

Question: Jubilee Australia's submission notes there have been some issues with the National Contact Point. It also refer to some improvements. Please expand on what could be changed to make the National Contact Point more effective.

Response by Jubilee Australia Research Centre, 4 November 2024:

Jubilee Australia Research Centre welcomes the opportunity to provide further information to the Committee into Pacific priorities regarding what could be changed to make the National Contact Point more effective.

Jubilee Australia has been pleased to participate as a co-notifier in bringing two complaints to the Australian National Contact Point for Responsible Business Conduct (AusNCP).

About the complaints brought to the AusNCP

The first, was pertaining to complaint brought on behalf of 2,638 people by Project Sepik, an NGO based in Papua New Guinea, and Jubilee Australia. This complaint alleged concerns regarding a lack of free, prior and informed consent by Sepik River communities to PanAust's proposed Frieda River mine, which plans a huge tailings dam in the headwaters of the Frieda River. The region was subject to massive flooding earlier this year, following an earthquake measuring 6.9 on the Richter scale in March 2024.

The notifiers in this complaint were essentially concerned about a lack of free, prior and informed consent (FPIC) as well as concern about the potential for a collapse of the tailings dam.

Collapse of a tailings dam occurred at Vale/BHP's Samarco tailings dam in Brazil, which is now subject to litigation in two countries, with a settlement this month in Brazil for \$31.7 billion, and an ongoing action in the UK seeking more than \$70 billion in damages. In that case, the Fundao tailings dam launched forth approximately 55 to 62 million cubic metres of tailings into the Doce River. In the case of the Frieda River mine, the tailings dam will have capacity for 'a maximum mine waste rock and tailings storage capacity of 3.3 billion cubic metres'.¹

The second complaint is currently on foot, with a Final Statement to be released later in 2024. This complaint was brought in conjunction with the Evangelical Lutheran Church of PNG, and environmental law firm the Centre for Environmental Law and Community Rights Inc, both based in PNG.

This complaint alleged concerned a lack of free, prior and informed consent, and a lack of respect for human rights and the environment, regarding Newcrest Mining and Harmony Gold (Australia) Pty Ltd's almost-approved plans to dump 360 million tonnes of tailings into the ocean less than 5km from Lae, the second largest city in PNG, via 'Deep Sea Tailings Placement'. The companies also plan to run three pipelines across the Morobe province, which is seismically active and faced severe flooding in July/August 2024, with the tailings pipeline (to carry heavy metals such as untold amounts of lead and mercury) planning to run directly through the streets of Lae, past hospitals, schools, homes and businesses. The city of Lae is bounded by two fault lines, north and south of the city, with experts from Geoscience Australia previously describing a major seismic event affecting the city as a matter of 'when, not if'.

Jubilee Australia has welcomed the opportunity to bring both of these complaints to the AusNCP. We have also welcomed the thoughtful attention, dedication and commitment of AusNCP Secretariat staff, as well as the thoughtful analysis, dedication and consideration

paid to both complaints by AusNCP staff and the Independent Examiners appointed for each of our complaints.

However, we see that there is a role for scope for extension of the powers of the AusNCP, and potentially the funding envelope for the AusNCP, as well as greater intersection of its Final Statements with the market and ASX to increase its relevance.

In October 2023, Jubilee Australia raised our concerns regarding the AusNCP in its consultation on Complaint Procedures. Some of these concerns are reproduced here.

The need to better integrate the AusNCP with the market

Jubilee Australia suggests that investors are increasingly focusing on the importance of human rights and environmental issues.

Jubilee Australia believes that this trend is evidenced in the landmark case lodged by the Australasian Centre for Corporate Responsibility against Santos, which is being currently heard in the Federal Court of Australia, with claims alleging greenwashing, and misleading and deceptive conduct.

However, while the AusNCP's issue of Final Statements can be a strong statement against corporate misconduct where there is non-compliance with the OECD Guidelines for Multinational Enterprises, Jubilee Australia submits that the findings of the AusNCP may potentially be operating in a silo. At present, the full-text Final Statements issued by the AusNCP are released in PDF on its website, and are potentially not well-read by the public (potential future investors) and investors of the companies who are named in complaints.

