

## NOTICE OF FILING

### Details of Filing

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File Title: JUBILEE AUSTRALIA RESEARCH CENTRE LTD v EXPORT FINANCE  
AND INSURANCE CORPORATION & ORS  
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



*Sia Lagos*

Registrar

### Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Form 17  
Rule 8.05(1)(a)

**Amended Statement of claim**

*Amended on 21 September 2023 pursuant to Rule 16.51 Federal Court Rules 2011 (Cth)*

No. NSD724 of 2023

Federal Court of Australia  
District Registry: New South Wales  
Division: General

**Jubilee Australia Research Centre Ltd**

Applicant

**Export Finance and Insurance Corporation**

First Respondent

**Northern Australia Infrastructure Facility**

Second Respondent

**James M Millar**

Third Respondent

**Khory McCormick**

Fourth Respondent

**Tracey Hayes**

Fifth Respondent

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Filed on behalf of (name & role of party) Jubilee Australia Research Centre Ltd  
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## A PARTIES

### A.1 Applicant

- 1 The Applicant, Jubilee Australia Research Centre Ltd, is a public company limited by guarantee under the *Corporations Act 2001*.
- 2 The Applicant is seeking the relief set out in the Originating Application in respect of the annual reports prepared and given to the responsible Minister pursuant to s 46 of the *Public Governance, Performance and Accountability Act 2013* (Cth) (**PGPA Act**):
  - 2.1 by the First Respondent, Export Finance and Insurance Corporation (**EFIC**) for the 2018/2019, 2019/2020, 2020/2021 and 2021/2022 reporting periods (**EFIC's Reports**); and
  - 2.2 by the Second Respondent, Northern Australia Infrastructure Facility (**NAIF**) for the 2018/2019, 2019/2020, 2020/2021 and 2021/2022 reporting periods (**NAIF's Reports**).
- 3 During the two years immediately before the preparation publication of each of EFIC's Reports and NAIF's Reports under s 46 of the PGPA Act, and during the two years immediately before the commencement of this proceeding, the Applicant's objects included:
  - 3.1 the protection or conservation of, or research into, the environment;
  - 3.2 through scientific research, to produce in-depth analysis, reports and data of value to Australia, with a focus on, inter alia, the relationship between Australian foreign policy and Australia's contribution to a fair and sustainable global economy including responsible international financing, and ecologically sustainable development; and
  - 3.3 engaging in public debates to promote the results of the Applicant's research.

#### **Particulars**

Clause 3.1 of the *Constitution of Jubilee Australia Research Centre Ltd*.

- 4 During the two years immediately before the preparation publication of each of EFIC's Reports and NAIF's Reports under s 46 of the PGPA Act, and during the two years immediately before the commencement of this proceeding, the Applicant has:

- 4.1 engaged in a series of activities related to the protection or conservation of, or research into, the environment; and
- 4.2 has prepared a number of reports and submissions which record a series of activities of Jubilee that are related to the protection or conservation of, or research into, the environment.

### **Particulars**

- a) In 2017, a submission to the 2017 Foreign Policy White Paper.
- b) In April 2018, a report entitled “Double or Nothing: The Broken Economic Promises of PNG LNG”.
- c) In May 2018, a report entitled “On Shaky Ground: PNG LNG and the consequences of development failure”.
- d) In June 2018, a submission in relation to the EFIC proposal to provide project finance to Mina Justa Copper Mine, Peru.
- e) In September 2018, a report entitled “Growing Bougainville’s Future: Choices for an Island and its peoples”.
- f) In March 2019, together with Caritas Australia and the University of New South Wales, a report entitled “Enter the Dragon: Australia, China, and the New Pacific Development Agenda”.
- g) In April 2019, together with ActionAid Australia and Caritas Australia, a submission to EFIC’s consultation on the SNE field development phase 1.
- h) In May 2019, together with the Oakland Institute, a report entitled “Land Summit or Land Grab?”.
- i) In June 2019, a submission to the Autonomous Bougainville Government Parliament’s Legislation Committee on the Bougainville Mining (Amendment) Bill 2019.
- j) In September 2020, together with The Center for Environmental Law and Community Rights, a report entitled “The Coal Agenda: Mayur Resources and the Push to Start a Coal Industry in PNG”.
- k) In October 2020, together with ACT NOW! and the Oakland Institute, a report entitled “From Extraction to Inclusion: Changing the Path to Development in Papua New Guinea”.
- l) In April 2021, a report entitled “2020 - The Year in Review”.
- m) In July 2021, a report entitled “HOT MONEY - Australian Taxpayers Financing Fossil Fuels”. Both reports set out a series of activities of

Jubilee that are related to “the protection or conservation of, or research into, the environment”.

