



# **Community grievance mechanisms and Australian mining companies offshore:**

## **An industry discussion paper**

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While acknowledging the helpful contributions that others have made to this paper, CSRSM takes sole responsibility for the views expressed herein and for any errors or omissions.

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# 1 Introduction

## 1.1 *What this paper is about*

Australia is now truly a global player in the mining industry, with Australian companies operating mines or undertaking exploration throughout regions such as Latin America, Africa, Asia and the Pacific. As the industry searches for new resources, Australian companies are increasingly operating in countries where political and legal institutions are weak and there are marked imbalances in political and economic power. This poses challenges at a number of levels, including the vexed issue of how to ensure that local communities affected by mining have their rights and interests protected, notwithstanding that the institutions of the state may be ineffective, corrupt, or not trusted.

In recent years, leading mining companies have taken proactive steps to address this issue by establishing internal management systems and policy frameworks designed to promote consistent practice and compliance with global standards. There is also an increasing level of scrutiny by international agencies such as the IFC and a raft of non-government organisations. However, the extent to which company mechanisms have been effective remains a matter for some dispute, with civil society groups and researchers highlighting ongoing examples of where communities have been disenfranchised and have experienced significant harm as a result of mining. It has also been argued that efforts to improve the industry's social and environmental performance have been focused largely on the 'big end of town' and that the junior sector largely still operates under the radar.

Clearly, it is important for Australia's international standing and for the reputation of the mining industry that Australian companies behave responsibly and respect the rights of local communities, regardless of the size of the company or where it is that the mining activity occurs. This is a multi-faceted challenge which is likely to require action on several fronts, including the strengthening of industry codes, monitoring and auditing processes, stricter controls over project financing and approvals, a greater focus on capacity building for host governments and industry (particularly the junior sector), and possibly, legislative reforms at the Australian end.

This paper focuses on one aspect of this broader challenge, which is ensuring that communities in other countries who are impacted by the activities of Australian mining companies can access grievance mechanisms that are fair, trusted and effective. Specific questions addressed are:

- Why is it important to have such mechanisms in place?
- What sorts of remedies are currently available to communities in other countries who consider that they have been adversely affected by the actions of Australian mining companies?
- What actions could companies take, either individually or collectively, to improve processes for addressing community grievances?
- What are some next steps for generating a broader dialogue around these issues?

The paper is primarily targeted towards industry, rather than government or civil society. However, it is recognised that all stakeholders must eventually have input into the debate about whether and how grievance mechanisms in the minerals industry can be strengthened. Momentum for an open, multi-stakeholder debate on this issue is building. The industry has an opportunity to be an active and constructive participant in this debate and to help shape the emerging agenda. To this end, the paper canvasses the idea of an industry roundtable to discuss a possible way forward.

## **1.2 Background to the paper**

In September 2007, Oxfam Australia, the Centre for Social Responsibility in Mining (CSRМ) and the Australian Centre for Peace and Conflict Studies (ACPACS), under the auspices of ConCord agreed to collaborate on a desktop research project to investigate how processes for resolving disputes between community groups and global mining companies might be improved. The original objectives were:

1. to review the operation and effectiveness of dispute resolution mechanisms currently in use in the international mining industry, including the Oxfam Australia Mining Ombudsman
2. to consider the case for establishing an independent, industry-level, dispute resolution mechanism which can be accessed by aggrieved community groups
3. to promote a discussion between the industry and key stakeholders about the form that such a mechanism might take.

It was not possible to meet all of the objectives of the project as originally conceived. Firstly, only limited information is available about grievance mechanisms currently used by the industry and their effectiveness or otherwise in resolving community grievances. As such, it is difficult to determine the case (or not) for an independent industry-level grievance mechanism through desktop research alone. If there is to be informed discussion between the industry and key stakeholders, a stronger evidence base is required.

The second reason for not meeting the original project objectives is that, while Oxfam and others believe the case for establishing an independent third-party mechanism is clear, this view is not widely shared within industry. Individual companies point to the advances they have made in community-level engagement and raise questions about the practicality and desirability of establishing an industry-level grievance mechanism, not least of which is the issue of state sovereignty in countries where legal mechanisms are in place (even if they are dysfunctional). Some companies also have questions about how laggard companies would be held to account if participation was voluntary.

There is broad agreement amongst different stakeholders about the *need* for effective grievance mechanisms, but there is less agreement about the *form* such mechanisms should take. Nevertheless, opportunities for improvement exist, and may include the establishment of an independent third-party mechanism to hear and resolve grievances, ensuring community access to third-party representation, strengthening industry codes and/or corporate policies and facilitating better links to existing grievance processes. All these possibilities warrant discussion and further research.

### **1.3 Study scope and limitations**

The study mainly comprised a desktop analysis of publicly available information including academic literature, examples of disputes, corporate policies, grievance mechanisms in mining and related sectors, and human rights principles and guidelines for business. The research also encompassed a visit to the Oxfam Australia head office to understand the current Ombudsman model. Largely due to time and budget constraints, no consultations or site visits were undertaken with mining companies to understand company-initiated dispute resolution processes. This is an obvious area for further research discussed later in this report.

The following should be noted about the scope of this paper:

- The paper is concerned with the offshore activities of Australian companies rather than with processes for dealing with grievances arising from within Australian communities. This is because there is relatively strong domestic legislation that applies to companies operating here, whereas legislative frameworks and enforcement regimes are often weaker or inaccessible in other parts of the world where Australian companies operate.
- The primary focus is on community grievances that are collective (i.e. involving communities or parts of communities) rather than individual in nature.
- The paper excludes full consideration of the role of business in conflict zones (e.g. where there is civil war). Business has an important role to play in these contexts, but these issues require more consideration than this document provides.

### **1.4 Structure**

The next section provides brief background to the issue of community grievances in the mining context. Section 3 outlines why effective grievance mechanisms are important from a company perspective. Specific remedies available for communities who believe that they have been adversely affected by Australian mining companies operating overseas are documented in Section 4, while Section 5 offers some initial thoughts on opportunities for improving the industry's current approach to grievances. The final section suggests next steps for initiating an industry roundtable.

## **2 The broader context**

A broad range of civil society organisations and other institutions argue that there needs to be stronger avenues of recourse for community groups adversely affected by mining companies, particularly in the developing world context, where institutional and legal frameworks may be weak, lack legitimacy or are difficult to access. In Australia, there have been repeated calls to provide communities impacted by the offshore activities of Australian mining companies with access to an independent grievance mechanism of some kind. Such a mechanism, it is argued, would help redress the power imbalance that often exists between mining companies and local community groups and reduce the likelihood that aggrieved groups would resort to more disruptive – and costly – tactics to advance their claims, such as public protests, media and political campaigns, or legal action.

