

Submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee reviewing the *Export Finance and Insurance Corporation (New Mandate and Other Measures) Bill 2013*.

I. INTRODUCTION

1. Jubilee Australia is pleased to present this submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee for consideration with reference to the *Export Finance and Insurance Corporation (New Mandate and Other Measures) Bill 2013* (the **bill**).
2. Jubilee Australia has invested many years carefully researching EFIC's policies, practices and the impacts of the projects it supports. The work of Jubilee Australia and other advocates helped lead to the Australian Government's November 2011 establishment of a Productivity Commission inquiry into Australia's export credit arrangements.
3. Jubilee Australia's interest in EFIC is almost exclusively concerned with projects which have significant social and environmental impacts. These projects tend to be associated with extractive industries and are designated Category A projects. This submission is directed at ensuring better decision-making around these projects, as well as those that are supported on the National Interest Account. Although the vast majority of export transactions financed by EFIC do not fall into this category, extractive industry sector projects nevertheless represent, historically, approximately one quarter of EFIC's portfolio in dollar terms.
4. Through the use of taxpayer money, EFIC's decisions with respect to these Category A and National Interest Account projects can have a tremendous impact on poor communities overseas. As Jubilee Australia detailed in its recent *Pipe Dreams* report, EFIC has been a major financier of the Papua New Guinea Liquefied Natural Gas Project. Not only is this \$19 billion project the largest development project in the history of the Pacific region, it has also completely transformed the PNG economy. EFIC has also supported other 'mega-projects' throughout its history. These projects can have significant social and environmental impacts, which need to be weighed up against their potential benefit.
5. Unfortunately EFIC, like other ECAs, has not always demonstrated the capacity to accurately or effectively weigh the potential benefits of such projects against potential harmful consequences. The reforms suggested in this submission aim to ensure that EFIC decisions with respect to these projects, which are supported by taxpayers' money, are subject to adequate risk management, transparency and accountability requirements.
6. The final report and recommendations of the Productivity Commission (the **Commission**) suggested widespread changes to the EFIC Act, often directed at improving transparency and accountability. The bill, however, ignores key Commission recommendations.
7. Jubilee Australia makes this submission with the aim of ensuring that the taxpayer funded work of the Commission and its key recommendations are adequately incorporated into legislation.

8. Jubilee, supported by the Commission's findings, submits to the Senate Committee that it recommend amendments to the bill (and the EFIC Act) to:

- make EFIC subject to freedom of information legislation,
- require that the Government release a National Interest Statement for National Interest Account transactions,
- ensure adequate assessment and disclosure of human rights impacts and environmental damage,
- remove its exemption from the operation of environmental legislation, and
- disclose its intentions to finance Australian based projects.

II. REMOVAL OF THE FREEDOM OF INFORMATION ACT EXEMPTION

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| Jubilee Recommendation | Remove exemption to FOIA legislation. |
| Productivity Commission | Recommendation 9.8 of the Commission’s Report on Australia’s Export Credit Arrangements. |
| UN Support | <ul style="list-style-type: none"> • Endorsed by the UN Independent Expert on foreign debt and human rights. • Codified in the <i>UN Guiding Principles on Business and Human rights</i>, for which Australia acted as a sponsor. |
| Best Practice | International standards include ECA compliance with the OECD Common Approaches and the Equator Principles, which embrace transparency and disclosure. |
| Relevant section of EFIC Act | New section required. |
| Other legislative and regulatory recommendations | <p>Amendment of Schedule 2 of the <i>Freedom of Information Act 1982 (Cth)</i>, which is currently the subject of a Parliamentary review.</p> <p>Establishment of an EFIC Disclosure Policy in line with the Australian Government’s 2010 <i>Declaration of Open Government</i>, and which provides boundaries for defining commercial confidentiality.</p> |

9. **Under the *Freedom of Information Act 1982 (Cth)* (FOIA) Schedule 2, all documents relating to anything done by EFIC under Part 4 (Insurance and Financial Service Products) or Part 5 (National Interest Transactions) of the EFIC Act are exempt from public disclosure.**
10. The Federal government has ultimate fiscal responsibility for the operation of EFIC. Not only is the government the financial guarantor of EFIC, providing a guarantee of \$200m in callable credit, the government is also the sole shareholder and beneficiary of EFIC, with the Commonwealth receiving an annual dividend payment. This makes EFIC a *de facto*, if not *de jure*, organ of government.
11. EFIC relies heavily upon taxpayers’ money. As such, it should be subject to the same transparency and accountability mechanisms as other state bodies. It cannot consistently put client confidentiality above public interest concerns.
12. EFIC’s business is risk; financial risk as well as environmental, social and human rights risk. EFIC has a responsibility to inform the public adequately of these risks and to manage them on behalf of the Government and taxpayers, the ultimate bearers of these risks.

13. EFIC's transparency lags behind that of many of its peers. The removal of EFIC's statutory exclusion from the FOIA is to redress this deficit.

Productivity Commission

14. The Productivity Commission supports Jubilee's position that EFIC's special exemption from the FOIA should be removed in order to improve accountability.

