



Complaint against Rio Tinto

Submitted to the Australian National Contact Point for the OECD
Guidelines for Multinational Enterprises

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1. Executive Summary

This complaint is brought by the Human Rights Law Centre (*the Notifier*) on behalf of 156 residents of Dapera, Enamira, Java, Kobalu 1 and other villages downstream of the Panguna mine in Bougainville, Papua New Guinea listed in **Appendix 1 (the Complainants)**.

The complaint alleges that Anglo-Australian mining company Rio Tinto is responsible for significant breaches of the OECD guidelines relating to the serious, ongoing environmental and human rights violations arising from the operation of its former Panguna mine on Bougainville.

Between 1972 and 1989, the Panguna mine, developed and majority-owned by Rio Tinto, was one of the world's largest copper and gold mines. During this period, the company's subsidiary Bougainville Copper Limited (**BCL**) discharged over a billion tonnes of mine waste into local river systems, devastating the environment and the health and livelihoods of local communities.

In 1989, tensions over the social and environmental impacts of the mine and unequal distribution of profits led to an insurrection by local people which forced the mine's closure and triggered a brutal, decade-long civil war which cost the lives of up to 15,000 people.

In 2016, Rio Tinto divested from the mine, leaving the massive quantities of waste and pollution from the mine unaddressed.

As a result, copper pollution from the mine pit and tailings continues to flow into local rivers, turning the riverbed and rocks an unnatural blue. The Jaba-Kawerong river valley downstream of the mine resembles a moonscape, with vast mounds of grey tailings waste and rock stretching almost 40km downstream to the coast. Levees constructed at the time of the mine's operation are now collapsing, threatening nearby villages.

An estimated 12,000-14,000 people live in communities around and downstream of the mine. These communities have been left in a deteriorating, increasingly dangerous situation as a result of Rio Tinto's failure to address the legacy of pollution left by the mine.

The contamination of the Kawerong and Jaba rivers has severely limited peoples' access to clean water for drinking and sanitation. Communities report serious health consequences as a result of bathing in and using the heavily polluted rivers, including skin diseases, diarrhoea, respiratory problems and pregnancy complications.

With each heavy rainfall, huge volumes of tailings waste continue to be washed into the rivers, flooding large tracts of land downstream with polluted mud, displacing villages, contaminating water sources and destroying sacred sites central to peoples' culture and

agricultural land essential to their livelihoods. At such times, river crossings become perilous, with constantly shifting channels and large areas of quicksand.

The mine pollution continues to infringe nearly all the economic, social and cultural rights of these indigenous communities, including their rights to food, water, health, housing and an adequate standard of living. It also continues to have serious environmental impacts, destroying and threatening previously un-impacted rivers and creeks and large areas of rainforest.

The complaint alleges that, through failing to address these ongoing impacts of its operations, Rio Tinto is responsible for significant breaches of its human rights and environmental obligations under Chapters II, IV and VI of OECD guidelines.

The Complainants are seeking commitments from Rio Tinto to:

- Engage with them and other Panguna mine-affected communities to help find solutions to these urgent problems and undertake formal reconciliation as per Bougainvillean custom;
- Fund an independent environmental and human rights impact assessment of the mine by a team of qualified local and international experts to map impacts – in particular those posing serious risks to public health and safety – and to develop recommendations to address these;
- Contribute to a substantial, independently-managed fund, to help address the harms caused by the mine and assist long-term rehabilitation efforts in accordance with the recommendations of the assessment and the needs identified by local communities.

The Complainants request the Australian OECD National Contact Point (**AusNCP**) uses its good offices to try to facilitate resolution of the issues set out in this complaint.

If resolution cannot be achieved, the complainants request that the Independent Examiner undertakes a thorough investigation of the issues and issues a determination with respect to the breaches of the Guidelines by Rio Tinto alleged in the complaint, and makes recommendations to the company to address the serious adverse impacts of its activities.

2. Background

2.1 Identity and interest of the Notifier

The **Human Rights Law Centre (HRLC)** is an Australian not-for-profit legal centre which uses a combination of legal action, policy solutions and advocacy to promote and protect human rights in Australia and in Australian activities overseas. The HRLC has been working directly with communities in Bougainville affected by the Panguna mine since mid-2019 and has previously engaged with Rio Tinto in relation to the impacts outlined in this complaint. In March 2020, the HRLC released a report about the ongoing human rights impacts of the mine, *After the Mine: Living with Rio Tinto's deadly legacy (HRLC Report)* which is appended to this complaint at **Appendix 2**.

2.2 Identity and interest of the Complainants

The 156 Complainants are residents and traditional landowners from the villages of Dapera, Enamira, Pangkarinaru (also called Java), Kobalu 1, Pirurari, Veleteba, Dutumani, Parakaikasi, Ariere, Makosi, Konepoi, Meua, Katauli, Palamato, Maile, Kokore, Kobaru, Namunsa, Topu, Konia and Derevai villages. These villages are located downstream of the mine in areas known as the Special Mine Lease area, Upper Tailings, Middle Tailings and Lower Tailings. A map setting out the location of the villages can be found at page 9 of the HRLC Report.

2.3 Identity of the Respondent - Rio Tinto

Rio Tinto is one of the world's largest global mining and metals companies, reporting a profit of \$10.37 billion in February 2020.¹

The Rio Tinto Group comprises Rio Tinto Limited, which is listed on the Australian Stock Exchange and headquartered at 360 Collins Street, Melbourne, Australia, and Rio Tinto plc, listed on the London Stock Exchange and headquartered in the UK.

Since 1995, the two companies have been joined in a dual listed company structure as a single economic entity.² Prior to June 1997, the combined company was referred to as RTZ/CRA (representing the two companies, RTZ Corporation plc (**RTZ**) and Conzinc Riotinto of Australia (**CRA**)).

¹ Peter Ker, 'Rio profit surges to eight-year high' *Australian Financial Review* (online) 26 February 2020, <https://www.afr.com/companies/mining/rio-tinto-profit-surges-to-8-year-high-20200226-p544lf>.

² See Rio Tinto, *DLC Structure*, <https://www.riotinto.com/investors/dlc-structure-4942.aspx>.

Rio Tinto produces aluminium, copper, diamonds, gold, industrial minerals, iron ore and uranium, and owns and operates open pit and underground mines, mills, refineries, smelters, power stations, research and service facilities. The company has a workforce of 47,500 people in around 35 countries, with operations in Australia, Canada, the United States, Asia, Europe, Africa and South America.

2.4 Rio Tinto's Policy Commitments to Human Rights and the Environment

Rio Tinto has for many years held itself out as a global leader on human rights and environmental standards, both publicly committing to international standards on these matters and regularly promoting their human rights credentials in their corporate publications. Rio Tinto unreservedly claims that:

*'We are committed to the protection of human rights across each and every one of our operations and throughout our business. It's not only the right way to do business but is essential to our license to operate.'*³

*'We're not always legally required to meet international human rights standards. We work to meet them because we've chosen to respect human rights as a responsible company. This is not only the right thing to do, it is critical to maintaining trust and our licence to operate.'*⁴

In consecutive human rights policies and statements since at least 2013, Rio Tinto has stated that it has voluntarily adopted and works consistently in line with both the UN Universal Declaration on Human Rights and the UN Guiding Principles on Business and Human Rights (**UNGPs**) to *'identify, prevent, mitigate and address any involvement [Rio Tinto] might have on adverse human rights impacts through its own operations and business relationships'*.⁵

Further and importantly, since at least 2001,⁶ Rio Tinto has publicly endorsed and voluntarily committed to complying with the OECD Guidelines for Multinational Enterprises. In its publication, *Why human rights matter*, Rio states:

'Our Human Rights Framework, which aligns with our commitments under the OECD Guidelines for Multinational Enterprises and reflects the UN Guiding Principles on

³ Bruce Harvey quoted in *DIHR helps produce human rights guides for Rio Tinto* (2013), <<https://www.humanrights.dk/news/dihr-helps-produce-human-rights-guide-rio-tinto>>.

