

31 January 2018

Sean Ryan  
Principal Solicitor  
Environmental Defenders Office (Qld) Inc  
8/205 Montague Road  
West End Qld 4101

Dear Sean,

**Re: Advice to ACF on whether a future federal ALP Government could stop  
the Carmichael Coal Mine under the EPBC Act**

**Introduction**

1. I have been asked to provide advice to the Australian Conservation Foundation (**ACF**) on whether a future federal Australian Labor Party (**ALP**) Government could stop the Carmichael Coal Mine under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**).
2. The short answer is, yes, a future ALP Government could stop the Carmichael Coal Mine under s 145(1)(b) of the EPBC Act on the basis of new information meeting the conditions specified in s 145(2) of the Act.
3. Importantly, the Minister has a broad discretion on whether the conditions specified in s 145(2) of the Act are met and a decision to revoke approval of the mine under s 145(1)(b) can only be challenged through judicial review, which is a very narrow process that does not allow the merits of the decision to be challenged. This means that, provided the requirements of administrative law are complied with (for instance by providing the proponent with natural justice), a decision to revoke the approval for the mine cannot be overturned by a legal challenge.
4. My conclusions in this regard are consistent with the advice the EDO gave to ACF on 15 December 2017, a copy of which I have been provided with. I agree with the EDO's advice on this matter, including the conclusion that a revocation of approval for the mine under s 145 of the EPBC Act would not be an acquisition of property that would require compensation under the *Commonwealth Constitution*.

## Background

5. The Carmichael Coal Mine (**the mine**) was proposed in Queensland's Galilee Basin in 2010 by Adani Mining Pty Ltd, a subsidiary of the Adani Group from India operating as Adani Australia for its Australian projects (**Adani**).
6. The mine has received all necessary Queensland Government approvals and was, relevantly, approved under the EPBC Act on 14 October 2015.
7. Due to its enormous scale, its impacts on the local and regional environment, and the consequences for climate change if it proceeds, the mine has been strongly opposed by ACF and other conservation groups and the campaign against it is the biggest environmental campaign seen in Australia since the Franklin campaign in the 1980s. A Labor figure was reported to have summarised the political context in May 2017 as:<sup>1</sup>

It is talismanic. It's the litmus test. Adani has become shorthand for "are you serious about climate change?"

8. In addition to the enormous political campaign against the mine, it has faced multiple court cases regarding the mine's impacts on matters such as:
  - (a) climate change and the contribution of the mine to climate change impacts to the Great Barrier Reef;
  - (b) threatened species such as the Black-throated Finch; and
  - (c) groundwater and groundwater-dependent ecosystems, particularly the Doongmabulla Springs Complex.<sup>2</sup>
9. The mine remains controversial and there is substantial new information that has emerged and is continuing to emerge regarding the threats to, and impacts of the mine on, the matters protected under the EPBC Act. For instance, research published following the 2016 mass coral bleaching event on the Great Barrier Reef concluded:<sup>3</sup>

"[There is] no support for the hypothesis that good water quality confers resistance to [coral] bleaching [and] Securing a future for coral reefs, including intensively managed ones such as the Great Barrier Reef, ultimately requires urgent and rapid action to reduce global warming."

10. Most recently, the ALP Leader, Bill Shorten, stated that an incoming Labor government might attempt to stop the mine and was considering the issue "closely".<sup>4</sup> He is reported to have stated:<sup>5</sup>

"If it doesn't stack up economically and environmentally, it won't get our support,"

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<sup>1</sup> Reported in Katherine Murphy, "Federal Labor feels the heat over Adani, and Coalition is sweating too", *The Guardian*, 27 May 2017, <https://www.theguardian.com/environment/2017/may/27/federal-labor-feels-the-heat-over-adani-and-coalition-is-sweating-too>

<sup>2</sup> See my website, Environmental Law Australia, at <http://envlaw.com.au/carmichael-coal-mine-case/> and <http://envlaw.com.au/carmichael-coal-mine-federal-court/> for details.