"The Australian Government should remove EFIC's special exemption in relation to matters done under Parts 4 and 5 of the Export Finance and Insurance Corporation Act 1991 from the *Freedom of Information Act 1982* (while retaining protection for Cabinet and commercial-in-confidence material)." Productivity Commission Report on Australia's Export Credit Arrangements, Recommendation 9.8¹

International comparisons

15. In the European Union the Aarhus Convention on access to public information, public participation in decision-making and access to justice in environmental matters has been incorporated into European law and binds EU institutions and bodies, as well as Member State public authorities. It facilitates public examination of decisions of EU Institutions and Member State public authorities, including export credit agencies, with regards to the activities of European corporations operating outside the EU.²
16. The export credit agencies of the US and UK are covered under their countries' freedom of information laws and they do not enjoy general exemptions. The Export-Import Bank of the US has nine specific exemptions³ from the US *Freedom of Information Act* and is subject to a disclosure policy detailed in the Procedures for Disclosure of Records under the *Freedom of Information Act*.⁴ The UK Export Credits Guarantee Department operates under the UK *Freedom Of Information Act 2000*, which itemises the UK Export Credit Guarantee Department's exemptions into 24 discrete categories.
17. The blanket nature of the EFIC exemption to the Australian FOIA stands in stark contrast to these international peers.

UN support

18. Dr Cephas Lumina, the UN Independent Expert on foreign debt and human rights expressed concern about EFIC's disclosure policies in a report following a 2011 visit to Australia. Removing the FOI exemption is consistent with his remarks:

"... the Independent Expert fully supports the view that the absence of transparency requirements raises serious questions about the agency's accountability to Australian taxpayers and to citizens of the developing countries where it supports

¹ <http://www.pc.gov.au/projects/inquiry/export-credit/report> p299.

² <http://ec.europa.eu/environment/aarhus/>.

³ <http://www.exim.gov/about/library/foia/foiaannualreports/2012.cfm>.

⁴ <http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&rgn=div6&view=text&node=12:5.0.2.3.3.1&idno=12>.

projects. Loans underwritten by the Government of Australia or guaranteed by the Governments of the countries where EFIC-supported projects are being implemented are matters of public concern.”⁵

19. The *UN Guiding Principles on Human Rights and Business*, particularly Principle 21, supports transparent operation; removing the FOI exemption is consistent with the Principles.⁶

Best practice

20. The Minister, in the Statement of Expectations on EFIC, expects EFIC to comply with the OECD Common Approaches on the Environment and Officially Supported Export Credits, the Equator Principles and other relevant international standards.⁷ Transparent reporting and disclosure are an important part of both standards.⁸ Removing the FOIA exemption is, therefore, consistent international standards.

Notes on ‘commercial in confidence’

21. In a public statement to the Parliamentary Inquiry into Australia’s relationships with the Countries of Africa, 7 December 2010, EFIC made the following comment in relation to public disclosure:

“Our concern around commercial-in-confidence is very much around the commercial end. We have firms who give us their financial statements, and if they are small firms that means I can tell how much their chief executive is paid. These firms are small, privately held companies through to big companies. They give us a whole raft of documents, and our commercial-in-confidence exemption is based on the fact that they do not want that material in the public arena. What we are willing to put in the public arena...are matters concerning the environment, but not issues of their cash flows, their internal reports et cetera.”

22. Jubilee Australia is in full agreement with EFIC that documents such as financial statements and cash flows of client companies should be kept confidential. We are also in agreement with the comment above, which identifies the distinction between commercial information and information pertaining to social and environmental issues. Neither in the policies nor the practices of EFIC is this distinction clear. “Commercial-in-confidence” is not defined and no Disclosure Policy exists.

23. The Commission addressed EFIC’s challenge of managing commercial confidentiality in this passage.

⁵ <http://www.pc.gov.au/projects/inquiry/export-credit/report>, Lumina 2011, p. 12.

⁶ <http://www.terna.it/LinkClick.aspx?fileticket=RrU6uaHgL81%3D&tabid=5399>.

⁷ http://www.efic.gov.au/about/governance/Documents/Minister-for-Trade-Statement-of-Expectations-19-July-2011.pdf?utm_source=seo&utm_medium=EFIC-Board&utm_campaign=seo-efic-expectations-PDF-110824.

⁸ The Equator Principles refer to the IFC Performance Standards and the IFC Performance Standards refer to disclosure of information to affected stakeholders in Section 29 of PS1.

“The costs of publicly releasing material that may compromise a firm’s commercial advantage must ultimately be weighted against the reputational risks to the Australian Government of supporting projects with potential significant environmental and social impacts. As public sector entities have stewardship of public funds, they are subject to different forms of operational accountability than private sector entities. The requirement for such transparency could reasonably be thought of as a cost of dealing with a government-owned entity.”⁹

24. Further, the Commission has found that the FOIA has adequate provision for ensuring the confidentiality of client information.

“If EFIC were subject to the FoI Act exemption provisions under the legislation would apply to information in its possession, including those related to Cabinet and commercial-in-confidence material. This would maintain the confidentiality of EFIC’s client’s commercially valuable information while also providing scope for enhanced transparency of EFIC’s operations on the CA [Commercial Account]”.¹⁰

25. Considerations of commercial confidentiality might preclude the release of some documents such as resource exploration maps. However there is no reasonable justification for environmental impact assessments, minutes of meetings with local communities and risk assessments of all types to be hidden behind a “commercial-in-confidence” curtain. The rationale of risk assessment is undermined if the assessments themselves are kept secret.