Conflict is a foreseeable – and to some extent unavoidable – outcome of the complex interplays and rapid change brought about by mineral development, but there are questions about whether Australian mining companies operating overseas are doing enough to facilitate the equitable and timely resolution of community grievances. Leading companies are attuned to the need to establish good relationships with local communities, but giving effect to these policies ‘on-the-ground’ can be difficult and examples abound where unresolved community grievances relating to perceived or real failures to deliver on commitments escalate into serious conflict. For these reasons, there is value in investigating how processes for hearing and dealing with community grievances might be improved.

### ***2.1 Societal expectations***

The current international environment provides unprecedented opportunities for business, including the mining industry. Changed attitudes to foreign direct investment have seen Australian mining companies increasingly venture offshore. Responding to the high global demand for minerals, Australian mining companies are entering more remote, politically volatile and impoverished areas of the world. These areas are often home to Indigenous or traditional communities. At the same time, globalisation has facilitated a more informed and highly networked civil society. This has increased the level of scrutiny of the industry and made it easier for community groups and their representative organisations to amplify grievances against mining companies onto a world stage through media, activist or legal campaigns.

Regardless of where they operate, global mining companies are now expected to establish and maintain good relations with local communities, minimise impacts, respect human rights and provide sustainable benefit for communities. There are now many norms and guidelines, some specific to extractive industries, emphasising the need for companies to establish effective dialogue processes in order to avoid or minimise negative impacts and ensure equitable benefits for local people. Some have specific requirements for grievance mechanisms, including:

### Minerals Council of Australia (MCA):

- The MCA's *Enduring Value: Guidance for Implementation*<sup>1</sup> (sub-element 10.3) suggests that member companies should:
  - *“utilise transparent and consultative communication processes to engage key stakeholders and provide feedback on issues raised*
  - *apply appropriate mechanisms for hearing and resolving stakeholder feedback within transparent and defined timeframes*
  - *maintain a complaint and comment register*
  - *provide open and transparent grievance mechanisms*
  - *publish reports about complaints and disputes and their resolutions.”*

### International Guidelines:

- The *International Finance Corporation's (IFC) Performance Standards on Social and Environmental Sustainability*<sup>2</sup> require that if the client anticipates ongoing risks to, or adverse impacts on, affected communities, the client will *“establish a grievance mechanism to receive and facilitate resolution of the affected communities and grievances about the client's environmental and social performance”*.
- The *Equator Principles*<sup>3</sup> require companies to establish an appropriate dispute resolution mechanism to *“allow the borrower to receive and facilitate resolution of concerns and grievances about the projects social and environmental performance raised by individuals or groups and among project-affected communities”*.

### Other Extractive Industry Guidelines:

- *International Alert's Guidelines for Conflict Sensitive Business Practices in Extractive Industries*<sup>4</sup> recommend dispute resolution processes be established in certain specific circumstances, such as resettlement.
- The IFC/World Bank's (draft) *Community Development and Local Conflict: A Resource Kit for Practitioners in the Extractive Sector*<sup>5</sup> recommends site-based context-specific grievance mechanisms as well as elevation to a third-party if necessary.
- The *Framework for Responsible Mining*<sup>6</sup> highlights the need for an independent, transparent and accountable dispute resolution mechanism that communities can access. Formal and confidential complaint mechanisms are also recommended for issue areas such as resettlement.

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<sup>1</sup> See: <http://www.minerals.org.au/enduringvalue> - *Enduring Value* is based on the ICMM's *Sustainable Development Framework*

<sup>2</sup> See: <http://www.ifc.org/ifcext/enviro.nsf/Content/EnvSocStandards>

<sup>3</sup> See: <http://www.equator-principles.com>

<sup>4</sup> See: [http://www.international-alert.org/our\\_work/themes/business\\_1a.php](http://www.international-alert.org/our_work/themes/business_1a.php)

<sup>5</sup> See: <http://commdev.org/content/document/detail/1801/>

<sup>6</sup> See: <http://www.frameworkforresponsiblemining.org/>

## Seminal Reports:

- The 2000 *World Commission on Dams*<sup>7</sup> (WCD) report recommends that dispute resolution mechanisms be developed in advance of projects, both for general matters and for specific issue areas, such as resettlement.
- The World Bank's 2005 *Extractive Industry's Review*<sup>8</sup> (EIR) report *Striking a Better Balance* recommends the development of both independent and localised grievance mechanisms that are trusted by communities.

These various guidelines and reports set new benchmarks for company performance against which companies are increasingly being held to account.

## **2.2 Calls for better remedies**

There have been several recent developments at the national and international level that point to the need for business – including the Australian mining industry – to strengthen its focus on grievance mechanisms and remedies for affected community groups.

The United Nations appointed a Special Representative for Business and Human Rights<sup>9</sup> in 2005. The Special Representative's landmark report of April 2008<sup>10</sup> calls for a greater focus on remedies as part of the "*Protect, Respect and Remedy*" framework, which distinguishes the distinctive roles of states and corporations with respect to human rights. It comprises three complementary principles: the state duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies. The report finds that facilitating access to more effective remedies is part of both the state duty to protect against corporate-related abuse, and the corporate responsibility to respect rights. In relation to the latter, the Special Representative has said that companies should provide "*a means for those who believe they have been harmed to bring this to the attention of the company and seek remediation, without prejudice to legal channels available*" (p.22). However, the Special Representative concludes that the current approach to non-judicial remedies, at the international, national and company level, is akin to a 'patchwork' of mechanisms that needs improvement in part and as a whole. In relation to the company level in particular, he observes that "*problems arise when a company acts as both defendant and judge*" (p.25).

The ICMM has made several submissions to the Special Representative. In its third submission in 2007, the ICMM supported "*the development and wider use of well-designed and credible grievance and dispute resolution mechanisms*"<sup>11</sup>. In response to the Special Representative's April 2008 report, the ICMM strongly supported "*effective corporate level grievance mechanisms*"<sup>12</sup>. The ICMM also indicated that the Special Representative's six

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<sup>7</sup> See: <http://www.dams.org/>

<sup>8</sup> See: <http://go.worldbank.org/R5DTVLIC80>

<sup>9</sup> See: <http://www.business-humanrights.org/Gettingstarted/UNSpecialRepresentative>

<sup>10</sup> See: <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>

<sup>11</sup> See: <http://www.icmm.com/page/2113/icmm-makes-third-submission-to-un-special-representative-on-human-rights>

<sup>12</sup> <http://www.icmm.com/page/8331/icmm-welcomes-ruggie-report->

attributes of effective grievance mechanisms (see Box 3 of this report) are “*valuable touchstones against which companies can benchmark their own grievance mechanisms.*”

The UN Human Rights Council adopted a resolution in June 2008 extending the Special Representative’s mandate for a further three years. The Special Representative has been tasked with elaborating further on the *Protect, Respect, Remedy* framework, which will include further stakeholder consultation in reaching views and recommendations. Amongst other things, the work of the Special Representative will strengthen its focus on access to learning from vehicles available to community groups affected by international business, including the mining industry.

