

# Final Statement

Complaint submitted by Justicia y Reparación on behalf of affected individuals, against an Australian-based enterprise operating in Chile (mining sector)

23 March 2023

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## Executive summary

1. In September 2021, the Australian National Contact Point for Responsible Business Conduct (AusNCP) received a complaint from Justicia y Reparación (notifiers) on behalf of affected individuals against an Australian multinational enterprise (enterprise). The complaint concerned impacts from mining operations in Chile, alleged to be contrary to the OECD Guidelines for Multinational Enterprises (OECD Guidelines).
2. Toward the end of the initial assessment process, the notifiers and the enterprise informed the AusNCP that they were in discussions about matters in the complaint, and requested the case be suspended for that engagement to occur outside the AusNCP process. The complaint was then suspended.
3. Both parties subsequently informed the AusNCP that positive progress had been achieved through in-country discussions regarding matters in the complaint. The notifiers indicated they wished to withdraw the complaint and did not want the Initial Assessment statement (which was in draft) to be published.
4. The AusNCP liaised with both parties and is comfortable that no undue pressure was made on those who raised the complaint, nor repercussions on Justicia y Reparación for having filed the complaint with the AusNCP.
5. The AusNCP has not made a determination on the merits of the claims presented, nor an assessment of whether the enterprise's actions are consistent with the OECD Guidelines.
6. The AusNCP engaged with the Chile National Contact Point for Responsible Business Conduct (Chile NCP) and kept them updated on developments throughout the duration of this case, including the withdrawal and closing of the case.
7. A schedule of events setting out the steps taken in the complaint is included in this Final Statement. A summary of the AusNCP governance and institutional arrangements are also included in this statement.
8. This statement is available on the AusNCP website at [www.ausncp.gov.au](http://www.ausncp.gov.au).

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## Parties and process

9. On 3 September 2021, the AusNCP received a complaint from a lawyer working with the organisation Justicia y Reparación, on behalf of affected individuals, against the enterprise. The complaint concerned impacts from mining operations in Chile, alleged to be contrary to the OECD Guidelines.
10. Justicia y Reparación is a law firm with offices in Chile and Argentina. Justicia y Reparación provided the AusNCP with materials showing its authority to represent and make the complaint on behalf of the individuals allegedly affected by the mining operations.
11. The enterprise was not publicly identified at that stage, consistent with the AusNCP procedures (para 4.9), given the details of the case were not already in the public domain due to independent reporting (not by the parties).

# AusNCP proceedings

## Initial assessment

12. From September to November 2021, the AusNCP Independent Examiner sought and obtained information and clarification from the notifiers and the enterprise. Each parties' documentation was shared with the other with the consent of the submitting party.
13. The Independent Examiner considered the six admissibility criteria of the initial assessment process and engaged with the parties and the Chile NCP. This was to obtain more information and understanding about relevant aspects in Chile.
14. The Independent Examiner consulted with the AusNCP Governance and Advisory Board (AusNCP Board) and the Chile NCP regarding the complaint in February and March 2022. There were multiple exchanges as a result of further information from the Chile NCP about coordination and assistance, and with the parties about other proceedings in Chile. The Independent Examiner provided the AusNCP Board with a draft Initial Assessment for comment on 8 March 2022 and a draft was provided to the parties for comment on 9 June 2022. The parties provided comments in July 2022.
15. In August 2022, while the AusNCP was finalising the Initial Assessment, the notifiers and enterprise informed the AusNCP they were in discussions about matters in the complaint. The parties jointly asked the AusNCP to suspend the complaint on a temporary basis and to not publish the Initial Assessment to allow for engagement to occur.
16. The AusNCP agreed to a temporary suspension from progressing the complaint to enable the parties to engage outside the AusNCP process. Subsequent requests for extensions to the suspension by both parties were granted.

## Withdrawal of complaint

17. In October 2022, both parties informed the AusNCP of positive progress achieved through in-country discussions regarding matters in the complaint. The notifiers indicated they wished to withdraw the complaint 'in its entirety' and that 'given the positive progress achieved through discussions ... and the Notifiers' subsequent withdrawal of their Complaint, the parties consider that publication of the Initial Assessment would not be in their best interests'. The enterprise agreed with the proposal.
18. Under the AusNCP procedures (para 11.1), where a notifier wishes to withdraw its complaint, the Independent Examiner will consult the enterprise and close the case. Withdrawn complaints will be publicly acknowledged on a case-by-case basis.
19. The Independent Examiner communicated with both parties to ensure no undue pressure or repercussions had arisen as a result of filing the complaint with the AusNCP. The Independent

Examiner emphasised this inquiry was not because of any concerns the AusNCP has with this particular matter, but because it is a general area for attention in relation to NCP complaints.<sup>1</sup>

20. The notifiers wrote to the AusNCP saying ‘there has not been any undue pressure on those who submitted the complaint to the AusNCP or repercussions for having filed that complaint. Everything has been done on a voluntary basis’ (emphasis in original).
21. The Independent Examiner is satisfied that no undue pressure was made on those who submitted the complaint, nor repercussions on the Justicia y Reparación for having filed the complaint with the AusNCP.

