



Australian National Contact Point
for the OECD Guidelines for Multinational Enterprises

Initial Assessment

The complaint submitted by Project Sepik and Jubilee
Australia Research Centre on behalf of affected Sepik River
communities, against PanAust Limited

Published on 25 July

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EXECUTIVE SUMMARY

1. In December 2021, the Australian National Contact Point (**AusNCP**) received a complaint from two non-government organisations (the **Notifiers**) representing communities in Papua New Guinea (**PNG**) regarding the activities of PanAust Ltd (the **Enterprise**). The complaint alleges that, through its subsidiary in PNG, the Enterprise's actions to progress the proposed Frieda River Project do not comply with the *OECD Guidelines for Multinational Enterprises* (the **Guidelines**).
2. The AusNCP Independent Examiner considered the six admissibility criteria of the Initial Assessment process, engaged with the parties, and decided to offer 'good offices' to the parties. Good offices entail proposing consensual and non-adversarial means (such as conciliation or mediation) to assist the parties in dealing with the issues in the complaint.
3. The following observations were made during the Initial Assessment.
 - 3.1 The admissibility criteria are sufficiently met for the purposes of Initial Assessment, including the Notifier's identity and interest in the matter; issues which are material and substantiated; and a link between the Enterprise's activities and the issues raised in the complaint. There are applicable laws and procedures in the Guidelines and related international standards about the issues raised by the Notifiers.
 - 3.2 There are, however, two aspects requiring further attention, to inform the potential and scope of any good offices. These concern the Notifiers' position and proposals within and outside the NCP process, and the environmental impact assessment (**EIA**) process underway in PNG.
4. The AusNCP now invites both parties to provide the other with further detail, to inform how any good offices might proceed. Specifically:
 - 4.1 the Enterprise could address whether, and how, the concerns raised by the Complainants are being addressed consistently with the Guidelines. In doing so, the Enterprise could usefully refer to the relevant expectations of the Guidelines, OECD due diligence guidances and the existing EIA processes in PNG; and
 - 4.2 the Notifiers could confirm that the Complainants wish to genuinely engage in the procedures with a view to finding a solution to the issues raised in accordance with the Guidelines.
5. An Examiner would then work with the parties to determine whether there is a consensus to proceed with good offices.
6. This Initial Assessment is not a determination on the merits of the claims presented, nor is it an assessment of whether the Enterprise's actions are consistent with the Guidelines.
7. This statement is available on the AusNCP website at www.ausncp.gov.au.

INITIAL ASSESSMENT

Parties, complaint, and outcomes sought

8. On 9 December 2021, two non-government organisations (NGOs) filed a complaint with the AusNCP about a proposed development of mining and hydroelectric facilities in PNG, called the 'Frieda River Project' (the **complaint**). That project is being progressed by the Enterprise, through a wholly owned subsidiary (Frieda River Limited). The complaint was filed by an association incorporated in PNG (called Project Sepik Inc) and 'an Australian-based non-profit research centre' (Jubilee Australia Research Centre), who identified themselves as the Notifiers. The Notifiers described that they 'jointly manage the "Save the Sepik" campaign, which aims to protect the Sepik River from the impacts of the Frieda River Mine'. The Notifiers say the complaint is 'on behalf of 2,638 Indigenous residents of 64 villages along the Sepik River' (which the complaint identified as 'the **Complainants**').
9. In summary, the complaint alleges the Enterprise's actions have 'breached ...[the] Disclosure, Human Rights and Environment' standards of the Guidelines.¹ The complaint asserts that 'If built, the Frieda River Mine would be the largest mine in the history of PNG and one of the largest mines in the world'. The Notifiers allege the Enterprise has (1) 'failed to uphold [the Complainants'] right as affected Indigenous communities to give Free, Prior and Informed Consent to the Project', (2) 'not adequately disclose[d] project risks'; and that (3) the proposed dam/storage facilities 'carries the risk of massive-scale environmental destruction and loss of human life should it fail, and therefore violates the precautionary principle'. The Notifiers specified four outcomes sought through the AusNCP process, being that the Enterprise:
 - 9.1 'pause all further Project development as there is currently no free, prior and informed consent [**FPIC**] from all affected communities';
 - 9.2 'engage in good faith consultations at an international standard with all potentially affected communities, including the Complainants, with participation of an independent third party [and including the] provision of detailed information about potential project risks, including provision of the dam break analysis';
 - 9.3 'commit to discontinuing its current plans for the mine if FPIC is not forthcoming from all affected communities'; and
 - 9.4 'take all possible measures to ensure that the affected communities do not face reprisals, including from company employees, contractors or government officials, for filing this complaint'.