In June 2008, the Australian Federal Parliament passed a motion – supported by all parties – which calls on the Government to encourage Australian companies to respect the rights of members of the communities in which they operate and to develop rights-compliant grievance mechanisms, whether acting in Australia or overseas. Political lobbying on this issue may increase in Australia, as has been the case in Canada, where the Roundtables on Corporate Social Responsibility were established to discuss the possibility of developing an independent industry-endorsed mechanism<sup>13</sup> for its mining industry operating overseas. The campaign is ongoing but has not, as yet, resulted in legislation or the establishment of an Ombudsman function.

In 2002, the Mining Minerals and Sustainable Development’s (MMSD) Australia report *Facing the Future*<sup>14</sup> reported that “*the establishment of an independent complaints mechanism would send a powerful message of the industry’s commitment to play a positive role in society and to respect the rights of stakeholders and host communities*” (p.54). The MMSD’s global report *Breaking New Ground*<sup>15</sup> articulated a vision for the future that included “*fair, equitable and accepted ways of preventing and resolving disputes*” (p.390) and while the report advocated local-level problem solving, it also supported the idea of a third-party dispute resolution mechanism, potentially at the global but preferably at the regional or national level. Since the MMSD report, many companies have focused on improving local-level grievance mechanisms, but the value of an impartial third-party mechanism for Australian mining companies operating overseas has not been rigorously explored or openly debated.

Since 2000, Oxfam Australia has advocated the establishment of a dispute resolution mechanism, independent of the industry for communities with grievances against Australian mining companies operating offshore (see also Box 2). In the absence of an industry response, Oxfam Australia, which takes a right-based approach to its work, has filled the ‘remedies gap’ for almost a decade through its Mining Ombudsman function. The function has not received official endorsement from the industry, largely because it adopts a community advocacy role and is therefore not considered to be impartial.

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<sup>13</sup> See: [http://www.halifaxinitiative.org/index.php/CNCA\\_Roundtables](http://www.halifaxinitiative.org/index.php/CNCA_Roundtables) for further information.

<sup>14</sup> [http://www.iied.org/mmsd/mmsd\\_pdfs/100\\_mmsdaustralia.pdf](http://www.iied.org/mmsd/mmsd_pdfs/100_mmsdaustralia.pdf)

<sup>15</sup> <http://www.iied.org/mmsd/finalreport/index.html>

## 2.3 Case examples

Case examples continue to give rise to concerns about the approaches taken or not taken by some parts of the industry to community grievances. Comprehensive knowledge about patterns of dispute resolution is not developing at the same rate. This is an obvious area for further research which may help clarify opportunities for improvement.

There are many dispute scenarios in the mining context. Disputes occur at small and large operations, at operations that are at the beginning or at end of their mine life, and at new or existing mines with complex legacy issues. Companies with strong commitments to community engagement, human rights and environmental responsibility are not immune. A recent International Council on Mining and Metals (ICMM) study that considered 38 human rights complaints against the industry<sup>16</sup> found that allegations focused most often on ‘flashpoint’<sup>17</sup> issues of health and environment, Indigenous peoples rights, security arrangements and civil conflict issues. Other flashpoint issues included resettlement and land compensation, consultation and consent, economic impacts, issues of corporate power associated with perceived undue political influence, corruption, labour issues and artisanal and small-scale mining.

Desktop research undertaken by CSRM aligns with the findings of the ICMM’s more comprehensive study and attests to the complex nature of community grievances in the mining context (see examples, Box 1). The most common aggravating factor across all cases (including flashpoint and underlying issues) was inadequate engagement, whether at the outset of a project, during operation or in relation to particular issues such as consent and resettlement. Resolution strategies included consultation to gain consent, establishment of joint responsibilities (for example environmental monitoring) and/or ongoing forums for dialogue and community involvement in decisions that affect them. The case analysis reinforces the important role of dialogue in resolving grievances.

Literature and case examples confirm that community grievances are rarely straightforward but are instead complex and nuanced. While they can relate to a single issue, such as a one-off breach of environmental standards, human rights abuse, or may stem from low level issues that over time reach a critical tipping point, collective disputes usually involve overlapping issues, with no single point of origin or obvious solution. This makes such disputes very difficult to resolve and highlights the need for grievance mechanisms that can act as ‘circuit breakers’ and provide a space for issues to be unpacked and options for resolution explored.

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<sup>16</sup> The study did not consider the validity of claims.

<sup>17</sup> Flashpoint issues were defined as issues dominating the headlines or providing the focus of criticism.

## **Box 1: Case examples**

### **Tolukuma Gold Mine, Papua New Guinea (2001-ongoing)**

Company: Emperor Mines now Petromin PNG Holdings

Community group(s): Yaloge, Fuyuge, Roro, Mekeo and Kuni community groups

Grievances: Many community grievances relate to environmental pollution and associated effects relating to dumping mine waste into the Auga/Angabanga Rivers, including concerns about health and safety, lack of available clean drinking water and threats to food security. Other grievances relate to lack of informed consent for exploration and other infringements of rights, including lack of local development, and poor communication and lack of transparency on the part of the company. Community groups lodged a complaint with the Oxfam Australia Mining Ombudsman and indicated an intention to commence legal action. DRD Gold repeatedly denied responsibility for elevated mercury levels and allegations of non-compliance with PNG environmental regulations.

Resolution strategies: In August 2007, with the prior consent and participation of people from affected communities, the Mining Ombudsman facilitated a team to assess alternative clean water sources for downstream communities, commencing in two villages. The team comprised community members, local community organisations, Oxfam Australia technical advisers and, for the first time, mining company representatives. Recommendations for provision of clean water sources were based on the information and advice of the communities coupled with sound scientific analysis.

Outcomes: Independent scientific studies found the river water unfit for human consumption. Following agreement by the communities to the recommended water source solutions, the mine operator commenced implementation and is now near completion; ensuring the provision of clean water supplies to the participating villages for the first time in 12 years. While the full range of issues has not been resolved, relationships between the company and communities participating in the water project have been significantly improved through increased communication, giving rise to greater opportunity for ongoing dispute resolution.

Links: Oxfam reports and materials on Tolukuma at: <http://www.oxfam.org.au/campaigns/mining/ombudsman/cases/tolukuma/>

DRD Response to Oxfam, 4 November 2002 at: <http://www.secinfo.com/dVut2.2k4x.d.htm>  
Emperor announcement of sale, 2008: <http://www.emperor.com.au/news/asx%20announcement%20220208%20Completion%20of%20TGM.pdf>

### **Marlin Mine, Guatemala (2005-6)**

Company: Montana Exploradora de Guatemala (subsidiary of Glamis Gold)

Community group(s): Communities in the Sipacapa municipality

Grievances: Local communities raised concerns that the project was developed without adequate consultation. Company and community perceptions about consultation were different, leading to lack of trust. The complaint was raised with the IFC's CAO.

Resolution strategies: The CAO recommended enhanced participation of local communities in decision-making and the establishment of ongoing forums for dialogue. The CAO also recommended that a fair and transparent mechanism for receiving, documenting and addressing grievances be established.

Outcomes: In a follow up report the CAO warned conflict could escalate as issues were not resolved.

