

FOI: Adani “may have been negligent”

FOI documents show Adani “may have been negligent” when it failed to disclose its CEO’s link to four environmental charges against a Zambian mining company that polluted a river and did not report it. The Department did not pursue charges, arguing the information and its omission would not impact the recommended approval. The Minister did not review the approval. Adani’s account of the “misunderstanding” is redacted, but as summarised it appears inconsistent. Adani was “reminded of its obligations” but not told it may have been negligent. The information was kept on file for future decisions about Adani under the EPBC Act.

The request

On 4 October 2017, The Australia Institute made an FOI request to the Department of Environment and Energy for:

Documents relating to the Minister’s and Department’s consideration of the suitability of Adani Mining Pty Ltd to hold an approval under the EPBC Act in relation to its proposal to develop an open cut and underground coal mining (EPBC reference no. 2010/5756) and a 310 km rail corridor (EPBC reference 2013/6885)

For clarity:

- EPBC 2010/5756 is the Carmichael Coal Mine and Rail Project
- EPBC 2013/6885 is the North Galilee Basin Rail Project

On 28 November, the Department provided a large tranche of documents under administrative access – including documents previously released under FOI.

On 13 December, the Department provided the remaining documents under FOI. There are some substantial redactions:

- all legal advice is redacted as privileged, as is
- all information from the Intelligence team (to protect its operations), and
- all correspondence from Adani (as commercial in confidence).

Failing to disclose environmental offences

On 29 October 2015, Environmental Justice Australia (EJA) wrote to The Hon Greg Hunt MP, the Minister for the Environment, to bring his attention to “environmental offences by a company associated with one of Adani Mining Pty Ltd’s executive officers”.¹

The letter contended the Minister ought to have considered this information when assessing the two approvals (named above), but that he did not.

Adani’s CEO of Australian operations Mr Jeyakumar Janakaraj was Director of Operations at Konkola Copper Mines Plc in Zambia in 2010. At this time the company was charged with four environmental offences relating to polluting a river and failing to disclose the pollution.

Adani did not disclose this fact as part of its application for federal environmental approval (under the EPBC Act). This was potentially an offence.

‘Show cause’

On 6 November, the Department’s First Assistant Secretary (FAS) sent a letter to Adani’s CEO in Australia, Mr Janakaraj.² This ‘show cause’ letter notes the failure to disclose the previous offences when asked as part of the application, notes this may be an offence and warns any responses may be evidence in future court proceedings.

On the same day the FAS wrote to EJA stating "the Department is, in accordance with its standard regulatory practices, reviewing the information included with your letter and is making appropriate inquiries".³

On 9 November a series of emails record phone calls with Adani representatives. One warned that a letter is coming. A further phone call from Adani’s legal representative sought to clarify the nature of the allegation. A final phone call warned Adani that the

¹ Document 7 in documents released under FOI 171001

² Document 8

³ Document 9

Department will be making media comment and that Adani may be asked to comment.⁴

Request for intelligence

On 11 November there was an internal request for intelligence, to

check that there is no adverse environmental history (in Australia or overseas) for any of the directors not previously provided to the Department (by Adani or environmental NGOs...

[or] for any related entities not previously provided to the Department.⁵

The request includes detailed checks of criminal, financial and travel history of all Adani directors. Intelligence checks of this detail do not appear in previous documents.

Adani says releasing its response would damage its interests

Adani's response on 25 November is fully redacted.⁶ The FOI Statement of Reasons it is confidential material, as it was information that

[was] provided on the understanding that they would be kept confidential [and]

The information is not common knowledge or otherwise in the public domain...

It is unclear why information relevant to a federal approval should be confidential or not in the public domain.

The Statement of Reasons also says

The Proponent has advised that they will suffer detriment if these documents were to be released. The Proponent has claimed that release of this information would harm their commercial relationships with third parties, the interests of their employees and shareholders and would have a detrimental effect on Mr Janakaraj's business affairs.