- 5 By reason of the matters set out in paragraphs 3 and 4 above, the Applicant is an “interested person” for the purposes of ss 475(7)(b) and 475(7)(c) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**).

## **A.2 Respondents**

- 6 EFIC is a body corporate established under the *Export Finance and Insurance Corporation Act 1991* (Cth) (**EFIC Act**).

- 7 EFIC is a Commonwealth entity within the meaning of s 10 of the PGPA Act.

- 8 The board of EFIC is the governing body of that entity and the accountable authority under the PGPA Act.

- 9 The Third Respondent is and was a member, and is and was also the Chair, of the Board of EFIC on the date or dates of the preparation of each of EFIC’s annual reports referred to in paragraph 10 below. ~~is the current Chair of EFIC.~~

- 10 The Third Respondent is sued as a Board member ~~the current Chair~~ of EFIC on the date or dates set out in paragraphs 10.1 to 10.4 below and, pursuant to rule 9.21 of the *Federal Court Rules 2011* (Cth), as representing:

10.1 each of the other Board members of the First Respondent as at the date or dates on which the Board prepared under s 46 of the PGPA Act of the publication of the Annual Report of the First Respondent for the 2018/2019 reporting period (the 2018/2019 EFIC Respondents);

10.2 each of the other Board members of the First Respondent as at the date or dates on which the Board prepared under s 46 of the PGPA Act of the publication of the Annual Report of the First Respondent for the 2019/2020 reporting period (the 2019/2020 EFIC Respondents);

10.3 each of the other Board members of the First Respondent as at the date or dates on which the Board prepared under s 46 of the PGPA Act of the publication of the Annual Report of the First Respondent for the 2020/2021 reporting period (the 2020/2021 EFIC Respondents); and

- 10.4 each of the other Board members of the First Respondent as at the date or dates on which the Board prepared under s 46 of the PGPA Act of the publication of the Annual Report of the First Respondent for the 2021/2022 reporting period (the **2021/2022 EFIC Respondents**)
- 11 The Third Respondent has the same interest in this proceeding as the persons he is representing.
- 12 NAIF is a body corporate established under the *Northern Australia Infrastructure Facility Act 2016* (Cth) (**NAIF Act**).
- 13 NAIF is a Commonwealth entity within the meaning of s 10 of the PGPA Act.
- 14 The board of NAIF is the governing body of that entity and the accountable authority under the PGPA Act.
- 15 The Fourth Respondent was a member, and was also the Chair, of the Board of NAIF on the date or dates of the preparation of each of NAIF's annual reports referred to in paragraph 16 below ~~is the former Chair of NAIF.~~
- 16 The Fourth Respondent is sued as a Board member ~~the former Chair~~ of NAIF on the date or dates set out in paragraphs 16.1 and 16.2 below and, pursuant to rule 9.21 of the *Federal Court Rules 2011* (Cth), as representing:
- 16.1 each of the other Board members of the Second Respondent as at the date or dates on which the Board prepared under s 46 of the PGPA Act of the publication of the Annual Report of the Second Respondent for the 2018/2019 reporting period (the **2018/2019 NAIF Respondents**); and
- 16.2 each of the other Board members of the Second Respondent as at the date or dates on which the Board prepared of the publication of under s 46 of the PGPA Act the Annual Report of the Second Respondent for the 2019/2020 reporting period (the **2019/2020 NAIF Respondents**).
- 17 The Fourth Respondent has the same interest in this proceeding as the persons he is representing.
- 18 The Fifth Respondent is and was a member, and is and was also the Chair, of the Board of NAIF on the date or dates of the preparation of each of NAIF's annual reports referred to in paragraph 19 below ~~is the current Chair of NAIF.~~

19 The Fifth Respondent is sued as a Board member of NAIF the current Chair on the date or dates set out in paragraphs 19.1 and 19.2 below of NAIF and, pursuant to rule 9.21 of the *Federal Court Rules 2011* (Cth), as representing:

19.1 each of the other Board members of the Second Respondent as at the date or dates on which the Board prepared under s 46 of the PGPA Act of the publication of the Annual Report of the Second Respondent for the 2020/2021 reporting period (the 2020/2021 NAIF Respondents); and

19.2 each of the other Board members of the Second Respondent as at the date or dates on which the Board prepared under s 46 of the PGPA Act of the publication of the Annual Report of the Second Respondent for the 2021/2022 reporting period (the 2021/2022 NAIF Respondents).

