

Initial Assessment

Complaint submitted by Evangelical Lutheran Church of Papua New Guinea, Centre for Environmental Law and Community Rights Inc and Jubilee Australia Research Centre on behalf of affected Morobe Province communities

against

Newcrest Mining Ltd and Harmony Gold (Australia) Ltd

1 August 2023

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Executive summary

1. On 9 November 2022, the Australian National Contact Point for Responsible Business Conduct (AusNCP) received a complaint from the Evangelical Lutheran Church of Papua New Guinea (ELC PNG), Centre for Environmental Law and Community Rights Inc (CELCOR) and Jubilee Australia Research Centre (notifiers) regarding the activities of Newcrest Mining Ltd and Harmony Gold (Australia) Ltd (enterprises). The notifiers indicated that the complaint is submitted on behalf of 2,596 people, including people from the villages of Wagang and Yanga, other villages located along the Huon Gulf coastline, citizens living in the city of Lae, and people living in villages along the pipeline corridor in the Morobe Province, Papua New Guinea (complainants).
2. The complaint alleges that the enterprises' plans for the disposal of mining waste via deep sea tailings placement (DSTP) into Huon Gulf waters as part of the Wafi-Golpu Project in Papua New Guinea does not comply with the OECD Guidelines for Multinational Enterprises (OECD Guidelines).¹ The notifiers hold concerns about the serious impact of the DSTP on the local ecosystem and the consequent impact on the surrounding communities. The notifiers also raise concerns about the disposal of filtrate waste.
3. Specifically, the notifiers allege that insufficient consultation has taken place regarding the risks of the proposed DSTP and the complainants, as well as the broader community, have not been given the opportunity to give or withhold their free, prior and informed consent. The notifiers' concerns are specific to the issue of the disposal of mining waste into the ocean and not the Wafi-Golpu Project in its entirety. With respect to the issue of by-product disposal, the complaint seeks to address concerns regarding the disposal DSTP into the ocean of filtrate and (by DTSP) tailings. The enterprises have explained that filtrate, derived from the dewatering of concentrate slurry at the Port Facilities Area, will be discharged from a filtrate pipeline at or near the Port of Lae, after (where necessary) treatment to comply with PNG water quality criteria at the point of discharge. Tailings, being fine-grained rock particles remaining after recoverable metals and minerals have been extracted from mined ore, will be discharged from two pipelines, approximately 986m in length, at or near the Outfall Area (~200m depth), located between the Wagang settlement and the mouth of the Busu River.²
4. I have considered the six admissibility criteria of the OECD Guidelines initial assessment process, engaged with the parties via written correspondence over the past 6 months, and decided to accept the complaint so that the AusNCP may 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 discussing the issues and arriving at outcomes that are mutually acceptable and comply with the OECD Guidelines. The scope of a good offices process may be negotiated further between the parties. Following the good offices process, and depending on its outcome, the

¹ Organisation for Economic Cooperation and Development (OECD), *OECD Guidelines for Multinational Enterprises*, OECD Publishing, 2011, <http://dx.doi.org/10.1787/9789264115415-en> (OECD Guidelines).

² Letter from Newcrest Mining Ltd and Harmony Gold (Australia) Ltd to the AusNCP Independent Examiner dated 21 July 2023.

complaint may then be subject to further examination by an Independent Examiner and a final statement reached in accordance with the AusNCP complaints procedures.³

5. I have set out my reasons below for accepting the complaint. This initial assessment statement is not a determination on the merits of the claims presented, nor is it an assessment of whether the enterprises' actions are consistent with the OECD Guidelines. While I have considered all submissions made by the parties in full, I have only set out relevant submissions below to the extent it is required for the initial assessment stage.
6. This statement has been prepared with reference to the 2011 version of the OECD Guidelines and the 2022 version of the AusNCP complaint procedures. It is available on the AusNCP website at www.ausncp.gov.au.

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OECD Guidelines for Multinational Enterprises

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³ Australian National Contact Point (AusNCP), *Complaint Procedures*, AusNCP, Australian Government, 2022, <https://ausncp.gov.au/index.php/complaints/ausncp-procedures> (AusNCP procedures).

