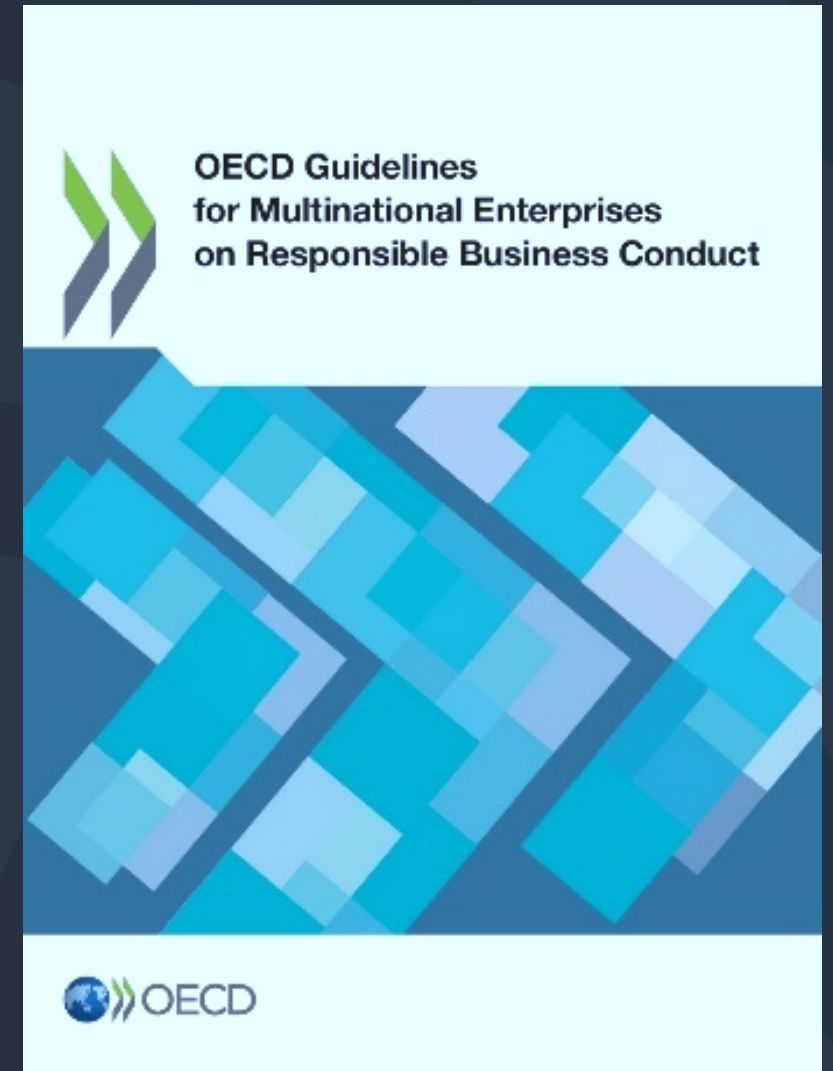


OECD Guidelines and NCP processes

Presentation to *WA, International Law, and the
International Law Association*

Perth, 17 October 2024



Summary

1. 'The Australian Government expects multinational businesses operating in Australia or operating overseas from Australia to act in accordance with the Guidelines'.
2. The Guidelines include concepts from international laws, eg:
 - International Bill of Human Rights
 - ILO *Declaration on Fundamental Principles and Rights at Work* and other ILO conventions
 - UN Declaration on Rights of Indigenous Peoples
 - Rio Declaration on Environment and Development
 - Paris Agreement
 - Convention on Biological Diversity
 - OECD Anti-Bribery Convention

Guidelines: origins & obligations

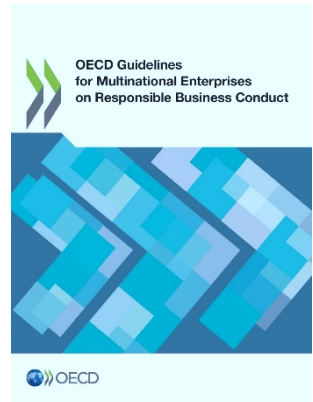


Contained in 1976 [Declaration on International Investment and Multinational Enterprises](#) (amended 2023).

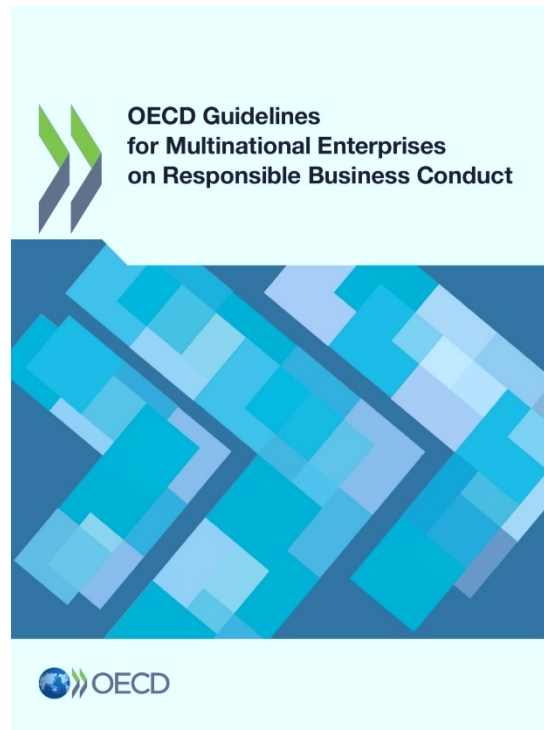
- In the Declaration, governments ‘recommend to multinational enterprises operating in or from their territories the observance of the Guidelines’: I

OECD members and others (51 nations) ‘adhere to’ the [Guidelines](#), including:

- ‘**encourage the enterprises operating in or from their territories to observe the Guidelines** wherever they operate’: I, [3];
- ‘**...set up National Contact Points** ...to... (a) promote awareness ...[and] support coherence of policies to promote responsible business conduct’: Decision, I, [1]
- ‘The NCP will...contribute to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances’: Procedures, I, C.



Guidelines: content



Chapters =
expectations of
enterprises

NCP implementation
arrangements

4 |

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Guidelines: human rights detail

| 25

IV. Human Rights

States have the duty to protect human rights. Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations:

1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.
2. Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.
3. Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.
4. Have a publicly available policy commitment to respect human rights.
5. Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.
6. Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.

Commentary on Chapter IV: Human Rights

41. This chapter opens with a chapeau that sets out the framework for the specific recommendations concerning enterprises' respect for human rights. It draws upon the United Nations 'Protect, Respect and Remedy Framework for Business and Human Rights' and is in line with the Guiding Principles on Business and Human Rights for its implementation as well as the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.

42. The chapeau and the first paragraph recognise that States have the duty to protect human rights, and that enterprises, regardless of their size, sector, operational context, ownership and structure, should respect human rights wherever they operate. Respect for human rights is the global standard of expected conduct for enterprises independently of States' abilities and/or willingness to fulfil their human rights obligations, and does not diminish those obligations.

43. A State's failure either to enforce relevant domestic laws, or to implement international human rights obligations or the fact that it may act contrary to such laws or international obligations does not diminish the expectation that enterprises respect human rights. In countries where domestic laws and regulations conflict with internationally recognised human rights, enterprises should seek ways to honour them to the fullest extent which does not place them in violation of domestic law, consistent with paragraph 2 of the Chapter on Concepts and Principles.

44. In all cases and irrespective of the country or specific context of enterprises' operations, reference should be made at a minimum to the internationally recognised human rights expressed in the International Bill of Human Rights, consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the

OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES ON RESPONSIBLE BUSINESS CONDUCT © OECD 2023

Each chapter has:

'chapeau' or introductory text

Numbered para's (1-n) of the Guidelines' expectation of enterprises

Additional commentary/explanation (continued # from previous).

IV. Human Rights

States have the duty to protect human rights. Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations:

