

Submission in response to

2024 Review of the Northern Australia Infrastructure Facility Act 2016

prepared by

Environmental Justice Australia

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Submitted to the Independent Expert Panel

A. Introduction and summary

1. Environmental Justice Australia (EJA) is a public interest environmental law practice, based in Melbourne and undertaking work across our areas of expertise throughout Australia, including Northern Australia. We provide legal advice and support to the community on public interest environmental issues, advocate for better environmental laws, and provide legal education to the community on environment matters. We act primarily for community organisations, Traditional Owners groups and NGOs on matters concerning environment and natural resources law and policy.
2. EJA welcomes the opportunity to provide feedback to the Independent Review of the *Northern Australia Infrastructure Facility Act 2016* (Cth) (**NAIF**). The purpose of this submission is to highlight, at a high-level, EJA's key recommendations to better deliver with Australian Government policy priorities of Net Zero and materially improving the lives of Indigenous people in addition to concerns about integrity and transparency.

B. Recommendations

3. We make the following specific recommendations:

Recommendation 1: Fossil Fuel projects must be exempt from the NAIF

- 1.1 Amending section 3(2) NAIF to expressly stipulates that Northern Australia economic infrastructure does not include any infrastructure in connection with fossil fuel projects, and
- 1.2 Amending section 9 of the Investment Mandate Direction so that Investment Proposals cannot be received from fossil fuel projects, including any ancillary infrastructure.

Recommendation 2: Strengthening integrity, accountability and transparency measures of the NAIF

- 2.1 Introducing a new provision where if a board member or staff member of the Facility is found guilty of a corruption offence in State, Territory or Federal legislation, the Minister must terminate their position.
- 2.2 Introducing a new provision where board members or the Chief Executive Officer must not have been previously convicted of a State, Territory or Federal corruption offence.
- 2.3 Introducing political donations and gifts provisions by prospective board members within the last four years.
- 2.4 Introducing a false and misleading conduct offence for providing false and misleading information in connection with a NAIF proposal or successful application.

2.5 Introducing a political donations and gifts provision which includes mandatory disclosure by prospective proponents of any political donations made within the last four years. If a disclosure has been made, then the proposal must undergo public benefit analysis by Infrastructure Australia.

2.6 Introducing a provision which mandates that any consultants used by the Facility must:

- Act in the public interest, and
- Disclose any conflicts of interest,

2.7 Introducing a new offence involving the failure to act in the public interest and disclose any conflicts of interest by a consultant contracted by the Facility,

2.8 Introducing a provision which mandates annual financial statements from successful proponents which involve:

- Compliance with accounting standards,
- Compliance with climate related financial disclosures required under the *Corporations Act 2021* (Cth)
- Present fairly the entity's financial position, financial performance and cash flows in connection with the NAIF project (If financial statements for an entity prepared in accordance with the accounting standards would not present fairly the entity's financial position, financial performance and cash flows, the accountable authority of the entity must add the information and explanations required to present fairly those matters.)
- the accountable entity must state whether, in the authority's opinion, there are reasonable grounds to believe, when the statement is made, that the entity will be able to pay its debts as and when they fall due.

2.9 The proponent financial statements must be audited by the Auditor-General which reviews and an audit report is prepared covering:

- Compliance with the accounting standards,
- Compliance with climate related financial disclosures required under the *Corporations Act 2021* (Cth)
- present fairly the entity's financial position, financial performance and cash flows. If the Auditor-General is not of that opinion, the Auditor-General must state the reason
- If the Auditor-General is of the opinion that a failure of the annual financial statements to comply with: (a) the accounting standards; or (b) any other requirements prescribed by the rules; has a quantifiable financial effect, then the Auditor-General must quantify that financial effect and state the amount, where practicable.
- A copy of the annual financial statements and the Auditor-General's report must be included in the Facility's report that is tabled in the Parliament.

2.10 The Facility must publish information on spending on consultants on the Facility website and in the Annual Report

2.11 The Facility must publish information relating to financial assistance, including:

- The total amount of the financial assistance

- The total amounts payable, but not yet paid by the successful proponent,
- The total amounts payable, but not yet paid by the Facility,
- The name of the successful proponent,
- The purpose of the financial assistance,
- The latest payment made by the Facility to the successful proponent, and
- The information must be update to date,

Recommendation 3: Capacity building of Indigenous proponents and Indigenous leadership requirements

- 3.1 Mandate culturally informed and thorough consultation with Aboriginal and Torres Strait Islander People who live in the Northern Australia about the NAIF and infrastructure projects in line with the principles of Free, Prior and Informed Consent in the *United Nations Declaration of the Rights of Indigenous People*,
- 3.2 The Establishment of an Indigenous Advisory Committee which has a veto power over proposed projects,
- 3.3 Approvals made pursuant to the Indigenous Engagement Strategy, and Priority 4 must be reviewed by the Indigenous Advisory Committee
- 3.4 Expanding the functions of the Facility to assist with capacity building of First Nations proponents,

