SENATE STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE
HEARING ON EFIC AMENDMENTS BILL
QUESTIONS ON NOTICE TO JUBILEE AUSTRALIA

1. **The Attorney General's Department recently conducted a review of the *Freedom of Information Act 1982* and the *Australian Information Commissioner Act 2010*. Did Jubilee Australia make a submission to the inquiry in relation to your recommendation that the FOI Act be amended to bring EFIC under the Act? Are you in discussions with the Attorney General about your recommendations?**

Jubilee Australia engaged with the inquiry as soon as we learned that it was going on. Regretfully this was not in time to make a formal submission, however, we are in discussions with the AGD about our recommendation that EFIC's blanket exemption to the FOI Act be removed and replaced with specific exemptions that address its concerns for the confidentiality of commercially sensitive client information.

As stated in our testimony, EFIC's blanket exemption to Australia's freedom of information laws is out of step with international norms. The US and the UK have established specific exemptions for their export credit agencies (ECAs) and are relevant models for Australia in relation to EFIC.

Our concern is that unless this Committee makes a strong statement in regards to the FOIA blanket exemption, then the AGD will think the EFIC exemption is not important.

In summary, we cite the following in support of our belief that this reform is urgent and essential:

1. the Productivity Commission has recommended the blanket exemption be removed,
2. the blanket exemption is inconsistent with international standards for ECAs regarding disclosure, and
3. civil society has raised grave concerns regarding -
    - EFIC's responsibility to inform the public adequately of the business, environmental, social and human rights risks born by its business,
    - the bias against public disclosure in EFIC's legislative and policy provisions governing the release of information, and
    - the obstacle the blanket exemption creates to public participation in Government processes

2. **As the Hearing did not include any discussions relating to your recommended reforms to the National Interest Account do you have any further comment in their support?**

In National Interest Account transactions, taxpayer funds are used to assist a small number of Australian private corporations to win export contracts – in many cases to assist Australian companies to participate in projects considered excessively risky by private financiers. Any substantive information used to justify this decision, however, is protected by "cabinet-in-confidence" and the validity of the decision is not open for debate even by elected members of the Federal Parliament. This is a process that is completely veiled from the public and from the Parliament. Jubilee Australia and members of the Senate have repeatedly asked for the documentation upon which this decision was based to be released, only for such requests to be denied.

Possibly the most important conclusion from *Pipe Dreams,* Jubilee's 70-page report about PNG LNG, was that the problematic nature of the Minister's decision to direct EFIC to approve financing for the project. Most seriously, the report points to a series of concerns about the long-term benefits of the project for the people of PNG that were known at the time. There are serious risks that the revenues generated by the project will not mitigate the negative economic and social impacts of the Project. Probably the most concerning aspect was the entirely inappropriate way which the landowner consultations were held, which may very well increase the chance of project related conflict once the project comes online.

The report pointed out that the attitude of the PNG Government to the project, and the record of similar resource projects in PNG, and the institutional framework to manage the revenues should all have given concern to Australian policymakers. It is absolutely clear that these issues should have had an appropriate public airing before the Minister and Cabinet chose to green light the Project. Such an airing would have allowed a proper discussion and may well have resulted in different approach towards the project, one that might have resulted in a more beneficial outcome for the people of PNG.

Apart from somewhat perfunctory statements in defence of the decision, neither the Government nor EFIC has attempted to engage with the claims made in *Pipe Dreams* in any substantive way, leaving the distinct impression that the arguments made in the report hold. National Interest Account decisions are by definition risky decisions: if they were not, EFIC would finance them on its Commercial Account. They do not happen that often, but when they do, they can have enormous ramifications: they can transform economies and they are associated with parts of the world where conflict and serious environmental and social ramifications may result.

Moreover, National Interest Account decisions bring the endorsement of the Australian Government to projects and involve a directly outlay of taxpayer money. It is absolutely clear then that greater scrutiny of these decisions is needed; scrutiny that involves more engagement with the public and the Federal Parliament. If not then more approvals like that for PNG LNG will follow without due considerations for the ramifications of such decisions.

3. During your testimony you made reference to EFIC's decision to provide funding to a Rio Tinto subsidiary for the Oyu Tolgoi mining project in Mongolia. As time did not allow for an exploration of the transaction issues you are concerned with would you like to elaborate?

By way of preamble we might make some reflections about the country in question. Mongolia, or Minegolia—a term that has become common during the mining boom—remains a poor country. About 30 percent of the population lived in poverty in 2011, according to the government, although that was an improvement from 40 percent in 2010, before the start of payouts funded by mine proceeds. Few things matter more today in the political and economic life of this landlocked country of 2.8 million people than foreign investment to develop its mineral wealth. Mining money has spawned gleaming office towers, pricey gated communities and luxury-car dealerships in the capital. And yet, half of all Mongolians still live like their nomadic ancestors in circular felt yurts that can be dismantled and moved.