Links: CAO Assessment of complaint, 2005: <http://www.cao-ombudsman.org/pdfs/CAO-Marlin-assessment-English-7Sep05.pdf>. CAO Follow-up Assessment, 2006: <http://www.cao-ombudsman.org/html-english/documents/CAOGuatemalaMarlinReport-english-May12006.pdf>.

Glamis Gold response to CAO report, 2006: <http://www.cao-ombudsman.org/html-english/documents/GlamisResponsetotheCAOFollow-UpAssessmentReport.pdf>

## **Box 1: Case Studies Continued...**

### **Bakhuys Project, Suriname (2005-7)**

Company: BHP/Alcoa

Community group(s): Lokono Peoples

Grievances: Traditional land rights of Indigenous Peoples are not recognised in Surinamense law. BHP/Alcoa did not consult with local communities during exploration on the Bakhuys mining project and excluded people from their traditional lands.

Resolution strategies: In 2005 BHP/Alcoa apologised for failing to assess impacts and adopted new corporate policies on stakeholder engagement and community development.

Outcomes: Aggrieved groups claim BHP/Alcoa actions do not comply with International Laws or their own company policies and that the company has failed to recognise the rights of the Lokono Peoples.

Links: Forest Peoples Programme & Tebtebba Foundation submission to the UN Special Representative on Business and Human Rights, 2006: <http://www.business-humanrights.org/Documents/Forest-Peoples-Tebtebba-submission-to-SRSG-re-indigenous-rights-29-Dec-2006.pdf>.

BHP Response, 2007: <http://www.business-humanrights.org/Documents/BHP-Billiton-response-re-Bakhuys-Suriname-5-Jan-2007.doc>

### **Tintaya Mine, Peru (2002-8)**

Company: BHP now Xstrata

Community group(s): Community groups in the Espinar province

Grievances: Community groups raised concerns regarding land acquisition by BHP which led to loss of lands and livelihoods for communities.

Resolution strategies: Following a complaint by the community to Oxfam America and Oxfam Australia's Mining Ombudsman, a formal multi-stakeholder dialogue process commenced. From here community development agreements were negotiated. The dialogue process has been formalised through a signed Agreement between the company and community.

Outcomes: The Agreement provides for land acquisition for communities whose land had been unfairly acquired by the mine, provision of technical assistance for land use, a community development fund, joint studies of environmental impact, and investigation into human rights abuses. An important feature of the Agreement is the formal recognition of the need to obtain the free prior and informed consent of communities. Parties continue to use the dialogue process to resolve issues.

Links: BHP Sustainability Report Tintaya community case study, 2005: <http://sustainability.bhpbilliton.com/2005/repository/community/caseStudies/caseStudies25.asp>

Oxfam America Tintaya information:

[http://www.oxfamamerica.org/whatwedo/where\\_we\\_work/south\\_america/news/publications/tintaya/art6242.html](http://www.oxfamamerica.org/whatwedo/where_we_work/south_america/news/publications/tintaya/art6242.html)

### **Bogoso Mine, Ghana (2006)**

Company: Bogoso Gold (subsidiary of Golden Star Resources)

Community group(s): Small-scale miners of the Prestea communities

Grievances: Groups of small-scale miners operate on the land concession awarded to Bogoso Gold. The government has ordered them to abandon their activities. Communities say there are no alternative sources of income or employment. Tensions peaked in June 2005 when the army opened fire on a public demonstration against the mine's activities.

Resolution strategies: Bogoso Gold believe it is the role of the government to resolve the issue. Government measures have not been effective to date.

Outcomes: Tensions between small-scale miners and Bogoso Gold remain unresolved.

Links: Article, 'Strained relations: A critical analysis of the mining conflict in Prestea, Ghana', 2006: [http://www.sciencedirect.com/science?\\_ob=ArticleURL&\\_udi=B6VG2-4M7CDBX-3&\\_user=331728&\\_rdoc=1&\\_fmt=&\\_orig=search&\\_sort=d&\\_view=c&\\_acct=C000016898&\\_version=1&\\_urlVersion=0&\\_userid=331728&md5=dbd41b7c1b80e29812e865eaac132b03](http://www.sciencedirect.com/science?_ob=ArticleURL&_udi=B6VG2-4M7CDBX-3&_user=331728&_rdoc=1&_fmt=&_orig=search&_sort=d&_view=c&_acct=C000016898&_version=1&_urlVersion=0&_userid=331728&md5=dbd41b7c1b80e29812e865eaac132b03)

### **3 Why is it important for companies to have grievance mechanisms in place?**

Establishing and participating in grievance resolution processes should be part of a holistic approach to stakeholder engagement. In addition to the strong moral arguments for companies to provide effective grievance mechanisms for local community groups, there is also a strong business case, as such mechanisms can help companies to better manage their social risks, avoid organisational costs, head off protracted and complex litigation in both the home and host state and demonstrate commitment to formally stated policy positions.

#### ***3.1 Reduce social risks***

Mining operations need stable operating environments in order to mine successfully, transport goods and services and attract workers. Instability can cause interruptions to production, increase costs of security and insurance premiums or at worst, result in closure of operations due to public protests, blockages or violent conflict. The remote location of exploitable reserves is now such that companies are increasingly operating in places that were previously considered too high risk. These locations may have weak legal frameworks and enforcement regimes that offer limited protection for local communities, marginalised and/or Indigenous groups. Such locations have other significant challenges including poverty, social, economic and political exclusion and human rights violations. In these environments, if grievances can be addressed in an orderly and fair manner, and at an early stage, this will help companies minimise risk.

Smaller companies often rely on the reputation of entrepreneurial individuals, so personality-based campaigning can be damaging for those being targeted. Many companies rely on home country support from foreign embassies and government departments for doing business in other countries. It is possible that such support may cease due to sullied reputations offshore. Similarly, access to finance may become more difficult if banks and financial institutions perceive particular companies to be high risk operators. Neither international press coverage nor protracted legal disputes are preferred options for reputation- and budget-conscious companies, small or large.

#### ***3.2 Avoid organisational costs***

Dealing with disputes can place a major strain on resources, in terms of people, time and budget. Conflict management can be stressful and result in reduced morale and loss of key personnel. There is often an emotional cost for all involved. It is in the best interests of companies to avoid disputes and conflict wherever possible, but when they do arise, it is important to ensure that organisational systems and processes function to minimise negative impacts on internal and external relationships, including the likelihood of escalation. Effective grievance mechanisms can help in this regard.

### **3.3 Demonstrate policy commitments**

Leading mining companies recognise that robust and healthy relationships with local impacted communities are essential for a successful mining venture. Industry and corporate policy is increasingly geared around the notion of sustainable development, which includes respect for human rights, environmental protection and lasting positive legacies for local communities<sup>18</sup>. The idea that mining companies have responsibilities to respect human rights in the course of their activities is now widely accepted<sup>19</sup>.