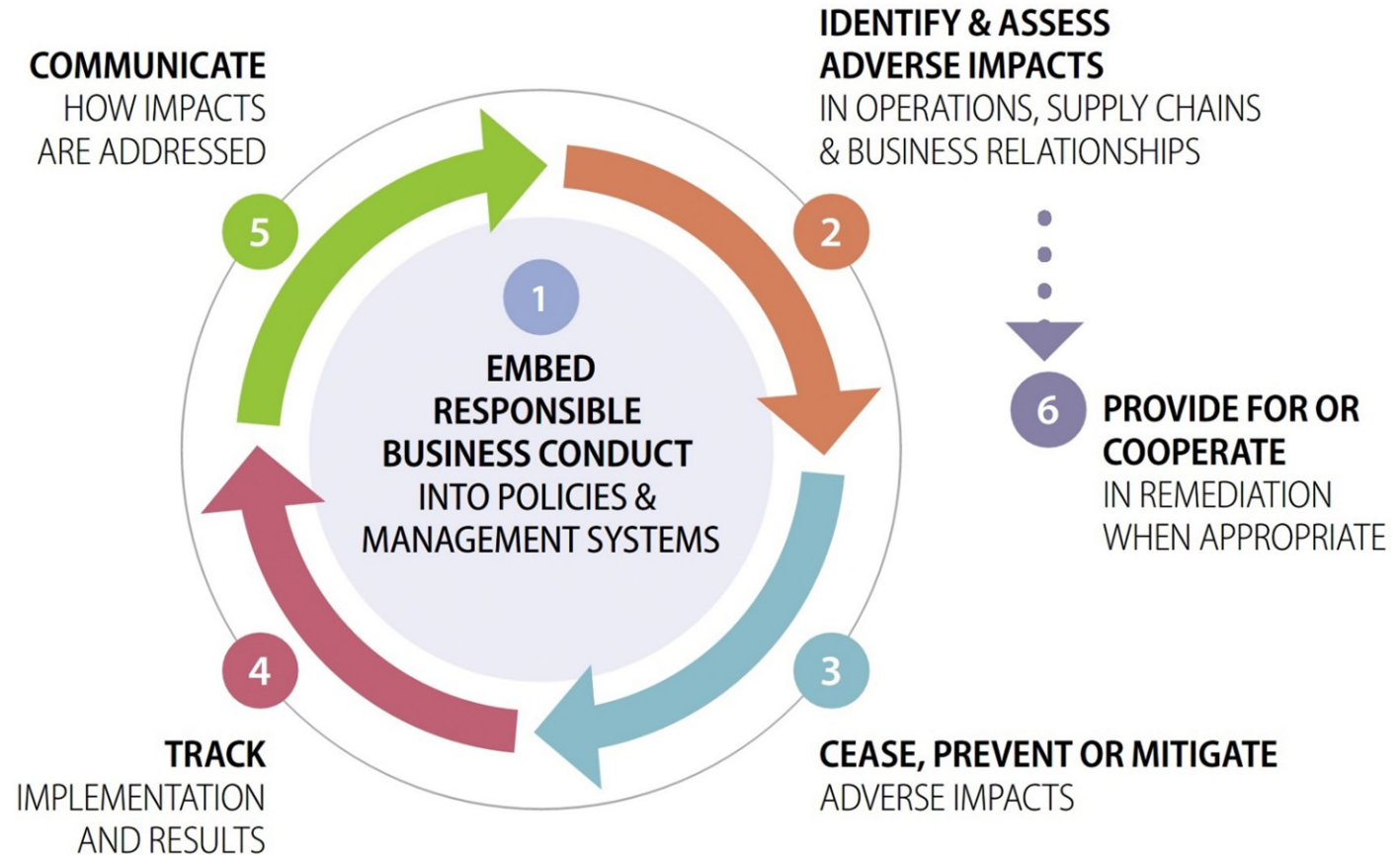
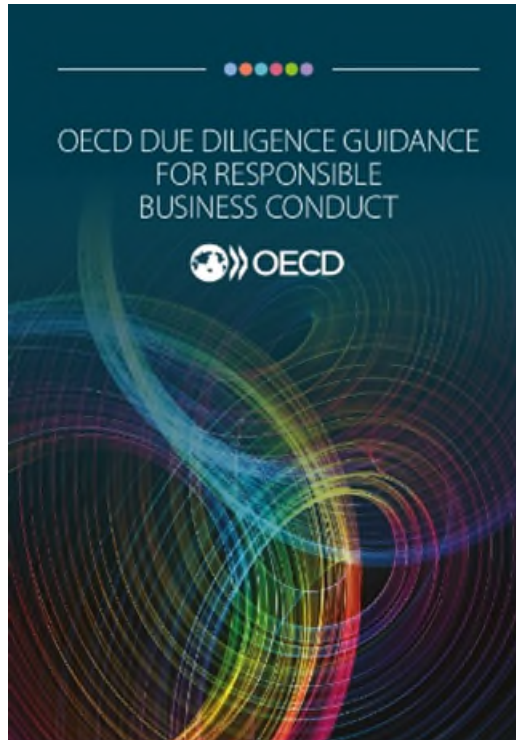
1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.
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OECD sectoral guidances: expectations of company

 <p>OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE BUSINESS CONDUCT</p> <p>OECD</p>	 <p>RESPONSIBLE BUSINESS CONDUCT</p> <p>Due Diligence for Responsible Corporate Lending and Securities Underwriting</p> <p>Key considerations for banks implementing the OECD Guidelines for Multinational Enterprises</p> <p>OECD</p>	 <p>OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector</p> <p>OECD</p>	 <p>OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector</p> <p>OECD</p>
<u>General</u>	<u>Lenders</u>	<u>Extractives</u>	<u>Textiles & Footwear</u>
 <p>RESPONSIBLE BUSINESS CONDUCT</p> <p>Responsible business conduct for institutional investors</p> <p>Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises</p> <p>OECD</p>	 <p>OECD-FAO Guidance for Responsible Agricultural Supply Chains</p> <p>OECD</p> <p>Food and Agriculture Organization of the United Nations</p>	 <p>OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas</p> <p>THIRD EDITION</p> <p>OECD</p>	 <p>G20/OECD Principles of Corporate Governance</p> <p>OECD</p>
<u>Investors</u>	<u>Agriculture</u>	<u>Mining</u>	<u>Corp. Governance</u>

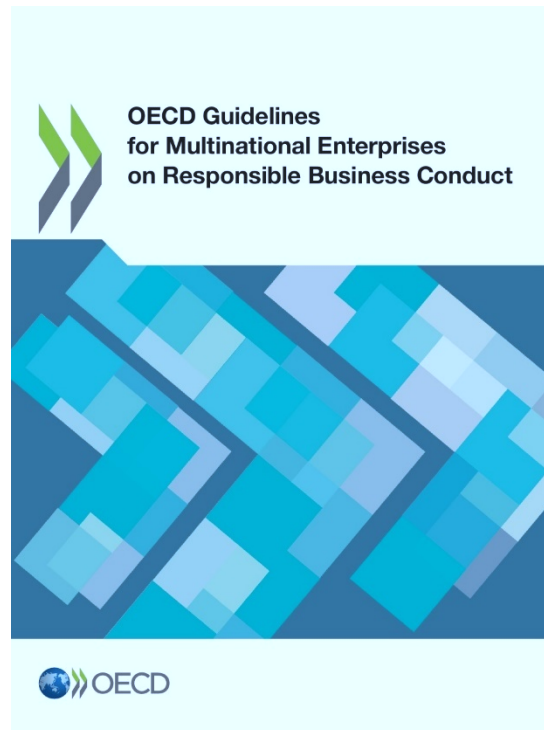
Due diligence and OECD guidance

DUE DILIGENCE PROCESS & SUPPORTING MEASURES



page 21 of <https://mneguidelines.oecd.org/due-diligence-guidance-for-responsible-business-conduct.htm>

Guidelines & domestic regulation¹²

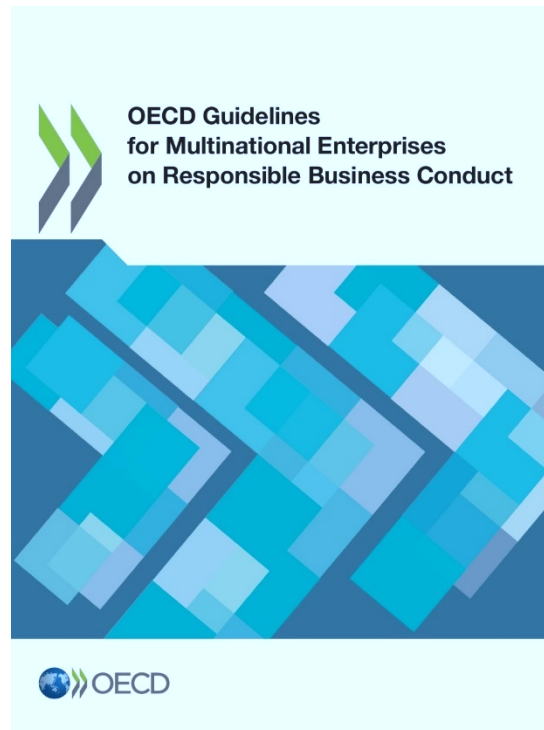


I. Concepts and Principles

1. The *Guidelines* are recommendations jointly addressed by governments to multinational enterprises. They provide principles and standards of good practice consistent with applicable laws and internationally recognised standards. Observance of the *Guidelines* by enterprises is voluntary and not legally enforceable. Nevertheless, some matters covered by the *Guidelines* may also be regulated by national law or international commitments.
2. Obeying domestic laws is the first obligation of enterprises. The *Guidelines* are not a substitute for, nor should they be considered to, override domestic law and regulation. Failure of governments to uphold the principles and standards consistent with the *Guidelines* or their associated international commitments does not diminish the expectation that enterprises observe the *Guidelines*. While the *Guidelines* extend beyond the law in many cases, they should not and are not intended to place an enterprise in situations where it faces conflicting requirements. However, in countries where domestic laws and regulations conflict with the principles and standards of the *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.
3. Since the operations of multinational enterprises extend throughout the world, international co-operation in this field should extend to all countries. Adherents to the *Guidelines* encourage the enterprises operating in or from their territories to observe the *Guidelines* wherever they operate, while taking into account the particular circumstances of each host country.
4. A precise definition of multinational enterprises is not required for the purposes of the *Guidelines*. While the *Guidelines* allow for a broad approach in identifying which entities may be considered multinational enterprises for the purposes of the *Guidelines*, the international nature of an enterprise's structure or activities and its commercial form, purpose, or activities are main factors to consider in this regard. These enterprises operate in all sectors of the economy. They usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of other entities in a group, their degree of autonomy within the group may vary widely from one multinational enterprise to another. Ownership may be private, State, or mixed. The *Guidelines* are addressed to all the entities within the multinational enterprise (parent companies and/or local entities). According to the actual distribution of responsibilities among them, the different entities are expected to co-operate and to assist one another to facilitate observance of the *Guidelines*.
5. The *Guidelines* are not aimed at introducing differences of treatment between multinational and domestic enterprises; they reflect good practice for all. Accordingly, multinational and domestic enterprises are subject to the same expectations in respect of their conduct wherever the *Guidelines* are relevant to both.
6. Governments wish to encourage the widest possible observance of the *Guidelines*. While it is acknowledged that small- and medium-sized enterprises may not have the same capacities as larger enterprises, Adherents to the *Guidelines* nevertheless encourage them to observe the *Guidelines*' recommendations to the fullest extent possible.

