

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Resources and Northern Australia

Northern Australia Infrastructure Facility Act 2016

Northern Australia Infrastructure Facility Investment Mandate Direction 2018

Purpose

Under the *Northern Australia Infrastructure Facility Act 2016* (the NAIF Act), the role of the Northern Australia Infrastructure Facility (the Facility) is to provide grants of financial assistance to the States and Territories for the construction of northern Australia economic infrastructure.

Under the NAIF Act, the Board of the Facility (the Board) is responsible for ensuring the proper, efficient and effective performance of the Facility's functions. The Board is also responsible for deciding the strategies and policies to be followed by the Facility, within the scope of the directions given to the Facility about the performance of the Facility's functions under subsection 9(1) of the NAIF Act. Directions issued in this manner are known collectively as the Facility's Investment Mandate. The purpose of the Investment Mandate is to provide a mechanism for the Commonwealth Government to articulate its broad expectations on the functions of the Facility and how it invests.

The Board is responsible for the Facility's Investment Decisions. Within the scope of the Investment Mandate, the Facility will make individual investment decisions independently of the Commonwealth. Those decisions are subject only to the Minister's limited powers of rejection set out in section 11 of the NAIF Act.

The Facility will fill the gaps in the infrastructure financing market for Northern Australia by providing financing for Projects that produce benefits to the region. Any loan applicant must be able to demonstrate the ability to repay the loan in full. The Facility will only provide the level of concession the Board considers necessary to ensure the project proceeds.

The *Northern Australia Infrastructure Facility Investment Mandate Direction 2018* (the 2018 Mandate) replaces the *Northern Australia Infrastructure Facility Investment Mandate Direction 2016* (the 2016 Mandate). The 2018 Mandate removes barriers to the effective operation of the Facility that have been identified since commencement of the Facility. The primary change is the removal of the two Mandatory Criteria in Schedule 1 to the 2016 Mandate that limited Facility loans to 50 per cent of debt funding and required the Facility to be satisfied that the project would not proceed, or would only proceed at a much later date, without Facility funds. There are also a number of consequential changes to other sections. The 2018 Mandate clarifies what types of projects are eligible for the Facility's assistance. It also provides some clarifications as to how the Board should consider whether a project provides a public benefit.

Details of the 2018 Mandate are outlined in [Attachment A](#).

Background

The Commonwealth Government announced the Facility in the 2015–16 Budget. It is a major initiative of the Commonwealth’s White Paper on Developing Northern Australia (*Our North, Our Future*), and is integral to the Commonwealth’s strategy for the north. The Facility offers up to \$5.0 billion in finance, which may be on concessional terms, to encourage investment in infrastructure in Northern Australia.

Authority

Subsection 9(1) of the NAIF Act provides that the responsible Minister must, by legislative instrument, give directions to the Facility about the performance of the Facility’s functions. Subsection 9(3) provides that the Facility must take all reasonable steps to comply with those directions.

Consultation

The Commonwealth undertook extensive consultation on the Facility when it was established. The changes implemented by the 2018 Mandate have been informed by an independent expert review of the operation of the Facility undertaken in late 2017. State and Territory governments, project proponents and the Facility were consulted as part of this review.

Along with the Facility, the following Commonwealth agencies were consulted in development of the 2018 Mandate: Department of the Prime Minister and Cabinet, Department of the Treasury, Department of Finance, Department of Foreign Affairs and Trade, Attorney General’s Department, Department of Infrastructure, Regional Development and Cities, Infrastructure and Project Financing Agency, Department of Communications and the Arts, Department of Education and Training, Department of the Environment and Energy, and Department of Agriculture and Water Resources.

Regulation Impact Statement

The Office of Best Practice Regulation (OBPR) agreed that the reissue of a direction for the Facility does not require a Regulation Impact Statement. The OBPR reference number for this matter is 22522.

Details of the *Northern Australia Infrastructure Facility Investment Mandate Direction 2018*

PART 1—PRELIMINARY

Section 1—Name

Section 1 provides that the title of the Direction is the *Northern Australia Infrastructure Facility Investment Mandate Direction 2018*.