Timing and process are at the heart of all disputes in impoverished, resource-rich countries. Mining companies impose urgency on the preparation of environmental and social impact assessments and the negotiation of relocation or benefit-sharing agreements, with the host nation always playing catch-up in terms of the preparation of mechanisms and institutions to manage construction and development, cultural adjustment and project revenues. It is the financiers' responsibility to hold their clients to account on matters of financing and process, as there is currently nothing that forces the companies to behave as responsible corporate citizens.

In this context, Jubilee Australia has a number of concerns about EFIC's approval of the funding proposal for the Oyu Tolgoi copper and gold mine in Mongolia's South Gobi desert.

First, in violation of the standards the EFIC claims to adhere to, the project has not achieved Free, Prior and Informed Consent from the Indigenous nomadic herders that have lived for centuries on the land occupied by the mine and its ancillary facilities.[1] Furthermore, construction of key components of the project has proceeded without the requisite local government consents, *and national consents are rumored to have been secured via facilitation payments to individuals at key authorities.*

Second, EFIC approved the funding proposal despite a number of clear violations of its supposed environmental and social standards:

[1] The herders have lodged 2 complaints with the World Bank Complaints Adviser/Ombudsman who assigned a mediator to address matters on the ground. The herders have been challenged in their engagement with the process and we understand the Mediator has recently quit. It is curious that the Bank's Board of Governors have taken the decision to proceed with the provision of financial support for the project despite the unresolved matters with the CAO.

- the Environment and Social Impact Assessment for the operational phase of the project has not been made public;
- no plan has been disclosed for the decommissioning and closure of the mine, which is also required by the IFC Performance Standards; and
- the project has not demonstrated that it has the water resources required to sustain it through its operational life.

Third, there are widely publicized continuing disagreements between the Rio Tinto and the Mongolian Government over cost overruns, financing, taxes and the government's desire for more locals in the mine's management, all related to growing concerns in Mongolia about the likelihood that foreign investment in Mongolian mining projects will generate benefits for average Mongolians. Puntsag Tsagaan, the president's chief of staff, says he doesn't want to see his country turned into Minegolia. Mineral wealth should be exploited cautiously and benefit the people, he says. "It does not have to be unlocked in a generation."

In summary, the Oyu Tolgoi funding proposal was approved in violation of many of the IFC Performance Standards, which EFIC claims to uphold. This was also the case with other projects, notably PNG LNG. This combination of lack of disclosure and absence of remedy means that EFIC operates with impunity.

On this point we would like to note a couple of interesting comments from the testimony to the committee of EFIC official Jan Parsons. Firstly, when asked about the application of the IFC Performance Standards Mr Parsons conceded that although EFIC uses them as a benchmark for the assessment of environmental and social risk, they are not compelled to apply them or comply with them. As the Oyu Tolgoi approval demonstrates, EFIC doesn't really apply the Performance Standards unless they have to and they can ignore them when they need to.

In Jubilee Australia's *Risky Business* report we present the case of the Goldridge Mine in the Solomon Islands where environmental violations occurred around the decommissioning of the mine. EFIC pulled out of the financing when Goldridge was bought by Canadian Barrick Gold, but had a clear intention to provide finance before the sale occurred. A history exists of disregarding the Performance Standards as necessary.

Further, Mr Parsons made the claim that EFIC does its own auditing against the IFC Performance Standards for Category A Projects, thus implying that no change to EFIC's reporting regime is necessary to ensure accountability.

However, as must be clear by now, if EFIC consistently approves projects that are in breach of its own standards, as is the case with PNG LNG and Oyu Tolgoi, to claim that the current system is operating effectively is not tenable.

EFIC is operating in an environment that lacks transparency and accountability and, as there are no consequences for lack of compliance, it also operates with

impunity. There is, therefore, a desperate need for two important revisions in the EFIC Act:

- First, EFIC must disclose details of how Category A projects under consideration meet its environmental standards before approval is given. Such disclosure will allow the public to engage with EFIC on any potential violations that such approval may make.

- Second, there are currently no consequences and no remedies in the case of approvals by EFIC of financing proposals which violate their own code. Obligations to comply with protocols such as the IFC Performance Standards must be enshrined in law so that there is a legal remedy when they are breached.

Application of the EPBC Act to EFIC

We would like to take this opportunity to clarify comments made at the 17 May 2013 Hearing on the application of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) to EFIC and our submissions in this respect.

For background we refer you to pages 369-372 of the Productivity Commission Report on Australia's Export Credit Arrangements. At page 371, the Commission states:

The provision of products by EFIC to support export projects are neither actions which are subject to s. 28 of the EPBC Act, nor actions under s. 160 of the Act that would require EFIC to obtain and consider advice from the Minister for the Environment prior to granting governmental authorisation. There is no mechanism under the assessment processes of the EPBC Act that requires EFIC to disclose its involvement in onshore and offshore projects. This is with the potential exception of those transactions which have a significant foreign aid component that would constitute EFIC making an authorisation to enter into a contract, agreement or arrangement under s. 160(2) of the Act.