⁴ Rio Tinto, 'Human Rights', accessed on 13 June 2019, <<http://www.riotinto.com/ourcommitment/human-rights-24289.aspx>>.

⁵ Rio Tinto, 'Why human rights matter' (2013) (January 2013) <https://www.riotinto.com/documents/ReportsPublications/Rio_Tinto_human_rights_guide_-_English_version.pdf> at 89 (Appendix A) and 90 (Appendix B); Rio Tinto, 'Our Commitment to Human Rights', <<http://www.riotinto.com/ourcommitment/human-rights-24289.aspx>>.

⁶ Rio Tinto, 'Annual Report' (2001).

*Business and Human Rights, has its foundations in human rights due diligence carried out as part of our corporate processes.*⁷

Rio Tinto has also publicly endorsed and positioned itself as a leader of other international human rights and environmental standards and initiatives such as UN Global Compact, the Sustainable Development Goals, the International Council on Mining and Metals, and the Voluntary Principles on Security and Human Rights.⁸

While Rio Tinto notes that it pays close attention to all internationally-recognised human rights, it claims to prioritise ‘*salient human rights issues*’ including:

- Land access and resettlement;
- Indigenous people’s rights, including cultural heritage; and
- The environment, including access to water.

In relation to its environmental obligations, Rio Tinto states that:

‘Our license to operate rights depends upon the quality of our environmental stewardship. We respect the value of natural resources of our host countries. We consider the environmental impact of all our activities, and we are pioneering innovative ways to reduce energy use and carbon emissions, manage water responsibly, and reduce waste...

*In planning and operating our assets, we seek to avoid, prevent, mitigate and remediate the environmental impacts of our activities. We work with our host communities and regulators to manage and monitor these and to comply with relevant regulations...Our overriding aim is to protect human health and the environment and we work with neighbouring communities to understand any impacts and further improve our practices.*⁹ (our emphasis added)

Rio Tinto notes that these responsibilities do not end once a mine ceases to be operational:

*We manage our assets and the impacts they have across their full life cycle, including after we have finished. This is the right thing to do for communities and the environment and it is the right thing to do for our business. The legacy we leave behind from our past activities impacts on our future licence to operate.*¹⁰

Likewise in relation to the rights of indigenous peoples, Rio Tinto emphasise their respect for peoples’ unique and important interests in their land, waters and cultural heritage:

⁷ Rio Tinto, ‘Why human rights matter’ (January 2013) <https://www.riotinto.com/documents/ReportsPublications/Rio_Tinto_human_rights_guide_-_English_version.pdf> 11.

⁸ Ibid.

⁹ Rio Tinto, ‘Environment’ accessed 13 June 2019 <http://www.riotinto.com/ourcommitment/environment-24290.aspx>.

¹⁰ Rio Tinto, ‘Closure’ accessed 13 June 2019 <https://www.riotinto.com/sustainability/closure>.

*We respect the diversity of indigenous peoples, acknowledging the unique and important interests that they have in the land, waters and environment as well as their history, culture and traditional ways... We set out to build enduring relationships with our neighbours that demonstrate mutual respect, active partnership and long term commitment.*¹¹

2.5 The development and operation of the Panguna mine

The history of Rio Tinto's development and operation of the Panguna mine are set out in full at pp 10-15 of the HRLC Report at **Appendix 2**.

In summary, Rio Tinto's Australian predecessor company, CRA, developed the mine in the 1960s while Bougainville was still governed by Australia as an external territory. RTZ/CRA controlled and operated the mine through a specially established subsidiary company, BCL, from 1972 until the mine's forced closure in 1989.

The development of the mine was, from the outset, resisted by local people, who were not consulted and for the most part strongly opposed the development.¹²

2.6 The environmental framework for the mine and impacts caused during its operation

At the time the mine was developed, there was no legal requirement for BCL to undertake an Environmental Impact Assessment for the project and none was undertaken.¹³

As outlined in successive agreements governing the mine, however, it was always the intention that the land impacted by the mine would ultimately be returned to landowners in useable condition, and the company was therefore required under those agreements to mitigate the most destructive and foreseeable consequences of its operations and the

¹¹ Rio Tinto, 'The Way We Work' (2009)

https://contractors.kennecott.com/sites/contractors.kennecott.com/files/uploads/The_way_we_work.pdf 14.

¹² W.D.Scott & Co. *A Study of the Impact of the Bougainville Copper Project on the Economy and Society of Papua New Guinea* (Bougainville Copper Pty Ltd, 1973, 2-1); Cairan O'Faircheallaigh, 'The Bougainville Crisis' (1990) 1:1, *Policy, Organisation and Society*, 30.

¹³ Philip J Hughes and Marjorie Sullivan, 'Environmental Impact Assessment in Papua New Guinea: Lessons for the Wider Pacific Region' (1989) 30(1) *Pacific Viewpoint*, 36.

disposal of tailings from the mine. These agreements are appended to the complaint at **Appendix 3.**

Under the 1971 Disposal of Overburden and Tailings Agreement which applied at the outset of the mine's operation, the company was required to:

- take such action as is necessary to confine flooding, damage or the disposal of tailings within the lease area;
- take adequate measures to maintain the integrity of the waste dumps from the dangers of Kawerong river flows;
- Use all practicable measures to ensure that copper leaching from its tailings dumps would be of sufficiently low level that no serious damage could result to vegetation or animal life; and
- Ensure that from 1980, disposal of tailings would be consistent with the objective of re-using any land affected by the tailings disposal.

The 1987 Disposal of Tailings Agreement further strengthened these obligations, requiring the company to:

- take all reasonable steps necessary to ensure rehabilitation of land and vegetation in areas affected by the waste rock and tailings disposal system; and
- take all reasonable steps to ensure that any discharges into the river system contained no more than a sufficiently low level of copper or other contaminants...to ensure no serious damage is done to the biota or causes any risk to public health.

These requirements were not adhered to. Instead, 150,000 tonnes a day of tailings waste was indiscriminately disposed of into the rivers – over 1 billion tonnes in total.¹⁴

As noted by early environmental studies on the mine, the vast quantities of sediment quickly choked the river system and caused an overbank of 1700 hectares of tailings on either side of the rivers, killing agricultural land and large areas of forest used by communities for hunting and building materials.¹⁵ Local water sources used for drinking, bathing and fishing were heavily polluted with heavy metals, which also wiped out all aquatic life in the rivers. Sacred

¹⁴ John Cornell, 'Compensation and Conflict: The Bougainville issue in Papua New Guinea' in John Connell and Richard Howitt (eds), *Mining and Indigenous Peoples in Australasia* (Sydney University Press, 1991); Don Vernon, 'The Panguna Mine' in Anthony Regan and Helga-Maria Griffin, *Bougainville: Before the Conflict*, (Pandanus Books, 1991); Paul Quodling, *Bougainville: the mine and the people*, (Centre for Independent Studies, 1991), 34.

¹⁵ MJF Brown, 'A Development Consequence – Disposal of Mining Waste on Bougainville, Papua New Guinea' (1974) 5(2) *Geoforum*, 20, 25-27. See also Applied Geology Associates (AGA), *Environmental, Socio-economic and Public Health Review of Bougainville Copper Mine, Panguna*, report prepared for the Government of Papua New Guinea (Wellington, 1989), 8.3.1.1.

sites were destroyed, villages were relocated and many communities lost large parts of their arable land.¹⁶

In 1988, faced with rising local anger over the extent of the mine's impacts, the PNG Government commissioned an independent environmental and social impact assessment of the mine by the New Zealand Applied Geology Associates (**AGA Report**).¹⁷ This report is appended to the Complaint at **Appendix 4**.

The AGA Report found that:

- Approximately 3000 hectares of the Jaba River valley had been occupied by tailings or flooding caused by the deposition of tailings;
- The forests that once occupied the Jaba River valley were unlikely to ever return;
- The water and fish resources of the Kawerong and Jaba rivers had been lost probably for at least several generations, due to the unstable flow of water, high sediment loads and chemical pollution;
- Copper and other heavy metals were likely to continue to leach from the tailings for many years after the mine's closure;
- The combined loss of land and water resources had destroyed local communities' ability to sustain themselves from the land as remaining land not already impacted by tailings waste was generally too steep and infertile to support gardens or crops.

