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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**EXPORT FINANCE AND INSURANCE CORPORATION AMENDMENT
(EQUITY INVESTMENTS AND OTHER MEASURES) BILL 2021**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Trade, Tourism and Investment,
the Hon Dan Tehan MP)

EXPORT FINANCE AND INSURANCE CORPORATION AMENDMENT (EQUITY INVESTMENTS AND OTHER MEASURES) BILL 2021

OUTLINE

Purpose/Objective

The Export Finance and Insurance Corporation Amendment (Equity Investments and Other Measures) Bill 2021 (“the **Bill**”) will amend the *Export Finance and Insurance Corporation Act 1991* (“the **Act**”) to provide Export Finance Australia with an equity investment power and to provide it with the ability to make stand-alone overseas infrastructure guarantees.

Why the Bill is required

The Bill will give legislative effect to the Government’s decision to broaden the range of transactions Export Finance Australia can finance by enabling Export Finance Australia to make equity investments, including to support important infrastructure investments in the Indo-Pacific or export-linked projects in Australia.

The current lack of an equity investment power restricts Export Finance Australia to a narrower range of transactions. Equity investments are a suitable form of financial support for important projects that support Australia’s national interests, when other financing tools are either unavailable or inadequate.

An equity investment power will complement Export Finance Australia’s existing suite of financing powers, comprised of loans, guarantees, bonds and insurance. It will align Export Finance Australia with export credit agencies in other countries, like the USA, China, Japan, Canada, and South Korea, and with other Australian Government financing agencies like the Northern Australia Infrastructure Facility and Clean Energy Finance Corporation.

The Bill will also give legislative effect to the Government’s decision to provide Export Finance Australia with the ability to offer guarantees for overseas infrastructure transactions without also needing to provide a loan to the same transaction. This will improve the flexibility and efficiency of Export Finance Australia’s and the Australian Infrastructure Financing Facility for the Pacific’s (AIFFP) overseas infrastructure financing activities, particularly in the Pacific, where transactions may be most appropriately financed in local currencies. Export Finance Australia providing a guarantee for another lender’s loan in local currency is an effective way of facilitating local currency borrowing. Export Finance Australia’s equity investment power will also be available to the AIFFP, which relies on Export Finance Australia’s governing legislation for delivery of its loans.

This Bill reflects the Australian Government’s commitment to ensuring Export Finance Australia has the tools it needs to support Australia’s national interests and priorities.

FINANCIAL IMPACT STATEMENT

The Bill will have no impact on the Commonwealth’s underlying cash balance.

NOTES ON CLAUSES

Clause 1: Short title

1. Clause 1 is a formal provision specifying the short title of the Bill.

Clause 2: Commencement

2. The Bill will commence on the day the Bill receives Royal Assent.

Clause 3: Schedules

3. Clause 3 provides that legislation that is specified in a Schedule to this Bill is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in the Schedule to this Bill has effect according to its terms.

Schedule 1—Equity investments

Export Finance and Insurance Corporation Act 1991

Item 1 – Subsection 3(1) (note to the definition of *overseas infrastructure financing*)

Omit “or providing a financial accommodation”, substitute “providing a financial accommodation or making an equity investment”.

To assist with reading of the Act, this note is amended to remind readers that a reference to the provision of loans or to the lending of money should be understood to include providing finance, providing a financial accommodation or making an equity investment, in any form.

Item 2 – Subsection 3(2)

Omit “or to the provision of a financial accommodation”, substitute “the provision of a financial accommodation or the making of equity investments”.

The item provides that where there is a reference to a loan or to the lending of money, it is read to include a reference to finance, the provision of a financial accommodation or the making of equity investments.

‘Equity investments’ is intended to cover a broad class of ownership interests including, but not limited to, shareholdings in a company, units in a unit trust and participation in partnerships, joint ventures and similar ownership arrangements, whether through subsidiaries or other investment vehicles, or by any combination of these means, regardless of the specific terms of the arrangement.

For example, in relation to shareholdings, an equity investment would include ordinary or preference share holdings whether or not dividends are payable and/or the shares can be redeemed.

Where the equity investment is of a kind that would involve Export Finance Australia arranging or joining in the formation of a company, the requirements of section 13 of the Act would need to be observed.

The amendment to subsection 3(2) flows through the entire Act. Notes are used in some, but not all, places to remind the reader of the effect of this change (for example section 88 and section 13 do not have a note).

Item 3 – At the end of subsection 7(3)

Add:

Note: The provision of loans includes providing finance, providing a financial accommodation or making an equity investment, in any form: see subsection 3(2).