20 The Fifth Respondent has the same interest in this proceeding as the persons she is representing.

## **B JURISDICTION**

21 The Court has jurisdiction in this matter:

21.1 pursuant to s 475 of the EPBC Act; and

21.2 pursuant to s 39B(1A)(c) of the *Judiciary Act 1903* (Cth) because the matter arises under a law made by the Parliament, namely the EPBC Act.

## **C EPBC ACT REPORTING REQUIREMENTS**

22 Section 516A of the EPBC Act requires the respective boards of EFIC and NAIF (as the accountable authority of a Commonwealth entity) to ensure that the annual reports of the reporting entities (being EFIC and NAIF) prepared under s 46 of the PGPA Act comply with s 516A(6) of the EPBC Act.

23 Pursuant to s 516A(6) of the EPBC Act, the annual reports of EFIC and NAIF were required to, relevantly:

23.1 report on how their activities accorded with the principles of ecologically sustainable development (**ESD principles**) (s 516A(6)(a));

23.2 document the effect of their activities on the environment (s 516A(6)(c));

- 23.3 identify any measures they are taking to minimise the impact of their activities on the environment (s 516A(6)(d)); and
- 23.4 identify the mechanisms (if any) for reviewing and increasing the effectiveness of those measures (s 516A(6)(e)).
- 24 For the purposes of s 516A of the EPBC Act, “Activities” is defined in s 516A(7) of the EPBC Act as including “developing and implementing policies, plans, programs and legislation”; and the “operations” of the entities.
- 25 “Environment” is defined in s 528 of the EPBC Act.
- 26 “Principles of ecologically sustainable development” is defined in ss 528 and 3A of the EPBC Act.

#### **C.1 EFIC**

- 27 EFIC is a Commonwealth statutory corporation.
- 28 EFIC’s functions under s 7 of the EFIC Act include:
- 28.1 to facilitate and encourage Australian export trade by providing insurance and financial services and products to persons involved directly or indirectly in such trade;
- 28.2 to encourage and facilitate overseas infrastructure financing by giving guarantees under s 23A of the EFIC Act; encouraging authorised deposit-taking institutions (**ADIs**) and other financial institutions carrying on business in Australia to engage in, or assist in, overseas infrastructure financing; and providing information and advice to any person regarding overseas infrastructure financing;
- 28.3 to encourage ADIs, and other financial institutions, carrying on business in Australia to finance, or assist in financing export contracts, eligible export transactions and overseas infrastructure;
- 28.4 to manage application of money made available by the Commonwealth or a Commonwealth instrumentality in relation to overseas aid projects; and
- 28.5 to assist NAIF in the performance of its functions and to provide incidental assistance, including financial assistance as agreed between EFIC and the States and Territories, for the construction of Northern Australia economic infrastructure.



- 29 EFIC and its Board prepare EFIC's Reports pursuant to s 46 of the PGPA Act.
- 30 EFIC's activities include the carrying out of its functions under the EFIC Act and the provision of insurance and financial services and products (loans, bonds, lines of credit and guarantees) to encourage export trade.
- 31 EFIC's "activities" for the purposes of s 516A(6) of the EPBC Act include the transactions reported in EFIC's Reports, other transactions entered into by EFIC and the activities EFIC describes in EFIC's Reports as "crowding in" the private sector before a transaction is completed (**EFIC Financing Activities**).
- 32 Each of EFIC's Reports, for the relevant 12 month reporting period from 1 July to 30 June, contain:
- 32.1 an "Index of statutory reporting requirements" that refers to s 516A and corresponding pages that purport to satisfy the s 516A reporting requirements;
  - 32.2 in the corresponding pages, commentary and a table styled "Our environmental footprint", the latter of which concerns the environmental footprint of EFIC's offices;
  - 32.3 a "Table of Facilities" that includes Commercial Account and National Interest Account transactions;
  - 32.4 a table styled "Environmental and social review summary" that identifies, among other things, the number of transactions:
    - 32.4.1 which are stated to fall into "Environmental and social impact category" A, B and C excluding military equipment and dual use goods transactions; and
    - 32.4.2 in respect of which there is stated to be an "existing project and non-project potential impact", excluding military equipment and dual use goods transactions.