There does not currently appear to be a requirement that Enterprises named in complaints disclose the full content of the Final Statements released by the AusNCP to their investors. The issues that we raised within our complaints to the AusNCP did not reach much public attention.

In Newcrest's 2023 Sustainability Report, Newcrest notes that 'Newcrest's Community Concerns, Complaints and Grievances Guideline classifies grievances according to a risk and severity classification level of between 1 and 3. Level 3 grievances are 'significant' and are reported in the table... for GRI disclosure but **did not meet internal thresholds for reporting to the market.**'⁹

The AusNCP complaint for Wafi-Golpu was listed as a 'significant' dispute, on page 56 of 62 of the report. The Sustainability Report further articulated that:

'The AusNCP assessed the complaint and decided to consider the matters raised by it, which means the complaint can proceed to the next stage of the AusNCP process (which is like mediation). After thoughtful consideration, Harmony Gold (Australia) and Newcrest Mining decided not to take part in the next stage. Importantly, the same issues raised with the AusNCP have also been raised in legal proceedings instituted in PNG, including by one of the Notifiers. Accordingly, we await the outcome of those legal proceedings.'

We are not aware if there has been any mention of the complaint in Newcrest's documentation to the ASX. It appears that current disclosure requirements mandate that enterprises disclose to ASX when it is subject to legal proceedings – however, the AusNCP does not fall within this definition. (This inherently fails to recognise the difficulties for citizens of a foreign country to file legal proceedings in Australia for civil liability, addressed further below. Given the multi-national aspect of many Australian companies, there is a need to

update disclosure requirements to cast the net wider than it currently operates. One aspect of this, would be to require disclosure to the market where an Australian company has been subject to an OECD National Contact Point complaint.)

Further, Listing Rule 3.1 requires a listed entity to disclose information “concerning it” that “a reasonable person would expect to have a material effect on the price or value of the entity’s securities”. (Continuous Disclosure: An Abridged Guide at page 3). We submit that ESG issues raised within AusNCP complaints are issues that a ‘reasonable person would expect to have a material effect on the price or value of the entity’s securities’.

We note that under the ASX Disclosure Rules that there are additional ongoing reporting requirements for a mining company, including the provision of quarterly reports on its mining activities immediately as it is available for release.¹⁰

Statements issued by Australian companies, such as Annual Mineral Resources and Ore Reserves Statements, regarding reserves held by the company, include reserves being mined or planning to be mined by foreign subsidiaries of the company. However, the environmental and human rights issues associated with the mining and planned mining of such reserves does not receive the same disclosure to the market.

We believe that it would be more appropriate for greater links between the AusNCP’s findings and the market to be made, to increase its effectiveness.

Jubilee Australia submits that the Committee further consider with the AusNCP, ASX and with ASIC what further opportunities may be feasible to integrate the notification of Initial Assessments and Final Statements of the AusNCP, with existing due diligence, disclosure, regulatory and legislative obligations to notify the market.

For example, one option may be that a ASX disclosure guidance be issued that could require that where a Final Statement has been issued by the AusNCP, that the statement must be released by the relevantly named company in full text to its investors.

Alternatively, another option could be that the publication of a Final Statement, and its accompanying full text, be mandated to be disclosed to the market as a ‘company announcement’ available on the ASX website.

Integrating the disclosure of AusNCP Initial Assessment and Final Statements with disclosure requirements is important so that investors are aware where issues are extant to such a level that they have been raised within an OECD process. We submit that the issues raised by the AusNCP should be deemed important to require disclosure given the interest, commitment and dedication by investors to the environment and human rights.

The importance of the OECD Australian National Contact Point

It must be remembered that the functions of the AusNCP are incredibly important, especially given the immense presence of Australian companies operating in the Pacific region, and globally. Australian extractive companies are operating in Fiji, Papua New Guinea, Solomon Islands, and many other countries in our region.

In our research, we have found that there are many foreign subsidiaries of Australian companies operating in the Pacific. For some of these, they appear to be essentially controlled in Australia, but are registered as local corporations in the country in which they are operating.