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4. A precise definition of multinational enterprises is not required for the purposes of the *Guidelines*. While the *Guidelines* allow for a broad approach in identifying which entities may be considered

Guidelines: implementation⁵⁶ through NCPs



Decision of the Council on the Guidelines for Multinational Enterprises on Responsible Business Conduct

THE COUNCIL,

HAVING REGARD to Article 5 a) of the *Convention on the Organisation for Economic Co-operation and Development* of 14 December 1960;

HAVING REGARD to the *OECD Declaration on International Investment and Multinational Enterprises* (the "Declaration") [OECD/LEGAL/0144], in which the Members and non-Members having adhered ("Adherents") jointly recommend to multinational enterprises operating in or from their territories the observance of *Guidelines for Multinational Enterprises on Responsible Business Conduct* (the "Guidelines");

RECOGNISING that, since operations of multinational enterprises extend throughout the world, international co-operation on issues relating to the Declaration should extend to all countries;

CONSIDERING it desirable to enhance procedures by which consultations may take place on matters covered by these *Guidelines* and to promote the effectiveness of the *Guidelines*;

On the proposal of the Investment Committee:

DECIDES:

I. National Contact Points for Responsible Business Conduct

1. Adherents shall set up National Contact Points for Responsible Business Conduct (NCPs) to further the effectiveness of the *Guidelines*. NCPs shall have the following responsibilities:

- a) Promote awareness and uptake of the *Guidelines*, including by responding to enquiries;
- b) Contribute to the resolution of issues that arise in relation to the implementation of the *Guidelines* in specific instances.

In addition, where appropriate and in coordination with relevant government agencies, NCPs may also provide support to efforts by their government to develop, implement, and foster coherence of policies to promote responsible business conduct.

The business community, worker organisations, other non-governmental organisations and other interested parties shall be informed of the availability of NCPs.

2. NCPs in different Adherents shall co-operate, if such need arises, on any matter related to the *Guidelines* relevant to their activities. As a general procedure, discussions at the national level should be initiated before contacts with other NCPs are undertaken.

3. NCPs shall meet regularly to share experiences and report to the Investment Committee.

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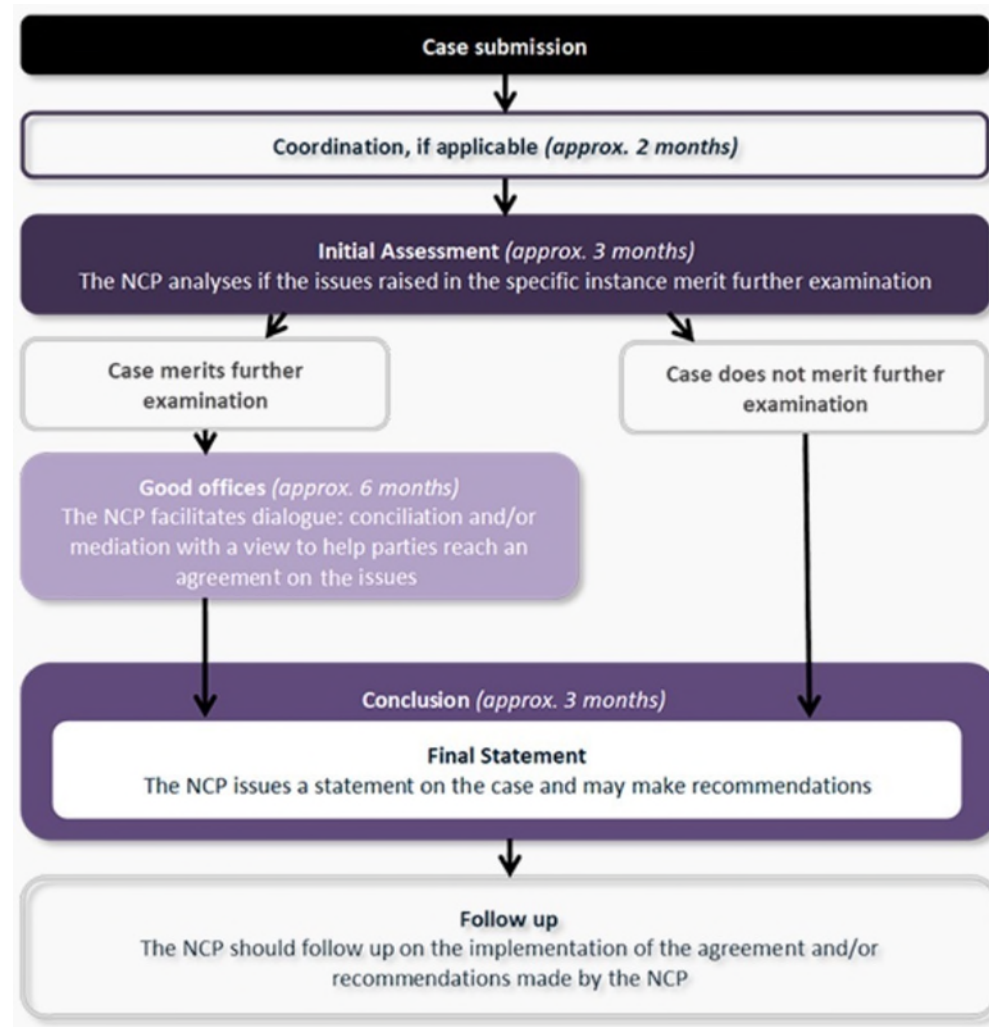
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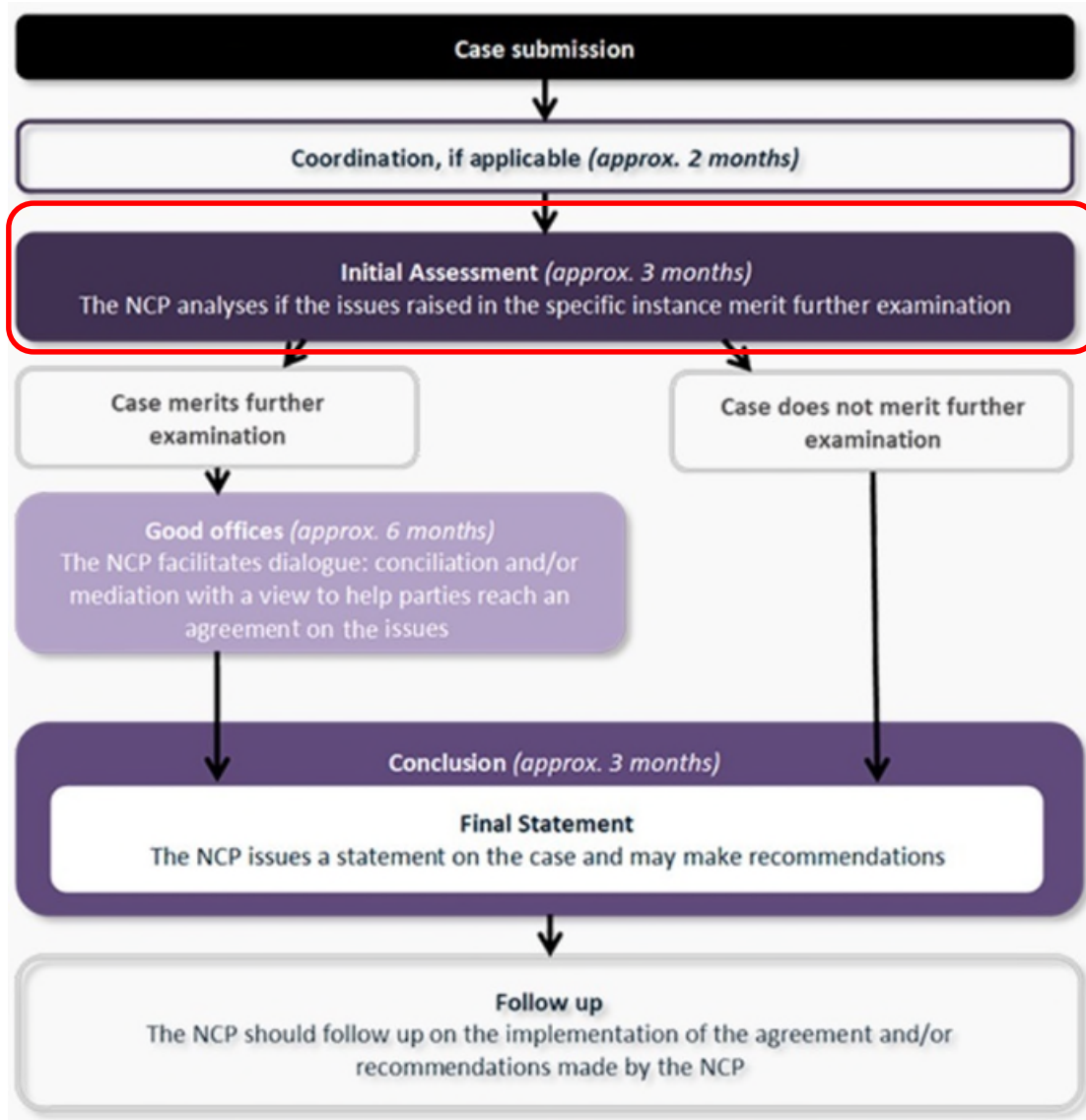
3. NCPs shall meet regularly to share experiences and report to the Investment Committee.

