



Australian National Contact Point
for the OECD Guidelines for Multinational Enterprises

Follow up Statement

In relation to the complaint submitted by Andrew Starkey and
Robert Starkey regarding ElectraNet Pty Ltd

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FOLLOW UP STATEMENT

1. On 9 June 2021, the Australian National Contact Point (**AusNCP**) issued a Final Statement¹ of the Independent Examiner (**IE**) regarding a complaint submitted by Andrew Starkey and Robert Starkey (**Complainants**) regarding ElectraNet Pty Ltd.² This Follow Up Statement is made in accordance with Chapter 7 of the AusNCP Specific Instance Procedures³ and examines the extent to which the recommendations in the Final Statement have been implemented. In summary, ElectraNet has elected not to engage in the Follow Up process and has not provided sufficient information in this Follow Up process to demonstrate that it has taken any steps in response to the Final Statement.
2. The Complaint related to the allegations that ElectraNet's construction of electricity facilities in South Australia damaged First Nations heritage sites for which the Complainants have traditional custodial responsibilities. In reaching the Final Statement that is the subject of this follow up, the IE assessed the Complaint, engaged with the parties, and accepted the Complaint in relation to one of the identified sites, the Davenport Mythological Site.
3. The IE acknowledged that ElectraNet had engaged and made agreements with various First Nations groups and sought to comply with domestic law in relation to heritage and native title rights. However, the Final Statement noted that in relation to the Davenport Mythological Site, ElectraNet did not engage with the Complainants or provide evidence to demonstrate how the concerns raised about the Davenport Mythological Site were addressed, and that its failure to do so was inconsistent with the OECD Guidelines for Multinational Enterprises (**Guidelines**).⁴
4. The IE noted that in some matters of concern to First Nations communities the OECD Guidelines require higher standards of due diligence than those enshrined in domestic law and specifically noted that:

Many enterprises negotiate and make agreements with Indigenous groups, beyond the legal minimums required by Australian law, which

¹ Final Statement, 9 June 2021, Available from: https://ausncp.gov.au/sites/default/files/2021-06/AusNCP_Final_Statement_Starkey_ElectraNet.pdf.

² Reference to Published Final Statement.

³ Available from: <https://ausncp.gov.au/sites/default/files/2022-07/AusNCP-complaint-procedures.pdf>.

⁴ Final Statement paragraph 61. The Guidelines are available from: <http://mneguidelines.oecd.org/guidelines/>.

*is a way to address FPIC expectations in international standards and the Guidelines.*⁵

The IE recommended that:

- 3.1 ElectraNet should ensure that, somewhere in its governance there is familiarity with the Guidelines.
- 3.2 ElectraNet should, in the future, take any opportunity to engage in complaint processes arising under the Guidelines.
- 3.3 Direct dialogue between ElectraNet and the Starkeys, around the Davenport Mythological Site, would assist in the resolution of any outstanding issues.

5. The IE also recommended the Final Statement to each federal and state government agency in Australia responsible for First Nations heritage preservation and noted that these agencies may wish to consider how each agency's procedures and policies can encourage Enterprise actions consistent with the Guidelines.
6. The AusNCP commenced the Follow Up procedure in June 2022. The purpose of this Follow Up procedure is to:

*Examine the extent to which the recommendations in the final statement have been implemented and whether any further engagement from the AusNCP is warranted.*⁶

7. At the outset of the Follow Up process both parties were provided with an opportunity to make verbal and written submissions. I also offered both parties the opportunity to participate in the AusNCP Good Offices process either through joint or shuttle conversations to address any outstanding concerns.
8. The Complainants provided verbal and written submissions specifically in relation to the Follow Up Process. The Complainants' representatives also sought to engage with ElectraNet through the AusNCP Good Offices process so that a negotiated outcome could be reached.
9. ElectraNet provided a short written response to the AusNCP indicating that it did not wish to participate in the Follow Up process as it considered there were no substantive recommendations contained within the AusNCP Final Statement from June 2021.
10. In issuing this Follow Up statement, it is not my role to reconsider those matters considered by the IE prior to the Final Statement. My consideration is limited to

⁵ Final Statement paragraph 56.

⁶ Paragraph 7.2 of the Australian National Contact Point Complaint Procedures, July 2022, Available from: <https://ausncp.gov.au/sites/default/files/2022-07/AusNCP-complaint-procedures.pdf>.

an assessment of whether the recommendations of the IE have been acted upon in the past 12 months.

