



# **Export Finance and Human Rights in Australia**

**Submission to the Productivity Commission's Inquiry into  
the Export Finance and Insurance Corporation**

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### **About the Human Rights Law Centre**

The Human Rights Law Centre is an independent, non-profit, non-government organisation which protects and promotes human rights.

We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

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## 1. Executive summary

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### 1.1 Background

1. The Productivity Commission is undertaking an inquiry into arrangements for the provision of export credit through Australia's Export Finance and Insurance Corporation (**EFIC**). EFIC is the Australian Government provider of export credits, insurance, reinsurance, and other financial services that support Australian exports and overseas investments. EFIC commenced its operations in its current form on 1 November 1991 under the *Export Finance and Insurance Corporation Act 1991* (Cth) (**EFIC Act**).
2. Like most export credit agencies globally, EFIC assists exporters and private providers of insurance and finance products in circumstances where the private sector is unwilling or unable to provide support. EFIC is guaranteed by the Federal Government in exchange for an annual dividend.
3. The role of ECAs has expanded considerably due to globalisation and the exponential growth of global markets. They now play an important role in promoting not only domestic industry but also international trade and finance. ECAs are now one of the biggest providers of export finance and insurance in the market.<sup>1</sup>
4. In particular, ECAs play a significant role as providers of finance in the developing world. ECAs may offer loans to developing countries on the condition that they buy the exports of the lending country, or they may provide guarantees or insurance for the loans made by commercial banks or exporters to developing countries. ECA-backed exports and investments have accounted for approximately 80% of annual foreign direct investment in developing countries (greater than any multilateral commitments).<sup>2</sup>
5. Given the importance of ECAs in the global economy and their role in supporting corporate activity in developing countries, ECAs are in a unique position to promote human rights compliance in projects seeking ECA support. However, EFIC and other ECAs have a poor history of incorporating human rights compliance mechanisms into their operations. As a result, EFIC and other ECAs have facilitated corporate activity that has been associated with significant adverse human rights impacts.<sup>3</sup>

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<sup>1</sup> As of 2008, ECAs sponsored one in every eight dollars of world trade and had directly or indirectly supported USD 1.5 trillion in global export business. See Scott Hickie, 'The Export Credit Renaissance: Challenges for Ecologically Sustainable Development in the Global Economic Crisis' (2009) 32 *University of New South Wales Law Journal* 587, 588.

<sup>2</sup> Jubilee Australia, *Risky Business: Shining a Spotlight on Australia's Export Credit Agency* (December 2009) 9 [http://www.jubileeaaustralia.org/literature\\_60529/Risky\\_Business\\_-\\_Full\\_Report](http://www.jubileeaaustralia.org/literature_60529/Risky_Business_-_Full_Report).

<sup>3</sup> See, for example, Jubilee Australia, *Risky Business* (above); ECA Watch, *Race to the Bottom – Take II* (2003) available at [http://www.eca-watch.org/eca/race\\_bottom\\_take2.pdf](http://www.eca-watch.org/eca/race_bottom_take2.pdf); Robert McCorquodale and Penelope Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law', (2007) 70 (4) *Modern Law Review* 598-625.

6. For example, ECA-backed projects have been associated with forced displacement of local populations, poor conditions of work, suppression of peaceful protests and the rights to freedom of expression and association, exposure to environmental contaminants and the destruction of cultural sites.<sup>4</sup>

