

13 July 2017

Committee Secretary
Senate Standing Committees on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

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

To the Committee,

The Australian Conservation Foundation (ACF) is Australia's peak environmental organisation. We represent a community of more than 400,000 people who are committed to achieving a healthy environment for all Australians. For more than 50 years ACF has been a strong advocate for Australia's forests, rivers, people and wildlife. We work with community leaders, social movements, Indigenous people, economists, businesses, governments and ordinary Australians. ACF is proudly independent, non-partisan and funded by donations from our community.

Summary of Recommendations

- ACF supports a strengthening of the suitable person test, through expanding its scope and inserting it as a mandatory consideration as proposed by this Bill.
- ACF supports a review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the EPBC Act) approvals relating to the Carmichael Coal Mine and Rail Project, Abbot Point Coal Terminal 0 and North Galilee Basin Rail Project.
- ACF maintains that a holistic redesign of the EPBC Act is required for the Act to better achieve its stated objective of protecting the environment.
- ACF supports the proposed amendments to the *Northern Australia Infrastructure Facility Act 2016* (the NAIF Act) regarding the insertion of a suitable person test. This will help to ensure the protection of northern Australia's unique environmental, social and economic values.
- However, ACF notes that broader reforms to the NAIF Act are necessary to ensure that sustainable development in northern Australia is achieved. ACF will make further submissions to the upcoming Senate Inquiry on the *Governance and Operations of the Northern Australia Infrastructure Facility* on these matters.

Amendments to the *Environment Protection and Biodiversity Conservation Act 1999*

Suitable Person Test

The proposed amendment would insert a third mandatory consideration for the Minister in deciding whether to approve the taking of an action. This is whether the person is a suitable person to be granted an approval (the suitable person test). It would add to the two considerations already set out in section 136, which are: “matters relevant to any matter protected by a provision of Part 3 that the Minister has decided is a controlling provision for the action” and “economic and social matters”.

As the EPBC Act is currently drafted, the suitable person test is a discretionary consideration. The proposed amendment would make the suitable person test mandatory. The amendment would also have the effect of broadening the scope of the existing suitable person test by including a requirement for the Minister to include in his considerations “any other matter the Minister considers to be relevant”. This catch-all language is common in other areas of Commonwealth decision-making legislation including, for example, the *Corporations Act 2001* and *Migration Act 1958*.

ACF supports the proposed amendments that would make the suitable person test mandatory and broaden its scope. Left as a discretionary consideration, the suitable person test may be applied to applicants at the whim of the Minister. ACF believes 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.

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. ACF fully endorses this Bill’s expansion of the suitable person test and its transformation to a mandatory, rather than discretionary consideration.

Specific Review of Adani Approvals

The proposed amendment would trigger a review of EPBC Act approvals for the Carmichael Coal Mine and Rail Project and associated infrastructure including the Abbot Point Coal Terminal 0 and North Galilee Basin Rail Project.

ACF supports this review considering the Adani Groups’ worrying lack of compliance with overseas environmental laws.

This evidence was exposed in *The Adani Brief*, a report prepared by EarthJustice and Environmental Justice Australia that investigated the legal compliance record of Adani Group companies and executives.¹ The report revealed several concerning issues including that:

- Adani Group entities in India are under investigation for corruption and illegal dealings;
- Adani Group entities have a concerning record of failing to comply with Indian environmental laws;
- Adani Mining Pty Ltd failed to disclose the concerning environmental record of a company formerly managed by one of its executive officers to the Australian government.

In his statement of reasons, the Minister considered a narrower set of issues relating to Adani's suitability as an operator.² In particular, the Minister failed to adequately address the conduct of Jeyakumar Janakaraj, Adani's Australian CEO, while he was Director of Operations and CEO at Konkola Copper Mines (KCM). During Mr Janakaraj's tenure at KCM, the Government of Zambia brought a successful prosecution against the company for environmental harm.³ Adani provided this information to the Department of the Environment *after* the Minister had approved the Carmichael mine and following an ABC investigation. In response, the Department stated that this "was likely due to a mistake".⁴

ACF is unimpressed with the half-hearted efforts by Adani and the Department to ensure compliance with the EPBC Act. Until the matters outlined above are considered in their entirety by the Minister, the current approvals for the Carmichael mine, rail and port infrastructure do not fully reflect strong concerns about the operator.

¹ Environmental Justice Australia (15 February 2017)

https://envirojustice.org.au/sites/default/files/files/Submissions%20and%20reports/The_Adani_Brief_by_Environmental_Justice_Australia.pdf.

² Minister for the Environment (14 October 2015)

<http://epbcnotices.environment.gov.au/entity/annotation/45c02035-e672-e511-b93f-005056ba00a7/a71d58ad-4cba-48b6-8dab-f3091fc31cd5?t=1499835575469> see paras 153-162.

