

Final Statement

Complaint submitted by

Andrew & Robert Starkey

against

Saab Australia P/L, Saab AB and Saab Bofors Dynamics

17 October 2025

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Executive summary

1. On 28 September 2021, the Australian National Contact Point for Responsible Business Conduct (AusNCP) received a complaint from Andrew and Robert Starkey (notifiers) concerning Saab Australia Pty Ltd, Saab AB and Saab Bofors Dynamics (enterprise, or Saab).
2. The complaint arose from the discovery by the notifiers in January 2021 of the remnants of an RBS70 missile manufactured by the enterprise (ordnance,¹ as pictured). The ordnance was found within an area referred to as the Lake Hart West Aboriginal heritage site, near artefacts and other items of cultural significance. The area in which the ordnance was found is part of the Woomera Prohibited Area (WPA), within which is the Woomera Test Range, which the Australian Government uses to test and evaluate advanced and emerging capabilities, including long-range weapons. The area in which the ordnance was found is also part of the notifiers' traditional lands (Country) as Traditional Owners and members of the Kokatha People.
3. The notifiers' complaint was that contrary to the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (OECD Guidelines), the enterprise failed to undertake or maintain adequate human rights due diligence which could prevent their product from being used in potential human rights violations, and failed to respect the notifiers' rights to protect and preserve the integrity of heritage sites for which they have custodial responsibilities.
4. Between February 2023 and February 2024, the parties engaged in 'good offices' (dispute resolution), without reaching resolution. The dispute resolution process was therefore terminated.
5. An examination commenced in March 2024, the results of which are contained in this Final Statement.
6. This Final Statement contains observations regarding whether the enterprise's actions were consistent with the OECD Guidelines, and recommendations as to means by which to improve observance of the OECD Guidelines.
7. In summary, the Independent Examiner observes that:

¹ Use of the term "ordnance" in this Final Statement should not be taken to mean that the debris found contained explosive material. The term "ordnance" is used in this Final Statement to describe the found item as this was the term used in the Initial Assessment and is consistent with the ordinary dictionary meaning of "ordnance", being military supplies including weapons and ammunition. The Commonwealth Department of Defence (Defence) notes that according to the Australian Defence Glossary, the term "ordnance" refers to "explosives, chemicals, pyrotechnics, and similar stores, e.g. bombs, guns and ammunition, flares, smoke, or napalm". Defence stated that it considers use of the term, ordnance, to describe the found item incorrect as it "consisted of the motor, wings, control fins, electronic package and receiver optics of an RBS70 missile – it did not contain an explosive component."

- 7.1. The ordnance was manufactured and supplied by the enterprise to Australia² between approximately the mid-1980s to early 1990s, and had a service life until about 2005.
- 7.2. The ordnance was used but not cleared.
- 7.3. In January 2021, the ordnance was discovered by the notifiers while engaged in cultural practice on Country. The notifiers informed the Commonwealth Department of Defence (Defence) about the discovery of the ordnance in May 2021. By September 2021, the ordnance remained uncleared. In September 2021, the notifiers raised the discovery of the ordnance with the enterprise. The enterprise immediately raised the issue with Defence SA and, later, Defence. The ordnance remained on Country until it was removed by Defence on 18 January 2022.
- 7.4. Given the last date of manufacture and supply of the ordnance to Australia and its service life, the ordnance was likely to have been used in or around the 1990s or early 2000s. It is therefore likely that the ordnance was present on Country for 20 to 30 years prior to its discovery by the notifiers.
- 7.5. The area where the ordnance was found was in close proximity to many cultural and heritage features, but the ordnance fortunately did not damage any of those features.
- 7.6. Although the impact area did not damage cultural and heritage features, for the period between the discovery of the ordnance in January 2021 and its removal in January 2022, the presence of the ordnance inhibited the notifiers from undertaking cultural practices on the land. The Independent Examiner accepts the evidence of the notifiers that they held concerns for their safety, and this prevented them from accessing the land and continuing cultural practices in which they were engaged when they discovered the ordnance. This constituted an adverse impact on their human rights, including rights to enjoy culture and take part in cultural life, maintain and strengthen their distinctive spiritual relationship with their traditional lands and to uphold their responsibilities to future generations (discussed further at [64] below).
- 7.7. There is insufficient information to identify why the ordnance was found largely intact, whether or not it had failed to explode, or why it was left uncleared after its use. No determination is made in this regard.
- 7.8. The OECD Guidelines and the United Nations Guiding Principles on Business and Human Rights (UN Guiding Principles),³ set out a continuum of potential enterprise involvement in breaches of human rights. Such involvement ranges from causing or contributing to human rights harms, to being directly linked to such harms. In this instance, there are reasonable grounds to conclude that Saab did not cause or contribute to the adverse human rights impacts experienced by the notifiers.

