

18 November 2011

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Productivity Commission  
Export Credit Arrangements  
Productivity Commission  
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Dear Commissioners

Oxfam Australia is pleased to make this submission to the Productivity Commission's Inquiry into Australia's Export Credit Arrangements.

Our submission and supplementary submission to EFIC's 2010 review of its Environmental and Social Policy and Procedures are also enclosed (Attachments A and B, respectively).

You will note our recommendation that EFIC establish and promote a grievance mechanism to receive and resolve complaints from people affected by EFIC supported projects. We also suggest that EFIC consider the roles and structure of the Compliance Advisor Ombudsman for the International Finance Corporation and Multilateral Investment Guarantee Agency of the World Bank as a model that may inform EFIC's decision making on this matter. With this as background, we recommend that you invite the Compliance Advisor Ombudsman to give evidence to the Inquiry to assist your understanding of this issue. My staff can facilitate this if required.

Please contact Christina Hill (03 9289 9311) or Serena Lillywhite (03 9289 9490) from Oxfam Australia's mining advocacy team to discuss our submission further.

Yours sincerely

Andrew Hewett  
Executive Director



## **Productivity Commission Inquiry into Australia's Export Credit Arrangements**

### **Submission**



Solomon Islands: Community members are worried this river, used for drinking, washing and watering their gardens, will be contaminated if a tailings dam at the Gold Ridge Mine overflows. The tailings dam has been a major point of contention in terms of the redevelopment of the mine. EFIC provided the mining company with political risk insurance in 2006. Photo: Lara McKinley/OxfamAUS

**Oxfam Australia**  
**18 November 2011**

## **1 About Oxfam Australia**

- 1.1 Oxfam Australia is an independent, not-for-profit, secular international development agency. We are a member of Oxfam International, a global confederation of 15 Oxfams that work with others to overcome poverty and injustice in more than 100 countries around the world. Oxfam Australia's vision is of a fair world in which people control their own lives, their basic rights are achieved, and the environment is sustained.
- 1.2 We have worked with local communities around the world to combat poverty and injustice for over 50 years. We support more than 400 long-term development projects in 30 countries across Africa, Asia, the Pacific and Indigenous Australia. Oxfam Australia undertakes long-term development projects, provides emergency response during disaster and conflict, and undertakes research, advocacy and campaigning for policy and practice changes which promote human rights and justice.
- 1.3 Our approach to bringing about change is guided by our central commitments to active citizenship and accountability, and a rights-based approach to development. Our work is guided by our four external change goals: economic justice, essential services, rights in crisis and gender justice.
- 1.4 Oxfam Australia believes that private sector investment can be a driver of economic growth and poverty reduction, provided appropriate regulations and controls exist. Our work in the mining sector clearly demonstrates the need for greater transparency and accountability by Australian mining companies operating offshore, and particularly when doing business in weak governance and conflict zones. Oxfam Australia recognises the key role and responsibility of the Australian Government to foster sustainable development and business integrity among both Australian companies and those parts of government that support and strengthen trade and investment such as our export credit agency, the Export Finance and Insurance Corporation (EFIC).
- 1.5 Our work encompasses private sector engagement and political influence at a national and international level, including engagement with and influencing of multilateral organisations such as the World Bank and International Finance Corporation, the Asian Development Bank and the OECD Investment Committee.
- 1.6 Oxfam Australia holds full accreditation status with AusAID, the Australian Government's Agency for International Development, and is a signatory to numerous industry codes of practice including the Australian Council for International Development (ACFID) Code.

## 2 Submission context

- 2.1 Oxfam Australia is pleased to provide this submission to the Productivity Commission's Inquiry into Australia's Export Credit Arrangements. This submission draws on our experience of over 15 years of working with communities affected by mining and other large-scale infrastructure projects – sectors where much of EFIC's support is focused. Over this time we have been actively involved in advocacy, research, policy and capacity building among project-affected communities. Our work demonstrates that companies that fail to respect and uphold human rights through good policy and practice can cause harm to local communities. Our emphasis is on ensuring that companies, and the financial institutions that support them, including export credit agencies, have policies and practices in place which respect and protect human rights. This is particularly important when Australian companies do business in countries characterised by weak governance and conflict.
- 2.2 Oxfam Australia has previously contributed to the review of EFIC's *Environmental and Social Policy and Procedures*. Our submission (October 2010) and supplementary submission (17 December 2010) are attached by way of background. We also participated in a workshop with EFIC to discuss the environmental and social policy, and are committed to ongoing engagement with EFIC including through a multi-stakeholder forum (comprising civil society, EFIC and relevant government departmental representatives). We note that through these processes, some commitments to improving social and environmental protections, and accountability and disclosure, have been made by EFIC. We also note that more needs to be done to ensure that EFIC does not support 'risky' projects and to further strengthen accountability and disclosure.
- 2.3 Current key global trends suggest EFIC should as a matter of urgency bolster the human rights standards underpinning its operations. Global demand for land and water is rising rapidly, leading to intense competition for control of land, mineral and water resources by governments and the private sector. As a result, these actors have an increased appetite for risk making investments in emerging economies, conflict prone regions and countries with weak governance and weak human rights protections. At the same time, global food production will need to rise by as much as 70% to feed a population of nine billion people by 2050. On top of this, new demands – such as for hydropower, bio fuels and carbon-sequestration projects – are competing with food production for the very land and water that the majority of poor people in developing countries depend upon for their livelihoods. Oxfam's analysis<sup>1</sup> suggests that local elites, foreign investors and global corporate interests are now in a scramble to control these limited resources, jeopardising people living in poverty and their ability to grow or buy enough food to eat. There has been a significant rise in 'land grabs' since the 2008 food and financial crises, as powerful elites and corporate interests buy up large areas of land in developing countries for commercial purposes. Women's land rights are typically insecure in national laws, so their land and water sources are particularly at risk. Internationally, Oxfam is campaigning on these issues.
- 2.4 Our submission focuses on EFIC's compliance with international obligations, its approach to social and environmental responsibility, and information disclosure by EFIC to various stakeholders.

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<sup>1</sup> Oxfam International, Growing a better future: food justice in a resource constrained world, June 2011, <http://www.oxfam.org.au/grow/wp-content/uploads/2011/05/growing-better-future-report1.pdf>

### 3 Summary of Recommendations

#### 3.1 Oxfam Australia urges the Productivity Commission to recommend:

1. An amendment to the EFIC Act so that it requires EFIC to 'comply' with Australia's international human rights obligations rather than just 'have regard to' these obligations
2. That EFIC develop a human rights framework or policy, and that this framework be a public document
3. That EFIC strengthen its approach to human rights impact assessment through an update to EFIC's Environmental and Social Policy and the proposed human rights framework
4. That EFIC provide guidance to potential clients on human rights due diligence
5. That EFIC strengthen its approach to gender impact assessment through an update to EFIC's Environmental and Social Policy and by including gender in the proposed human rights framework
6. That EFIC strengthen its approach to conflict risk and impact assessment through an update to EFIC's Environmental and Social Policy and by including issues of conflict in the proposed human rights framework
7. That conflict and human rights risks, and corruption and bribery issues are clearly described in all Country Profiles published by EFIC
8. That EFIC establish and promote a grievance mechanism to receive and resolve complaints from project affected people about EFIC supported projects, and to ensure as a minimum compliance with EFIC's Environment and Social Policy
9. That EFIC disclose for Category A projects
  - the social and environmental assessments of projects it is considering supporting
  - details of benefit sharing agreements in the host country to ensure that the payments of revenues to host governments and other stakeholders is transparent for natural resource projects including mining projects
  - any independent assessments or reports related to EFIC supported projects
  - the result of EFIC's benchmarking and assessment process
  - client monitoring reports
  - contract terms that relate to requirements for additional work, compliance with environmental and social standards, and monitoring and reporting requirements
10. That EFIC discloses all the information referred to above for Category A projects on its website permanently (not just for the 30 day public comment period as it currently does for social and environmental assessments while EFIC is considering supporting a project)
11. That EFIC ensures that its clients make the information referred to above available to project affected people and other stakeholders in the host country and that this information is available in local languages