In other words, Adani claims releasing its explanation of why it failed to disclose the offences would be damaging to Adani's interests.

⁴ Documents 10, 11 and 12

NB: On 12 November the FAS granted Adani an extension until 27 November. Document 14

⁵ Document 15

⁶ Document 16

The Compliance Report

On 18 December the Department produced a detailed “Compliance Report”.⁷ Key attachments to the Compliance Report are redacted, including the Intelligence note and the letter that Adani provided on 25 November. However most of the report itself is provided.

Summary of findings

The report summarises Adani’s letter of 25 November (redacted).

It says Adani claims the oversight was due to "an internal misunderstanding in Adani Mining Pty Ltd whereby Mr Janakaraj's role as Director of Operations at the copper mine was not identified as an executive officer position".⁸

The report found Adani “may have been negligent” in this omission.

Nonetheless, recommended against pursuing charges and found the information would not have “materially influenced the advice” to the Minister about approving the project.

Figure 1 – Main findings of Compliance Report

3. Adani Mining Pty Ltd may have been negligent in that, when requested in August 2015, it failed to disclose a complete account of its executive officers in relation to environmental matters.³ While it may be possible to progress an allegation under section 489 (2A), the review finds that it may not be in the public interest to invest significant additional resources to pursue a criminal prosecution when it is unclear that the oversight was done negligently in order to mislead the Department and the Minister. There is also uncertainty about whether evidence to support a criminal prosecution could be obtained and the prospects of a conviction being secured appear to be limited.
4. The approval granted to Adani Mining Pty Ltd contains 36 conditions requiring the company to meet the highest environmental standards. Additional information relating to the environmental history of Mr Janakaraj, had it been known, is unlikely to have materially influenced the advice provided by the Department to the Minister prior to his decision of 14 October 2015 in relation to this project.

Source: Document 17, Compliance Report, Par 2.4

The summary also notes that Adani had “been subject to 11 allegations of non compliance under Queensland legislation, two of which resulted in the issuing of penalty infringement notices.”⁹

⁷ Document 17

⁸ Par 2.4.2

An “Evidence Matrix” listing evidence against tests for offences in the EPBC Act states that Adani was “possibly” negligent. It also says it is "unclear" if Adani was “reckless” or had known the information was false or misleading.

Figure 2 – Evidence Matrix for offences of omission in EPBC Act

Table 1 Evidence Matrix

Offence	Elements	Findings	Satisfied?
EPBC Act s489 (1) Providing false and misleading information to obtain approval	A person	Adani Mining Pty Ltd	Yes
	Provides information in response to a requirement or request under Part 9	Adani responded to a request by the Department for information about environmental history	Yes
	The person is reckless as to whether the information is false or misleading in a material particular	Adani has admitted that the omission of the material was an oversight and the result of an internal misunderstanding	Unclear
EPBC Act s489 (2A)	A person	Adani Mining Pty Ltd	Yes
	Provides information in response to a requirement or request under Part 9	Adani responded to a request by the Department for information about environmental history	Yes
	The person is negligent as to whether the information is false or misleading in a material particular	Adani has admitted that the omission of the material was an oversight and the result of an internal misunderstanding	Possible
EPBC Act s491 (1) Providing false or misleading information to an officer in the Department	A person	Adani Mining Pty Ltd	Yes
	Gives information to a person performing a duty or carrying out a function under the EPBC Act	Adani responded to a request by the Department for information about environmental history	Yes
	The person knows that the information is false and misleading in a material particular	Adani has admitted that the omission of the material was an oversight and the result of an internal misunderstanding	Unclear

The report recommends the Department not pursue prosecution.

Instead, it recommends the Department issue a caution and to keep all information from the review on file to inform future decisions under the EPBC Act relating to the company.

Whether and how this information has been used for subsequent decisions is unclear.