Initial assessment

Parties, complaint and outcomes sought

7. The complaint under consideration is made by the Evangelical Lutheran Church of Papua New Guinea (ELC-PNG), Centre for Environmental Law and Community Rights Inc and Jubilee Australia Research Centre (notifiers) against Newcrest Mining Ltd and Harmony Gold (Australia) Ltd (enterprises) on behalf of 2,596 people, including people from the villages of Wagang and Yanga, other villages located along the Huon Gulf coastline, citizens living in the city of Lae, and people living in villages along the pipeline corridor in the Morobe Province, Papua New Guinea (complainants).
8. The notifiers and complainants have raised concern about the enterprises' plans for the disposal of mining waste into the ocean of the Huon Gulf at Wagang, as well as the disposal of mining filtrate at the Port of Lae, due to the concern that disposal of the mining waste will cause serious and permanent damage to the local ecosystem and have impacts on the surrounding communities. The notifiers also allege that the complainants and other communities along the Huon Gulf have not been adequately consulted or informed regarding the potential risks of the project. The complaint alleges that the enterprises' plans for the disposal of mining waste via DSTP into Huon Gulf waters as part of the Wafi-Golpu Project in Papua New Guinea do not align with the OECD Guidelines due to the alleged environmental risks and the alleged failure of the enterprises to conduct adequate consultation with the affected communities. According to the notifiers, the affected communities have not been given the opportunity to give or withhold their free, prior and informed consent.

Assessment criteria

9. In making this initial assessment I have considered:
 - 9.1. the OECD Guidelines
 - 9.2. previous initial assessment statements made by AusNCP Independent Examiners available from: <https://ausncp.gov.au/complaints/track-complaints>
 - 9.3. submissions made by the notifiers on 9 November 2022 (complaint submission) and 24 April 2023 (response to enterprises' submission to the initial assessment)
 - 9.4. submissions made by the enterprises on: 15 December 2022 (Newcrest Mining correspondence), 21 December 2022 (Harmony Gold correspondence), and 27 February 2023 (enterprises' joint submission to the initial assessment).
10. I also note that the complaint and substantive submissions made by the notifiers and the enterprises have been provided to the other party for consideration and comment in the initial assessment process. A draft version of this initial assessment was also provided to both the notifiers and the enterprises for comment.
11. The enterprises have not been provided with the specific submission annexure that identifies each of the individual complainants. The notifiers provided this information confidentially to the AusNCP and indicated that the specific identity of the complainants is to remain confidential due

to safety concerns.⁴ In this regard, I note that no evidence has been provided that indicates any direct connection between the enterprises and the safety concerns raised by the notifiers. The enterprises strongly resist any inference that the complainants have or will experience any safety threat from the enterprises.

12. The OECD Guidelines require a National Contact Point for Responsible Business Contact (NCP), when it receives a complaint, to conduct an 'initial assessment'. The initial assessment statement is to determine whether the issues raised by the notifier are 'bona fide' (in other words real or authentic)⁵ and related to the OECD Guidelines implementation (in other words within the scope of coverage of the OECD Guidelines).⁶ At this stage it is not necessary to conduct a full consideration of the merits or engage in fact-finding, or to test the veracity of all claims made by parties.
13. The AusNCP procedures specify that in deciding whether to accept a complaint, six admissibility criteria are assessed, as set out in the OECD Guidelines.⁷ I have listed each of these below, and considered the application of each criterion in the following statement:
 1. the identity of the party concerned and its interest in the matter
 2. whether the issue was material and substantiated
 3. whether there seemed to be a link between the enterprise's activities and the issue raised in the complaint
 4. the relevance of applicable laws and procedures, including court rulings
 5. how similar issues have been, or are being, treated in other domestic or international proceedings
 6. whether consideration of the complaint would contribute to the purposes and effectiveness of the OECD Guidelines.
14. I have made my initial assessment following consideration of all six criteria together in a manner which promotes accessibility, predictability, transparency, impartiality, and compatibility with the OECD Guidelines.
15. Separate to the admissibility criteria is also the submission by Harmony Gold (Australia) that it is not subject to the AusNCP's jurisdiction as it is the subsidiary of a foreign owned company, operating outside of Australia. This submission was made in correspondence to the AusNCP from Harmony Gold on 27 February 2023. It is my assessment that as Harmony Gold (Australia) is registered as a company in Australia, this is sufficient connection for it to be subject to the jurisdiction of the AusNCP, regardless of where its business activities may be and where its parent company may be located.

⁴ Consistent with Paragraph 10.2 of the AusNCP procedures, information provided by any party to a complaint will only be shared with the other party to the complaint with the consent of the party that provided the information, above n 1, p 15.

