian Governments' (COAG) eight Principles of Best Practice Regulation (2007)'. It described the bill as ignoring the principles of natural justice, imposing obligations retrospectively, and lacking sufficient regard for the institution

22 Minerals Council of Australia, *Submission 17*, p. 3.

23 Minerals Council of Australia, *Submission 17*, p. 3.

24 Minerals Council of Australia, *Submission 17*, p. 3.

25 Queensland Resources Council, *Submission 13*, p. 2.

26 Adani Mining Pty Ltd, *Submission 3*, p. 2.

27 Minerals Council of Australia, *Submission 17*, p. 2.

of Parliament (at both the state and Commonwealth level).²⁸ Similarly, the MCA noted that the COAG principles of good regulation include:

- establishing a case for action before addressing a problem;
- considering a range of feasible policy options;
- consulting effectively with key stakeholders; and
- consistency and proportionality.²⁹

2.29 The MCA concluded that 'it is unclear whether the development of the Bill satisfies any of the above COAG requirements for good regulation as the explanatory memorandum fails to address these principles'.³⁰

2.30 EDOs of Australia, despite offering support for a clearer suitable person test being applied to future projects, stated that 'as lawyers, we have concerns with retrospective application of new criteria to specified approvals'.³¹

2.31 Adani Mining Pty Ltd argued that the principle of non-retrospectivity is 'founded on the rule of law' and that 'individuals must know the fixed content of rules beforehand in order to act in accordance with them'. It stated that 'no justification has been provided for the retrospective nature' of the section and 'no attempts to minimise its effects are apparent'. Adani Mining Pty Ltd concluded that:

Indeed, from the very name of the Bill and from Senator Waters' statement in her second reading speech that the Bill is "the next step in the movement to stop Adani", the clearly-intended effect of the Bill is to cause harm to Adani.³²

Liability and sovereign risk

2.32 Adani Mining Pty Ltd also submitted that Schedule 1 Section 12 (the review of existing approvals) would subject 'Adani to a liability unique to it and inescapable by it'. It noted that in addition to its projects being reassessed, it would be compelled to publicly disclose information which would otherwise be subject to the processes and protections of the *Freedom of Information Act 1982*. Adani Mining Pty Ltd argued that the bill is 'punitive and effectively singles out Adani for a punishment to

28 Queensland Resources Council, *Submission 13*, p. 1.

29 Minerals Council of Australia, *Submission 17*, p. 2. See also, Council of Australian Governments, *Best practice regulation – A guide for ministerial councils and national standard setting bodies*, Department of Prime Minister and Cabinet, October 2007, https://www.pmc.gov.au/sites/default/files/publications/COAG_best_practice_guide_2007.pdf, (accessed 4 August 2017).

30 Minerals Council of Australia, *Submission 17*, p. 2.

31 EDOs of Australia, *Submission 14*, p. 2.

32 Adani Mining Pty Ltd, *Submission 3*, p. 2.

which no other person is subject' which 'violates the fundamental legal principle that legislation should apply objective standards of general application'.³³

2.33 Both Adani Mining Pty Ltd and the QRC expressed concern that the bill would have financial implications. Adani Mining Pty Ltd noted that it has 'invested significantly in the Abbot Point Terminal and Carmichael Mine and Rail projects' and it argued that any revocation, amendment or suspension of its current approvals should entitle it to just terms compensation.³⁴

2.34 The QRC similarly submitted that reopening granted approvals would 'create untenable levels of sovereign risk for a broad range of existing investments which were made under EPBC approvals'.³⁵ The MCA also stated that 'should the Bill be passed, it would set a poor precedent and raise sovereign risk concerns for companies considering investing in Australia'. The MCA also referred to observations made by the Law Council of Australia that:

...retrospective laws can cause a 'number of practical difficulties for business, and the wider economy' including: actual and reputational damage to the market (sovereign risk); disruption to business planning processes resulting in high compliance costs; and unintended consequences from increased regulatory complexity.³⁶

2.35 The QRC also expressed concern regarding the timeframe in which such a review would be required to be conducted and tabled. It suggested that if a review were to occur, then a 'more reasonable process would be for the review to be made available to the company and the Minister before it is tabled...or published'.³⁷

Selective application

2.36 Submitters who did not support the bill also expressed concern about the selective application of the proposed measures and pointed to possible adverse outcomes should the proposal be enacted.