To assist with reading of the Act, this note is added to remind readers that a reference to the provision of loans should be understood to include providing finance, providing a financial accommodation or making an equity investment, in any form.

Item 4 – Paragraph 16(1)(a)

After “has lent, or proposes to lend,”, insert “other than in the form of an equity investment”.

This item prohibits Export Finance Australia from providing guarantees in relation to equity investments provided to a person who is carrying on business in Australia.

Item 5 – Subsection 17(1)

After “has lent, or proposes to lend,”, insert “other than in the form of an equity investment,”.

This item prohibits Export Finance Australia from providing guarantees in relation to equity investments provided for the purpose of financing an export contract or a contract for the sale of goods, or for the performance of works or services outside Australia.

Item 6 and Item 7 – Paragraph 18(a) and Paragraph 18(b)

Paragraph 18(a): After “has lent, or proposes to lend,”, insert “other than in the form of an equity investment,”.

Paragraph 18(b): After “has also lent, or proposes to lend,”, insert “other than in the form of an equity investment”.

These items amend subsections 18(a) and 18(b) to prohibit Export Finance Australia from providing guarantees in relation to equity investments on transactions where Export Finance Australia has also provided an equity investment.

Item 8 – Subsection 23(1) (note)

Omit “or to provide a financial accommodation”, substitute “to provide a financial accommodation or to make an equity investment”.

To assist with reading of the Act, this note is amended to remind readers that a reference to the provision of loans or to the lending of money should be understood to include providing finance, providing a financial accommodation or making an equity investment, in any form.

Item 9 – Subsection 23(3)

After “must not lend money”, insert “(other than in the form of an equity investment)”.

This item amends subsection 23(3) so that the provisions of subsections 23(3) and 23(4) do not apply to equity investments provided by Export Finance Australia.

Item 10 – At the end of section 23

Add:

- (5) In addition, EFIC must not lend money in the form of an equity investment under this section unless an application for the loan has been referred to the Minister under section 25.

Note: A direction under section 26 may prevent such applications from being referred to the Minister. EFIC cannot lend money under this section in those circumstances.

This subsection and note are added to clarify the use and scope of Export Finance Australia's equity investment powers. The addition of subsection 23(5) clarifies that Export Finance Australia cannot make an equity investment under section 23 of the Act unless it has referred the application for the equity investment to the Minister, in accordance with the provisions of section 25 of the Act.

The addition of the note to subsection 23(5) clarifies that a direction issued by the Minister under section 26 of the Act can set out circumstances which may prevent Export Finance Australia from referring applications for equity investments to the Minister. An example of the type of circumstance that the Minister could set out in a section 26 direction for the purposes of this note includes establishing a minimum value for equity investments that can be referred to the Minister under section 23.

Taken together, this new subsection and note have the effect of constraining Export Finance Australia's ability to make equity investments unless a proposed equity investment has been: 1) referred to the Minister for consideration under section 25; and 2) met the circumstances for referral set out in any relevant ministerial direction made under section 26. In practice, this new subsection and note are intended to ensure equity investments provided by Export Finance Australia are only made on its National Interest Account at the direction of the Minister, and not on its Commercial Account.

Item 11 – Subsection 23A(1) (note)

Omit “or to provide a financial accommodation”, substitute “to provide a financial accommodation or to make an equity investment”.

To assist with reading of the Act, this note is amended to remind readers that a reference to the provision of loans or to the lending of money should be understood to include providing finance, providing a financial accommodation or making an equity investment, in any form.

Item 12 – At the end of section 23A

Add:

- (4) In addition, EFIC must not lend money in the form of an equity investment under this section unless the application for the loan has been referred to the Minister under section 25.

Note: A direction under section 26 may prevent such applications from being referred to the Minister. EFIC cannot lend money under this section in those circumstances.

This subsection and note are added to clarify the use and scope of Export Finance Australia's equity investment powers for the purpose of supporting overseas infrastructure development. The addition of subsection 23A(4) clarifies that Export Finance Australia cannot make an equity investment under section 23A of the Act unless it has referred the application for the equity investment to the Minister, in accordance with the provisions of section 25 of the Act.

The addition of the note to subsection 23A(4) clarifies that a direction issued by the Minister under section 26 of the Act can set out circumstances which may prevent Export Finance Australia from referring applications to the Minister for equity investments associated with supporting overseas infrastructure development. An example of the type of circumstance that the Minister could set out in a section 26 direction includes establishing a minimum value for equity investments that may be referred to the Minister under section 23A.