Section 28[2] requires Ministerial approval for 'actions' that have, will have or are likely to have a significant impact on the environment inside or outside Australia (s28(1) and (2)(a)).

Section 160 requires that Commonwealth agencies take into account advice about the 'action'.

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[2] www.austlii.edu.au/au/legis/cth/consol_act/epabca1999588/s28.html

Decisions by EFIC to provide financial products appear to be exempt from both these requirements according to the EPBC explanatory memorandum. It says that:[3]

The definition of 'action' ensures that this clause [28] applies only in circumstances where the Commonwealth is the proponent - for example, when the Commonwealth or a Commonwealth agency is undertaking a project or a development. It does not, for example, apply to Commonwealth decisions (such as a decision to approve an action), the provision of funding by the Commonwealth or the entering into an agreement by the Commonwealth.

An explicit statutory exemption exists in section 524[4] of the EPBC Act. Subsection 524(3)(c) states:

To avoid doubt, a decision by the Commonwealth or a Commonwealth agency to grant a governmental authorisation under one of the following Acts is not an action:

...

(c) the Export Finance and Insurance Corporation Act 1991 ;

This section, we believe, provides EFIC's decisions with an indisputable exemption from compliance with important requirements of the EPBC Act.

Category A projects are those defined as having potentially significant impacts on the environment; these are the same impacts as contemplated under section 28(1) of the EPBC Act. We see no justification for EFIC's financing of Category A projects to be exempt from the requirement to obtain and consider ministerial advice or approval under s28 and s160.

The EPBC Act clearly contemplates significant impacts that can occur outside of Australia, and that Commonwealth agencies should obtain approval from the Minister. The consequences of EFIC's actions can be immense for host countries and can transform economies and social structures. EFIC's role in facilitating projects, which in some cases can be the key to making the project a reality,[5] is such that it should perhaps be considered akin to a 'proponent' and be required

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[3] www.comlaw.gov.au/Details/C2004B00223/Explanatory%20Memorandum%201/Text at [98]

[4] www.austlii.edu.au/au/legis/cth/consol_act/epabca1999588/s524.html

[5] See Jubilee Australia, Pipe Dreams: The PNG LNG project and hopes of a nation, Report (2012), p66 which states: *It seems clear that without the financial and political support of outside governments, the Project could not have gone ahead. Although it was neither the lead corporate actor (ExxonMobil) nor the other lead actor (PNG Government), Australia's role in supporting PNG LNG through the Trade Ministry and EFIC was particularly important.*

to consult with the Minister on potential or actual significant environmental impacts.

We stated at the Hearing on 17 May 2013[6] that we would like to see section 28 apply to EFIC and for EFIC to access the expertise of the Minister for the Environment when considering proposals to finance major projects with significant impacts.

To clarify, in our view sections 28 and 160 should apply to EFIC's consideration of project loans, guarantees, export credits and insurance for Category A projects located both inside and outside Australia. The provision of corporate loans and bonds connected to Category A projects should also trigger these EPBC requirements.

There is no justification to limit the possible application of sections 28 or 160 to EFIC's provision of *project finance loans*. The scope of financial instruments that trigger environmental assessment is ever-expanding. For example, Equator Principles III, to which EFIC submit, now apply to corporate loans, advisory services and export credits.[7] Section 28, and the requirement for an approval under s28(2)(a), and the requirement to consider the Minister's advice under 160(1) should apply to these facilities, in addition to guarantees or corporate bonds that are likely to relate to Category A projects.

Ministerial or inter-departmental consultation on export credit agency financing is not a novel requirement. In the USA for example, the Ex-Im Bank is required to consult with US wildlife agencies on projects that impact on threatened and endangered species pursuant to the *Endangered Species Act*. 16 U.S.C. § 1536(a)(2).[8] Furthermore, impacts on World Heritage Areas are required to be taken into account.[9] This is not the case with EFIC. If sections 28 and 160 were to apply in the manner we suggest, the situation in Australia would be comparable with the USA.

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[6] See p6 of the Transcript (Proof).

[7] www.equator-principles.com/resources/equator_principles_III.pdf under 'Scope' at p3.

[8] According to the complaint in *Center for Biological Diversity et al v Export-Import Bank of the United States and Fred P Hochberg*, case 3:2012cv06325 in the California District Court. The complaint is available at www.seaturtles.org/downloads/ExIm%20Complaint%20Final%2012%2013%2012.pdf

[9] Footnote 5 referring to the *National Historic Preservation Ac*t, 16 U.S.C. §§ 470 et seq.