¹ OECD 2011, *OECD Guidelines for Multinational Enterprises*, OECD Publishing, Paris (**Guidelines**).

10. Consistent with *AusNCP Complaint Procedures*,² on 9 December 2021, the Enterprise was notified that a complaint had been made and was provided with a copy of the complaint.
11. In response to the complaint, the Enterprise denied the allegations it had breached the Guidelines. It questioned the Notifier's motivation and actions, and the extent to which the Complainants are aware of the relevant information. The Enterprise suggested the complaint should not be accepted for the following reasons:
 - 11.1 the project's Environmental Impact Statement (EIS) 'meets global industry standards and was undertaken following leading practice principles by internationally recognised experts' and is currently under consideration by PNG's Conservation and Environmental Protection Authority (**CEPA**);
 - 11.2 as part of the project's EIA process, there have been consultations with 'villagers throughout the proposed project area and along the river and road corridors... coordinated both by FRL [Frieda River Limited, the Enterprise's subsidiary] and by the Papua New Guinea regulator, the [CEPA]', and that the Notifiers' activities have obstructed these processes;
 - 11.3 the Government of PNG 'has a mandated process for evaluating resource development projects. This is an ongoing process in regard to the Project. FRL has followed and continues to follow the mandated process';
 - 11.4 the 'Project's reporting and disclosure practices are wholly aligned with the OECD [Guidelines] articles presented in the complaint'; and
 - 11.5 'the [environmental impact] studies and engagement work has been resourced and executed to International Finance Corporation Performance Standard level'.

Assessment criteria

12. The Guidelines require an NCP, when it receives a complaint, to conduct an 'initial assessment'. The Initial Assessment is to determine whether the issues raised by the Notifier are 'bona fide' (in other words real or authentic) and related to the Guidelines' implementation (in other words within the Guidelines' scope of coverage).³ The AusNCP has procedures,⁴ mirroring the Guidelines, which specify that in deciding whether to accept a complaint, six admissibility criteria are assessed:
 - 12.1 the identity of the party concerned and its interest in the matter;
 - 12.2 whether the issue is material and substantiated;
 - 12.3 whether there seems to be a link between the enterprise's activities and the issue raised in the complaint;
 - 12.4 the relevance of applicable law and procedures, including court rulings;

² Australian National Contact Point 2019, *Complaint Procedures (September 2019)*, Department of Treasury, Canberra [4.8] & [4.9] (**AusNCP Procedures**).

³ OECD 2019, *Guide for National Contacts Points on the Initial Assessment of Specific Instances*, OECD Publishing, Paris (**OECD Initial Assessments Guide**), p5.

⁴ *AusNCP Procedures* (above n2).