26. The following documents should at minimum be available on FoI requests, or ideally released publicly by EFIC:

- a. Project assessments undertaken during due diligence,
- b. Modifications and mitigation measures required by EFIC, and
- c. Project monitoring and evaluation documents generated by EFIC project proponents and consultants throughout project implementation.

27. The Commission’s report has stated that “the FoI Act exemptions reduce the ability of the public and the Australian Parliament to examine facilities for their environmental, social and human rights impacts.”¹¹

Legislative and Regulatory Mechanisms

28. The Attorney-General of Australia is currently undertaking a review of *the Freedom of Information Act 1982* and section 33 of the *Australian Information Commissioner Act 2010*. Dr Allan Hawke AC is conducting the review and is expected to submit his report by 30 April 2013.

⁹ <http://www.pc.gov.au/projects/inquiry/export-credit> P299.

¹⁰ <http://www.pc.gov.au/projects/inquiry/export-credit> P299.

¹¹ http://www.pc.gov.au/data/assets/pdf_file/0019/117514/12-export-credit-chapter9.pdf p298.

Recommendations

29. The EFIC Act should explicitly refer to the ability to obtain information through FoI requests. Concurrent amendment to Schedule 2 of the FOIA is to be made.
30. The EFIC Act to require the publication of documents listed in #26 on the EFIC website or tabled in Parliament within a reasonable time frame.
31. The EFIC Act amended to require creation and publication of a Disclosure Policy in line with the Australian Government's 2010 *Declaration of Open Government*.¹² The Disclosure Policy will have a presumption in favour of disclosure, providing limits to commercial-in-confidence by requiring companies to demonstrate commercial confidentiality before a document is withheld from public release.

¹² <http://agimo.gov.au/2010/07/16/declaration-of-open-government/>

III. NATIONAL INTEREST ASSESSMENT

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| Jubilee Recommendation | Mandatory disclosure of a National Interest Statement for National Interest Account Transactions. Definition for “National interest” in the context of the EFIC mandate. |
| Productivity Commission | Recommendation 9.5 of the Commission’s Report on Australia’s Export Credit Arrangements. |
| UN Support | N/A |
| Best Practice | Australian precedents for national interest assessment exist in the <i>International Monetary Agreement Act 1947 (Cth)</i> and the <i>Environment Biodiversity and Conservation Act 1999 (Cth)</i> . |
| Relevant section of EFIC Act | New section required. |
| Other legislative and regulatory recommendations | N/A |

32. Most EFIC facilities are written on the Commercial Account. The Commercial Account is operated on a fully commercial basis by the EFIC board and management who take sole responsibility for assessing risk and making financing decisions.
33. Facilities written on the EFIC National Interest Account are the subject of the strategic objectives of the Government.
34. The Minister for Trade can direct EFIC to arrange funding if such an arrangement is deemed to be “in the national interest”, and “whether or not EFIC would enter into the transaction in the ordinary course of business”.¹³
35. The use of the National Interest Account has occurred where the size or risk of a deal is beyond the commercial parameters of EFIC. EFIC refers the deal to the Minister of Trade for consideration on the National Interest Account. The Minister considers whether providing support for the transaction is in the “national interest”.
36. The EFIC Act does not stipulate a process by which the Minister must justify the national interest decision, only requiring such a direction from the Minister of EFIC to be in writing and the basic particulars of the transaction to be published in the Gazette.
37. The Minister is not required to disclose how the “national interest” has been assessed, nor the reasons for the approval. A ministerial direction to apply taxpayer funds for

¹³ EFIC Act, s29.

finance or insurance of risky business overseas could be as simple as a minute from a confidential Cabinet meeting.

38. Any substantive information used to justify this decision is protected by cabinet-in-confidence and the validity of the decision is not open for debate by elected members of Federal Parliament. **There are no checks and balances in this system and, in an environment of minimal transparency, intended or unintended abuses of the policy might occur and go undetected.**
39. National Interest Account transaction proposals require assessment and disclosure of the national interest benefit to Australia.

Productivity Commission

40. The Productivity Commission Recommendation 9.5 states:

“Proposed facilities with national interest objectives should only be considered in the context of the national interest account.

The Australian Government’s assessment of national interest account facilities should include analysis of whether the proposal is the most cost-effective way of achieving intended outcomes.

The Australian Government should clearly and publicly articulate the justification for a national interest account facility after it has been approved by the Minister.

Information on the performance of national interest account facilities should be collated and publicly reported by the Australian Government.¹⁴

41. We fully endorse the Productivity Commission Recommendation on this matter however we note that no definition of “national interest” is provided EFIC. It may be taken to mean ensuring Australian subcontractors and suppliers are involved in projects, including projects in Australia with foreign proponents?¹⁵ It may be taken to incorporate considerations of resource security, as the national interest of the Japanese ECA JBIC is interpreted to mean?¹⁶
42. The lack of definition of “national interest” and potential wide range of considerations is unacceptable for the taxpayers that fund the national interest account.