³ Environmental Justice Australia (2015)

https://envirojustice.org.au/sites/default/files/files/Submissions%20and%20reports/Report_Earthjustice%20and%20Environmental%20Justice%20Australia_The%20Adani%20Groups%20Global%20Environmental%20Record_29%20Oct%202015.pdf.

⁴ Mark Willacy (ABC News) (2016) <http://www.abc.net.au/news/2016-01-21/adanis-non-disclosure-of-ceos-pollution-history-a-mistake/7102270>.

Holistic Changes to the EPBC Act

The EPBC Act is Australia's principal federal environmental law. Yet after almost two decades of operation, the EPBC Act is failing to effectively protect Australia's natural environment. Numerous indicators show that Australia's biodiversity is under increased threat and has continued to decline.⁵ Meanwhile, climate change, land-use change, habitat fragmentation and degradation, and invasive species continue to erode Australia's unique ecology. A business-as-usual approach to environmental management will cause profoundly negative consequences.

The EPBC Act affords decision-makers a wide breadth of discretion when considering environmentally damaging impacts. There are few environmental protection standards set by the legislation itself. Most of its features are procedural, as reflected in the EPBC Act standards document.⁶ Most environmental protection provided by the legislation is delivered through other documents, such as policies, management plans, recovery plans and conservation advices. Project proponents are delegated a substantial degree of responsibility to ensure environmental protection.

ACF stands by its position that for the EPBC Act to achieve environmental protection and conservation, comprehensive changes to the design of the Act must take place. In the absence of such changes, any amendments to the Act can only ensure piecemeal improvements.

Amendments to the Northern Australia Infrastructure Facility Act 2016

The Northern Australia Infrastructure Facility (NAIF) presents the Federal Government with a valuable opportunity to support environmentally sustainable economic development in northern Australia.

ACF supports the idea of an infrastructure investment fund, such as the NAIF, so long as it ensures outcomes that are environmentally sustainable, economically resilient, fair and equitable, and operates in a transparent and accountable manner.

⁵ State of Environment Report (2016) <https://soe.environment.gov.au/download/reports>.

⁶ Standards for Accreditation of Environmental Approvals under the Environment Protection and Biodiversity Conservation Act 1999 (2014) http://www.environment.gov.au/system/files/resources/40e7000f-4d52-47fe-9a61-ff2b321aec3b/files/standards-accreditation-2014_0.pdf.

The NAIF is currently the subject of a Senate Inquiry into the *Governance and Operations of the Northern Australia Infrastructure Facility*. The focus of this Inquiry is the architecture of the NAIF Act and Investment Mandate, as well as projects under the Facility's consideration.

So far as it impacts the NAIF, the Stop Adani Bill pursues a narrower issue. Its singular focus is the insertion of a suitable person test within the NAIF Act.

Accordingly, this submission deals only with the merits of the suitable person test, leaving comments about the general design, governance and operations of the NAIF for a later submission to the relevant Senate Inquiry.

We note that ACF has previously also made submissions to the *Inquiry on Developing Northern Australia*, *Inquiry into Opportunities and Methods for Stimulating the Tourism Industry in Northern Australia* and *Consultation Paper on the Goal, Design and Criteria of the Northern Australia Infrastructure Facility (NAIF)*.

Suitable Person Test

Stretching over 2,500 kilometres from the Kimberley in the west, through Kakadu and Arnhem Land in the Northern Territory, to the Gulf country and Cape York Peninsula in the east, and including vast fringing reef marine parks of Ningaloo and the Great Barrier Reef, northern Australia is home to the largest, most ecologically intact ecosystems left on earth. It is world renowned for its natural and cultural values, recognised in both National and World Heritage proclamations. These natural environments support thousands of jobs and livelihoods in tourism, the arts, and land and sea management.

Rigorous regulatory oversight is fundamental to the protection of northern Australia's unique environment and culture.

The proposed suitable person test would insert into the NAIF Act a mandatory requirement that the Facility assess whether an applicant for financial assistance is a suitable person to benefit from the financial assistance. This assessment must take account of a broad range of matters. The matters covered by the assessment would provide the Facility with evidence of whether the applicant can be trusted to operate in parts of Australia with such rich, but sensitive, ecological values. Where the Facility makes a finding that the applicant is not a suitable person, the Minister would be compelled to reject the application for financial assistance.



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. ACF supports the proposed suitable person test and notes that an assessment of an applicant's compliance history should be a necessary precondition of financial assistance from NAIF.

Conclusion

ACF maintains that the EPBC and NAIF Acts require fundamental overhauls if they are to create beneficial outcomes for Australia's people and environment. Although the focus of this Bill is a narrow set of issues, ACF believes that it is a small step towards strengthening federal environmental law.

ACF supports embedding the suitable person test as a mandatory consideration in the EPBC Act, as well as broadening its scope. ACF also supports the inclusion of a suitable person test in the NAIF Act, as an additional layer of oversight. ACF believes that reviewing Adani's environmental approvals is necessary to ensure the protection of the environment.

For more information:

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