2.37 The Department of the Environment and Energy submitted that it 'considers it both unnecessary and unreasonable to single out EPBC Act projects for further review'. It noted that the 'Adani projects have been subject to stringent environmental assessment'. The department highlighted that the Minister, in making the approval

33 Adani Mining Pty Ltd, *Submission 3*, pp. 2–3.

34 Adani Mining Pty Ltd, *Submission 3*, p. 5.

35 Queensland Resources Council, *Submission 13*, p. 2.

36 Minerals Council of Australia, *Submission 17*, p. 2. See also Law Council of Australia, submission 75 in Australian Law Reform Commission, *Traditional Rights and Freedom – Encroachments by Commonwealth Laws (ALRC Final Report 129)*, p. 364, https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_129_final_report_.pdf, (accessed 4 August 2017).

37 Queensland Resources Council, *Submission 13*, p. 2.

decision for the Carmichael Coal Mine and Rail Project had access to extensive information on the environmental history of Adani Mining Pty Ltd and its executive officers. The Minister also had extensive information on Adani's parent companies and their executive officers.³⁸

2.38 The department also explained that following the approval decision being made, concerns were raised with the department regarding the environmental history of the company and one of its executive officers. As a result, it conducted a thorough investigation and concluded that no changes to the approval of the Carmichael Coal Mine and Rail Project were warranted.³⁹

2.39 The department submitted that 'the selective application of these requirements risks eroding business and community confidence in the decisions made under the EPBC Act'.⁴⁰

2.40 The MCA argued that that this would result in a 'complex and unwieldy process' that would 'create considerable uncertainty for proponents'. The MCA submitted that this would not only be problematic for new approvals, but would endanger existing operations seeking to vary or extend a current EPBC Act approval. It noted that there are many reasons for which approval conditions may be varied, not all of which would be deemed significant. These include removing conditions made redundant by planning changes or adding conditions to include new ancillary activities. The MCA submitted that:

...it would be nonsensical that a mine seeking to vary a pre-existing EPBC Act approval, including minor changes, would require a potentially global review of executive officers and associated entities. It would serve only to create significant uncertainty for these operations while unnecessarily complicating the EPBC Act operation.⁴¹

Proposed amendments to the NAIF Act

2.41 The committee received evidence that the proposed amendments to the NAIF Act do not provide any additional protections beyond existing legislative frameworks.

2.42 The Department of Industry, Innovation and Science submitted that the considerations proposed under the bill's 'suitable person test' are already covered by the *Northern Australia Infrastructure Facility Investment Mandate 2016* (the Investment Mandate). Specifically, section 15(2) of the Investment Mandate prevents the NAIF from providing financial assistance to projects until all relevant regulatory, environmental and Native Title approvals are received. This would include approval under the EPBC Act which currently provides for consideration of a proponent's

38 Department of the Environment and Energy, *Submission 16*, p. 2.

39 Department of the Environment and Energy, *Submission 16*, p. 2.

40 Department of the Environment and Energy, *Submission 16*, p. 2.

41 Minerals Council of Australia, *Submission 17*, p. 3.

history in relation to environmental matters, and consideration of a company's executive officers' history in relation to environmental matters.⁴²

2.43 The Department of Industry, Innovation and Science concluded that:

It is therefore the department's view that the proposed amendments relating to environmental performance do not provide any additional protection beyond existing Commonwealth and state or territory frameworks, and are therefore unnecessary.⁴³

2.44 The bill's proposed 'suitable person' test also includes a requirement for the Minister to have regard to the corporate and financial history of the proponent and its executive officers. The Explanatory Memorandum states that:

This test would involve consideration of any investigations and findings against members or executive officers of the Adani corporate group for...fraud, money laundering, tax minimisation and corruption.⁴⁴

2.45 The Department of Industry, Innovation and Science noted that section 7(2)(b) of the Investment Mandate establishes that the NAIF 'Board must be satisfied that the Commonwealth will be repaid, or that the investment can be refinanced'. The Department submitted that as such, it is 'of the view that the NAIF Board will already have regard' to these matters. It also noted that under section 15(2) of the Investment Mandate, consideration of compliance with Commonwealth, state and territory regulatory frameworks would also include legislation related to corporate activities such as the *Corporations Act 2001*, the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, tax legislation, and anti-corruption regulations.⁴⁵