² The enterprise reports that the ordnance was supplied to the Commonwealth of Australia's Department of Defence.

³ United Nations, *Guiding principles on business and human rights: Implementing the United Nations "Protect, Respect and Remedy" framework*, (2011), (A/HRC/17/31) (UN Guiding Principles), available at https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinessshr_en.pdf.

However, as the ordnance was manufactured and supplied by Saab, the enterprise was directly linked to that adverse human rights impact.

- 7.9. Since 2011, the OECD Guidelines have set out that consistent with the responsibility to respect human rights, multinational enterprises should carry out human rights due diligence.⁴ Human rights due diligence is “a process that entails assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses as well as communicating how impacts are addressed”.⁵
- 7.10. Between 2011 and 2021, prior to the notifiers’ discovery of the ordnance, the enterprise had not undertaken human rights due diligence consistent with the OECD Guidelines. Specifically, Saab had not assessed the ‘downstream’ impacts of its weaponry production and supply – that is, the impact that the use of its weapons may have on human rights. The enterprise instead relied on Swedish export control processes, which include an assessment of a recipient country’s position relating to democracy, respect for human rights and compliance with international humanitarian law. In order to meet the expectations set out in the OECD Guidelines since 2011, Saab ought to have undertaken human rights due diligence that included its downstream human rights impacts. It did not. That failure did not, however, cause or contribute to the adverse human rights impacts on the notifiers.
- 7.11. Upon the notifiers reporting the discovery of the ordnance to the enterprise, the enterprise contacted Defence SA⁶ in September 2021 and Defence in November 2021, to bring the matter to their attention. Defence was the entity responsible for the use and clearance of the ordnance. Defence SA advised in September 2021 that it was aware of the ordnance and Defence subsequently removed it once it was located.⁷
- 7.12. The enterprise’s conduct in bringing the notifier’s concerns regarding the ordnance to the attention of Defence was compliant with the OECD Guidelines. The OECD Guidelines in operation in 2021 stated that enterprises should “seek ways to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship”.⁸
- 7.13. Under the OECD Guidelines, multinational enterprises are expected to undertake ongoing human rights due diligence. The enterprise has been made aware through this complaint of the adverse human rights impacts on Traditional Owners of the lands

⁴ OECD, *OECD Guidelines for Multinational Enterprises*, (2011), OECD Publishing (2011 OECD Guidelines), Chapter IV: Human Rights, [4], available at <http://dx.doi.org/10.1787/9789264115415-en>

⁵ OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*, (2023), OECD Publishing, Paris, available at <https://doi.org/10.1787/81f92357-en> (2023 OECD Guidelines), Commentary on Chapter IV: Human Rights, [50].

⁶ Defence SA is South Australia's lead government agency for all defence industry matters.

⁷ See paragraphs [91] – [93] below regarding the conduct of the enterprise in raising the issue with Defence SA and Defence. Note that Defence informed the Independent Examiner that the enterprise’s conduct did not influence Defence. Whether or not the enterprise’s conduct caused Defence to remove the ordnance, the Independent Examiner observes that the enterprise’s conduct in raising the matter with Defence SA and Defence was compliant with the OECD Guidelines.

⁸ 2011 OECD Guidelines, Chapter IV: Human Rights, [3].

within the WPA that arose by Australia's use and failure to clear the ordnance from the WPA. This information should be taken into account by the enterprise as part of its ongoing human rights due diligence. As part of this process, the enterprise should integrate and act upon this finding so as to prevent and mitigate future adverse impacts, track its response, and communicate how such impacts are addressed. If the enterprise causes or contributes to adverse human rights impacts, it ought to provide for or cooperate in remediation as appropriate.