Section 2—Commencement

Section 2 provides that the direction commences the day after it is registered. A note to section 2 further clarifies that the Direction, as a direction by a Minister to a body, is exempt from Parliamentary disallowance (see section 9 of the *Legislation (Exemptions and Other Matters) Regulation 2015*).

Section 3—Authority

Section 3 provides that the Direction is made under subsection 9(1) of the NAIF Act.

Section 4—Definitions

Section 4 provides the definitions of key terms used in the Direction.

The definition of **Project** covers the overall project that embodies or incorporates the Northern Australia economic infrastructure for which the Project Proponent is seeking the Facility's support. For example, a Project could be an agricultural venture that also includes transportation infrastructure to export its goods to the market, rather than only the transportation infrastructure.

Section 5—Purpose

Section 5 provides that the purpose of the Direction is to direct the Facility in relation to the performance of its functions. As set out in section 7 of the NAIF Act, the function of the Facility is to provide grants of financial assistance to states and territories for the construction of Northern Australia economic infrastructure and determine the terms and conditions for these grants of financial assistance. The matters on which the Direction can provide detailed directions to the Board are covered in section 10 of the NAIF Act.

PART 2—DIRECTIONS

Section 6—Making Investment Decisions

Section 6 provides that the Board must make Investment Decisions on behalf of the Facility, in relation to whether to provide financial assistance to states and territories for the construction of Northern Australia economic infrastructure.

Subsection 6(2) provides that upon making an Investment Decision, the Facility must notify the Project Proponent of the outcome of that Investment Decision as soon as practicable after the decision is made.

Section 7—Matters to be considered when making Investment Decisions

Subsection 7(1) provides that before the Board makes an Investment Decision to offer a Financing Mechanism, it must be satisfied that the project meets all five criteria in Schedule 1 to the Direction.

The Facility aims to promote economic and population growth in northern Australia through the construction of new or enhanced infrastructure. Criterion 1 reflects this, requiring projects to incorporate construction or enhancement of physical structures, assets (including moveable assets) or facilities which underpin, facilitate or are associated with the transport or flow of people, goods, services or information, the establishment or enhancement of business activity in a region, an increase in economic activity in a region, including efficiency in developing or connecting markets, or an increase in population. Examples of the type of projects that may be eligible include, but are not limited to ports, airports, rail, roads, water, energy and communications networks, social infrastructure (including health facilities, education facilities, research facilities, training and related accommodation facilities), processing facilities (including abattoirs and agricultural processing plants) and transshipment vessels.

Criterion 2 requires that projects will be of public benefit. In assessing a project to be of public benefit, the Board must be satisfied that the project will deliver benefits for the broader economy and community. In satisfying this criterion, the Board may consider whether the Project has the capacity to serve multiple users either immediately or during the expected life of the Project.

Criterion 3 requires that the Project be located in or have a significant benefit for Northern Australia.

Criterion 4 requires that the Board be satisfied that the loan will be able to be repaid or refinanced. The purpose of this Criterion is to ensure that prior to an Investment Decision the Project Proponent demonstrates to the Board, through comprehensive financial modelling, its ability to repay or refinance the debt as set out in the proposed contract terms to the Facility in full.

Criterion 5 requires Project Proponents to have an Indigenous engagement strategy.

In addition to the Mandatory Criteria, paragraph 7(1)(b) requires that any return on the Facility's investment will cover at least the Facility's administrative costs and the Commonwealth's cost of borrowing, which may include a risk premium.

Subsection 7(2) sets out the matters that the Board must have regard to when making Investment Decisions.

Paragraph 7(2)(a) provides that these matters include the extent of any concessions that can be offered under section 9 of the Direction.

Paragraph 7(2)(b) requires the Board to have regard to the potential effect of the project on other infrastructure in the region, both existing and planned. For example, if for a particular Project to proceed other infrastructure in the region of the Project would be required to be upgraded, (such as roads, telecommunications and rail lines), then the Board should consider these circumstances in making that Investment Decision.

Paragraph 7(2)(c) requires the Board to have regard to the effects of the Financing Mechanism on the Australian infrastructure financing market. The Financing Mechanism includes loans and alternative Financing Mechanisms under section 11 of the Direction. The purpose of this paragraph is to ensure that the Board fully considers the implications and potential distortions the provision of financial assistance, and the type of financial assistance provided, may have on the operation of the Australian infrastructure financing markets.