The report concluded that:

*'The impact of the mine has been extreme by any measure and most of the adverse impacts are long lasting; in some cases permanent...Overall, the nature and scale of the effects of the tailings disposal are well beyond what the people of the Kawerong and Jaba valleys could have imagined prior to the start of operations and certainly beyond what BCL predicted and the Administration accepted at the start of mining...While the National Government...and the Company have enjoyed the benefits, the costs have not been borne by them but by the Nasioi people.'*¹⁸

The AGA recommended a series of urgent actions by the company to address the multiple problems caused by the mine, including but not limited to:

- Taking steps to stabilise the Kawerong-Jaba river system and undertake environmental monitoring and rehabilitation wherever possible of the river valley;

¹⁶ MJF Brown, above n 15, 20, 25-27, 25.

¹⁷ Applied Geology Associates, above n 15, 8.3.1.1.

¹⁸ Ibid, 5.3.5.

- Undertaking a review and assessment of the water supply requirements of villages with a view towards providing a permanent, good quality water reticulation or storage tank system ideally designed to remain after the mine had closed;
- Testing of process chemicals in the deposited tailings and on dust from the tailings and an assessment of the impacts of these on human health;
- Planning additional reserved land for potential resettlement of those likely to be displaced by ongoing impacts from the tailings;
- Making attempts to control malaria in areas permanently backed up by tailings deposition, including through the introduction of appropriate fish species; and
- Upgrading health care services in the area.¹⁹

2.7 The Conflict

The environmental devastation and profound socio-cultural disruption caused by the mine led in 1988 to a campaign of protest and civil disobedience by landowners – including sit-ins to block access to the mine and calls for BCL to implement proper environmental controls and pay K10 billion in compensation to landowners.²⁰

When these demands were not met, the New Panguna Landowners Association (**PLA**), began a campaign of industrial sabotage, using explosives to attack the power pylons to the mine.²¹

In response, the PNG government sent in police mobile squads and troops to crush the uprising and try to secure the mine. An extensive, bloody campaign of “destructions” was initiated, during which hundreds of villages around the mine area were looted and burned and their inhabitants were forcibly moved into detention camps known as “care centres” run by the military, where torture, rape and extra-judicial killings were recorded.²²

The conflict rapidly evolved into bloody decade-long civil war which ultimately claimed the lives of between 10,000 and 15,000 people. Evidence has subsequently emerged revealing that CRA/BCL played a key role in pressuring the PNG Government into a military response to recapture the mine, and provided crucial logistical support for their military operations there.²³

¹⁹ Ibid, 8.4.

²⁰ Ibid, 1.2.

²¹ Kylie McKenna, *Corporate Social Responsibility and Natural Resource Conflict*, (Routledge, 2016) 26.

²² Amnesty International, *Papua New Guinea: Human Rights Violations on Bougainville 1989-1990*, (Amnesty International Secretariat, 1990a); Marilyn Taleo Havini, *A Compilation of Human Rights Abuses Against the People of Bougainville: 1989-1995*, Volumes 1 and 2, (Bougainville Freedom Movement, 1996).

²³ Bougainville Copper Limited Official, A Personal Communication, 31 May 2006; Bougainville Copper Limited Official B, Personal Communication, 7 June 2006; Bougainville Copper Limited Official C, Personal Communication,

The conflict finally ended in 1998, and peace was formalised in 2001 with the signing of the Bougainville Peace Agreement. The mine has remained closed since 1989.

2.8 Rio Tinto's divestment from the mine

Throughout the conflict and the 18 years that followed, Rio Tinto retained its majority holding in BCL and kept a skeleton staff team in Port Moresby.²⁴ Between 2013 and 2014, the company held discussions with the ABG, the PNG Government and local landowners about potentially re-opening the mine.²⁵ The ABG and landowners made it clear that addressing the environmental legacy of the mine was an essential precondition to any consideration of its re-opening.²⁶

In the context of these discussions, Rio Tinto, via BCL, publicly committed to undertaking remediation and rehabilitation studies and implementing environmental programs at Panguna. The company noted that:

'The abrupt shut down of the Panguna mine in 1989 and the subsequent period of conflict on Bougainville meant there was no opportunity to implement plans for its formal closure. BCL is committed to undertaking appropriate remediation and rehabilitation studies and implementing environmental programs regardless of the future operation of the mine.'²⁷ (our emphasis)

A joint committee comprising company, landowner and government representatives developed terms of reference for an independent environmental assessment, advised by the United Nations Environment Program.²⁸ A number of internationally accredited firms were shortlisted to undertake the assessment and develop recommendations for clean-up,²⁹ and a separate social audit was initiated to assess social and cultural impacts.³⁰

26 October 2006, Letter from RJ Cornelius to Colonel Nuia 17 Jan 1990: published in Kristian Lasslett, *State Crime on the Margins of Empire*, State Crime on the Margins of Empire: Rio Tinto, the War on Bougainville and Resistance to Mining (Pluto Press, 2014). Key documentary records have been published by Professor Lasslett and can be accessed here: <http://statecrime.org/state-crime-research/why-bougainville-landowners-oppose-rio-tintos-return/>.

²⁴ BCL's 2013 Annual Report notes that 'given the non-operational status of BCL... the company does not have any employees and instead contracts a management team, including the services of Peter Taylor, from Rio Tinto as chief executive officer, under a service agreement. Peter Taylor is the managing director and is employed by the Rio Tinto Group, which pays his salary and entitlements'. See Bougainville Copper Limited, Annual Report 2013, <<http://www.bcl.com.pg/wp-content/uploads/2014/03/Annual-Report-Release-March-141.pdf>>.

²⁵ Dr John Momis, 'Deciding the Future of the Panguna Mine' (21 May 2014)

<<https://ramumine.wordpress.com/2014/05/21/john-momis-deciding-the-future-of-the-panguna-mine/>>.

²⁶ Dr John Momis, quoted in Kylie McKenna, *Corporate Social Responsibility and Natural Resource Conflict* (Routledge 2016) 87.

²⁷ Bougainville Copper Limited, 'Studies Will Provide More Information on Panguna' (Media Release, 10 February 2014) <http://www.bcl.com.pg/studies-will-provide-more-information-on-panguna/>.

²⁸ ABC News, 'UNEP to help Bougainville manage clean-up of Panguna mine' (4 September 2013).

²⁹ Bougainville Copper Limited, 'Panguna Planning Continues with Appointment of Consultants' (Media Release, 19 August 2014) <<http://www.bcl.com.pg/pangunaplanning-continues-with-appointment-ofconsultants/>>.

³⁰ Catherine MacDonald, Final Report: Bougainville Socioeconomic and Cultural Baseline Desktop Study and Social Mapping and Landowner Identification Desktop Study (Aug 2015) (on file).

In August 2014, however, in the midst of making these plans,³¹ Rio announced it would be undertaking a review of its investment in the mine.³² In June 2016, the company divested of its entire 53.8% shareholding in BCL, passing its shares to the ABG and PNG Governments. Through its divestment, Rio asserted that it had no ongoing responsibilities in relation to the extensive legacy issues arising from the operation of the mine.³³

Rio Tinto's decision to review its investment in the mine appears to have been prompted at least in part by new mining legislation passed by the ABG, which stripped BCL of seven of its exploration and mining leases, leaving it with just one exploration lease over the mine site itself.³⁴

The official reason the company ultimately gave to the ABG for its withdrawal was that '*market conditions and competing demands within the company for its limited capital resources*' meant that Rio Tinto was not in a position to participate in future mining activity there.³⁵ In relation to addressing the mine's legacy of environmental devastation, Rio Tinto stated that it believed that '*BCL was fully compliant with all regulatory requirements and applicable standards at the time*' and therefore had no further responsibility for addressing these.³⁶

Rio's abandonment of its responsibilities was resoundingly condemned on Bougainville.³⁷ Without Rio Tinto's financial backing, the environmental and social assessments had to be abandoned and the impacts of the mine have to this day remained unaddressed. Neither the ABG nor PNG Government (nor BCL, which was left a shell company by the divestment) have the resources to clean up the site, which it has been estimated could cost billions.³⁸

³¹ ABC News, 'UNEP to help Bougainville manage clean-up of Panguna mine' (4 September 2013) <https://www.abc.net.au/news/2013-09-04/an-bougainville-unesp/4935456>; Bougainville Copper Limited, 'Panguna Planning Continues with Appointment of Consultants' (Media Release, 19 August 2014) (<http://www.bcl.com.pg/pangunaplanning-continues-with-appointment-of-consultants/>); Catherine MacDonald, Final Report: Bougainville Socioeconomic and Cultural Baseline Desktop Study and Social Mapping and Landowner Identification Desktop Study (Aug 2015) (on file).

