



28 July 2017

Senate Standing Committee on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

By email only: economics.sen@aph.gov.au

Dear Chairman

**Governance and operation of the Northern Australia Infrastructure Facility
Submission by Environmental Justice Australia**

1. Environmental Justice Australia (**EJA**) is a non-profit legal practice. We thank you for the opportunity to make this submission. Our submission raises issues with respect to each of the terms of reference for this inquiry.

The adequacy and transparency of the NAIF's governance framework, including its project assessment and approval processes

2. There is no transparency in NAIF's project assessment and approval processes for individual proposals. NAIF has routinely rejected Freedom of Information (**FOI**) requests from interested parties on individual projects. The only information required to be published for projects financed are basic details 30 business days after an investment decision has been made. Publication is subject to commercial confidentiality.¹
3. Transparency is critical when \$5 billion of taxpayers' money is put at risk by a handful of people. For example, it is unclear whether NAIF, in considering Adani's Galilee Basin railway proposal, expects to provide finance to an opaque entity ultimately owned by a private entity domiciled in a Cayman Islands tax-haven. NAIF has repeatedly refused EJA's FOI request seeking to capture this information. It has avoided providing this information to the Senate under a carefully crafted answer in response to a Senate estimates question on notice.²

¹ Investment Mandate, s 17(2)

² http://www.aph.gov.au/~media/Committees/economics_ctte/estimates/sup_1617/Industry/answers/SI-35_Waters.pdf

4. It appears NAIF providing money to, or for the benefit of, a Cayman Islands subsidiary is the likely outcome for that project.³ Adani Enterprises Ltd (**AEL**), the ultimate owner of Adani Mining Pty Ltd, the entity which holds the regulatory approvals,⁴ is listed on the Bombay Stock Exchange (**BSE**). AEL told the BSE it has no interest in the railway project.⁵ NAIF's consideration of financing the project appears untenable given the *Northern Australia Infrastructure Facility Investment Mandate Direction 2016 (Investment Mandate)* says concessional finance will be offered to the 'Project Proponent' and that is the entity that receives the regulatory approvals.⁶
5. NAIF is a Commonwealth statutory body. Its board (the accountable authority) and board members are subject to duties and obligations in the *Public Governance, Performance and Accountability Act 2013 (PGPA Act)*.
6. EJA wrote to NAIF's Chair on 11 April 2017 advising that NAIF Board members will breach their duty of care and diligence under s 25 PGPA Act if an investment decision were made to finance any Galilee Basin railway project (**Annexure A**). We asked NAIF to give an undertaking that it would not provide financial support for the project. No response was received.
7. We understand NAIF continues to actively consider financial support for the Galilee Basin rail project despite our advice. In our view, ongoing consideration of a project that cannot ultimately be financed breaches the NAIF Board's duty to govern in a manner that promotes the proper use and management of public resources under s 15 PGPA Act. Our letter dealt with NAIF's consideration of an individual project, and the Minister cannot direct the NAIF Board as to individual projects.⁷ But surprisingly Senator Canavan, then the responsible Minister, made public statements about our letter to a national radio program describing letter as a 'bullying tactic'.⁸ All the while NAIF remained silent.
8. NAIF's board must establish a risk management framework under s 16 PGPA Act. The policy rationale is that government entities should only take prudent risks.⁹ It is not doing so considering the Galilee Basin rail proposal. We provide further evidence that NAIF is not operating in a manner consistent with prudent risk-taking below.

The adequacy of the NAIF's Investment Mandate, risk appetite statement and public interest test in guiding decisions of the NAIF Board

Investment Mandate and public interest test

9. EJA wrote to NAIF on 11 May 2017 outlining the serious financial risks faced by the Galilee Basin rail project (**Annexure B**). In the letter we described Australian commercial financiers' best practice corporate governance. Westpac treats climate change risks as financial risks and ruled out funding of the Galilee Basin railway in a policy designed to address those financial risks. NAIF must have regard to best

³ http://ieefa.org/wp-content/uploads/2017/04/Adani-Remote-Prospect-Prospects-Carmichael-Status-Update-2017_April-2017_SN.pdf p15; <http://www.abc.net.au/news/2017-03-14/adani-carmichael-coalmine-to-shift-millions-to-cayman-islands/8350704>

⁴ <https://www.statedevelopment.qld.gov.au/assessments-and-approvals/north-galilee-basin-rail-project.html>

⁵ www.bseindia.com/xml-data/corpfiling/AttachHis/82A69C69_E6D8_4F61_8356_6A74DE960812_145512.pdf

⁶ Investment Mandate, ss 7(3)(c), 15

⁷ *Northern Australia Infrastructure Facility Act 2016*, s 9

⁸ <http://www.abc.net.au/worldtoday/content/2016/s4652508.htm>

⁹ PGPA Act Explanatory Memorandum, cl 54

practice governance when performing its functions under the Investment Mandate.¹⁰ There is no evidence it is currently doing so.¹¹