Guidelines: specific instance process



From OECD [‘How do NCPs handle cases ?’](#)

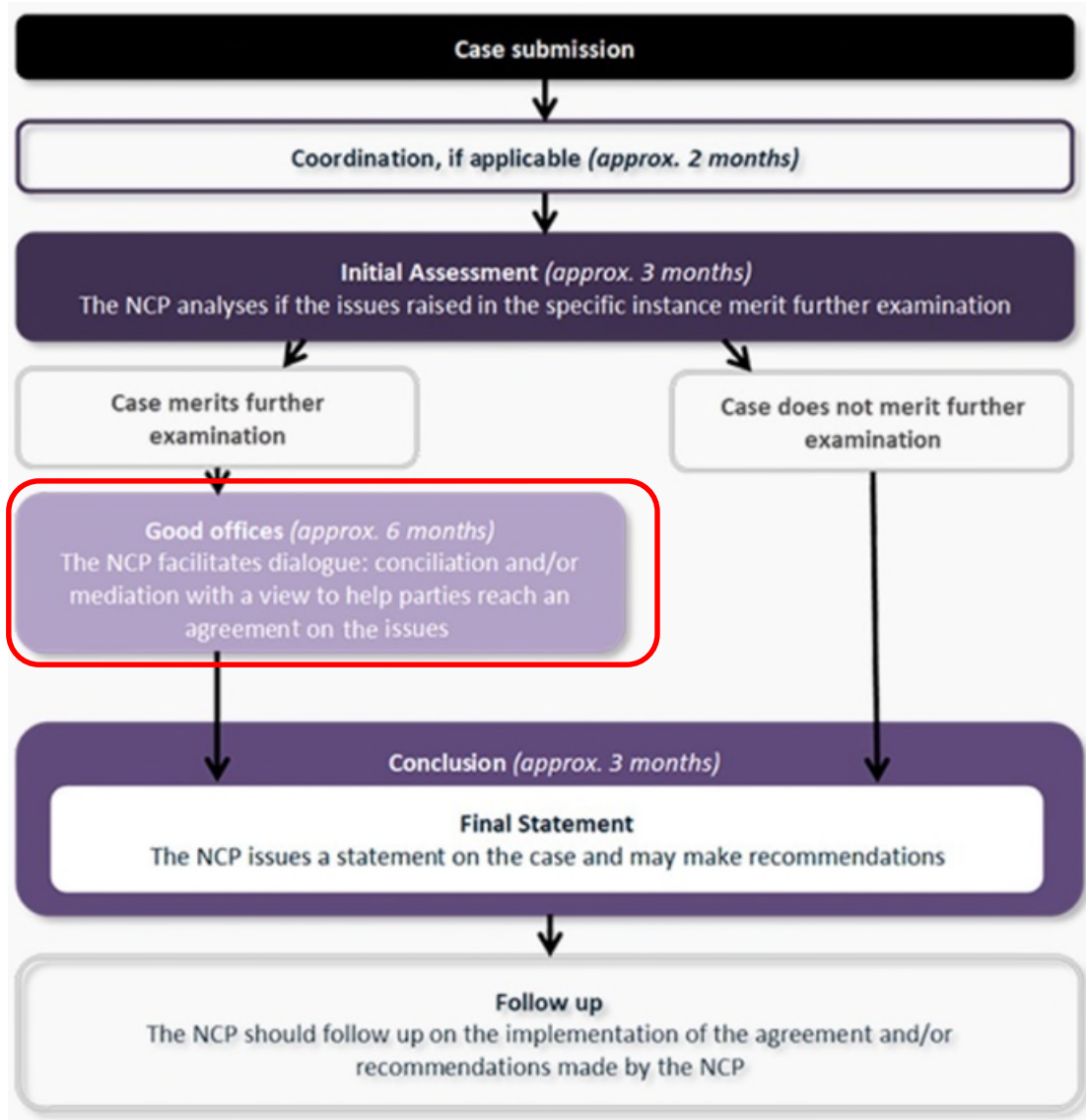
Guidelines: specific instance process



Initial Assessment: does case merit further examination? Procedures Commentary, [33]

1. identity of [notifier] and its interest in the matter;
2. whether issue is material (relevant to *Guidelines*) and substantiated (sufficient and credible information);
3. whether enterprise is covered by the *Guidelines*;
4. whether there [is] link between the enterprise's activities and the issue raised;
5. [does] applicable law / parallel proceedings limit NCP's ability to [help] resolution;
6. [would] examination contribute to the purposes and effectiveness of the *Guidelines*.

Guidelines: specific instance process

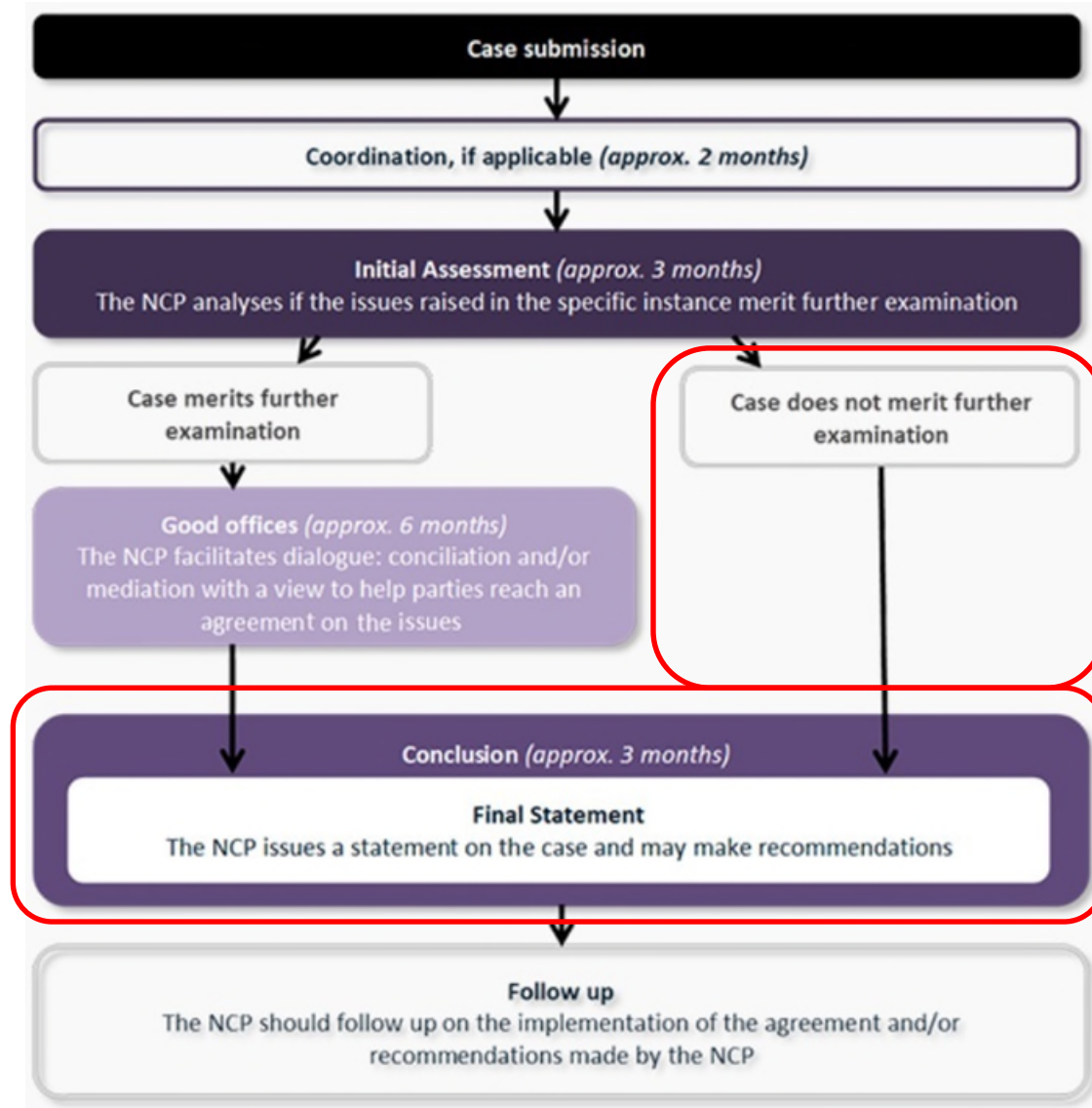


If Initial Assessment accepts: **NCP offers 'good offices'**

'The NCP will ...offer and, with the agreement of the parties involved, facilitate access to consensual and non-adversarial means, such as mediation or conciliation, to assist the parties in resolving the issues' Procedures I C [3] (d)

- significant flexibility on how any 'good offices' might proceed
- often navigated/directed through procedural agreement NCP arranges with parties

Guidelines: specific instance process



At conclusion **NCP must always issue PUBLIC final statement**
Procedures I C [4]

Content will depend on previous course:

- If not accepted in Initial Assessment: Final Statement will explain why
- If parties agree in good offices: content largely depends on them (some aspects may remain confidential)
- If parties don't agree in good offices: NCP makes statement on case; may include recommendations

Australia

Application of OECD Guidelines in & by Australia

Australian NCP



(within The Treasury, where responsibility resides for managing the Australian Government's obligations under the declaration)

Secretariat

Overall management, support services, promotion and international representation.