12. That EFIC amend its social and environmental procedure to remove the exemption from disclosure on the grounds that some information might be 'commercially sensitive'
13. Changes to the legislative provisions governing the release of information about EFIC to improve transparency and accountability including possible changes to the Freedom of Information Act
14. That EFIC share its social and environmental impact assessments with Austrade to ensure the provision of Austrade products and services is consistent with decisions made by EFIC on social and environmental grounds
15. That EFIC:
  - incorporate the OECD Guidelines for Multinational Enterprises' general policies and principles into its environmental and social policy and procedures
  - ensure that its social and environmental due diligence framework is consistent with the OECD Guidelines' recommendations on due diligence and that EFIC include consideration of its clients' business relationships and supply chains in its due diligence framework
  - disclose to the Australian National Contact Point all social and environmental impact assessments that concern an EFIC client that might be involved in a complaint to the National Contact Point
  - invite the Australian National Contact Point to join its multi-stakeholder forum
16. That if an existing or prospective EFIC client has a complaint made against it to any National Contact Point alleging violation of the OECD Guidelines, that the company be deemed ineligible to receive EFIC support until such a time that the company can demonstrate that any alleged adverse impacts have been resolved to the satisfaction of affected communities
17. That EFIC's anti-corruption initiatives be reviewed to ensure alignment with the proposed National Anti-Corruption Plan and compliance with the UN Convention Against Corruption

## 4 Background

### Australia's human rights obligations

- 4.1 The Australian Government, like all governments, has a responsibility to protect against human rights abuses committed by third parties, including business enterprises. Governments should prevent human rights abuse by third parties through appropriate policies, regulation and adjudication. This responsibility to protect is the first pillar of the UN's 'Protect, Respect and Remedy' Framework<sup>2</sup> for business and human rights. This framework was developed by the UN Secretary General's Special Representative on Business and Human Rights, John Ruggie, is endorsed by the Human Rights Council and supported by governments, business and civil society. The UN framework (sometimes referred to as the 'Ruggie framework') also places a responsibility on business to respect human rights and for greater access for victims of human rights abuse to effective remedy.
- 4.2 The responsibility to protect applies to EFIC – an Australian statutory corporation – as it does to other all parts of Government. The Guiding Principles on the UN 'Protect, Respect and Remedy' Framework make clear that '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 . . . , including, where appropriate, by requiring human rights due diligence'.<sup>3</sup> Further,

'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'.<sup>4</sup>

### Extractive industries

- 4.3 As stated above, the UN framework places obligations on business to respect human rights, which at a minimum requires business to act with due diligence to avoid infringing the rights of others, or to 'do no harm', and to provide a remedy if things do go wrong. Human rights due diligence requires companies to identify and assess the actual or potential human rights impacts of their operations (including by conducting a human rights impact assessment) to allow it to then prevent, mitigate and account for how it will address its human rights impacts.
- 4.4 A global survey<sup>5</sup> of alleged corporate-related human rights abuse shows that 28% of complaints related to mining, oil and gas projects – the worst of any sector. While not all mining, oil and gas projects will cause harm, this does demonstrate the need for EFIC to exercise particular care when assessing the risks associated with transactions in support of Australia mining, oil and gas projects overseas. Assessing potential human rights impacts is an important part of this process.

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<sup>2</sup> Human Rights Council, A/HRC/8/5, 7 April 2008 and A/HRC/17/31, 21 March 2011

<sup>3</sup> Human Rights Council, A/HRC/17/31, 21 March 2011

<sup>4</sup> Human Rights Council, A/HRC/17/31, 21 March 2011

<sup>5</sup> Human Rights Council, A/HRC/8/5/Add.2, 23 May 2008

- 4.5 Export credit agencies provide significant financial support to large-scale industrial and infrastructure projects in non-OECD countries. The UN Independent Expert on Foreign Debt recently concluded that:

'many projects supported by export credit agencies have harmful environmental, social and human rights consequences and are not financially viable. Numerous reports have documented human rights violations arising from or associated with projects supported by export credit agencies, including forced displacement of local populations, violation of the rights of indigenous peoples, denial of access to basic services and environmental damage'.<sup>6</sup>

- 4.6 EFIC has a history of providing significant support for Australian extractive industry projects overseas – directly through support for mining, oil and gas projects and indirectly through support for extractive industry related services such as construction. Some of the projects that EFIC has supported have appalling social and environmental records – the Ok Tedi and Porgera mines in Papua New Guinea being two high profile examples. During the period 2001 to 2009, 26% of EFIC's financing support went to the mining, oil and gas sector.<sup>7</sup> In 2009, EFIC made a USD\$350 million loan to the PNG LNG project<sup>8</sup> (an offer of up to USD\$500 million was made<sup>9</sup>).

- 4.7 As noted above the extractive industries are a significant source of complaints about negative human rights impacts. Oxfam Australia's work demonstrates that the overseas operations of Australian mining companies can have negative impacts on local communities and the environment. Grievances commonly expressed by communities impacted by mining activities include:

- inadequate consultation and negotiation with local people, including women and Indigenous Peoples;
- little disclosure about proposed mining activities;
- forced evictions and damage to homes;
- adverse health and social impacts;
- harassment of community members and retaliation against anti-mine protesters;
- adverse environmental and related livelihood impacts;
- adverse impacts on water supply quality and quantity, and pollution of land;
- poor management of hazardous waste and inadequate emergency response procedures; and
- mining revenues do not result in improvements in the quality of or access to essential services such as health care and education

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<sup>6</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, A/66/271, 5 August 2011

<sup>7</sup> Jubilee Australia, Risky Business: Shining a spotlight on Australia's export credit agency, 2009

<sup>8</sup> EFIC Annual Report 2010

<sup>9</sup> Minister for Trade media release, Australian Government Support for Gas Project in PNG, 8 December 2009



4.8 Our work also shows that the impacts of mining are not gender neutral as women often experience the negative impacts of mining more so than men, and don't always receive the benefits from mining that men do. For example:

- women are rarely consulted when companies negotiate access to land, compensation or benefits;
- when mining damages the environment, it can undermine women's ability to provide food and clean water for their families and can increase their workload;
- compensation and benefits are paid to men "on behalf of" their families denying women access to the financial benefits of mining – this can increase women's economic dependence on men;
- women can lose their traditional status in society when mining creates a cash-based economy;
- a transient male work force and cash income received by men can bring increased alcohol, sex workers and violence into a community; and
- women mine workers often face discrimination, poor working conditions and unequal pay for equal work.

4.9 The negative impacts described above are more likely to occur in countries, or regions, characterised by corruption, conflict, weak governance and poor human rights and environmental protections – countries where Australian mining companies are increasingly active and EFIC support is often sought. In fact, mining can exacerbate corruption and conflict.

4.10 Oxfam Australia recently undertook some research on the PNG LNG project – EFIC made a USD\$350 million loan to the PNG LNG project in 2009. Our research focused on four communities located closest to the processing plant and export facility (just outside of Port Moresby) and aimed to 'develop an understanding of the potential positive and negative impacts of the PNG LNG project by documenting communities' experiences and views of these impacts'.<sup>10</sup>

4.11 The research found that the PNG LNG Project is having both positive and negative impacts on local communities, and that in some cases what should amount to positive opportunities resulting from the PNG LNG Project were having unintended negative side effects. Concerns expressed by community members about the PNG LNG project include:

- a perception that employment recruitment and other benefit distribution is not fair, and that "middle men" in the distribution chain are capturing benefits;
- intra-community division, disputes and conflict including over who is and who is not receiving benefits from the PNG LNG project, and in relation to the use of land by the project;
- money earned from the project is being spent on alcohol bringing problems into the community and family;

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<sup>10</sup> Oxfam Australia, Listening to the impacts of the PNG LNG Project in Central Province, Papua New Guinea, November 2011, [http://www.oxfam.org.au/resources/pages/view.php?ref=655&search=mining&order\\_by=relevance&sort=DESC&offset=0&archive=0&k=](http://www.oxfam.org.au/resources/pages/view.php?ref=655&search=mining&order_by=relevance&sort=DESC&offset=0&archive=0&k=)

- outsiders coming into the communities bringing alcohol and with the intention to buy land or make business ventures; and
- changes to peoples' lifestyles including concern that traditions and culture are being lost and the spiritual life of people in the communities is being eroded.