- 12.5 how similar issues have been, or are being, treated in other domestic or international proceedings; and
- 12.6 whether the consideration of the complaint would contribute to the purposes and effectiveness of the OECD Guidelines.⁵
13. In December 2021 and January 2022, the AusNCP engaged with the Notifiers and the Enterprise to gather more information and invite submissions on various aspects of the complaint.
14. Detailed observations regarding each of the six admissibility criteria have been provided to the parties, so that they are aware of the reasoning and detail. This ensures the parties' submissions and material are addressed to the full extent necessary in conducting the Initial Assessment, while maintaining appropriate confidentiality. For broader transparency and predictability,⁶ however, the key points of the Initial Assessment are summarised in the paragraphs below.
15. Most of the admissibility criteria for Initial Assessment have been met. This includes: the Notifiers' identity and interest in the matter; issues which are material and substantiated; and the link between the Enterprise's activities and the issues raised in the complaint. There are applicable laws (in the Guidelines and related international standards) relevant to the issues raised by the Complainants.
16. There are, however, two matters relevant to the sixth admissibility criteria (which is 'whether the consideration of the complaint would contribute to the purposes and effectiveness of the OECD Guidelines'). These arise out of the Complainants' *Supreme Sukundimi Declaration* and the current and ongoing EIA process by PNG's CEPA.
17. The Notifiers explained, and provided a copy of, a public declaration from the Complainants entitled the *Supreme Sukundimi Declaration*.⁷ This was said to have been the result of extensive consultations and includes the following statements.

The Supreme Sukundimi is a coalition of Chiefs from selected Haus Tambarans along the great Sepik River. ... We, the collective voice of the Haus Tambaran of Sepik River, under the powers of the Supreme Sukundimi, the River God, assert to the following: ... We call for a total ban on the Frieda River Mine.

17.1 The Notifiers clarified to the AusNCP that the Complainants 'are opposed to the building of the mine and have expressed this position publicly on several occasions. However, the Complainants are not seeking to stop the mine through the [AusNCP] "good offices" process'.

17.2 The good offices process under the Guidelines involves great flexibility, and usually commences with parties opposed on many points. For Guidelines' good

⁵ *AusNCP Procedures* (above n2), [4.10].

⁶ The Guidelines state NCPs should deal with complaints 'in a manner that is Impartial ... Predictable ... Equitable ... [and] Compatible with the Guidelines': *Guidelines* (above n1), Implementation Procedures, Commentary, [22].

⁷ *Save the Sepik 2020, Supreme Sukundimi Declaration*, viewed 21 March 2022, <https://savethesepik.org/declaration-media/>.

offices to occur, both parties are expected to engage in good faith and to demonstrate that commitment to the other party. That is necessary given the Guidelines' good offices is a process 'with the agreement of the parties involved, [to] facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist the parties in dealing with the issues'.⁸

17.3 The Complainants are 'not seeking to stop the mine through the [NCP] "good offices" process', and seek to 'engage in good faith consultations at an international standard' with the Enterprise. That presumably means consultation about the proposed mine and whether the Enterprise could address all relevant international standards to gain the Complainants' consent. The *Supreme Sukundimi Declaration* calls for 'a total ban on the Frieda River Mine'. This does not mean good offices cannot occur. It does, however, identify an area requiring attention early in any good offices.

17.4 The implications of FPIC depend on the relevant activities and processes. It is not, therefore, inevitable that if 'FPIC is not forthcoming from all affected communities', the Guidelines expectation of the Enterprise would be 'a total ban on the Frieda River Mine'. That would depend on the Enterprise's activities and actions, which is an appropriate topic within good offices.

17.5 The Notifiers should discuss with the Complainants and determine their informed position with regard to potential good offices. In particular, whether they wish to 'genuinely engag[e] in the procedures with a view to finding a solution to the issues raised *in accordance with the Guidelines*'.⁹

18. The Enterprise explained the project is currently under consideration by the CEPA as part of the EIA processes mandated by the laws and Government of PNG.

18.1 Information from both parties indicates the EIA is still underway and some issues raised in this complaint may be addressed by either the Enterprise or the Government of PNG in decisions relating to the EIA. It is clear, however, that the Complainants will be affected by the activities proposed by the project and that, for various reasons, comprehensive consultation with them has not yet occurred.