10. Our letter provided strong evidence that the Galilee Basin railway project was unviable because recent events in India have rendered the coal-fired power station slated to purchase the bulk of Adani's Galilee Basin coal uncommercial. We questioned whether NAIF's board, in allowing NAIF to continue expending resources by considering an unbankable project, is breaching its obligations to govern the entity in a manner that promotes an efficient, economical, effective and ethical use of public resources.¹² We sought a response by 25 May 2017. NAIF has not furnished one.
11. Oliver Yates, former head of the Clean Energy Finance Corporation, has provided compelling arguments that NAIF's board, in considering financing the Galilee Basin railway, is breaching the reputation clause of the Investment Mandate.¹³ That clause requires NAIF not to act in a way that is likely to cause damage to the reputation of the Commonwealth Government, or that of a relevant State or Territory.¹⁴ NAIF did not provide a public response.
12. Relevant to reputation is our 23 September 2016 letter to NAIF regarding the connections between Adani Australia and investigations in India into money laundering. We asked NAIF to follow best practice and put aside any determination of providing financial assistance to Adani until investigations were complete. The allegations have been further explored by the national broadcaster.¹⁵ A litany of misconduct associated with the Adani Group is detailed in *The Adani Brief: What governments and financiers need to know about the Adani Group's record overseas*.¹⁶ NAIF will likely bring the government into disrepute if it finances the Galilee Basin rail project. EJA sent *The Adani Brief* to NAIF and offered to discuss its findings. No response was received.
13. Many sections of the Investment Mandate are vague and give too much discretion to NAIF. In circumstances where NAIF has 5 years to operate, has received 124 proposals of which 50 are considered 'active', the discretion to put tax-payers' money at risk by favouring certain projects is apparent.¹⁷ Despite strong evidence of the Galilee Basin rail project becoming a stranded asset NAIF continues to assess it. Repeated public encouragement for favoured projects by government Ministers fuel suspicions that NAIF is the responsible Minister's 'personal slush fund'.¹⁸
14. For example, mandatory criterion 2 'public benefit' is entirely incommensurate. The concept of 'public benefit' is limited to two almost meaningless considerations that could be satisfied by almost any proposal, being that:

¹⁰ Investment Mandate, s 17

¹¹ NAIF should benchmark its operations against best practice according to the Implementation of the Commonwealth Risk Management Policy, it does not appear to be doing so:
www.finance.gov.au/sites/default/files/implementing-the-rm-policy.PDF p29

¹² PGPA Act, ss 8, 15

¹³ <https://www.theguardian.com/environment/2017/jul/06/loan-to-adani-by-infrastructure-fund-could-be-unlawful-says-former-clean-energy-head>

¹⁴ Investment Mandate, s 16.

¹⁵ <http://www.abc.net.au/news/2016-12-22/adani-companies-facing-multiple-corruption-probes/8140100>

¹⁶

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

¹⁷ Laurie Walker, NAIF CEO, interview with ABC Radio, Tropical North Mackay, Queensland, 19 July 2017

¹⁸ See paragraph 40 below

- (a) projects have the capacity to serve multiple users, which might be satisfied by a vague possibility of multiple users some time in the future; and
- (b) projects will produce benefits to the broader economy and community beyond those able to be captured by project proponents – also a vague notion. There is no requirement for ‘net’ or proportional benefits, thus satisfaction of the threshold appears arguable for any infrastructure project.
15. Even with negligible thresholds, the ‘mandatory’ nature of the public benefit criterion is misleading. All that is required is the board give *preference* to those projects that surpass the test. That means the door is ajar for NAIF to finance projects that do not meet the test, irrespective of how adequate the test is.
16. Mandatory criterion 3 provides no guidance on how the board is to assess whether the project is unlikely to proceed or will only proceed at a much later date, or with a limited scope, without financial assistance. All that is required is the project proponent to demonstrate this criterion *to the Board’s satisfaction*.¹⁹ The Export Finance and Insurance Corporation (**EFIC**) has similar²⁰ criteria which the Productivity Commission (the **Commission**) in 2012 deemed ‘lacks rigour’ and was ‘unsound’.²¹
17. EJA on behalf of Institute for Energy Economics and Financial Analysis, lodged a complaint with the Australian Government Competitive Neutrality Complaints Office (**AGCNCO**) regarding NAIF’s failure to comply with competitive neutrality principles (**Annexure C**). On 24 July 2017 AGCNCO informed EJA it would write to NAIF with its concerns. However, we were informed that despite the evidence presented, AGCNCO was not able to progress the complaint until a decision had been made. As such, AGCNCO appears unable to act to *prevent* market distortions, in this case up to \$1 billion worth of distortion. If AGCNCO were to act to remove market distortions after the loan was made, the Australian government would likely need to compensate the project proponent if the loan was unwound.
18. The OECD in the 2012 publication *Competitive Neutrality: A compendium of OECD recommendations, guidelines and best practice* establishes that it is *straightforward* for governments to achieve debt neutrality, a key component of competitive neutrality. The OECD says:
- State aids and subsidies directed to inefficient firms distort firms’ behaviour, as they subject them to softer budget constraints than their non-subsidised rivals. Government loans provided at below market interest rates or against collateral or securitisation that would not be acceptable under purely commercial terms, are tantamount to direct grants and can have the same distortive outcome.²²
19. The OECD cites the *2010 Roundtable on Competition, State Aids and Subsidies* proceedings:

¹⁹ Investment Mandate, Schedule

²⁰ Productivity Commission letter to EJA, 22 May 2017

²¹ Productivity Commission 2012 report into Australia’s Export Credit Arrangements: Inquiry report 58, 31 May 2012, pp 36, 209 : www.pc.gov.au/inquiries/completed/export-credit/report/export-credit.pdf

²² *Competitive Neutrality: A compendium of OECD recommendations, guidelines and best practices*, at 2.7: www.oecd.org/dai/ca/50250955.pdf

... the only acceptable circumstances when the State should intervene is to correct market failures. And even when it does, it should grant loans at market rates, against collateral that is required by the market.²³

20. The concessions available under s 10(2) of the Investment Mandate breach those recommendations as NAIF can offer both below market interest rates and a subordinated security position.
21. NAIF's market gap mandate is embodied in mandatory criterion 3. In 2012 the Commission found 'the criteria and process EFIC uses for assessing the presence and size of the market gap are vague' and the 'market gap concept is unsound'.²⁴ In our view NAIF's market gap criteria and process are both unsound, like those of EFIC. In 2012 the Commission looked at EFIC's market gap mandate and found there was no justification for government intervention in financing a large firm's resource related projects in Australia because there was no obstacle to firms getting finance.²⁵ In Senate Estimates on 31 May 2017 the Commission confirmed there were no systemic failures for access to finance for small, medium and large-size businesses in Australia.²⁶ We call into question the entire rationale for the existence of NAIF as a gap financier. Clear evidence from the government itself reveals no market failure and no gap, especially for domestic resource related projects like the Galilee Basin railway.
22. Confusion around the market gap mandate and s 9(2) of the Investment Mandate is rife. Adani stated NAIF's support was 'not critical' in December 2016 yet despite widespread press coverage of the issue²⁷ NAIF did not clarify why it would be able to offer concessions to such a project.
23. Mandatory criterion 6 states 'The Project Proponent must present comprehensive financial modelling to demonstrate the ability of the Project to repay the debt in full and on time, or refinance, based on assumptions acceptable to the Board'. Notably, there is no guidance as to what assumptions might be acceptable to the board. EJA advised NAIF that if its officials were to satisfy their PGPA Act duty of care and diligence, the acceptable base emissions pathway assumption is the International Energy Agency (IEA) 450 Scenario. Under that scenario the Galilee Basin rail project is unbankable.²⁸ No response was received from NAIF to that letter. The project is still under consideration.
24. Further, mandatory criterion 6 requires the presentation of modelling to the board to demonstrate the ability to repay debt and so on. There is no requirement that the modelling must objectively or reasonably demonstrate the ability to repay debt. Similarly, s 7(2)(b) Investment Mandate says 'the Board must be satisfied ... there is an expectation that the Commonwealth will be repaid'. We query whether this means that in the spectrum of scenarios only one scenario need exist which gives rise to an expectation of repayment. There is no requirement in the Investment Mandate that this expectation be reasonable, or real, or that there is an overall expectation of repayment. Why not when \$5 billion of taxpayers' money is at risk?

²³ As above, p5

²⁴ As above

²⁵ As above

²⁶ Senate Budget Estimates, 31 May 2017, transcript proof, p68:

http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/0493150c-8738-423c-a856-9cb37d9e9073/toc_pdf/Economics%20Legislation%20Committee_2017_05_31_5131_Official.pdf;fileType=application%2Fpdf#search=%22committees/estimate/0493150c-8738-423c-a856-9cb37d9e9073/0000%22

²⁷ <http://www.theaustralian.com.au/business/mining-energy/palaszczuk-lauds-iron-clad-deal-on-adani-coal-jobs/news-story/>; <https://www.theguardian.com/environment/2016/dec/08/voters-near-proposed-adani-mine-oppose-public-loan-for-rail-line-poll-finds>

²⁸ Annexure A

25. Consider a scenario where the Project Proponent, in accordance with that company's board's duty to rely on reasonable forecasts, presents comprehensive financial modelling that illustrates, under reasonable assumptions, that repayment is unlikely to occur in full or on time. This is the likely scenario given NAIF can only provide financial assistance if the project would not proceed. What if other scenarios which are considered less likely are also presented, or the board alters the principal scenario? Under the Investment Mandate the board can choose whatever assumptions it sees fit. As such, objectively unreasonable modelling could be used to prove repayment. This is concerning given allegations by the former Federal Treasurer that the board is 'stacked in favour of mining investments' (see below at paragraph 40).

