



## AusNCP Governance and Advisory Board

### Terms of Reference

#### Purpose

1. The Governance and Advisory Board (Board) provides advice and other support to the Australian Government's National Contact Point (AusNCP) and the Independent Examiners with the goal of ensuring the AusNCP is visible, accessible, transparent and accountable, in accordance with its obligations under the *OECD Guidelines for Multinational Enterprises* (the Guidelines).

#### Role

2. **The Board** will provide advice and expertise to support the effective functioning of the AusNCP, including on matters of governance and accountability. Board members will assist the AusNCP Independent Examiners by providing professional advice (in an individual capacity and not by consensus) relevant to the Independent Examiners' consideration of active and emerging complaints (also known as specific instances), including on procedural matters. Board members may, when necessary, be called on to form a Review Committee (a subset of the Board) to conduct procedural reviews of AusNCP complaints in accordance with the Australian National Contact Point Complaint Procedures.
3. **Board members** will actively support the AusNCP by using their own networks, events and publications to promote the Guidelines and the AusNCP's services. Members will be engaged on various operational and administrative matters as needed.

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4. The Board is responsible for supporting the AusNCP in promoting the *OECD Guidelines for Multinational Enterprises*, and for providing their expertise to assist the AusNCP's mediation and conciliation functions in accordance with the Guidelines and oversight of the procedural integrity of the function. Board members will:
  - 4.1 Actively assist in conducting outreach and publication activities that promote the AusNCP and the Guidelines, in accordance with an annual promotional plan. Board members are also encouraged to promote the application of the Guidelines as appropriate in their ordinary business.
  - 4.2 Support the effective handling of complaints, including providing input on, and oversight of, matters of procedural fairness. Members will engage with Independent Examiners as necessary to ensure accountability of decision making, in line with established and published guidance of the OECD and the AusNCP. This includes:

- a) Advising the Independent Examiners on the application of the Guidelines and procedures in relation to complaint handling and decision making.
- b) Recommending or facilitating access to additional expertise on issues outside the Board and Independent Examiners' knowledge and experience.
- c) Contributing to the AusNCP and the Independent Examiners' understanding of broader contexts and emerging issues relevant to complaints under consideration.
- d) Conducting procedural reviews of AusNCP complaints when necessary and in accordance with AusNCP procedural guidance.

4.3 While members are not required to form a consensus view, their feedback on these matters will be shared with other members, who are encouraged to take a collaborative approach. To maintain confidentiality of views, feedback will not be shared if there are sound reasons to do so.

4.4 The Board may make recommendations to the AusNCP regarding its terms of reference and any changes required to better achieve its objectives.

5. The Board is not responsible for:

5.1 Decisions or statements of the Independent Examiners on complaints, including content published in Final Statements.

5.2 Decisions about resources, reporting or other organisational matters, however it may provide advice to Treasury as necessary.

5.3 Formal representative duties for the AusNCP (international or domestic) except where invited by Treasury.

## Composition

- 6. The Board will be convened and chaired by a senior Treasury official, who will appoint members on the basis of their experience and expertise.
- 7. Where there are reasonable grounds to do so, the Chairperson may dissolve the Board, alter the permanent membership, or invite experts to participate in meetings on an ad-hoc basis. Circumstances that could lead to reasonable grounds to dissolve or alter Board membership could include, for example:
  - a) AusNCP is moved to another Australian Government agency that results in a change to government membership, significant restructure or changes to the function.
  - b) Significant change to Board membership categories, such as business organisations or unions advise they no longer wish to be represented on the Board.
- 8. The Board must be advised in writing in advance of any significant changes in membership or meeting attendance. Any changes to the Board composition or attendance will be included on the AusNCP website in accordance with the AusNCP's governance mandate to be transparent, visible, and accountable.

9. The Board will comprise a maximum of 12 members, with a quorum of four government and two external members including at least one business and one civil society or union representative, required to conduct a formal Board meeting. Member positions will be held by the Australian Government (eight seats, including the Chairperson), civil society (one seat), unions (one seat) and the business community (two seats). Non-government members will have a proxy. The AusNCP Independent Examiners will be permanent Observers to the Board for the purposes of contributing to the sound functioning of the AusNCP, seeking advice from the Board, reporting on their work in managing complaints and promoting the AusNCP and OECD's Guidelines for multinational enterprises.
10. As the agency responsible for the AusNCP function, Treasury will provide secretariat services to the Board, and all government agency members will bring to the Board relevant public policy expertise. Treasury will manage the AusNCP's international relationships as required under its obligations to the OECD Investment Committee.
11. Non-government members will bring expertise and stakeholder networks, from domestic and/ or international perspectives, in one or more of the following areas: responsible business conduct; complaint handling; public policy; and corporate governance.