18.2 There is nothing to indicate that, if the Enterprise engaged in good offices regarding this complaint, that would create serious prejudice for parties involved in the EIA process in PNG.¹⁰ Equally, however, ensuring the Complainant's concerns are addressed consistently with the Guidelines does not have to occur through NCP good offices. There may be other ways in which government or company procedures ensure equivalence. However, where that 'equivalence' is not publicly apparent (or explained to the Complainants), good offices can 'facilitat[e] an exchange between the

⁸ *Guidelines* (above n1), Implementation Procedures, Procedural Guidance, C, [2](d).

⁹ *Guidelines* (above n1), Implementation Procedures, Commentary, [21] (emphasis added).

¹⁰ The *Guidelines* (above n1) say 'NCPs should evaluate whether an offer of good offices ... would not create serious prejudice for either of the parties involved in ... other proceedings': Implementation Procedures, Commentary, [26].

parties, discussing the issues and expectations of the Guidelines ...[to] support or encourage the resolution of the issues'.¹¹

- 18.3 The Guidelines' aims include 'to ensure that the operations of ... enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, [and] to help improve the foreign investment climate'.¹²
- 18.4 Where existing government processes are already underway, addressing issues later raised in an NCP complaint, NCP good offices on those issues will rarely be appropriate. To do so would require parties to engage in multiple proceedings about the same issues, creating the potential for inconsistency and inefficient use of resources of governments (agencies and the NCP) and parties. It would be inconsistent with seeking a harmony between the Guidelines and government processes.
- 18.5 Where existing procedures are underway, the OECD guidance suggests an NCP may suspend or adjourn the progress of a complaint 'pending a relevant decision outside the NCP'.¹³ That depends, however, on whether the other proceedings address every Guidelines issue being raised in a complaint.¹⁴ It is not apparent here, from the parties' materials and submissions to date, whether all the Guidelines issues raised in the complaint will be addressed within the EIA process underway in PNG.

Conclusion

19. In the circumstances, the Examiner considers the complaint merits further consideration. This involves the offer of AusNCP 'good offices', within the Guidelines, to facilitate the exchange of information between the parties (which can include conciliation, formal mediation or facilitated discussions) with the aim of arriving at a mutually agreed resolution. The objective of good offices would be to help the parties resolve their differences regarding PanAust's due diligence on the proposal and planning for a mine in the Frieda River Project.
20. Good offices through the AusNCP commence with a 'preparation stage', which includes determining whether there is agreement to engage in any conciliation, mediation or facilitated discussions.¹⁵ During this stage, an Examiner works with the parties to determine agreement on the modalities and scope of any good offices (including participants, topics, procedures and commitments).

¹¹ *OECD Initial Assessments Guide* (above n3), p12.

¹² *Guidelines* (above n1), Preface, [1].

¹³ *OECD Initial Assessments Guide* (above n3), p10.

¹⁴ *OECD Initial Assessments Guide* (above n3), p9.

¹⁵ Per *AusNCP Procedures* (above n2), [5.2].

21. In the preparation stage of good offices, an Examiner would invite both parties to provide the other with further detail to help determine how good offices might proceed.
 - 21.1 Specifically, the AusNCP could ask PanAust to advise the AusNCP and the Notifiers whether and how the concerns raised by the Complainants are being addressed consistently with the Guidelines. In doing so, PanAust could usefully refer to the relevant expectations of the Guidelines, OECD due diligence guidances¹⁶ and the existing EIA processes in PNG.
 - 21.2 The AusNCP could ask the Notifiers to confirm the Complainants wish to genuinely engage in the procedures with a view to finding a solution to the issues raised in accordance with the Guidelines. This should pay particular attention to operation of FPIC within the Guidelines.
 - 21.3 The Examiner could work with the parties, through these exchanges, to determine whether there is a consensus to proceed with conciliation, mediation or facilitated discussions to assist the parties to deal with issues in the complaint.
22. If PanAust does not wish to engage in good offices, then the proceedings move to a final statement by the AusNCP (which could include a determination on PanAust's consistency with the Guidelines).¹⁷ That would occur *after* giving both parties fair process to provide materials and submissions. If the Notifiers do not wish to engage in good offices, then the proceedings would move to final statement without further assessment of issues.¹⁸
23. The Examiner provided a draft of this Initial Assessment to the AusNCP's Governance and Advisory Board for comment. The parties to the complaint were then invited to comment on the draft. While the Examiner considered all comments received on the draft, the decision on the complaint remained his responsibility.
24. The AusNCP Procedures specify that 'acceptance or rejection of a complaint is not an assessment of whether the enterprise's actions are consistent with the OECD Guidelines'.¹⁹

