

The Senate

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Environment and Communications  
Legislation Committee

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Environment and Infrastructure Legislation  
Amendment (Stop Adani) Bill 2017

September 2017

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## **Committee membership**

### ***Committee members***

Senator Jonathon Duniam, Chair (from 21 August 2017)	LP, Tasmania
Senator Janet Rice, Deputy Chair (from 4 September 2017)	AG, Victoria
Senator Anthony Chisholm	ALP, Queensland
Senator Linda Reynolds CSC	LP, Western Australia
Senator Anne Urquhart	ALP, Tasmania
Senator John Williams	NP, New South Wales

### ***Former member***

Senator Peter Whish-Wilson (to 4 September 2017)	AG, Tasmania
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### ***Former participating member***

Senator Larissa Waters (to 18 July 2017)	AG, Queensland
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# Table of contents

<b>Committee membership .....</b>	<b>iii</b>
<b>Abbreviations .....</b>	<b>vii</b>
<b>Chapter 1: Introduction .....</b>	<b>1</b>
Conduct of the inquiry .....	1
Reports of other committees.....	1
Scope and structure of the report.....	2
Background.....	2
Purpose of the bill.....	3
<b>Chapter 2: Key issues .....</b>	<b>5</b>
Evidence supporting the bill .....	5
Evidence opposing the bill .....	8
Committee view.....	15
<b>Labor Senators' Additional Comments .....</b>	<b>17</b>
<b>Australian Greens' Dissenting Report .....</b>	<b>19</b>
<b>Appendix 1: Submissions .....</b>	<b>18</b>



## **Abbreviations**

ACF	Australian Conservation Foundation
ACIC	Australian Criminal Intelligence Commission
ASIC	Australian Securities and Investment Commission
COAG	Council of Australian Governments
QRC	Queensland Resources Council
MCA	Minerals Council of Australia
NAIF	Northern Australia Infrastructure Facility





# Chapter 1

## Introduction

1.1 The Environment and Infrastructure Legislation Amendment (Stop Adani) Bill 2017 (the bill) was introduced by Senator Larissa Waters on 13 June 2017.<sup>1</sup>

1.2 On 22 June 2017, the Senate referred the bill to the Senate Environment and Communications Legislation Committee (the committee) for inquiry and report by 13 September 2017.

### Conduct of the inquiry

1.3 In accordance with its usual practice, the committee advertised the inquiry on its website and wrote to relevant individuals and organisations inviting submissions. The date for receipt of submissions was 14 July 2017.

1.4 The committee received 33 submissions, which are listed at Appendix 1. The committee also received a form letter from five individuals. The submissions and copy of the form letter are available at [www.aph.gov.au/senate\\_ec](http://www.aph.gov.au/senate_ec).

1.5 The committee also received 204 short statements which were accepted by the committee as correspondence. Many of these statements commented on general issues related to the Adani mining project and did not make specific reference to the provisions of the bill.

1.6 The committee thanks all of the individuals and organisations that contributed to the inquiry.

### Reports of other committees

1.7 When examining a bill or draft bill, the committee takes into account any relevant comments published by the Senate Standing Committee for the Scrutiny of Bills. The Scrutiny of Bills Committee assesses legislative proposals against a set of accountability standards that focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary propriety.

1.8 In its *Scrutiny Digest 7 of 2017*, the Scrutiny of Bills Committee stated that it had no comment on the bill.<sup>2</sup>

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1 *Journals of the Senate*, 2016–17, No. 42, 13 June 2017, p. 1386.

2 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2017*, p. 26.

## Scope and structure of the report

- 1.9 This report comprises two chapters as follows:
- Chapter 1—provides background information and the purpose of the bill;
  - Chapter 2—outlines the principal issues raised in submissions, and contains the committee view and recommendation.