³² Rio Tinto, 'Bougainville Copper Limited shareholding' (Media Release, 30 June 2016) <https://www.riotinto.com/media/media-released-237_17638.aspx>.

³³ Letter from Dr John Momis to the International Council on Mining and Metals, *Rio Tinto Plc and its Responsibilities in Relation to Bougainville* (4 July 2016), available at: <https://bougainvillenews.files.wordpress.com/2016/07/momis-to-icmm-4-july-2016.pdf>.

³⁴ Jemima Garrett, 'Rio Tinto subsidiary takes legal advice after being stripped of Bougainville mining licences' ABC News (online) 13 August 2014. See also Rio Tinto, 'Rio Tinto to review options in Bougainville Copper Limited' (Media Release, 18 August 2014).

³⁵ Letter from Rio Tinto Group Executive Joanne Farrell to President Momis dated 5 August 2016, available online at <<https://www.smh.com.au/world/billion-dollar-mess-a-major-disaster-the-people-do-not-deserve-to-have-20160817-gquzli.html>>.

³⁶ Ibid.

³⁷ ABG President John Momis, 'Rio Tinto's decision to divest its BCL shares, and deny responsibility for Panguna mine legacy issues', Statement to the House of Representatives (20 July 2016). <<https://asopa.typepad.com/files/president/momiss-statement-to-bougainville-parliament-on-rio-tinto-decision.pdf>>. See also Autonomous Bougainville Government, 'Resolution by the House relating to Rio Tinto shares and the Panguna mine legacy' (20 July 2016).

³⁸ Ibid.

3. Ongoing environmental damage and human rights impacts caused by the mine

The ongoing environmental damage and the human rights impacts suffered by communities as a result of pollution from the mine are summarised in this section and are set out in full, together with relevant images and testimonies from community members, at pages 20-45 of the HRLC Report at **Appendix 2**.³⁹

3.1 Polluted Rivers

The Kawerong and Jaba rivers continue to be heavily contaminated by ongoing copper pollution from the mine pit and vast quantities of waste tailings left by the mine. The water which flows out of the mine pit drainage tunnel and into the Kawerong River is a bright unnatural blue and leaves a blue residue on the rocks in and surrounding the river. The leaching of copper and other heavy metals from the mine dumps and waste rock was noted by the AGA Report in 1989 and it was predicted that this would continue and potentially worsen as a result of acid rock drainage.⁴⁰

Copper is highly toxic to fish, plants and other aquatic life and can be dangerous to human health in higher concentrations.⁴¹ Current levels of copper and other heavy metals within the Kawerong and Jaba rivers are unknown, but communities point to the absence of fish and aquatic life in the rivers as evidence the water is highly polluted. Communities further report that the water causes an itchy, burning sensation on the skin and causes clothing and metal objects to rapidly deteriorate if immersed in the rivers.

Despite this, due to the absence of alternative water sources, particularly for communities living further downstream in the Middle and Lower Tailings areas, many people are obliged to continue to use the rivers for bathing and washing. Large numbers of people, including children, also work in the rivers panning for gold to support themselves, due to a lack of

³⁹ See HRLC Report, 'Polluted Rivers' pages 16-19, 'Lack of access to Clean Water' pages 20-22, 'Flooding and land destruction' pages 23-27, 'Treacherous river crossings' pages 30-31, 'Landslides and collapsing levees' pages 32-34, 'Food shortages' pages 35-36, 'Disease and illness' pages 37-45.

⁴⁰ Applied Geology Associates, above n **Error! Bookmark not defined.**, 5.14.

⁴¹ Ibid.

alternative sources of income. Communities report a variety of health impacts due to contact with the polluted water, discussed further below.

3.2 Treacherous river crossings

The lack of safe roads and bridges along and across the Jaba and Kawerong rivers means that residents of many villages are compelled to cross the rivers daily in order to access basic services, look for firewood, tend to crops or gardens and go to school.

The highly polluted nature of the rivers, combined with the continuous movement of the tailings sands, which also creates areas of quicksand, makes such crossings treacherous, particularly during the rainy season. Community members interviewed by the HRLC reported several cases where people, including children, had drowned or suffered serious injuries attempting to cross the rivers.

Bridges constructed during the time of the mine's operation are now either gone or unusable. Many communities find themselves entirely cut off for parts of the rainy season. In other places, communities are reliant on using rusted pipes left from the mining operation as their only route across the rivers.

3.3 Lack of access to clean water

Lack of access to clean water for drinking and sanitation is a major ongoing concern for most communities living around the mine. In the Middle Tailings area, people generally use a combination of rainwater tanks or water piped a substantial distance from mountain springs. Communities report, however, that many of these sources dry up during the dry season meaning they either have to travel long distances to get water, buy it or rely on boiling water from potentially contaminated sources. During the dry season, communities also report that their water sources become contaminated from dust from the vast tailings mounds nearby.

Communities in lowland areas further downstream are in an even worse position, as they have no nearby mountain springs and are heavily reliant on nearby creeks and groundwater for fresh water. Those who can afford them have rainwater tanks, but this is uncommon and most rely on tiny groundwater pits dug next to creeks. Communities report that flooding caused by the tailings waste moving into these areas is now contaminating many nearby creeks and other water sources previously used for fishing and drinking water, meaning many

people now have to walk long distances each day to carry water back from uncontaminated sources.

Communities report significant anxiety about potential contamination of their water sources with chemicals from the mine and the unknown long-term health consequences of these chemicals.

3.4 Flooding and destruction of land and sacred sites

The chemical contamination of the rivers is compounded by ongoing erosion from the vast mounds of tailings waste dumped by the company into the Jaba River valley. With each heavy rainfall, huge volumes of tailings sand are washed into rivers, flooding large tracts of land downstream with polluted mud.

In 2017, sediment build-up in the Kawerong River caused it to flood and change course, impacting areas of land in the Lower Tailings area far from the original course of the river. Large forest and wetlands areas are reported to have been destroyed by tailings sludge in January 2019. The area had previously been used for farming and collecting vital materials for house construction such as sago palm leaves. The area is now a wasteland dotted with dying trees.

The flooding has already had a significant impact on people's livelihoods, housing and ability to feed themselves and their families. The flooding and dangerous conditions of the rivers also creates serious dangers for communities who have to cross rivers on a regular basis and has at times threatened villages, forcing people to relocate.

The flooding caused by the mine waste is also reported to be destroying some of the few remaining sacred sites in the Lower Tailings area, which is causing communities significant distress. Interviews undertaken by the HRLC identified at least 2 important sites belonging to the Mematangha Clan and one belonging to the Barapang Clan which are being destroyed or

partially destroyed by flooding. These are sites which the Clans believe house the spirits of their ancestors and which were previously used for important rituals.

Destruction of these sacred places is not only depriving communities of important places to undertake customary ceremonies but also a sense of connectedness to their ancestors, land and culture.

Flooding has also caused landlessness in some places and eroded land boundaries, which in turn has engendered social tensions between landowners.

3.5 Landslides and collapsing levees

Risks created by levee instability and landslides from the vast mounds of tailings waste generated by the mine is another issue of major concern for communities. Levees originally built to contain the tailings and to redirect the Kawerong River have collapsed or are in the process of collapsing putting communities at risk and contributing to the issues of flooding further downstream.