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¹⁶ Including the OECD's *Due Diligence Guidance for Responsible Business Conduct* (2018) and other sectoral guidance documents.

¹⁷ *AusNCP Procedures* (above n2), [6.1]-[6.4].

¹⁸ As required by *AusNCP Procedures* (above n2), [5.5].

¹⁹ *AusNCP Procedures* (above n2), [4.16].

INSTITUTIONAL ARRANGEMENTS

25. The Australian Government is committed to promoting the use of the OECD Guidelines and implementing them effectively and consistently. Through business cooperation and support, the OECD Guidelines can positively influence business conduct and ultimately economic, environmental and social progress.
26. The OECD Guidelines are recommendations on responsible business conduct addressed by governments, including Australia, to multinational enterprises. Importantly, while the OECD Guidelines have been endorsed within the OECD international forum, they are not a substitute for, nor do they override, Australian or international law. They represent standards of behaviour that supplement Australian law and therefore do not create conflicting requirements.
27. Companies operating in Australia and Australian companies operating overseas are expected to act in accordance with the principles set out in the OECD Guidelines and to perform to — at minimum — the standards they recommend.
28. The OECD Guidelines can be seen as:
 - a useful aid to business in developing their own code of conduct (they are not aimed at replacing or preventing companies from developing their own codes);
 - complementary to other business, national and international initiatives on corporate responsibility, including domestic and international law in specific areas such as human rights and bribery; and
 - providing an informal structure for resolving issues that may arise in relation to implementation of the OECD Guidelines in specific instances.

GOVERNANCE

29. Countries adhering to the OECD Guidelines have flexibility in organising their National Contact Points (NCPs) and in seeking the active support of social partners, including the business community, worker organisations, other non-governmental organisations, and other interested parties.
30. Accordingly, the OECD Guidelines stipulate that NCPs:
 - i) will be composed and organised such that they provide an effective basis for dealing with the broad range of issues covered by the OECD Guidelines and enable the NCP to operate in an impartial manner while maintaining an adequate level of accountability to the adhering government;
 - ii) can use different forms of organisation to meet this objective. An NCP can consist of senior representatives from one or more ministries, may be a senior government official or a government office headed by a senior official, be an interagency group, or one that contains independent experts. Representatives of the business community, worker organisations and other non-governmental organisations may also be included; and
 - iii) will develop and maintain relations with representatives of the business community, worker organisations and other interested parties that are able to contribute to the effective functioning of the OECD Guidelines.
31. The [AusNCP Governance and Advisory Board](#) (the Board), which includes non-government members as well as representatives from key government agencies, provides advice and assistance to the AusNCP Secretariat in relation to the handling of complaints. The Board was consulted in the development of this statement.
32. The Board helps to ensure that the AusNCP is visible, accessible, transparent and accountable, in accordance with its obligations under the OECD Guidelines for Multinational Enterprises. Members may be called on to conduct procedural reviews of AusNCP complaints and may be consulted on various operational and administrative matters as needed.
33. From September 2019, all new cases are managed by Independent Examiners, who are supported by the AusNCP Secretariat and the Board. The Australian National Contact Point, held by a Senior Executive official in the Treasury, retains responsibility for current cases submitted prior to September 2019.