## Background

### *Adani*

1.10 Adani Mining Pty Ltd, a wholly owned subsidiary of India's Adani Group, is the proponent for the Carmichael Coal Mine and Rail Project. This project includes a proposed open-cut and underground coal mine with an expected yield of 60 million tonnes per annum, and a 189 kilometre railway line. It is to be located in the Galilee Basin, 160 kilometres west of Clermont, Queensland. The railway is expected to connect the mine to Moranbah, where it will join the exiting Goonyella rail system, connecting to coal terminals at the point of Hay Point and Port of Abbot Point.<sup>3</sup>

1.11 Adani Mining Pty Ltd is also the proponent of the North Galilee Basin Rail Project, an approximately 310 kilometre rail line connecting the Galilee Basin to the Port of Abbot Point. This project would connect with rail infrastructure proposed as part of the Carmichael Coal Mine and Rail Project.<sup>4</sup>

1.12 Both projects have been approved as controlled actions under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).<sup>5</sup>

1.13 Adani Abbot Point Terminal Pty Ltd is the proponent for the Abbot Point Coal Terminal 0 Project which is also an approved controlled action under the EPBC Act. This project entails the construction of a new terminal located to the south of the existing Terminal 1 facility at Abbot Point.<sup>6</sup>

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3 For more information see: <https://www.statedevelopment.qld.gov.au/assessments-and-approvals/carmichael-coal-mine-and-rail-project.html>.

4 For more information see: <https://www.statedevelopment.qld.gov.au/assessments-and-approvals/north-galilee-basin-rail-project.html>.

5 Adani Mining Pty Ltd, *Submission 3*, p. 1.

6 Adani Mining Pty Ltd, *Submission 3*, p. 1. For more information on the project see: <https://gateway.icn.org.au/project/3611/abbot-point-coal-terminal-0-project>.

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## ***Northern Australia Infrastructure Facility***

1.14 The Northern Australia Infrastructure Facility (NAIF) is a key initiative of the Australian Government's policy framework as established by the *White Paper on Developing Northern Australia: Our North, Our Future*.<sup>7</sup>

1.15 The NAIF will be responsible for administering up to \$5 billion over five years in concessional finance to support significant infrastructure including airports, communications, energy, ports, rail and water. It is designed to complement private sector investment in major infrastructure projects.<sup>8</sup>

1.16 The NAIF is established as an independent statutory authority under the *Northern Australia Infrastructure Facility Act 2016* (NAIF Act) and the NAIF Board is responsible for making investment decisions, and considering the financial viability of proposals. The NAIF Act also provides for the *Northern Australia Infrastructure Facility Investment Mandate Direction 2016* (the Investment Mandate), a binding Ministerial Direction establishing how the NAIF is to perform its duties.<sup>9</sup>

### **Purpose of the bill**

1.17 The bill seeks to amend provisions of the EPBC Act regarding consideration of a person's history in relation to environmental matters for all future projects. In addition, it seeks to apply these amendments to three projects already approved under the EPBC Act.<sup>10</sup>

1.18 Specifically, the bill proposes to amend the EPBC Act to:

- require the mandatory consideration of a person's history in relation to environmental matters, both in Australia and overseas, when making statutory decisions related to approvals, and when varying or adding to any conditions attached to an approval;
- broaden the categories of persons or entities, whose history in relation to environmental matters the Minister must consider to include 'associated entities and, in some cases, the executive officers of such entities'.<sup>11</sup>

1.19 The bill would also require the Secretary of the Department of the Environment and Energy to review the approval decisions in relation to three specified referrals: Carmichael Coal Mine and Rail Project; Abbott Point Coal Terminal 0; and North Galilee Basin Rail Project. This review must consider the new broader considerations of the proponent's history in relation to environmental matters. As a

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7 Department of Industry, Innovation and Science, *Submission 15*, p. 2.