<sup>3</sup> Terry Hughes et al, "Global warming and recurrent mass bleaching of corals" (2017) *Nature* 543: 373–377.

<sup>4</sup> Katherine Murphy, "Shorten tests weather on Adani but can he be Batman's climate crusader", *The Guardian*, 30 January 2018, <https://www.theguardian.com/australia-news/2018/jan/30/shorten-tests-weather-on-adani-but-can-he-be-batmans-climate-crusader>

<sup>5</sup> *Ibid.*

11. This is the factual context in which I am asked to provide advice on whether a future ALP Government could stop the mine by revoking its approval under the EPBC Act.

### **Statutory context**

12. Section 145 of the EPBC Act provides a number of grounds on which an approval under the Act can be revoked.

13. In the context where the mine has not yet commenced and there may not be a contravention of the conditions of the approval by the time a new ALP Government is elected, the most relevant and straight-forward basis upon which the approval can be revoked is under s 145(1)(b). Section 145(1) and (2) provides:

#### **145 Revocation of approval**

- (1) The Minister may, by written instrument, revoke an approval under this Part for the purposes of a specified provision of Part 3 if:
  - (a) a significant impact on the matter protected by the provision has occurred because of the contravention of a condition attached to the approval; or
  - (b) the conditions specified in subsection (2) are satisfied.
- (2) The conditions are that:
  - (a) the action has had, or the Minister believes that the action will have, a significant impact that was not identified in assessing the action on a matter protected by a provision of Part 3 for which the approval has effect; and
  - (b) the approval would not have been granted if information that the Minister has about that impact had been available when the decision to approve the action was made.

14. A decision under s 145(1)(b) of the EPBC Act can only be challenged through judicial review, which is a very limited process that does not allow the merits of the decision to be challenged.<sup>6</sup>

15. There is no relevant case law on a revocation under these provisions but, more widely, the general case law on the EPBC Act and Commonwealth administrative law establish that a decision by a Minister to revoke Adani's approval for the mine under s 145(1)(b) would be virtually impossible to overturn provided the narrow requirements of administrative law were complied with, for instance by providing natural justice to Adani.

16. Ample illustration of the very limited nature of judicial review is provided by the Federal Court's decisions to dismiss ACF's challenge to the approval of the mine under the EPBC Act.<sup>7</sup>

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<sup>6</sup> For a general discussion of this in the context of the EPBC Act, see Chris McGrath, "Myth drives Australian Government attack on standing and environmental "lawfare" (2016) 33(1) *Environmental and Planning Law Journal* 3-20.

<sup>7</sup> *Australian Conservation Foundation Inc v Minister for the Environment* [2016] FCA 1042 (Griffiths J), upheld on appeal in *Australian Conservation Foundation Incorporated v Minister for the Environment and Energy* [2017] FCAFC 134 (Dowsett, McKerracher and Robertson JJ).

### **Avenues to lawfully stop the mine**

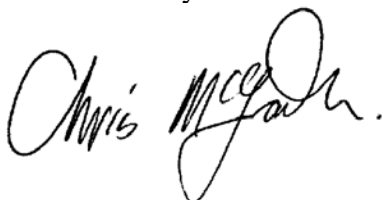
17. A new Minister administering the EPBC Act appointed by an incoming ALP Government, therefore, would have a broad discretion to revoke approval of the mine under s 145(1)(b) on the basis that the conditions stated in s 145(2) were satisfied.
18. Should a new Minister seek to revoke approval of the mine, my recommendations would be to:
- (a) Initiate a review of information about key impacts of the mine including on matters such as:
    - (i) climate change and its effects on the Great Barrier Reef;<sup>8</sup>
    - (ii) threatened species such as the Black-throated Finch; and
    - (iii) groundwater and groundwater-dependent ecosystems, particularly the Doongmabulla Springs Complex.
  - (b) Once the review is complete, provide it and any other relevant information that the Minister may rely upon to Adani and allow Adani a reasonable opportunity to respond to the information and why approval for the mine should not be revoked under s 145(1)(b) of the Act.
  - (c) Once Adani has been given a reasonable opportunity to respond to all of the information upon which the Minister relies and complying with any other administrative law requirements, exercise the discretion under s 145(1)(b) to revoke the mine's approval.
19. In the unlikely event that Adani attempted to proceed with the mine after revocation there is no doubt that the Minister could obtain an injunction under s 475 of the EPBC Act to prevent the mine proceeding without approval.

