



Australian National Contact Point Independent Examiner

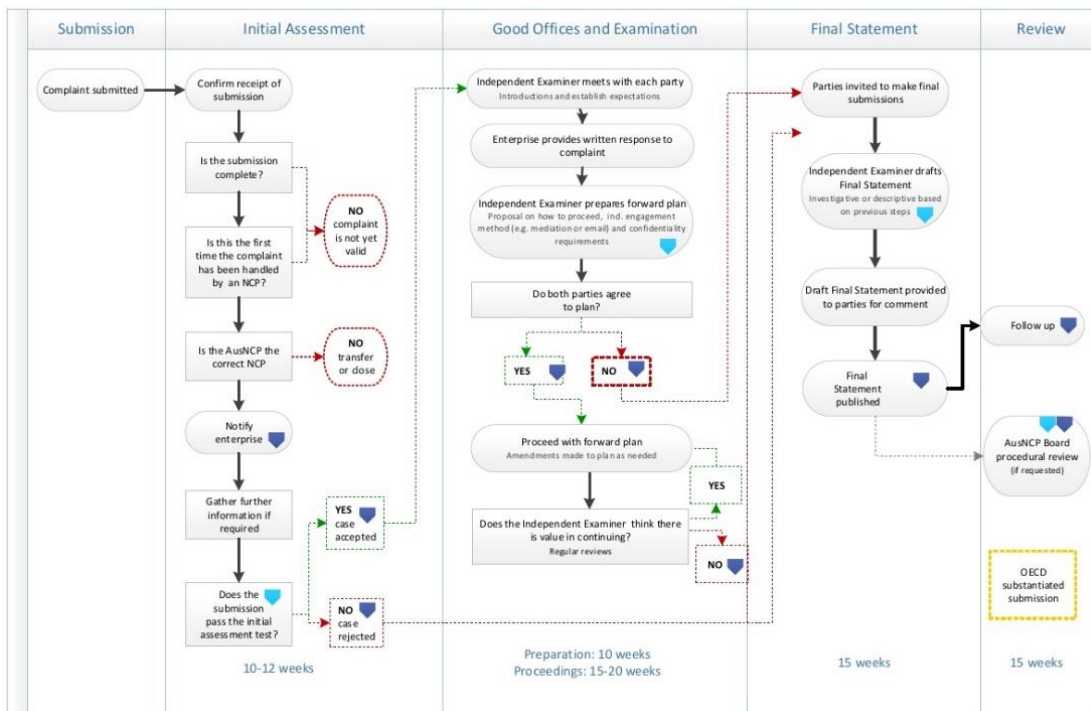
AusNCP complaints function

(observations for webinar *OECD Guidelines and AusNCP*, 8 Sep 2020)

The AusNCP can receive complaints that enterprises, connected with Australia, have acted inconsistently with the [OECD Guidelines](#). All complaints are dealt with in accordance with **the AusNCP's [Complaint Procedures](#)**,¹ which **specify how the AusNCP deals with complaints; and this paper provides only observations** and materials relevant to the AusNCP's complaint function.

The AusNCP's process and examples in dealing with complaints

The AusNCP's process for dealing with a complaint is summarised in this diagram,² and is subject to review by AusNCP's Governance and Advisory Board³ and also by the OECD's Investment Committee.⁴



The AusNCP has an Independent Examiner to manage the complaint process.⁵ Broadly, there are three potential outcomes for a complaint.

- (1) It is assessed as **not suitable to progress**, and a statement is made explaining why. A recent example is the decision and [statement not to accept the complaint regarding Deutsche Bank Australia](#).

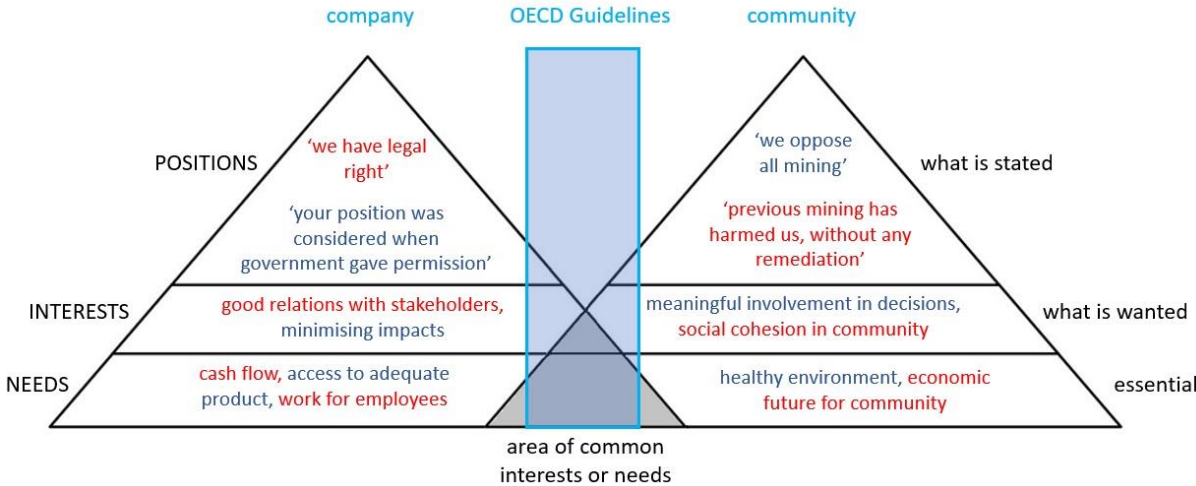
- (2) The complaint is assessed as suitable to proceed, 'good offices' are offered to the parties, but **the company does not engage**. In this case, **the AusNCP will assess the case and issue a final statement** which 'will where possible include a statement as to whether the enterprise's actions were consistent with the OECD Guidelines'.⁶ A recent example is the [statement regarding a complaint against Mercer PR](#).
- (3) The complaint has merit and the parties engaged in the 'good offices' facilitated by the AusNCP. **On completion of good offices, a statement is made reporting on that** outcome. A recent example is the case concerning impacts associated with an historic ANZ loan in Cambodia. There was mediation which did not reach agreement, reported in the [2018 final statement](#). As part of the AusNCP's follow-up, the parties undertook further mediation and agreed an outcome, which was reported in the [2020 follow up statement](#).