C. Fossil fuel projects must be exempt from the NAIF scheme

4. To finance fossil fuel projects under the NAIF undermines:
 - a. the integrity of the legislation's stated purpose,
 - b. Australia's international and domestic greenhouse gas emissions commitments, and
 - c. Australia's our diplomatic relations with our Pacific Islander neighbours,

Legacy of successful fossil fuel projects under NAIF

5. Of the 32 projects that have been financed under the *Northern Australia Infrastructure Facility Act 2016* (Cth) (**NAIF**) since 2016, at least five of those are connected to the fossil fuel industry.
6. Research completed by the Australia Institute in 2024 found that the NAIF supported the following fossil fuel projects by granting:
 - a. \$255 million in subsidised loans for water and port infrastructure for the Perdamen Urea Project which they considered wholly dedicated to fossil fuels,
 - b. \$168 million loan to the new Olive Downs Coal Mine;

- c. \$300 million in finance for the Darwin Ship Lift, which will partly assist the offshore oil and gas industry. (The balance of the project is funded by the NT government);
 - d. \$16.8 million loan that was “integral” to the Onslow Marine Support Basel, which services the offshore oil and gas industry; and
 - e. \$37 million loan to the owners of the gas-fired Hudson Creek Power Station in the NT.¹
7. The above list demonstrates that the fossil fuel sector has been a major beneficiary of NAIF funding since its inception.

Australia’s current domestic and international commitments to reduce greenhouse gas emissions

- 8. The most significant national greenhouse gas emissions legislation is the *Climate Change Act 2022* (Cth) (**Climate Change Act**) which defines Australia’s greenhouse gas emissions reduction targets.²
- 9. These targets involve reducing Australia’s net greenhouse gas emissions to 43% below 2005 levels by 2030³ and reducing Australia’s net greenhouse gas emission to zero by 2050.⁴
- 10. This legislation arose out of Australia’s international obligations as a party to the Paris Agreement (12 December 2015) (**Paris Agreement**).
- 11. The Paris Agreement involves pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels and making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.⁵
- 12. The Paris Agreement parties also acknowledge that efforts to implement the commitments involve differentiated responsibilities and respective capabilities, in the light of different national circumstances.⁶
- 13. In December 2023, Australia became a signatory to Statement on International Public Support for the Clean Energy Transition (**the Glasgow Statement**) which commits to “end new direct public support for the international unabated fossil fuel energy sector within one year of signing this statement.”⁷

¹ The Australia Institute, *Fossil fuel subsidies in Australia 2024* (May 2024), 24.

² *Northern Australia Infrastructure Facility Act 2016* (Cth) s 5

³ *Climate Change Act 2022* (Cth) s 10(1)(a)

⁴ *Climate Change Act 2022* (Cth) s 10(1)(b)

⁵ Paris Agreement (12 December 2015) Article 2(1)(a) and (c)

⁶ Paris Agreement (12 December 2015) Article 2(2)

⁷ ‘Statement on International Public Support for the Clean Energy Transition’, *Clean Energy Transition Partnership* <https://cleanenergytransitionpartnership.org/the-statement/>

14. As a signatory of the Glasgow Statement, Australia has formally recognised that:

that investing in unabated fossil-related energy projects increasingly entails both social and economic risks, especially through the form of stranded assets, and has ensuing negative impacts on government revenue, local employment, taxpayers, utility ratepayers and public health.⁸

Conflict of NAIF fossil fuel grants and requirements under domestic legislation and international obligations

15. The NAIF explicitly contemplates Australia’s greenhouse gas emissions targets and international obligations in its functions.

16. The functions of the NAIF include providing financial assistance to non-Government entities to develop economic infrastructure:

- a. Giving effect to any international agreement to which Australia is a party (s7(1A)(g)(i)), and
- b. Contributing to the achievement of Australia’s greenhouse gas emissions reductions targets (s7(1A)(g)(iii))

17. The *Northern Australia Infrastructure Facility Investment Mandate Direction 2023* (Cth) (**Investment Mandate Direction**) also requires the alignment of the Investment Proposal with one or more of the Government Policy Priorities identified in Schedule 2 to be considered when making Investment Decisions by the Minister⁹

18. Schedule 2 includes:

- a. Projects that contribute to the reduction of Australia’s emissions by 43 per cent by 2030, Australia’s renewable energy target of 82 per cent by 2030, or net zero emissions by 2050.
- b. Projects contributing to Australia’s clean energy transformation or renewable energy superpower ambition

19. Although there are a number of functions and scheduled Government Policy Priorities listed within the NAIF, statutory interpretation rules requires that the statute is read as a whole and gives effect to “harmonious goals”.¹⁰

20. There is a clear intention of Parliament that emissions reductions and green infrastructure is a central aim of the NAIF.

21. In light of these aims, to finance fossil fuel projects under NAIF undermines the integrity of the legislation’s stated purpose and thus the legislation and Investment Mandate must be amended to explicitly carve out fossil fuel projects.