### **Conclusion**

20. A future ALP Government could stop the Carmichael Coal Mine under s 145(1)(b) of the EPBC Act on the basis of new information meeting the conditions specified in s 145(2) of the Act.
21. The Minister has a broad discretion on whether the conditions specified in s 145(2) of the Act are met and a decision to revoke approval of the mine under s 145(1)(b) can only be challenged through judicial review, which is a very narrow process.

Please contact me if you have any further questions regarding this matter.

Yours faithfully



Dr Chris McGrath

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<sup>8</sup> Professor Terry Hughes would be an appropriate expert to conduct this part of the review.



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our environment.*

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15 December 2017

Basha Stasak  
Healthy Ecosystems Campaigner  
Australian Conservation Foundation Inc

*Sent via email: [B.Stasak@acfonline.org.au](mailto:B.Stasak@acfonline.org.au)*

Dear Basha

### **Revocation of EPBC Approval No 2010/5736 – Carmichael Coal Mine and Rail Infrastructure Project, Queensland**

Thank you for your request for advice on:

1. whether the approval under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**the EPBC Act**) of the Carmichael Coal Mine and Rail Infrastructure Project (**Carmichael Project**), EPBC No 2010/5736 (**EPBC Approval**) issued to Adani Mining Pty Ltd (**Adani**) can be revoked under [s 145 of the EPBC Act](#); and
2. If so, whether this would:
  - a. create ‘sovereign risk’; or
  - b. otherwise entitle Adani to compensation.

### **SUMMARY**

The Commonwealth Environment Minister (**the Minister**) currently has discretion to revoke the EPBC Approval on at least two grounds:

1. new information of the consecutive bleaching of the Great Barrier Reef, indicating increased sensitivity to greenhouse gas emissions; and
2. new information of the insufficiency of offsets for the endangered Black-throated Finch, indicating a threat to the continued survival of the species from the Carmichael Project.

In relation to ground (1) above it would be within the Minister’s discretion to form the view that approval of the Carmichael Project would be inconsistent with Australia’s obligations under the World Heritage Convention to protect the outstanding universal values of the Great Barrier Reef World Heritage Area. If the Minister forms that view, they would have been bound to refuse the application and would have a strong basis for revocation, and refusal of any subsequent request for reinstatement, or fresh application for approval.

The Minister may have a further grounds for refusal based on new information of impacts to the Doongmabulla Springs Threatened Ecological Community if ongoing investigations identify the coal seam as the source aquifer for the springs.

A revocation under s145 of the EPBC Act would not:

1. create a 'sovereign risk' as it is an application of existing law and policy to new factual circumstances; or
2. attract a right of compensation under the Constitution as it is not an acquisition of property.

The basis of this opinion is set out in more detail below.

## ADVICE

[Section 145 of the EPBC Act](#) states as follows:

“(1) The Minister may, by written instrument, revoke an approval under this Part for the purposes of a specified provision of Part 3 if:

(a) a significant impact on the matter protected by the provision has occurred because of the contravention of a condition attached to the approval; or

(b) the conditions specified in [subsection](#) (2) are satisfied.

(2) The conditions are that:

(a) the action has had, or **the Minister believes that the action will have, a significant impact that was not identified in assessing the action on a matter protected by a provision of Part 3 for which the approval has effect;** and

(b) **the approval would not have been granted if information that the Minister has about that impact had been available when the decision to approve the action was made.**” (our emphasis)

The matters protected by Part 3 are the matters of national environmental significance (MNES). The MNES for which the EPBC Approval has effect relevantly include:

1. World heritage properties; and
2. Listed threatened species and communities.

We will consider whether the elements of s145(2) are satisfied in respect of one World heritage property, one listed threatened species and one threatened community.

