

# STATEMENT BY THE AUSTRALIAN NATIONAL CONTACT POINT: ANZ SPECIFIC INSTANCE

## BACKGROUND

1. On 28 August 2006, the Australian National Contact Point for the OECD's Guidelines for Multinational Enterprises received a request to consider a 'specific instance' from a consortium of five non-government organisations ('the complainants') alleging that the ANZ Banking Group (ANZ), through its financial links with the Malaysian-owned forestry company Rimbunan Hijau (RH) operating in Papua New Guinea, had breached various provisions of the OECD's Guidelines for Multinational Enterprises.<sup>1</sup>
2. Specifically, it is alleged that the ANZ is not complying with the following provisions of the Guidelines:
  - Article II, Section 1: "Enterprises should contribute to economic, social and environmental progress with a view to achieving sustainable development";
  - Article II, Section 2: "Enterprises should respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments";
  - Article II, Section 10: "Enterprises should encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines"; and
  - Article V, Section 1: "Enterprises should establish and maintain a system of environmental management appropriate to the enterprise."
3. Through the specific instance mechanism of the Guidelines, the complainants sought the following outcomes and commitments:
  - ANZ adopt meaningful forestry and human rights policies that set basic standards for its clients across all its business operations, in accordance with international best practice for financial institutions;
  - ANZ immediately disengage from the socially and environmentally destructive forestry operations in PNG;
  - ANZ explore and actively foster community-based forestry operations conducted on a sustainable basis in PNG; and
  - ANZ advocate for positive solutions to forestry and human rights issues in Australia and in PNG.
4. The complainants also noted that the specific instance mechanism was being invoked because they were dissatisfied with the lack of progress in direct discussions with the ANZ. The

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<sup>1</sup> The complainants were the Australian-based Australian Conservation Foundation and the Human Rights Council of Australia and the PNG-based Centre for Environmental Law and Community Rights; the PNG Eco-Forestry Forum; and the Environmental Law Centre.

complainants hoped that the specific instance process would facilitate better dialogue with the ANZ and secure commitments in accordance with the Guidelines.

## **ANCP'S PROCESSES**

5. In accordance with the ANCP's published procedures for handling specific instances, the ANCP commenced an initial assessment as to whether the issues raised warranted further consideration as a specific instance under the Guidelines. The ANCP's fact finding included meeting separately with representatives of the complainants and the ANZ on 6 September in Melbourne. On 14 September the complainants lodged a supplementary submission and on 21 September the ANZ lodged its submission. Both submissions sought to amplify and clarify issues discussed in the meetings.<sup>2</sup> Both parties consented for their submissions to be shared with the other party.
6. On 29 September 2006, the ANCP conveyed to both parties his assessment that it would not be appropriate to accept the complainants' request to consider a specific instance.

## **ANCP'S DETERMINATION**

7. In seeking to determine whether this case is admissible as a specific instance under the Guidelines, the ANCP sought to establish whether there was an investment nexus between ANZ and RH.
8. The ANZ submitted that it has no capacity to direct or control RH operational decisions. The ANZ is not a member of any RH Board, management committee or other decision-making body of RH and it holds no investment in RH. The ANZ also noted that it was a provider of banking and financial services to an entity that was operating legitimately under PNG law.
9. The ANCP considered the complainants' view that the performance-related bank guarantee given to the PNG Forestry Authority constituted an ANZ investment in RH because of its contingent nature.<sup>3</sup> The ANCP notes that a business investment typically involves an element of residual risk bearing by the investor which appears to be absent in the bank guarantee. Moreover, the ANCP notes ANZ's advice that its financial services, including the bank guarantee, are provided on a fee-for-service basis to RH. These facts have led the ANCP to conclude that it would be difficult to characterise ANZ's financial links with RH as an investment as intended by the Guidelines.<sup>4</sup>
10. The ANCP also carefully considered the complainants' view that the ANZ's engagement with RH to promote more responsible business practices of itself reflected ANZ's acceptance that it was part of RH's 'supply chain'. The ANCP notes that the matter of whether a supply chain exists, let alone whether it is sufficiently strong to support a specific instance is unclear in relation to financial sector participants. The usual notion of a supply chain is of a

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<sup>2</sup> The complainants' original and supplementary submissions and the ANZ's submission are posted along with this statement on the ANCP's website ([www.ausancp.gov.au](http://www.ausancp.gov.au)).

<sup>3</sup> The ANZ guarantee is made on behalf of RH and promises to make good liabilities that may be incurred by RH under the terms of its lease with the PNG Forestry Authority. The Authority can call upon the guarantee if RH were to fail to pay royalties, undertake reforestation, if applicable or act in any way outside the terms of its lease.