While mutual understanding and respect between communities and companies is essential for policy implementation, relationships between some local community groups and mining companies are strained. Discussion about how the Australian industry operating overseas could improve grievance mechanisms would be a practical way to demonstrate ongoing commitment to policy and represent a further maturation of the industry's approach to local community relationships.

### **3.4 Access to finance**

It is also the case that banks and financial institutions increasingly require companies to meet certain criteria in order to access finance, including a rigorous approach to risk management in the social dimension. Financial institutions are seeking confidence that a company is actively building and maintaining good stakeholder relationships and community relations systems. As mentioned earlier, the *Equator Principles* specifically require companies to ensure that grievance mechanisms are in place.

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<sup>18</sup> See for example, the policy frameworks of companies such as BHP Billiton, Rio Tinto, Newmont Mining and smaller companies such as Lihir Gold Limited.

<sup>19</sup> See for example commitments to human rights in the International Council on Mining and Metals' (ICMM) *Sustainable Development Framework* (Principle 3), and in Australia, the Minerals Council of Australia's (MCA) *Enduring Value*.

## **4 What forms of recourse are available to community groups affected by the overseas operations of Australian mining companies?**

This section provides a brief overview of the options that are potentially available to community groups who believe they are negatively affected by the actions of Australian mining companies. Needless to say, the availability and effectiveness of these options can vary greatly between locations and across and within jurisdictions.

Companies can have formal procedures in place that allow community groups to lodge grievances directly with the company, either verbally or in writing. While these procedures are used in some settings, in others they may not be used because of fear of reprisal or because it is not culturally appropriate.

In addition, or as an alternative, to lodging a formal grievance, community groups may initiate direct dialogue, sometimes with assistance from a representative or other organisation, or via a facilitated process. If these strategies are unsuccessful, some groups may accept the situation and withdraw. Some may move away from the area but others, particularly Indigenous and traditional peoples with strong ties to land, will stay, possibly harbouring resentment.

Some groups may opt for further escalation. Options include protest action, such as blockades, boycotts and strikes which aim to force the company to respond to issues. Some groups may have resources to launch legal action, if such remedies are available, either in the host or home state. Community groups may also work with a representative or other organisation to launch a media or political campaign against the company. These elevated actions carry significant costs for the company and the community. If community groups feel the need to use such strategies, the chance of establishing dialogue becomes more remote.

### ***4.1 Pre-emptive mechanisms and processes***

Leading companies now seek early engagement with communities to understand impacts and opportunities – perceived and actual – that mining may or may not bring. Some companies formalise engagement outcomes through bilateral agreements that define responsibilities and obligations around impact mitigation and development benefits for local communities. Sometimes, governments, representative and other interested groups contribute to the agreement-making process through endorsement or support.

Some of these engagement processes and agreements pre-determine a process for handling grievances in non-confrontational ways, including referral to a third-party. Some even make financial provision for community groups to access assistance and representation should this be necessary. While there are several examples of formal agreements between communities and companies in industrialised countries (e.g. Australia, Canada, the United States), such agreements are less common in developing countries or on a trans-national level. Resolution processes can also be stipulated in

permit conditions and licensing agreements, although this information is not always publicly available.

Problems can still arise when community groups, who were not a party to prior engagement or formal agreements, seek to raise issues and are not regarded by the company and/or local authorities as a 'valid' stakeholder. Problems may also arise where not all members of a community involved in the agreement making process agree on the terms and conditions stipulated. In some cases, internal community conflicts and divisions can be exacerbated through negotiation processes making the implementation of agreements difficult.

## **4.2 Site-level grievance mechanisms**

It is standard practice for large companies across all business sectors to have some form of grievance mechanism for their employees. Such mechanisms typically cover non-discrimination issues or serve as channels for whistle blowing on non-compliance with ethical standards or corporate codes of conduct. An examination of sustainability reports in the mining industry confirms that internal mechanisms for employee concerns are in place for most major companies. Some companies also indicated that internal whistle-blowing mechanisms were available to community members should they have issues to report<sup>20</sup>.

In order to understand the mining industry's approach to grievance mechanisms for local communities CSRM examined publicly available material from 15 mining companies<sup>21</sup>, ranging from multi-nationals to small and medium-sized companies<sup>22</sup> with offshore operations, as well as other literature containing mining industry case examples. The desktop analysis found that most corporate policy documentation emphasises the importance of stakeholder engagement, but rarely mentions dispute and/or conflict resolution processes. Generally speaking, there was less emphasis on stakeholder engagement as the size of the company decreased. Some corporate offices state a requirement for operational-level dispute resolution processes in supplementary or explanatory documentation, rather than in high-level policies.

Sustainability reports and company websites provide a source of information about operational-level grievance mechanisms. Some mining companies provide case study examples of disputes that have occurred, are still occurring, or have been resolved. Some also outline specific initiatives set up to deal with disputes<sup>23</sup>. The Global Reporting Initiative (to which most leading companies subscribe) has no specific requirements for reporting data about community grievances. Nevertheless, some companies provide aggregated and site-specific data in their sustainability reports, such as number of complaints or in one case, rates of resolution. Community perspectives on the

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<sup>20</sup> For example, Alcoa Brazil's Code of Ethical Behaviour Hotline, a free 24 hour hotline for employees, suppliers, customers and everyday citizens.

<sup>21</sup> Companies in the analysis included: BHP Billiton, Rio Tinto, Newmont, Anglo Coal, Alcoa, Xstrata, Oxiana, Straits, Zinifex, Iluka, Newcrest, plus four junior companies.

<sup>22</sup> The research was desktop only, and no clarification was sought from companies, although this would be a worthwhile exercise.

<sup>23</sup> For example the 'Complaints Resolution Committee' of the Newmont Ahafo Mine in Ghana.

effectiveness of processes and mechanisms used by companies are rarely provided<sup>24</sup>. The company case study approach provides basic information, but without summary research, it is difficult to determine broad trends in terms of processes, mechanisms, strategies, levels of community satisfaction and sustainability of outcomes.

Several companies mention the use of 'complaints registers' or 'community contact databases' to record community interactions at the operational level, including grievances<sup>25</sup>. Such registers tend to capture complaints lodged by individuals, rather than dealing with those that are collective in nature. Methodologies and procedures for classification and ranking were not publicly accessible, although may be available upon request. Similarly, little is known about how operations deal with issues raised through day-to-day interaction with the community. Issues raised informally may be addressed immediately, or communicated internally, but at this stage little is known about the degree of systematisation in handling such information.

### **4.3 Legal remedies**

This section discusses three possible legal avenues communities may pursue: host country, Australian and international law.

In recent years there have been changes in some legal and regulatory environments of host countries that have improved the recognition of community rights. However, some host countries still have weak domestic legal frameworks, which do not adequately protect the human rights of people within their jurisdiction, especially vulnerable groups at risk such as Indigenous peoples. Other countries have strong legal frameworks but lack the resources or the will to implement and regulate. Even where rights are recognised, enforcement can be problematic due to weak judicial systems and corruption. Furthermore, community groups may lack the resources required to initiate and undertake legal action.