Independent Examiners

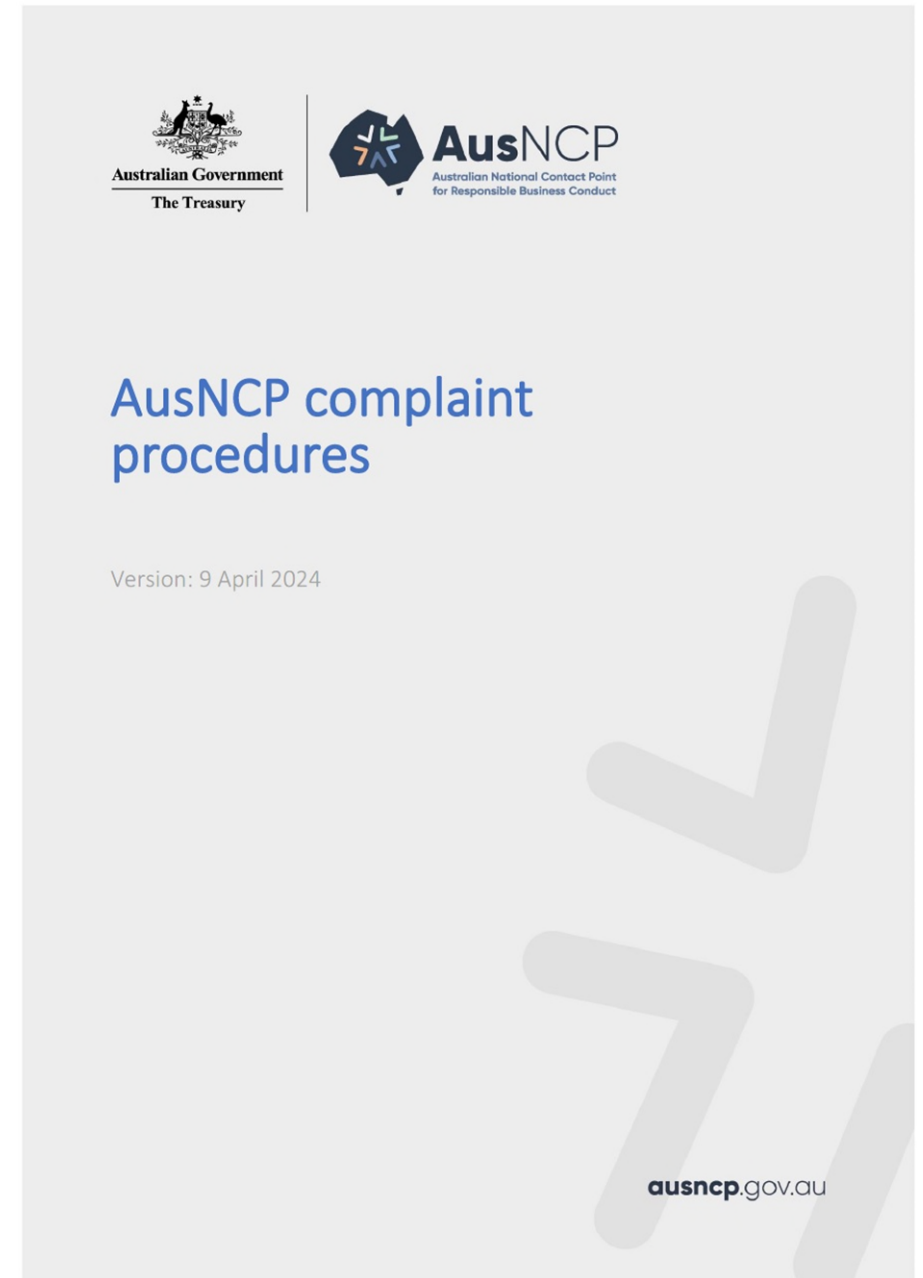
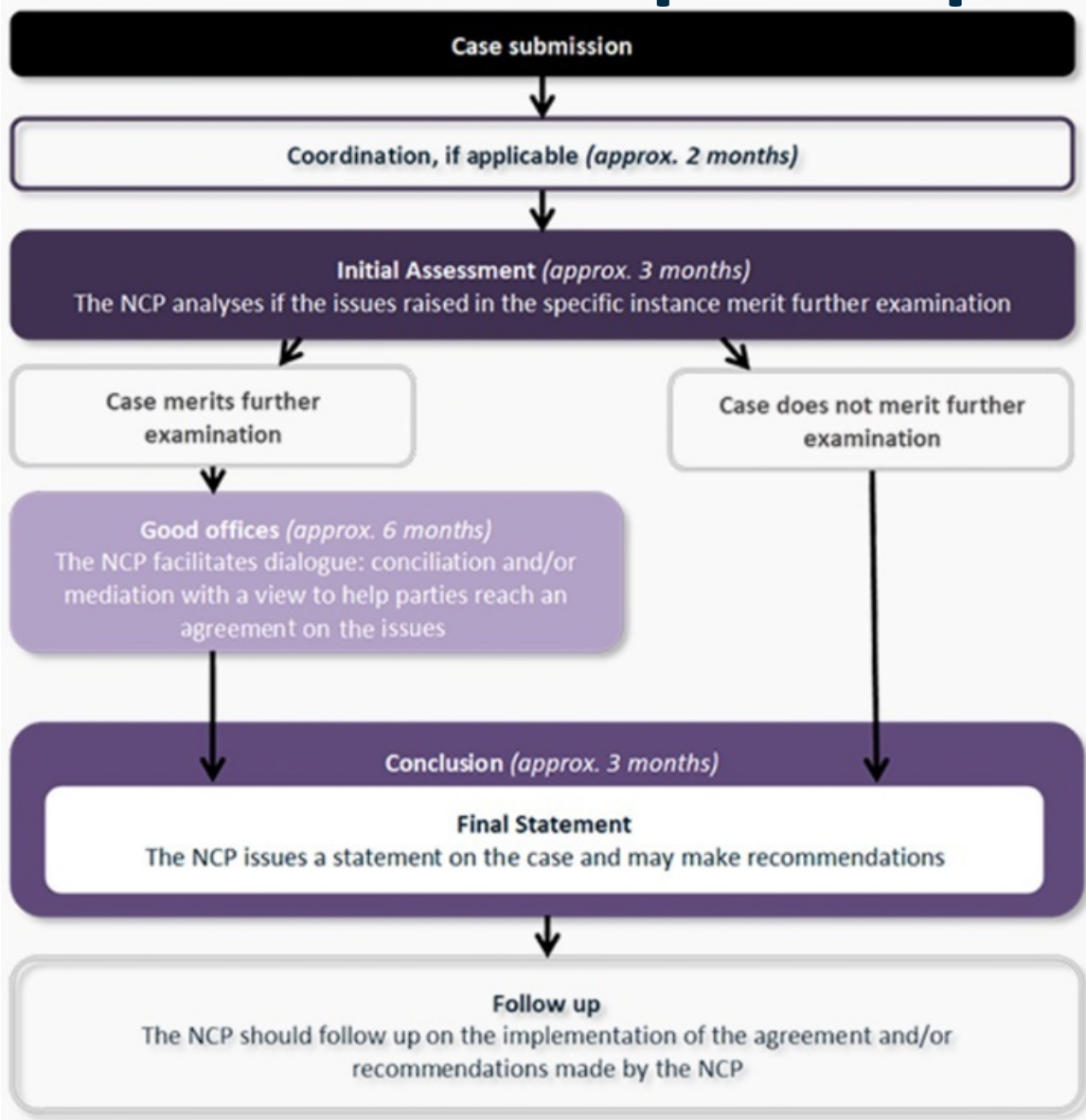
Manage complaints against multinational enterprises and promotes the Guidelines.

May draw instances of inappropriate conduct to the attention of other government agencies through the Secretariat.