⁹ Documents relating to “non compliances” were released under administrative access e.g. “removing state owned quarry material from a crown holding”. This note does not compare these documents to the “11 allegations” cited in the Compliance Report.

Figure 3 – Recommendations from the Compliance Review

The review recommends that:

1. The Department does not pursue a criminal prosecution of Adani Mining Pty Ltd for a potential breach of section 489 (2A) of the EPBC Act.
2. Adani Mining Pty Ltd be cautioned in relation to its failure to fully interrogate the history of its executive officers in response to a formal request made by the Department relating to a person's environmental history.
3. The information discovered during this review be recorded and used to inform any future decisions that may be made under the EPBC Act which relate to Adani Mining Pty Ltd.

Inconsistencies in Adani's explanation

The Compliance Report outlines a letter from Adani's on 11 September 2015 in response to questions from the Department.

In that letter, Adani said "none of the executive officers has been an executive officer of a body during the time it was subject of any [civil or criminal penalties for breaches of environmental laws]".

That letter also said Mr Janakaraj "has previously held executive officer roles at the following companies: "CEO, at KCM plc Zambia, from 2008 to 2013"".

In fact, Mr Janakaraj was not CEO during the time of the charges, but Director of Operations. Nonetheless, as Director of Operations he was an executive officer.

It is unclear why Adani claimed the omission was due to a misunderstanding about whether Mr Janakaraj's role as Director of Operations was not an 'executive officer' position, when Adani had already claimed Mr Janakaraj was the Chief Executive Officer. This inconsistency is not identified in the documents.

The Compliance Report states that Adani's letter on 25 November to confirms Mr Janakaraj was an executive officer of the Zambian company during the period in which it was charged with various environmental crimes. Notably, however, the Department has redacted Adani's own description of its CEO's term.

Figure 4 – Adani's own description of CEO's term redacted as confidential

The response noted, in relation to Mr Janakaraj's term as CEO of " . . . s45

[Redacted text block]

It is unclear if this relates to Mr Janakaraj's time as CEO of the Zambian company or Adani in Australia. At any rate, Adani is claiming that their description of Mr Janakaraj's time as CEO of either would be damaging to Adani's or Mr Janakaraj's interests.

Adani's adverse history

In response to questions from the Department, "The proponent provided information about significant environmental harm that had been caused by the organisation's operations overseas."¹⁰

The Compliance Report notes further that the new investigation (in November)

includes information about criminal charges relating to forgery and fraud, and allegations relating to conspiracy, corruption and money laundering, all in other jurisdictions and not relevant to environmental history.¹¹

It is remarkable that this is the only time these matters are raised in the review.

The report outlines 11 allegations of environmental non-compliance under Queensland law. This includes the company

- taking tens of thousands of tonnes of state-owned quarry material from Crown land without approval, from 2012 to 2015, resulting in charges of over \$125,000;
- sewerage leaks,
- leaks from absorption trenches,
- delayed reporting of uncontrolled fires damaging 18,400 hectare suitable for protected fauna,
- not following weed management plans, and
- three cases of relating to not rehabilitating a total of 75 hectares of disturbed area.

Adverse history and omission does not change approval

The Compliance Report emphasises in a number of places that the Minister had a lot of information before them about relevant related adverse environmental history.

The argument appears to be that if approval was justified given existing information, then the further omitted information would not impact that approval.

This raises questions about what evidence a Minister would need to judge a proponent unsuitable. This is ultimately a judgment for the Minister.

¹⁰ Par 3.5

¹¹ Par 3.7

The Compliance Report says that to pursue charges of negligence regarding the Zambian copper mine charges the Department would need to have the view that "the oversight was done negligently in order to mislead ". But:

In view of the extensive information available to the Minister prior to making the decisions of 14 October 2015 ... it is considered unlikely that the investment in further investigative actions would uncover new evidence indicating that, in failing to supply information about [KCM] the company [Adani] intended to gain by misleading the Department and the Minister.