4.12 Some other research<sup>11</sup> has been undertaken in the Southern Highlands of Papua New Guinea where the PNG LNG project will extract the gas before it is sent via pipeline to the processing plant near Port Moresby. This research found that:

- benefit sharing negotiations are widely considered to be have been unfair and non-transparent;
- PNG LNG business development grants have been associated with misappropriation, disputes over claims and a lack of monitoring;
- the pursuit of monetary benefits from the PNG LNG project has, to a degree, distorted some traditional family values and structures;
- the greater availability of cash has generated social problems including increases in alcohol consumption, gambling and prostitution; and
- the PNG LNG project has contributed to a higher cost of living.

The research concludes that a majority of people feel that the benefits of the PNG LNG project are not fairly shared and that if this is not addressed, human development is likely to stagnate for many people while the risk of instability and violence is likely to increase.

4.13 All of the above illustrates the need for EFIC to have a robust due diligence framework in place to ensure that it does not support 'risky' projects that may harm local communities, including by increasing poverty. This framework must ensure that economic incentives to support a particular project are not at the expense of risks to, and negative impacts on, local communities. Such a framework must include requirements for assessment of the potential social – including human rights and gender – and environmental impacts of projects EFIC is considering supporting. Further, when a potential project is located in a conflict or post-conflict zone, or conflict prone area, the risk of a project causing or exacerbating conflict must also be assessed. Mechanisms should also be established by EFIC to 'fix things' (ie, to remedy any negative impacts) should an EFIC supported project cause harm, despite best efforts to avoid such harm.

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<sup>11</sup> Dr James McIlraith, Preliminary review – The PNG LNG Project in the Hela region of Papua New Guinea, unpublished

## 5 Comments and recommendations

### Human rights

- 5.1 Section 8 (2) (iii) of the *Export Finance and Insurance Corporation Act 1991* (the EFIC Act) states that, in performing its functions, EFIC must 'have regard to' Australia's obligations under international agreements. It then follows that EFIC must have regard to Australia's international human rights obligations.<sup>12</sup> There are a number of ways that EFIC can give effect to this requirement including by developing a human rights framework, strengthening its *Environmental and Social Policy and Procedures* and establishing a grievance mechanism. Each of these is discussed below.
- 5.2 Oxfam Australia believes that the EFIC Act should be strengthened so that it requires EFIC to 'comply' with Australia's international human rights obligations rather than just 'have regard to' these obligations. Oxfam Australia urges the Productivity Commission to recommend an amendment to the EFIC Act accordingly.

### Human rights framework

- 5.3 EFIC has indicated to Oxfam Australia that it is committed to developing a human rights framework, which we welcome. As yet though we are not aware of what, if any, detailed consideration EFIC has done on this matter.
- 5.4 A human rights framework or policy should clearly explain, as a minimum:<sup>13</sup>
- The human rights standards to which EFIC and its clients must comply with;
  - Those forms of trade and investment support that are not offered by EFIC on the basis of human rights concerns;
  - Specific information that clients are required to provide regarding the human rights impacts of proposed projects (this should include assessment of gender and conflict risks);
  - EFIC's procedure for assessing human rights impacts of a proposed project including a projects' business relationships and supply chains;
  - EFIC's procedure for assessing human rights context in the host state;
  - EFIC's procedure for including human rights considerations in decision-making processes regarding the provision of support;
  - EFIC's procedure for monitoring compliance with human rights standards during all stages of a project; and
  - The consequences of non-compliance with the framework, such as withdrawing EFIC support for a project.

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<sup>12</sup> This includes the International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Convention on the Elimination of all forms of Racial Discrimination; Convention on the Elimination of all Forms of Discrimination against Women; and the Convention on the Rights of the Child.

<sup>13</sup> Adapted from Halifax Initiative, Export Credit Agencies and the International Law of Human Rights, January 2008

- 5.5 We urge the Productivity Commission to recommend that EFIC develop a human rights framework or policy, and that this framework be a public document.

#### **EFIC's social and environmental policy and procedure**

- 5.6 EFIC's Environmental and Social Policy requires it to screen and classify potential projects to identify environmental and social risks associated with the project. This process considers<sup>14</sup>:
1. an exporter or investor's role in a transaction which can determine their responsibility and ability to manage environmental and/or social impacts;
  2. potential environmental and social issues;
  3. Australia's obligations under international agreements; and
  4. the OECD's Recommendation on Common Approaches on the Environment and Officially Supported Export Credits (the Common Approaches) and the Equator Principles.
- 5.7 EFIC must ensure that it does not support projects with negative environmental and social impacts regardless of an investor's level of responsibility and ability to manage impacts. Whether or not an investor has leverage over a project (ie the ability to manage environmental and/or social impacts) is quite different to determining whether or not the project is likely to have negative impacts.
- 5.8 In a letter from the Special Representative on business and human to members of the OECD's Export Credit Group rights, the Special Representative asks, if a very serious and high probability risk is uncovered as a result of an assessment, and the investor has relatively little leverage over the other parties, would we conclude that EFIC should go ahead and support the project because it and its client lacks leverage to alter the risk? Or would we conclude that supporting a project that has a high probability of contributing to serious human rights harm is not appropriate?<sup>15</sup> Australia's human rights obligations would suggest that EFIC support for a project in this situation unacceptable.
- 5.9 EFIC's Environmental and Social Policy also requires it to benchmark potential projects and evaluate risks associated with the project. EFIC usually benchmarks projects against the relevant Performance Standards of the International Finance Corporation (IFC) (hereafter, the Performance Standards). The Equator Principles referred to above align with the Performance Standards. Oxfam Australia recognises the Performance Standards as an important global standard against which project social and environmental impacts are typically assessed. However, the Performance Standards do contain significant gaps and weaknesses and by themselves offer no guarantee that project-affected people will not experience harm. These weaknesses exist in relation to human rights, gender and conflict – all critical issues for mining and other large scale projects. EFIC must ensure that its Environmental and Social Policy and Procedures address these gaps.

#### ***Human Rights***

- 5.10 The IFC Performance Standards do reference some specific human rights and 'recognise the responsibility of business to respect human rights'. However, the Performance Standards do not require a proper assessment of human rights risks for all projects. Instead the

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<sup>14</sup> <http://www.efic.gov.au/corp-responsibility/envr-responsibility/Pages/Policy.aspx>

<sup>15</sup> Adapted from Letter to Members of the OECD's Export Credit Group from the United Nations Secretary-General's Special Representative on business and human rights, 29 September 2010

Performance Standards states that 'in limited high risk circumstances, it may be appropriate for the client to complement its environmental and social risks and impacts identification process with specific human rights due diligence.' Projects such as mining and other large scale projects can impact on a range of human rights not just when the project is located in a high risk area.

- 5.11 Further, the Performance Standards do not at present provide adequate guidance on what human rights due diligence is or how to do a human rights impact assessment (including consideration of human rights risks in business relationships and supply chains). The UN's Guiding Principles on Business and Human Rights does provide this guidance<sup>16</sup>. Hence, EFIC's reliance on the Performance Standards means it (or its clients) may not always properly assess the human rights impacts of the projects it supports.
- 5.12 EFIC does have a 'checklist for environmental and social review of transactions' designed to ensure 'consistent application of the Environmental and Social Policy and Procedure'. The checklist states that in some situations further studies may be required before EFIC will make a decision on whether or not to support a particular project. EFIC may require further studies when EFIC's Country Risk Assessments identifies human rights issues, where armed security not controlled by the client will be used or there is documented repression of minorities, for example. These further studies appear to focus on better understanding the human rights impacts of a project. Oxfam Australia welcomes this as useful start but believes the checklist is too narrow in its approach. EFIC should require the proponents of all mining and other large projects to undertake a human rights impact assessment, and to disclose the results of the assessment.
- 5.13 Oxfam Australia urges the Productivity Commission to recommend that EFIC strengthen its approach to human rights impact assessment, through an update to EFIC's Environmental and Social Policy and the proposed human rights framework.
- 5.14 Oxfam Australia also urges the Productivity Commission to recommend that EFIC provide guidance to potential clients on human rights due diligence by, for example, developing and publishing a 'guide to human rights due diligence and impact assessment'.