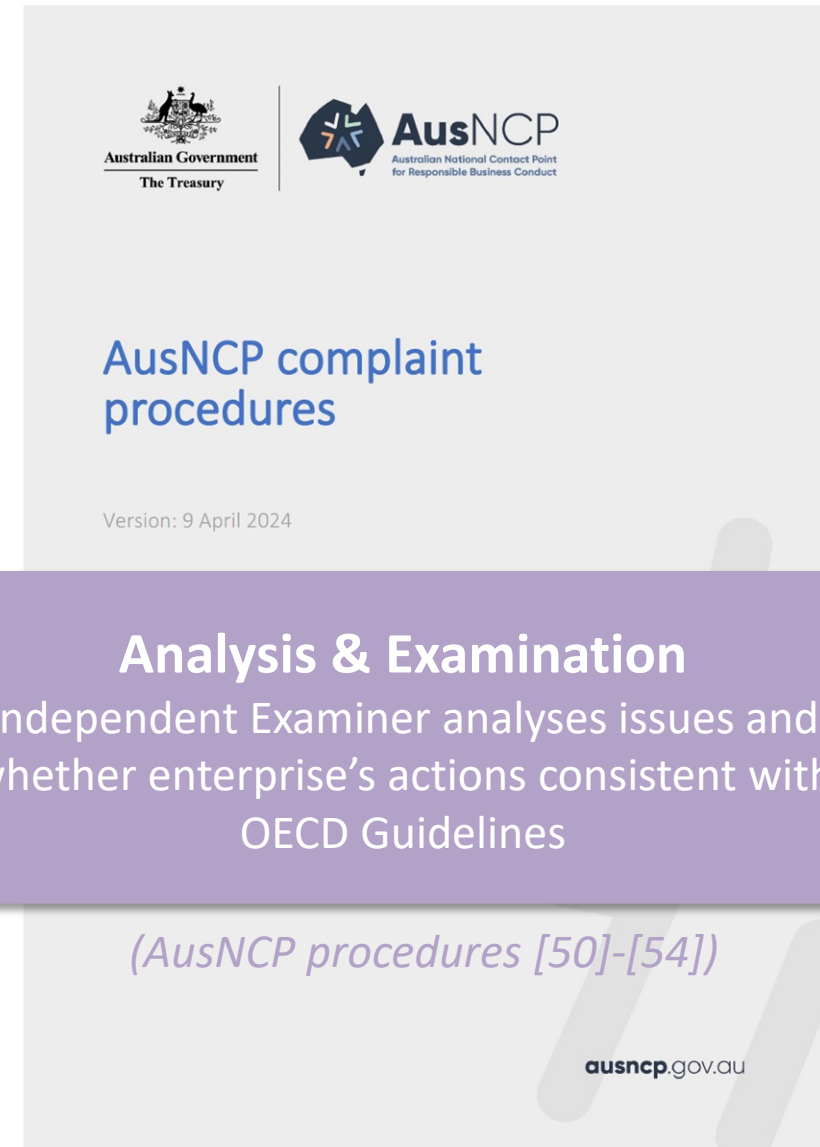
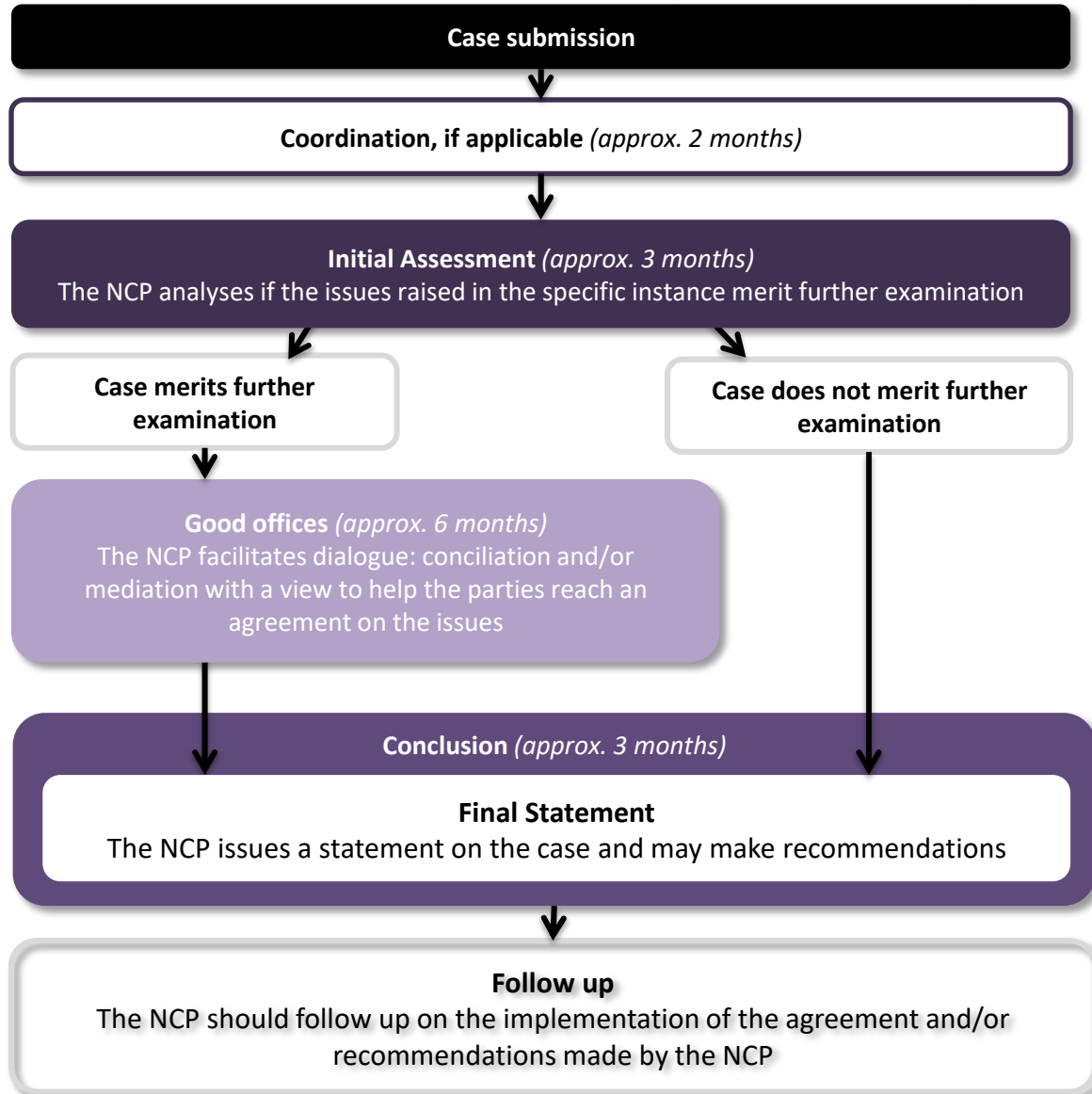
Governance and Advisory Board

external and government members provide advice on management of complaints and promote the Guidelines.