⁵ OECD, *Guide for National Contact Points on the Initial Assessment of Specific Instances*, (2019), OECD Publishing, p 5, <https://mneguidelines.oecd.org/Guide-for-National-Contact-Points-on-the-Initial-Assessment-of-Specific-Instances.pdf> (OECD Initial Assessments Guide)

⁶ Above n 1, paragraph 25.

⁷ Above n 1, paragraph 25; above n 4, pp 82-83; and above n 2, 4.11..

Criterion 1: Parties' identities and interests

16. The first admissibility criterion is 'the identity of the party concerned and its interest in the matter'. Parties submitting a complaint 'should have some interest in the matters they raise in their submissions.'⁸
17. The enterprises contest the acceptance of this complaint on the basis that the identities of all purported 2596 complainants that are said to be represented by the notifiers have not been provided to them. I acknowledge the concerns of the enterprises regarding transparency and note that there may be difficulties with resolving disputes where the identity of the complaining parties is unknown. However, this does not preclude the acceptance of this complaint.
18. The notifiers submit that there are concerns for the safety of the individual complainants and while the names and signatures of the complainants have been provided to the AusNCP, the notifiers do not agree to the broader disclosure of these names. I have not sought any supporting evidence for this claim at this initial assessment stage but note that this may be an issue that is the subject of further discussion and examination as this complaint progresses.
19. My view is that the notifiers, in their own right, have sufficient interest in the matters raised for this complaint to be accepted – regardless of the specific identity of each of the anonymous complainants. In particular, I note the following information provided by the notifiers:
 - 19.1. *The Evangelical Lutheran Church of Papua New Guinea (ELC-PNG) has a membership of over 1.2 million all throughout Papua New Guinea....Jabem District is the Church's administrative area covering the potentially affected area within Morobe province. There is an organised church located in almost every village along the Huon Gulf coastline, meaning that the Church is strongly connected and embedded within communities. All grievances are formally expressed through the administrative layers of the Church and are raised at Church conferences. As a result, the concerns of communities and the Church regarding DSTP have reached the national decision bodies of the Evangelical Lutheran Church of PNG.*
20. I accept that there will be difficulty in the resolution of all concerns where the identity of complainants is unknown. However, this does not preclude the acceptance of this complaint for further good offices discussion and examination. Further, I consider that some concerns raised by the notifiers may be considered and addressed through good offices and examination without the disclosure of the specific names of the complainants.⁹

Criteria 2 and 3: Link between the enterprise's actions and the complaint

21. The AusNCP interprets 'material and substantiated' to mean that the issues are plausible and related to the application of the OECD Guidelines, and that there is a plausible link between the

⁸ OECD Initial Assessments Guide, above n 4, p 6.

⁹ Australian National Contact Point for the OECD Guidelines for Multinational Enterprises (AusNCP), *Initial Assessment: The complaint submitted by Project Sepik and Jubilee Australian Research Centre on behalf of affected Sepik River communities against PanAust Limited*, AusNCP, Australian Government, July 2022 [file:///C:/Users/EVH/Downloads/29_AusNCP_Initial_Assessment%20\(1\).pdf](file:///C:/Users/EVH/Downloads/29_AusNCP_Initial_Assessment%20(1).pdf).

enterprise's activities and the issues raised. Having considered the correspondence from the notifiers and enterprises, I am satisfied that plausible issues are raised for consideration in relation to the obligations of enterprises set out in Chapter II. General Policies, Chapter III. Disclosure, Chapter IV. Human Rights Chapter VI. Environment of the OECD Guidelines.

22. For the purposes of this initial assessment, I am also satisfied that there is a link between the enterprises proposed activities in relation to the disposal of mining waste into the ocean, and the issues raised for consideration in accordance with the OECD Guidelines.
23. I note that the parties have come to different conclusions on whether the planned actions of the enterprises align with the OECD Guidelines. This is a question for further careful consideration in subsequent stages of this complaint process by an AusNCP Independent Examiner, and subject also to any discussions and outcomes of good offices engagement between the parties to this complaint.