Communities report that small landslides from the uncontained tailings mound are commonplace, particularly following earth tremors and after heavy rains. Due to land shortages, people have been compelled to build houses directly on the tailings waste, often directly next to unstable levees and tailings mounds.

In one area, near the village of Pangkarinaru, the levee separating the Kawerong River from the village is being undermined by the river and villagers fear that following heavy rainfall, the levee may collapse, causing the river to flood their village.

3.6 Food shortages

Loss of arable land has denied many people the ability to carry out subsistence farming, creating situations of food insecurity which has been and continues to be compounded by destruction of fish in the Jaba and Kawerong rivers. Communities describe both a decrease in the amount of land available for growing food and the quantity and quality of food that their land will yield, which they believe is due to contamination of the soil from chemical from the mine.

3.7 Disease and illnesses

Residents describe the overall health of their communities as poor. They report the prevalence of particular health problems which they attribute to exposure to pollution from the mine. These include:

- Skin diseases, particularly irritation and itching when they spend time in the rivers, and the development of skin sores, particularly on parts of the body such as the feet and legs which are immersed in the water.
- Respiratory problems and chest infections, particularly among children, from swimming or bathing in the rivers and from inhaling the fumes and dust that rise off the tailings and waste rock.
- Gastrointestinal problems, including diarrhoea and sometimes vomiting after exposure to the rivers.
- Women's health and pregnancy complications, particularly among "panning mothers" who spend time in the rivers while pregnant, including bleeding, miscarriages and difficulty bringing pregnancies to term.
- Increased instances of malaria as a result of mosquito infestations linked to the swamplands created by local creeks being backed up with tailings mud.

Local health professionals interviewed by the HRLC confirmed the prevalence of these health problems among communities living along the tailings, and were of the opinion that many of these problems could well be linked to exposure to pollution from the mine.

4. Human rights violations

4.1 Right to life

At their most serious, the mine's impacts are directly infringing peoples' rights to life.⁴² As noted above, several residents interviewed by the HRLC reported that community members, including children, had drowned, or been placed at serious risk, as a result of the treacherous river conditions created by the massive quantities of mine waste.⁴³

Exposure to toxic and dangerous products also '*constitutes a serious threat to the human rights to life and health of individuals*',⁴⁴ particularly '*in developing countries that do not have*

⁴² Human Rights Committee, *General Comment No 6: Article 6 (Right to Life)*, 16th sess, UN Doc. HRI/GEN/1/Rev1 (30 April 1982) para 1; Human Rights Committee, *General comment No 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, 124th sess, UN Doc CCPR/C/GC/36 (30 October 2018) para 2.

⁴³ These were already forming and expected to continue forming during the mine's period of operation. See, AGA Report above n 15, at 8 which states: 'In some areas, especially along the northern bank of the Jaba River, access to villages has been hindered by the deposition of tailing which provide an uncomfortable and sometimes dangerous access to the road for which there is no alternative.'

⁴⁴ Human Rights Committee, *The adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights*, 12th sess, UN doc A/HRC/RES/12/18 at 2.

the technologies to process them.⁴⁵ For people in Bougainville living in many cases literally on top of the mine's waste and bathing in its chemically-polluted rivers, serious questions arise about the long-term health effects of such exposure and whether it is diminishing the life expectancy of families.

4.2 Right to health

The mine has also had, and continues to have, multiple, intersecting impacts on peoples' right to health under the International Covenant of Economic, Social and Cultural Rights (**ICESCR**)⁴⁶. The right to health expressly extends to cover the social determinants of health such as food, water, and housing and poverty,⁴⁷ and to preventing exposure of communities to '*harmful chemicals or other detrimental environmental conditions that... impact on human health*'.⁴⁸ As UN experts have noted, safe water and adequate sanitation are essential for the realisation of the right to health.⁴⁹

Communities living within the mine's impact zone, justifiably, have serious concerns about the short and long-term health impacts of exposure to the chemicals leached from the mine waste into their homes, water, gardens and food. The HRLC Report and other previous studies on the mine⁵⁰ have recorded consistent accounts by people that they experience specific health problems when they are exposed to the polluted rivers or to dust from the mine waste. Food insecurity caused by the loss of hunting and fishing grounds,⁵¹ mosquito infestations encouraged by the swampy conditions created by the tailings overburden and overcrowded, unsanitary living conditions due to displacement of villages by the mine are evidently compounding these problems.

⁴⁵ Commission on Human Rights, *Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights*, 57th sess, UN Doc E/CN.4/RES/2001/35 at 1.

⁴⁶ *International Covenant on Economic, Social and Cultural Rights* (ICESCR), opened for signature on 16 December 1966, 993 UNTS 3 (signed and entered into force 3 January 1976), art 12.

⁴⁷ See, regarding the right to health as informed by the social determinates of health: Committee on Economic, Social and Cultural Rights, *General Comment 14: The right to the highest attainable standard of health* (CESCR General Comment 14), 22nd session, UN Doc E/C.12/2000/4 (11 August 2000) para 3, UN General Assembly, Report of the Special Rapporteur on the right to health, A/62/214 (8 August 2007) paras 45-48, 50.

⁴⁸ CESCR General Comment 14, UN Doc E/C.12/2000/4 para 11.

⁴⁹ Paul Hunt, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, UN Doc, A/62/214 (8 August 2007) para 50: '*Safe water and adequate sanitation are two integral and closely related underlying determinants which are essential for the realization of the right to the highest attainable standard of health. Inadequate access to water and sanitation can threaten life, devastate health, destroy opportunities, undermine human dignity and cause deprivation*'.

⁵⁰ See, AGA Report, above n 15, 8.3.3-5; 8.3.1.1 and 8.4.4.

⁵¹ See, AGA Report, above n 15, at 2: '*the loss of land and water resource – the National Government... has issues a lease over this land to a private company... laying large areas of land waste, making river water unusable and polluting the coastal waters..;* and at 5: '*The water and fish resources of the Kawerong River and the Jaba River below its confluence with the Kawerong, have been lost for probably several generations. The unstable flow of water, high sediment loads and unacceptable water chemistry deter fish from migrating to the upper Jaba River system. There is some hope of recovery for the Pangara River but it will be a long slow process unless an innovative solution, such as diversion directly to the coast, is found.*'

4.3 Right to water

The waste and pollution caused by the mine's operation have profoundly impacted communities' right to water, most acutely from the mid tailings area and downstream. The right to water is a fundamental right, '*indispensable for leading a life in human dignity*'⁵² and an essential precondition to the realisation of other human rights.

The importance of the right to water and its interdependence with other rights has been recognised in numerous international treaties and instruments,⁵³ including the ICESCR, which recognises the right of all people to '*sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses*' including for drinking, food preparation, personal sanitation and basic household hygiene.⁵⁴ The UN Declaration on the Rights of Indigenous Peoples also recognises the distinct rights of Indigenous peoples over traditionally owned and used rivers and coastal sea resources as a central part of the maintenance of culture and responsibilities to future generations.⁵⁵

While it is not a company's obligation to create access to safe water in a community, where their operations adversely affect peoples' existing access to safe water in the sense of polluting, diverting or otherwise depleting it, then it is their responsibility to remedy those impacts.⁵⁶ The mine's operations, as noted above, have polluted the major rivers which local people previously relied on for bathing, washing, fishing and agriculture and are continuing to pollute nearby water sources used for these purposes as well as contaminating drinking water sources.

4.4 Right to food, housing and an adequate standard of living

Rights to adequate food and housing are both established components of the right to an adequate standard of living,⁵⁷ and are recognised in the ICESCR, the Universal Declaration of

⁵² Committee on Economic, Social and Cultural Rights, *General Comment No 15: The Right to Water*, 29th session, UN Doc E/C.12/2002/11 (20 January 2003) para 1.

⁵³ UDHR, art 25(1); ICESCR, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), CERD, CEDAW, CRC, *Convention on the Rights of Persons with Disabilities* (CRPD), opened for signature 13 December 2016, 2515 UNTS 3 (entered into force 3 May 2018).