¹⁴ http://www.pc.gov.au/data/assets/pdf_file/0019/117514/12-export-credit-chapter9.pdf, p288.

¹⁵ Mr Field of EFIC during the Productivity Commission Inquiry, Sydney Hearing 4 April 2012, at p295, suggests this was the reason justifying EFIC’s \$50m support of UGL via a bonded facility, albeit located on the commercial account. Transcript: http://www.pc.gov.au/data/assets/pdf_file/0007/116467/export-credit-20120404-sydney-transcript.pdf. Details of the facility are in EFIC’s 2012 Annual Report. We assume the facility is on the commercial account, as 2012 National Interest account exposure for Australian products is less than \$50m. This is an assumption. The fact that we can’t be sure is an example of the opacity behind which EFIC operates.

<http://www.efic.gov.au/about/governance/AnnualReports/Documents/EFIC-Annual-Report-2012.pdf> at pp10,29.

¹⁶ Mr Armour of EFIC during the Productivity Commission Inquiry, Sydney Hearing 4 April 2012, at p300: http://www.pc.gov.au/data/assets/pdf_file/0007/116467/export-credit-20120404-sydney-transcript.pdf.

Legislative and Regulatory Mechanisms

43. The *International Monetary Agreement Act 1947 (Cth) (IMAA)* provides a precedent for the establishment of an EFIC process for publicly disclosing and reviewing export credit proposals deemed in the national interest.
44. Section 8D of the IMAA establishes the mandate for the release of a national interest statement¹⁷ and Section 8E of the IMAA defines the contents of the national interest statement:

A national interest statement under Section 8D is to include:

 - (a) A description, in as much detail as practicable, of the nature and terms of the agreement; and
 - (b) the reasons why the agreement is in Australia’s national interest, having regard, in particular, to foreign policy, trade and economic interests.¹⁸
45. The IMAA does not define national interest but refers to foreign policy, trade and economic interests.
46. The *Environment Biodiversity and Conservation Act 1999 (Cth)* Section 303A refers to the national interest and allows the Minister to consider Australia’s defence, security or a national emergency and other things.

Recommendations

47. “National interest” in the context of the EFIC mandate is to be defined in the legislation. At minimum the legislation should refer to heads of consideration in determining what is in the national interest, such as the IMAA.
48. In determining whether or not EFIC support from the national interest account is in the national interest, the Minister must consider, amongst other things, the key assessment documentation (such as those described in Annex 1).
49. The Minister’s considerations and reasons must be detailed in a “national interest statement”.
50. The “national interest statement” is to be tabled in Parliament at least 21 days prior to the approval of Category A projects.

¹⁷ http://www.austlii.edu.au/au/legis/cth/consol_act/imaa1947360/s8d.html.

¹⁸ http://www.austlii.edu.au/au/legis/cth/consol_act/imaa1947360/s8e.html.

IV. PROJECT DISCLOSURE, PUBLIC PARTICIPATION AND ASSESSMENT

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|-------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Jubilee Recommendation | Statutory requirements for project disclosure, public participation and assessment. |
| Productivity Commission | Recommendation 9.6 of the Commission’s Report on Australia’s Export Credit Arrangements. |
| UN Support | <ul style="list-style-type: none"> • Endorsed by the UN Independent Expert on foreign debt and human rights. • Codified in the <i>UN Guiding Principles on Business and Human rights</i>, for which Australia acted as a sponsor. |
| Best Practice | Canada’s ECA - Export Development Canada. US Overseas Private Investment Corporation (OPIC). ECAs operating in compliance with the OECD Common Approaches and the Equator Principles. |
| Relevant section of EFIC Act | Section 2. |
| Other legislative or regulatory recommendations | Procedures for fulfilling the statutory mandate for public disclosure, public participation and assessment. |

51. **The EFIC Act and the bill contain no requirements for project disclosure, public participation and submissions, and the consideration of environmental and social benchmarks before EFIC makes a decision on a major project.**
52. From EFIC’s support of the Ok Tedi and Porgera mines in the 1980s and 1990s, to the present day support of the PNG LNG project, EFIC has an ongoing record of approving projects without adequate consideration of social and environmental impacts. Jubilee’s thorough examination of EFIC’s PNG LNG financing decision found that EFIC support occurred despite manifest evidence that the landowner consultation process was flawed and still-valid concerns that the project could cause significant social conflict.
53. Such project benchmarking against environmental and social standards occurs as does occur at the moment presently happens behind closed doors. There is presently no way for Australian taxpayers or project-affected communities to determine the accuracy of EFIC’s benchmarking against the standards that it has promised to uphold. Moreover, as Jubilee Australia has experienced, there is presently no way to hold EFIC to account when it gives support to clients despite clear and manifest violations of EFIC’s social and environmental safeguards.
54. We recommend that the EFIC Act be amended to include these processes to guarantee transparency, public participation and accountability and that the key features of the Environmental and Social Policy should be formally recognised in the EFIC Act.
55. Our recommendations in this section apply to EFIC financing of Category A projects, those deemed to have the greatest environmental and social impacts by the World

Bank. The recommendations apply to financing by EFIC on the commercial account and the national interest account¹⁹ and apply to projects located both in and out of Australia.