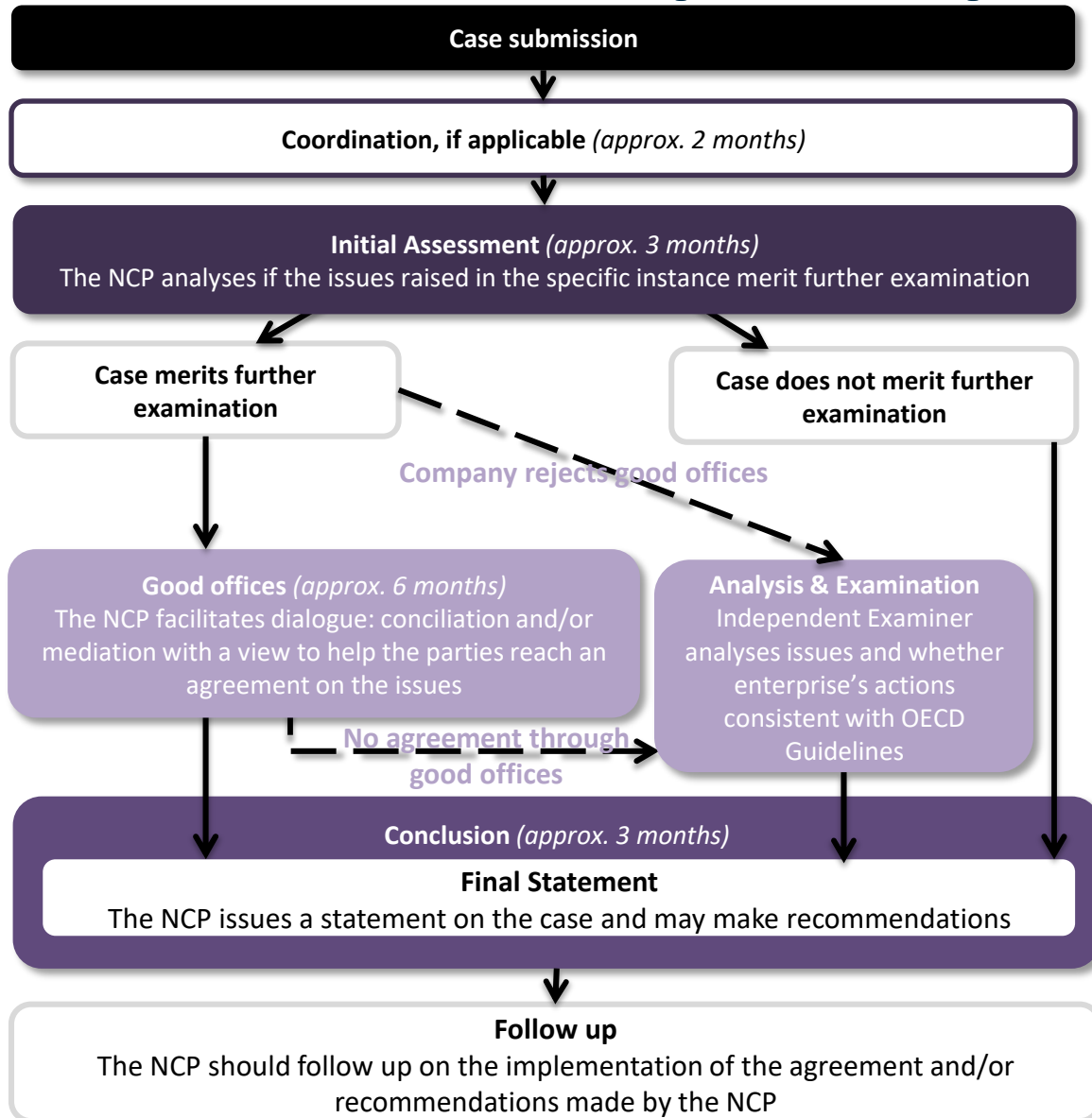
AusNCP 'complaint' process



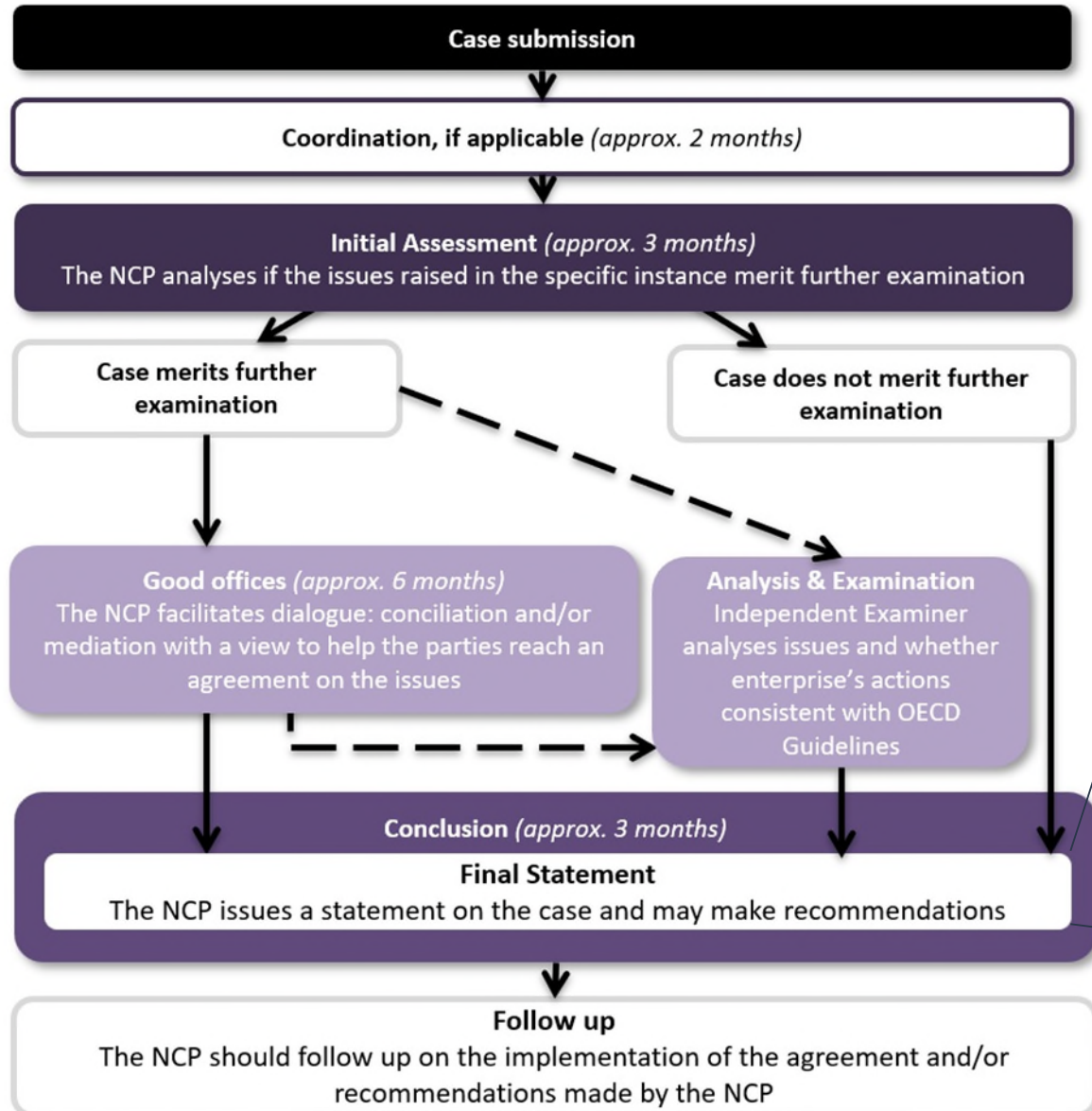
AusNCP 'complaint' process



AusNCP 'complaint' process



AusNCP 'complaint' process



AusNCP complaint procedures

Final Statement

- explain issues raised, parties' engagement, agreement (if any)
- may include examiner's views on whether enterprise observed the Guidelines
- recommendations on the implementation of the Guidelines
- where appropriate, may inform other government agencies about relevant matters and conduct

ausncp.gov.au

(AusNCP procedures [56]-[69])

AusNCP examples

Parties reach **agreement outside** NCP process:

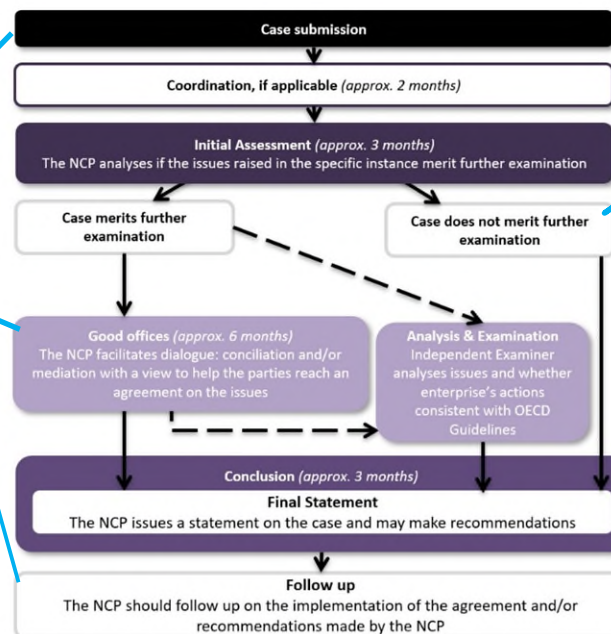
- [Parella Law](#), [33]-[35]
- [Justicia y Reparación](#), [17]-[23]

Parties reach **agreement within** 'good offices':

- [Ansell Ltd](#), p9
- [ANZ \(Cambodia\) FuS](#), [17]-[23]

Final Statement (where GO don't agree) can include observations, eg:

- **recommend company improve governance & procedures:** [ANZ \(Cambodia\) FS](#), [46]-[48]
- **Company's actions were consistent with Guidelines:** [ANZ \(FoE\) FS](#), [64] & [70]-[72]; [AusLabS](#), [54]-[57]
- Other information contrary to complaint, so no conclusions re co'y compliance: [ElectraNet FS](#), [62]



Reasons against further examination can include:

- Notifier not shown how company caused harm: [Deutsche Bank](#), [7.3.1]
- Position and statements of notifier: [BHP \(Hedland\)](#), [52]
- Notifier **not demonstrated adequate interest/connection with issues under Guidelines**, or not substantiated them: [BHP \(Hedland\)](#), [17], [19], [23] & [52]
- **Company is addressing everything within Guidelines, so little relevant for GO:** [BHP \(Hedland\)](#), [27] & [36]
- **Notifier does not agree to good offices:** [BHP \(GLAN\)](#), [26]-[27], or withdraws complaint: [SAVEducation \(India\)](#), [25]
- Notifier not raised issues materially different from previous NCP matter: [Coca Cola](#), [25]-[28]