⁵⁴ Committee on Economic, Social and Cultural Rights, *General Comment 15: The right to water*, 29th sess, UN Doc 12/2002/11 (20 January 2013) (CESCR General Comment 15) para 2.

⁵⁵ United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007), art 25.

⁵⁶ UNGPs, Principle 24. See also, UN Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, *Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes*, UN A/HRC/30/40, [88], [92].

⁵⁷ Adequate housing as a component of the right to an adequate standard of living, HRC Res, HRCOR, 15th sess, UN Doc A/HRC/RES/15/8 (30 September 2010); Committee on Economic, Social and Cultural Rights, *General Comment 12: the right to adequate food*, 20th sess, UN Doc E/C12/1999/5 (CESCR General Comment 12).

Human Rights and reflected in multiple other international law instruments.⁵⁸ As the UN Economic, Social and Cultural Rights Committee has stated: '*the private business sector...should pursue its activities within the framework of a code of conduct conducive to respect for the right to adequate food, agreed upon jointly with the Government and civil society*'.⁵⁹ This has been reinforced, repeatedly, by the UN Special Rapporteur on the right to food.⁶⁰

The mine's activities have undermined food security through the destruction of significant quantities of arable land, with even historic reports on the mine's impacts noting that the areas of land suitable for gardening in some villages had decreased by as much as 90%.⁶¹ The recent flooding and mud-flows caused by the erosion of the tailings waste is decimating remaining fishing grounds.⁶² This ongoing destruction is also depriving communities of further large tracts of agricultural land.

As noted above, communities who have had to relocate as a result of the land destruction caused by the mine have also highlighted the inappropriateness and inadequacy of housing which people have been pushed towards as the mine and its waste occupies their homelands.

4.5 Cultural rights

The mine's impacts have profoundly undermined the rights of people in communities throughout the impact zone to take part in their cultural life, and to practice their culture, in breach of multiple, binding human rights instruments, including the UN Declaration on the Rights of Indigenous Peoples (**UNDRIP**)⁶³ and the Universal Declaration of Human Rights.⁶⁴ The UN Committee on Economic, Social and Cultural Rights has established, repeatedly,⁶⁵ that taking part in cultural life, including accessing cultural sites, participating in ceremonies,

⁵⁸ UDHR, art 25(1); ICESCR, art 11(1). In respect of children and women's rights, please see further below at [cross ref once finalised].

⁵⁹ CESCR General Comment 12, para 20.

⁶⁰ Jean Ziegler, *Report submitted by the Special Rapporteur on the right to food*, UN Doc E/CN.4/2003/54 (10 January 2003), para 32; Jean Ziegler, *Report submitted by the Special Rapporteur on the right to food*, UN Doc UN Commission on Human Rights, UN Doc E/CN.4/2004/10 (9 February 2004) paras 41 to 52. See also Jean Ziegler, *Interim report of Special Rapporteur of the Commission on Human Rights on the right to food*, UN Doc A/60/350 (12 September 2005) para 33.

⁶¹ AGA Report, above n 15, at 2: '*the land holdings of some villagers have been significantly decreased – the area of land suitable for gardening, owner or customarily used by Dapera and Moroni villages has decreased by perhaps as much as 90%. Other villages have lost arable land.*'

⁶² Brown, above n 15, at 25: '*the spread of tailings has threatened several villages, deprived the people of both agricultural land and areas of rainforest traditionally important for hunting and building materials, and the people have lost access to fish in the rivers...*'.

⁶³ UNDRIP arts 8(1), 11(1), 12(1), 25(1), 31(1).

⁶⁴ UDHR, art 27(1).

⁶⁵ Committee on Economic, Social and Cultural Rights, *Report on the Seventh Session*, UN Doc E/1993/22 (1993) para 213; Committee on Economic, Social and Cultural Rights, *General Comment 21: Right of everyone to take part in cultural life*, 43rd sess, UN Doc E/C.12/GC/21(21 December 2009), see especially paras 11 to 13.

and maintaining ways of life, including through food, hunting practices, and farming are each protected cultural practices.

The mine's operations caused profound socio-cultural disruption, linked both to the physical destruction of communities' land, sacred sites and cemeteries, to disruption of traditional livelihoods, food sources and forms of social organisation, all of which have left communities with a deep sense of cultural loss and grief.

The ongoing destruction of new areas of forest, rivers and sacred sites as new areas are flooded with mine waste is causing additional distress among communities, a sense of disconnectedness from their ancestors and denying people access to important traditional food sources, farming and hunting practices and ceremonial sites. Land – both the practice of caring for the land, and using it – are central to Bougainvillean culture. Land is, as Bougainvilleans clearly articulated in opposition to the mine from its outset, '*at the heart of our very existence*'.⁶⁶

4.6 Rights of women and girls

Women and girls are disproportionately affected by the unaddressed impacts of the mine. The health of women and girls is distinctly and additionally compromised by the contamination and inaccessibility of safe water sources⁶⁷ which has, according to local communities and health professionals, harmed maternal health and led to pregnancy complications. Women and girls' daily lives and privacy are also disproportionately affected when safe water for sanitation, cooking and cleaning is made harder, or non-existent.

These impacts for women and girls breach the fundamental rights they share with all members of the community, but also infringe the specific rights of rural women conferred under the Convention on the Elimination of Discrimination against Women (**CEDAW**).⁶⁸ The real world and flow-on effects of these breaches are hard to overstate. As the UN Committee on the Elimination of Discrimination against Women has stated: '*Rural women's and girls' rights to water and sanitation are not only essential rights in themselves, but also are key to the realization of a wide range of other rights, including health, food, education and participation*'.⁶⁹

⁶⁶ Quoted in Dove, T. Minting, M. Togolo, 'Mining Bitterness' in Peter G. Sack (ed.), *Problem of choice: land in Papua New Guinea's future* (ANU Press, 1974) 182: '*Land is our life. Land is our physical life – food and sustenance. Land is our social life; it is marriage; it is status; it is security; it is politics; in fact, it is our only world. When you (the Administration) take away our land, you cut away the very heart of our existence.... For us to be completely landless is a nightmare which no dollar in the pocket or dollar in the bank will allay: we are a threatened people.*'

⁶⁷ Committee on the Elimination of Discrimination against Women, *General recommendation No 34 on the rights of rural women* (CEDAW General Recommendation 34), UN Doc CEDAW/C/GC/34, paras 81 to 83.

⁶⁸ CEDAW, art 14(2)(h).

⁶⁹ CEDAW General Recommendation 34, para 81.

4.7 Children's rights

The damage, harm and risks created throughout the mine's impact zone also affect children and their rights in specific and serious ways, contrary to the fundamental rights already detailed above and under the UN Convention on the Rights of Children (**CRC**) to life, health, education, an adequate standard of living and to enjoy their own culture.⁷⁰

For children living within mine's impact zone, the contamination and instability of the Kawerong and Jaba rivers raise heightened risks. Children are more likely to swim and bathe in the rivers, more likely to inadvertently drink from them, less likely to understand the risks and consequences of doing so and more likely to become seriously ill as a result. Children are also more likely to drown or sustain serious injuries attempting river crossings in dangerous conditions. The impacts of food and water insecurity on children's long-term health and development are also more serious than for adults.

The mine's impacts have also had serious consequences for children's rights to education and future livelihoods. As a result of land destruction and the impoverishment of communities, many children are now compelled to assist their families panning for gold in the rivers, compromising their education and exposing them to even more serious health risks.

5. Priority and urgent needs identified by complainants

Community members interviewed by the HRLC identified a range of types of assistance that are urgently needed to help address the mine's impacts, including:

- Assistance accessing clean water for drinking and sanitation, whether through the provision of water tanks or assistance piping water from uncontaminated sources further away from the rivers;
- Reinforcement of levees to contain the Kawerong River and tailings and to prevent further new damage and flooding, and temporary relocation assistance for villages at immediate risk;
- Re-construction of bridges to enable safe passage across the Jaba and Kawerong rivers and access by communities to essential services;

⁷⁰ CRC arts 6, 24, 27, 28, 30.