UN support for amendments

56. Dr Cephas Lumina, the UN Independent Expert on foreign debt and human rights has recently expressed concern about EFIC's disclosure policies:

“EFIC should be required to publicly disclose information concerning its activities, including project assessment, decision-making and implementation and to undertake assessments of the human rights impact of its financing decisions (in addition to its environmental and social impact assessments).”²⁰

57. The UN Guiding Principles on Business and Human Rights (**UN Principles**)²¹ emphasise the nexus between export credit agencies and human rights obligations at Principle 4 (see below at paragraph 82). Principle 18 sets out the requirement to assess actual or potential adverse human rights impacts and consult with potentially affected groups.²² Principle 5 guides states to legislate to ensure adequate oversight for human rights obligations.²³

58. Our view is that meaningful consultation with potentially affected groups and relevant stakeholders requires that submissions be accepted from interested parties in Australia and overseas. This is the current EFIC practice for Category A projects but it is unenforceable at law. The EFIC Act should be amended to ensure EFIC complies with this practice.

59. An independent human rights impacts assessment is proposed in UN Principle 18.3. An Independent Expert Scientific Committee is proposed to provide an assessment of impacts of coal seam gas or large coal development projects, being of national environmental significance. This committee and reporting to the Minister is contemplated in proposed amendments to the *Environment Protection Biodiversity and Conservation Act 1982 (Cth)*.²⁴

¹⁹ This is because the distinction is largely artificial. The National Interest account is 100% taxpayer funded and EFIC recognises that all profits and losses on the commercial account belongs to the government Mr Armour of EFIC during the Productivity Commission Inquiry, Sydney Hearing 4 April 2012, at p293:

http://www.pc.gov.au/data/assets/pdf_file/0007/116467/export-credit-20120404-sydney-transcript.pdf .

²⁰ Lumina 2011, p. 12.

²¹ <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples> .

²² Principle 18. In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should:

(a) Draw on internal and/or independent external human rights expertise;

(b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.

²³ Principle 5. States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.

²⁴ <http://www.environment.gov.au/epbc/about/2013-amendments-q-and-a.html> .

Productivity Commission

60. Recommendation 9.6 of the Commission's Report says the following:

“The Minister should amend the Statement of Expectations to require EFIC to publicly disclose its prospective involvement in any facility with potentially significant environmental or social impacts. This includes all category A projects, and ‘non-projects’ and bonds where it has been determined that there is potential for significant environmental and social impacts.

Information relating to the environmental and social classification of projects and the reasons for their approval should be predictable and disclosed in the annual report and on EFIC's website. This information should include assessment benchmarking and processes, conditions of approval and consequences for non-compliance. Information that is relevant to EFIC's assessment of environmental and social impacts should be made public.

EFIC should make public its involvement in supporting projects that are subject to environmental assessment in Australia.”²⁵

61. We fully endorse this recommendation from the Productivity Commission, but specify that EFIC's disclosure of its assessment of social and environmental safeguards occurs before announcement of project financing, in a process detailed in Annexure 1. We also recommend that this disclosure be codified in the Act itself, rather than just in the Statement of Expectations.
62. The Commission also recognised that future delays to projects could be caused by adverse human rights outcomes.²⁶ The same can be said for adverse environmental impacts. This is why it is prudent to fully assess impacts prior to approval of finance.
63. We expect the assessment and reporting requirements in Annexure 1 will not delay EFIC's clients any more than should they deal only with private financiers given the efficiencies that clients now enjoy over dealing with private financiers. In submissions, EFIC clients repeatedly stated that without EFIC, they would have experienced delays to financing.²⁷

Best practice

64. The OECD Common Approaches and the Equator Principles are international standards for managing environmental and social risk and are identified in the Minister's

²⁵ http://www.pc.gov.au/data/assets/pdf_file/0019/117514/12-export-credit-chapter9.pdf p40.

²⁶ http://www.pc.gov.au/data/assets/pdf_file/0019/117514/12-export-credit-chapter9.pdf, p290.

²⁷ Productivity Commission Inquiry, Perth Hearing, 23 April 2012, at pp6,12:

http://www.pc.gov.au/data/assets/pdf_file/0016/116125/export-credit-20120323-perth-transcript.pdf.

Statement of Expectations to EFIC as protocols they must comply with. Disclosure, stakeholder consultation and transparency are an important part of both standards.²⁸

65. Recently a Bill was introduced in the Canadian Parliament aimed at regulating Canada's Export Credit Agency as well as extractive industry companies in order to create contractually binding eligibility criteria for export credit financing, based on environmental and human rights standards. After a wide-ranging stakeholder engagement process with civil society and a long period of debate the Bill was put to a vote and was defeated by an extremely narrow margin of votes.

Recommendations

66. We recommend that statutory requirements for project disclosure, public participation and assessment be incorporated into the EFIC Act. Legislative machinery is set out in Annexure 1.

²⁸ http://www.equator-principles.com/resources/equator_principles.pdf) and http://www1.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES.

