

## Australia's \$1 billion loan to Adani is ripe for a High Court challenge

Written by Brendan Gogarty, Senior Lecturer in Law, University of Tasmania

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Indian mining giant Adani's proposal to build Australia's largest coal mine in Queensland's Galilee Basin has been the source of sharp national controversy, because of its potential [economic, health, environmental](#) and [cultural](#) risks.

These concerns were amplified this week when India's former environment minister Jairam Ramesh [told the ABC's Four Corners](#) :

My message to the Australian government would certainly be: please demonstrate that you have done more homework than has been the case so far.

It's a valid warning, considering that a Commonwealth investment board is considering loaning Adani [A\\$1 billion](#) in federal money to assist the development of mining infrastructure.

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**Read more:** [Adani gives itself the green light, but that doesn't change the economics of coal](#)

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The loan, expected to be [announced any day now](#) , will no doubt agitate further political controversy.

It is also likely to pave the way for yet more court challenges against Adani's proposal.

## Why does Adani want Commonwealth money?

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One of the major questions about Adani's mine is its financial viability, and its [inability to secure private sector funding](#)

. Its proponents blame anti-coal campaigners, but arguably more important are the [myriad concerns](#) about Adani's liquidity, its corporate structure and conduct, and the ever-weakening international coal market.

Against this backdrop Adani has requested A\$1 billion from the [Northern Australia Infrastructure Facility](#) (NAIF) – a A\$5 billion discretionary government fund set up in 2016 to [promote economic development in the country's north](#)

The timing and geographical focus of the fund have raised fears it is just a government “[slush fund](#)”, set up with Adani's plans specifically in mind. The federal government initially [denied this](#), with Energy Minister Josh Frydenberg stressing that the mine “needs to stand on its own two feet”.

But shortly after the NAIF Act was passed, [Adani's application was made public](#), although there remains little available detail about whether or why it will be given the money, or the exact amount.

## Loan procedures

NAIF's board will make the decision, not a government minister. Its processes are shielded from scrutiny by a [lack of transparency requirements](#) and consistent [blocking of Freedom of Information requests](#).

As the loan decisions are made by a quasi-corporate board, rather than a minister, it is much harder (if not impossible) to challenge them directly in court. Nor does the NAIF Act provide grounds for review or appeal.

Ultimately, this leaves those who object to Adani receiving Commonwealth money with a very limited avenue of legal challenge. The only option is to argue that the NAIF Act is itself unconstitutional.

### Constitutional challenge

The Commonwealth has no direct power to make laws that control or support infrastructure or mining directly. Instead, the NAIF Act seeks to do this indirectly using [Section 96 of the Constitution](#), which states:

During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, **the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.**  
(emphasis added)

There are two points to note here.

The first is that this granting provision was clearly meant as a transitional measure for the decade immediately following federation, to protect poorer states from bankruptcy while adjusting their economies to a federal model. Note also that the provision was clearly intended to help state governments, not corporations.

The second is the phrase “terms and conditions”, which clearly relates to the repayment of these loans, much like the terms and conditions applied to any banking loan today.

Both of these things were ignored by the early (and somewhat infamous) [Engineers High Court from the 1920s to 1950s](#), which tended to interpret the Constitution in a way that favoured the Commonwealth over the states.

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Perhaps most importantly, the court ruled that Section 96 allows the Commonwealth to apply any terms and conditions it likes to the loans, rather than simply setting the terms of repayment. That has meant that states can be compelled to take particular actions – such as accepting national educational standards, building roads or, indeed, infrastructure development – in return for financial assistance. States were also forced to stop collecting income tax in return for federal monies. This resulted in a “[vertical fiscal imbalance](#)” which has left the states at the financial mercy of the Commonwealth ever since.

This extremely liberal interpretation of Section 96 has not been legally challenged since the early days of the federation, not least because recipients or potential recipients of money are unlikely to bite the hand that feeds them. But the Adani loan might just change this.



Critics of the use of Section 96 have long hoped for a High Court challenge to its ever-growing use to expand Commonwealth financial influence. The Adani loan may be the right vehicle. Then nicke/Wikicommons

Adani's prospective loan seems clearly inconsistent with the wording of Section 96. Any constitutional challenge against it is likely to be complex and nuanced, but two basic arguments present themselves.

First, the Constitution states that it is the *Commonwealth Parliament* that must determine both the loan and its conditions. However, the NAIF Act grants these powers to a corporate board, which answers only indirectly to the Parliament.

Second, the Constitution states that it is the *state* that must receive the loan. But the Queensland Government has [stated that it will simply pass the NAIF funding straight to Adani](#), and that:

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Commonwealth's borrowings for the NAIF project will remain on the Commonwealth's balance sheet and not on Queensland's.

This is a highly questionable use of a federal power that was conceived as a way to help states with their financing, rather than private multinational companies.

Note also the apparent bypassing of the Senate in this process. Senators may be likely to bring a legal challenge if they feel that federal money meant to benefit their states is being distributed improperly.

### More than just federal money at stake

While it is impossible to second-guess the High Court on such a complex matter, its recent decisions indicate a [major swing away from unsupervised Commonwealth spending](#), especially on issues that affect the [fiscal balance between the states and Commonwealth](#). The potential Adani loan certainly seems to fall into that category.

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**Read more:** [Why are we still pursuing the Adani Carmichael mine?](#)

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Yet as much as Section 96 has been stretched beyond its original intention, it has also been used to support vital and important national enterprises, from education, to social welfare, and indeed national development projects.

With that in mind, the Commonwealth might ultimately come to doubt the wisdom of granting such a vast sum of money to a questionable company. If it leads to more restrictive reading of Section 96 by the High Court, it might significantly limit Canberra's ability to fund valuable schemes in other areas.

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*Brendan Gogarty is has provided pro bono (free) legal advice to the Australian Conversation Foundation on the constitutionality of the proposed Adani Loan. The advice was provided in a voluntary capacity in his role as a community legal practitioner.*

Authors: Brendan Gogarty, Senior Lecturer in Law, University of Tasmania

**Read more** <http://theconversation.com/australias-1-billion-loan-to-adani-is-ripe-for-a-high-court-challenge-85077>