- Water monitoring, health surveys and studies to give communities full information about both the contaminants in the water, soil and fish populations and the health consequences of exposure to these;
- Relocation and resettlement assistance for communities displaced by land destruction and flooding;
- Better access to medical services to treat health problems created by the mine;
- Assistance with the development of alternative sources of livelihood given the destruction of land and waters previously used for subsistence agriculture, hunting and fishing;
- Better investment in education in the area to give children opportunities for alternative future employment and livelihoods;
- Clean up and rehabilitation of land, rivers and forests destroyed by the mine;
- Compensation for permanent damage to land (both inside and outside the mine lease areas), rivers and sacred sites;
- Proper GIS mapping of Clan land boundaries especially within areas being destroyed by tailings flow to help prevent land disputes;
- Food aid, particularly in areas worst affected by flooding; and
- A justice and accountability process to deal with the past and ongoing trauma caused by the legacy of the mine.

This list is undoubtedly not definitive of the needs of all mine-affected communities in the Panguna area. It is, however, indicative of the broad range of serious impacts the mine has had and continues to have on those living in its wake, and the need for urgent action by Rio Tinto to help address them. Simply put, the Complainants are calling on Rio Tinto to comply with its international legal obligations and, in the company's own words, '*do what is right, not is what easiest*'.⁷¹

6. Alleged breaches of the OECD Guidelines

6.1 Relevant sections of the Guidelines

The OECD Guidelines were implemented in 1976, just four years after the Panguna mine opened, with a view to encouraging sustainable development and strengthening the basis of mutual confidence between enterprises and the societies in which they operate. A more detailed Chapter on Environmental Protection was added to the Guidelines in 1991 and again

⁷¹ Rio Tinto, 'The Way We Work' (August 2017) accessed on 11 June 2020, <<https://mc-56397411-4872-452d-b48e-428890-cdn-endpoint.azureedge.net/-/media/Content/Documents/Sustainability/Corporate-policies/RT-The-way-we-work-EN.pdf?rev=ccfe41c89a9341ba833ad483dda0ef8a>>.

updated in 2000 and 2011, and a Chapter on Human Rights was introduced in 2011, five years before Rio Tinto's decision to divest from the mine.

Chapter II: General Policies

Chapter II of the Guidelines provides that enterprises should:

- “Contribute to economic, environmental and social progress with a view to achieving sustainable development” (Ch. II, para A1)
- “Respect the internationally recognised human rights of those affected by their activities” (Ch. II, para A2)
- “Develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate” (Ch. II, para A7)
- “Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are addressed” (Ch. II, para A10)
- “Avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur” (Ch. II, para A11)

Chapter IV: Human Rights

Chapter IV of the Guidelines provides that enterprises should:

- “Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved” (Ch. IV, para 1)
- “Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur” (Ch. IV, para 2)
- “Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts” (Ch. IV, para 3)
- “Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.” (Ch. IV, para 5)

- “Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts” (Ch. IV, para 6)

The Commentary to this Chapter further clarifies that:

- Respect for human rights is the global standard of expected conduct for enterprises independently of States’ abilities or willingness to fulfil their own human rights obligations (Ch. IV, para 37);
- In countries where domestic laws and regulations conflict with internationally recognised human rights, enterprises should seek ways to honour them to the fullest extent that does not place them in violation of domestic law (Ch. IV, para 38);
- Particular attention should be paid by enterprises to respecting the human rights of indigenous peoples, women and children (Ch. IV, para 40);
- Addressing actual and potential human rights impacts consists of taking adequate measures for their identification, prevention, where possible, and mitigation of potential human rights impacts and remediation of actual impacts and accounting for how these are addressed (Ch. IV, para 41);
- A company’s “activities” can include both acts and omissions (Ch. IV para 42);
- Where enterprises have caused or contributed to an adverse impact, the Guidelines recommend that they have processes in place to enable remediation, and which meet the basic criteria of internationally-recognised economic, environmental and social progress (Ch IV. para 46).

Chapter VI: Environment

Chapter VI of the Guidelines provides that enterprises should:

- “Establish and maintain a system of environmental management appropriate to the enterprise, including:
 - a) collection and evaluation of adequate and timely information regarding the environmental, health, and safety impacts of their activities;” (Ch. VI, para 1)
- “Provide the public and workers with adequate, measurable and verifiable (where applicable) and timely information on the potential environment, health and safety impacts of the activities of the enterprise...” (Ch. VI, para 2)
- “Engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation” (Ch. VI, para 2)

- “Assess, and address in decision-making, the foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle with a view to avoiding or, when unavoidable, mitigating them. Where these proposed activities may have significant environmental, health, or safety impacts, and where they are subject to a decision of a competent authority, prepare an appropriate environmental impact assessment” (Ch. VI, para 3)
- “Maintain contingency plans for preventing, mitigating, and controlling serious environmental and health damage from their operations, including accidents and emergencies; and mechanisms for immediate reporting to the competent authorities.” (Ch. VI, para 5).

The Commentary to the Guidelines provides that, ‘*The basic premise of the Guidelines is that enterprises should act as soon as possible and in a proactive way to avoid...serious or irreversible environmental damages resulting from their activities*’.⁷²

6.2 Alleged Breaches of the Guidelines

It is considered that Rio Tinto has contravened these provisions of the Guidelines through:

- Its failure to address or mitigate the foreseeable environmental, health and safety related impacts of its operations or put in place plans to prevent, mitigate or control serious future environmental or health damage;
- Its failure to respect the internationally-recognised human rights of people affected and harmed by its operations or provide appropriate remedy for this harm; and
- Its failure to conduct adequate risk-based rights due diligence in relation to the ongoing and future environmental, health and human rights risks and impacts posed by leaving the pollution from the mine unaddressed.

6.2.1 Failure to address or mitigate the foreseeable environmental, health and safety related impacts of its operations or put in place plans to prevent, mitigate or control serious future environmental or health damage;

Underpinning the ‘*Environment*’ Chapter of the OECD Guidelines is the Rio Declaration on Environment and Development (Rio Guidelines)⁷³ and the precautionary principle. OECD

⁷² OECD Guidelines, Ch IV, paragraph 69.

⁷³ United Nations Conference on Environment and Development. (1992). Agenda 21, Rio Declaration, Forest Principles. New York: United Nations.

Guidance on the Chapter provides that *'the basic premise of the Guidelines is that enterprises should act as soon as possible, and in a proactive way, to avoid serious or irreversible environmental damage resulting from their activities'*.⁷⁴

Rio Tinto has manifestly failed to take a precautionary approach to the environmental or health and safety related impacts of its operations at Panguna, either during the mine's operation or subsequently.

As noted in section 2.6 above, as far back as 1988, the AGA noted that the mine had caused serious and in many instances irreversible damage to the Kawerong-Jaba river valley, far in excess of that predicted by the company or agreed to at the outset of the mine. The AGA Report also put the company on notice that unless action was taken, these problems would likely worsen, with copper from the tailings continuing to leach into local water sources and the Kawerong-Jaba rivers remaining highly unstable due to the tailings load and made clear recommendations to the company with respect to actions needed to address them.⁷⁵

The subsequent uprising and forced closure of the mine in 1989 and ensuing period of civil conflict do not simply release Rio Tinto from its unmet obligations to address or mitigate these impacts (particularly in circumstances where the socio-environmental impacts of the mine were a major cause of the conflict).

Whilst it may have been difficult for Rio Tinto to take action to address the situation during the period of the conflict, that conflict ended in 1998, a full 18 years before the company's divestment from the mine. At any stage during those 18 years, the company could have initiated an environmental assessment and clean-up of the site, via an independent third party if necessary.

Indeed, clear invitations were extended by the ABG and landowners to Rio Tinto and BCL in 2014 to do precisely this and terms of reference for proposed environmental and social impact assessments were drawn up. Had Rio Tinto not abruptly divested from BCL in 2016, these assessments would almost certainly have gone ahead and at least some of the serious and dangerous impacts caused by the mine waste pollution may already have been addressed.