⁸ *ibid*

⁹ *Northern Australia Infrastructure Facility Act 2016* (Cth) s 8 (2)(b)

¹⁰ *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28 [69]-[70]

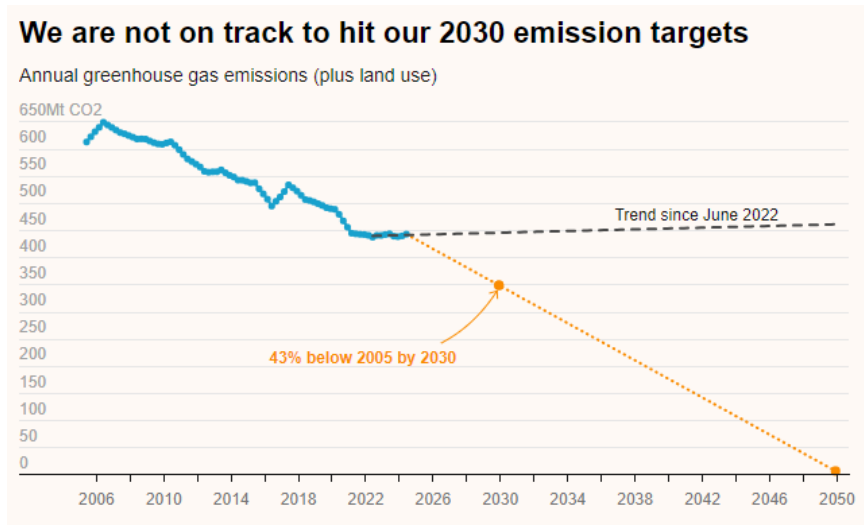
Funding decisions ought to take into account climate reality

22. As stated above, functions of the NAIF include providing financial assistance to non-Government entities to develop economic infrastructure which give effect to international agreements which Australia is party to.
23. A more consistent and coherent approach to this legislation would thus provide financial assistance to non-Government entities which do not undermine international agreements which Australia is party to, including the Paris Agreement.
24. New research has revealed that Australia is the second-largest climate polluter in the world when calculated by total carbon emissions (by including its fossil fuel exports).¹¹
25. The Paris Agreement requires that parties of the agreement take appropriate responses in light of their national circumstances.
26. This research demonstrates Australia has a particularly significant responsibility in reducing the climate harms produced by its fossil fuel sector and the spending of public finance is one such lever.
27. Further, as a signatory of the Glasgow Statement, Australia has formally recognised that:
 - a. the findings of the Intergovernmental Panel on Climate Change (IPCC) and IEA net-zero analysis show that in the pathways consistent with the 1.5°C warming limit of the Paris Agreement, the global production and use of unabated fossil fuels must decrease significantly by 2030.
 - b. that the accelerated alignment of international public and private sector financial flows is critical to driving energy transitions, energy access and supporting the development of both emerging and existing clean technologies, improving livelihoods and employment prospects worldwide
 - c. that investing in unabated fossil-related energy projects increasingly entails both social and economic risks, especially through the form of stranded assets, and has ensuing negative impacts on government revenue, local employment, taxpayers, utility ratepayers and public health¹²
28. It stands to reason that the explicit prohibition of fossil fuel projects must be captured in NAIF legislative framework to prevent further public spending on emissions producing projects.

¹¹ 'New data on Australia's fossil fuel exports places us among the world's biggest climate polluters' *Australia Human Rights Institute News* (11 August 2024) < <https://www.humanrights.unsw.edu.au/news/new-data-australias-fossil-fuel-exports-places-us-among-worlds-biggest-climate-polluters>>.

¹² 'Statement on International Public Public for the Clean Energy Transition', *Clean Energy Transition Partnership* <https://cleanenergytransitionpartnership.org/the-statement/>

29. Analysis by the Guardian Australia of the Department of Climate Change Environment & Water's data shows that Australia is not on track to meet its 2030 emissions targets under the Climate Change Act.¹³



30. With this climate reality, there is further impetus to use public funding on projects other than climate polluting fossil fuel industries when the NAIF has been designed to in part to support infrastructure that reduces greenhouse gas emissions.
31. An additional policy consideration is the finite resources at the disposal of NAIF decision makers.
32. As the *Fossil fuel subsidies in Australia 2024* report by the Australia Institute found, fossil fuel subsidies provide benefits to industry but there is an opportunity cost of allocating resources elsewhere that would otherwise benefit the community:

If governments choose to allocate scarce resources to fossil fuel industries and not to other government priorities, this represents a subsidy to fossil fuels. The fact that user fees may later be collected does not change the fact that a government has directed resources to one project at the expense of another.¹⁴

33. Subsidies provided to the fossil fuel industry come at the expense of public services and genuine pursuit of climate action.
34. The Climate Change 2023 synthesis report commented on the important role of financing climate change technologies to mitigate and lessen the worst impacts of climate change:

¹³ Greg Jericho, 'Plibersek's coalmine decision is double trouble for climate and housing' Guardian Australia (3 October 2024) Available here: <<https://www.theguardian.com/business/grogonomics/2024/oct/03/tanya-plibersek-coalmine-decision-climate-housing-emissions>>

¹⁴ The Australia Institute, *Fossil fuel subsidies in Australia 2024* (May 2024), 6-7

Increased access to finance can build capacity and address soft limits to adaptation and avert rising risks, especially for developing countries, vulnerable groups, regions and sectors (*high confidence*). Public finance is an important enabler of adaptation and mitigation, and can also leverage private finance (*high confidence*). Average annual modelled mitigation investment requirements for 2020 to 2030 in scenarios that limit warming to 2°C or 1.5°C are a factor of three to six greater than current levels, and total mitigation investments (public, private, domestic and international) would need to increase across all sectors and regions (*medium confidence*). Even if extensive global mitigation efforts are implemented, there will be a need for financial, technical, and human resources for adaptation (*high confidence*). {4.3, 4.8.1}¹⁵

35. When taken together, the climate reality in 2024, Australia’s formalised climate change commitments and the existing considerations under NAIF, fossil fuel projects must be exempted from accessing NAIF’s benefits.