#### *EFIC's Transactions*

- 33 Every transaction in the Table of Facilities set out in each of EFIC's Reports is allocated an environmental and social impact category as follows:
- 33.1 Low Potential, with an accompanying note reference (Note 1 denoting a non-project or bond transaction; Note 2 denoting that the product was assessed and found to always have low or no potential for significant environmental and social

impact; Note 3 denoting that the transaction was assessed under a screen to identify if the transaction required an environmental or social impact assessment);

33.2 Category A (for the EFIC 2018/2019, 2019/2020 and 2020/2021 Reports, Category A transactions were defined as transactions with potentially significant adverse environmental or social impacts; for the EFIC 2021/2022 Report, Category A transactions were defined as transactions with potential significant adverse environmental and social risks and/or impacts that are diverse, irreversible or unprecedented);

33.3 Category B (for the EFIC 2018/2019, 2019/2020 and 2020/2021 Reports, Category B transactions were defined as transactions with environmental or social impacts between categories A and C; for the EFIC 2021/2022 Report, Category B transactions were defined as transactions with potential limited adverse environmental or social risks and/or impacts that are few in number, generally site-specific, largely reversible, and readily addressed through mitigation measures);

33.4 Category C (transactions with minimal or no adverse environmental or social impacts);

33.5 ME (military equipment transactions).

34 For the period 1 July 2018 to 30 June 2022, EFIC's Reports recorded various Low Potential, Category A, Category B, Category C and military equipment transactions.

### **Particulars**

The Category A and B transactions included:

- a) The EFIC 2020/2021 Report Table of Facilities describes as Category A the loan provided to Mantoverde S.A. in respect of the Mantoverde copper mine project. EFIC's "Category A project archive" website states the "risk factors" for the Mantoverde copper mine project included biodiversity, water resources, environmental and social management, community health, safety and security and cultural heritage.
- b) The EFIC 2019/2020 Report Table of Facilities describes as Category B both the loan and export finance guarantee to Senex Energy Limited (**Senex**). Senex has developed new gas reserves in the Surat Basin for Project Atlas (which supplies gas domestically) and the Roma North development (which provides gas for export), and EFIC provided critical support to Senex's banks for the construction of the projects. Project Atlas has a total project area of 76 square kilometres, ~80 natural gas wells, pipelines, a processing facility and an expected natural gas production of

~18 petajoules (**PJ**)/year. Roma North has a total project area of 760 square kilometres, 35 natural gas wells, a processing facility, a 5 kilometre pipeline and an initial production of 6 PJ/year with capacity to expand to ~18 PJ/year. The Project Atlas and the Roma North developments involve the extraction and burning of natural gas.

- c) The EFIC 2018/2019 Report Table of Facilities describes as Category A the loan provided to Marcobre SAC in respect of the Mina Justa copper mine project. EFIC's "Category A project archive" website refers to the Mina Justa Copper Mine and identifies risk factors including environmental and social management, labour and working conditions and community health, safety and security.

35 Some or all of the transactions reported in EFIC's Reports are activities that have had, and/or will likely have:

35.1 effects on the environment, which are "effects" on the environment for the purposes of s 516A(6)(c) of the EPBC Act; and

35.2 impacts on the environment, which are "impacts" on the environment for the purposes of s 516A(6)(d) of the EPBC Act.

### **Particulars**

The effects and impacts of the activities include:

- a) local effects and impacts such as those referred to in particular (a) to paragraph 34;
- b) effects and impacts arising from Scope 1, 2, and 3 emissions of greenhouse gases, including contribution to climate change.
  - a. Scope 1 emissions are direct emissions from owned or controlled sources.
  - b. Scope 2 emissions are indirect emissions from the generation of purchased energy.
  - c. Scope 3 emissions are all indirect emissions (not included in scope 2) that occur in the value chain of the reporting company, including both upstream and downstream emissions.