### **World heritage property – Great Barrier Reef World Heritage Area (GBRWHA)**

*Whether impact on the GBRWHA was identified in assessment*

In deciding the EPBC Approval on 14 October 2015 the Minister made the following findings:

- a) the harmful effects of climate change (increased ocean temperature and acidification) are the most serious threat to the Great Barrier Reef;<sup>1</sup>
- b) these effects will get worse, and their extent and persistence depends on how effectively the issue of rising levels of greenhouse gases is addressed worldwide (that is, the Minister accepted the effects were caused by greenhouse gas emissions);<sup>2</sup> and
- c) it was possible to determine a possible total quantity of greenhouse gas emissions from transport and combustion of the coal from the mine, being 4.64 billion tonnes of

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<sup>1</sup> Statement of Reasons, para 131.

<sup>2</sup> Statement of Reasons, para 131.

carbon-dioxide-equivalent greenhouse gas emissions (CO<sub>2</sub>-e) over the life of the mine.<sup>3</sup>

On these findings it was open to the Minister to find that the Carmichael project significantly contributed to climate change, and therefore the impacts on the Great Barrier Reef.<sup>4</sup>

Instead the Minister found that it was “difficult to identify the necessary relationship between the taking of the action and any possible impacts on relevant matters of national environmental significance which might occur as a result of an increase in global temperature”.<sup>5</sup>

The Federal Court<sup>6</sup> has upheld that it was within the Minister’s discretion to determine that he could not be satisfied of any relevant impact under the EPBC Act from contribution to climate change due to a range of variables including: whether the coal replaces coal currently provided by other suppliers, whether the coal is used as a substitute for other energy sources, and the efficiency of the coal burning power plants.<sup>7</sup>

Consequently the Minister did not identify an impact of the Carmichael Project on the GBRWHA from its contribution to climate change.

*Whether new information of a significant impact on GBRWHA now available*

Since the EPBC Approval decision was made there has been significant new information of the impacts of climate change on the Great Barrier Reef including the consecutive bleaching of the GBRWHA in 2016 and 2017 which have been attributed to human induced climate change.<sup>8</sup>

There has also been significant new information of the plateauing in global coal demand<sup>9</sup> and reports that the Carmichael Project would reduce global coal prices, which would entitle a Minister to form the view that it is now clear that the increase in supply would reduce prices and increase coal consumption sufficient to significantly contribute to increased emissions.

Accordingly there is a reasonable basis for the Minister to now form the belief that there is a significant impact on the GBRWHA that was not identified in the assessment.

*Whether the approval would not have been granted if the impact was known*

Considering the vulnerability of the GBRWHA to climate change and the very large quantity of greenhouse gas emissions that could result from the Carmichael Project,<sup>10</sup> it would not be unreasonable for the Minister to now conclude that the approval would not have been granted if it had been known that those emissions would cause a significant increase in global emissions, due to market conditions now known, and impact the GBRWHA recovering from consecutive bleaching events.

Further, s137(a) of the EPBC Act requires the Minister, in making the decision, to not act inconsistently with Australia’s obligations under the World Heritage Convention (WHC).

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<sup>3</sup> Statement of Reasons, paras 136, 138 and 140.

<sup>4</sup> Particularly having regard to the Ministers obligation to consider the precautionary principal under EPBC Act, ss 3A(b), 136(2)(a), and 391(1) and (3), item 2.

<sup>5</sup> Statement of Reasons, para 140.

<sup>6</sup> *Australian Conservation Foundation Incorporated v Minister for the Environment* [2016] FCA 1042.

<sup>7</sup> Statement of Reasons, para 138.

<sup>8</sup> See Attachment 1 for more detail.

<sup>9</sup> International Energy Agency, World Energy Outlook 2017.

<sup>10</sup> As acknowledged by the Minister in the Statement of Reasons.