## 1.2 Scope of this submission

7. This submission responds to the question raised in the Productivity Commission's Issues Paper, 'is there any evidence to suggest EFIC is not complying with its international obligations?' The international obligations considered are EFIC's international human rights obligations.
8. In its publication *Australia: seeking human rights for all*,<sup>5</sup> the Department of Foreign Affairs and Trade (the lead agency in the Ministerial portfolio of which EFIC is part) states that:
- Protection and promotion of the human rights encapsulated in the [universal] declaration is vital to global efforts to achieve lasting peace and security, and freedom and dignity for all. Australia's commitment to the aims and purposes of the universal declaration of human rights reflects our national values and is an underlying principle of Australia's engagement with the international community.
9. While EFIC's current policies demonstrate that the organisation is concerned with the environmental and social impact of projects which it supports, this concern is insufficient to meet Australia's international human rights obligations.
10. Section two of this submission discusses the source and content of EFIC's international human rights obligations. Particular attention is paid to the framework for managing business and human rights set out by the UN Special Representative on Business and Human Rights, Professor John Ruggie, and unanimously endorsed by the UN Human Rights Council (**Ruggie Framework**).<sup>6</sup>
11. Section three considers other principles, standards and guidelines that have been developed to encourage ECAs to consider social and environmental issues, namely the Common Approaches, Equator Principles and IFC Performance Standards.
12. Section four considers whether EFIC is currently meeting its human rights obligations and concludes that EFIC's policies and operations do not comply with its obligations to respect and protect human rights.
13. In light of the gaps in compliance identified in the preceding sections, section four discusses the Human Rights Law Centre's recommendations for reform:

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<sup>4</sup> Ibid.

<sup>5</sup> Available at: <[http://www.dfat.gov.au/hr/hr\\_for\\_all.html](http://www.dfat.gov.au/hr/hr_for_all.html)>.

<sup>6</sup> Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, UN Doc A/HRC/9/5 (2008).

**Recommendation**

**EFIC's policies should:**

- (a) **require that EFIC undertake adequate human rights due diligence;**
- (b) **require due diligence by EFIC's client companies; and**
- (c) **state that EFIC will not support activities that are likely to cause or contribute to human rights abuses.**

**1.3 Transparency and accountability**

14. We note that the introduction of a human rights policy will only be effective if it is adopted in conjunction with appropriate monitoring and grievance procedures and transparency and accountability frameworks. This submission does not make recommendations in this regard, but endorses those made by Oxfam Australia.

**2. EFIC's Human Rights Obligations**

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**2.1 Australia's human rights obligations**

15. As an organ of the State, EFIC is bound by Australia's international human rights obligations and any violation of international law committed by EFIC will be attributable to the Australian Government.<sup>7</sup>
16. Treaties are the most commonly referred to source of international human rights law. A treaty is an instrument which imposes binding obligations on the States that become a party to it.<sup>8</sup>
17. Australia has ratified and accepted obligations under all of the core international human rights treaties, including the two main human rights treaties – the *International Covenant on Civil and Political Rights (ICCPR)* and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*.<sup>9</sup>
18. Australia is also party to five of the six the international treaties created to ensure the specific recognition and protection of particular groups and particular human rights, namely the:
- (a) *International Convention on the Elimination of all Forms of Racial Discrimination*;<sup>10</sup>
  - (b) *Convention on the Elimination of all Forms of Discrimination against Women*;<sup>11</sup>

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<sup>7</sup> International Law Commission, *Articles on the Responsibility of States for Internationally Wrongful Acts* (2001) articles 4 and 5.

<sup>8</sup> See art 26 of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

<sup>9</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976).

<sup>10</sup> Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

<sup>11</sup> Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

- (c) *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment*,<sup>12</sup>
  - (d) *Convention on the Rights of the Child*,<sup>13</sup> and the
  - (e) *Convention on the Rights of Persons with Disabilities*.<sup>14</sup>
19. Australia has an obligation to respect, protect and fulfil the rights contained in the treaties listed above. Under international law this includes a direct legal obligation on States to protect against the commission of human rights violations by non-State actors, including business entities, within their jurisdiction.<sup>15</sup>
20. The obligation on States to regulate the actions of business has been the subject of detailed consideration by the UN Special Representative on Business and Human Rights and is discussed below.

## **2.2 The Ruggie Framework on business and human rights**

- (a) **Background and scope**
21. In his landmark 2008 report the UN Special Representative on Business and Human Rights, Professor John Ruggie, noted that the globalisation of business activity has not been matched by a globalisation of business regulation.<sup>16</sup> He acknowledged that while corporations have the capacity to contribute to economic growth, poverty alleviation and human development, they can also harm the human rights of individuals and communities. The challenge for governments, business and civil society is to ensure more of the former and less of the latter.
22. To answer this challenge, Professor Ruggie proposed a global policy framework on business and human rights, which was unanimously endorsed by the UN Human Rights Council. The Ruggie Framework comprises three complementary pillars:
- (a) the State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication;
  - (b) the corporate responsibility to respect human rights, including by developing corporate cultures of rights and acting with due diligence to avoid infringing the rights of others; and

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<sup>12</sup> Opened for signature 4 February 1985, 1465 UNTS 85 (entered into force 26 June 1987).