### **Gender**

- 5.15 The Performance Standards expect project proponents to 'minimise gender-related risks from business activities and unintended gender differentiated impacts'. Further, the Performance Standards require project proponents, in some situations, to identify disadvantaged or vulnerable groups of people (including because of gender) and implement measures to ensure that adverse impacts do not fall disproportionately on these groups. However, the Performance Standards do not include specific requirements for project proponents to conduct gender impact assessment, nor do they provide any guidance on how to do a gender impact assessment.
- 5.16 Gender impact assessments can be used to ensure that the potential gender impacts of a project are adequately assessed and addressed. They can assist project proponents ensure that their projects do not violate the human rights of women – this is critically important because we know that women are often disproportionately affected by large projects such as mining. EFIC's reliance on the Performance Standards means it may not properly assess the gender impacts of the projects it supports.

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<sup>16</sup> Human rights due diligence requires companies to identify and assess potential adverse human rights risk; integrate commitments to prevent and mitigate negative impacts into internal control and oversight systems; and track and report performance.

- 5.17 Oxfam Australia urges the Productivity Commission to recommend that EFIC strengthen its approach to gender impact assessment through an update to EFIC's Environmental and Social Policy and by including gender in the proposed human rights framework.

### **Conflict**

- 5.18 The IFC Performance Standards are almost entirely silent on conflict, and do not require assessment of conflict risk and impact where a project is located in a conflict zone, post-conflict zone or conflict prone area. This is a significant gap given that many of the projects that EFIC supports are located in 'high risk' areas. As stated above, EFIC does have a 'checklist for environmental and social review of transactions' designed to ensure 'consistent application of the Environmental and Social Policy and Procedure'. The checklist states that in some situations further studies may be required before EFIC will make a decision on whether or not to support a particular project. EFIC may require further studies where a project is located in a conflict or post conflict area. Oxfam Australia welcomes this, but believes that more should be done to ensure that EFIC does not support projects that may cause or contribute to conflict, and related human rights abuse.
- 5.19 Large projects such as mining can cause or contribute to conflict – not just when the project is located in conflict or post conflict zones, although risks here are greatest. Resettlement and involuntary displacement, compensation, social investment, security arrangements, and corruption and transparency can all trigger conflict. It is essential that these issues are understood by EFIC and its clients. EFIC should require proponents of all mining and other large scale projects to undertake an initial conflict assessment. If the initial conflict assessment indicates that the level of conflict risk is high then a full 'conflict risk and impact assessment' should be required.
- 5.20 EFIC should provide guidance on how to conduct conflict risk and impact assessments. Such an assessment can assist EFIC and its clients better understand existing or potential conflicts and its actors, causes and consequences, and better understand the influence that a project such as mining may have on such conflict. Such an assessment, along with EFIC's Country Risk Assessment, should inform EFIC's decision on whether it supports or declines a transaction. If EFIC does support a project in a conflict, post-conflict or conflict prone area, the assessment can then be used mitigate the risk of the project causing or contributing to conflict, and related human rights abuse.
- 5.21 EFIC publishes 'Country Profiles'.<sup>17</sup> These provide information to potential clients, and the wider public, on the key risks of doing business in a particular country. These profiles should be strengthened to pay greater attention to issues of conflict and related human rights risk. Additionally, the Country Profiles should also provide more information on corruption and bribery.
- 5.22 Oxfam Australia urges the Productivity Commission to recommend that EFIC strengthen its approach to conflict risk and impact assessment, through an update to EFIC's Environmental and Social Policy and by including a requirement related to conflict in the proposed human rights framework. Further, we recommend that conflict and related human rights risk issues are clearly described in all Country Profiles published by EFIC.

### **EFIC Grievance Mechanism**

- 5.23 As stated above, many of the projects that EFIC supports such as mining, can have negative impacts on local communities (including on human rights) and their environment. Communities, quite rightly, want access to an effective remedy (such as a 'grievance' or

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<sup>17</sup> <http://www.efic.gov.au/country/countryprofiles/Pages/countryprofiles.aspx>

'complaints' mechanism) if problems occur. Oxfam has previously recommended that EFIC establish and promote a grievance mechanism to receive and resolve complaints from project affected people about EFIC supported projects and to investigate alleged non-compliance with EFIC's Environment and Social Policy.<sup>18</sup> We note that a human rights framework, such as that referred to above, is only effective if it is adopted in conjunction with appropriate grievance and accountability procedures.

- 5.24 A grievance mechanism is a formalised process to prevent and resolve community concerns with, or grievances about, the performance or behaviour of a company, its contractors or employees. A grievance mechanism is designed to assist the resolution of complaints from people who believe they have been harmed by a project. Companies should establish their own local-level complaints mechanism as one means to ensure they 'do no harm'. A company-based grievance mechanism can result in grievances being resolved locally and quickly. A grievance mechanism can also help companies reduce risk and conflict, and improve relationships with local communities.
- 5.25 However, there is also a need for third party mechanisms in cases where there is no company-level grievance mechanism, or where company mechanisms are unable to resolve community grievances at the local level. EFIC has a responsibility here for the projects it supports – in its role as project financier and as an extension of the Australian Government's responsibility to protect against human rights abuses including through appropriate adjudication. Ensuring access for victims of human rights abuse to effective remedy forms part of the UN 'Protect, Respect and Remedy' framework for business and human rights. A grievance mechanism is also an important risk mitigation tool for EFIC in that it will help EFIC identify and solve problems at projects it has supported.
- 5.26 The role of EFIC, through a grievance mechanism process that it establishes, could be, as a minimum, to:
- bring together those people who believe they have been harmed by an EFIC-supported project and the company (ie EFIC's client);
  - provide sufficient resources, including suitably qualified and independent specialists,<sup>19</sup> to facilitate a mediated outcome designed to resolve community concerns about the project; and
  - ensure that, as a minimum, EFIC's client complies with EFIC's Environmental and Social Policy and any conditions covering environmental and social conditions included in the contract between EFIC and its client.
- 5.27 An EFIC grievance mechanism should be supported by a governance structure that is:
- sufficiently independent of EFIC management and reports directly to EFIC's Board and the Minister for Trade; and
  - supported by an independent advisory group with expertise in mediation and the social and environmental impacts of the types of projects EFIC most commonly supports.

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<sup>18</sup> Some other ECA's have grievance mechanisms, for example, the Japan Bank for International Cooperation's 'Examiner for Environmental Guidelines' and Export Development Canada's 'Compliance Officer'.

<sup>19</sup> Experience in alternative dispute resolution, conflict assessment and management, mediation, facilitation and working cross-culturally would be required

- 5.28 Further, the management structure and grievance resolution process should be consistent with the UN's Guiding Principles on Business and Human Rights – these are that the mechanism should be legitimate, accessible, predictable, equitable, rights-compatible, transparent and be based on engagement, dialogue and mediation.<sup>20</sup>
- 5.29 We have previously suggested that EFIC consider the roles and structure of the Compliance Advisor Ombudsman<sup>21</sup> for the IFC and Multilateral Investment Guarantee Agency of the World Bank as a model that may inform EFIC's decision making on this matter. In suggesting this, we do not believe that EFIC needs to establish a permanently staffed grievance mechanism. Instead EFIC should ensure that it has:
- appropriate processes in place;
  - a supporting structure that can be scaled up when required;
  - mediators and subject matter experts that can be called on when required;
  - a consistent process; and
  - a senior staff member in EFIC (who is not responsible for project assessment and decision making) with responsibility for the grievance mechanism's processes and structures and to ensure that recommendation made through grievance resolution processes are implemented.
- 5.30 EFIC has indicated to Oxfam Australia that it is committed to giving further consideration to the establishment of some form of grievance mechanism to resolve complaints about EFIC-supported projects, which we welcome. As yet though we are not aware of what, if any, detailed consideration EFIC has done on this matter.
- 5.31 We urge the Productivity Commission to recommend that EFIC establish and promote a grievance mechanism to receive and resolve complaints from project affected people about EFIC supported projects and to investigate alleged non-compliance with EFIC's Environment and Social Policy.