The WHC includes recognition of the duty to protect world heritage properties and commits Australia “to do all it can to this end, to the utmost of its own resources”.<sup>11</sup>

It would be open therefore to the Minister to form the view that approval of the Carmichael Project, in light of the new information on its impacts on climate change and of the vulnerability of the GBRWHA, would be inconsistent with Australia’s obligations under the WHC, such that the Minister would have been bound to refuse the application had this information been known.

### *Conclusion on GBRWHA*

The impacts of climate change on the GBRWHA were not identified in the assessment of the Carmichael Project. New information on the impacts of climate change on the GBRWHA and the likely increase in emissions resulting from the project, are sufficient for the Minister to now form the view that the approval would not have been issued if these impacts had been known.

Accordingly the Minister now has jurisdiction to revoke the EPBC Approval under section 145 of the EPBC Act.

We note that Minister Frydenberg has already been written too seeking revocation on this basis and we **attach** that letter, with which we agree (**Attachment 1**).

### **Listed threatened species – Black-throated Finch**

The Black-throated finch (southern subspecies) (*Poephilla cincta* subsp. *cincta*) (**BTF**) is listed as endangered under the EPBC Act<sup>12</sup> and was one of the listed threatened species assessed in the EPBC Approval.

The impact on the BTF was considered in the assessment process,<sup>13</sup> however significant reliance was placed on the sufficiency of conditioned ‘offsets’ to determine that the Carmichael Project would not have an unacceptable impact on the BTF.

Since the EPBC Approval decision the BTF Recovery Team, which has a statutory role in protecting the endangered BTF, obtained the offsets proposed under the conditions of approval. Their assessment was that the proposed stage 1 offsets for the Carmichael project will result in net loss of BTF habitat. This loss will likely cause a decline in the BTF species, a significant impact that is a much larger impact than that originally identified in the application and assessment material.

The attached letter to Minister Frydenberg dated 19 July 2017 (**Attachment 2**) sets out in detail the Recovery Team’s expert reasoning on why the information presented in the proponent’s Biodiversity Offset Strategy (**BOS**) and BTF Species Management Plan (**BTF SMP**) establishes that the avoidance, mitigation and offsets for the BTF will fail to prevent unacceptable impacts on the species if the project proceeds.

The project was assessed on the basis of the material at the time, and as per the statement of reasons for the approval decision, was decided that it “would not have any unacceptable impacts on listed threatened species in view of all avoidance, mitigation and compensation (offset measures to be adopted)”. Having the benefit of viewing and assessing the relevant

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<sup>11</sup> Articles 4 and 5(d).

<sup>12</sup> EPBC Act, ss18 and 18A.

<sup>13</sup> Statement of Reasons 73 to 84.



avoidance, mitigation and offset measures to be adopted as presented in the final approved version of the BOS, the BTF Recovery Team's expert opinion is that:

- there is no evidence that the critical BTF habitat can be offset;
- there will be a net loss of BTF habitat – a threatened ecological community because no new habitat will be created; and
- offset areas are inadequate, due to incorrect use of the offset calculator and over-stated justifications.

On page 3 of its letter the BTF Recovery Team's finding that there are manifest errors in the use of the offset calculators. The BTF Recovery Team has used a transparent, evidence-based and expert-advised recalculation, which resulted in 48,363 hectares needed for the offset, more than double the area proposed by the proponent. This is a different, significant impact given it is much larger and not identified in assessing the action.

Further, the BTF Recovery Team highlights the significance of a failure to include the impact of habitat fragmentation on the BTF in the offset calculators. Importantly, the BTF Recovery Team also states that "BTF habitat has never been successfully created and there is no evidence that this is possible." This conclusion necessarily raises the issue that the BOS fails to meet the requirement of condition 11 of the approval to include "a description of the potential risks to the successful implementation of the BOS, and *details of the contingency measures that will be implemented to mitigate these risks.*" In failing to provide evidence that habitat can be successfully created, the proponent has failed to detail a contingency measure that will mitigate the risk.