<sup>13</sup> Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

<sup>14</sup> Opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008).

<sup>15</sup> *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-American Court of Human Rights (Ser. C) No. 4 (1988); John Ruggie - United Nations Special Representative, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, UN Doc. A/HRC/4/35 (2007), paragraph 18.

<sup>16</sup> Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, UN Doc A/HRC/9/5 (2008).

- (c) enhanced access to judicial and non-judicial remedies for corporate violations of human rights.<sup>17</sup>
23. The Ruggie Framework is supplemented by a set of concrete and practical recommendations for its implementation in the form of **Guiding Principles**. The Guiding Principles arose out of, among other things, the Human Rights Council's 'need to operationalise' the Ruggie Framework 'with a view to providing more effective protection to individuals and communities against human rights abuses by, or involving, transnational corporations and other business enterprises'.<sup>18</sup>
24. The Framework has been approved and drawn upon by governments, businesses, civil society, national human rights institutions and investors.<sup>19</sup> Some ECAs and global institutions, such as the International Organization for Standardization and the OECD, have already employed the Ruggie Framework in conducting policy assessments and developing initiatives in the business and human rights domain.<sup>20</sup>

**(b) EFIC's responsibilities under the Ruggie Framework**

25. EFIC is a public entity and, as such, is bound by the State duty to protect against human rights abuses. This duty is particularly pertinent in cases where there is a strong State-business nexus. The Guiding Principles provide:<sup>21</sup>

**States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.**

States individually are the primary duty-bearers under international human rights law, and collectively they are the trustees of the international human rights regime. Where a business enterprise is controlled by the State or where its acts can be attributed otherwise to the State, an abuse of human rights by the business enterprise may entail a violation of the State's own international law obligations. Moreover, the closer a business enterprise is to the State, or the more it relies on statutory authority or taxpayer support, the stronger the State's policy rationale becomes for ensuring that the enterprise respects human rights.

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<sup>17</sup> Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Business and Human Rights: Towards Operationalizing the 'Protect, Respect and Remedy' Framework*, UN Doc A/HRC/11/13 (2009).

<sup>18</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, respect and Remedy" Framework', final report of the Special Representative, John Ruggie, 21 March 2011. Adopted by Human Rights Council, Resolution 8/7, 28<sup>th</sup> Session, 18 June 2008, paragraph 2.

<sup>19</sup> Guiding Principles, above, page 4.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid, page 9.



A range of agencies linked formally or informally to the State may provide support and services to business activities. These include export credit agencies, official investment insurance or guarantee agencies, development agencies and development finance institutions. Where these agencies do not explicitly consider the actual and potential adverse impacts on human rights of beneficiary enterprises, they put themselves at risk – in reputational, financial, political and potentially legal terms – for supporting any such harm, and they may add to the human rights challenges faced by the recipient State.

Given these risks, States should encourage and, where appropriate, require human rights due diligence by the agencies themselves and by those business enterprises or projects receiving their support. A requirement for human rights due diligence is most likely to be appropriate where the nature of business operations or operating contexts pose significant risk to human rights.

26. In essence, the Ruggie Framework obliges EFIC to conduct human rights due diligence and to require the same from the projects it supports.