<sup>4</sup> A succinct statement on the scope of the Guidelines, including application of the investment nexus test in a specific instance process is provided in the clarification issued by the OECD Investment Committee through the 2003 Annual Report of National Contact Points (reproduced as [Annex 1](#) to this statement).

collection of entities that successively transform a good or a service until it reaches final consumers. Contrastingly, financial services or indeed other services (e.g. consultancy services or human resources) are supply inputs to a firm's productive capacity. The ANCP notes that the OECD Investment Committee intends to study these issues in 2007.

11. Nevertheless, the ANCP drew on existing guidance from the OECD Investment Committee that indicates that the supply chain (and business partners) issue rests on "the practical ability of enterprises to influence the conduct of their business partners with whom they have an investment like relationship".<sup>5</sup>
12. In this regard, the opposing submissions are noteworthy. The ANZ indicates that its capacity to influence RH is limited as it does not participate in any decision making processes of RH. It also points to the competitive nature of financial service provision. The complainants, on the other hand, question ANZ's lack of ability to influence RH pointing to the ANZ's reputation and established market position as potential levers that could be used to effect a change in RH's practices. The complainants also note that ANZ might consider emulating Citigroup's 2005 announcement that "RH would be required to comply with Citigroup's environmental policy to continue to qualify for financing from the bank".
13. On the facts tendered by both parties, the ANCP is unable to ascertain the degree to which ANZ has the capacity to influence RH's logging decisions in PNG. That being the case, the ANCP nevertheless notes that the issues raised by the supply chain (and business partners) become significant only when there is an established investment or investment-like relationship.

#### **SUMMARY AND NEXT STEPS**

14. In spite of the ANCP's inability to accept this case as a specific instance, the ANCP notes that the complainants and the ANZ are both striving to improve responsible business practices. The ANZ is committed to promoting responsible business practices by its clients, including RH. Moreover, the ANZ intends to make a public commitment to the OECD Guidelines for Multinational Enterprises. The complainants are also striving to assist global entities like the ANZ to achieve their stated goals of promoting responsible business conduct.
15. It would seem appropriate that both parties have much to gain from resuming their dialogue on these matters even if that dialogue were to occur outside the umbrella of the specific instance process. The ANCP acknowledges that there would need to be a renewed commitment from both sides to take the dialogue to a higher, more productive plane.
16. Although not formally part of the ANCP's mandate, the ANCP stands ready to inaugurate such a dialogue should both parties request it.

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<sup>5</sup> Third dot point in the 2003 clarification reproduced as [Annex 1](#) to this Statement.

## **APRIL 2003 STATEMENT BY THE INVESTMENT COMMITTEE ON THE SCOPE OF THE GUIDELINES**

(Statement published in the 2003 Annual Report on the OECD Guidelines for Multinational Enterprises; pages 21-22)

In considering this issue, the CIME has sought to protect and enhance the credibility and effectiveness of the Guidelines and to remain true to the agreement reached among adhering governments at the 2000 Review after extensive consultations with the business, trade union and NGO communities.

The Guidelines are a multifaceted instrument and the Committee found it useful to consider this issue with reference to the following, which does not aim to change the balance reached during the 2000 Review:

- First, the Guidelines are an Annex of the OECD Declaration on International Investment and Multinational Enterprises. The fact that they are part of the Declaration and that oversight responsibility for them has been assigned by the Council to the CIME – the body charged with responsibility for the Organisation’s work on investment and multinational enterprises – indicates the investment intent of the drafters of the instrument.
- Second, the Guidelines are a major corporate responsibility instrument that draws on and reinforces an established body of principles dealing with responsible business conduct. These principles reflect common values that underlie a variety of international declarations and conventions as well as the laws and regulations of governments adhering to the Guidelines. As such, these values are relevant to the activities of multinational enterprises. Thus, as it has already done in a number of areas, the international community may continue to draw on the values underlying the Guidelines in other contexts.
- Third, the Guidelines have been developed in the specific context of international investment by multinational enterprises and their application rests on the presence of an investment nexus. When considering the application of the Guidelines, flexibility is required. This is reflected in Recommendation II.10 and its commentary that deal with relations among suppliers and other business partners. These texts link the issue of scope to the practical ability of enterprises to influence the conduct of their business partners with whom they have an investment like relationship. In considering Recommendation II.10, a case-by-case approach is warranted that takes account of all factors relevant to the nature of the relationship and the degree of influence. The fact that the OECD Declaration does not provide precise definitions of international investment and multinational enterprises allows for flexibility of interpretation and adaptation to particular circumstances.