### *EFIC's further Financing Activities*

- 36 Further, with respect to the EFIC Financing Activities, the EFIC 2020/2021 Report refers to crowding in the private sector on 22 unspecified transactions with a value of \$242.1 million.
- 37 The EFIC Reports' transaction tables do not refer to certain EFIC Financing Activities that took place in the reporting period (**Unreported Transactions**).
- 38 The Unreported Transactions include activities of EFIC that have had, and/or will likely have:
- 38.1 effects on the environment, which are "effects" on the environment for the purposes of s 516A(6)(c) of the EPBC Act; and
  - 38.2 impacts on the environment, which are "impacts" on the environment for the purposes of s 516A(6)(d) of the EPBC Act.
- 39 EFIC's Reports do not refer to the refinancing of the Ichthys LNG project (an Unreported Transaction), which was an activity of EFIC that has had, and will likely continue to have:
- 39.1 effects on the environment, which are "effects" on the environment for the purposes of s 516A(6)(c) of the EPBC Act; and
  - 39.2 impacts on the environment, which are "impacts" on the environment for the purposes of s 516A(6)(d) of the EPBC Act.

### **Particulars**

IJGlobal has reported that EFIC loaned to Ichthys LNG Pty Ltd USD 113.85 million as part of USD 4,075.30 million in "ECA-Covered Loans", in turn part of a total debt facility of USD 8,292.30 million, for refinancing purposes, that reached financial close on 16 June 2020. The provision of finance to Ichthys LNG Pty Ltd as part of the refinancing of the Ichthys LNG Project was an "activity" of EFIC for the purposes of s 516A of the EPBC Act. Ichthys commenced LNG production in 2018, has an operational life of 40 years, and is expected to produce 8.9 million tonnes of LNG per year, 1.65 million tonnes of LPG per year and 100,000 barrels of condensate per week. The extraction,

transport and burning of these fossil fuels will affect and impact the environment.

- 40 EFIC's Reports do not refer to the refinancing of the Wiggins Island Coal Export Terminal (**WICET**) (an Unreported Transaction), which was an activity of EFIC that has had, and will likely continue to have:

40.1 effects on the environment, which are "effects" on the environment for the purposes of s 516A(6)(c) of the EPBC Act; and

40.2 impacts on the environment, which are "impacts" on the environment for the purposes of s 516A(6)(d) of the EPBC Act.

#### **Particulars**

IJGlobal has reported that, on 25 September 2018, EFIC loaned to Wiggins Island Coal Export Terminal Pty Ltd USD 89.52 million and contributed USD 780,000 to a letter of credit. The provision of finance to Wiggins Island Coal Export Terminal Pty Ltd as part of the refinancing of WICET was an "activity" of EFIC for the purposes of s 516A of the EPBC Act. WICET provides export capacity for coal from new mines and expansions of existing mines in the Surat and southern Bowen Basins. The extraction, transport and burning of that coal will affect and impact the environment.

- 41 EFIC's Reports do not report on EFIC Financing Activities, undertaken before the relevant reporting period, that have had in the relevant reporting period:

41.1 effects on the environment, which are "effects" on the environment for the purposes of s 516A(6)(c) of the EPBC Act;

41.2 impacts on the environment, which are "impacts" on the environment for the purposes of s 516A(6)(d) of the EPBC Act.

#### **Particulars**

The effects and impacts are of the type referred to in the particulars to paragraph 35.

EFIC is an Equator Principle Financial Institution. Principle 8 (covenants) of the Equator Principles requires ongoing reporting by the borrower to the EPFI on some types of environmental performance of Category A and Category B transactions.

In 2009, EFIC provided a loan of US\$350 million to the PNG LNG Project, a Category A project: see entry on the EFIC website styled "PNG LNG" and EFIC 2009-10 Annual Report. As at 30 June 2021, there was an estimated

AU\$198.8 million outstanding on this loan: see Budget 2021-22 Budget Paper No. 1, p 299.