We understand that the BTF Recovery Team was not consulted by the proponent in the development of offsets for impacts on BTF from the Carmichael Project. Consequently, both the BOS, and the BTF Recovery Team's assessment of the proposed offsets in the BOS, has not been provided to the Minister by the proponent. It is new information of a significant impact on BTF that was not assessed when the Minister decided to approve the action.

The complete loss of the best habitat in Australia for the BTF as a result of the construction of the Carmichael Project is a reasonable basis for the Minister to now conclude it is an unacceptable impact. Had the information above and expert advice been available at the time of decision it would have been a reasonable basis for the Minister to not grant the approval.

Consequently it is presently within the discretion of the Minister to form the view that if the new information from BTF Recovery Team, regarding the insufficiency of proposed offsets, had been known at the time the approval was decided, the Minister would not have granted approval.

Accordingly if the Minister forms that view, they would now have the discretion to revoke the EPBC Approval under s145(2).

### **Listed Threatened Ecological Community (TEC) - Doongmabulla Springs**

The Doongmabulla Springs complex<sup>14</sup> is listed as Great Artesian Basin TEC under the EPBC Act and is comprised of:

- (a) Joshua Spring;
- (b) the Moses springs group of about 60 springs; and

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<sup>14</sup> EPBC Act ss [18\(5\)-\(6\)](#), s [146K](#).

(c) Little Moses Spring.

The EIS for the Carmichael Project recognised that it had the potential to impact on the Doongmabulla Springs Complex TEC through drawdown of related aquifers.<sup>15</sup> However the EIS states that the drawdown will not lead to any of the mound springs drying up.<sup>16</sup> The source of the water for the springs was unknown when the project was assessed under the EPBC Act and it is still unknown.<sup>17</sup>

If the springs are fed from faults, or cracks, in the Rewan Formation which allow water from the coal beds to reach the springs, mining will likely cause the loss of the springs.<sup>18</sup> The ecology experts in the Land Court agreed that if the source of the springs is below the Rewan Formation and flows are lost, the impact would be very unlikely or infeasible to offset.<sup>19</sup>

In the event that further evidence shows that the coal beds feed the springs, the expert evidence that a loss of flow is likely to cause irreversible impacts or a complete loss of ecological values of the springs is a reasonable basis on which to form an opinion that an unacceptable impact on the springs is likely to occur unless the EPBC approval is revoked.

The following further evidence is suggested to support this ground for revocation:<sup>20</sup>

1. Seismic testing to identify the source aquifer;
2. Hydraulic properties of relevant groundwater units;
3. Robust conceptual model;
4. Expert hydrogeological report on the results of seismic surveys, hydraulic properties and model.

If the evidence above demonstrates an irreversible significant impact on the Doongmabulla Springs Complex TEC, this would be a much larger impact than that originally identified in the application and assessment material.

This new evidence, would be a strong basis for the Minister to conclude that the mine will have a significant impact that was not identified in the original assessment and approval decision, such that the approval would not have been granted if the information about these impacts had been available at the time. Such a conclusion would satisfy the criteria for revoking an approval under [section 145\(2\) EPBC Act](#).

### **‘Sovereign risk’**

‘Sovereign risk’ is not defined in commonwealth legislation,<sup>21</sup> nor could we find a definition in relevant case law. It is not defined in the Macquarie English Dictionary.

In our view ‘sovereign risk’ is not a legal term or a well-defined concept.

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<sup>15</sup> EIS (203), Vol 4, Appendix H- Matters of National Environmental Significance, Pages ix and 71.

<sup>16</sup> SEIS, Vol 4, Appendix K1 – Mine Hydrogeology Report (GHD 2013) soft page 145-6.

<sup>17</sup> Mathew Currel et al, ‘Problems with the application of hydrogeological science to regulation of Australian mining projects: Carmichael mine and Doongmabulla Springs (2017) 548 *Journal of Hydrology* 674.

<sup>18</sup> *Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors* [2015] QLC 48, [267].