Criteria 4 and 5: Applicable law and procedures and treatment of similar issues in domestic or international proceedings

24. 'The relevance of applicable law and procedures, including court rulings' is the fourth admissibility criterion. The OECD Guidelines 'extend beyond the law in many cases.'¹⁰ Where there is a conflict between domestic laws and regulations and the principles and standards of the Guidelines, 'enterprises should seek ways to honour such principles and standards to the fullest extent which does not place them in violation of domestic law'.¹¹ The fifth admissibility criterion is 'how similar issues have been, or are being, treated in other domestic or international proceedings'. This assists in ensuring relevant precedents are known, to promote consistency and avoid duplication.
25. I acknowledge that there are ongoing legal proceedings in the Papua New Guinea courts that relate to the subject matter of the complaint. This however does not preclude the acceptance of the complaint. I understand the respondents in the domestic legal proceeding to be separate to the enterprises, given the domestic proceedings appear to comprise judicial review applications of administrative decisions and that the enterprises are not expressly named as parties to those proceedings. In this regard, the enterprises note that CELCOR, one of the notifiers, represent the applicants in one of these parallel proceedings. I also accept the submissions of the enterprises that while the enterprises may not be named as a defendant in the relevant proceedings, the outcomes of these proceedings may nonetheless have an impact on the activities of the enterprises. I consider that should a subsequent examination and final statement be issued by an AusNCP Independent Examiner the relevance and impact of these parallel proceedings will warrant further, and up to date consideration.
26. For the purposes of this initial assessment, I note that the NCP complaint process does not examine compliance with domestic law, and I accept that is a matter for domestic authorities. Compliance with domestic law may identify matters separate and different to those

¹⁰ OECD at paragraph I.2, above n 4, p 17.

¹¹ OECD, *OECD Due Diligence Guidance for Responsible Business Conduct*, (2018),

<https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm>.

considerations exercised in relation to determining compliance with the OECD Guidelines. Accordingly, statements about consistency or breach of Papua New Guinean law about environmental requirements and court orders are not determinative of this admissibility criteria.

27. Having considered the correspondence from the notifiers and enterprises, I am satisfied that plausible issues are raised by the notifiers for consideration in relation to the obligations of enterprises set out in Chapter II. General Policies including due diligence expectations, Chapter III. Disclosure, Chapter IV. Human Rights and Chapter VI (Environment) of the OECD Guidelines. The OECD due diligence expectations of companies include 'potential adverse impacts' and where no impact has yet occurred. There are expectations of companies on how to approach these, to remove or reduce the risk of occurrence.¹²
28. The enterprises have provided persuasive submissions to contest the allegations of the notifiers and have provided substantial information to the AusNCP to explain the due diligence steps that they have taken. This initial assessment does not make any determination on the competing submissions of the parties to this complaint. Rather, I note that the matters contested between the parties fall well within the ambit of the OECD Guidelines and the expectations placed on enterprises.
29. It is my assessment that the acceptance of this complaint is not precluded by the application of other laws and procedures, and that in fact the acceptance of this complaint will further the OECD Guidelines considerations as separate and distinct to the matters under consideration by the Papua New Guinea courts. I recognise a difference in views as to the extent of the relationship between the concerns raised in this complaint and those matters before the Papua New Guinea courts. This does not preclude the acceptance of this complaint. Rather it provides further matters for discussion between the parties. The scope of any good offices will be shaped by the parties. In agreeing on the scope in the preparation for good offices, the parties may agree to not cover some aspects of a complaint if these are still under consideration in other proceedings, particularly if discussion of those issues may cause harm or prejudice to those parallel proceedings.

Criterion 6: The purposes and effectiveness of the OECD Guidelines

30. The final admissibility criterion is 'whether the consideration of the complaint would contribute to the purposes and effectiveness of the OECD Guidelines'. This criterion 'is intentionally broad and can encompass a wide range of issues'.¹³ That includes considering 'whether providing good offices through facilitating an exchange between the parties, discussing the issues and expectations of the OECD Guidelines with the enterprises in question, or developing meaningful recommendations with respect to enterprise conduct would support or encourage the resolution of the issues'.¹⁴

¹² OECD Due Diligence Guidance for Responsible Business Conduct, above n 10.

¹³ OECD Initial Assessments Guide at paragraph 10, above n 4.

¹⁴ OECD Initial Assessments Guide at paragraph 12, above n 4.

31. The purposes of the OECD Guidelines include the promotion of positive contributions by enterprises to economic, environmental and social progress worldwide,¹⁵ and to assist in minimising and resolving difficulties which may arise from enterprise operations.¹⁶
32. The OECD Guidelines set out the expectations that apply to the enterprises, which are distinct and separate to obligations on the Papua New Guinea state, either domestically or in international law. The AusNCP offers an additional pathway for positive and constructive engagement between enterprises and concerned parties to further address compliance with the OECD Guidelines. I am satisfied that the acceptance of this complaint for good offices and further examination will further the purposes of the OECD Guidelines particularly with respect to resolving the alleged difficulties which arise from enterprises' operations.