## Board Operations

12. Membership is voluntary. Members are not remunerated for their services, however external members (including proxies) will be compensated by Treasury for pre-approved out of pocket expenses, including travel to attend relevant meetings convened by the Chairperson.
13. External members hold their position in an individual professional capacity, however are free to make representations on behalf of their constituent groups and collaborate with their formal proxy on significant matters. External members will be required to sign a confidentiality agreement.
14. Civil society and business members will be appointed for terms of three years. Unions have ongoing membership and will appoint their representatives.
15. All members are required to abide by the terms of reference and will be listed on the AusNCP website. They will conduct themselves in accordance with strict confidentiality requirements and have an obligation to disclose any conflicts and interests. Members are otherwise free to disclose non-sensitive information that supports these terms of reference and contributes to the broader objectives of the AusNCP facility. See Annex A for further guidance about the disclosure of interests and management of conflicts.
16. Proxies can be nominated by external members and appointed subject to Treasury's agreement. They will be subject to the same conduct requirements as members. The purpose of formally designating proxy members is to ensure continuity and appropriate representation at each meeting, as well as manage any significant conflicts of interest.
17. The Board will meet at least twice a year and can be convened more often if the Chair considers it necessary.
18. These Terms of Reference will be reviewed annually by Treasury, in consultation with Board members.

## Annex A: Guidelines for disclosing interests and managing conflicts

### Introduction and purpose

These Guidelines outline when and how conflicts of interest should be identified, assessed and managed by members of the AusNCP Governance and Advisory Board (the **Board**) and their Proxies (collectively referred to as **Board Members** in these Guidelines), based on advice from the Secretariat. They are designed to ensure that the activities of the Board can withstand scrutiny and are undertaken in a fair and unbiased way consistent with the OECD's '[Managing conflict of interest in the Public Service](#)' 2003.

The Australian Department of the Treasury (through the AusNCP Secretariat and as the accountable body responsible for all AusNCP operational matters) will use this Annex A guidance to assess disclosures and inform its advice to the Board regarding the identification and treatment of conflicts.

Where a conflict arises in relation to an Independent Examiner, the Secretariat will consult with the Board on proposed management strategies after applying the *AusNCP – Independent Examiner Conflicts of Interest Framework for the AusNCP Secretariat*. If the conflict relates to a Board member they will be recused from the discussion.

### Context

Conflicts of interest can arise when interests of Board Members or those of their close families, friends, or organisations with which they are involved, are incompatible or in competition with the interests of the AusNCP.

Conflicts of interest can:

- ❖ Result in decisions or actions taken that are not in the best interests of parties to a complaint or the AusNCP.
- ❖ Undermine the integrity and functioning of the Board.
- ❖ Breach the requirements of the OECD Guidelines if not properly managed.
- ❖ Attract adverse publicity and damage the work and reputation of the AusNCP and the Board.