V. STATUTORY RECONGITION OF EFIC’S INTERNATIONAL AND HUMAN RIGHTS OBLIGATIONS

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| Jubilee Recommendation | Statutory recognition of international obligations, including human rights obligations. |
| Productivity Commission | Recommendation 9.7 of the Commission’s Report on Australia’s Export Credit Arrangements. |
| UN Support | <ul style="list-style-type: none"> • Endorsed by Special Representative of the UN Secretary General on Human Rights and Business. • Endorsed by the UN Independent Expert on foreign debt and human rights. • Codified in the <i>UN Guiding Principles on Business and Human rights</i>, for which Australia acted as a sponsor. |
| Best Practice | Canada’s ECA - Export Development Canada. US Overseas Private Investment Corporation (OPIC). |
| Relevant section of EFIC Act | New section required. |
| Other comments | Procedures for disclosing human rights assessments. |

67. The EFIC Act and bill (contrary to the advice of the Commission) do not require articulation of EFIC’s international obligations, especially its human rights obligations.

68. Category A projects, especially those in extractive industries, can be associated with human rights violations. This is especially the case (a) if the project takes place in a location where there is a recent history or culture of violence, which can be exacerbated by the project (b) companies contract government or private security forces to protect the project from local people. Both these situations can lead to the escalation of violence and of human rights violations.

69. In the case of PNG LNG, although the project has been associated with a number of instances of violence as outlined in Jubilee Australia’s Pipe Dreams report, there remains an even greater fear that widespread violence could erupt in the project impact area if the already tense relationship between the landowners and the Government/companies breaks down. Jubilee Australia suspects that although such risks were known before the financing decision was taken, they were disregarded in a way that shows up the inadequacy of EFIC’s process for incorporating human rights violations into its decisions.

UN Support

70. Professor John Ruggie, the Special Representative of the UN Secretary General on Human Rights and Business, states:

“As I see it, ECAs potentially are running two risks in relation to human rights. The first is the risk that a client’s business activities or relationships contribute to human rights abuse abroad, with the moral, reputational, political and in some cases legal implications this entails for an ECA itself. The second is the financial risk to the project that may result from its adverse impact on the human rights of individuals and communities, which in turn could affect the ECA’s own exposure. These risks are inextricably linked. But in the case of many if not most ECAs, they are currently unknown and unmeasured. Why is that the case? Why do you not, as a matter of course, practice human rights due diligence yourselves, and require it of projects you support?

Moreover, I doubt that there is any Government among the ECG [Export Credit Group] countries that disagrees with the fundamental principle that as ECAs pursue their statutory mission, they should not add to the human rights burdens of individuals and communities in capital importing countries. If I’m wrong, then I am prepared to try to persuade your parliaments.”²⁹

71. There should be no distinction between the national interest account and commercial account in terms of compliance with international obligations. Professor Ruggie supports the proposition that Human Rights obligations should apply to commercial and publicly funded export credit operations.

“As affirmed in UN Human Rights Council resolution 8/7, adopted unanimously in June 2008, all business enterprises have ‘the responsibility to respect all human rights’—where respect means to act with due diligence to avoid infringing on others’ rights. So if your ECA is a commercial entity, this language applies directly to you. If yours is a public entity, then you can hardly ask less of yourselves than your governments, collectively, have agreed to ask of business. And no public entity should be using public funds or public authority to contribute to human rights harm in other countries—or have to admit that it has no way of knowing whether or not it does.”³⁰

72. Cephas Lumina states:

“In particular, the Government of Australia should ensure that the activities of EFIC are fully compliant with Australia’s international human rights obligations.”³¹

²⁹ <http://www.rightrespect.org/wp-content/uploads/2010/08/Ruggie-remarks-to-OECD-re-export-credit-agencies-23-Jun-2010-3.pdf>.

³⁰ Ruggie-remarks-to-OECD-re-export-credit-agencies-23-Jun-2010-3 p5.

³¹ (Lumina 2011, p. 12).

73. Professor Ruggie acknowledged that “some ECAs say they would need statutory authority to incorporate human rights impacts into their work”.³² We consider such a statutory authority to be the best way of incorporating assessment of human rights impacts into EFIC’s work.
74. The UN Principles unequivocally state that States have the obligations to protect human rights (Principle 1) and that these rights should be articulated for business enterprises (Principles 2, 3). Principle 4 emphasises that states should require Export Credit Agencies or the business they engage to conduct human rights due diligence.

Principle 4

States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.

75. The rationale to ensure EFIC respects human rights and other international obligations and the implementation of human rights via legislation and regulations are explained in the commentary to Principle 4:

States individually are the primary duty-bearers under international human rights law, and collectively they are the trustees of the international human rights regime. Where a business enterprise is controlled by the State or where its acts can be attributed otherwise to the State, an abuse of human rights by the business enterprise may entail a violation of the State’s own international law obligations. Moreover, the closer a business enterprise is to the State, or the more it relies on statutory authority or taxpayer support, the stronger the State’s policy rationale becomes for ensuring that the enterprise respects human rights.