### **Disclosure and public reporting**

- 5.32 The UN Independent Expert on Foreign Debt holds the view that 'the absence of transparency requirements raises serious questions about the accountability of export credit agencies to the taxpayers of their home States and to citizens of the developing countries where they support projects. Loans underwritten by an export credit agency's home Government . . . are matters of public concern. It is therefore reasonable to expect a public body or a publicly funded body to abide by transparency requirements and operate with clear accountability mechanisms'.<sup>22</sup> Further, 'the Independent Expert is concerned about the lack of transparency in the activities undertaken by . . . EFIC'.<sup>23</sup>

<sup>20</sup> Human Rights Council A/HRC/17/31, 21 March 2011

<sup>21</sup> <http://www.cao-ombudsman.org/>

<sup>22</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, A/66/271, 5 August 2011

<sup>23</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, A/HRC/17/37/Add.1, 25 May 2011



5.33 We note that since July 2011 EFIC has published an online register of transactions it has supported in the current year. The register contains some basic information about the company, the goods or services being supported and the results of the screening and classification undertaken in accordance with EFIC's social and environmental policy. We also note that 'EFIC may omit some details if they, or the fact of EFIC's support, are commercially sensitive for a client.'<sup>24</sup> However, there is no technical definition of commercially sensitive information. Everything, from the existence of a contract, to illegal bribes, to most of what is disclosed under securities regulations, can be classified as 'commercially sensitive' in the broadest sense of the term. The exemption from disclosure on the grounds that the information is commercially sensitive is unhelpful and serves to undermine peoples' right to information.

5.34 We also note that EFIC has an online register of Category A projects it is considering supporting (these are projects with potentially significant adverse environmental and/or social impacts). Disclosure is for at least 30 days and before EFIC makes a decision to provide support for the project. This register contains some basic information about the company and project as well as links to social and environmental assessments of the project that has been provided by EFIC's clients. Interested people can make a submission to EFIC about EFIC's possible support of the project.

5.35 Finally, EFIC has committed to engaging an independent environmental and social expert to audit the application of its social and environmental policy and procedure every two years. Audit reports will be published.

5.36 Oxfam Australia welcomes these attempts by EFIC to improve its disclosure and public reporting but believe that more can be done to ensure that Australian taxpayers and people potentially affected by EFIC supported projects better understand the projects that EFIC supports and the nature of EFIC's support. This is particularly important for people affected by a project as it will assist them to hold EFIC and its clients to account should the project cause harm. We note that the US Export-Import Bank is required to disclose 'environmental assessments and supplemental environmental reports required to be submitted to the Bank, including remediation or mitigation plans and procedures, and related monitoring reports' for projects that receive long term support valued at \$10 million or more.<sup>25</sup>

5.37 We urge the Productivity Commission to recommend that:

- EFIC also disclose for Category A projects
  - details of benefit sharing agreements in the host country to ensure that the payments of revenues to host governments and other stakeholders is transparent for natural resource projects including mining projects;
  - any independent assessments or reports related to EFIC supported projects;
  - the result of EFIC's benchmarking and assessment process;
  - client monitoring reports; and
  - contract terms that relate to requirements for additional work, compliance with environmental and social standards, and monitoring and reporting requirements;

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<sup>24</sup> <http://www.efic.gov.au/corp-responsibility/envr-responsibility/Pages/Procedure.aspx>

<sup>25</sup> Halifax Initiative, Export Development Canada Environmental Policy Review Submission, 26 August 2009

- EFIC discloses the information above, along with links to social and environmental assessments of the project, for Category A projects on its website permanently, not just during the period while EFIC is considering supporting a project;
- EFIC ensure that its clients make all the information referred to above available to project affected people and other stakeholders in the host country – this information should be made available in local languages; and
- EFIC amend its social and environmental procedure to remove the exemption from disclosure on the grounds that some information might be ‘commercially sensitive’.

### ***Freedom of Information***

- 5.38 Under the Freedom of Information Act 1982 (Cth) all documents relating to anything done by EFIC under Part 4 (Insurance and Financial Service Products) or Part 5 (National Interest Transactions) of the EFIC Act are exempt from disclosure. Information about ‘national interest’ decisions made by the Minister for Trade under Section 29 of the EFIC Act is so exempt from disclosure.<sup>26</sup> The exemption from the Freedom of Information Act prevents proper public scrutiny of EFIC and limits EFIC’s accountability to Australian taxpayers and people potentially affected by EFIC supported projects.
- 5.39 Oxfam Australia urges the Productivity Commission to consider the legislative provisions governing the release of information about EFIC and make recommendations to improve transparency and accountability including changes to the Freedom of Information Act.

### **EFIC and other Australian Government programs and commitments**

- 5.40 The Australian Government has indicated its support for a number of global corporate accountability mechanisms and international treaties. This inquiry into Australia’s export credit arrangements provides an opportunity to ensure consistent implementation of these standards across all parts of government.
- 5.41 EFIC is well placed to engage in high-level interagency discussions on corporate accountability and international standards and treaties that relate to business and human rights. EFIC, along with Austrade, the National Contact Point for the OECD Guidelines for Multinational Enterprises and the Transnational Crime Unit in the Department of Foreign Affairs and Trade should be critical partners in such discussions.
- 5.42 We urge the Productivity Commission to recommend that EFIC share its social and environmental impact assessments with Austrade to ensure the provision of Austrade products and services, such as the Export Market Development Grants scheme, is consistent with decisions made by EFIC on social and environmental grounds.
- 5.43 AusAID has recognised that some development projects it supports can result in the resettlement and involuntary displacement of local communities, and that it needs to develop its own guidance on this. We understand that a process is underway to develop some guidelines designed to protect community rights. EFIC must ensure that its assessment of, and standards for, resettlement and involuntary displacement risks is consistent with any future AusAID guidelines.

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<sup>26</sup> Jubilee Australia, Risky Business: Shining a spotlight on Australia’s export credit agency, 2009

### ***OECD Guidelines for Multinational Enterprises***

5.44 The OECD Guidelines for Multinational Enterprises<sup>27</sup> are the only multilaterally agreed and comprehensive code of responsible business conduct that governments, including Australia, have committed to promoting. We note that the Guidelines have been recently strengthened to include:

- A new human rights chapter, which is consistent with the UN 'Protect, Respect and Remedy' Framework;
- A new and comprehensive approach to due diligence including a general principle that businesses should avoid causing or contributing to adverse impacts;
- A general principle that businesses must take steps to avoid negative impacts throughout their business relationships and supply chains, even when the enterprise has not directly caused or contributed to the harm;
- Strengthened provisions in relation to employment and industrial relations, combating bribery, environment, consumer interests, disclosure and taxation.
- Confirmation the Guidelines apply to all sectors, including the financial sector;
- A requirement for meaningful stakeholder engagement by businesses; and
- A requirement for businesses to reduce and report on greenhouse gas emissions.

As a minimum, EFIC should uphold, and demonstrate alignment with, the Guidelines' principles and policies for responsible business conduct.

5.45 The OECD Guidelines establish a 'National Contact Point' to 'further the effectiveness of the Guidelines by undertaking promotional activities, handling enquiries and contributing to the resolution of issues [ie to help resolve complaints affected people] that arise relating to the implementation of the Guidelines in specific instances'.<sup>28</sup> All OECD countries and so-called 'adhering countries' have a National Contact Point. The Australian National Contact Point is Executive Member of the Foreign Investment Review Board (who is also the General Manager of the Foreign Investment and Trade Policy Division at the Treasury).

5.46 To ensure greater consistency with the OECD Guidelines for Multinational Enterprises we urge the Productivity Commission to recommend that EFIC:

- Incorporate the OECD Guidelines' general policies and principles into its environmental and social policy and procedures;
- Ensure that its social and environmental due diligence framework is consistent with the OECD Guidelines' recommendations on due diligence and that EFIC include consideration of its clients' business relationships and supply chains in its due diligence framework;
- Disclose to the Australian National Contact Point all social and environmental impact assessments that concern an EFIC client that might be involved in a complaint to the National Contact Point; and

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<sup>27</sup> <http://www.oecd.org/dataoecd/43/29/48004323.pdf>

<sup>28</sup> <http://www.oecd.org/dataoecd/43/29/48004323.pdf>

- Invite the Australian National Contact Point to join its multi-stakeholder forum.
- 5.47 We also urge the Productivity Commission to recommend that if an existing or prospective EFIC client has a complaint made against it to any National Contact Point alleging violation of the OECD Guidelines, that the company be deemed ineligible to receive EFIC finance, insurance and other support until such a time that the company can demonstrate that any alleged adverse impacts have been resolved to the satisfaction of affected communities.