- 7.14. Conducting appropriate human rights due diligence must involve meaningful consultation with stakeholders, including First Nations people with rights over traditional lands in the WPA.
 - 7.15. As it does not appear that Saab caused or contributed to the adverse human rights impacts referred to at [7.6] above, there is not an expectation arising under the OECD Guidelines for Saab to provide remedy to the notifiers, although it remains open to Saab to do so.
 - 7.16. However, Saab is directly linked to the human rights impacts referred to above. There is an expectation under the OECD Guidelines for an enterprise with direct links to an adverse impact to use its leverage "to influence the entity causing the adverse impact to prevent, mitigate or remediate that impact".⁹ Where an enterprise's leverage is limited, the enterprise should seek to create opportunities to increase its leverage.
8. In light of the above, it is recommended that the enterprise:
- 8.1. incorporate consideration of the issues raised in this Final Statement into its human rights due diligence process going forward, specifically including the potential adverse impacts posed by Saab weaponry to the rights of First Nations people by reason that Saab weaponry may be used in the WPA, but remain uncleared from traditional lands
 - 8.2. undertake meaningful engagement with stakeholders, including First Nations people with rights and interests in the WPA, when undertaking such human rights due diligence
 - 8.3. informed by its due diligence and consultation with stakeholders, consider the improvement of existing grievance mechanisms or the establishment of complementary mechanisms by the enterprise or in collaboration with others
 - 8.4. clearly communicate the enterprise's human rights policies and human rights due diligence policies and processes, including as they relate to the downstream use of Saab weaponry
 - 8.5. use its leverage and create opportunities in which it could exercise leverage as appropriate to influence the Australian Government to prevent, mitigate or remediate the impact on human rights by use of the enterprise's products in the WPA.

⁹ 2023 OECD Guidelines, Commentary on Chapter II: General Policies, [23].

9. It is recommended that the AusNCP liaise further with Defence and other relevant government agencies or departments, in order to foster policy coherence across the whole of government in promoting responsible business conduct, noting that:
 - 9.1. This Final Statement arises from the use of weaponry in the WPA that was not cleared from traditional lands for a period of potentially 20 to 30 years, despite the existence of Defence's Clean Range Policy (CRP).
 - 9.2. The presence of the ordnance between January 2021 and January 2022 impeded the ability of the notifiers and potentially other Traditional Owners to exercise cultural rights in the area where the ordnance was found, contrary to their human rights.
 - 9.3. While enterprises have responsibilities to respect human rights, the duty to protect, respect and fulfil human rights remains with the State, including the right to effective remedy where human rights are violated.
 - 9.4. The actions of the Australian Government when utilising products supplied by multinational enterprises can harm human rights and enliven the responsibilities of an enterprise under the OECD Guidelines. In such circumstances, the Australian Government remains responsible for preventing, mitigating and remedying any adverse human rights impacts.
 - 9.5. There is currently a dispute between the notifiers and Defence as to whether any remediation has been offered and provided by the Australian Government to the notifiers. That dispute is outside the scope of the AusNCP process. However, it is noted that in line with its international commitments and obligations, it is for the Australian Government to provide access to effective remedy to those whose human rights are adversely impacted by acts or omissions.
 - 9.6. Where adverse human rights impacts are directly linked to a multinational enterprise, the Australian Government should expect - and consistent with the OECD Guidelines, encourage - enterprises to use and build their leverage to influence the entity causing the adverse impact (which may include government agencies). In this instance, Saab may seek as appropriate to use its leverage to influence the Australian Government to prevent, mitigate or remediate the impact that Defence's use of Saab products in the WPA has had and may have on human rights.
10. The AusNCP will follow up on these recommendations in 12 months.
11. This statement is available on the AusNCP website at www.ausncp.gov.au.

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Ordnance within Lake Hart West as at 13 January 2022 (image supplied by notifiers)