Australia’s fossil fuel industry has an adverse impact on Australia’s international reputation and foreign relations

36. The Minister may reject a proposal for finance under NAIF if the financial assistance would have an adverse impact on Australia’s international reputation or foreign relations.¹⁶
37. In 2024, it is clear that Australia’s decisions in support of the fossil fuel industry have an adverse impact on our international reputation and foreign relations.
38. The former Prime Minister of Tuvalu, Rt Hon Enele S Sopoaga PC, delivered a speech at the Climate Integrity Summit on 20 March 2024 stating:

We have always enjoyed good relations with Australia, but this relationship becomes more and more strained with every day that passes. Our future is being undermined by Australia’s climate change policy or more correctly – its fossil fuel export policy. The continued mining and export of coal and has by Australia creates a death warrant for Tuvalu. It’s that simple. Tuvalu and many small island countries like Tuvalu – Kiribati, Marshall Islands and the like in the Pacific and other parts of the world. So, the more Australia digs up fossil fuels, the more uncertain Tuvalu’s future becomes.¹⁷

¹⁵ IPCC, 2023: *Summary for Policymakers*. In: *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [Core Writing Team, H. Lee and J. Romero (eds.)]. IPCC, Geneva, Switzerland, pp. 1-34, doi: 10.59327/IPCC/AR6-9789291691647.001, 33.

¹⁶ S 11(5)(b)

¹⁷ Rt Hon Enele Sopoaga PC, Keynote Address, 21 March 2024. Available here: <https://australiainstitute.org.au/post/keynote-address-rt-hon-enele-sopoaga-pc/>

39. On 26 August 2024, Dr Wesley Morgan wrote a piece published in the University of New South Wales' newsroom titled 'Can Australia repairs its standing in the Pacific?'. He noted that "long a regional laggard on climate action, Australia must convince Pacific leaders it's serious about moving away from fossil fuels".¹⁸
40. On 27 August 2024 it was reported that the United Nations Secretary-General Antonio Guterres had "implored major polluters and developed nations such as Australia to rapidly cut emissions and phase out coal and gas after meeting Pacific leaders in Tonga, warning the region is on the brink of climate catastrophe."¹⁹
41. On 29 August 2024, Liam Moore writing for The Conversation said:

Pacific leaders have consistently said they are willing to take their allegiances elsewhere if high-level rhetoric does not turn into action. In 2019, former Fijian Prime Minister Frank Bainimarama claimed climate reluctance by Australia's Morrison government would push Pacific nations close to China.²⁰

42. After Environment Minister Tanya Plibersek approved three coal mines in late September 2024, Tuvalu's Climate Minister responded saying:

I have made my view on new coal projects very clear at last month's Pacific Islands Forum: fossil fuels are killing us, all of us. It is therefore immoral and unacceptable to any country to open new fossil fuel projects, as Australia has recently done with the three coalmines expansion projects it has just approved... This is a matter of survival for my country of Tuvalu and for other nations in the Pacific. Australia calls itself a member of the Pacific family but this recent decision puts this statement in question.²¹

43. The former president of Kiribati and current chair of the Pacific Elders' Voice, Anote Tong, said after Minister Plibersek's decision that Pacific countries should not support

¹⁸ Dr Wesley Morgan, 'Can Australia repairs its standing in the Pacific' UNSW Newsroom, 26 August 2024. Available here: <https://www.unsw.edu.au/newsroom/news/2024/08/can-australia-repair-its-standing-in-the-pacific>

¹⁹ Stephen Dziedzic and Marian Kupu, 'UN secretary-general calls on major polluters to show leadership in cutting emissions to prevent Pacific climate catastrophe' ABC News (27 August 2024) Available here: <https://www.abc.net.au/news/2024-08-27/guterres-implores-australia-to-phase-out-fossil-fuels/104272368>

²⁰ Liam Moore, 'Talk isn't enough: Pacific nations say Australia must end new fossil fuel projects' *The Conversation* (29 August 2024) Available here: <https://theconversation.com/talk-isnt-enough-pacific-nations-say-australia-must-end-new-fossil-fuel-projects-237749>

²¹ Adam Morton, 'Australia's 'immoral' coalmine decision akin to drowning Pacific neighbours, Tuvalu climate minister declares' *The Guardian* (1 October 2024) Available here: <https://www.theguardian.com/environment/2024/oct/01/australia-coalmine-decision-akin-to-drowning-its-pacific-neighbours-tuvalu-climate-minister-says>