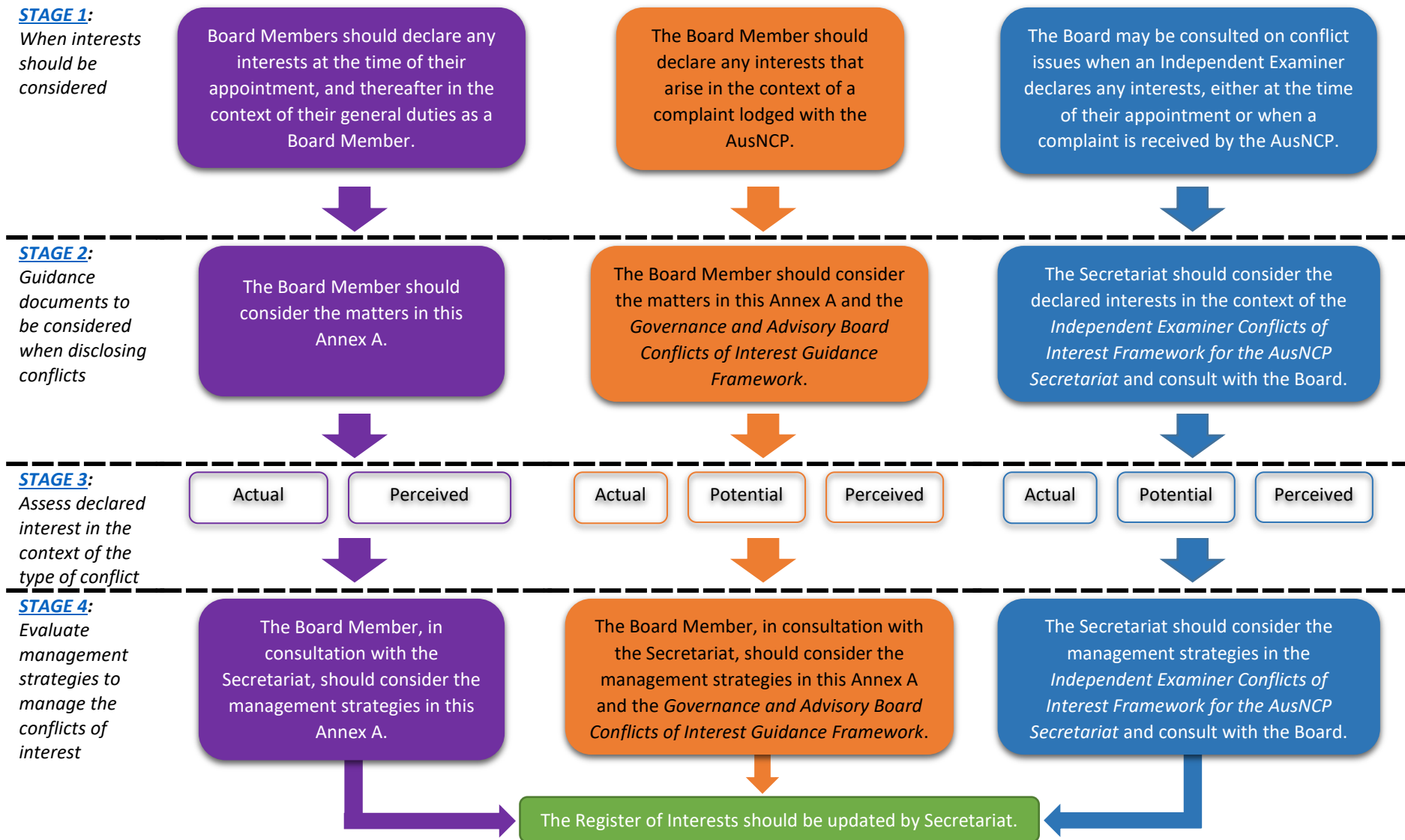
As stated in the Terms of Reference above, all Board Members must take proactive, reasonable steps to disclose their personal, financial and professional interests (including how those interests relate to their role and responsibilities on the Board).

Generally speaking, conflicts of interest issues should be considered by Board Members at the following times:

- ***On their appointment as a member or proxy of the Board and thereafter in the context of their general duties as Board Members*** – Board Members have an ongoing obligation to declare any conflict of interest that may arise in relation to the AusNCP functions more generally.
- ***In the context of a complaint*** – Where a Board member has a conflict of interest in relation to a complaint or AusNCP's functions, the Board (having regard to the advice of the Secretariat) will agree suitable measures to manage the conflict.

- ***Where an Independent Examiner has declared a conflict*** - If parties to a complaint raise conflict of interest issues relating to the allocated Independent Examiner during the course of an active complaint, the relevant Independent Examiner will consider and address these matters with the Secretariat in accordance with the *AusNCP – Independent Examiner Conflicts of Interest Framework for the AusNCP Secretariat*. The Secretariat in turn will consult with the Board regarding its proposed conflict management strategies.

The following diagram summarises when and how the Board should address conflicts:



## Framework for addressing conflicts of interest

A context-specific approach is required to effectively address the different conflicts that may arise. The following guidance considers each of the stages identified in the diagram above and establishes procedures for identifying and managing conflict of interest situations.

The Secretariat has a significant role in advising the Board and maintaining materials relating to conflicts of interest. Secretariat staff are also required as a condition of their employment to report any relevant interests that arise in the course of their role. In the event that staff within the Secretariat have an interest related to the functions of the AusNCP, this will be handled in accordance with established Australian Public Service protocols.