Parties and process

Background and progress of complaint

12. In September 2021, the AusNCP received a complaint from Andrew and Robert Starkey (notifiers). The notifiers are Traditional Owners of the area in which they discovered the ordnance, as Kokatha members and traditional senior lawmen (referred to as Kokatha *Badu*). The notifiers have very significant experience in the field of Aboriginal heritage protection.
13. The complaint was brought initially against Saab Australia Pty Ltd, and was subsequently expanded to include Saab Bofors Dynamics (Saab Dynamics) and parent company, Saab AB.¹⁰ As the three entities responded collectively as members of the Saab Group, they are referred to collectively as ‘the enterprise’ or ‘Saab’ and where relevant, by their individual entity names.
14. The complaint was about an item of military equipment (ordnance) that the notifiers discovered on their traditional Country, and their concerns about safety and heritage impacts arising from that. The ordnance was made by the enterprise.¹¹
15. The complaint alleged the enterprise failed to comply with the OECD Guidelines, specifically that the enterprise failed to undertake or maintain adequate human rights due diligence which could prevent their product from being used in potential human rights violations, and failed to respect the notifiers’ rights to protect and preserve the integrity of heritage sites for which they have custodial responsibilities.
16. The notifiers informed Defence of the existence of the ordnance in May 2021. In September 2021, the notifiers also engaged with Saab. Saab contacted a member of Defence SA regarding the ordnance and was informed that Defence was aware of the issue, and it was being dealt with.
17. In January 2022, Defence arranged for the ordnance to be removed. No detonation of the ordnance was required.¹²

¹⁰ Saab Australia is a wholly-owned Australian subsidiary of Saab AB, a public company listed on the Stockholm stock exchange. Saab AB is the ultimate parent company of a number of companies worldwide that, together, make up the Saab group of companies (Saab Group). The Saab Group supplies ordnances like the subject ordnance to Defence through Saab Dynamics AB (Saab Dynamics), also a wholly-owned subsidiary of Saab AB.

¹¹ Letter from Saab Australia to the AusNCP, 16 November 2021.

¹² Defence informed the Independent Examiner that it removed the ordnance on 18 January 2022. Defence stated, “From the time the notifiers’ legal representative first communicated concerns about missile debris in May 2021, Defence maintained ongoing communication with the notifiers, seeking the location of the ordnance. Following the notifiers providing Defence the coordinates of the ordnance on 17 January 2022, Defence removed the ordnance on 18 January 2022.” Defence also stated that the RBS70 missile “did not contain an explosive component. This could be for a range of reasons, including: explosive material (such as a warhead) was not fitted for the test, or (if it was fitted) the explosive material detonated on contact with an aerial target, and not in the location found.”

Circumstances in which this Final Statement is made

18. The examination and Final Statement took place following the conclusion of the ‘good offices’ (dispute resolution) stage, without reaching a mutually agreed resolution.¹³

AusNCP proceedings

Initial assessment

19. An Initial Assessment was conducted by Independent Examiner John Southalan and published on 1 April 2022.¹⁴ After assessing the complaint against the six admissibility criteria, it was accepted for further consideration and the parties were offered the AusNCP’s ‘good offices’ (dispute resolution) in respect of:

(a) the due-diligence policies and procedures of the Enterprise (and its parent company) regarding impacts of its products/services which could affect persons and places in testing areas like the Woomera Prohibited Area; and

(b) any proposed changes in the companies as a result of learning of the Ordnance being found by the Notifiers.¹⁵

20. The Initial Assessment observed that there were areas of the complaint that were not appropriate for good offices. These were:

20.1. questions about the parent company’s future supply of ordnance to the Australian Government, or relations between those two parties more generally

20.2. questions about heritage impact and compensation regarding Kokatha culture, without the involvement of the Kokatha Aboriginal Corporation (KAC), and

20.3. the Australian Government’s actions in using this particular piece of ordnance, and the Government’s actions about its removal or rehabilitation.

Good offices (dispute resolution)

21. The parties accepted the offer of good offices (dispute resolution) and, after a period of negotiations regarding the scope and terms, commenced confidential discussions in February 2023.

22. After 12 months of engaging in dispute resolution, the parties were unable to reach a resolution.

¹³ AusNCP, *Australian National Contact Point complaint procedures*, Australian Government, 2024, (AusNCP complaint procedures), available at <https://ausncp.gov.au/complaints/complaints-process>, paras 51.2 and 60.

¹⁴ AusNCP, *Initial Assessment: Complaint submitted by Andrew and Robert Starkey regarding Saab Australia and Saab Group Sweden*, (2022); available at <https://ausncp.gov.au/complaints/complaint-28>.

¹⁵ Ibid, p 4, [2.3].

23. On 12 February 2024, Independent Examiner Southalan proposed to the parties that the dispute resolution phase conclude because it was unlikely to be productive in achieving a resolution of the complaint.
24. Both parties agreed and the dispute resolution process ended on 15 February 2024.