26. Former Treasurer Wayne Swan on 27 March 2017 raised concerns over how NAIF could satisfy 'an expectation of repayment':

The NAIF does not have a requirement for a positive return. The board only needs to be satisfied that the government can be repaid or the investment can be refinanced. And we have no idea how the board is going to make those decisions. Indeed, they have said they have no documentation about this-none! Nor do they have any documentation about how they would be satisfied that a project actually needs a loan. The few policies they do have they are now keeping a secret.²⁹

27. Incredibly, NAIF appears comfortable with a broad range of assumptions that could forecast new markets up to 30 years in the future. On 19 July 2017 NAIF CEO Laurie Walker stated:³⁰

We have a toolbox of what we call concessions which allow us to put in very long-term tenor, so as I said up to 30 years. We can be very patient as to when we need principal or interest repaid and that will allow people to move on to new supply chains, to take advantage of new markets and we'll be able to support them as they ramp up to take advantage of those opportunities.

28. Senator Canavan suggested on 1 June 2017 that the availability of longer loan tenors was NAIF's key tool to fulfil its mandate. In doing so he described maximum loan tenors as typically 10-11 years before the global financial crisis (**GFC**) and 6-7 years post GFC.³¹ We understand in Australia commercial bank loans for projects do not exceed 5-6 years. There is an important reason why maximum commercial project loan tenors are not 30 years. And the reason exposes a major structural problem with NAIF: it is impossible to reasonably operate on a commercial basis³² with loan terms of up to 30 years. Given no commercial financiers offer such project loans, we query how NAIF might have the expertise to oversee those loans.

29. To illustrate the problem Forbes Magazine contributor Rick Ferri in 2015 equated producing 30 year forecasts to risking 'professional suicide'. He described 30 year forecasts as 'bound to be wrong' and 'a terribly imprecise exercise because no one can know how financial markets will perform in the future. There are just too many variables and too many unknowns.'³³ NAIF's officials cannot satisfy their duty of care and diligence when considering long-term modelling, especially if they ignore

²⁹ House Hansard, 23 March 2017, p 3269

³⁰ Laurie Walker, NAIF CEO, interview with ABC Radio, Tropical North Mackay, Queensland, 19 July 2017

³¹ Senate Budget Estimates, 1 June 2017, transcript proof, p119

³² Investment Mandate Explanatory Memorandum

³³ <https://www.forbes.com/sites/rickferri/2015/03/30/portfolio-solutions-30-year-market-forecast-for-2015/#271af6c63260>

modelling from leading international bodies like the IEA. We note that the optimum average board tenure for firm value is about 10 years,³⁴ and if NAIF board members' average tenure was 10 years, relying on 30 year loan terms opens up the possibility of moral hazard. Relying on unreasonable financial modelling over long time-frames was raised with NAIF in our 11 April 2017 letter. No response was received.

30. In the case of the Galilee Basin railway the result is a massive stranded asset risk for a potential loan tenor more than 400% longer than what is commercially acceptable. EJA has provided ample evidence to NAIF that shows why the Carmichael project and the Galilee Basin railway is commercially unviable and inconsistent with the climate goals of the Paris Agreement. NAIF, in considering the Galilee Basin railway, is effectively making \$1 billion bet from the public purse that the Paris Agreement will fail. Oliver Yates, formerly of the CEFC, recognises that in itself would be enough to damage any governments' reputation.³⁵ To fly in the face of an international agreement carefully crafted by 195 countries is simply embarrassing.
31. For mandatory criterion 7, we note there is no requirement that NAIF's Indigenous engagement strategy reflect *the views of* the Indigenous population in the region. Strangely, there is no requirement that the strategy *be implemented* by NAIF or project proponents. The criterion is silent on the time by which it is to be 'provided' and gives no direction on who it is to be provided to.
32. NAIF's mandatory criteria are loose. It is no surprise then that the Investment Mandate's non-mandatory criteria, to which the board 'must have regard',³⁶ are effectively ignored. For example, non-mandatory criterion 1 requires an amount to be sought from the NAIF of \$50 million or more. On 19 July 2017 NAIF CEO Laurie Walker said:

There's another non-mandatory criterion which is that the minimum size of the NAIF contribution is \$50 million. Now the Board's very flexible on that, and we recognise in parts of our Northern remit that is a very large project if you think that ours is 50% and you match it with 50% ... so the Board's been very flexible on that and say if it's a project that is significantly below that but going to bring that benefit and there is strategic value in developing that project the Board will look at that.³⁷

33. NAIF's Investment Mandate is replete with inadequate safeguards for a \$5 billion concessional loan facility. Objective and reasonable standards to consider risky loan proposals are completely absent. Instead operative terms feature cursory requirements, containing vague wording such as 'have regard to', 'consider a preference for', 'be satisfied there is an expectation', 'to the Board's satisfaction' and 'based on assumptions acceptable to the Board'.