### ***Corruption***

- 5.48 The Minister for Justice recently announced that the Government will develop and implement a National Anti-Corruption Plan.<sup>29</sup> This offers the opportunity for Government to review the effectiveness of EFIC's Anti-corruption initiatives and its compliance with relevant provisions of the UN Convention Against Corruption and other relevant obligations. The development of the Anti-Corruption Plan should be informed by findings of the Productivity Commission's Inquiry into EFIC.

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<sup>29</sup> Media release, 22 September 2011

[http://www.ag.gov.au/www/ministers/oconnor.nsf/Page/MediaReleases\\_2011\\_ThirdQuarter\\_22September2011-Proceedsofcrimetobeusedtofightcorruption](http://www.ag.gov.au/www/ministers/oconnor.nsf/Page/MediaReleases_2011_ThirdQuarter_22September2011-Proceedsofcrimetobeusedtofightcorruption)

17 December 2010

Mr John Pacey  
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Export Finance and Insurance Corporation

Via email

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Dear John

Thank for inviting Oxfam Australia, and other civil society groups, to the recent workshop to discuss EFIC's Social and Environment Policy. We are pleased at being given the opportunity to meet you and your staff, and to begin a dialogue on how EFIC manages the social and environmental risks posed by some of your clients. The consensus reached on many of the issues discussed and broader outcomes, including to ongoing dialogue, is very pleasing. We also wish to thank you for the material circulated prior to the meeting – this assisted us in preparing for the meeting and lead to what were highly focused and productive discussions during the workshop.

Oxfam provides this supplementary written submission to complement our first written submission (October 2010) and comments made during the workshop on 9 December 2010. We provide these comments to assist EFIC with its deliberations as it seeks to finalise its review of the Social and Environment Policy, and in keeping with the commitment to ongoing dialogue between our two organisations.

1. Oxfam Australia welcomes the commitment by EFIC to give further consideration to the establishment of some form of grievance mechanism to resolve complaints about EFIC-supported projects from people who believe they have been harmed by such a project (ie from project affected people). As stated previously, the Office of the Compliance Advisor/Ombudsman (CAO) offers a useful model for consideration. The Ombudsman function responds to complaints by people affected by the social and environmental impacts of projects. The Ombudsman works with stakeholders to resolve grievances using a problem-solving approach, based on engagement and dialogue, to improve outcomes on the ground for project affected people. CAO staff are trained in alternative dispute resolution, with expertise in conflict assessment and management, mediation, and facilitation.
2. We understand that the Compliance Advisor/Ombudsman will be in Australia in early-mid 2011 and we would be happy to facilitate a meeting with her and EFIC staff as a way to build EFIC's understanding of the possible functions and institutional arrangements of grievance mechanisms. We are also happy to provide introductions to other experts.
3. As stated previously, Oxfam does not consider that the Performance Standards require adequate consideration of human rights, gender and conflict risks. Many projects that may be supported by EFIC, including mining projects, have the potential to negatively impact in human rights, gender and conflict and as such require careful assessment by both EFIC and its clients. While we are hopeful that the revised Performance Standards will be strengthened in these areas, they may not be. Hence is it critical for EFIC to broaden its assessments, and require its clients to consider project risks, beyond what is required by the Performance Standards.
4. Oxfam does not believe that the Performance Standards adequately considers all human rights – in fact the Performance Standards rarely mentions human rights at all. A further gap is that the Performance Standards do not contain adequate procedural guidance for conducting human rights due diligence and do not require clients to undertake a human rights impact assessments (HRIA). HRIA can assist project proponents identify and mitigate potential human rights risks to local communities. HRIA is an emerging area of impact assessment and there exists some useful tools to guide the impact assessment process. To

not require clients to undertake HRIA for lack of a commonly agreed methodology does little to develop experience and expertise in this critical risk assessment area.

5. The Performance Standards do not require a gender impact assessment. They do require that clients 'identify individuals and groups that may be differentially or disproportionately affected by a project because of their disadvantaged or vulnerable statement'. In a footnote to Performance Standard 1 it is suggested that clients consider factors such as gender amongst others. This is not sufficient to ensure a rigorous assessment of the gender impacts, or implications, of a project. It is essential that Gender Impact Assessments are undertaken because we know that mining and other large developments affected women more so than men.
6. The worst corporate-related human rights abuses occur amid armed conflict over the control of territory, resource or the government itself. Australian companies are increasing operating in countries that are or have experienced conflict – without a proper conflict risk and impact assessment, companies may cause or contribute to harm. As John Ruggie said at the June 2010 meeting of the OECD's Export Credit Group, particular attention needs to be paid to the possibility that ECA clients may get drawn into serious human rights violations where a project operates in or near conflict-affected areas. In these situations, 'heightened due diligence' is required. The Performance Standards do not require an assessment of conflict risk and impact. Environmental and social impact assessments do not necessarily lead to an understanding of existing or potential conflict and its actors, causes or consequences, and do not lead to an understanding of the influence a company may have on such conflict. Project level conflict assessments can be undertaken alongside country risk assessments which we understand informs EFIC decision making.
7. We reiterate our earlier recommendation that EFIC should require clients, as part of their environmental and social risk assessment, and to strengthen EFIC's due diligence process, to conduct and disclose HRIA, Gender Impact Assessments; and Conflict Risk and Impact Assessments. This should be required by EFIC's Social and Environment Policy and/or the proposed Human Rights Framework.
8. On the broad issue of disclosure, Oxfam Australia encourages EFIC to reconsider how it balances legitimate confidentially concerns with public interest concerns including peoples' right to information.
9. In our experience, companies and governments consistently argue that confidentiality clauses keep them from disclosing information. This argument is circular because the companies and governments put the clauses into the agreements themselves. However, in most cases, confidentiality clauses are not the major barriers to disclosure that parties claim. Parties can generally disclose by consent or unilaterally – there is considerable margin for action if and when contract parties decide to make disclosures. As a party to any such contract, surely EFIC is in a position to dictate the terms of these contracts, and as such determine what is confidential and what should be disclosed.
10. Perhaps the most widely made—and unchallenged—claim for confidentiality is that it protects commercially sensitive information. However, there is no technical definition of commercially sensitive information. Everything, from the existence of a contract, to illegal bribes, to most of what is disclosed under securities regulations, can be classified as "commercially sensitive" in the broadest sense of the term. Yet disclosure of such information is desirable in order to serve a greater public interest. The most important public interest at stake is the right to information, which enables democratic accountability. Other Export Credit Agencies have outlined thresholds for disclosure and a policy for how stakeholder interests and the right to information will be balanced with the protection of more sensitive information. We encourage EFIC to consider such an approach.
11. We reiterate our earlier recommendation that EFIC should disclose:
  - Summary information about the project;
  - Complete copies of the social, environmental, human rights, gender, indigenous peoples and conflict impact assessments prepared by the client;

- Details of benefit sharing agreements in the host country to ensure that the payments of revenues to host governments and other stakeholders is transparent for natural resource projects including mining projects;
- Any independent assessments or reports;
- The result of EFIC's benchmarking and assessment process;
- Client monitoring and reports; and
- Parts of the contracts EFIC enters into with clients that relate to requirements for additional work, compliance with environmental and social standards, monitoring and reporting requirements, and requirements for auditing by independent experts.

Kind regards,

Serena Lillywhite  
Mining Advocacy Lead

Christina Hill  
Mining Advocacy Coordinator



## **Export Finance and Insurance Corporation Environment and Social Policy Review**

### **Submission**



A young Highlands man leads his tribe into battle during a mock tribal fight staged as part of the 2007 Independence Day celebrations in Tari, Papua New Guinea. EFIC provided \$500 million support to the PNG LNG (liquefied natural gas) project. Already there are concerns that this project will cause conflict and other negative impacts. These impacts will be felt by people living in Tari which is located close to the gas production areas.