### **2.3 UN Guidance on extraterritorial regulation of transnational corporations**

#### **(a) Committee on Economic, Social and Cultural Rights**

27. The United Nations Committee on Economic, Social and Cultural Rights recently issued a statement on the obligations of States in relation to corporations and the rights set out in the International Covenant on Economic, Social and Cultural Rights.<sup>22</sup> The statement emphasises that States which are home to transnational corporations are responsible for taking steps to prevent those corporations from contravening Covenant rights abroad. Consistent with its statement, the Committee's recent Concluding Observations on Germany contained a number of recommendations regarding extraterritorial obligations in relation to transnational corporations and economic, social and cultural rights.<sup>23</sup>
28. Importantly, recognising that corporations often operate beyond national boundaries, the Committee's statement notes that States' obligations to protect and fulfil Convention rights have extraterritorial application. The Committee's statement requires States to take steps to prevent human rights contraventions abroad by corporations with headquarters under their jurisdiction, and to encourage such companies to assist host States to build their capacity to address corporate responsibility for the observance of economic, social and cultural rights.
29. Issued at the same time as the statement, the Committee's 2011 Concluding Observations on Germany reflect many of the observations made in the statement.<sup>24</sup> In particular, in paragraph 10 of the Concluding Observations, the Committee 'expresses concern that [Germany's]

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<sup>22</sup> Committee on Economic, Social and Cultural Rights, *Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights*, Forty-sixth session, Geneva, 2-20 May 2011.

<sup>23</sup> Committee on Economic, Social and Cultural Rights, *Consideration of reports submitted by States parties under Articles 16 and 17 of the Covenant*, Forty-sixth session Geneva, 2-20 May 2011. *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Germany*, UN Doc E/C.12/DEU/CO/5 (12 July 2011), paragraphs 9-11.

<sup>24</sup> Ibid.

policy-making process in, as well as support to, investments by German companies abroad does not give due consideration to human rights', and calls on Germany to ensure that its policies on foreign investments by German companies respect Covenant rights. Outside of the corporate sphere, the Committee also expresses concern about the effect of Germany's agriculture, trade and development co-operation policies on economic, social and cultural rights in other countries.

**(b) Maastricht Principles**

30. On 28 September 2011, a group of leading international law experts, including members of UN human rights treaty bodies and the UN Human Rights Council, adopted a comprehensive set of Principles on the Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights.<sup>25</sup>
31. The Principles set out the legal obligations in relation to acts or omissions by a State which have impacts on the realisation of human rights outside of that State's territory. The Principles affirm that States may be held responsible for the adverse effects of their conduct on the enjoyment of rights beyond their own borders.
32. The Principles also set out the obligations of States to conduct human rights impact assessments of the 'risks and potential extraterritorial impacts of their laws, policies and practices' and to 'regulate...transnational corporations and other business enterprises' to ensure they do not 'nullify or impair the enjoyment of economic, social and cultural rights'.

### **3. Common Approaches, Equator Principles and Performance Standards**

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#### **3.1 Overview**

33. This Section considers other guidelines that have been developed to encourage ECAs to prioritise human rights compliance and awareness, namely the Common Approaches, the Equator Principles and the IFC Performance Standards.
34. These frameworks are not formal sources of international human rights law and even strict compliance with them would be insufficient to ensure that EFIC was meeting its international human rights obligations. While the Common Approaches, the Equator Principles and the IFC Performance Standards provide a framework through which some human rights concerns may be addressed, they place insufficient emphasis on human rights as a separate issue meriting consideration.

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<sup>25</sup> Available at: <[http://www.icj.org/dwn/database/Maastricht ETO Principles - FINAL.pdf](http://www.icj.org/dwn/database/Maastricht%20ETO%20Principles%20-%20FINAL.pdf)>. While the principles were developed to elaborate extraterritorial obligations in relation to economic, social and cultural rights, their applicability to other human rights, including civil and political rights, is not excluded.

### 3.2 Common Approaches

35. Most ECAs have adopted environmental policies that were developed from a set of guidelines brokered by the Organisation for Economic Co-operation and Development (OECD) in December 2003 known as the **Common Approaches**.
36. The Common Approaches outline a step-by-step process for the assessment of projects by ECAs before deciding whether or not to provide them with assistance. The purpose of this guidance is to promote uniformity and coherence between the assessment processes of different ECAs and thus create a 'level playing field' for ECA project evaluation.<sup>26</sup>
37. The Common Approaches do not set down a prescriptive checklist of characteristics which a project should possess to obtain approval. Instead, the Common Approaches provide a high-level framework for how ECAs should structure their project assessment process. In general terms, the Common Approaches state that ECAs should screen and classify projects in terms of their potential environmental impacts, undertake an appropriately tailored environmental due diligence of the project and then decide whether or not to support the project.
38. Although a useful guide for ECA project assessment, the Common Approaches have limited utility in assessing the human rights risks and impacts of a project. This is for two reasons:
- (a) the Common Approaches are drafted to apply to the ECAs of OECD members. Accordingly, they provide little guidance to how private enterprises should engage with human rights issues; and
  - (b) the Common Approaches focus on environmental risks and impacts rather than human rights risks and impacts.
39. Moreover, NGOs have heavily criticised the Common Approaches as being ineffective in protecting against environmental and social risks. Sixteen environmental and development NGOs from Europe, North America and Japan have collectively claimed that the Common Approaches fail to promote 'coherence, good environmental practice and a level playing field' and to develop common procedures and enhance efficiency.<sup>27</sup> ECA Watch, for example, has claimed:<sup>28</sup>