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<sup>1</sup> See, for example, OECD Working Party on Responsible Business Conduct, ‘Statement of the Working Party on Responsible Business Conduct’ [media statement], OECD Centre for Responsible Business Conduct, 13 March 2020, accessed 5 January 2023. <https://mneguidelines.oecd.org/ncps/working-party-on-rbc-statement-march-2020.htm> ; OECD Watch and Business and Human Rights Resource Centre, ‘Use with caution: The role of the OECD National Contact Points in protecting human rights defenders’, OECD Watch, 10 June 2019, accessed 5 January 2023. <https://www.oecdwatch.org/use-with-caution-the-role-of-the-oecd-national-contact-points-in-protecting-human-rights-defenders/>; and Australian National Contact Point (AusNCP), ‘Complaint Procedures’, AusNCP, Australian Government, 2022, para [2.4]. <https://ausncp.gov.au/index.php/complaints/ausncp-procedures>

## Application of the OECD Guidelines

22. The complaint referenced chapters IV (Human rights) and VI (Environment) chapters of the OECD Guidelines. No observations are made on the application of the OECD Guidelines here, as the complaint has been withdrawn.

## Conclusions and recommendations

23. The complaint has been withdrawn. The parties have agreed on a way forward based on what they have communicated to the AusNCP and the notifiers are an experienced human-rights law firm. In these circumstances, the Independent Examiner considers that the AusNCP's further examination of the complaint would not be constructive.
24. Accordingly, no conclusions or recommendations have been made by the AusNCP in respect of the complaint. As noted above (para 17), at the request of the parties an Initial Assessment for this complaint will not be published. Therefore, for this matter, only this Final Statement will be made public on the AusNCP website.
25. The AusNCP notes that as the complaint has been withdrawn, this Final Statement is not a determination on the merits of the claims presented, nor is it an assessment of whether the enterprise's actions are consistent with the OECD Guidelines.

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# Annexes

## Annex A: Schedule of events

Submission	Date
<ul style="list-style-type: none"><li>Complaint submitted to the AusNCP by Justicia y Reparación on behalf of affected individuals against the enterprise</li></ul>	3 September 2021
<ul style="list-style-type: none"><li>AusNCP acknowledged receipt of complaint from the notifiers</li></ul>	3 September 2021
<ul style="list-style-type: none"><li>Enterprise notified that complaint submitted to AusNCP</li></ul>	6 September 2021
<ul style="list-style-type: none"><li>AusNCP Governance and Advisory Board notified</li></ul>	6 September 2021
<ul style="list-style-type: none"><li>OECD notified of new AusNCP complaint</li></ul>	7 September 2021
<ul style="list-style-type: none"><li>AusNCP website updated to list new complaint, enterprise not named</li></ul>	8 September 2021
<ul style="list-style-type: none"><li>Enterprise acknowledged receipt of AusNCP complaint</li></ul>	8 September 2021
<ul style="list-style-type: none"><li>Chile NCP notified of new complaint relating to enterprise activities in Chile</li></ul>	9 September 2021
<ul style="list-style-type: none"><li>AusNCP and Chile NCP ongoing coordination on complaint</li></ul>	16 September 2021 – 14 January 2022
<ul style="list-style-type: none"><li>Enterprise made a submission to AusNCP in response to complaint</li></ul>	20 September 2021
<ul style="list-style-type: none"><li>Independent Examiner sent letter to parties requesting further information for Initial Assessment</li></ul>	2 October 2021
<ul style="list-style-type: none"><li>Enterprise made a submission to AusNCP with information relating to the complaint</li></ul>	1 November 2021
<ul style="list-style-type: none"><li>Notifier made a submission responding to Examiner letter with further information and confirmed authorisation for Justicia y Reparación to represent affected persons</li></ul>	13 November 2021
<ul style="list-style-type: none"><li>Enterprise made a submission responding to Examiner letter with further information</li></ul>	17 November 2021
<ul style="list-style-type: none"><li>Independent Examiner gave both parties opportunity to provide any further submissions, for the Initial Assessment</li></ul>	30 November 2021
<ul style="list-style-type: none"><li>Enterprise provided further submission</li></ul>	10 December 2021
Initial assessment	
<ul style="list-style-type: none"><li>Draft Initial Assessment provided to AusNCP Board for comment</li></ul>	8 March 2022
<ul style="list-style-type: none"><li>Draft Initial Assessment provided to Chile NCP for comment</li></ul>	18 March 2022
<ul style="list-style-type: none"><li>Draft Initial Assessment provided to parties to the complaint for comment</li></ul>	9 June 2022