Photo: Maureen Bathgate/OxfamAUS

**Oxfam Australia**  
October 2010



## **1 About Oxfam Australia**

- 1.1 Oxfam Australia is an independent, not-for-profit, secular international development agency. We are a member of Oxfam International, a global confederation of 15 Oxfams that work with others to overcome poverty and injustice in more than 100 countries around the world. Oxfam Australia's vision is of a fair world in which people control their own lives, their basic rights are achieved, and the environment is sustained.
- 1.2 We have worked with local communities around the world to combat poverty and injustice for over 50 years. We support more than 400 long-term development projects in 30 countries across Africa, Asia, the Pacific and Indigenous Australia. Oxfam Australia undertakes long-term development projects, provides emergency response during disaster and conflict, and undertakes research, advocacy and campaigning for policy and practice changes which promote human rights and justice.
- 1.3 Our approach to bringing about change is guided by our central commitments to active citizenship and accountability, and a rights-based approach to development. Our work is guided by our four external change goals: economic justice, essential services, rights in crisis and gender justice.
- 1.4 Oxfam Australia believes that private sector investment can be a driver of economic growth and poverty reduction, provided appropriate regulations and controls exist. Our work in the mining sector clearly demonstrates the need for greater transparency and accountability by Australian mining companies operating offshore, and particularly when doing business in weak governance and conflict zones.
- 1.5 Oxfam Australia recognises the key role and responsibility of the Australian Government to foster sustainable development and business integrity among both Australian companies and the government departments and diplomatic missions that support and strengthen trade and investment.
- 1.6 Our work encompasses private sector engagement and political influence at a national and international level, including engagement with and influencing of multilateral organisations such as the World Bank and International Finance Corporation, the Asian Development Bank and the OECD Investment Committee.
- 1.7 Oxfam Australia holds full accreditation status with AusAID, the Australian Government's Agency for International Development, and is a signatory to numerous industry codes of practice including the Australian Council for International Development (ACFID) Code.

## 2 Submission context

- 2.1 Oxfam Australia is pleased to provide comments on EFIC's draft *Policy on Environmental and Social Review of Transactions* and draft *Environmental and Social Review Procedure*. This submission draws on our experience over 15 years of working with communities affected by mining and other large-scale infrastructure projects – sectors where much EFIC support is focused. Over this time we have been actively involved in advocacy, research, policy and capacity building among project-affected communities. Our work demonstrates that companies that fail to respect and uphold human rights through good policy and practice can cause harm to local communities. Our emphasis is on ensuring that companies, and the financial institutions that support them, including export credit agencies, have policies and practices in place which respect and protect human rights. This is particularly important when Australian companies and financial institutions do business in countries rich in natural resources and characterised by weak governance and conflict.
- 2.2 The Australian Government has a responsibility to protect against human rights abuses. This responsibility extends to human rights violations committed by business, as acknowledged in the UN's 'Protect, Respect and Remedy' Framework. This framework has been developed by the Secretary General's Special Representative on Business and Human Rights<sup>1</sup> and supported by Governments, business and civil society. The responsibility to protect applies to EFIC – an Australian statutory corporation – as it does to other parts of Government. This responsibility is increasingly recognised by multilateral institutions as evidenced, for example, by the current review of the OECD Guidelines for Multinational Enterprises.
- 2.3 The UN framework also places obligations on business to respect human rights, which at a minimum requires business to act with due diligence to avoid infringing the rights of others, or to do no harm, and to provide a remedy if things do go wrong.
- 2.4 The Performance Standards of the International Finance Corporation, the World Bank Safeguards Policies and the OECD's Recommendation on Common Approaches on the Environment and Officially Supported Export Credits are all being reviewed. It is Oxfam Australia's expectation that these will be strengthened to provide increased protections for project affected people and we note the move towards increased consistency between these standards.
- 2.5 In this context, a review of EFIC's environmental and social review policy and procedure is timely and welcome. However, Oxfam Australia does not believe that this review has been widely publicised and, as such, it is likely that key stakeholders and other organisations with relevant expertise may not be aware of this review. Oxfam Australia strongly recommends a more comprehensive review of EFIC's policies and procedures. A more comprehensive review that as a minimum:
1. Is guided by a publicly available Terms of Reference that includes timelines;
  2. Is widely advertised;
  3. Includes public hearings; and
  4. Makes all submissions received publicly available.

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<sup>1</sup> Human Rights Council, A/HRC/8/5, 7 April 2008

### 3 Comments and recommendations

#### Overview

- 3.1 Oxfam Australia acknowledges the Export Finance and Insurance Corporation's (EFIC) stated commitment to applying international best practice environmental and social standards in its transaction assessment process.
- 3.2 However, Oxfam Australia believes that EFIC's draft Environmental and Social Policy requires considerable strengthening to ensure that EFIC is accountable to project stakeholders, including project affected people, and Australian taxpayers. The policy also requires strengthening to ensure that EFIC does not support projects that may cause harm to people (including human rights abuse) or the environment. The policies of other leading export credit agencies and the UN Protect, Respect and Remedy Framework offer guidance to EFIC on how it might strengthen the policy.
- 3.3 In its current form, the policy is severely limited and narrow in scope, transparency and accountability. Oxfam Australia believes that the policy should be strengthened in four key areas:
1. Screening and Benchmarking Standards, including to ensure protection of human rights;
  2. Information required from clients;
  3. Disclosure and reporting; and
  4. Complaint handling.
- 3.4 Oxfam Australia is concerned that the draft policy and procedures contains some language that in some situations may weaken implementation of the policy. For example, use of words like 'where relevant' may result in procedures not always being followed. EFIC should ensure that the policy requires that procedures are followed for all transactions.

#### Screening and Benchmarking Standards

- 3.5 The screening process outlined in the draft Environmental and Social Review Procedure is problematic and as a result only 'new projects' would be subject to a predictable and therefore transparent benchmarking and assessment process. All other transaction would be subject to assessment on a case by case basis. The risk is that these 'other transactions' would not be subject to the same high level of assessment, disclosure and accountability as 'new projects'. As such, EFIC should change its proposed screening process in order to ensure that all types of transactions are then subject to the same assessment process, and same disclosure and accountability requirements.
- 3.6 Oxfam Australia also recommends that the screening process should be broadened to require an initial assessment of environmental and social impacts associated with the project by EFIC staff. A simple questionnaire or checklist on environmental and social issues will assist EFIC staff to understand possible risks and issues at an early stage in the assessment process. GIEK, the Norwegian Export Credit Agency, has developed such a questionnaire<sup>2</sup>.

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<sup>2</sup> [http://www.giek.no/filarkiv/sporreskjemaer\\_miljo\\_og\\_csr/hydro-power\\_screening-social\\_and\\_hr\\_impacts\\_20.09.10.doc/no](http://www.giek.no/filarkiv/sporreskjemaer_miljo_og_csr/hydro-power_screening-social_and_hr_impacts_20.09.10.doc/no)

- 3.7 Oxfam Australia recognises the Performance Standards of the International Finance Corporation as an important global standard against which project social and environmental impacts are typically assessed. Hence it is right that these, and host country standards, form part of EFIC's benchmarking process. However, the policy should state that the more stringent of the Performance Standards or host country standards should always apply. EFIC's policy does, however, state that in some circumstances, the World Bank Safeguard Policies (WBSP) will be used for benchmarking. Oxfam Australia does not consider this appropriate. The WBSP are viewed as outdated and inadequate in addressing social-related impacts, such as labour rights, working conditions, resettlement and indigenous peoples.<sup>3</sup> While we recognise that the WBSP are typically used when support is provided through foreign governments we also note that the WBSP are being reviewed and likely to be strengthened. We expect EFIC to support global efforts to strengthen project financing safeguards. EFIC should use the PS as the minimum standard against which to benchmark all transactions.
- 3.8 However, the Performance Standards do contain significant gaps and weaknesses and by themselves offer no guarantee that project affected people will not experience harm. These weaknesses are especially acute in relation to human rights. An assessment of the Performance Standards that considers the extent to which they provide sufficient guidance for project sponsors to manage the human rights risks of their operations finds that the standards fall short in some key areas.<sup>4</sup> Specifically, the Performance Standards do not:
1. Address many critical human rights issues, and address others only partially or in ways that do not meet international norms and standards; and
  2. Provide an adequate procedural framework for conducting human rights due diligence including that they do not require explicit assessment of potential impacts on human rights.
- 3.9 EFIC should therefore include as a benchmark, against which projects are assessed, key international human rights instruments, including but not limited to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights with its two Optional Protocols and the International Covenant on Economic, Social and Cultural Rights, and Australia's other human rights obligations.
- 3.10 EFIC should also make an explicit commitment in its policy to protecting human rights, including those rights articulated in the instruments listed above.