11. At the time the Final Statement was issued ElectraNet remained concerned about whether it fulfilled the requirements of a multinational enterprise for the purposes of compliance with the Guidelines.⁷ The Final Statement noted that ElectraNet did not engage with the AusNCP Good Offices process or provide requested information, as it did not accept that the Complainants had effectively demonstrated that it was a multinational enterprise for the purposes of the Guidelines. The IE addressed this issue by explaining that, at the time, the majority ownership of ElectraNet by foreign enterprises introduced a 'multinational element' to its operations and that this was sufficient for the IE to consider the Complaint.⁸
12. Since the date of the Final Statement, I understand that the ownership of ElectraNet has changed to a majority Australian owned enterprise.⁹ ElectraNet has not raised this issue in the Follow Up process. In any event, I note that any changes to ElectraNet's ownership structure does not affect the validity of the Final Statement or this Follow Up Process.
13. ElectraNet declined to participate in this Follow Up process as it considered there were no substantive recommendations contained within the Final Statement. ElectraNet explained that it is:

*Committed to the protection of cultural heritage and will continue to engage and work respectfully with Andrew and Robert Starkey (as we do with other Traditional Owners) where a mutual interest exists, to avoid impact to cultural heritage sites of significance as necessary works are undertaken across the electricity transmission network.*¹⁰
14. Since the above response, ElectraNet was provided with a Draft version of this Follow Up Statement containing the recommendations outlined at paragraph 4 above. Notwithstanding the recommendations being brought to its attention, ElectraNet has maintained its position of not engaging with this Follow Up process.
15. Aside from direct communications with the AusNCP through the Follow Up Process, I also note that ElectraNet provided SBS News with the following statement in early June 2022:

It (ElectraNet) regrets the damage caused to the Davenport mythological site. It says it had engaged with three separate

⁷ Final Statement para 16-19.

⁸ Final Statement para 18-19.

⁹ ElectraNet webpage *Who We Are*, accessed 27 August 2022

Available from: <https://www.electranet.com.au/who-we-are/ownership/>.

¹⁰ Letter to Independent Examiner dated 3 December 2020.

[A]boriginal organisations but has now updated its processes to identify all individual knowledge holders of relevant significant sites.¹¹

16. It is the Complainants' general contention that ElectraNet has failed to act upon any of the recommendations of the Final Statement. The Complainants contend that ElectraNet has not communicated any change to its governance practices that would demonstrate its compliance with the Guidelines. The Complainants also stated that ElectraNet had not made any attempt to contact the Starkeys to engage in direct dialogue in relation to the Davenport Mythological Site.¹²
17. Having considered the Final Statement, and the written submissions provided by the parties in this Follow Up process, it is my assessment that ElectraNet has not provided sufficient information to demonstrate that it has taken any steps in response to the Final Statement and has erroneously concluded that no substantive recommendations were made by the Final Statement. ElectraNet has not provided the AusNCP or the Complainants with any evidence to indicate how its governance processes have been amended to reflect an awareness of the Guidelines and what measures have been put in place to ensure the Guidelines will be considered and complied with in future actions.
18. Aside from broad statements of intent, ElectraNet's communications do not identify specific governance instruments, policies or updated processes that would give practical effect to these commitments. If ElectraNet has made progress, the Guidelines recommend that any relevant policy is made publicly available and also communicated to concerned stakeholders such as the Complainants.¹³
19. I acknowledge that ElectraNet has expressed a commitment to the protection of cultural heritage and working with Traditional Owners. However, as it has not provided details of the specific steps it has taken to enact this commitment, I am unable to find that any steps have been taken by ElectraNet to enact the recommendations of the Final Statement.
20. With respect to the IE's recommendation that the Final Statement be brought to the attention of relevant Government Agencies, I note that a copy of the Final Statement was provided by the AusNCP Secretariat to relevant Government agencies for consideration shortly after the publication of the Final Statement in June 2021.

¹¹ SBS News (3 June 2022) *The Aboriginal family fighting to protect their heritage in South Australia* [news segment transcript], SBS News, 2.

¹² Letter to Independent Examiner dated 6 November 2020.

¹³ Specifically, the OECD Guidelines recommend that *enterprises express their commitment to respect human rights through a statement of policy that... is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties*. See paragraph 44 of the OECD Guidelines for Multinational Enterprises 2011, Available from: <https://www.oecd.org/daf/inv/mne/48004323.pdf>.

21. In line with section 7.6 of the AusNCP's [Complaint Procedures](#), this Follow Up statement will be published on the AusNCP's website and shared with the parties, members of the board and relevant Government Agencies for their consideration.

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