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<sup>26</sup> Working Party on Export Credits and Credit Guarantees, OECD, *Revised Council Recommendation on Common Approaches on the Environment and Officially Supported Export Credits*, OECD Doc No TAD/ECG(2007)9 (12 June 2007) 3 <<http://www.exim.gov/news/21684464.pdf>>.

<sup>27</sup> Letter to OECD Director, Janet West, from Bob Thomson for ECA Watch, The Corner House (UK), Environmental Defence (USA), World Resources Institute (USA), Both Ends (Netherlands), FERN (UK), Pacific Environment (USA), urgewald (Germany), WEED (Germany), Finnish NGO Campaign to Reform the ECAs, Observatorio de la Deuda en la Globalizacio (Spain), The Halifax Initiative (Canada), Friends of the Earth Japan, Proyecto Gato (Belgium), Campagna per la Riforma della Banco Mondiale (Italy) and Projecto Eco-Iberia/Euronatura (Portugal), 20 April 2007.

<sup>28</sup> See ECA Watch, *Export Credit Agencies Explained* <[http://www.eca-watch.org/eca/ecas\\_explained.html](http://www.eca-watch.org/eca/ecas_explained.html)>.

[T]he Common Approaches agreement is rife with loopholes. For example, it states that ECA-backed projects should “in all cases” comply with World Bank, regional development bank and host country standards, unless an ECA ‘finds it necessary’ to apply lower standards ... The lack of adequate environmental and social policies and associated professional staff to perform due diligence also results in ECA projects that contravene the international environmental, human rights and other treaties and agreements to which these ECAs’ own governments are party.

40. At the OECD Export Credit Group ‘Common Approaches’ Meeting on 23 June 2010, Professor John Ruggie, UN Special Representative on Transnational Corporations and Other Business Enterprises, emphasised the urgent need to promote corporate responsibility to respect human rights within the Common Approaches.

### 3.3 Equator Principles

41. The Equator Principles apply to project finance generally and so cover both ECAs and the private sector. Like the Common Approaches, the Equator Principles are designed to ensure that finance is provided to projects in a way which is ‘socially responsible and reflects sound environmental management policies’.<sup>29</sup>
42. To provide a common baseline and framework for the provision of project finance, the Equator Principles outline ten principles which should be fundamental components of each financial entity’s own internal environmental and social assessment policies.<sup>30</sup>
- (a) Project review and categorisation: categorise each project according to the magnitude of its potential environmental and social impact risks.
  - (b) Social and environmental assessment: ensure the project proponent has conducted adequate social and environmental risk assessments.
  - (c) Applicable social and environmental standards: assess the project according to international benchmarks such as the Common Approaches.
  - (d) Action plan and management system: outline and prioritise the actions necessary to eradicate or minimise and remedy any potential impacts and risks associated with the project throughout the life of the project.
  - (e) Consultation and disclosure: ensure adequate consultation with affected communities and interested agencies, with disclosure of sufficient project information to enable parties to provide submissions.
  - (f) Grievance mechanism: provide a mechanism for the project proponent to receive and facilitate the resolution of concerns about the project’s impact and risks.
  - (g) Independent review: conduct a project review by an independent social and environmental risk and impact expert.

<sup>29</sup> The Equator Principles, June 2006, page 1.

<sup>30</sup> The Equator Principles, June 2006, pages 2-6.

