



Australian National Contact Point
for the OECD Guidelines for Multinational Enterprises

Initial Assessment

This complaint was submitted by John Podgorelec (on behalf of Andrew Starkey and Robert Starkey) in relation to ElectraNet Pty Ltd

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EXECUTIVE SUMMARY

1. On 28 October 2020, the Australian National Contact Point (**AusNCP**) received a complaint (**Complaint**) on behalf of Andrew Starkey and Robert Starkey (**Starkeys**) against ElectraNet Pty Ltd (**ElectraNet**). The Complaint alleges that ElectraNet's construction of electricity facilities in South Australia damaged Aboriginal heritage sites for which the Starkeys have traditional custodial responsibilities, contrary to the *OECD Guidelines for Multinational Enterprises* (**OECD Guidelines**).
2. The AusNCP Independent Examiner considered the six admissibility criteria of the Initial Assessment process, engaged with the parties, and determined to accept some aspects of the Complaint and offer 'good offices' to the parties regarding the due-diligence and arrangements concerning the activity at one site.
3. The following observations were made during the Initial Assessment.
 - 3.1 The Starkeys demonstrated they have relevant interest in the matter, the concerns are plausible and related to the application of the OECD Guidelines, and there is link between ElectraNet and the issues raised in the Complaint.
 - 3.2 There is a question of whether the OECD Guidelines apply, given this is an Australian corporation and the impacts occurred in Australia. There are, however, multinational aspects to ElectraNet's shareholding and management, making it inappropriate to reject the Complaint on this basis at the Initial Assessment phase.
 - 3.3 The OECD Guidelines outline expectations on enterprises where their actions impact Indigenous people. Relevant here are standards about group rights, which are not determined by the presence or absence of agreement with individual Indigenous persons.
 - 3.4 The construction affecting *most* sites (all the sites except one) occurred after an agreement with an Indigenous body which has publicly acknowledged authority to represent those Aboriginal people with rights to maintain and protect sites of cultural significance in the area. There was no indication, from that body, of concerns with the agreement nor ElectraNet's actions. The Complaint was not accepted concerning those sites.
 - 3.5 However one location ('Davenport mythological site') is outside that area. Regarding the Davenport mythological site, it is not apparent whether the types of due-diligence expected by the OECD Guidelines occurred with *all* relevant Indigenous stakeholders for that site.
 - 3.6 The AusNCP accepts this Complaint *in part*, and will offer its 'good offices' under the OECD Guidelines, focussing on the 'Davenport mythological site', the due-diligence requirements of the OECD Guidelines, and ElectraNet's governance concerning that site.
4. This Initial Assessment is not a determination on the merits of the claims presented, nor is it an assessment of whether ElectraNet's actions are consistent with the OECD Guidelines.
5. This statement is available on the AusNCP website at www.ausncp.gov.au.

INITIAL ASSESSMENT

Parties, complaint and outcomes sought

6. On 28 October 2020, John Podgorelec submitted to the AusNCP a complaint under the OECD Guidelines¹ on behalf of the Starkeys. The Complaint is against the company ElectraNet.
7. Much of the Complaint repeats material and statements the Starkeys had already made to a Commonwealth Parliamentary inquiry about impacts on Indigenous heritage. That inquiry has published the submission by the Starkeys and also a submission in response by ElectraNet. Those documents have also been considered by the Independent Examiner in assessing the Complaint.
8. The Complaint alleges that, in constructing an electricity transmission line for OZ Minerals, ElectraNet 'destroyed or disturbed at least 20 Aboriginal heritage sites' for which the Starkeys 'have traditional custodial responsibilities'. The Complaint notes that ElectraNet did consult with a relevant Aboriginal group (Kokatha Aboriginal Corporation or **KAC**) regarding 'the majority of sites'. However the Complaint asserts that 'The failure of the Enterprise (or any of its project partners) to consult the registered holders of the confidential site information [the Starkeys], at any stage of construction, confirms that the required standard of due diligence [in the OECD Guidelines] was not met'. In the Complaint, the Starkeys sought commitments from ElectraNet to fund a heritage and human rights impact assessment, contribute to a fund to assist long-term heritage site protection, and provide compensation for the loss and harm from the impacts.
9. The Complaint alleges that ElectraNet 'failed to observe ... the following sections of the Guidelines:

Ch. II General Policies

Paras 10 & 14 - for failing to a) "carry out risk-based due diligence" and b) "engage with relevant stakeholders"

Para 2 - for failing to "respect... internationally recognised human rights"

Paras 11-13 - failing to avoid causing or contributing to adverse impacts and address such impacts

Ch. IV Human Rights

Paras 1-3 - for failing to respect, prevent and avoid infringing human rights and failing to address the same

Para 5 - for failing to "carry out human rights due diligence"

Para 6 - for failing to "[remediate]... adverse human rights impacts... that they have caused or contributed to... " "

¹ OECD, *OECD Guidelines for Multinational Enterprises* (2011, OECD Publishing).

10. Consistent with AusNCP Complaint Procedures 4.8 and 4.9, ElectraNet was notified that a complaint had been made and provided with a copy of the Complaint.
11. ElectraNet explained, in response to the Complaint and in its submission to the Parliamentary inquiry, that:
 - 11.1 'The Project traverses the native title determination land of three native title groups, namely KAC, Barnjarla Determination Aboriginal Corporation (BDAC) and Nukunu Wapma Thura Aboriginal Corporation (Nukunu)'
 - 11.2 'An agreement between OZ Minerals and KAC is the relevant agreement for the period of construction'
 - 11.3 'Detailed Cultural Heritage Management Plans were developed in collaboration with the heritage teams nominated by KAC, BDAC and or Nukunu and implemented for the Project [which included] In-field flagging-off of all cultural heritage sites by traditional owner monitors prior to ground disturbing works to physically demarcate the sites; In-field cultural heritage monitoring in line with the recommendations in the cultural heritage survey report; [and] In the Kokatha Native Title Determination Area this included monitoring of all ground'.

Assessment criteria

12. The OECD Guidelines require an NCP, when it receives a complaint, to conduct an 'initial assessment'. This is to determine whether the issues are 'bona fide' (in other words real or authentic) and relevant to the implementation of the OECD Guidelines (in other words within their scope of coverage). The AusNCP has procedures, mirroring the OECD Guidelines, which specify that in deciding whether to accept a complaint, six admissibility criteria are assessed:
 - 12.1 the identity of the party concerned and its interest in the matter;
 - 12.2 whether the issue is material and substantiated;
 - 12.3 whether there seems to be a link between the enterprise's activities and the issue raised in the complaint;
 - 12.4 the relevance of applicable law and procedures, including court rulings;
 - 12.5 how similar issues have been, or are being, treated in other domestic or international proceedings; and
 - 12.6 whether the consideration of the complaint would contribute to the purposes and effectiveness of the OECD Guidelines.
13. The Independent Examiner engaged with the Starkeys (through their representative) and ElectraNet, from October to December 2020, in gathering more information and inviting submissions on various aspects.
14. Observations regarding each of the six admissibility criteria are contained in the Annexure to this Initial Assessment. The Annexure is not published with this Initial Assessment but has been provided to the parties, so that they are aware of the reasoning and application in detail. If, after the completion of any 'good offices stage', any material in the Annexure remains relevant that will be incorporated into a Final Statement on completion of this matter. The main points in the Annexure are summarised in the paragraphs below.