Generally speaking, it is difficult to hold Australian companies or their subsidiaries to account in Australian courts for their behaviour offshore, such as in the case of an alleged human rights abuse. In particular, recourse via the domestic Australian legal system is constrained by hurdles linked to issues of state sovereignty, the complexities raised by corporate structures and simply the lack of any relevant cause of action in some situations. Some opportunities do exist under domestic civil law (i.e. claims such as negligence) and extraterritorial criminal legislation. However, where the conduct at issue was carried out by the company's subsidiary, civil negligence actions against the company may be difficult to pursue due to the challenges associated with separate legal personality. The criminal avenue is constrained as provisions such as those contained in the Commonwealth Criminal Code only capture specific and limited instances of corporate misconduct committed offshore. Nevertheless, there is some evidence that the Australian domestic legal system is slowly developing to make it harder for Australian

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<sup>24</sup> Many of the sustainability reports are verified or assured, but often exclude case studies from the scope of the assurance assignment.

<sup>25</sup> For example a grievance register is maintained at Oxiana's Sepon operations in Laos to record community complaints, and a grievance procedure has also been formalised.

companies to escape liability for abuse abroad<sup>26</sup>. This shift in focus makes it easier to bring a case within the Australian jurisdiction even if the alleged conduct occurred overseas. In the UK there have been some developments that challenge the complex interplay between parent and subsidiary companies in attributing liability. The Ruggie report for instance, cites several examples where foreign direct liability, where it is alleged that a parent company should be held liable for its own actions and omissions regarding harm involving its foreign subsidiaries, has been accepted by UK courts as an acceptable basis on which to found a cause of action<sup>27</sup>.

At the international level, companies may find that complaints are made to the United Nations' treaty bodies as well as to Special Procedures which report to the United Nations' Human Rights Council<sup>28</sup>. These bodies, however, are designed to deal with hearing complaints against states rather than companies and can only offer recommendations, not binding judgments<sup>29</sup>. Thus, both complaints and recommendations to treaty bodies as well as Special Procedures will generally be phrased with a focus on what the state should have done and could do to avoid abuse by the corporation rather than focusing on the corporation itself<sup>30</sup>. Nevertheless, such complaints may still lead to negative publicity for the company, and could result in the host or home state taking action depending on the particular recommendations.

As the business and human rights debate continues, it is likely that legal avenues will adapt to better deal with corporate responsibilities at domestic and international levels. The need to build capacity in both home and host domestic jurisdictions in particular, has been highlighted by the Ruggie report. Legal recourse has several benefits, such as the ability to impose sanctions and mandate compensation, but it also has limitations. For instance, existing power disparities may be exacerbated, adjudication may run counter to culturally-specific understandings of dispute resolution, and litigation is resource intensive and leads to uncertainty for all parties. Overall, the complexities involved in legal recourse make a strong case for advancing discussions around non-judicial grievance mechanisms as a complement to legal avenues.

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<sup>26</sup> For example, the doctrine of *forum non-conveniens*, the rule that a legal case should be heard in the most appropriate jurisdiction, was traditionally applied to exclude cases from the Australian jurisdiction where there was evidence of a *more suitable jurisdiction*. Recent case law, however, has relaxed this rule so that a court will now only refuse to hear a case if there is a clear argument that Australia is an *inappropriate* forum.

<sup>27</sup> Professor Ruggie refers to *Connelly v. RTZ Corporation plc and others* [1998] AC 854, and *Lubbe v. Cape plc* [2000] 4 All ER 268 (House of Lords, United Kingdom). See para. 90 of the Ruggie report.

<sup>28</sup> For example, see the complaint made to the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions regarding Barrick Gold's activities in PNG by Mining Watch Canada. See: [http://www.miningwatch.ca/updir/Letter\\_Special\\_Rapporteur\\_PNG.pdf](http://www.miningwatch.ca/updir/Letter_Special_Rapporteur_PNG.pdf)

<sup>29</sup> The issue of whether companies should have binding obligations under international human rights law is still being debated. However, it is noteworthy that in June 2008 the United Nations' Human Rights Council emphasised that corporations have a "responsibility to respect" rights (A/HRC/RES/8/7). The corporate responsibility to respect is part of Ruggie's three-part framework described above. Professor Ruggie has been asked to elaborate on the scope and content of this responsibility and to provide concrete guidance to business and other stakeholders.

<sup>30</sup> Refer to the various reports of the UN's Special Representative on Business and Human Rights: <http://www.business-humanrights.org/Documents/Ruggie-HRC-2006>.

## 4.4 *Third-party mechanisms*

The Oxfam Australia Mining Ombudsman is the only fully operational trans-national dispute resolution mechanism specific to the mining industry anywhere in the world, although it is restricted to Australian mining companies working overseas (see Box 2). Since 2000, the Ombudsman has investigated 12 cases and published a total of 26 reports on a multitude of mine and community issues<sup>31</sup>. Due to resource constraints, the number of cases accepted for full investigation is limited. The function comprises two Oxfam employees (with assistance from volunteers and other staff members)<sup>32</sup>.

### **Box 2: Oxfam Australia's Mining Ombudsman**

Oxfam Australia's Mining Ombudsman responds to concerns raised by local and Indigenous communities that relate to the activities of an Australian-based mining company operating offshore. Oxfam does not adopt a pro or anti-mining position. Rather, its human rights-based approach, which takes international human rights standards as the basis for assessing community-company disputes, reflects the disparate power dynamics inherent in most community-company disputes.

The Ombudsman relies on rigorous and evidence based analysis of disputes it takes on (spurious complaints are not investigated). Ultimately however, whilst the Ombudsman is independent of the industry, it is not perceived by the industry to be impartial.

The Ombudsman focuses on party engagement, local capacity building and participatory processes. So, even where disputes are not resolved, community empowerment and improved knowledge of human rights are often achieved.

Oxfam uses its partner network to support community groups through the dispute resolution process, thus limiting the need to introduce foreign processes and personnel. This locally networked model facilitates awareness of the Ombudsman function among affected communities, enables the Ombudsman to gain a rapid understanding of disputes during case investigations, and make realistic and culturally appropriate recommendations.

The possibility of achieving dialogue depends on the willingness and capacity of companies and communities to engage with each other and the Ombudsman. Some companies are defensive and occasionally hostile. Oxfam finds that companies are more receptive to the Ombudsman when they are knowledgeable about their human rights responsibilities, have had some prior exposure to Oxfam or the Ombudsman, or can see value in having a third party mediate disputes and facilitate solutions (for example in the cases of Tintaya and Tolukuma).

If dialogue with companies does not ensue once Oxfam has investigated, verified and communicated a community grievance to a company, the Ombudsman's lever of last resort is through media exposure, political pressure, and indirect persuasion such as through discussions with financiers.

Oxfam reports that the mining boom has led to an increasing number of smaller companies involved in Ombudsman cases, which presents challenges for seeking to influence those companies. Oxfam maintains that the potential for some companies to evade responsibilities would be eliminated if regulatory mechanisms in Australia required compliance with human rights in external operations; thus creating a level playing field for all Australian mining companies operating abroad.