2.46 The Department of Industry, Innovation and Science also submitted that Mandatory Criteria 5 of Schedule 1 of the Investment Mandate also requires that any loans by the NAIF must not be the majority source of debt funding. This ensures that other investors must be involved in any project to which the NAIF provides funding. As such, NAIF participation will be part of a syndicate of lenders and other syndicate members will also conduct their own assessments of the proponent to determine the risk of default.⁴⁶

42 Department of Industry, Innovation and Science, *Submission 15*, p. 3.

43 Department of Industry, Innovation and Science, *Submission 15*, p. 3.

44 Explanatory Memorandum, p. 1.

45 Department of Industry, Innovation and Science, *Submission 15*, p. 4.

46 Department of Industry, Innovation and Science, *Submission 15*, p. 4.

2.47 The Department of Industry, Innovation and Science concluded that:

In summary, the department considers that the proposed amendments relating to suitability will not provide additional assurances beyond those already associated with the Act, and are therefore unnecessary.⁴⁷

2.48 The bill also proposes to amend the NAIF Act by introducing a binding requirement on the Minister to reject financial assistance to an entity which has been found not to be suitable. The Department of Industry, Innovation and Science submitted that this provision 'appears to contemplate a scenario where the NAIF Board both considers a recipient as unsuitable and recommends to the Minister an offer of financial assistance'.⁴⁸

2.49 However, the Department of Industry, Innovation and Science noted that section 11 of the NAIF Act currently provides the Minister for Resources and Northern Australia with the power to reject Investment Decisions of the NAIF Board for a range of reasons. These include if financial assistance would be inconsistent with the objectives and policies of the Commonwealth Government, or would have adverse implications for Australia's national or domestic security, or adverse impacts on Australia's international reputation or foreign relations.⁴⁹

2.50 The Department of Industry, Innovation and Science concluded that 'the Act's provisions already provide scope for the Minister to act' in the situation contemplated by the bill.⁵⁰

Committee view

2.51 The committee recognises the economic and social importance of a successful and properly managed resources sector.

2.52 It is the view of the committee that this bill unnecessarily expands the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). The EPBC Act as it stands, already sets out considerations which the Minister must take into account when assessing a project for approval and when determining any conditions to attach to such an approval.

2.53 The EPBC Act provides the Minister with all the powers necessary to assess the history of people and entities in relation to environmental matters, both within and external to Australia. It already enables the Minister to consider the environmental history of all individuals or entities who are in a position to exert control, or who have influence over, the environmental activities of a proponent.

47 Department of Industry, Innovation and Science, *Submission 15*, p. 4.

48 Department of Industry, Innovation and Science, *Submission 15*, pp.4–5.

49 Department of Industry, Innovation and Science, *Submission 15*, p.5.

50 Department of Industry, Innovation and Science, *Submission 15*, p.5.

2.54 This bill will simply increase the regulatory burden on business, and raise administrative costs for the Department of the Environment and Energy without materially improving the environmental outcomes for nationally protected matters.

2.55 It is clear that this bill is not a transparent attempt to reform the EPBC Act, rather it is intended, and designed, to target a single project. The committee is of the view that legislating to regulate a single project sets a worrying precedent.

2.56 In addition, the retrospective application of new criteria cannot be supported by the committee. It is important that legislation is drafted and implemented with sufficient regard for fundamental legal principles, including the principle against retrospectivity.

2.57 The retrospective application of criteria would also create sovereign risk issues which would threaten business investment in Australia. Regulatory certainty is fundamental to Australia's appeal as an investment destination and this bill would place Australia's reputation at risk and may threaten the viability of other major investment projects.

2.58 Similarly, it is the view of the committee that the introduction of a suitable person test into the *Northern Australia Infrastructure Facility Act 2016* (NAIF Act) is unnecessary. The *Northern Australia Infrastructure Facility Investment Mandate Direction 2016* (Investment Mandate) already requires that financial assistance not be provided to projects which have not already received approval under all relevant regulatory frameworks. This includes environmental approvals assessed under the EPBC Act.

2.59 The Investment Mandate also requires that the NAIF Board be satisfied that the Commonwealth will be repaid, or that the investment can be refinanced. In assessing this, the NAIF Board must examine a proponent's corporate history (including that of its executives) in its due diligence processes. As such, the committee is of the view that the bill's proposed amendments relating to suitability will not provide additional assurances beyond those already associated with the NAIF Act.

Recommendation 1

2.60 The committee recommends that the Senate not pass the Environment and Infrastructure Legislation Amendment (Stop Adani) Bill 2017.

**Senator Jonathon Duniam
Chair**