Instead, Rio Tinto walked away from its responsibilities, leaving communities around the mine in a deteriorating, increasingly dangerous situation.

Given the limited resources of the PNG and Bougainville Governments, it is almost inevitable that if no action is taken by Rio Tinto, the environmental damage currently being caused by the tailings waste will continue and worsen, particularly in the Lower Tailings area, as the tailings

⁷⁴ OECD, 'Environment and the OECD Guidelines for Multinational Enterprises: Corporate Tools and Approaches' (OECD Publishing, 2005) <https://www.oecd-ilibrary.org/docserver/9789264009394-en.pdf?expires=1590986928&id=id&accname=guest&checksum=8FAD7811DD5F7CF2618CEA01DB8905C7> p 10.

⁷⁵ AGA Report, above n 15, 8.3.1-8.3.2.

continue to erode into the rivers and flood those flatland areas further downstream from the mine.

The health and safety risks posed by the mine waste pollution, including through the ongoing contamination of communities' water sources, treacherous river conditions and flooding, long-term exposure to copper contamination and collapsing levees and other remaining mine infrastructure will likewise only grow with time. Indeed, it is highly likely that further people will be killed or seriously injured unless proactive measures are taken to try to mitigate these risks.

6.2.1 *Rio Tinto's failure to respect the internationally-recognized human rights of people affected and harmed by its operations or provide appropriate remedy for this harm.*

Rio Tinto has also breached the human rights provisions set out in Ch II paras A2 and A11, and Ch IV paras 1, 2, 3 and 6 of the Guidelines.

As set out in detail in section 4 above,⁷⁶ the impacts of the billion tonnes of waste left by the Panguna mine continue to infringe nearly all the economic, social and cultural rights of local communities, including their fundamental rights to food, water, health, housing and an adequate standard of living. They are impacting communities' rights to practice their traditions and culture and disproportionately affecting the rights and health of women and children. At their most serious, they are infringing peoples' right to life.

Rio Tinto has clear obligations to address and remedy these serious and widespread impacts caused and/or contributed to by its operations. Its failure to do so places the company in serious, ongoing breach of its responsibilities under both the OECD Guidelines and the UNGPs.

No reparation or remedy has been provided by Rio Tinto to try to mitigate or address these harms caused and/or contributed to by its operations. While financial compensation was paid to some landowners by the company's subsidiary, BCL, during the mine's operation for dislocation and damage to crops and gardens that occurred at that time, no reparations have ever been provided for the serious, ongoing human rights impacts flowing from the permanent destruction and pollution of the communities' immediate environment.⁷⁷

⁷⁶ See also HRLC Report p 46-49.

⁷⁷ AGA Report, above n 15, 8.1. The AGA noted that 'The compensation payments need to be identified for what they are. Most are no more than a redress for immediate loss of produce from the land. Only for some is there an element of compensation for permanent loss. Few, if any...convey a benefit to the recipients in the sense that they profit from the mining'. Compensation payments ultimately ranged from \$103 to \$60,000 annually, with an average payment of \$590. See Joint Standing Committee on Foreign Affairs, Defence and Trade, *Bougainville: the peace process and beyond*, [2.30]
<https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Completed_Inquiries/jfadt/bougainville/BVrepind_x> Many landowners refused to accept the compensation payments altogether on the basis that to do so might be interpreted as evidence of their willingness to alienate their land. See Ciaran O'Faircheallaigh, *Mining and Development* (Beckenham, 1984), 221.

As outlined in section 5 above, addressing these adverse impacts will require a range of solutions and substantial resourcing. Assistance accessing clean water for drinking and sanitation is a particularly acute need identified by almost all communities interviewed by the HRLC.

In other respects, however, the adverse impacts of the mine waste vary substantially between villages. In Dapera, a village constructed entirely on mine waste rock, for instance, one of the chief problems is lack of access to arable land for growing crops, undertaking burials or even constructing pit toilets. In Kobalu 1 in the Lower Tailings, by contrast, the community's primary concern is the flooding of their lands and waterways with mine waste.

As noted above, neither the PNG Government nor ABG alone have the resources to address these serious and widespread adverse impacts created by the mine. As one of the world's largest mining companies which made substantial profits from the Panguna mine, Rio Tinto has heightened obligations under the OECD Guidelines to help remedy the impacts caused and contributed to by its operations.

6.2.3 Rio Tinto's failure to conduct adequate risk-based rights due diligence in relation to the ongoing and future environmental, health and safety and human rights risks and impacts posed by leaving the pollution from the mine unaddressed.

As noted in the OECD's Guidance for the Extractives Sector (**Guidance**), 'due diligence' in the context of the OECD Guidelines is understood as '*the process through which enterprises identify, prevent and mitigate actual and potential adverse impacts and account for how these impacts are addressed*'.⁷⁸ The risks to be identified encompass adverse impacts related to any of the issues covered in the Guidelines, including environmental, health and safety and human rights risks.

The Guidance notes that the nature and extent of due diligence required will depend on both the size of the operation and the nature of the risks of adverse impacts related to a particular situation, with more serious risks increasing an enterprise's obligation.⁷⁹

The Guidance also emphasises the ongoing, dynamic and iterative nature of effective due diligence, and the fact that it must go beyond an initial risk assessment to encompass the full lifecycle of a project – including, presumably, at the point of divestment. The due diligence

⁷⁸ OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector (2016), p 10. <https://mneguidelines.oecd.org/OECD-Guidance-Extractive-Sector-Stakeholder-Engagement.pdf>

⁷⁹ Ibid.

should also be informed by meaningful engagement with relevant stakeholders, including potentially affected communities.⁸⁰

Even the most cursory due diligence undertaken prior to Rio Tinto's decision to divest from the mine would have revealed the substantial environmental, health and safety and human rights risks of leaving the legacy of pollution from the mine unaddressed. It was not necessary for Rio Tinto to have had renewed access to the Panguna mine site in order to understand the majority of these risks. Many, as noted above, were already present and had been pointed out to the company at the time the mine was operational.

The fact that Rio Tinto divested from the mine without addressing these risks indicates either that the company undertook no risk-based due diligence prior to its divestment, or that it chose to ignore the results of such due diligence. Either way, the company is in clear breach of its obligations under the OECD Guidelines.

7. Remedy sought by the Complainants

The Complainants are seeking commitments from Rio Tinto to:

- Engage with them and other Panguna mine-affected communities to help find solutions to these urgent problems and undertake formal reconciliation as per Bougainvillean custom;
- Fund an independent environmental and human rights impact assessment of the mine site by a team of qualified local and international experts to map impacts – in particular those posing serious risks to public health and safety – and to develop recommendations to address these. The Complainants stress that both the assessment and recommendations must be developed in close collaboration with the mine-affected communities and the results made freely and publicly available in a form accessible to all;
- Contribute to a substantial, independently-managed fund, to help address the harms caused by the mine and assist long-term rehabilitation efforts in accordance with the recommendations of the assessment and the needs identified by local communities. The size of the contribution should reflect Rio Tinto's central role in causing the destructive impacts of the mine and enable effective reparation and remedy.

⁸⁰ Ibid, pp 10-11. See also OECD Due Diligence Guidance for Responsible Business Conduct, 2018, pp 16-18. <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>.

The Human Rights Law Centre has previously worked with the Catholic Diocese of Bougainville and affected communities to try to engage Rio Tinto on these issues, including through direct meetings with company representatives and engagement with the company at its Annual General Meeting in London in April 2020. These efforts have not resulted in any commitments by the company to address their legacy or to engage in any further dialogue with local communities about the problems they are facing.

The Complainants therefore respectfully request the Australian NCP to accept the complaint and offer its good offices to try to facilitate resolution of these issues. If resolution cannot be achieved through this process, the complainants request that the Australian NCP undertakes a thorough investigation of the issues and makes a determination with respect to the breaches of the Guidelines by Rio Tinto alleged in the complaint and recommendations to the company to address the serious adverse impacts of its activities.