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<sup>31</sup> Porgera, Barisan, Rawas, Gag Island, Kelian, Indo Muro, Marinduque, Tintaya, Vatukoula, Tolukuma, Didipio and Rapu Rapu. See: <http://www.oxfam.org.au/campaigns/mining/ombudsman/index.html> for reports and case profiles.

<sup>32</sup> There have been three incumbents in the Ombudsman role since its establishment - all direct employees of Oxfam Australia.

In some circumstances, third-party initiatives, mechanisms and schemes (such as those listed in the previous chapter) may have their own complaints mechanism that aggrieved communities can access. For example, if the International Finance Organisation (IFC) or Multilateral Investment Guarantee Agency (MIGA) is involved in project finance arrangements their Compliance Adviser/Ombudsman (CAO) may be a potential avenue of redress for aggrieved communities. Similarly, there are National Contact Points (NCPs) in countries that have adopted the OECD Guidelines, such as Australia. In specific instances, NCPs can contribute to the resolution of issues that arise in relation to implementation of the OECD Guidelines by providing a forum for discussion and assistance to affected parties. The United Nations (UN) Global Compact describes a mechanism for any party to register a complaint about a member company, although it is unclear as to how these complaints are processed. While there are a few examples<sup>33</sup> it is difficult to determine the extent to which Australian mining companies are involved in cases where communities have used these avenues.

#### ***4.5 Protests, media campaigns and political lobbying***

Once community groups take their concerns into the public arena, through protests, media and political campaigns, companies generally have little choice but to respond, either by denying responsibility or responding in an attempt to mend a damaged reputation. While political lobbying can also be undertaken behind closed doors, it is no less damaging. Public protests and campaigns call into question corporate performance in a very public way – for individual companies and the industry at large. While many companies are proud of their reputations at the local community level, there is often limited discernment in the public mind between companies. If maverick or laggard companies abuse their resource privileges, whether through accusations of environmental damage, human rights abuses or inequitable benefit flows, mining companies in general can become mistrusted.

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<sup>33</sup> For example, BHP Billiton's website indicates that its Cerrejon Coal Mine in Columbia is assisting to investigate a complaint that it has breached the OECD Guidelines.

## 5 What actions could companies take – either individually or collectively – to improve processes for addressing community grievances?

This section aims to provide a basis for initial discussion about how the Australian industry operating offshore might improve community grievance mechanisms. Options to consider include (but are not limited to):

- extending Australia’s extraterritorial legal framework
- augmenting industry and/or corporate policy frameworks and enforcement mechanisms
- endorsing and strengthening voluntary regulation
- establishing a third-party mechanism.

As detailed in the next section, an industry roundtable would be an appropriate forum in which to explore these and related issues.

### 5.1 Extend Australia’s legal framework

It is difficult to hold Australian companies to account in Australian courts for their actions outside Australia, either through domestic tort law (i.e. civil law claims such as negligence) and/or extraterritorial legislation. Some limited redress via Australian tort law has been recognised. In the *Ok Tedi* case, for example, it was held that some, albeit limited, negligence claims by foreign nationals against an Australian company operating offshore could be actionable in an Australian court. However, any claims founded on a *proprietary or possessory right* to foreign land or waters was considered to offend the principles associated with state sovereignty and therefore held not to be actionable<sup>34</sup>. As discussed previously, the domestic legal avenue is constrained by rules associated with state sovereignty and corporate structures. Australia does not have an Alien Tort Claims Act (ATCA) such as that of the United States. In the USA, the ATCA (1789) allows non-US citizens to bring a civil action in the US relating to the violation of the law of nations or a treaty to which the United States is a signatory. Increasingly, efforts have been made to use the ATCA to capture breaches of international law committed by transnational corporations operating in countries outside the US<sup>35</sup>.

Extraterritorial legislation applies to actors and actions beyond domestic jurisdictional borders. Such laws are usually targeted at misconduct by domestic nationals committed offshore. Currently, the Australian federal Criminal Code (1995) makes some provisions for misconduct of corporations abroad<sup>36</sup>. However, these provisions focus on areas such as war crimes, trafficking and terrorism, not environmental damage, labour standards or consent processes. In Australia, more extensive extra territorial legislation has been

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<sup>34</sup> *Dagi and Others v The Broken Hill Proprietary Company Ltd and Another (No 2)* [1997] 1 VR 428, 429-30.

<sup>35</sup> The Alien Tort Claims Act was not designed specifically for this purpose but has been recently adopted for this use: <http://www.globalpolicy.org/intljustice/atca/atcaindx.htm>

<sup>36</sup> *Criminal Code Act 1995* (Cth), Division 12 (Corporate Criminal Responsibility), Division 15 (Extended geographical jurisdiction).

mooted through a Corporate Code of Conduct Bill (2000). This Bill was tabled with the Parliamentary Joint Statutory Committee on Corporations and Securities in 2000 by the Australian Democrats. The Bill aimed to regulate the activities of Australian companies overseas in the areas of human rights, environment, labour and occupational health and safety, but was not passed by the Australian Parliament. With the demise of the Australian Democrats as a Parliamentary Party, the Bill is unlikely to be revived in its current form, although it remains to be seen whether the agenda will be actively taken up in another form.

On the whole, the corporate sector, including the mining industry, prefers voluntary mechanisms over legislative options to influence corporate behaviour<sup>37</sup>. Some members of civil society and the NGO community however, argue that where non-judicial options fail to provide a resolution, recourse should still be available through the judicial system because this provides a definitive outcome according to predetermined standards. The two approaches can also be complementary, for example non-judicial mechanisms can tackle issues that are not covered by regulation, such as cultural misunderstandings or breakdown in relationships as a result of poor communication. They can also provide motivation to engage where the next level of elevation may be litigation.

## **5.2 Augment corporate and industry policy frameworks**

The Australian mining industry could help promote the establishment and utilisation of community grievance mechanisms by the comparatively simple means of augmenting corporate and/or industry policy frameworks. For example, the MCA might consider including explicit provisions about grievance mechanisms within *Enduring Value* and/or explanatory documentation.

Policy frameworks could be augmented via an overarching set of industry-endorsed principles for dispute resolution. Harvard University's Kennedy School of Government recently released a guidance tool for rights-compatible, dialogue-based grievance mechanisms at the company level<sup>38</sup>. The tool suggests that company mechanisms should be "*legitimate, accessible, predictable, equitable, rights compatible and transparent*" (p.24). Based on a year of multi-stakeholder and bilateral consultations related to the Special Representative's business and human rights mandate the Harvard tool presents seven principles for a mechanism to be effective and credible. The Special Representative then extrapolated six higher-level principles applicable for any non-judicial rights-compatible grievance mechanism – including third party mechanisms (see Box 3). The ICMM has responded favourably to these principles<sup>39</sup>, but has not yet embedded them in policy.