In other words, Adani had already provided so much information about its environmental history that it would be difficult to prove they intended to gain by misleading the Department and Minister.

The Department here appears to argue that the evidence of environmental offences - and of their omission - would not change the recommendation that the Minister approve the project.

Then the report notes correspondence from 'Qld Major Projects',¹² which told the Department that the information if known would have been included in briefs. However the Department says

that information would have been unlikely to result in changes to the recommended decision or conditions of approval. The level of regulatory oversight of company operations can be expected to vary significantly between various countries. We would be confident that we have sufficiently robust regulatory systems to ensure that the company would carry out operations under the Qld Government and Commonwealth Government regulatory requirements.

On that basis, I would not have recommended changes to briefing material, other than informing the Minister of the matter in the covering brief.¹³

On this basis, the Compliance Report finds Adani "was unlikely to have materially benefited as a result of its failure to disclose Mr Janakaraj's environmental history".¹⁴

The argument seems to be that conditions and oversight in Australia mean that adverse environmental history in other countries would not change the recommendation.

¹² Included as Document 21

¹³ Cf Document 21

¹⁴ Page 16, Document 17

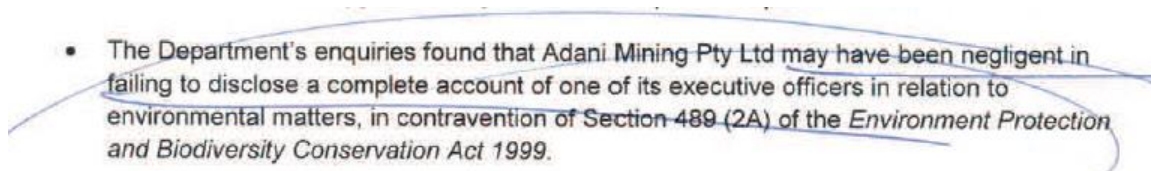
This raises questions about what adverse environmental history – and omissions in applications – would be sufficient to ground an alternative judgment.

Any benefit or advantage ultimately depends on the Minister’s decision of whether the information makes the applicant suitable or unsuitable to hold the approval.

Briefing to the Minister

On 21 December 2015 the Department provided a brief to the Minister. It says Adani may have been negligent and so breached EPBC Act. This finding is circled, most likely by the Minister.

Figure 5 – Ministerial briefing that Adani may have been negligent



The briefing then states there "would not have been a material change to the recommendations [and so] would not have resulted in an obvious benefit or advantage" to Adani.¹⁵

The Department provided a “recommended comment” that the Minister state the information “would not have altered the decision I made” to approve the project.

It is clear that the Minister took this view. He did not review the approval in light of the information about the previous offences, or the failure to disclose that information.

Letter to Adani and public statements

On 23 December Dean Knudson, Deputy Secretary, wrote to Mr Janakaraj outlining the review’s findings. The letter outlines the “risk-based approach” to EPBC Act compliance.¹⁶

the relevant factors we considered [were]...

- The nature and severity of the harm caused;
- Whether or not the contravention was intentional, reckless, negligent or a mistake; and

¹⁵ Document 18

¹⁶ Document 22

- The level of cooperation given to authorities.

The letter says there was no environmental harm, the omission was likely due to a mistake, and Adani officials provided full cooperation. Hence the Department “will take no further compliance action”.

This letter is substantially replicated in a 24 December “back pocket” briefing, providing possible public statements the Minister might make on the matter.

While both documents note Adani’s “co-operation” and the absence of environmental harm, neither were the focus of earlier documents. Indeed the Compliance Report raises “real or *potential* harm”¹⁷ – absent from the letter to Adani and “back pocket” statements.

Neither document mentions of the Department’s finding of possible negligence, nor the word “caution”.

These documents do note the information will be kept on file for future decisions relating to Adani under the EPBC Act.

¹⁷ Page 15 of Document 17. Emphasis added.