In Australia, 'whether a parent company is liable for the wrongs of a foreign subsidiary is determined by applying orthodox principles of the tort of negligence.'ⁱⁱ

However, it has been noted that 'unlike in the UK and Canada, the courts in Australia have not (yet) engaged with the emerging concept of 'group enterprise theory.'ⁱⁱⁱ It has also been noted that 'the courts in Australia have generally been 'reluctant to pierce the corporate veil' between a parent company and its subsidiary operating overseas. Further challenges in seeking to hold Australian corporations liable for their subsidiaries for human rights abuses can be seen in an excellent paper by barrister and academic Peter Cashman.^{iv} Such challenges include costs, jurisdiction, limitations, and public awareness.

There is a need for the further development of legal precedent in this area, as well as exploration of scope for reform in the area of the civil liability of Australian corporations and their foreign subsidiaries for human rights abuses, and how this plays out in the Australian courts.

However, until that happens, and beyond, the role of the AusNCP is incredibly important in providing vulnerable communities with a non-judicial avenue to raise their concerns and to seek remedy.

Below, see some extracted responses of recommendations and views that we provided to the AusNCP Consultation in October 2023, that would assist in increasing the effectiveness of the AusNCP.

Responses to AusNCP Consultation October 2023

Question: Are the revised procedures well-designed to bring parties together to resolve complaints? If not, what changes could be made?

We note that the Procedures surrounding 'Submitting a complaint' now includes 'an expectation about good faith participation in the complaints process'. We also note that there has been a revised definition of 'good faith'. We note that 'good faith' is defined within the Complaint Procedures as:

[...] responding to the AusNCP in a timely fashion, acting consistent with the AusNCP complaint procedures including by maintaining confidentiality where appropriate, refraining from misrepresenting the issues and the process particularly in public communications, not threatening or taking reprisals against other parties or against the AusNCP itself, and genuinely engaging in the proceedings with a view to finding a Guidelines-compatible solution to the issues raised, including giving serious consideration to any offer of good offices made by or on behalf of the AusNCP.³

Under the current arrangements, there is a strong onus upon Notifiers of a complaint to evidence their allegations that the company has breached the guidelines. However, there is no similarly strong consequence placed upon Enterprises if they do not participate in good faith with the AusNCP process, for example, if they were to decline an offer of good offices.

Jubilee Australia believes that one of the greatest weaknesses in the current guidelines and procedures is the ability of enterprises to opt out of the good offices stage.

Enterprises may also continue to pursue their projects while AusNCP processes remain underway, and the existence of an AusNCP complaint does not place any form of roadblock on this pursuit.

Previously, we recommended in our submission to the AusNCP consultation that:

The good faith definition should be broadened to include participation in the good offices stage if the complainants request it.

It may also be appropriate to include that the good faith definition may also include halting those activities which the complaint seeks to draw attention to, if any are ongoing.

The AusNCP could issue stronger recommendations and offer possibilities for sanctions

We submit that it may be appropriate for the AusNCP to consider issuing stronger recommendations to companies, including recommending actions to be taken by Enterprises that incur considerable financial cost.

Possibilities for sanctions may also be appropriate to consider. For example, the Canadian Ombudsman for Responsible Enterprise (CORE), an ancillary body to the Canadian NCP with respect to human rights abuses, affords a number of possibilities for sanctions if a company has not acted in good faith, such as:

- The withdrawal or denial of trade advocacy support provided to the Canadian company by the Department of Foreign Affairs, Trade and Development;
- The refusal to provide future trade advocacy support to the Canadian company;
- The refusal by Export Development Canada to provide future financial support to the Canadian company.

Publication, transparency and reporting

We wish to note that presently, the lack of transparency and public awareness regarding the AusNCP plays into the interests of the companies. It is in the interest of the companies for these complaints to be as quiet, unobtrusive as possible.

We believe that there are ways that the AusNCP can increase the transparency surrounding the complaint process – through strengthening publication and reporting.

At present, there is a table available of active complaints and closed complaints on the AusNCP website. While helpful in summarising the active complaints before the AusNCP, we believe that this does not devote enough attention to each complaint, or provide sufficient detail.