Australia's proposal to co-host Cop31, the UN climate summit scheduled for 2026, in partnership with the Pacific while it continued to expand fossil fuel operations.²²

44. On 26 September 2024, the Federated States of Micronesia endorsed the Fossil Fuel Non-Proliferation Treaty at the UN General Assembly to join 13 other nations, mostly from the Pacific.²³
45. In light of the concerns regarding Australia's fossil fuel industry by a number of different nations, it provides another basis to explicitly carve out the fossil fuel industry from the benefits afforded under the NAIF.
46. **To provide clarity to decision-makers and to appropriately implement the intentions of Parliament, EJA recommends amending:**
 - a. **Section 3(2) NAIF to expressly stipulates that Northern Australia economic infrastructure does not include any infrastructure in connection with fossil fuel projects, and**
 - b. **Section 9 of the Investment Mandate Direction so that Investment Proposals cannot be received from fossil fuel projects, including any ancillary infrastructure.**

D. Integrity, transparency and accountability of the Facility and NIAF funded projects must be strengthened

47. There is a concerning lack of statutory oversight once a project receives NAIF funding in addition to general integrity concerns at the Northern Australia Infrastructure Facility (**Facility**).

The current system of accountability

48. The Facility is a body corporate and Commonwealth entity.²⁴ It is led by a board of no less than 6 members and a Chief Executive Officer manages the day-to-day administration.²⁵
49. The functions of the Facility include providing grants of financial assistance and determining the terms and conditions for the grants of financial assistance, which include the form of equity investments and acquiring derivatives.²⁶

²² Ibid.

²³ 'Who has joined the call for a fossil fuel non-proliferation treaty?' *Fossil Fuel Treaty* Available here: <https://fossilfuel treaty.org/endorsements/#governments>

²⁴ *Northern Australia Infrastructure Facility Act 2016* (Cth) s 6

²⁵ *Northern Australia Infrastructure Facility Act 2016* (Cth) ss 13, 28

²⁶ *Northern Australia Infrastructure Facility Act 2016* (Cth) s 7(1)(a)-(b) (1B), (1C)

50. The Facility may set the terms and conditions of the agreement in writing to the successful proponent, which must include the circumstances in which the financial assistance is repaid to the Facility.²⁷
51. There is capacity for the Facility to vary the terms and conditions for financial assistance provided before or after 30 June 2026.²⁸
52. The Investment Mandate is the legislative instrument that gives directions to the Facility's Board about the performance of the Facility's functions.²⁹
53. The matters covered by the Investment Mandate include:
- a. Objectives the Facility is to pursue in providing financial assistance,
 - b. Strategies and policies to be followed for the effective performance of the Facilities functions,
 - c. Loan characteristics in which financial assistance is used to provide or support loans,
 - d. Providing financial assistance for purposes other than to provide or support loans,
 - e. matters relating to the provision of financial assistance in the form of equity investments, including limits on the amount that may be provided in this form, the rate of return, and the management of risks,
 - f. eligibility criteria for financial assistance,³⁰
 - g. risk and return in relation to providing financial assistance
54. The rejection notice for a proposal must be accompanied by the Minister's written reasons for the notice.³¹
55. Consultants may be procured by the Facility to assist with the performance of its functions.³²
56. An annual report must be prepared by the Board pursuant to s 46 of the *Public Governance, Performance and Accountability Act 2013* (Cth)³³ and delivered to the Auditor General.

Absence of integrity protection and transparency measures

57. The National Anti-Corruption Commission provided its strategic corruption priorities on 6 August 2024 and many of those priorities are relevant to the Facility.³⁴

²⁷ *Northern Australia Infrastructure Facility Act 2016* (Cth) s 7A

²⁸ *Northern Australia Infrastructure Facility Act 2016* (Cth) s 8(2)(b)

²⁹ *Northern Australia Infrastructure Facility Act 2016* (Cth) s 9(1)-(2)

³⁰ *Northern Australia Infrastructure Facility Act 2016* (Cth) s 10

³¹ *Northern Australia Infrastructure Facility Act 2016* (Cth) s 12

³² *Northern Australia Infrastructure Facility Act 2016* (Cth) s 39

³³ *Northern Australia Infrastructure Facility Act 2016* (Cth) s 42

³⁴ National Anti-Corruption Commission 'Strategic corruption priorities' (6 August 2024) Available here: < <https://www.nacc.gov.au/news-and-media/strategic-corruption-priorities> >