- a) The PNG LNG project commenced operating in April 2014. It has the capacity to produce 8.3 million tonnes per year of LNG and will run for 30 years: see entry on the PNG LNG website styled "Project Overview".
- b) The PNG LNG 2021 Environment and Social Report states: "Total greenhouse gas emissions are calculated and reported on an annual basis. In 2021, PNG LNG facilities generated approximately 2132 kilotonnes of carbon dioxide equivalent, which was primarily from gas turbine fuel consumption at the LNG Plant and HGCP." In the 2020 Environment and Social Report this was reported to be 2070 kilotonnes of carbon dioxide equivalent and in the 2019 Environment and Social Report this was reported to be 1985 kilotonnes.

In addition to PNG LNG, other projects supported by the EFIC Financing Activities that produce substantial Scope 3 emissions include:

- a) WICET, the recipient of a \$94.2 million EFIC guarantee in 2011/2012, and a related loan of \$124.65 million to Glencore (40% owner of WICET);
- b) Santos Ltd's Gladstone LNG Project, the recipient of a \$244.7 million EFIC guarantee in 2011/2012.

Further particulars will be provided after the completion of discovery.

#### *The EFIC Contraventions*

42 In contravention of s 516A(1) and s 516A(6)(a) of the EPBC Act, EFIC's Reports do not report on how EFIC's activities accorded with the principles of ESD for EFIC's:

42.1 crowding in activities;

42.2 Category A transactions;

42.3 Category B transactions;

42.4 Unreported Transactions;

42.5 Activities referred to in paragraph 41 above.

#### **Particulars**

Among other things, EFIC's Reports do not report on how EFIC's activities, the effects and impacts of which include Scope 1, 2, and 3 emissions of

greenhouse gases which contribute to climate change, accord with the precautionary principle and the principle of intergenerational equity.

43 In contravention of s 516A(1) and s 516A(6)(c) of the EPBC Act, EFIC's Reports (and the generalised classification of environmental impacts in the categories of environmental/social impact in the Table of Facilities therein, as set out in paragraphs 33-34 above) do not document the effect of EFIC's activities on the environment for EFIC's:

43.1 crowding in activities;

43.2 Category A transactions;

43.3 Category B transactions;

43.4 Unreported Transactions;

43.5 Activities referred to in paragraph 41 above.

#### **Particulars**

Among other things, EFIC's Reports do not:

a) apply, or refer at all to, the EPBC Act definition of "environment" in s 528;

b) report on the effects in the particulars to paragraph 3529.

44 In contravention of s 516A(1) and s 516A(6)(d) of the EPBC Act, EFIC's Reports do not identify any measures that EFIC is taking to minimise the impacts on the environment of EFIC's:

44.1 crowding in activities;

44.2 Category A transactions;

44.3 Category B transactions;

44.4 Unreported Transactions;

44.5 Activities referred to in paragraph 41 above.

#### **Particulars**

~~EFIC's Reports do not:~~

~~a) apply, or refer at all to, the EPBC Act definition of "environment" in s 528;~~

~~b) report on the effects in the particulars to paragraph 29.~~

45 In contravention of s 516A(1) and s 516A(6)(e) of the EPBC Act, EFIC's Reports do not identify the mechanisms (if any) implemented by EFIC for reviewing and increasing the effectiveness of any measures referred to in paragraph 44 above.

## **D NAIF**

46 NAIF is a Commonwealth statutory corporation.

47 NAIF's functions under s 7 of the NAIF Act include providing grants of financial assistance for development of Northern Australia economic infrastructure; and incidental assistance in relation to financial arrangements and agreements.

48 NAIF and its Board prepare NAIF's Reports pursuant to s 46 of the PGPA Act.

49 NAIF's activities include the carrying out of its functions under the NAIF Act which include providing grants of financial assistance for development of Northern Australia economic infrastructure and incidental assistance in relation to financial arrangements and agreements.

50 NAIF's "activities" for the purposes of s 516A(6) of the EPBC Act include the financial investment in the projects reported on in NAIF's Reports and also include the activities identified in NAIF's Reports relating to the provision of financial or other support for projects or companies (NAIF refers in NAIF's Reports to its involvement in projects identified as "contractually closed" or "supported" or making "investment decisions") (**NAIF Financing Activities**).

51 Some or all of the NAIF Financing Activities have had, or will likely have:

51.1 effects on the environment, which are "effects" on the environment for the purposes of s 516A(6)(c) of the EPBC Act; and

51.2 impacts on the environment, which are "impacts" on the environment for the purposes of s 516A(6)(d) of the EPBC Act.