<sup>19</sup> Expert Report on Springs Ecology by Roderick Fensham [30]; *Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors* [2015] QLC 48, [295] – [296].

<sup>20</sup> Mathew Currel et al, ‘Problems with the application of hydrogeological science to regulation of Australian mining projects: Carmichael mine and Doongmabulla Springs (2017) 548 *Journal of Hydrology* 674, 681.

<sup>21</sup> Although it is occasionally raised in explanatory memorandum, see for example [Explanatory Memorandum to the Offshore Petroleum Amendment \(Greenhouse Gas Storage\) Bill 2008](#).

In its narrow, historical definition ‘sovereign risk’ “was the risk of less developed country governments defaulting on their foreign currency debt to banks or developed country governments. It could also be taken to include the risk of expropriation and nationalisation of private assets”.<sup>22</sup>

In its broadest usage ‘sovereign risk’ is the risk of the State using its power to alter the established rights of private sector companies.<sup>23</sup>

It is commonly raised by industry in relation to proposed legislation that alters existing rights of private companies. For example, in consultation for the Environment and Infrastructure Legislation Amendment (Stop Adani) Bill 2017, Adani Mining Pty Ltd, the Minerals Council of Australia and the Queensland Resources Council (QRC) expressed concerns of liability and sovereign risk in relation to any review and retrospective amendment of the EPBC Approval,<sup>24</sup> which was also a concern of the Senate committee.<sup>25</sup> For example, the QRC 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>26</sup>.

The fundamental legislative presumption against retrospectivity was rightly considered in drafting this Bill, which proposed to alter the conditions of the EPBC Approval granted prior to the proposed legislation taking effect. However it is necessary to emphasise that the presumption against retrospectivity can be displaced by Parliament in legislation by express provision, which is reasonably common in Commonwealth legislation.<sup>27</sup>

Indeed in our view ‘sovereign risk’ appears to be not a super-added legal impediment to promulgating legislation, but rather an economic argument that the valid exercise of sovereign power will discourage investment if erodes existing rights, by increasing uncertainty for investors.<sup>28</sup>

In our view ‘sovereign risk’, even in its broadest conception does not arise in respect of the exercise of executive power under existing policy and legislation. Such actions cannot increase the risk as the risk of falling afoul of already promulgated legislation would be well known to the well-informed investor.

The power in s 145 of the EPBC Act to revoke an approval is clear and unambiguous, and is essential for the Minister to protect the environment from significant impacts not assessed prior to an approval being granted.

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<sup>22</sup> <http://theconversation.com/what-is-and-isnt-a-sovereign-risk-30612>

<sup>23</sup> Vigar. C, Parrots, politics and policy: governmental risk in energy and resources projects, 2006, MinterEllison Lawyers, <http://www.minterellison.com/public/connect/Internet/Home/Legal+Insights/>

<sup>24</sup> Environment and Communications Legislation Committee, Commonwealth of Australia, *Environment and Infrastructure Legislation Amendment (Stop Adani) Bill 2017* (2017) 2.32 – 2.40

<sup>25</sup> *Ibid* at 2.57

<sup>26</sup> Environment and Communications Legislation Committee, Commonwealth of Australia, *Environment and Infrastructure Legislation Amendment (Stop Adani) Bill 2017* (2017) at 2.34

<sup>27</sup> Australian Law Reform Commission, Commonwealth of Australia, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws – Summary Report* (2015) at 54

<sup>28</sup> We note that we have not considered Investor-State Dispute Settlement clauses under international trade agreements that Australia has signed but observe the indications from DFAT that ISDS “does not prevent the Government from regulating, including in the interests of the environment”

<http://dfat.gov.au/trade/topics/pages/isds.aspx>

The EPBC Act provisions implement, and are necessary to protect, Australia's international obligations in relation to environmental protection, and are therefore supported by the Commonwealth's external affairs power.<sup>29</sup> For example, the EPBC Act provisions are necessary to protect the Great Barrier Reef Marine Park in a manner consistent with the Convention for the Protection of the World Cultural and Natural Heritage 1975. Further, the Black-Throated Finch is protected under the Convention on International Trade in Endangered Fauna and Flora, and protection of the Doongmabulla Springs Complex TEC is necessary to protect Indigenous cultural rights under the International Covenant on Economic Social and Cultural Rights.