58. This includes:

- a. *Corruption affecting vulnerable people*: including Aboriginal and Torres Strait Islander people. Corruption in provision of services to vulnerable people reduces the volume and quality of government support, adds to exploitation, and exacerbates systemic disadvantage and inequality.
- b. *Corruption in senior public official decision-making*: Senior public officials have considerable authority and substantial resources at their disposal. Corruption in their decision-making—whether for personal gain, due to a conflict of interest or for other private benefit—can have serious economic and social impacts. Even the perception of corruption can significantly harm trust in government.
- c. *Corruption relating to contractors and consultants*: Consultants to government often have access to sensitive information, and the ability to misuse it for their own benefit or the benefit of their clients. This priority focuses the Commission on the close relationships between contractors, consultants, and the departments awarding them contracts, as well as the lack of regulation in this area.
- d. *Corruption in complex procurements*: The Australian Government spends tens of billions of dollars on procurements each year, and even more on grants. Corruption in procurement can lead to substantial financial loss and waste, decreased service quality and reduced confidence in government. ‘Complex’ procurements are high value, require niche expertise, rely on a limited number of providers, or have complexity in funding or governance arrangements.
- e. *Corruption in the environmental sector*: Climate change, habitat loss, invasive species pollution and resource extraction are leading to a deteriorating Australian environment. Although the extent of corruption in the environment sector is unknown, the friction between economic growth and environmental protection—combined with complexities in funding, governance and oversight arrangements—make it a vulnerable area.
This priority focuses the Commission on decisions and allocation of resources in environmental protection and natural resource management.

59. All of the above strategic priorities are relevant to the Facility.

60. To strengthen the integrity of the Facility, EJA recommends introducing:

- a. **A new provision where if a board member or staff member of the Facility is found guilty of a corruption offence in State, Territory or Federal legislation, the Minister must terminate their position.**
- b. **A new provision where board members or the Chief Executive Officer must not have been previously convicted of a State, Territory or Federal corruption offence.**
- c. **a false and misleading conduct offence for providing false and misleading information in connection with a NAIF proposal or successful application.**
- d. **political donations and gifts provisions by prospective board members within the last four years.**

- e. **a political donations and gifts provision which includes mandatory disclosure by prospective proponents of any political donations made within the last four years.**
 - a. **If a disclosure has been made, then the proposal must undergo public benefit analysis by Infrastructure Australia.**
- f. **A provision which mandates that any consultants used by the Facility must:**
 - a. **Act in the public interest, and**
 - b. **Disclose any conflicts of interest,**
- g. **A new offence involving the failure to act in the public interest and disclose any conflicts of interest by a consultant contracted by the Facility,**

61. To strengthen the transparency of the Facility, EJA recommends introducing:

- a. **a provision which mandates annual financial statements from successful proponents which involve:**
 - a. **Compliance with accounting standards,**
 - b. **Compliance with climate rated financial disclosures under the *Corporations Act 2001* (Cth)**
 - c. **Present fairly the entity's financial position, financial performance and cash flows in connection with the NAIF project (If financial statements for an entity prepared in accordance with the accounting standards would not present fairly the entity's financial position, financial performance and cash flows, the accountable authority of the entity must add the information and explanations required to present fairly those matters.)**
 - d. **the accountable entity must state whether, in the authority's opinion, there are reasonable grounds to believe, when the statement is made, that the entity will be able to pay its debts as and when they fall due.**
- b. **The proponent financial statements must be audited by the Auditor-General which reviews and an audit report is prepared covering:**
 - a. **Compliance with the accounting standards,**
 - b. **Compliance with climate rated financial disclosures under the *Corporations Act 2001* (Cth)**
 - c. **present fairly the entity's financial position, financial performance and cash flows. If the Auditor-General is not of that opinion, the Auditor-General must state the reason**
 - d. **If the Auditor-General is of the opinion that a failure of the annual financial statements to comply with: (a) the accounting standards; or (b) any other requirements prescribed by the rules; has a quantifiable financial effect, then the Auditor-General must quantify that financial effect and state the amount, where practicable.**

- e. **A copy of the annual financial statements and the Auditor-General's report must be included in the Facility's report that is tabled in the Parliament.**
- c. **The Facility must publish information on spending on consultants on the Facility website and in the Annual Report**
- d. **The Facility must publish information relating to financial assistance, including:**
 - a. **The total amount of the financial assistance**
 - b. **The total amounts payable, but not yet paid by the successful proponent,**
 - c. **The total amounts payable, but not yet paid by the Facility,**
 - d. **The name of the successful proponent,**
 - e. **The purpose of the financial assistance,**
 - f. **The latest payment made by the Facility to the successful proponent, and**
 - g. **The information must be update to date,**

E. Capacity building of First Nations proponents and Indigenous leadership requirements

62. The NAIF has failed a key aspect of its objects to materially assist First Nations people. It is a great disappointment that the minimum target of \$500 million for Priority 4 projects which materially assist First Nations people has not been met.

Consulting with Aboriginal and Torres Strait Islander People about economic infrastructure in Northern Australia

63. It is unclear to what extent that policymakers involved in the NAIF and the Facility itself have meaningfully engaged with Aboriginal and Torres Strait Islander people who live in the Northern Australia about:

- a. the construction of NAIF legislation,
- b. Infrastructure that is occurring on Indigenous land, and
- c. Infrastructure that is to have material benefit to Indigenous Australians.

64. Australia is a signatory to the United Nations Declaration of Rights of Indigenous Peoples (**UNDRIP**).

65. Article 19 of the DRIP states:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their

free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.³⁵

66. In the Closing the Gap National Agreement one of the priority reform areas is formal partnerships and shared decision-making, in particular making place-based partnerships.