### **Particulars**

a) The NAIF 2020/2021 Report refers to the investment decision for the Olive Downs South Coking Coal Project developed by Pembroke Resources for a NAIF loan of up to \$175 million to support the first phase of mine construction including rail and transmission lines, water pipelines, access roads and a coal



handling preparation plant. Olive Downs is an open cut coal project with 514 million tonnes of reserves, to produce at peak production 15 million tonnes per annum of coal. The mine life is expected to be over 80 years. The extraction, transport and burning of coal from Olive Downs will affect and impact the environment.

b) The effects and impacts of the activities include:

- a. local effects and impacts such as those referred to in particular (a);
- b. effects and impacts arising from Scope 1, 2, and 3 emissions of greenhouse gases, including contribution to climate change.
  - i. Scope 1 emissions are direct emissions from owned or controlled sources.
  - ii. Scope 2 emissions are indirect emissions from the generation of purchased energy.
  - iii. Scope 3 emissions are all indirect emissions (not included in scope 2) that occur in the value chain of the reporting company, including both upstream and downstream emissions.

The Applicant is unable to provide further particulars until after discovery.

52 NAIF's Reports each contain a section styled "Environmental Reporting" that purports to address NAIF's reporting requirements under s 516A of the EPBC Act.

53 The "Environmental Reporting" section of each of NAIF's Reports states that NAIF's activities accord with the ESD principles through the application of NAIF's "Environmental and Social Review of Transaction Policy" (**ESR Policy**).

54 The NAIF 2021/2022 Report states that the ESR Policy "ensures that each project submitted for an Investment Decision has been assessed through environmental and social due diligence and measures identified to minimise the impact of our activities on the environment" and that the ESR Policy is available on the NAIF website.

55 NAIF's Reports also disclosed NAIF's "Environmental Footprint" at its office locations.

56 NAIF's Reports do not report on NAIF Financing Activities, undertaken before the relevant reporting period, that have had in the relevant reporting period:

56.1 effects on the environment, which are "effects" on the environment for the purposes of s 516A(6)(c) of the EPBC Act;

56.2 impacts on the environment, which are “impacts” on the environment for the purposes of s 516A(6)(d) of the EPBC Act.

### **Particulars**

The effects and impacts are of the type referred to in the particulars to paragraph 51.

Further particulars will be provided after the completion of discovery.

### *The NAIF Contraventions*

57 In contravention of s 516A(1) and ~~the reporting requirements in~~ s 516A(6)(a) of the EPBC Act, NAIF’s Reports do not report on how the NAIF Financing Activities accorded with the principles of ESD.

### **Particulars**

Among other things, NAIF’s Reports do not report on how NAIF’s Financing Activities, the effects and impacts of which include Scope 1, 2, and 3 emissions of greenhouse gases which contribute to climate change, accord with the precautionary principle and the principle of intergenerational equity.

58 In contravention of s 516A(1) and s 516A(6)(c) of the EPBC Act, NAIF’s Reports do not report on the effect of the NAIF Financing Activities on the environment.

59 In contravention of s 516A(1) and s 516A(6)(d) of the EPBC Act, NAIF’s Reports do not identify any measures that NAIF is taking to minimise the impacts of the NAIF Financing Activities on the environment.

60 In contravention of s 516A(1) and s 516A(6)(e) of the EPBC Act, NAIF’s Reports do not identify the mechanisms (if any) implemented by NAIF for reviewing and increasing the effectiveness of any measures referred to in paragraph 59 above.

## **E CONTRAVENTIONS**

61 By failing to comply with the reporting requirements in sections 516A(1) and 516A(6)(a), (c), (d) and (e) of the EPBC Act in EFIC’s Reports as set out above, the Third Respondent (and the Board members represented by the Third Respondent for the relevant report periods) have engaged in conduct consisting of acts and omissions that constitute contraventions of those sections of the EPBC Act.

62 By failing to comply with the reporting requirements in sections 516A(1) and 516A(6)(a), (c), (d) and (e) of the EPBC Act in NAIF's Reports as set out above, the Fourth Respondent and the Fifth Respondent (and the Board members represented by the Fourth and Fifth Respondents for the relevant report periods) have engaged in conduct consisting of acts and omissions that constitute contraventions of those sections of the EPBC Act.