Accordingly s145 is well within the power of the Commonwealth to act for valid public purposes based on new information.

Industry would have been well aware of the risk that new information of impacts, particularly in regard to the evolving science of climate change, could enliven revocation under this existing legislation.

The operation of s145 therefore does not validly raise issues of sovereign risk.

### **Compensation under the Constitution**

The legislative powers of the Commonwealth in the Constitution include its ability to acquire property on just terms,<sup>30</sup> its ability to make laws to implement international obligations,<sup>31</sup> and its ability to regulate trade and commerce,<sup>32</sup> which has been used to support environmental protection.<sup>33</sup> In relation to the Commonwealth's power to acquire 'property',<sup>34</sup> this power is not to be confined to real property, and may extend to innominate and anomalous interests in property.<sup>35</sup> In terms of acquisition, the termination of a mining lease has been found to be an acquisition of property,<sup>36</sup> due to the fact that the property of the Commonwealth had been enhanced because it was no longer liable to suffer the extraction of minerals from its land in exercise of the rights conferred by the mining leases.<sup>37</sup> In contrast, the cancellation of bore licences has been found not to constitute an 'acquisition' of property requiring compensation on just terms,<sup>38</sup> as the Commonwealth always had the power to limit the volume of water to be taken from the groundwater in question.<sup>39</sup> The EPBC Approval merely limits, rather than grants, the rights conveyed by the associated mining lease granted under the *Mineral Resources Act 1989* (Qld), so the better view is that it is not property to be acquired.

Therefore in our view the exercise of the power of revocation under s145 of the EPBC Act is not properly considered the acquisition of property and therefore does not attract the obligation to pay compensation.

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<sup>29</sup> *Commonwealth of Australia Constitution Act* s 51 (xix)

<sup>30</sup> *Ibid* at s 51 (xxxi)

<sup>31</sup> *Ibid* at s 51 (xxix)

<sup>32</sup> *Ibid* at s 51 (i)

<sup>33</sup> *Murphyores Incorporated Ptd Ltd v The Commonwealth of Australia* [1976] HCA 20

<sup>34</sup> *Commonwealth of Australia Constitution Act* s 51 (xxxi)

<sup>35</sup> *Bank of NSW v Commonwealth* [1948] HCA 7 at 47

<sup>36</sup> *Newcrest Mining (WA) Limited v Commonwealth* [1997] HCA 38

<sup>37</sup> *The Commonwealth v WMC Resources Ltd* [1998] 194 HCA 8 Brennan J at 17

<sup>38</sup> *ICM Agriculture Pty Ltd v The Commonwealth* [2009] HCA 51

<sup>39</sup> *Ibid* at 84

## **CONCLUSION**

In our view the Minister currently has jurisdiction on at least two bases to revoke the EPBC Approval under s145 of the EPBC Act.

Ongoing investigation into the source aquifer of the Doongmabulla Springs may well give rise to a third ground on which the power of revocation can be validly issued.

We suggest the strongest and most robust process for a Minister to consider exercising a power under s145 in relation to the EPBC Approval would be to conduct a review of current information on these three matters against the information identified in assessing the application.

If the Minister forms the view that the new information of impacts is such that the approval would not have been issued if these impacts had been known, then the Minister is empowered to revoke the EPBC Approval. The revocation would be difficult to overturn if there were three independent grounds for revocation and if the Minister also formed the view, based on the new information, that the approval would be inconsistent with Australia's obligations under the World Heritage Convention.

Yours faithfully

Environmental Defenders Office (Qld) Inc

A handwritten signature in black ink, appearing to be 'Sean Ryan', written in a cursive style.

**Sean Ryan**

*Principal Solicitor*