Conclusion

33. Consistent with the AusNCP procedures and the principles set out in the OECD Guidelines procedural guidance and commentary, I have considered the complaint and reviewed the material provided by the parties. Having considered the six admissibility criteria of the initial assessment process, I consider the complaint merits further consideration and would be appropriate for 'good offices' within the OECD Guidelines.
34. Acceptance of the complaint is not an assessment of whether the enterprises' actions are consistent with the OECD Guidelines. I have not assessed the weight of the claims made by the notifiers as summarised in this initial statement and simply consider that the concerns warrant further examination and consideration.
35. The next step following the acceptance of this complaint will be an offer of good offices facilitation to both parties by the AusNCP. I note that the notifiers have indicated an interest in engaging with the enterprises on discussions around their concerns regarding the disposal of mining waste into the ocean via the two sites as currently proposed by the enterprises. In preparing for good offices, further information may be directly exchanged between the parties as to the scope and conditions of such discussions.

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¹⁵ OECD Guidelines, Foreword, above n 1.

¹⁶ Adhering Governments, *Declaration on International Investment and Multinational Enterprises*, (OECD), (2011), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0144>.

Annexes

Annex A: Publications

OECD, Evangelical Lutheran Church of Papua New Guinea (ELC-PNG), the Center for Environmental Law and Community Rights Inc. (CELCOR) and Jubilee Australia Research Centre & Newcrest Mining Ltd and Harmony Gold (Australia) Pty Ltd, OECD Database of specific instances, n.d., accessed 17 May 2023.

Annex B: Institutional arrangements

36. The Australian Government is committed to promoting the use of the OECD Guidelines for Multinational Enterprises (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.
37. The OECD Guidelines are recommendations on responsible business conduct addressed by governments, including Australia, to multinational enterprises. They provide voluntary principles and standards for responsible business conduct consistent with applicable laws and internationally recognised standards. 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 the standards they recommend. In countries where domestic laws and regulations conflict with the principles and standards of the OECD Guidelines, enterprises should seek ways to honour such principles and standards to the fullest extent, which does not place them in violation of domestic law.
38. Importantly, while Australia is an adhering country to the OECD Guidelines and 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 legal requirements.
39. 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. For example, the human rights chapter in the OECD Guidelines as well as other key concepts align with the [United Nations Guiding Principles on Business and Human Rights](#).
 - Providing an informal structure for resolving issues that may arise in relation to implementation of the OECD Guidelines in complaints.

Annex C: Governance

40. Governments adhering to the OECD Guidelines have flexibility in organising their National Contact Points for Responsible Business Conduct (NCPs). NCPs are expected to meet core effectiveness criteria, by operating in a manner that is visible, accessible, transparent, accountable, impartial and equitable, predictable, and compatible with the OECD Guidelines. NCPs are also expected to seek the active support of social partners, other stakeholders and relevant government agencies.
41. Accordingly, the OECD Guidelines stipulate that:
- NCPs will be composed, organised and sufficiently resourced to provide an effective basis for dealing with the broad range of issues covered by the OECD Guidelines, have access to expertise on all relevant aspects of the NCP mandate, and operate in an impartial manner and maintain an adequate level of accountability to the adhering government.
 - NCPs can use different forms of organisation to meet the effectiveness criteria and maintain stakeholder confidence.
 - Governments are encouraged to include representatives of the business community, worker organisations, civil society and other non-governmental organisations in advisory or oversight bodies to assist the NCP in its tasks and contribute to the effectiveness of the OECD Guidelines.
42. The [AusNCP Governance and Advisory Board](#) (AusNCP Board) includes representatives from Australian Government agencies, business, civil society and unions. The AusNCP Board provides independent expert advice and assistance to the AusNCP and the Independent Examiners on complaints handling. Board members use their networks, events and publications to promote responsible business conduct standards under the OECD Guidelines and the AusNCP services. The AusNCP Board is consulted on all AusNCP statements.
43. The AusNCP Board helps to ensure that the AusNCP meets the effectiveness criteria of the OECD Guidelines. AusNCP Board Members may be called on to conduct procedural reviews of AusNCP complaints and may be consulted on various operational and administrative matters as needed.
44. From September 2019, all new cases are managed by Independent Examiners, who are supported by the AusNCP Secretariat and the AusNCP Board.