Paragraph 7(2)(d) requires the Board to have regard to the potential of the investment to encourage private sector participation in the Project.

Paragraph 7(3)(a) provides that the Board must have regard to the location and related industry sector of the Project and give preference to an overall portfolio of Projects with a diverse geographical and sector representation. It is the Commonwealth's preference for the Facility to invest in a range of different types of infrastructure which are spread across the three Northern Australia jurisdictions.

Paragraph 7(3)(b) provides that the Board should have regard to whether a project has been identified as a priority project through a Commonwealth, State or Territory assessment process, pipeline or priority. This reflects the Government's preference for the investments of the Facility to overcome identified infrastructure gaps.

Section 8—Discretion

Section 8 gives the Board the discretion to decline an Investment Proposal for a grant of financial assistance.

Section 9—Determining concessions

Paragraphs 9(1)(a) and 9(1)(b) require the Board to have regard to the extent and mix of all concessions necessary for the Investment Proposal to proceed, and the extent of the Project's public benefit.

Subsection 9(2) requires the Board to provide only the level of concession the Board considers necessary to allow the Project to proceed. The role of the Facility is not to increase the profitability of Project Proponents, but to support infrastructure Projects that provide a public benefit.

Subsection 9(3) provides the Board the flexibility to propose contract terms that provide for the reduction of concessions or exit from the investment altogether. For example, this could be if the Project is performing better than expected.

Section 10—Loan conditions

Section 10 provides that loans are the primary form of funding mechanism that the Board should consider for all Investment Proposals. Subsection 10(2) sets out a non-exhaustive list of loan concessions that the Facility may propose.

Paragraph 10(2)(b) requires that interest rates offered by the Facility are not lower than the rate at which the Commonwealth borrows. The Commonwealth borrows at different rates for different loan tenors. For example, if the Facility is lending for a 10-year period, then the rate offered by the Facility should not be below the rate that the Commonwealth borrows at for a similar 10-year period. In determining the interest rates to be offered, the Facility should also take into account possible fluctuations to the Commonwealth's cost of borrowing that will occur over time. This paragraph should be read with paragraph 7(1)(b), which specifies that any return the Facility generates from an investment needs to meet the Commonwealth's cost of borrowing.

Section 11—Alternative Financing Mechanisms

Subsection 11(1) allows the Board to consider alternative Financing Mechanisms where it is more appropriate for a particular Project. This includes where it is more efficient or effective to use an alternative Financing Mechanism. This provides the Board the ability to be flexible in its Financing Mechanism offerings to the unique needs of the Project. This can include financial guarantees and other financial mechanisms. Any alternative Financing Mechanisms fully account against the Facility's \$5 billion funding allocation.

Subsection 11(2) makes it clear that all sections of, and the Schedules to, the Direction apply to any alternative Financing Mechanisms, other than section 10 (which is specific to loans), or where otherwise stated.

Subsection 11(3) sets out the process the Board must take to seek agreement from the responsible Minister to the use of an alternative Financing Mechanism.

Subsection 11(4) specifies that the responsible Minister will seek agreement from the Minister for Finance and the Treasurer, and consult with the relevant jurisdiction(s), prior to agreeing to the use of an alternative Financing Mechanism.

Subsection 11(5) states that the Facility will not provide equity for a Project. This means the Facility will not take on an ownership stake in a Project. This does not prevent the Board from utilising alternative Financing Mechanisms that subject the Commonwealth to risks associated with the operation and performance of a Project.

Section 12—Investment risk

Subsection 12(1) sets out risk related matters that the Board must have regard to for each Project that the Facility provides assistance to.

Paragraphs 12(1)(a) and (b) are intended to ensure that there is a reasonable allocation of risk for the Project between NAIF and other sources of finance. Paragraph 12(1)(c) ensures that the Board must be satisfied that the Facility only takes on risks that are appropriately managed.

Paragraph 12(1)(d) requires the Board to identify all sources of Commonwealth financial risk in a Project and be satisfied that the Commonwealth does not hold the majority of that risk. Financial risk is borne by equity capital that carries the first loss risk. In assessing whether the Commonwealth holds the majority of the financial risk, the Board should consider the proportion of equity capital held by the Commonwealth.