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<sup>37</sup> The ICMM for example encourages member companies to support a variety of voluntary initiatives, such as the UN Global Compact, Voluntary Principles on Security and Human Rights, Extractive Industries Transparency Initiative and the Global Reporting Initiative.

<sup>38</sup> See: <http://www.reports-and-materials.org/Grievance-mechanisms-principles-Jan-2008.pdf>.

<sup>39</sup> See <http://www.icmm.com/page/8331/icmm-welcomes-ruggie-report> for ICMM's response.

More recently the IFC/CAO produced a guide to designing and implementing grievance mechanisms for development projects.<sup>40</sup> Like the Harvard Tool, this guide places a significant emphasis on the importance of local level non-judicial grievance mechanisms and re-iterates the importance of dialogic processes of engagement. The guide also outlines specific phases for the design of a grievance mechanism.

**Box 3: UN Special Representative on Business and Human Rights key principles for non-judicial mechanisms to address alleged human rights standards from April 2008 ‘Protect, Respect, Remedy’ report (p. 24)**

Legitimate: a mechanism must have clear, transparent and sufficiently independent governance structures to ensure that no party to a particular grievance process can interfere with the fair conduct of that process

Accessible: a mechanism must be publicised to those who may wish to access it and provide adequate assistance for aggrieved parties who may face barriers to access, including language, literacy, awareness, finance, distance or fear of reprisal

Predictable: a mechanism must provide a clear and known procedure with a timeframe for each stage and clarity on the types of process and outcome it can and cannot offer, as well as a means of monitoring the implementation of any outcome

Equitable: a mechanism must ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair and equitable terms

Rights-compatible: a mechanism must ensure that its outcomes and remedies accord with internationally recognised human rights standards

Transparent: a mechanism must provide sufficient transparency of process and outcome to meet the public interest concerns at stake and should presume transparency wherever possible; non-state mechanisms in particular should be transparent about the receipt of complaints and the key elements

### **5.3 Endorse and strengthen voluntary regulation**

A related measure would be for industry groups and individual companies to formally endorse existing standards and guidelines that contain requirements for effective community grievance mechanisms, such as the IFC’s *Performance Standards on Social and Environmental Sustainability*, International Alert’s *Guidelines for Conflict Sensitive Business Practices in Extractive Industries*, the *Framework for Responsible Mining* and the IFC’s (draft) *CommDev Toolkit*.

Other than the abovementioned Harvard and IFC/CAO guidance documents, there is not a lot of guidance in terms of *how* companies and communities might go about establishing non-judicial grievance mechanisms, either at the industry, corporate or operational level. In his April 2008 report, the UN Special Representative observes that while some voluntary initiatives require members to have their own grievance processes, few set clear process standards for this. He says, “*This risks encouraging tokenistic rather than effective processes at the operational level.*” (p.26).

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<sup>40</sup> See [http://www.cao-ombudsman.org/html-english/documents/GM\\_final\\_11.June.2008\\_000.pdf](http://www.cao-ombudsman.org/html-english/documents/GM_final_11.June.2008_000.pdf)

Opportunities exist for the industry to support the augmentation of voluntary regulation in the area of dispute resolution either through specific reference to existing guidance documents or through the development of guidance tailored specifically to extractive industries. In this context, the industry could consider how links to grievance mechanisms that are part of existing voluntary schemes might be strengthened, such as awareness raising with host and home governments, community groups, representative organisations and civil society.

#### **5.4 Establish a third-party mechanism**

As discussed above, there are strong calls to establish a third-party mechanism. The utility and form of such a mechanism, including links to local or company-level mechanisms, should be deliberated. If a third party mechanism was established for the Australian industry operating offshore, there would also need to be some way of tracking effectiveness.

Considerations include:

- ***Overarching principles:***  
Most leading mining companies and industry organisations have accepted that companies must respect fundamental human rights. Any operating principles would need to be rights-compatible.
- ***Relationship to other mechanisms:***  
Particular consideration would need to be given to where such a mechanism would 'sit' in relation to bilateral agreements, legal avenues and other existing forums (for example the NCP) in order to avoid unnecessary elevation of disputes and at the same time ensure that recourse is available to community groups who believe they have been adversely affected by Australian mining companies operating offshore.
- ***Impartiality and neutrality:***  
If companies or communities perceive the mechanism to be biased, it will not be utilised or endorsed. A balanced multi-stakeholder governance structure may offer the greatest potential to maximise impartiality and neutrality.
- ***Process and methods:***  
A third-party mechanism should aim to resolve disputes through dialogue and active engagement between all parties in finding mutually acceptable paths forward. Some forms of adjudication (such as assessments or recommendations) are legitimate and can be useful.
- ***Eligibility criteria:***  
For a mechanism to accept a case, jurisdictional and screening criteria would have to be established. These would have to be pre-determined and well communicated. Criteria might consider whether host-country avenues of redress be explored before elevation to an external third-party mechanism.

- ***Role and function:***  
Core functions might include initial case assessment, facilitation roles (e.g. through mediation and conciliation), arbitration/determination, follow up and public reporting. Additional functions might include monitoring, advisory and education/research.
- ***Enforcement and accountability:***  
Having a legal mandate is one option, which would help ensure a 'level playing field'. Without such a mandate, enforcement would rely on the commitments made by participating parties. High levels of transparency could increase the likelihood that parties will respond as agreed or determined.
- ***Awareness and access for aggrieved groups:***  
Home and host country organisations, local communities and international actors would all have to be aware of and communicate the purpose and scope of a mechanism, its principles and eligibility criteria and so forth. Communities must be able to access the mechanism through clear, simple, processes.

## **6 Next steps for generating an industry dialogue on these issues**

The Australian mining industry has an opportunity to respond to strong domestic and international calls to improve its approach to community grievances in the spirit of open dialogue and relationship building. The industry is well placed to initiate an industry roundtable to pre-emptively understand the range of positions amongst companies and industry groups, pro-actively identify opportunities for improvement and consider the risk of not responding adequately to the emerging agenda.

### ***6.1 Convening an industry roundtable***

The University of Queensland's ConCord, with CSRM and ACPACS – or another neutral facilitator – would be willing to initiate and convene an industry roundtable to discuss the ideas put forward in this discussion paper.

If an industry roundtable is not possible, CSRM could compile industry responses to this report. This would help clarify the various positions on the issue of grievance mechanisms within parts of the industry itself.

### ***6.2 Establishing a research agenda***

At present, relatively little is known about patterns of dispute resolution in the mining industry, including for Australian companies operating overseas. Potential areas for further research which would help build understanding in this area include:

- Documentation and analysis of company practice, including deficiencies and strengths of current grievance mechanisms.
- Case analysis to determine specific benefits and drawbacks of different processes and mechanisms from various stakeholder perspectives.
- Evaluation of dispute resolution processes/mechanisms used elsewhere in the natural resources sector or 'footprint' industries (like agriculture, forestry etc.).

A multi-stakeholder advisory group comprising government, industry and civil society could be established to help scope such research and identify what information is required.