Thus, when a complaint is received by the AusNCP, the first stage is 'initial assessment' by the Independent Examiner, and the *only* factors considered are the six admissibility criteria contained in the OECD Guidelines.⁷ Where the Independent Examiner accepts the complaint, the parties are then encouraged to participate in a 'good offices' process.

'Good offices' engagement to help parties resolve issues

The Guidelines envisage flexibility in 'good offices', that the NCP will 'offer, and with the agreement of the parties involved, facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist the parties in dealing with the issues'.⁸ So the process does not *have* to be conciliation, but does have to be (1) consensual, and (2) not inconsistent with Guidelines. It is not a process which enforces parties' rights. Mediation/conciliation only works where parties are prepared to engage, and the Independent Examiner works with parties to get agreement about process first, before facilitating direct engagement between the parties.

A diagram can help understand some of these dynamics, and also typical factors present in a 'good offices' engagement under the OECD Guidelines. This uses a hypothetical example of a dispute between a community and a mining company.



This diagram is developed from one demonstrating voluntary mediation.⁹ Each party likely has stated positions, but also desired interests and essential needs. Mediation seeks to help the parties find whether, and what, interests or needs they may share and, if there is common ground, to reach some agreement about that. The extent to which the parties do (or do not) have common interests and needs will determine the potential outcome of the mediation. This is indicated above ('area of common interests or needs'), with possible examples from the community and mining company.

The additional dynamic of the 'good offices' process through the OECD Guidelines, is the NCP must ensure any outcome is consistent with the OECD Guidelines. The scope of the Guidelines may well include parts the parties' positions, interests, and needs – but this all will depend on the particular complaint.

Complaints under the OECD Guidelines

The basis for a complaint (or 'specific instance') under the Guidelines is about 'issues that arise relating to the implementation of the Guidelines'.¹⁰ So issues or disputes that are not 'relating to the implementation of the Guidelines' are not envisaged within NCPs' complaint functions. However the Guidelines incorporate *other* documents and standards; and reference to those can be central to resolving a complaint. These include the OECD's [Due Diligence Guidance for Responsible Business Conduct](#), which applies to all businesses, and also other documents focussed on particular issues.

- The G20/OECD [Principles of Corporate Governance](#)¹¹ address effective corporate governance, shareholder rights and equitable treatment, the role of stakeholders in corporate governance, disclosure & transparency, and responsibilities of the board. There are also separate principles on [Corporate Governance of State-Owned Enterprises](#) which the Guidelines apply to state-owned entities.¹²
- The OECD-FAO [Guidance for Responsible Agricultural Supply Chains](#) addresses issues such as labour rights, health and safety, tenure rights over and access to natural resources, animal welfare, and sustainable use of natural resources.
- The [Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas](#) guide 'provides a framework for detailed due diligence as a basis for responsible supply chain management of all minerals',¹³ having grown from its origins dealing only with tin, tantalum and tungsten. There is also a guide on [Practical actions for companies regarding child labour in mineral supply chains](#) and a recommendation that companies follow the [OECD Transfer Pricing Guidelines](#).¹⁴
- Guides on [Responsible Corporate Lending and Securities Underwriting](#) and [Responsible Business Conduct for Institutional Investors](#) both apply to banks and other financial entities, and address complexities in those areas around 'business relationship', due diligence, risk assessment, stakeholder engagement and 'remediation under the OECD Guidelines'.
- A [Stakeholder engagement in extractive industries](#) guide is particularly relevant for issues in Australia in the annexures addressing 'Engaging with indigenous peoples', 'Monitoring and evaluation framework for meaningful stakeholder engagement', and 'Engaging with women'.