- (h) Covenants: incorporate a list of mandatory covenants as contractual conditions on the provision of assistance.
  - (i) Independent monitoring and reporting: ensure ongoing independent review and monitoring of the project on an on-going basis over the life of the project.
  - (j) EPFI reporting: each Equator Principles Financial Institution adopting the Equator Principles is obliged to report publicly at least annually about its implementation and compliance with the principles.
43. In some ways, the Equator Principles go further than the Common Approaches in addressing human rights issues. The Equator Principles require consideration to be directed towards social issues (some of which may implicate human rights concerns). However, the Equator Principles also have limited utility in assessing the human rights risks and impacts of a project. The Equator Principles focus on environmental and social risks and impacts rather than human rights risks and impacts, and they lack a robust and effective compliance mechanism.

### **3.4 IFC Performance Standards**

44. The International Finance Corporation (IFC) recently released its updated Policy on Environmental and Social Sustainability, scheduled to take effect from the beginning of 2012.<sup>31</sup>
45. The updated Policy incorporates the IFC Performance Standards. The Performance Standards not only provide guidance in the form of a procedural framework for project assessments, but they also specify substantive areas for assessment. The eight areas that finance providers should address in deciding whether to provide project finance are:
- (a) Assessment and Management of Environmental and Social Risks and Impacts;
  - (b) Labor and Working Conditions;
  - (c) Resource Efficiency and Pollution Prevention;
  - (d) Community Health, Safety and Security;
  - (e) Land Acquisition and Involuntary Resettlement;
  - (f) Biodiversity Conservation and Sustainable Management of Living Natural Resources;
  - (g) Indigenous Peoples; and
  - (h) Cultural Heritage.
46. Performance Standard One (Assessment and Management of Environmental and Social Risks and Impacts) includes the following requirement:

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<sup>31</sup> Available at [http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/Updated\\_IFC\\_SFCompounded\\_August1-2011/\\$FILE/Updated\\_IFC\\_SustainabilityFrameworkCompounded\\_August1-2011.pdf](http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/Updated_IFC_SFCompounded_August1-2011/$FILE/Updated_IFC_SustainabilityFrameworkCompounded_August1-2011.pdf)

3. Business should respect human rights, which means to avoid infringing on the human rights of others and address adverse human rights impacts business may cause or contribute to. Each of the Performance Standards has elements related to human rights dimensions that a project may face in the course of its operations. Due diligence against these Performance Standards will enable the client to address many relevant human rights issues in its project.
47. The inclusion of language acknowledging business' obligation to respect human rights is a positive development. However, the IFC Performance Standards fall short of the obligations set out in the Ruggie Framework in that they:<sup>32</sup>
- (a) do not acknowledge the IFC's duty to protect and respect human rights;
  - (b) fail to adequately incorporate all human rights;
  - (c) do not include a requirement for either the IFC or its clients to undertake assessment of human rights impacts; and
  - (d) do not integrate human rights assessments into oversight, tracking and reporting systems.
48. Rather than incorporate specific human rights due diligence requirements, the Performance Standards allow consideration of human rights to be subsumed under the existing Performance Standards. This approach is inadequate because, while the Performance Standards cover some rights, they leave many others unaddressed. For example, many civil and political rights such as freedom of expression and assembly are not addressed in the Performance Standards.
49. Further, the requirement for specific human rights due diligence in the Performance Standards is limited to 'high risk circumstances' where:<sup>33</sup>
- it may be appropriate for the client to complement its environmental and social risks and impacts identification process with specific human rights due diligence as relevant to the particular business.
50. This approach does not meet the standards set out in the Ruggie Framework which require adequate human rights due diligence of all projects.

#### **4. EFIC's compliance with human rights obligations**

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##### **4.1 EFIC's current social and environmental policies**

51. EFIC assesses the environmental and social impact of a project before agreeing to support it. EFIC's approach is set out in two central documents — the *Policy for Environmental and*

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<sup>32</sup> See eg Amnesty International, *Time to Invest in Human Rights: A Human Rights Due Diligence Framework for the International Finance Corporation*, 2010, available at: <http://amnesty.org/en/library/info/IO80/004/2010/en>

<sup>33</sup> Ibid.