Risk Appetite Statement

34. Senators have requested the production of NAIF's Risk Appetite Statement³⁸ but NAIF and the Minister have not provided it. There is a strong public interest argument for disclosure. Questions on the prudent nature of the Risk Appetite Statement exist, as

³⁴ <http://www.effectivegovernance.com.au/wp-content/uploads/2014/07/Director-Tenure-Paper.pdf> p2

³⁵ <https://www.theguardian.com/environment/2017/jul/06/loan-to-adani-by-infrastructure-fund-could-be-unlawful-says-former-clean-energy-head>

³⁶ Investment Mandate, s 7(3)(a)

³⁷ Laurie Walker, NAIF CEO, interview with ABC Radio, Tropical North Mackay, Queensland, 19 July 2017. See also <http://rdafngts.org.au/wp-content/uploads/2017/07/NAIF-Update-July-2017.pdf> p3

³⁸ Senate Budget Estimates, 1 June 2017, transcript proof, p142

do questions on NAIF's actions in the absence of the statement. In December 2016, when NAIF had made 'preliminary approval' of Adani railway project, no Risk Appetite Statement was in place.³⁹

35. Under the *Commonwealth Risk Management Policy* each entity *must* ensure that the systematic management of risk is embedded in key business processes.⁴⁰ This does not appear to have occurred. If the finalised Risk Appetite Statement would not have permitted investment in the Galilee Basin rail (like commercial best practice embodied by Westpac) yet due diligence was being undertaken by NAIF the result would be a waste of resources. Such a situation flouts the board's duty to promote the proper use and management of resources under s 15 PGPA Act.
36. This circumstance is illustrative of the board failing to adequately establish an appropriate system of risk oversight and management under s 16 PGPA Act. Without disclosing the Risk Appetite Statement, there is no way of knowing whether the board has an appetite for 'prudent risk-taking' which, according to the PGPA Act explanatory memorandum, is 'crucial for improving productivity and innovation in the public sector'.⁴¹ Given APRA and Westpac's comments on treating climate change risks as a financial risk,⁴² NAIF's detailed consideration of Adani's railway absent a Risk Appetite Statement, blindness to the Paris Agreement and extraordinarily long loan tenors, it seems NAIF does not have an appetite for prudent risk-taking. It might be that the 'high risk tolerance' in Investment Mandate s 12(3) is incompatible with the Commonwealth government's broader policy framework as the policy rationale behind the PGPA Act's risk oversight requirements appears to have been ignored. It also appears, contrary to APRA's advice to financial institutions on climate change risks, that NAIF has unreasonably read down the reference to 'climate' in s 12(3)(c) of the Investment Mandate to exclude climate change-related risks.
37. PGPA Act s 35 requires the publication of a corporate plan. It not clear to us why NAIF's 2016/17 corporate plan⁴³ was dated 19 June 2017, 11 days before the end of the 2016/17 year. According to the framers of the PGPA Act the corporate plan is to set out 'the objectives and strategies the organisation is to pursue and the outcomes it hopes to achieve in the coming year'.⁴⁴ That NAIF operated for almost one year without a plan is intriguing.
38. The governance framework as it applies to Commonwealth officials and entities appears adequate, yet evidence suggests NAIF does not adhere to it. When legitimate questions are raised about specific projects, no responses are received. Instead, at critical times, the responsible Minister, who purportedly has no ability to direct the independent NAIF Board on specific projects, comes to NAIF's defence.

³⁹ Senate Budget Estimates, 1 June 2017, transcript proof, p137; <https://350.org.au/press-release/courier-mail-adanis-2b-rail-on-track-for-jobs-boom/>

⁴⁰ CI 16.1; www.finance.gov.au/sites/default/files/commonwealth-risk-management-policy.pdf

⁴¹ PGPA Act Explanatory Memorandum, para 54

⁴² <http://www.apra.gov.au/Speeches/Pages/Australias-new-horizon.aspx>;

www.westpac.com.au/content/dam/public/wbc/documents/pdf/aw/sustainability/WestpacCCEActionPlan.pdf

⁴³ <https://naif-gov-au.industry.slicedtech.com.au/wp-content/uploads/2017/07/FINAL-Corporate-Plan-2016-17.pdf>

⁴⁴ PGPA Act Explanatory Memorandum, cl 226.