67. The National Agreement states:

The purpose of formal policy partnerships and place-based partnerships is to:

- a. drive Aboriginal and Torres Strait Islander community-led outcomes on Closing the Gap
- b. enable Aboriginal and Torres Strait Islander representatives, communities and organisations to negotiate and implement agreements with governments to implement all Priority Reforms and policy specific and place-based strategies to support Closing the Gap
- c. support additional community-led development initiatives
- d. bring together all government parties, together with Aboriginal and Torres Strait Islander people, organisations and communities to the collective task of Closing the Gap.³⁶

68. To uphold Australia's commitment to the UNDRIP and to make a genuine effort to reach the Closing the Gap targets, the Facility must consult with Aboriginal Torres Strait Islander people about the NAIF and also infrastructure for the community's benefit.

69. It is critical that the relevant Aboriginal and Torres Islander people have a seat at the table at every stage of the project to ensure genuine representation and engagement.

Absence of meaningful Indigenous leadership

70. The current structure of the Facility board means that there is no mandated position for a board member who identifies as Aboriginal or Torres Strait Islander or has any experience with developing infrastructure projects for the benefit of Indigenous people.

71. To overcome the issues with the lack of guaranteed Indigenous leadership and knowledge within the Facility, the NIAF must be amended so that the board consults

³⁵ Available here: https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf

³⁶ Closing the Gap National Agreement < <https://www.closingthegap.gov.au/national-agreement/national-agreement-closing-the-gap/6-priority-reform-areas/one>>

with an Indigenous Advisory Committee before the Minister may approve a project which affects Indigenous people.

72. Upon the release of the Close the Gap report in 2022, the Aboriginal and Torres Strait Islander Social Justice Commissioner June Oscar AO stated:

Our self-determination is fundamental to forming the programs, organisations and structures that will close the gap—anything done without us will never be good enough.

This Close the Gap report reminds us of the deep expertise carried within our lived experience, our knowledge systems, our culture and how what we know have formed the systems that have kept all our peoples healthy, safe and cared for across millennia.³⁷

73. The Closing the Gap National Agreement also provides guidance on shared decision making between government and Aboriginal and Torres Strait Islanders. It states shared decision making is:

- a. by consensus, where the voices of Aboriginal and Torres Strait Islander parties hold as much weight as the governments
- b. transparent, where matters for decision are in terms that are easily understood by all parties and where there is enough information and time to understand the implications of the decision
- c. where Aboriginal and Torres Strait Islander representatives can speak without fear of reprisals or repercussions
- d. where a wide variety of groups of Aboriginal and Torres Strait Islander people, including women, young people, elders, and Aboriginal and Torres Strait Islander people with a disability can have their voice heard
- e. where self-determination is supported, and Aboriginal and Torres Strait Islander lived experience is understood and respected
- f. where relevant funding for programs and services align with jointly agreed community priorities, noting governments retain responsibility for funding decisions

³⁷ Urgent Funding needed to support Indigenous community-led health solutions' *Australian Human Rights Commission* (17 March 2022) Available here: <https://humanrights.gov.au/about/news/urgent-funding-needed-support-indigenous-community-led-health-solutions>

- g. where partnership parties have access to the same data and information, in an easily accessible format, on which any decisions are made.³⁸

74. To appropriately realise the Closing the Gap priorities, the NAIF must enable Indigenous people to be in positions of leadership and to contribute to decisions which affect them.

75. The Indigenous Advisory Committee must be given genuine power which means they have an ability to veto a proposal that involves the Indigenous Employment Strategy or a Priority 4 matter.

Existing statutory rights do not always provide adequate opportunities for consultation

76. Some Traditional Owners have an opportunity to be consulted on infrastructure through rights they have acquired through other legislation. In the Northern Territory, some Traditional Owners have been granted land rights under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). Section 19 ensures that Traditional Owners have a veto power over proposals on their traditional lands.

77. For projects that involve Traditional Owners who only have native title interests, the Facility must be aware of the enormous power imbalance between Traditional Owners and proponents in the context of the future act regime.

78. In the *A Way Forward* report (October 2021) the Committee recommended a review of *Native Title Act 1993* (Cth) to address the inequalities in the negotiating position of Aboriginal and Torres Strait Islander peoples and that standards for negotiations of agreements require proponents to adhere to the principles of Free, Prior and Informed Consent as set out in the UNDRIP.³⁹

79. It follows that the Facility must not infer that because a project has obtained consents from a native title group that it is a matter that has the genuine support of the native title group.

80. A well publicised example of a development that obtained consent from native title holders but it has been a source of concern for Traditional Owners is gas production in the Beetaloo Basin.⁴⁰

³⁸ Priority Reform One – Formal Partnerships and Shared-decision making, *Closing the Gap National Agreement*, (July 2020) Available here: < <https://www.closingthegap.gov.au/national-agreement/national-agreement-closing-the-gap/6-priority-reform-areas/one>>

³⁹ Joint Standing Committee on Northern Australia, *A Way Forward* (October 2021), Recommendation 4 https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024757/toc_pdf/AWayForward.pdf;fileType=application%2Fpdf

⁴⁰ Daniel Fitzgerald, 'Who can veto a Beetaloo Basin gas project? It's an issue vexing Indigenous people, pastoralists' *ABC News* (6 May 2023) Available here: < <https://www.abc.net.au/news/2023-05-06/indigenous-pastoralists-rights-to-veto-beetaloo-fracking/102306884>>

81. Further, there are many instances where infrastructure projects occur on the traditional lands of Aboriginal and Torres Strait Islander people where they have no land or native title rights and therefore no ability to be consulted as a group.