Taken together, this new subsection and note have the effect of constraining Export Finance Australia's ability to make equity investments, unless a proposed equity investment has been: 1) referred to the Minister for consideration under section 25; and 2) met the circumstances for referral set out in any relevant ministerial direction made under section 26. In practice, this new subsection and note are intended to ensure equity investments provided by Export Finance Australia for the purpose of supporting overseas infrastructure development are only made on its National Interest Account at the direction of the Minister, and not on its Commercial Account.

Item 13 – At the end of subsection 27(4)

Add:

Note: The provision of loans includes providing finance, providing a financial accommodation or making an equity investment, in any form: see subsection 3(2).

To assist with reading of the Act, this note is added to remind readers that a reference to the provision of loans should be understood to include providing finance, providing a financial accommodation or making an equity investment, in any form.

Item 14 – At the end of subsection 27(4A)

Add:

Note: The provision of loans includes providing finance, providing a financial accommodation or making an equity investment, in any form: see subsection 3(2).

To assist with reading of the Act, this note is added to remind readers that a reference to the provision of loans should be understood to include providing finance, providing a financial accommodation or making an equity investment, in any form.

Item 15 – Paragraph 28(c)

After “the rate of interest to be charged”, insert “(if applicable)”.

This item amends subsection 28(c) to reflect that rates of interest are not applicable to equity investments.

Item 16 – Paragraph 29(5)(c)

After “the rate of interest to be charged”, insert “(if applicable)”.

This item amends subsection 29(5)(c) to reflect that rates of interest are not applicable to equity investments.

Item 17 – Paragraph 30(2)(c)

After “the rate of interest to be charged”, insert “(if applicable)”.

This item amends subsection 30(2)(c) to reflect that rates of interest are not applicable to equity investments.

Item 18 – At the end of subsection 56(1)

Add:

; and (c) to make adequate provision for losses in relation to loans made in the form of equity investments made by EFIC.

This item requires Export Finance Australia’s Board to ensure that Export Finance Australia’s capital and reserves are sufficient, at any time, to appropriately provision for losses in relation to Export Finance Australia’s equity investments.

Item 19 – Paragraph 56(2)(b)

After “in relation to a loan made by EFIC,”, insert “or a likely loss of a kind referred to in paragraph (1)(c) to a loan made by EFIC in the form of an equity investment,”.

This item clarifies that the Export Finance Australia Board should not include equity investments made in the national interest (under Part 5 of the Act) as part of its consideration (under subsection 56(1)) when determining whether Export Finance Australia has adequate capital and reserves.

Item 20 – Paragraph 66(6)(b)

After “in respect of which default”, insert “or loss”.

This item clarifies that the Commonwealth is liable for losses on equity investments made by Export Finance Australia in the national interest.

Item 21 – After subsection 66(10)

Insert:

(10A) For the purpose of subsection (10), the expenses of EFIC in relation to a loan made in the form of an equity investment include expenses incurred by EFIC in relation to the acquisition, management or sale of its equity interest.

This item clarifies that expenses associated with acquiring, managing or selling an equity interest may be taken into account when determining the amounts that may be deducted from the payments Export Finance Australia is required to make to the Commonwealth under subsection 66(4).

Item 22 – Application of amendments

The amendments of sections 23 and 23A of the *Export Finance and Insurance Corporation Act 1991* made by this Schedule apply in relation to money lent after the commencement of this item.

This provision clarifies that the amendments to sections 23 and 23A of the Act do not affect loans that were provided by Export Finance Australia prior to the commencement of the Bill.

Schedule 2—Guarantees for overseas infrastructure development

Export Finance and Insurance Corporation Act 1991

Item 1 – Section 18A

Repeal the section, substitute:

18A – Guarantees in relation to overseas infrastructure development

If a person (in this section called *the lender*) has lent, or proposes to lend, other than in the form of an equity investment, money to a person for the purpose of supporting overseas infrastructure development, EFIC may guarantee to the lender:

- (a) the repayment of the whole, or any part, of the money lent, or to be lent;
and
- (b) the payment of the whole or a part of any interest or other charges that may become payable to the lender in respect of the money lent, or to be lent.

This item enables Export Finance Australia to provide stand-alone guarantees for the purpose of supporting overseas infrastructure development.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Export Finance and Insurance Corporation Amendment (Equity Investment and Other Measures) Bill 2021

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

This Bill will provide Export Finance Australia with an equity investment power that will give Export Finance Australia more flexibility to support important infrastructure investments in the Indo-Pacific or export-linked projects in Australia. The Bill will also provide Export Finance Australia with a stand-alone overseas infrastructure guarantee power.

Human rights implications

This Bill does not engage any of the applicable rights or freedoms, as it relates to high-level changes to Export Finance Australia's general powers, functions and primary duties.

Conclusion

This Bill is compatible with human rights, as it does not raise any human rights issues.

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