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Environment and Communications Legislation Committee
Department of the Senate
PO Box 6100
Canberra ACT 2600

Submitted to: ec.sen@aph.gov.au

Dear Committee,

'Suitable person' environmental history test

EDOs of Australia (**EDOA**) welcome the opportunity to make a submission regarding the *Environment and Infrastructure Legislation Amendment (Stop Adani) Bill 2017*.

As a national network of public interest community legal centres, EDO offices have over 30 years' experience advising Australian communities on using the law to protect the environment, including legal advice, casework, education and law reform. Through this work, we have identified a substantial body of reform recommendations to strengthen our national environmental law to better protect our unique environment, and ensure development is ecologically sustainable. In particular, we have consistently recommended ways to strengthen and improve assessment of projects that will significantly impact on matters of national environmental significance under the *Environment Protection & Biodiversity Conservation Act 1999 (EPBC Act)*.ⁱ

In this context, we support measures to clarify and expand consideration of the environmental history of proponents of projects under the Act. Accordingly this brief submission focuses on the provisions aiming to "strengthen our national environment law, the Environment Protection and Biodiversity Conservation Act 1999, to make sure environmental history, including overseas environmental history, must always be considered when approvals are given, varied, suspended, revoked or transferred."ⁱⁱ

We note that environmental history is a relevant consideration for decisions under sections 136(4), 143(3), 144(3), and 145(3) of the EPBC Act; and that the provisions of Chapter 4 of the EPBC Act that allow a person's environmental history to be taken into account are expressed broadly.ⁱⁱⁱ While the current wording does not limit the type of information that could be relevant to a person's environmental history, the provisions could be clarified to ensure that environmental history of the proponent in Australia and overseas must be more fully considered for all relevant proponents of relevant projects.

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Other jurisdictions provide useful precedents for more detailed relevant considerations. For example, amendments to NSW mining laws in 2014 introduced a new “fit and proper person” test to replace the previous “public interest” test.^{iv} That Act now provides an extensive list of matters which the relevant decision-maker may consider in deciding whether a proponent is fit and proper person.^v In contrast to the focus of the EPBC Act on activities and compliance with Australian laws, the NSW law refers to “NSW or elsewhere” when considering compliance or criminal conduct issues.^{vi}

We therefore **recommend** that the EPBC Act, regulations and relevant guides be amended and updated to clarify that a broader range of considerations must be taken into account to determine whether proponents qualify as a ‘suitable person’ to undertake projects that may significantly impact on matters of national environmental significance. A similar suitable person test should also be applied to other relevant legislation, including for example, the *Northern Australia Infrastructure Facility Act 2016* and the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*.

As lawyers, we have concerns with the retrospective application of new criteria to specified approvals, but support a clearer ‘suitable person’ test being applied to proponents of any relevant proposed project in the future.

For further information, please contact rachel.walmsley@edonsw.org.au or on (02) 9262 6989.

Yours sincerely,
EDOs of Australia



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ⁱ Previous submissions on EPBC Act reform are available at: www.edo.org.au/submissions.

ⁱⁱ *Explanatory Memorandum*, available at:

http://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bld=1067.

ⁱⁱⁱ [EPBC Act Policy Statement](#), *Consideration of a Person’s Environmental History when making decisions under the EPBC Act*, Department of Sustainability, Environment, Water, Population and Communities

^{iv} See Mining and Petroleum Legislation Amendment Act 2014 No 10 [NSW] Schedule 1 Amendment of Mining Act 1992 No 29, section 380A.

^v These include: whether a person or a director of the body corporate has compliance or criminal conduct issues; whether, in the opinion of the decision-maker, the person is not of good repute; and whether the person is in partnership, in connection with activities that are subject to a mining right or proposed mining right, with a person whom the decision-maker considers is not a fit and proper person under this section.

^{vi} See 380A(3)(b).