The processes used to appoint NAIF Board members, including assessment of potential conflicts of interest

39. The process to appoint board members appears grossly inadequate. We understand board members have been nominated by Senator Matthew Canavan.⁴⁵ There is a fundamental problem with an independent board, especially when a board member such as Ms Way-McPhail is a friend of individual who was once the responsible Minister.⁴⁶ The issue is compounded when the then Minister made repeated public overtures supporting NAIF's provision of financial assistance to the Galilee Basin railway.
40. The process for assessing conflicts of interest is also inadequate. Former Treasurer Wayne Swan on 27 March 2017 said:

.. with a board that has been stacked in favour of mining investments; and with an investment mandate so broad and vague that the Minister Canavan can essentially treat the NAIF as his own personal slush fund. The government has stacked the board with pro-mining people who are unwilling to assert NAIF's independence-and that is most alarming, the most alarming aspect of NAIF.⁴⁷
41. 'Stacking a board' to administer \$5 billion of taxpayer funds for Northern Australian infrastructure 'in favour of mining investments' does not provide a sound basis for consideration of projects. Allegations of bias may ensue. There appears, at minimum, the existence of apprehended bias. The legal rule against bias requires decision makers to approach a matter with an open mind that is free of prejudice and prejudice. We understand the rule against bias can apply to statutory bodies like NAIF.⁴⁸ Put simply, the rule against bias deals with the absence of impartiality for decisions before the NAIF Board. This is particularly important for NAIF because NAIF's board must consider a preference for a diversified portfolio when making an investment decision.⁴⁹
42. To prove apprehended bias, a Court must be satisfied that a reasonable observer *might* have perceived that a person or authority was unable to impartially discharge their functions.⁵⁰ A reasonable observer would note that NAIF has a list of 124 projects, of which 50 are 'active'. Of those 124 projects, 'resources' or mining projects make up 19%.⁵¹ One of two known projects in the due diligence stage is Adani's Galilee Basin rail project, a resource related project - so 50% of the known projects can be classified as mining projects. Adani's project alone is reportedly in line for \$1 billion in funding, or 20% of NAIF's entire loan book.
43. A Court would consider the reasonable observer's understanding that the breakdown of the 124 projects by sector was as follows: transport (23%), energy generation (20%), resources (19%), agriculture (15%), telecommunications and water (each unknown).⁵² A brief scan of board member profiles on NAIF's website by the observer

⁴⁵ Senate Budget Estimates, 1 June 2017, transcript proof, p114

⁴⁶ Senate Budget Estimates, 1 June 2017, transcript proof, p128

⁴⁷ House Hansard, 23 March 2017, p 3269

⁴⁸ <http://www.austlii.edu.au/au/journals/UMonashLRS/2009/10.html#fn3>

⁴⁹ Investment Mandate, s 9(4)

⁵⁰ *Ebner v Official Trustee* (2000) 205 CLR 337

⁵¹ Laurie Walker, NAIF CEO, interview with ABC Radio, Tropical North Mackay, Queensland, 19 July 2017.

Slightly different statistics are provided in the 2016/17 Corporation Plan: <https://naif-gov-au.industry.slicedtech.com.au/wp-content/uploads/2017/07/FINAL-Corporate-Plan-2016-17.pdf>

⁵² Laurie Walker, NAIF CEO, interview with ABC Radio, Tropical North Mackay, Queensland, 19 July 2017

would reveal the prevalence of mining experience and interests. There is no readily observable skills or dedicated capability to deal with energy generation, telecommunications or water. Recently, the lack of representation was recognised by NAIF which admitted to the Senate under questioning on 1 June 2017 that it 'put a water specialist on'.⁵³ Further details are not known.

The transparency of the NAIF's policies in managing perceived, actual or potential conflicts of interest of its Board members

44. When specific conflicts of interest of NAIF Board member Ms Karla Way-McPhail were raised with NAIF in our letter dated 25 May 2017 (**Annexure D**) we asked NAIF to tell us whether or not information about the Galilee Basin rail proposal had been provided to Ms Way-McPhail. We asked NAIF to respond by 7 June 2017. NAIF did not respond to our questions.
45. Ms Walker, NAIF CEO, despite repeated questions from Senators on 1 June 2017, refused to confirm whether or not Ms Way-McPhail has recused herself from any decision on the Galilee Basin project. This information must be disclosed if the integrity of NAIF is to be maintained. Ms Walker states: 'All I can say is I am comfortable that the board members understand their obligations and have complied with them'.⁵⁴
46. There is no evidence that Ms Way-McPhail declared conflicts immediately, or whether there was a period of time in which she or other board members did not understand their obligations or did not comply with them. In addition, the public does not know whether NAIF or Ms Way-McPhail consider the conflicts as a 'material interest'. As such, nobody outside NAIF appears to know what, hypothetically speaking, would be the appropriate way to deal with the conflict. Instead, Senator Canavan on 1 June 2017 relied on the lack of evidence of misconduct to suggest the conflict was dealt with properly.⁵⁵ Absence of evidence is not evidence of absence. The situation must be clarified.
47. Further still, the public does not know whether or not Ms Way-McPhail received any information about the proposal that may give her an advantage. The public must be satisfied that Commonwealth officials have complied with section 27 PGPA Act (duty in relation to position) and section 28 PGPA Act (duty in relation to use of information). Of concern is that Ms Way-McPhail, the day before EJA wrote to NAIF about her conflicts, publicly supported the Adani railway project in local media saying 'we're very supportive' and the project is 'vital'.⁵⁶
48. NAIF's board secretary takes into account conflicts of interest when preparing board papers. EJA could not locate any information that disclosed the identity of the NAIF board secretary. On 30 May 2017 we wrote to NAIF and asked it to disclose the identity of the secretary. No response was received.
49. These questions are of paramount importance and go to the transparency and adequacy of NAIF's conflict of interest process. Instead of adequate public disclosure by the independent board, a shield is put up by the Minister.