8 Department of Industry, Innovation and Science, *Submission 15*, p. 2.

9 Department of Industry, Innovation and Science, *Submission 15*, p. 2.

10 Explanatory Memorandum, p. 1.

11 Explanatory Memorandum, p. 2.

result of this review, the Minister would be required to consider whether the proponent is a suitable person to hold the approval.<sup>12</sup>

1.20 The Explanatory Memorandum describes the proposed amendments as strengthening the EPBC Act 'to make sure that environmental history, including overseas environmental history, must always be considered when approvals are given, varied, suspended, revoked or transferred'.<sup>13</sup>

1.21 The bill also proposes to amend the NAIF Act by inserting new subsections 11(2A) and 11 (2B) to introduce a 'suitable person test'. This test would require the NAIF to assess a project proponent's character prior to making an Investment Decision and to decide whether the proponent is a suitable person to receive finance from NAIF.<sup>14</sup>

1.22 The Explanatory Memorandum states that the test 'is intended to be broad given the wide range of possible projects which could benefit from funding under the NAIF and the broad public interest in ensuring that public money is not wasted'. The test would include a proponent's environmental history and prior commercial dealings. The bill also proposes (subsection 11(6)) to require the relevant Minister to veto a project proposal if the NAIF Board reaches the conclusion that the project proponent fails the suitable person test.<sup>15</sup>

1.23 Proposed subsection 11(2C) would require NAIF to undertake mandatory consultation with the Australian Securities and Investments Commission (ASIC) and the Australian Criminal Intelligence Commission (ACIC).<sup>16</sup>

1.24 The Explanatory Memorandum states that the introduction of a suitable person test into the NAIF ACT is intended to 'make sure that the Australian Government cannot hand out \$1 billion to Adani for their coal railway' through the NAIF.<sup>17</sup>

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12 Explanatory Memorandum, p. 2.

13 Explanatory Memorandum, p. 1.

14 Explanatory Memorandum, p. 3.

15 Explanatory Memorandum, p. 3.

16 Explanatory Memorandum, p. 1.

17 Explanatory Memorandum, p. 1.

# 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.<sup>1</sup>

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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.<sup>2</sup>

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.<sup>3</sup>

#### *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'.<sup>4</sup> 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.<sup>5</sup>

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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.

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### ***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.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

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'.<sup>9</sup>

### ***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.<sup>10</sup>

### ***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'<sup>11</sup>

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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.<sup>12</sup>

### **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.<sup>13</sup>

#### ***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'.<sup>14</sup>

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'.<sup>15</sup>

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'.<sup>16</sup>

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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.



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## *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'.<sup>17</sup>

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.<sup>18</sup> 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.<sup>19</sup>

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.<sup>20</sup>

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'.<sup>21</sup>

### *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

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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'.<sup>22</sup>

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.<sup>23</sup>

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.<sup>24</sup>

### ***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'<sup>25</sup> while Adani Mining Pty Ltd described this section as violating a number of legal principles including the fundamental principle of non-retrospectivity.<sup>26</sup>

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'.<sup>27</sup>

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

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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.

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of Parliament (at both the state and Commonwealth level).<sup>28</sup> 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.<sup>29</sup>

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'.<sup>30</sup>

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'.<sup>31</sup>

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.<sup>32</sup>

### *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

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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](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'.<sup>33</sup>

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.<sup>34</sup>

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'.<sup>35</sup> 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.<sup>36</sup>

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'.<sup>37</sup>

### *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

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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](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.<sup>38</sup>

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.<sup>39</sup>

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'.<sup>40</sup>

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.<sup>41</sup>

### ***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

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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.<sup>42</sup>

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.<sup>43</sup>

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.<sup>44</sup>

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.<sup>45</sup>

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.<sup>46</sup>

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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.<sup>47</sup>

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'.<sup>48</sup>

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.<sup>49</sup>

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.<sup>50</sup>

### **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.

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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**



## **Labor Senators' Additional Comments**

1.1 Labor Senators agree with the recommendation that the Senate not pass the Environment and Infrastructure Legislation Amendment (Stop Adani) Bill 2017.