- Enterprise indicated parties were engaging in Chile and requested extension to comment on Initial Assessment. Examiner agreed to the request, and confirmed with both parties 15 July 2022
- AusNCP clarified who was participating in the engagement in Chile with parties 19-29 July 2022
- Enterprise provided comments on draft Initial Assessment 28 July 2022
- Notifier provided comments on draft Initial Assessment 29 July 2022
- AusNCP informed parties that the Initial Assessment had been finalised and would be published on 6 September 2022 12 August 2022
- Parties jointly requested temporary suspension of AusNCP process to enable discussions between the parties 15 August 2022
- Independent Examiner agreed to parties' request to temporarily suspend AusNCP complaint process as well as subsequent extension requests 16 August – 21 October 2022
- Notifiers withdrew AusNCP complaint 21 October 2022
- Independent Examiner confirmed to parties that case would be closed with publication of Final Statement 31 October 2022
- Chile NCP advised that complaint to be concluded with publication of Final Statement 15 November 2022

## Final statement

- Draft Final Statement provided to AusNCP Board for comment 15 November 2022
- Draft Final Statement provided to the parties and Chile NCP for comment 25 January 2023
- Notifier requested extension to comment on Final Statement. Examiner agreed to the request, and confirmed with both parties 17 February 2023
- Enterprise provided comments on draft Final Statement 24 February 2023
- Embargoed Final Statement provided to parties and AusNCP Board 7 March 2023
- Final Statement published on [www.AusNCP.gov.au](http://www.AusNCP.gov.au) and reported to the OECD 23 March 2023

## Annex B: Publications

OECD, 'Justicia y Reparación (on behalf of individuals) & Australian-based enterprise (mining sector) operating in Chile', OECD Database of specific instances, n.d., accessed 8 January 2023.

<http://mneguidelines.oecd.org/database/instances/au0021.htm>

## Annex C: Institutional arrangements

26. The Australian Government is committed to promoting the use of the OECD Guidelines for Multinational Enterprises (OECD Guidelines) and implementing them effectively and consistently. Through business cooperation and support, the OECD Guidelines can positively influence business conduct and ultimately economic, environmental and social progress.
27. The OECD Guidelines are recommendations on responsible business conduct addressed by governments, including Australia, to multinational enterprises. Importantly, while the OECD Guidelines have been endorsed within the OECD international forum, they are not a substitute for, nor do they override, Australian or international law. They represent standards of behaviour that supplement Australian law and therefore do not create conflicting requirements.
28. Companies operating in Australia and Australian companies operating overseas are expected to act in accordance with the principles set out in the OECD Guidelines and to perform to the standards they recommend. In countries where domestic laws and regulations conflict with the principles and standards of the OECD Guidelines, enterprises should seek ways to honour such principles and standards to the fullest extent, which does not place them in violation of domestic law.
29. The OECD Guidelines can be seen as:
  - A useful aid to business in developing their own code of conduct (they are not aimed at replacing or preventing companies from developing their own codes).
  - Complementary to other business, national and international initiatives on corporate responsibility, including domestic and international law in specific areas such as human rights and bribery. For example, the OECD Guidelines' human rights chapter as well as other key concepts align with the [United Nations Guiding Principles on Business and Human Rights](#).
  - Providing an informal structure for resolving issues that may arise in relation to implementation of the OECD Guidelines in complaints.

## Annex D: Governance

30. Countries adhering to the OECD Guidelines have flexibility in organising their National Contact Points for Responsible Business Conduct (NCPs) and in seeking the active support of social partners, including the business community, worker organisations, other non-governmental organisations, and other interested parties.
31. Accordingly, the OECD Guidelines stipulate that:
- NCPs will be composed and organised such that they provide an effective basis for dealing with the broad range of issues covered by the OECD Guidelines and enable the NCP to operate in an impartial manner while maintaining an adequate level of accountability to the adhering government.
  - NCPs can use different forms of organisation to meet this objective. An NCP can consist of senior representatives from one or more ministries, may be a senior government official or a government office headed by a senior official, be an interagency group, or one that contains independent experts. Representatives of the business community, worker organisations and other non-governmental organisations may also be included.
  - NCPs will develop and maintain relations with representatives of the business community, worker organisations and other interested parties that are able to contribute to the effective functioning of the OECD Guidelines.
32. The [AusNCP Governance and Advisory Board](#) (AusNCP Board), which includes representatives from Australian Government agencies, business, civil society and unions, provides advice and assistance to the AusNCP Secretariat in relation to the handling of complaints. The AusNCP Board was consulted in the development of this statement.
33. The AusNCP Board helps to ensure that the AusNCP is visible, accessible, transparent and accountable, in accordance with its obligations under the OECD Guidelines. Members may be called on to conduct procedural reviews of AusNCP complaints and may be consulted on various operational and administrative matters as needed.
34. From September 2019, all new cases are managed by Independent Examiners, who are supported by the AusNCP secretariat and the AusNCP Board.