Critical infrastructure may be at odds with the views of Indigenous people

82. The NAIF in its current form does not adequately account for infrastructure that may be deemed by certain policy interests as critical however local Indigenous groups have objected or voiced concerns about the project which have been unaddressed or ignored.

83. Larrakia people have faced this issue with both the Middle Arm Industrial Precinct and Defence Housing Australia's housing project at Lee Point in recent times.

84. As Larrakia people do not have native title or land rights at Lee Point, they put in an application made under the *Aboriginal and Torres Strait Islander Heritage Act 1986* (Cth) to prevent the housing development from proceeding in July 2023. This action was ultimately unsuccessful and no amendments to the housing project plans were made.⁴¹

85. In the Senate Inquiry into Middle Arm Industrial Precinct, the recommendations made by all committee members included the free, prior and informed consent of Larrakia Traditional Owners over any development at Middle Arm.⁴² At present, no such agreement exists which provides free, prior and informed consent of Larrakia people before development is to commence at Middle Arm.

86. The NAIF must not enable such mistakes to be repeated which are counter to the interests of Indigenous people in light of the statutory objectives of the NAIF.

Capacity building of First Nations businesses

87. If the NAIF's objective's involve building infrastructure which is to have a material benefit over Indigenous people's lives, then the relevant communities and Indigenous business leaders must have an opportunity to bring forth and lead their own initiatives.

88. Article 23 of the UNDRIP states:

⁴¹ Roxanne Fitzgerald, 'Environment Minister Tanya Plibersek rejects Aboriginal cultural heritage application at Lee Point' *ABC News* (28 March 2024) Available here:

<<https://www.abc.net.au/news/2024-03-28/nt-tanya-plibersek-rejects-cultural-heritage-push-lee-point/103647770>>

⁴² The Senate Environment and Communications Reference Committee, Middle Arm Industrial Precinct, 21 August 2024. Available here:

https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/RB000239/toc_pdf/MiddleArmIndustrialPrecinct.pdf

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

89. To promote these values, Indigenous businesses must be supported so that they can participate in infrastructure projects for Northern Australia.
90. In 2022, the Reserve Bank of Australia reported that many budding First Nations entrepreneurs still face substantial barriers to establishing a successful business despite it being a growth sector.⁴³ They found that there are additional advantages to be gained by supporting Indigenous-led projects stating:
- [W]e all stand to benefit enormously by addressing the challenges of trust faced by First Nations entrepreneurs – as vehicles of self-determination, First Nations businesses and corporations provide social, cultural, environmental and economic contributions to Australian society. These benefits or ‘spillovers’ from First Nations business activity need to be understood and valued.⁴⁴
91. Research from the Institute of Public Administration Australia found that public servants should draw on place-based and Indigenous-led approaches to make a meaningful difference in the primary health sector which overcomes ‘top down’, ‘one-size-fits-all’ approaches and embeds cultural safety.⁴⁵
92. NIAA already has a capacity building project which supports native title body corporates to take advantage of economic opportunities.⁴⁶ It follows that capacity building opportunities ought to be extended to other First Nations businesses so that the economic opportunities in Northern Australia can be enjoyed by Indigenous corporations.

⁴³ Michelle Evans and Cain Polidano, ‘First Nations Businesses: Progress, Challenges and Opportunities’ (16 June 2022) Available here: <https://www.rba.gov.au/publications/bulletin/2022/jun/first-nations-businesses-progress-challenges-and-opportunities.html>

⁴⁴ Ibid.

⁴⁵ Institute of Public Administration Australia, ‘Co-design and place-based approaches: Lessons from Indigenous-led Initiatives in Australia’s primary health sector’ Available here: <https://www.ipaa.org.au/co-design-and-place-based-approaches-lessons-from-indigenous-led-initiatives-in-australias-primary-health-sector/>

⁴⁶ Capacity building for native title corporations, *National Indigenous Australians Agency*, Available here: <https://www.niaa.gov.au/our-work/environment-and-land/capacity-building-native-title-corporations>

93. To ensure that NAIF financial assistance benefits meaningfully flow to Indigenous Australians, EJA recommends:

- a. Mandate culturally informed and thorough consultation with Aboriginal and Torres Strait Islander People who live in the Northern Australia about the NAIF and infrastructure projects in line with the principles of Free, Prior and Informed Consent in the *United Nations Declaration of the Rights of Indigenous People*,**
- b. The Establishment of an Indigenous Advisory Committee which has a veto power over proposed projects which affect Indigenous people,**
- c. Approvals made pursuant to the Indigenous Engagement Strategy, and Priority 4 must be reviewed by the Indigenous Advisory Committee**
- d. Expanding the functions of the Facility to assist with capacity building of First Nations proponents**