### Stage 1 – Identifying interests and conflicts for Board Members

#### What is a conflict?

A conflict of interest occurs when a Board Member's duty to the AusNCP is, or could be perceived to be, improperly influenced by the performance of their duties, obligations or interests elsewhere, such as their business or workplace interests, or family or friends.

#### Why is disclosure of conflicts important?

A conflict of interest has the potential to undermine the public and stakeholder's confidence in the performance of the AusNCP and its processes for resolving complaints. It can also damage the reputation of individual Board Members – even those not directly involved in an identified complaint. For this reason, it is important that Board Members and those involved in the AusNCP are alert to conflict of interest issues and promptly disclose all relevant information about a conflict:

- at the time of their appointment,
- when their personal circumstances change after the initial disclosure has been made,
- when a complaint is submitted or
- if/when a new situation arises (such as when a procedural review is required).

## When might a conflict arise?

An interest (but not necessarily conflict) may arise if the Board Member:

- previously had, currently has or intends to have direct involvement in a complaint prior to it being submitted to the AusNCP (as opposed to simply raising awareness of the NCP function and explaining general procedural information to prospective notifiers);
- represents, or is employed by (or consults to), organisations with financial or contractual links or affiliations to a party to a complaint;
- has a close personal relationship (e.g. spouse, domestic partner or immediate family member) with someone employed by or otherwise supporting (including through a board appointment or consulting services), a party to a complaint;
- holds an account, or major shareholdings with a party to a complaint; and
- has a close personal relationship with those who may have the above interests.

This is not an exhaustive list of possible conflicts of interests, and it is up to the individuals concerned to consider and fully disclose interests that may impact the functions of the AusNCP and/or the public's confidence in the AusNCP's activities.

Board Members must regularly assess whether they have an interest and take reasonable steps to avoid situations where their private financial, professional or other interests could be, or could be perceived to be, in conflict with their role. Board Members must not allow their interests to improperly influence the decisions they make, the actions they take or the advice they provide in the course of their official duties.



## Stage 2 - Disclosing interests and conflicts

In addition to the ongoing requirement to disclose interests, the Secretariat will request that Board Members consider their interests and, where required, make a conflict of interest declaration or update an existing declaration. It is important that declarations provide sufficient detail on the relevant interest to facilitate an informed assessment of the nature of the interest, the type of conflict that may arise and appropriate management strategies.

### **Disclosures to be recorded in the Register of Interests**

Details of disclosed interests will be recorded in a Register of Interests substantially in the form of the table contained in these Guidelines. The Secretariat is responsible for circulating the Register of Interests to the Board when updates are made. The Register of Interests and any declarations made by Board Members will be maintained by the Secretariat and held in confidence by the Secretariat.

The Register will not be publicly disclosed due to the sensitive nature of complaints and Board Member's interests. The Secretariat may require Board Members to provide a signed confidentiality agreement relating to the confidentiality of the Register of Interests.

### **Leveraging Board Member expertise and networks**

Recognising that the Board is comprised of government and non-government / external members, these Guidelines aim to preserve access to the expertise and stakeholder networks members bring to the Board. While external Board members hold their position in an individual professional capacity, it is important they remain free to make representations on behalf of their constituent groups.

Professional or personal associations with a party to a complaint from the Board members' stakeholder network or constituency will not generally be assessed as an **actual** conflict of interest, except in circumstances where they have been *directly involved* in the preparation and/ or lodgement of a complaint to the AusNCP (including being employed by a party to a complaint). However, even where an actual conflict does not exist, the perception of a conflict can arise which may need to be managed to the extent possible.

### Stage 3 – Assessing declared interests

The Secretariat will assess all declared interests as actual, potential or perceived/ apparent conflicts of interest in accordance with the following criteria:

#### **Actual**

Where the AusNCP considers that a real conflict exists between the Board Member's current official duties and existing private or professional interests that improperly influences the performance of his or her duties outlined in the Role of the Board in the Terms of Reference).

#### **Potential**

Where the AusNCP considers that private interests are not currently in conflict with official duties, but could come into conflict with the Board Member's official duties at some future point.

#### **Perceived / Apparent**

Where the AusNCP considers that it appears or it could be reasonably perceived that private interests are improperly influencing the performance of the Board Member's official duties, whether or not that is actually the case.