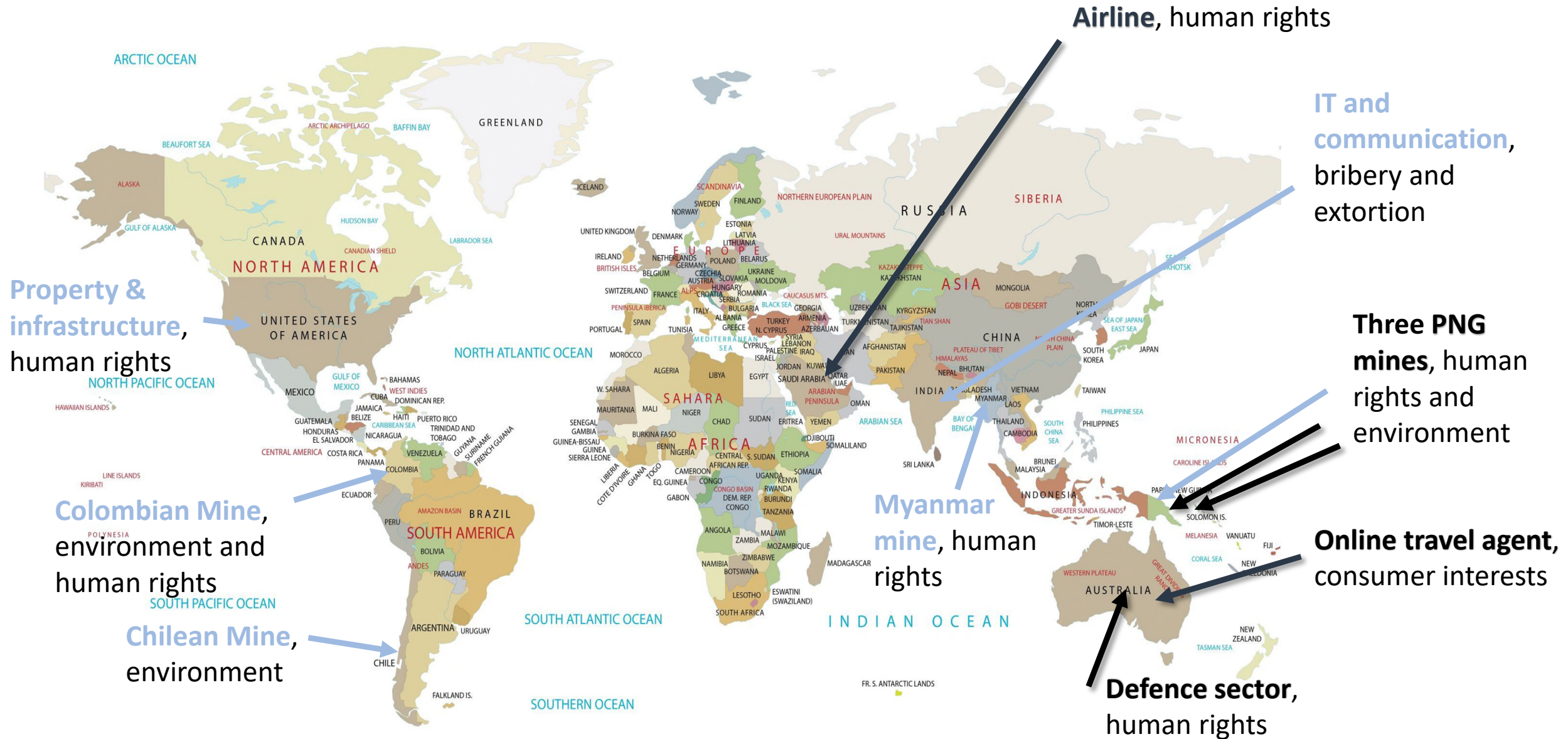
Final Statement (where company not engage) can include observations, eg:

- **company's actions inconsistent with Guidelines** (eg. no HR policy, inadequate DD): [Mallee Resources](#), [128]; or **identified actions not inconsistent with Guidelines:** [PanAust](#), [3] & [94]
- **failure to engage/show Guidelines compliance is problematic:** [ElectraNet FS](#), [54] & [61]
- encourage company apology & compensation: [Mercer PR](#), [49]
- **recommend company action** eg. (1) develop HR policy, and use leverage/influence on others to address impacts [Mallee Resources](#), [130]; (2) develop **training & procedures** [Mercer PR](#), [49]; (3) **disseminate relevant information:** [PanAust](#), [69]-[73]; (4) familiarisation with Guidelines [ElectraNet FS](#), [63]

This world map displays the following geographical features and locations:

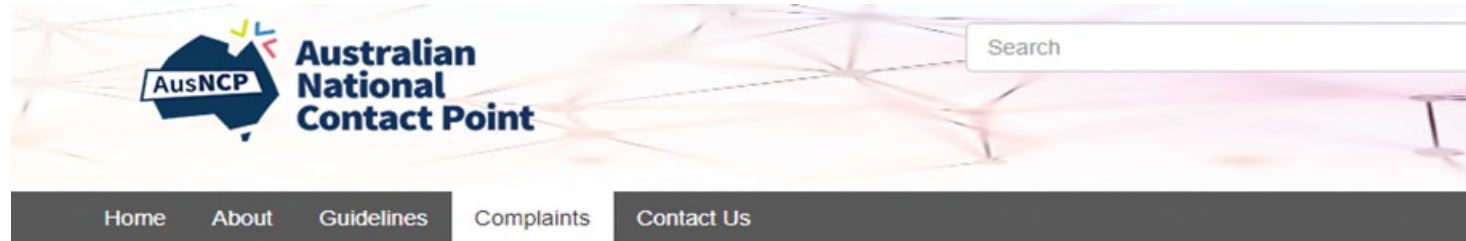
- Oceans and Seas:** Arctic Ocean, North Atlantic Ocean, South Atlantic Ocean, Indian Ocean, Southern Ocean, North Pacific Ocean, South Pacific Ocean, Beaufort Sea, Hudson Bay, Labrador Sea, Gulf of Alaska, Gulf of Mexico, Caribbean Sea, Bay of Bengal, Arabian Sea, Black Sea, Mediterranean Sea, Sea of Japan, East Sea, Sea of Okhotsk, Philippine Sea, South China Sea, Coral Sea, Tasman Sea.
- Continents and Major Regions:** North America (USA, Canada), South America (Brazil, Argentina, Chile), Europe, Africa, Asia, Australia.
- Key Landmarks and Features:** Arctic Archipelago, Baffin Bay, Greenland, Canadian Shield, Hudson Bay, Gulf of Mexico, Amazon Basin, Andes, Sahara, Ural Mountains, Gobi Desert, Plateau of Tibet, Himalayas, Tibetan Plateau, Great Dividing Range.
- Location Pins:**
 - North America: USA
 - South America: Brazil, Argentina, Chile
 - Europe: Sweden, Germany
 - Africa: Mali, Nigeria, South Africa, Mozambique
 - Asia: India, China, Indonesia, Philippines, Japan
 - Australia: Australia

Current and recent AusNCP Complaints



Complaint tracking

<https://ausncp.gov.au/complaints/track-complaints>



[Complaints](#) / [Track an open complaint](#)

Track an open complaint

The AusNCP handles complaints about alleged non-observance of the OECD Guidelines for Multinational Enterprises. A list of active cases currently being handled by the AusNCP is available below. [View closed complaints](#).

Active Complaints

ID	Received	Notifier	Enterprise	Location of activity	Status (September 2022)	Statements
21	September 2020	Human Rights Law Centre on behalf of affected individuals	Rio Tinto	Papua New Guinea	Good Offices – Panguna mine impact assessment Examiner: John Southalan	AusNCP Update Statement December 2021 AusNCP Update & Parties' Joint Statement July 2021
23	January 2021	Global Legal Action Network	Anglo American Plc, BHP Group Ltd and Glencore International AG	Colombia	Preparing final statement Examiner: John Southalan	Initial Assessment – January 2022

Databases of NCP cases

<https://mneguidelines.oecd.org/database/>

The screenshot shows the OECD Responsible Business Conduct Guidelines database. It features a navigation bar with links to Home, MNE Guidelines, Due Diligence, National Contact Points, Global Forum, Resources, and Global Partnerships. The main content area is titled 'Database of specific instances' and includes a search bar and filters. The filters are organized into sections: NCP (All, Argentina, Australia), Theme (Combating bribery, bribe solicitation and extortion, Competition), Date (All, 2022, 2021), Host country (All, Albania, Algeria), Source of case (All, Business, Individuals), Status (All, Concluded, In progress), and Industry sector (Accommodation and food service, Activities of extraterritorial organisations and bodies). A sidebar on the right lists 'MOST RECENTLY NOTIFIED' and 'BY THEME' with corresponding bar charts.

FAU Friedrich-Alexander-Universität
Erlangen-Nürnberg

The screenshot shows the OECD Case Law Analysis website. It features a navigation bar with links to Home, The Project, Code Handbook, About Us, Create New, and Login. The main content area is titled 'OECD Case Law Analysis' and includes a search bar and filters. The main content area also features a world map with blue dots indicating case locations across various regions including North America, South America, Europe, Africa, Asia, and Oceania.

<https://www.oecdaselaw.com/statements>

<https://www.oecdwatch.org/complaints-database/>

The screenshot shows the OECD Watch Complaints database interface. It features a navigation bar with links to Home, The Project, Code Handbook, About Us, Create New, and Login. The main content area is titled 'Complaints database' and includes a search bar and filters. The main content area also features a list of complaints, including 'FOCSIV and others vs. Stellantis Italy', 'Rohingya refugees supported by Victim Advocates International vs. Facebook', and 'Project Sepik Inc. and Jubilee Australia Research Centre vs PanAust Limited'. Each complaint entry includes a date filed, a title, and a status (Rejected or Filed).

Take-aways

- Guidelines expectations include risk-based due-diligence.
- NCP process focus on company, not government.
- Companies should ensure consistency with Guidelines. May occur through:
 - national regulation (eg. legal requirements, permits/processes, policy encouragement, court/regulator enforcement)
 - company's own action (procedures, policies, grievance mechanism)
- Where company action not evidently consistent with Guidelines:
 - exposes company to NCP complaint and Final Statement
 - AusNCP statement may include observations on company, and recommendations to other relevant bodies

Thank you

E: Secretariat@ausncp.gov.au

W: <https://ausncp.gov.au/>

OECD: <https://mneguidelines.oecd.org>