- The [Garment & Footwear Sector](#) guide addresses areas including supply chain investigation and remediation, child labour, working time and wages, collective bargaining, hazardous chemicals, and responsible sourcing from homeworkers.
- Concepts of the UN's [Guiding Principles on Business and Human Rights \(UNGPs\)](#) are included in the OECD Guidelines ch IV, but the UNGPs help further detail what is expected of companies regarding policy, due-diligence and remediation.
- The OECD Guidelines reference various recommendations and declarations of the International Labour Organization,¹⁵ relevant to issues regarding the workplace and workforce;
- The OECD Guidelines also reference UN and other OECD materials regarding bribery and corruption.¹⁶

A useful resource, in understanding complaints under the Guidelines, is the OECD's [database](#) of complaints to (and statements by) NCPs.

Other NCP statements can provide some guidance but they are not binding precedents for two reasons. First, the NCP complaints function is a relatively new process, and NCP statements have some variance. An objective of Guidelines is that NCPs have 'functional equivalence'¹⁷ but each government is given flexibility to establish, organise and resource their NCP how they consider appropriate.¹⁸ More significant, in why other NCP statements are not binding precedents, is that the complaints-process emphasises its 'consensual and non-adversarial means'.¹⁹ Where an NCP statement reports an agreed outcome, the statement's content is influenced by what those parties will countenance.²⁰ Where the NCP process did not reach an agreed outcome, the NCP statement may make recommendations,²¹ and some NCPs have also made observations on whether the company observed the Guidelines, but NCP practice in this regard varies.²²

For the AusNCP, the content of its public statements from the complaint-handling process is determined by the [Complaint Procedures](#), which specify that a statement can include:

'determinations on whether an enterprise's actions were consistent with the Guidelines...

recommendations to the enterprise or other relevant bodies [including]

- a) encouraging an enterprise to improve (or more closely align) its compliance with its own stated corporate policies or the Guidelines more generally;*
- b) strengthening its due diligence arrangements (including staff training) to ensure risks are assessed and/or addressed in supply chains; and*
- c) options to address adverse impacts of activities; [and]*

may draw instances of inappropriate conduct to the attention of ... government agencies'.²³

Endnotes

- ¹ The current version is September 2019 and is regular reviewed including stakeholder and NGO input.
- ² From p17 of [AusNCP Complaint Procedures](#) .
- ³ [AusNCP Complaint Procedures](#) section 8. An example is the *Procedural Review Statement* regarding the AusNCP's handling of the complaint by Mr Palin regarding Deutsche Bank (14 May 2020) [available here](#).
- ⁴ *OECD Guidelines, Implementation Procedures, II, 2(b)*. An example is *Response by the Investment Committee to the Substantiated Submission by OECD Watch regarding the Australian National Contact Point*, DAF/INV(2018)34/FINAL, 30 November 2018 [available here](#).
- ⁵ As the position of Independent Examiner is new, some of the examples in this paper are of earlier statements and action of the AusNCP which would now be undertaken by the Independent Examiner.
- ⁶ [AusNCP Complaint Procedures](#) 6.2.2.
- ⁷ Detailed in 4.10 of [AusNCP Complaint Procedures](#).
- ⁸ *OECD Guidelines, Procedural Guidance IC, [2](d)*. Reflected in of [AusNCP Complaint Procedures](#), 5.1.
- ⁹ Acland, *A Sudden Outbreak of Common Sense: Managing Conflict Through Mediation* (Hutchison Business, 1990).
- ¹⁰ *OECD Guidelines, Implementation Procedures, I [1]*.
- ¹¹ Referred to in *OECD Guidelines, II General Policies, Commentary, [7]* and *III Disclosure, Commentary, [29]*.
- ¹² Referred to in *OECD Guidelines, II General Policies, Commentary, [10]*.
- ¹³ *OECD (2016), OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition, p4*.
- ¹⁴ Referred to in *OECD Guidelines, XI Taxation, Commentary, [106]*.
- ¹⁵ Mostly referenced in the Commentary to *OECD Guidelines, V. Employment and Industrial Relations*.
- ¹⁶ Mostly referenced in the Commentary to *OECD Guidelines, VII. Combating Bribery, Bribe Solicitation and Extortion*.
- ¹⁷ *OECD Guidelines, Procedural Guidance I, National Contact Points, involving the 'Core Criteria for Functional Equivalence' being Visibility, Accessibility, Transparency, and Accountability (which are further detailed in Procedural Guidance, Commentary, [9])*.
- ¹⁸ *OECD Guidelines, Procedural Guidance IA Institutional Arrangements*.
- ¹⁹ *OECD Guidelines, Procedural Guidance IA Institutional Arrangements*
- ²⁰ *OECD Guidelines, Procedural Guidance IC, [3]* and *Commentary, [34]*.
- ²¹ *OECD Guidelines, Procedural Guidance IC, [3]* and *Commentary, [35]-[36]*.
- ²² Discussed in [Guide for National Contact Points on Recommendations and Determinations](#) (OECD, 2019).
- ²³ [AusNCP Complaint Procedures](#) 6.1-6.4.