Where States own or control business enterprises, they have greatest means within their powers to ensure that relevant policies, legislation and regulations regarding respect for human rights are implemented. Senior management typically reports to State agencies, and associated government departments have greater scope for scrutiny and oversight, including ensuring that effective human rights due diligence is implemented.

76. The Guiding Principles do not prescribe which human rights obligations apply to business enterprises (Principle 18). We think a similar approach to the identification of human rights obligations that EFIC is to comply with should be taken, and the EFIC act be amended to refer to compliance with any human rights treaties or convention that Australia is party to. We propose that the EFIC Act is amended to refer to international human rights obligations as identified by an appropriate body, such as the Australian

³² Ruggie-remarks-to-OECD-re-export-credit-agencies-23-Jun-2010-3 p4

Human Rights Commission.³³ ECAs are becoming more accountable to binding standards and the trend is moving in the direction of statutory recognition of environmental and social due diligence requirements.

Best Practice

77. ECAs are becoming more accountable to binding standards and the trend is moving in the direction of statutory recognition of environmental and social due diligence requirements.
78. Export Development Canada, Canada's export credit agency, has recognised its policy for ensuring environmental and social review of transactions³⁴ in the Export Development Act 1985³⁵ for the purpose of ensuring consistent application of its environmental and social due diligence procedures.
79. In December 2009 the US Congress passed the 2010 Consolidated Appropriations Act that, in addition to appropriating funds to the US Overseas Private Investment Corporation (OPIC), compels OPIC to issue a "comprehensive set of environmental, transparency and internationally recognised worker rights and human rights requirements binding on the Corporation and its investors." This new set of standards is required to be "no less rigorous" than relevant World Bank social and environmental policies or OPIC's existing standards.

Productivity Commission

80. Recommendation 9.7 of the Productivity Commission's report states:

"The Minister, by way of a direction under the Export Finance and Insurance Corporation Act 1991, should articulate which international obligations, including human rights obligations, EFIC is required to comply with.

EFIC's compliance with those obligations should be included in its internal audit Program with outcomes publicly reported, including in EFIC's annual report."³⁶

81. On the issue of environmental and social risk the Commission's report made this further statement:

"Risks faced by EFIC – including reputational risk - are ultimately borne by the Australian Government. To ensure any risk to the Australian Government is avoided or mitigated, it is important that EFIC's obligations under international agreements are expressed clearly to EFIC by the Australian Government, and that EFIC meets these obligations."³⁷

³³ <http://www.humanrights.gov.au/human-rights-explained-fact-sheet-7australia-and-human-rights-treaties> .

³⁴ EDC Environmental and Social Review Directive <http://www.edc.ca/EN/About-Us/Corporate-Social-Responsibility/Environment/Documents/environment-social-review-directive.pdf>.

³⁵ Canadian Export Development Act, Section 10.1 <http://laws.justice.gc.ca/eng/acts/E-20/>.

³⁶ http://www.pc.gov.au/data/assets/pdf_file/0019/117514/12-export-credit-chapter9.pdf p41.

³⁷ http://www.pc.gov.au/data/assets/pdf_file/0019/117514/12-export-credit-chapter9.pdf at p28

EFIC Policy and Procedure for Environmental and Social Review of Transactions

82. After a period of extensive public consultation, in February 2011 EFIC adopted a *Policy for Environmental and Social Review of Transactions*³⁸ and a *Procedure for Environmental and Social Review of Transactions*³⁹, referred collectively as the Environmental and Social Policy and Procedure (**ESPP**).
83. We acknowledge that the ESPP may change from time to time, however certain minimum benchmarking standards should be inserted into the act to ensure transparency, accountability and public participation.

Recommendations

84. We recommend the creation of an independent committee to provide input into the Minister's consideration of major impacts. An independent expert committee would provide an assessment to the Minister, which will consider issues identified in proponent documents and submissions against human rights obligations considered relevant by the committee. See Annexure 1 that outlines this process.
85. We recommend an amendment to the EFIC Act that states what international obligations, including human rights obligations, EFIC is required to comply with.
86. To ensure EFIC's obligations for environment and social due review of projects are understood and met, the key features of the ESPP should be formally recognised in the EFIC Act. We acknowledge that the ESPP may change from time to time therefore certain minimum benchmarking standards should be inserted into the act to ensure transparency, accountability and public participation.

³⁸ http://www.efic.gov.au/corp-responsibility/envr-responsibility/Documents/EFIC-Policy-Environmental-Social-Review-August-2012.pdf?utm_source=seo&utm_medium=EFIC-policy-PDF&utm_campaign=seo-efic-enviro-social-policy-PDF-120920 .

³⁹ http://www.efic.gov.au/corp-responsibility/envr-responsibility/Documents/EFIC-Procedure-Environmental-Social-Review-August-2012.pdf?utm_source=seo&utm_medium=procedure&utm_campaign=seo-efic-procedure-enviro-social-PDF-120919 .

VI. REMOVAL OF ENVIRONMENTAL BIODIVERSITY AND CONSERVATION ACT EXEMPTION

87. **EFIC is exempt from the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*.** Other ECAs, such as USA's Ex-Im Bank, are not exempt from equivalent domestic national environmental legislation.
88. In accordance with the recommendations made in Risky Business and submissions to the Productivity Commission Inquiry by Greenpeace⁴⁰ we recommend that the EFIC Act, and if necessary the EPBC Act, is amended so that the EPBC Act applies to EFIC.