*Social Review of Transactions (Policy) and the Procedure for Environmental and Social Review of Transactions (Procedure).*<sup>34</sup>

52. The Policy outlines eight principles which EFIC applies in assessing and assisting projects. These principles are pitched at a relatively high level of generality, but they make it clear that EFIC's assessment process is informed by the Common Approaches, Equator Principles and the Performance Standards.
53. The Procedure provides more specific guidance on how EFIC will apply the Policy. It sets out a four-step process for the review of all transactions and projects seeking EFIC assistance. The four stages in EFIC's scrutiny of projects are:
  - (a) Screening: EFIC determines whether a transaction involves a 'New Project', 'Existing Project' or 'Non-Project'.
  - (b) Classification: EFIC classifies transactions according to their potential adverse impacts.
  - (c) Risk evaluation and benchmarking: EFIC conducts a 'risk evaluation' of the project for Australian interests.
  - (d) Consideration: EFIC ultimately decides whether to support the project and whether any conditions should be imposed on that support.
54. EFIC applies a combination of the Common Approaches, the Equator Principles and the Performance Standards to inform its decision-making at each stage of the process.
55. Ultimately, the level and nature of the scrutiny to which a project is subject depends on the classification and screening decisions made by EFIC in stages one and two. Accordingly, the depth and breadth of the environmental and social review can vary greatly depending on the nature of the project and the type of assistance EFIC is asked to provide.

#### **4.2 Assessment of the Policy and Procedure**

56. A positive feature of the Policy and the Procedure is that they set out in reasonable detail the assessment process that EFIC applies to each project seeking EFIC support. However, there are three key problems with the current approach.
  - (a) ***Insufficient coverage of human rights issues***
57. The Policy and Procedure incorporate insufficient assessment against substantive principles to determine what constitutes desirable environmental and social outcomes, let alone desirable human rights outcomes.
58. Although the IFC Performance Standards are incorporated in the review process, those Standards do not provide adequate coverage of human rights issues, as discussed in section 3.3 above.

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<sup>34</sup> EFIC, *Procedure for Environmental and Social Review of Transactions*, page 3.

**(b) Insufficient scrutiny of certain projects**

59. EFIC's Procedure states that it relies on the Common Approaches and the Equator Principles, and uses the IFC Performance Standards where it deems assessment/benchmarking to be required. This approach is insufficient as negative human rights impacts can occur in any country.
60. The Policy and Procedure also suggest that assessment and benchmarking may not occur in cases where the client company does not have a role in environmental and social management. However, EFIC still has human rights obligations in respect of all projects which it supports and should be in a position to assess the human rights impacts of projects so that they are able to make a decision about whether or not the project should be supported or rejected on the grounds of potential human rights impacts.

**(c) Failure to decline transactions on the basis of human rights concerns**

61. The Procedures provide that 'EFIC declines a transaction if it determines that the environmental and/or social impact does not satisfy the relevant benchmark'. This commitment falls short in terms of human rights due diligence when the benchmarks employed in the assessment do not adequately incorporate human rights obligations.

**(d) Case study: LNG Project**

62. A recent example of the inadequacy of EFIC's Policy and Procedure is the LNG project currently being undertaken in the Southern Highlands of Papua New Guinea led by Exxon Mobil, an American company, together with ASX-listed Australian parties Oil Search and Santos. This project received EFIC assistance in the form of a US\$350 million direct loan. According to the EFIC project disclosure, EFIC's motivation for participating and providing finance was to 'support Australian exporters in pursuing contracts for the construction phase of the project' and to 'add considerably to PNG's economic growth'.<sup>35</sup>
63. Since its commencement, the project has been plagued by a number of issues including tribal conflict and local landowner unrest resulting in a number of local villager deaths<sup>36</sup> and security issues for project workers.<sup>37</sup> This case highlights how EFIC's project assessments can overstate economic incentives and significantly undervalue the risks to, and social impacts on, local landowners. In addition, the case emphasises the need for ongoing and detailed project monitoring and, where necessary, comprehensive review and amendment of project environmental and social management plans.