For the avoidance of doubt, satisfaction of subsection 12(1) does not preclude the Facility being the sole provider of debt finance to a Project.

Subsection 12(2) to (4) outlines how the Facility is to develop its Risk Appetite Statement, which will guide its Investment Decisions.

Subsection 12(2) requires the Facility to develop a Risk Appetite Statement in consultation with the Minister and Northern Australia jurisdictions. Subsection 12(3) requires the Risk Appetite Statement to have a preference for a diversified portfolio.

Subsection 12(4) permits the Facility to have a greater tolerance for risk (relative to Commercial Financiers) due to factors unique to investing in Northern Australian economic infrastructure. Subsection 12(5) requires the Facility to review the Risk Appetite Statement at least annually.

Section 13—Consultation

Section 13 provides information on the consultation processes the Facility is to undertake with jurisdictions. It specifies that the Facility's consultation process with relevant jurisdictions must commence as soon as practicable after receiving an Investment Proposal. The relevant jurisdiction is where the Project is located, and can include multiple jurisdictions. The purpose of this section is for the relevant jurisdiction to be fully engaged on a Project, and for the Project Proponent to be informed as soon as possible if the Project will not be supported. Where a Project crosses jurisdictional boundaries, consultation is to occur with all jurisdictions in which the Project falls, but this does not preclude the jurisdictions agreeing to appoint a lead jurisdiction for a particular Project.

Section 14—Relationship with other Government entities

Section 14 specifies that the Facility must consult with Infrastructure Australia on Investment Proposals where the Facility's investment is \$100 million or greater. As appropriate, the Facility must consult with relevant government stakeholders including for example Commonwealth departments and local councils.

Section 15—Regulatory and environmental approvals

Section 15 requires that financial assistance cannot be provided to a Project Proponent unless such approvals are in place in order to ensure that all Projects invested in by the Facility are compliant with all relevant regulatory, environmental and Native Title approvals and arrangements for each stage of the Project.

This could include the implementation of water arrangements under the National Water Initiative, as well as all relevant Native Title requirements.

Section 16—Reputation

Section 16 provides that the Facility has a responsibility to act in a way that is not likely to cause reputational damage to the Commonwealth, or the Northern Territory, Queensland, and Western Australia governments.

Section 17—Corporate governance

Subsection 17(1) provides that in undertaking its investment function, the Facility must have regard to Australian best practice government governance principles and Australian best practice corporate governance for Commercial Financiers. This is so the Facility has credibility in financial markets and maintains a positive commercial reputation. For the purposes of transparency, the Facility is required to publish information regarding the Board's Investment Decisions on its website within 30 business days of a final Investment Decision (subsection 17(2)). Final Investment Decisions can only be made after the Ministerial consideration period as required by Section 11 of the NAIF Act has elapsed. Subsection 17(3) specifies that the Facility will publish guidance on its website to assist Project Proponents in their development of Investment Proposals.

Section 18—Application of Australian Industry Participation (AIP) Plans

Section 18 provides that Projects must comply with the Commonwealth's Australian Industry Participation (AIP) Plan policy, before the Board can make an Investment Decision on an Investment Proposal. AIP Plans are designed to provide details on the expected opportunities to supply goods and/or services to the Project; how these opportunities will be communicated to potential suppliers; and how Australian businesses will be assisted in longer-term participation, including encouraging capability development and integration into global supply chains. The purpose of this section is to maximise the opportunities for Australian businesses to participate in major Projects.

Section 19—Repeal of previous Direction

Section 19 provides that the Direction repeals the Facility's previous Investment Mandate (the *Northern Australia Infrastructure Facility Investment Mandate Direction 2016*).

The power to repeal a previous investment mandate is implied in the power of the responsible Minister under subsection 9(1) of the NAIF Act to issue new investment mandates to the Facility. Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

SCHEDULE 1—ELIGIBILITY FOR FINANCIAL ASSISTANCE—MANDATORY CRITERIA

Schedule 1 to the Direction specifies the mandatory criteria that an Investment Proposal must satisfy. To be eligible for financial assistance from the Facility, Project Proponents must satisfy all 5 criteria. These criteria are discussed in section 7 above.