VII. DISCLOSURE OF INVOLVEMENT IN AUSTRALIAN CATEGORY A PROJECTS

89. **Neither the EFIC Act nor the bill require disclosure of support of Category A projects in Australia.**
90. EFIC has and is involved with environmentally sensitive projects such as Gladstone LNG and Ichthys LNG in Australia. EFIC was also courted to participate in Gunns Ltd (in liq) to finance its Bell Bay Pulp Mill project following the withdrawal of the mandated lead arranger of project finance, ANZ, as a result of market forces.⁴¹
91. However, taxpayers are unable to participate in the decision making process which is contrary to the principles of transparency, public participation and accountable decision making.
92. Transparency, public participation and assessment of proposals to support Australia-based Category A projects should be subject to the same disclosure, stakeholder participation and assessment criteria for other Category A projects.
93. This recommendation is incorporated into the proposed procedure recommended under the Project Disclosure, Public Participation and Assessment section and outlined in Annexure 1.

⁴⁰ http://www.pc.gov.au/data/assets/pdf_file/0004/113872/sub009.pdf.

⁴¹ Productivity Commission Inquiry, Sydney Hearing, 4 April 2012, Transcript p272.

Annexure 1

Proposed mechanism for disclosure, stakeholder participation and assessment for Category A projects to be incorporated into the EFIC Act. The mechanism draws on our submissions and current practice. We recommend these steps are incorporated into the EFIC Act to ensure proper procedure.

The mechanism to apply to Category A projects proposed to be financed through the Commercial Account and the National Interest Account and located either in Australia or overseas.

1. Initial disclosure

Before the consideration of any support to a Category A project located in Australia or overseas, the project must be displayed on EFIC's website. Final, not draft, environmental and social impact statements for construction and operational and decommissioning stages must be disclosed.

2. Stakeholder participation

EFIC currently allows public submissions for a window of 30 days before it approves support for a Category A project overseas. Submissions can be made by any party of any nationality located anywhere in the world. As per current EFIC practice, there is no requirement that submissions only be made by Australians.

We recommend that submissions are to be published by EFIC on its website within 2 business days of lodgement with EFIC, unless the submitting party request that their submissions not be made publicly available.

3. Assessment and publication

To provide support, EFIC must, commencing after the 30 day minimum submission period, consider the final versions of any environmental and social impact statements and *all* submissions lodged for that project.

EFIC must assess compliance by the Category A project with the following benchmarks:

- a. OECD Common Approaches on the Environment and Officially Supported Export Credits,
- b. Equator Principles,
- c. IFC Performance Standards,
- d. World Bank Handbook, and

- e. relevant human rights standards

if it is considering provision of the following support to a Category A project in Australia or overseas:

- a. Direct loan (project finance)
- b. Export finance guarantee
- c. Documentary credit guarantee
- d. Lines of credit to alliance partner
- e. Supplier credit
- f. Export payments insurance

We recommend the creation of the following two independent committees to provide input into the EFIC's consideration of major impacts:

- a. Expert Human Rights Committee to assess human rights impacts in a **Human Rights Report**
- b. Expert Scientific Committee to assess major environmental impacts of Category A projects **Major Environmental Impact Report**.

EFIC must consider these reports and refer to them in a **Benchmark Report**, which is to outline compliance with the standards referred to above. In the **Benchmark Report** EFIC must disclose areas of compliance and non-compliance. If EFIC wishes to provide support, it the report must state why EFIC believes non-compliance is acceptable and disclose what steps EFIC will do to minimise or offset impacts by, for example, detailing any covenants and ongoing environmental and social performance reviews in the **Benchmark Report**.

The following reports must be published on EFIC's website and/or tabled in parliament 21 days prior to any decision to provide support:

- a. Human Rights Report
- b. Major Environmental Impact Report
- c. Benchmark Report



About Jubilee Australia

Jubilee Australia is an independent non-profit research and advocacy organisation established in 2001 in response to the success of the international Jubilee 2000 campaign for debt cancellation and the need for continued work in this area. Today Jubilee's work exposes and challenges the policies of government and practices of business that hinder the alleviation of long-term poverty.

Jubilee Australia has been examining EFIC and Australian export credit policy for more than six years. Our work started with advocating for the cancellation of export credit debts to highly indebted countries and continues today. Jubilee Australia has also published extensively on the impacts of EFIC-supported extractives industry projects in the region.

Our 2009 report *Risky Business – Shining a Spotlight on Australia's Export Credit Agency* has given rise to a range of policy reforms at EFIC as well as the Government's November 2011 call for a Productivity Commission inquiry into Australia's export credit arrangements.

Jubilee Australia's December 2012 report, *Pipe Dreams: The PNG LNG Project and the future hopes of a nation* is an in-depth investigation of the US\$19bn project and its foreseeable impacts on the country's precarious political institutions, economy and society. The findings raise concerns that the Australian government, by investing taxpayer funds into the massive Project, has placed already vulnerable Papua New Guineans at even greater risk.

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