1.2 Labor Senators further note that the bill proposes amendments to the Northern Australia Infrastructure Facility (NAIF) Act.

1.3 As the Auditor General is expected to soon issue a report on the NAIF, and the Senate Economics References Committee is currently considering the governance and operation of the NAIF, Labor Senators don't consider it prudent to recommend reforms to the NAIF until such a time as the Auditor General and the Senate Economics References Committee issue their reports.

1.4 Labor Senators also note that in the over 2 years since NAIF was announced, it is yet to allocate funds to a single project in Northern Australia.

**Senator Anne Urquhart**  
**Senator for Tasmania**

**Senator Anthony Chisholm**  
**Senator for Queensland**



# Australian Greens' Dissenting Report

1.1 The Australian Greens fundamentally disagree with the Committee's view and recommendation in its report on the Environment and Infrastructure Legislation Amendment (Stop Adani) Bill 2017.

## **Proposed Amendments to the EPBC Act**

1.2 The fact that the Adani Group's projects in Queensland have been granted approval under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), despite its appalling record of environmental breaches, demonstrates the clear need for this Bill.

1.3 The Government has granted approval for three projects—the Carmichael Coal Mine and Rail Project, the Abbot Point Coal Terminal 0, and the North Galilee Basin Rail Project—proposed by a company that has committed numerous serious legal breaches with adverse consequences for the environment and local people.

1.4 Environmental Justice Australia's submission outlines some of these breaches. For example, in 2013, an independent committee established by the Indian Ministry of Environment and Forest found 'incontrovertible evidence' that an Adani Group company operating a large coal-fired power plant and port in Mundra, India, had violated the conditions of its environmental approval and caused destruction of mangroves in a conservation area, obstructed creeks and the tidal system, failed to prevent salinity intrusion into ground water, and constructed an airstrip without approval.

1.5 Additionally, the Indian National Green Tribunal found Adani Enterprises Ltd (as well as several other non-Adani entities) liable for failing to clean up after the unseaworthy coal ship that Adani Enterprises Ltd had chartered sank off the coast of Mumbai in 2011. Adani Enterprises Ltd was fined the equivalent of AUD 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 is particularly relevant given the Adani Group plans to ship Carmichael coal out of Abbot Point Port and through the fragile Great Barrier Reef World Heritage area.

1.6 In another impropriety, in January 2016 the Indian National Green Tribunal cancelled the environmental approval of Adani Hazira Port Private Ltd because it was found liable for illegally undertaking work without an environmental approval, thus blocking the access of 80 fishing families from their traditional fishing zones.

1.7 There are not just concerns about Adani's operations in India. One of Adani Mining Pty Ltd's directors, Mr Jeyakumar Janakaraj, was Director of Operations of Konkola Cooper Mines (KCM), which in 2010 pled guilty to environmental offences

in Zambia and was fined. Adani Mining Pty Ltd did not provide this information to Australia's Environment Minister, even though it was specifically requested to do so. Reports and court documents indicated that KCM had a history of pollution.

1.8 Yet despite this disastrous environmental record, the Adani Group's projects received approval under the EPBC Act. This is a clear demonstration that the current provisions in the EPBC Act must be strengthened. The Act already recognises that the record of compliance with environmental laws is an important consideration in deciding whether to grant an approval, but clearly these provisions are not stringent enough. The Bill's proposal to amend the EPBC Act to ensure that this information *must* be considered, rather than *may* be considered, is critical. Likewise, the Bill puts beyond doubt that the matters relevant under the EPBC Act in relation to the company's environmental history extend to the environmental history of the company, its officers and associated entities, both in Australia and overseas.

1.9 There is no doubt that leaving a company's environmental destruction as a discretionary consideration is resulting in perverse and damaging outcomes. As the Australian Conservation Foundation noted in its submission: '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'.