## **F THREATENED CONTRAVENTIONS**

63 The:

63.1 current Board of EFIC; and

63.2 current Board NAIF,

threaten and intend to engage in conduct consisting of acts and omissions that will repeat the contraventions of s 516A(1) and s 516A(6) of the EPBC Act referred to above in preparing their respective Annual Reports for the 2022/2023 reporting period.

### **Particulars**

The Applicant refers to and relies upon the past contraventions set out in paragraphs 61 to 62 above, which are likely to be repeated in relation to the forthcoming EFIC and NAIF Annual Reports for the 2022/2023 reporting period.

The Applicant is unable to provide further particulars until after discovery.

## **G RELIEF**

64 The Applicant seeks:

64.1 A declaration that the Third Respondent and the 2018/2019 EFIC Respondents have contravened sections 516A(1) and 516A(6)(a), (c), (d) and (e) of the EPBC Act by failing to report in the EFIC 2018/2019 Report on the matters set out in paragraphs 42 to 45 above.

64.2 A declaration that the Third Respondent and the 2019/2020 EFIC Respondents have contravened sections 516A(1) and 516A(6)(a), (c), (d) and (e) of the EPBC Act by failing to report in the EFIC 2019/2020 Report on the matters set out in paragraphs 42 to 45 above.

- 64.3 A declaration that the Third Respondent and the 2020/2021 EFIC Respondents have contravened sections 516A(1) and 516A(6)(a), (c), (d) and (e) of the EPBC Act by failing to report in the EFIC 2020/2021 Report on the matters set out in paragraphs 42 to 45 above.
- 64.4 A declaration that the Third Respondent and the 2021/2022 EFIC Respondents have contravened sections 516A(1) and 516A(6)(a), (c), (d) and (e) of the EPBC Act by failing to report in the EFIC 2021/2022 Report on the matters set out in paragraphs 42 to 45 above.
- 64.5 A declaration that the Fourth Respondent and the 2018/2019 NAIF Respondents have contravened sections 516A(1) and 516A(6)(a), (c), (d) and (e) of the EPBC Act by failing to report in the NAIF 2018/2019 Report on the matters set out in paragraphs 57 to 60 above.
- 64.6 A declaration that the Fourth Respondent and the 2019/2020 NAIF Respondents have contravened sections 516A(1) and 516A(6)(a), (c), (d) and (e) of the EPBC Act by failing to report in the NAIF 2019/2020 Report on the matters set out in paragraphs 57 to 60 above.
- 64.7 A declaration that the Fifth Respondent and the 2020/2021 NAIF Respondents have contravened sections 516A(1) and 516A(6)(a), (c), (d) and (e) of the EPBC Act by failing to report in the NAIF 2020/2021 Report on the matters set out in paragraphs 57 to 60 above.
- 64.8 A declaration that the Fifth Respondent and the 2021/2022 NAIF Respondents have contravened sections 516A(1) and 516A(6)(a), (c), (d) and (e) of the EPBC Act by failing to report in the NAIF 2021/2022 Report on the matters set out in paragraphs 57 to 60 above.
- 64.9 An injunction restraining the Third Respondent and the 2021/2022 EFIC Respondents from continuing to contravene sections 516A(1) and 516A(6)(a), (c), (d) and (e) of the EPBC Act in the manner set out in paragraphs 42 to 45 above in the forthcoming EFIC Annual Report for the 2022/2023 reporting period.
- 64.10 An injunction restraining the Fifth Respondent and the 2021/2022 NAIF Respondents from continuing to contravene sections 516A(1) and 516A(6)(a), (c), (d) and (e) of the EPBC Act in the manner set out in paragraphs 57 to 60 above in the forthcoming NAIF Annual Report for the 2022/2023 reporting period.

64.11 Such further or other orders as the Court deems fit.

64.12 Costs.

This pleading was drawn by Natasha Hammond of counsel and settled by Ron Merkel KC.

### **Certificate of lawyer**

I David Barnden certify to the Court that, in relation to the amended statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 21 September 2023~~18 July 2023~~

A handwritten signature in black ink, appearing to be 'DB' followed by a horizontal line.

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Signed by David Barnden

Lawyer for the Applicant