Recommendation: Complaint data could be more completely displayed on the website to include;

- the names of the Enterprises, the country, the sector to which the complaint relates, as well as also the Chapter headings and specific paragraph provisions of the Guidelines which are alleged to have been breached;
- A new webpage to be dedicated to each complaint submitted to the AusNCP, as well as a 'news' section which provides updates about each complaint, including publication as a full-text news item of the full text of initial assessments, final statements and follow-up statements.

To date, the publication of an initial assessment statement has been in the form of a PDF document. We believe that this is inadequate. The choice of publication type itself hinders transparency and accountability regarding the Enterprise. We believe that it would be appropriate for the Complaint Procedures to specify that more details about the initial

assessment statement be published as a full-text news item on the AusNCP website, as well as the PDF of the initial assessment.

This would greatly assist in increasing the transparency of the complaint process, as well as ensuring that complainants are able to more easily access important information - that may be pertinent to their complaint - in remote areas, rather than needing to download PDFs.

Annual reporting of the AusNCP

We would also like to see more complete annual reporting by the AusNCP. We believe that this reporting would assist in raising awareness of the AusNCP and its functions. We also believe that it would assist in increasing both accountability of the AusNCP as a process, and ensuring greater measurement of the AusNCP's functions, including measurements on a year-to-year basis on the number of complaints received, and how many breaches of the OECD Guidelines were found. This would then assist in assessing the AusNCP's functions as a whole, rather than just its functions in relation to individual complaints.

Recommendation: The AusNCP's Annual Reports should provide the following information:

- Number of complaints received;
- Number of complaints that have been initially assessed, examined and followed up;
- Names of companies that have received complaints;
- Reporting against which chapters of the Guidelines have been subject to alleged breaches;
- Reporting regarding which provisions of the Guidelines have been subject to alleged breaches;
- Reporting against which chapters and provisions of the Guidelines have been found by the AusNCP in their Final Statements to have been breached;
- Summary of all complaints which have been subject to Final Statements or Follow Up Statements;
- Summary of all recommendations issued within the year;
- Any subsequent follow-up or update in the conduct of companies associated with those complaints;
- Summary of which Chapters were most frequently subject to complaint in the year;
- Summary of any notifications undertaken by AusNCP to other agencies or regulatory bodies;
- Highlighting the vision of the OECD Guidelines and the mandate of the AusNCP.

Make a finding as to alleged breaches

Paragraph 52 of the Complaint Procedures provides that:

At a minimum, the final statement will include the issues raised, the parties' respective positions as appropriate, the steps taken by the AusNCP, and the parties' engagement in the process.

We submit that it may be more appropriate that this paragraph also require the AusNCP to make a conclusive assessment as to whether there has been a breach of each of the OECD Guidelines alleged by the Notifiers or Complainants.

Conclusion

We thank the Committee for the opportunity to elaborate further upon the operation of the OECD Australian National Contact Point. Again, we wish to emphasise that we have welcomed the dedication and commitment of the staff and independent examiners of the AusNCP in addressing the concerns raised within our complaints. We look forward to the further strengthening of this important mechanism.

References

ⁱ Frieda River, 'The Frieda River Hydroelectric Project,' available at https://www.friedariver.com/wp-content/uploads/2022/11/Frieda-River-Limited_Fact-sheet_Frieda-River-Hydroelectric-Project.pdf

ⁱⁱ Norton Rose Fulbright, Australia – Cross border guide to parent company liability for foreign subsidiaries, May 2021, available at <https://www.nortonrosefulbright.com/en-bi/knowledge/publications/45a02b88/australia-cross-border-guide-to-parent-company-liability-for-foreign-subsidiaries>

ⁱⁱⁱ Norton Rose Fulbright, Australia – Cross border guide to parent company liability for foreign subsidiaries, May 2021, available at <https://www.nortonrosefulbright.com/en-bi/knowledge/publications/45a02b88/australia-cross-border-guide-to-parent-company-liability-for-foreign-subsidiaries>

^{iv} Peter Cashman, 'Civil liability in Australia for international human rights violations,' UNSW Law and Justice Research Series, (2024) available at <https://www5.austlii.edu.au/au/journals/UNSWLRS/2024/27.pdf>