### **Proposed Amendments to the NAIF Act**

1.10 The Bill's proposal to introduce a 'suitable person test' to the *Northern Australia Infrastructure Facility Act 2016* (NAIF Act), and undertake mandatory consultation with the Australian Securities and Investments Commission (ASIC) and the Australian Criminal Intelligence Commission (ACIC), is also manifestly necessary, given the Adani Group's history of corporate malfeasance.

1.11 For example, five Adani companies in India are under investigation by India's Directorate of Revenue Intelligence (DRI). The Directorate is investigating the use of 'black money' associated with inflating the quality, and hence the value, of coal imported from Indonesia.

1.12 Adani Transmission Ltd is also under investigation by the DRI 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.

1.13 Furthermore, Adani Enterprises Ltd stands accused of active involvement in large-scale illegal iron ore exports. In July 2011, the Ombudsman of the Indian state of Karnataka reported that Adani Enterprises Ltd 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. The Ombudsman 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 and 2010.

1.14 Given the Government's public support for the NAIF's consideration of a loan to the Adani Group's Carmichael rail project, evidenced by former Minister for Resources and Northern Australia, Senator the Hon Matt Canavan's press release on 8 December 2016 entitled 'It's time to consider Adani loan', Australian taxpayers deserve additional safeguards around how their money is spent.

### **Review of existing EPBC Act approvals**

1.15 The Committee raised concerns that this Bill violates the fundamental principle of non-retrospectivity, given that it would require the Secretary of the Department of the Environment and Energy to review the approval decisions in relation to three specified referrals. However, the Scrutiny of Bills Committee stated that it had no comment on the Bill. It is clear the Committee is just scratching around for anything to justify its opposition.

1.16 While the Greens acknowledge the long-established presumption that statutes do not operate retrospectively, since 1915 the High Court of Australia has held that the Commonwealth Parliament has power to enact legislation that operates retrospectively, and there are numerous examples of legislation that applies retrospectively.

1.17 In the case of the three decisions referred to in this Bill, retrospective application is critical to both safeguarding Australia's environment and maintaining public confidence in the process for environmental approvals.

### **Recommendation 1**

**1.18 The Australian Greens recommend that the Senate pass the Environment and Infrastructure Legislation Amendment (Stop Adani Bill) 2017.**

**Senator Richard Di Natale**  
**Senator for Victoria**  
**The Australian Greens**

**Senator Janet Rice**  
**Senator for Victoria**  
**The Australian Greens**

**Senator Peter Whish-Wilson**  
**Senator for Tasmania**  
**The Australian Greens**



# Appendix 1

## Submissions

### Submissions

1	Protect the Bush Alliance
2	Birds Queensland
3	Adani Mining Pty Ltd
4	Australian Conservation Foundation
5	Farmers for Climate Action
6	Environment Council of Central Queensland
7	Environmental Justice Australia
8	Lighter Footprints
8.1	Supplementary to Submission 8
9	BirdLife Southern Queensland
10	The Australia Institute
11	Queensland Conservation Council
12	Mackay Conservation Group
13	Queensland Resources Council
14	EDOs of Australia
15	Department of Industry, Innovation and Science
16	Department of the Environment and Energy
17	Minerals Council of Australia
18	Ms Meaghan Burkett
19	Mr Alan Roberts
20	Ms Nicola Chirlan
21	Ms Abby McCaffrey
22	Ms Maggie Mckeown
23	Mr Jonathan Peter
24	Ms Alison Mason
25	Ms Gaye Mallinson
26	Mr Erik Doerr
27	Ms Elizabeth Smith
28	Ms Deborah Mackenzie
29	Mr Harry Audus
30	Ms Helen Atkinson
31	Ms Sarah Thompson
32	Mr John Bartholomew
33	Wide Bay Burnett Environment Council

### Form letter

Form letter received from 5 individuals