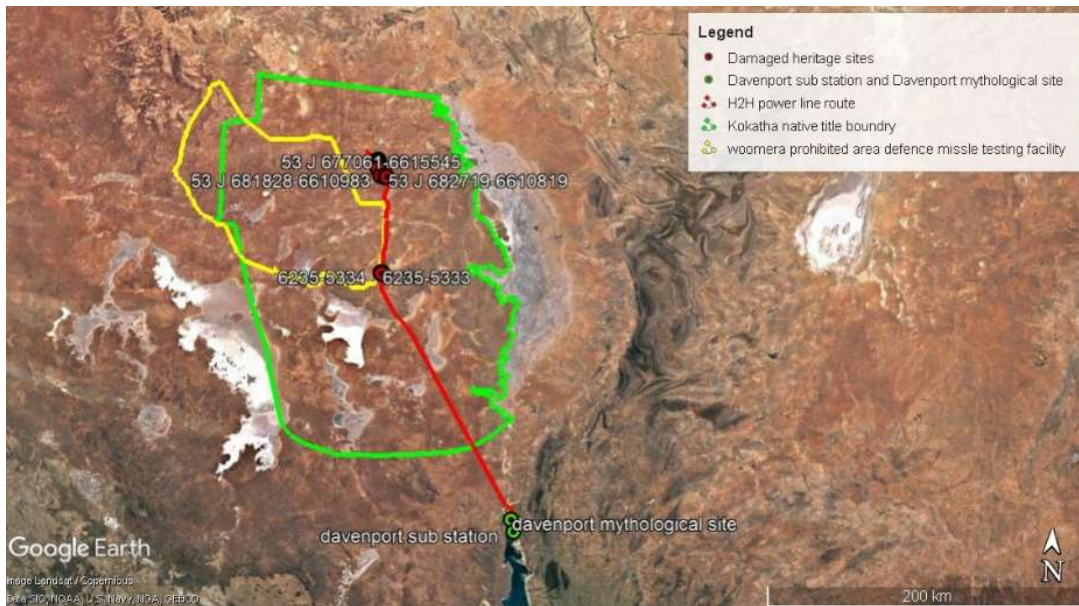
15. Consistent with section II paragraph 26, a complaint under the OECD Guidelines is about the expectations of the Guidelines; it is not about compliance nor breach of Australian laws. Actions which parties take, in following Australian law, can also be relevant to meeting the Guidelines. Equally, factual findings by Australian courts and tribunals may identify matters relevant to meeting the Guidelines. However parties' statements about compliance or breach of Australian law are not, of themselves, relevant to assessing a complaint under the OECD Guidelines.
16. Most of the admissibility criteria are sufficiently evident for the purposes of Initial Assessment. This includes: the identity of the party making the Complaint and its interest in the matter; whether the issue is material and substantiated; and the link between the enterprise's activities and the issues raised in the Complaint.
17. There is a preliminary issue of whether the OECD Guidelines apply given this is an Australian corporation and the events complained of occurred in Australia. ElectraNet's position is that 'no multinational enterprise exists', describing itself as a 'wholly domestic Australian based and controlled enterprise'. There are, however, some multinational aspects to ElectraNet's shareholding and management. The majority of controlling interests in ElectraNet are international, so at some stage in its governance and activities, there should be consideration of the issues and expectations in the OECD Guidelines. This makes it inappropriate to reject the Complaint on the basis of 'no multinational' at this Initial Assessment phase.
18. The OECD Guidelines contain expectations on enterprises where their actions impact Indigenous people; and these are detailed in relevant international and Australian standards and legal proceedings. Of significance here is the issue of free, prior, informed consent (**FPIC**) of Indigenous peoples concerning projects affecting their lands or territories and other resources.² FPIC is a group right and is not determined by the presence or absence of agreement with individual Indigenous persons.³

² For example, see 'Engaging with indigenous peoples' Annexure B to OECD, *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector* (2017, Organisation for Economic Co-Operation and Development).

³ For example, in *United Nations Declaration on the Rights of Indigenous Peoples* (UN General Assembly, 13 Sep 2007, UN doc A/RES/61/295), all FPIC rights (arts 10, 11, 19, 28, 29 & 32) are expressed of 'peoples' not of 'individuals'. Various cases have determined consistency with international standards by examining the whole context of Indigenous engagement and not whether some individuals agree or oppose the development: eg.:

- *Mahuika -v- NZL* (Human Rights Committee, UN doc CCPR/C/70/D/547/1993, 16 Nov 2000), [9.6]-[9.8];
- *NOR NCP, Complaint from The Future In Our Hands (FIOH) against Intex Resources Asa and the Mindoro Nickel Project* (2011, Norwegian National Contact Point for the OECD Guidelines for Multinational Enterprises), 23 & 25;
- *Kitok -v- SWE* (Human Rights Committee, UN doc CCPR/C/33/D/197/1985, 27 Jul 1988), [9.8];
- *Ågren -v- SWE* (Committee on the Elimination of Racial Discrimination, UN doc CERD/C/102/D/54/2013, 18 Dec 2020), [6.18]-[6.20];
- *Poma Poma -v- PER* (Human Rights Committee, UN doc CCPR/C/95/D/1457/2006, 24 April 2009), [7.6]-[7.7].

19. All the sites (except one) identified in the Complaint are in the 'Kokatha determination area', which is indicated in the following image (extracted from the Complaint) as the green-bordered area labelled 'Kokatha native title boundary'.



20. For the Kokatha determination area, the KAC has been recognised, through extensive court proceedings involving the Starkeys, as having authority to represent the Aboriginal people with rights to maintain and protect sites of cultural significance.⁴ The construction relevant to the sites in Kokatha determination area occurred after an agreement with the KAC. ElectraNet indicated that its activities at those sites were in accordance with that agreement. There was no indication from the KAC of concerns with the agreement nor ElectraNet's actions. Accordingly, the Complaint is not accepted in relation to those sites.
21. However one location ('Davenport mythological site') is outside the Kokatha determination area. Andrew Starkey has been recognised by other domestic court proceedings as having traditional Indigenous interests around this location.⁵ Unlike the other areas, there was no basis identified by ElectraNet which could indicate it had undertaken the types of due-diligence action expected by the OECD Guidelines with *all* relevant Indigenous stakeholders for the Davenport mythological site. Accordingly, 'good offices' will be offered on this aspect.

⁴ *Starkey -v- South Australia* [2014] FCA 924, order 15.

⁵ *Croft (Barnjarla Group) -v- South Australia* [2020] FCA 888, [65]-[73] & [77].

Conclusion

22. In the circumstances, the Independent Examiner considers this Complaint merits further consideration. The AusNCP will offer its 'good offices', within the OECD Guidelines, to facilitate the exchange of information between the parties (which can include conciliation, formal mediation or facilitated discussions) with the aim of arriving at a mutually agreed resolution.
- 22.1 Any engagement would be facilitated by the Independent Examiner, and focus only on the 'Davenport mythological site', the due-diligence requirements of the OECD Guidelines, and ElectraNet's governance concerning that site.
- 22.2 The aim of the 'good offices' process would be to help the parties' exchange and determine whether they can reach any agreement consistent with the OECD Guidelines.
- 22.3 The AusNCP will formally ask the parties whether they are willing to engage in the 'good offices' process. This would involve the Independent Examiner providing information to the parties on the process and preparing a framework for handling any conciliation, mediation or facilitated discussions. Subject to their response, the Independent Examiner will liaise with the parties to arrange how the 'good offices' stage will proceed.
- 22.4 If, through the good offices, the parties reach an agreement the AusNCP will then publish a final statement with the results of the proceedings. Information regarding the *contents* of the discussions and the agreement would only be published with the consent of the parties.
- 22.5 If no agreement is reached, or one of the parties is not willing to take part in the proceedings, the AusNCP's procedures require that to be identified in a published final statement. The final statement, by the Independent Examiner, would include analysis of the issue and state whether ElectraNet's actions were consistent with the OECD Guidelines. It may also include recommendations to ElectraNet or other relevant bodies where appropriate.
23. A draft of this Initial Assessment was provided, for comment, to the AusNCP's Governance and Advisory Board, and then to the parties. All comments were considered by the Independent Examiner, in finalising this Initial Assessment, with the decision remaining the responsibility (and discretion) of the Independent Examiner.
24. The AusNCP Procedures specify that 'acceptance or rejection of a complaint is not an assessment of whether the enterprise's actions are consistent with the OECD Guidelines'.⁶

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⁶ AusNCP Complaint Procedures (above n5), 4.16.