⁵³ Senate Budget Estimates, 1 June 2017, transcript proof, p130

⁵⁴ Senate Budget Estimates, 1 June 2017, transcript proof, p115

⁵⁵ Senate Budget Estimates, 1 June 2017, transcript proof, p119

⁵⁶ <https://www.theguardian.com/environment/2017/may/31/adani-director-on-board-that-will-consider-900m-loan-says-project-is-vital>

The adequacy of the Northern Australia Infrastructure Facility Act 2016 and Investment Mandate to provide for and maintain the independence of decisions of the Board

50. NAIF's governing framework is inadequate to achieve the stated goal of independence. NAIF Act s 9(4) says the Investment Mandate must not direct or have the effect of directing NAIF to finance a particular project. There is no requirement that the Minister, or any member of the executive, abstain from public commentary about NAIF's potential financing of particular projects.
51. The Investment Mandate Explanatory Memorandum states "The Facility operates commercially and is governed by an independent Board".⁵⁷ But the Investment Mandate, like the NAIF Act, provides no positive direction to the board to act independently. Ministers have routinely commended the Adani proposal in circumstances where there are over 50 'active' projects. Where \$5 billion in public money is at risk (and where a board member is a friend of the responsible Minister) the safeguards to establish and maintain independence must be stronger.

The status and role of state and territory governments under the NAIF, including any agreements between states and territories and the Federal Government

52. At the time of this submission NAIF's responses to key Senate estimates questions on notice had not been published, and it had not publicly released the Master Facility Agreement despite being requested to do so by the Senate. That agreement purportedly governs the role of the Western Australia, Northern Territory and Queensland governments. Thus, there is little transparency on the role of governments. We submit that the Master Facility Agreement should be made public immediately. There is no legitimate reason to refuse the Senator's request.
53. Nevertheless, the limited public information about the Master Facility Agreement confirms the financing mechanism contemplated for any NAIF loan to the Adani Galilee Basin rail project, as requested by the State of Queensland, is that funds will 'flow from the Commonwealth directly to the proponent'.⁵⁸
54. The *Northern Australia Infrastructure Facility Act 2016 (NAIF Act)* relies on s 96 of the Constitution for its power.⁵⁹ Section 96 is explicit about grants being to the States and Territories, as is the NAIF Act. There is no power under the NAIF Act or section 96 to make grants directly to corporations. A court will interpret the NAIF Act in accordance with its Explanatory Memorandum that states '[t]he intention of this clause [which sets out the functions of the Facility] is to enable the Facility to provide loans, guarantees and other financing mechanisms (as "grants of financial assistance") to the States and Territories'. It is abundantly clear that loans can only be provided to the States. Parliament did not intend NAIF loans to be provided directly to proponents.
55. As such, any conceivable mechanism by which NAIF funds flow directly to the proponent is beyond power and unlawful. The Australian Government Solicitor apparently agrees. A letter dated 18 February 2016 from Queensland Treasurer Curtis Pitt to The Hon Josh Frydenberg states:⁶⁰

⁵⁷ <https://www.legislation.gov.au/Details/F2016L00654/Explanatory%20Statement/Text>. The framework is also inadequate to ensure NAIF acts in a commercial manner.

⁵⁸ Senate Budget Estimates, 1 June 2017, transcript proof, p135

⁵⁹ NAIF Act Explanatory Memorandum, cl 7; NAIF Act, ss 3, 7

⁶⁰ Question on Notice [SI-36](#), p3 of PDF

I am informed that the NAIF design, as guided by constitutional legal advice by the Australian Government solicitor to the Australian Government, requires the Queensland Government to be the legal conduit for the Australian Government to provide loans (or other financial assistance) to NAIF applicants. I am further informed that the Australian Government has indicated that there is no alternative means by which to implement this program, due to restrictions on the Australian Government's constitutional authority to have any direct legal relationship with NAIF recipients.

56. On 29 November 2016 Mr Pitt confirmed the legal position before Queensland parliament:

Under the Commonwealth's existing constitutional powers, it is unable to provide financial assistance directly to proponents within a restricted geographic area.⁶¹

57. There are good reasons for this. High Court of Australia authority on section 96 is against the proposition that NAIF can finance any proponent directly. The *Second Uniform Tax Case* examined the intention of the framers of the Constitution and referred to the s 96 power as 'confined to supplementing the resources of the Treasury of a State'.⁶² Chief Justice Dixon ruled:

The power conferred by s 96 is confined to granting money and moreover to granting money to governments.⁶³

58. A more recent High Court of Australia decision, the *DOGS Case*, confirms that under s 96 a State must enter into an agreement with any non-state entity that will be the ultimate recipient of a s 96 grant.