### Information Requirements

- 3.11 EFIC should require clients to thoroughly assess all potential risks. The policy should therefore be more explicit about the information required from clients in order to properly assess the risks.

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<sup>3</sup> Norwegian Export Credit Agency, OECD's Export Credit Regime and International Standards: Overview of Standards and Procedures utilised by GIEK and other Export Credit Agencies in the review of Environmental and Social Impacts of Energy Projects.

<sup>4</sup> S Herz, K Genovese, K Herbertson, and A Perrault, *The International Finance Corporations Performance Standards and the Equator Principles: Respecting human rights and remedying violations?*, A Submission to the U.N. Special Representative to the Secretary General on Human Rights and Transnational Corporations and other Business Enterprises, Center for International Environmental Law, Bank Information Center, BankTrack, Oxfam Australia, World Resources Institute, August 2008.

The policy should require clients, as part of their environmental and social risk assessment, and to strengthen EFIC's due diligence process, to conduct and disclose:

1. Human Right Impact Assessments;
2. Gender Impact Assessments;
3. Indigenous Peoples Impact Assessments;
4. Conflict Risk and Impact Assessments where a project is located in a conflict zone, post-conflict zone or conflict prone area.

Further to this EFIC's procedures should outline minimum expectations for what these impacts assessments should include – the Asian Development Bank provides such information as part of its Safeguard Policy Statement<sup>5</sup>. By requiring clients to undertake and disclose these risks assessments, along with plans to mitigate risks, EFIC will be in a better position to ensure that it does not inadvertently support projects that cause harm, for example by forcibly displacing people from their lands, using child or bonded labour, having severe impacts on women, having adverse impacts on indigenous peoples' livelihoods, triggering violent conflict or using security personnel with a history of causing abuse.

- 3.12 Numerous guidelines and resources<sup>6</sup> exist to assist project operations and their financiers to conduct such impact assessments. EFIC should make itself, and its clients, aware of these.
- 3.13 In addition to relying on information provided by clients, EFIC should also actively seek information from independent experts and seek comment from project stakeholders including the host government, project affected people and local civil society representatives, and Australian stakeholders. This information and public comment should be sought early in EFIC's assessment process and be given due consideration by EFIC as it assesses whether or not to support a project. Stakeholders will require access to all social, environmental, human rights, gender, indigenous peoples and conflict impact assessments in a timely manner in order to be able to participate in this process. Consultation with project affected communities is essential to ensure that decision-making processes are transparent and to improve accountability.

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<sup>5</sup> Asian Development Bank, Safeguard Policy Statement, 2009.

<sup>6</sup> Key guidelines and resources include: International Business Leaders Forum and International Finance Corporation, *Guide to Human Rights Impact Assessment and Management* (2010); International Alert, *Conflict Sensitive Business Practice: Guidance for Extractive Industries* (2005); Oxfam Australia, *Women communities and mining: The gender impacts of mining and role of gender impact assessment* (2009); Universal Declaration on the Rights of Indigenous Peoples and ILO Convention 169 on Indigenous and Tribal Peoples.

## **Disclosure and Reporting**

- 3.14 EFIC's commitment to publicly reporting on implementation of the Equator Principles needs to be strengthened. While application of these principles can assist in evaluating environmental and social issues in project finance, this mechanism is internally focused, lacks external accountability and does not encourage comprehensive reporting. The Equator Principles lack accountability and as such EFOC should use the Performance Standards as a minimum benchmark.
- 3.15 EFIC should disclose on its website, and ensure its clients make available to project affected people and other stakeholders in the host country (including in local languages if necessary), all the information on which EFIC benchmarks projects and that informs its decision making process. As a minimum, EFIC should disclose:
1. Summary information about the project;
  2. Complete copies of the social, environmental, human rights, gender, indigenous peoples and conflict impact assessments prepared by the client;
  3. Details of benefit sharing agreements in the host country to ensure that the payments of revenues to host governments and other stakeholders is transparent for natural resource projects including mining projects;
  4. Any independent assessments or reports;
  5. The result of EFIC's benchmarking and assessment process; and
  6. Client monitoring and reports.
- 3.16 Oxfam Australia appreciates that the contracts entered into by EFIC and its clients will contain commercially sensitive information and that some of the terms of the contract must remain confidential. However, those terms that relate to requirements for additional work, compliance with environmental and social standards, monitoring and reporting requirements, and requirements for auditing by independent experts should be made publicly available. Monitoring and auditing requirements need to be strong to ensure that standards are met on the ground. By disclosing this information, project affected people and other stakeholders can hold EFIC's clients to account and work with EFIC to identify and remedy any non-compliance or project-related harm.
- 3.17 While Oxfam Australia recognises the sensitive nature of National Interest Assessments we believe that there is an urgent need to balance this against increased transparency and accountability in use of the National Interest Account. For projects where a transaction is provided partly or wholly from the National Interest Account, and in addition to the information referred to above, consideration should be given to disclosing summaries of National Interest Assessments. Current restrictions on access to information through Freedom of Information should be removed.

## **Complaints Mechanism**

- 3.18 EFIC should establish and promote a mechanism to receive and resolve complaints about EFIC-supported projects, including from people who believe they have been harmed by such a project. The mechanism should also be able to investigate alleged non-compliance with EFIC's Environment and Social Policy and undertake compliance audits of project performance against the policy.

- 3.19 The mechanism could be housed within EFIC but should be sufficiently independent of EFIC management and report directly to EFIC's Board and the Minister for Trade. The mechanism should be supported by an independent advisory group with expertise in mediation and the social and environmental impacts of the projects EFIC most commonly supports. The mechanism should also prepare publicly available annual reports outlining its activities.
- 3.20 The Compliance Advisor Ombudsman<sup>7</sup> for the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) of the World Bank, and the complaints mechanism of the Japan Bank for International Cooperation (JBIC) offer possible models for EFIC to consider in implementing this recommendation. Finally, the mechanism should be designed and implemented in accordance with principles promoted by the Secretary General's Special Representative on Business and Human Rights. Mechanisms must be legitimate, accessible, predictable, equitable, rights-compatible, transparent and be based on engagement, dialogue and mediation.

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<sup>7</sup> <http://www.cao-ombudsman.org/>

## 4 Summary of Recommendations

4.1 Oxfam Australia strongly recommends a more comprehensive review of EFIC's policies and procedures that as a minimum:

1. Is guided by a publicly available Terms of Reference that includes timelines;
2. Is widely advertised;
3. Includes public hearings; and
4. Makes all submissions received publicly available.

4.2 Oxfam Australia recommends that:

1. EFIC change its proposed screening process to ensure that all types of transactions are subject to the same assessment process, and same disclosure and accountability requirements.
2. The screening process should be broadened to require an initial assessment of environmental and social impacts associated with the project.
3. EFIC use the International Finance Corporation's Performance Standards as the minimum standard on which to benchmark all transactions.
4. EFIC include as a benchmark against which projects are assessed key international human rights instruments.
5. EFIC also make an explicit commitment to protecting human rights in its policy.
6. EFIC require clients, as part of their environmental and social risk assessment to conduct and disclose social, environmental, human rights, gender, indigenous peoples and conflict impact assessments.
7. EFIC actively seek information from independent experts and consult with project stakeholders including the host government, project affected people, local civil society representatives, and Australian stakeholders.
8. EFIC disclose on its website, and ensure its clients make available to project affected people and other stakeholders in the host country, all the information on which EFIC benchmarks projects and that informs its decision making process including:
  - Summary information about the project;
  - Complete copies of the social, environmental, human rights, gender, indigenous peoples and conflict impact assessments prepared by the client;
  - Details of benefit sharing agreements in the host country to ensure that the payments of revenues to host governments and other stakeholders is transparent for natural resource projects including mining projects;



- Any independent assessments or reports;
  - The result of EFIC's benchmarking and assessment process; and
  - Client monitoring and reports.
9. Contract terms that relate to requirements for additional work, compliance with environmental and social standards, monitoring and reporting requirements, and requirements for auditing by independent experts should be made publicly available.
  10. EFIC give consideration to disclosing summaries of National Interest Assessments where support is provided from the National Interest Account.
  11. EFIC establish and promote a complaints mechanism to receive and resolve complaints about EFIC supported projects and to investigate alleged non-compliance with EFIC's Environment and Social Policy.