Examples of the different types of conflicts include:

**Actual** conflicts of interest may arise where a Board member is involved with a complaint in which he/she (or a close family member) holds a managerial position.

**Potential** conflicts of interest may arise where a Board member has an interest in an entity who may be a party to a complaint or may have an interest in that complaint (in circumstances where full details of the parties to the complaint are not yet known), or a close personal relationship with someone who has an interest in the complaint or who occupies a managerial position of a party who may become involved in the complaint.

**Perceived / Apparent** conflicts of interest can occur where a Board member maintains strong social, personal and/ or professional relationships with parties to a complaint (including coaching prospective notifiers to craft their complaint by drawing on information not publicly available).

As part of the assessment process:

- **The Secretariat will consult with the relevant Board Member** – The AusNCP Secretariat will share with the relevant Board member its assessment of all new disclosures. Board Members should not undertake to assess for themselves whether or not their interest is materially relevant. The Secretariat will initially determine the materiality of any disclosures made by Board Members and advise the Board of its views on the materiality of an interest or conflict.
- **Register of Interests will reflect the categories of conflict** – The Register of Interests will reflect the Secretariat’s assessment of all declared interests as actual, apparent or potential, in accordance with the following criteria. The purpose of categorising the interest in this manner is to ensure full transparency, common language and mutual understanding for all Board Members

#### Stage 4 – Evaluate management strategies to manage the conflicts of interest

Stage 4 of the conflict of interest process involves identifying appropriate management strategies for addressing/ resolving a conflict. Fundamentally the AusNCP should take remedial action in circumstances where a conflict could undermine the Board’s (and/or it’s individual members) ability to carry out its role and responsibilities impartially and with integrity.

#### Factors for consideration when determining an appropriate management strategy

To determine an appropriate management strategy the following factors should be considered:

- a) the type of conflict assessed by the Secretariat (i.e. whether the interest gives rise to an actual, potential or perceived/ apparent conflict);
- b) the nature of the interest disclosed including the extent to which the interest is ongoing or pervasive;
- c) the degree of influence a Board member might have on the issue or individuals involved;
- d) whether there is a material benefit to be gained or could reasonably be seen to be gained; and/or
- e) the specific circumstances of the individual case.

## Evaluation of specific management strategies for declared conflicts

Following the Secretariat's assessment of a disclosed interest, the Board (not including the relevant Board Member) should consider the possible management strategies that may be applicable to the declared conflict. The Board should work together with the Secretariat during this process to evaluate the appropriateness of any management strategies and the implementation requirements for the proposed strategies.

Possible management strategies may include, but are not limited to, the following:

- sharing information with the Board about the interest and how it may conflict with the Board's role;
- excluding the relevant Board Member from correspondence or other information on a matter in part or full;
- ensuring the relevant Board Member is not present for discussions on the matter in part or full;
- avoiding sharing internal papers that discuss the matter with the relevant Board Member in part or full;
- the Board Member avoiding informal discussions that might influence fellow Board Members on the matter in part or full;
- excluding a Board Member from participating in Reviews if there is an actual or perceived/apparent conflict;
- temporarily appointing additional external Proxy to undertake certain specific duties (eg advising on a complaint) if the existing Proxy could be or have become compromised;
- the Board Member divesting or liquidating the interest if possible in the circumstances (this management strategy may be required if the interest is likely to recur frequently and undermine the Board Member's capacity to perform its role on an ongoing basis); and/or
- the Board Member being recused from their role in the matter (in particular where it is not possible to quarantine information, or where it is not practical for the Board Member to be excluded from certain parts of the matter).

## Review and update of Guidelines

These Guidelines were developed in December 2021 to enhance the advice on conflicts outlined in the AusNCP Complaint Procedures. These Guidelines are now appended as an Annex to the current published Terms of Reference for the AusNCP Governance and Advisory Board.

These Guidelines will be reviewed annually to ensure they remain fit for purpose. The Register of Interests will be updated and circulated throughout the year as required and tabled for input at each formal Board meeting.

## AusNCP Register of Interests

(to be held in strict confidence and not for wider circulation)

Name and position	Position	Appointment dates	Declared interest*	Relevance	Assessment and outcome	Remedial action taken
		Commenced:  Concluded:	Personal:  Professional:  Other:	Complaint:  Other issue:	Nature of influence:  Characterisation: [real/apparent/potential]	