The State enters into that agreement, not as agent for the Commonwealth, but as principal.⁶⁴

59. Needless to say it is the principal that lends money. And that principal is the State of Queensland.

60. Professor Anne Twomey, respected Constitutional law expert, stated in correspondence with EJA:

I cannot see how, under the current form of the *Northern Australia Infrastructure Facility Act 2016* (Cth), financial assistance could be granted by the Facility directly to Adani. Section 41 of the Act provides that the Consolidated Revenue Fund is appropriated 'for the purposes of providing grants of financial assistance to the States and Territories for the construction of Northern Australia economic infrastructure'. Section 7 of the Act provides that the Functions of the Facility are 'to grant financial assistance to States and Territories for the construction of Northern Australia economic infrastructure'. While it is certainly the case that such assistance could be granted to the State of Queensland subject to a condition that funds be paid to a private body for the purpose of constructing the infrastructure, it would

⁶¹ Queensland Hansard, First Session of the Fifty-Fifth Parliament, at 4629:

http://www.parliament.qld.gov.au/documents/hansard/2016/2016_11_29_WEEKLY.pdf

⁶² *Victoria v Commonwealth* (1957) 99 CLR 275 at 609 per Dixon CJ ('*Second Uniform Tax Case*')

⁶³ *Victoria v Commonwealth* (1957) 99 CLR 275 at 609 per Dixon CJ

⁶⁴ *Attorney General (Vic); Ex rel Black v Commonwealth (DOGS Case)* (1981) 146 CLR 559 at 660 per Wilson J

appear from the legislation that the financial assistance from the Facility must be granted to the State (not to the private body).

To the extent that the Act relies upon s 96 for its head of power, then such grants must be made to the States (albeit on condition that the money be passed on to other bodies). Grants cannot be made directly under s 96 to bodies that are not the States.⁶⁵

61. Senator Canavan on behalf of the Federal government on 28 May 2017 confirmed there would be no changes to NAIF's governing framework.⁶⁶ Without changes to the NAIF Act, there is no apparent way for NAIF to lend money directly to Adani.
62. Under the Constitution of Queensland, we understand there is no way for grants of financial assistance to Queensland not to be accounted for in the State's consolidated revenue fund.⁶⁷ It is unclear why Queensland limited NAIF to fund Adani in a manner that appears unlawful under its own Constitution.
63. On 1 June 2017 Ms Walker, CEO, revealed to the Senate that NAIF had not sought legal advice on the proposed arrangement for Adani under the Master Facility Agreement.⁶⁸ Further, she said 'that is not really a matter for us'.⁶⁹ We think it is.
64. We understand NAIF has access to the Australian Government Solicitor. It has a hand-picked, skills based independent board. They are described by NAIF's CEO as 'skilled, experienced non-executive directors [who] understand their duties and obligations'.⁷⁰ Yet NAIF proceeds with due diligence on the Adani Galilee Basin rail project when the only acceptable financing arrangement to Queensland looks unlawful. An overwhelming risk exists that NAIF is wasting taxpayers' money in considering a project, and potentially giving \$1 billion to it, when doing so would be unconstitutional. This risk has not been addressed contrary to the board's s 15 PGPA Act duties on the proper use of resources and, it would seem, contrary to its s 16 PGPA Act duties on risk management.
65. We urge NAIF to produce the current Master Facility Agreement between it and Queensland so the public can understand how it might lawfully propose to lend money directly to the as yet unknown entity that is somehow related to Adani's rail proposal.

⁶⁵ Email from Professor Anne Twomey, 4 July 2017

⁶⁶ <https://www.northernstar.com.au/news/adani-may-axe-mine-plans-thanks-state-government/3183236/>

⁶⁷ Section 64

⁶⁸ Senate Budget Estimates, 1 June 2017, transcript proof, p135

⁶⁹ Senate Budget Estimates, 1 June 2017, transcript proof, p135

⁷⁰ Senate Budget Estimates, 1 June 2017, transcript proof, p114

Any other related matters

66. The *Commonwealth Risk Management Policy* states each entity must implement arrangements to communicate and consult about risk in a timely and effective manner to both internal and external stakeholders.⁷¹ This has not been EJA's experience and the lack of any or meaningful responses to our inquiries does not reflect timely or effective communication. It certainly does not reflect the best practice of Australian commercial financiers.

Yours sincerely,



David Barnden
Lawyer
Environmental Justice Australia

⁷¹ CI 19.1; www.finance.gov.au/sites/default/files/commonwealth-risk-management-policy.pdf