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<sup>35</sup> See EFIC, *PNG LNG Project* <<http://www.efic.gov.au/casestudies/Pages/PNGLNGproject.aspx>>.

<sup>36</sup> Ilya Gridneff, 'Four Shot Dead at PNG LNG Site', *The Age* (online), 1 February 2010 <<http://news.theage.com.au/breaking-news-world/four-shot-dead-at-png-lng-site-20100201-n80t.html>>.

<sup>37</sup> Blair Price, "'Virtually No Security" at PNG LNG Sites', *PNG Industry News* (online), 7 September 2011 <<http://www.pngindustrynews.net/storyview.asp?storyid=2488704>>.



## 5. Recommendations for improving EFIC's human rights protection

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### Recommendation

#### EFIC's policies should:

- (a) require that EFIC undertake adequate human rights due diligence;
- (b) require due diligence by EFIC's client companies; and
- (c) state that EFIC will not support activities that are likely to cause or contribute to human rights abuses.

64. The current gap in EFIC's policies was commented upon by the UN Independent Expert on Human Rights and Foreign Debt following his February 2011 country mission to Australia. In his Report, tabled in the UN Human Rights Council on 31 May 2011, the Independent Expert recommended that EFIC be required 'to undertake assessments of the human rights impact of its financing decisions (in addition to its environmental and social impact assessments).'<sup>38</sup>
65. In addition to being a human rights obligation, there are also practical reasons why EFIC should be required to undertake human rights due diligence of projects seeking its support. According to Professor Ruggie, ECAs face two risks when it comes to human rights.<sup>39</sup> The first is the risk that projects in receipt of ECA funding will contribute to human rights abuses that will have negative moral, reputational and political consequences for the ECA. The second is that adverse human rights outcomes can result in delays to projects that in turn increase the financial exposure of the supporting ECA.
66. For the reasons outlined in section three, above, the current international standards applicable to ECAs are insufficient to ensure that EFIC meets its international human rights obligations. Until these international standards are updated, it is incumbent upon EFIC to formulate its own policy on human rights.
67. We recommend that EFIC either release a human rights due diligence policy or amend its current Policy and Procedure to contain:
- (a) a requirement that EFIC undertake adequate human rights due diligence;
  - (b) a requirement of due diligence by EFIC's client companies;

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<sup>38</sup> Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephias Lumina, Mission to Australia (7–11 February 2011) and Solomon Islands (14–18 February 2011), A/HRC/17/37/Add.1, 25 May 2011.

<sup>39</sup> John Ruggie, 'Engaging Export Credit Agencies in Respecting Human Rights' (Speech delivered at the OECD Export Credit Group's 'Common Approaches' Meeting, Paris, 23 June 2010) 4 <<http://www.reports-and-materials.org/Ruggie-remarks-to-OECD-re-export-credit-agencies-23-Jun-2010.pdf>>.

- (c) articulation of the human rights standards to which EFIC clients must conform and performance indicators against those standards;
  - (d) a requirement for project-specific human rights impact assessments (these should involve consultation with individuals or groups who might be affected by EFIC-supported projects);
  - (e) a requirement that clients develop and submit action plans to prevent human rights abuses for projects that pose a risk of adverse human rights impacts;
  - (f) procedures for transparent monitoring and reporting on compliance with human rights standards during all stages of the project;
  - (g) provision for the refusal of support on the basis of human rights concerns; and
  - (h) sanctions for non-compliance, including the possible withdrawal of support.
68. The human rights policy should 'slot into' EFIC's current procedure. Accordingly, human rights risks and impacts should be considered at each of the four stages of the environmental and social review process outlined in the Procedure document.<sup>40</sup> As Professor Ruggies' Guiding Principles note:
- Human rights due diligence should be initiated as early as possible in the development of a new activity or relationship, given that human rights risks can be increased or mitigated already at the stage of structuring contracts or other agreements....
69. When governments fund projects that result in human rights abuses, they are complicit in causing harm. The implementation of the above policies and procedures, in conjunction with appropriate transparency requirements and grievance mechanisms, would be a significant step towards the implementation of EFIC's international human rights obligations.

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<sup>40</sup> EFIC, *Procedure for Environmental and Social Review of Transactions*, page 2.