Examination

25. The appointment of a different independent examiner to that which conducted good offices can aid in ensuring that the examination process is conducted without inadvertent use of confidential information that may have been disclosed during good offices.
26. Accordingly, in March 2024, Independent Examiner Shanta Martin was appointed by the AusNCP Secretariat to conduct an examination of the complaint and prepare a Final Statement.
27. Independent Examiner Martin was provided a copy of a memorandum from Independent Examiner Southalan (a copy of which was provided to the parties), the initial complaint submission, initial assessment submissions, an embargoed draft of the Initial Assessment and the published Initial Assessment for the complaint. Independent Examiner Martin was not provided with confidential information or exchanges arising from the good offices phase.

Examination

“The objective of the examination stage is for an examiner to:

- (i) consider whether the enterprise’s actions raised in a complaint were consistent with the OECD Guidelines, and**
- (ii) identify means by which to improve observance of the OECD Guidelines, where appropriate”**

AusNCP complaint procedures (2024), [50].

Further information from the parties

28. Upon review of the materials made available, Independent Examiner Martin considered that issues arising from the complaint that warranted examination were:
- 28.1. Saab’s human rights due diligence policies and processes in relation to its supply of weaponry, and
 - 28.2. any impacts on those policies and processes that may have occurred as a result of the information made known to the enterprise by the complaint.

It is noted that these observations were consistent with the result of the Initial Assessment undertaken by Independent Examiner Southalan.¹⁶

29. In April 2024, each of the parties was invited to provide Independent Examiner Martin with access to or copies of any materials that they had provided the AusNCP during good offices, excluding any materials that included confidential information of the other party. The

¹⁶ Ibid.

Independent Examiner also requested specific additional information from each of the parties, as set out below.

Information sought from the enterprise

30. The enterprise was requested to provide:
- 30.1. copies of any policy or procedure regarding human rights due diligence to which each enterprise was committed in the period prior to the initiation of the complaint on 28 September 2021
 - 30.2. information as to whether any of those policies or procedures had changed and if so, provide copies of any policy or procedure regarding human rights due diligence to which each enterprise is now committed, and
 - 30.3. any update to the enterprises' position since a letter from Saab Australia Pty Ltd to the AusNCP dated 16 November 2021, which contained the enterprise's response to the initial complaint.
31. On 23 April 2024, the enterprise requested an extension of time until 31 May 2024 in order to respond. The Independent Examiner agreed to provide additional time for the substantive response, but requested copies of the enterprises' policies be provided earlier.
32. On 31 May 2024, the enterprise responded by letter. No corporate policies were provided. The letter asserted that the complaint related to "(a) whether, and if so to what extent, Saab was required to (and did) undertake human rights due diligence at the time the product was supplied to the end user, and (b) Saab's response to the issue when it was raised by the Notifiers through their legal representative". The enterprise's position was that as the OECD Guidelines in existence at the time the ordnance was supplied made no reference to human rights due diligence, the information and policies sought at [30.1] and [30.2] above were not relevant and any question about Saab's current due diligence processes were beyond scope and should not be considered.
33. The enterprise also stated that it had not caused or contributed to adverse impacts, it had only engaged in supply. While Saab recognised that in circumstances where an impact is directly linked to an enterprise, it should seek to prevent or mitigate adverse human rights impacts,¹⁷ it also stated that its leverage is limited. However, Saab noted that notwithstanding its limited corporate leverage, it took steps available to it to bring the issue raised by the notifiers to the attention of those it considered best placed to address it. Specifically, the enterprise stated:

Saab was not aware of the issue until the Notifiers contacted Saab. On the same day, Saab raised the matter with a member of the Woomera Protected Area (WPA) Advisory Board. The WPA Advisory Board is the primary governance board for the coexistence framework governing management of the WPA, where these kinds of products are tested.

Saab received a response from its contact the following day, confirming the issue was known to, and being dealt with by, the end user. Saab had no reason to believe that this was not the case.

¹⁷ Saab referred to Chapter II, [A.13]-[A.14], and Chapter IV, [3] of the OECD Guidelines.

The speed with which the matter was raised with Defence and a response provided (less than 24 hours) suggests Saab's actions were an appropriate use of Saab's limited leverage and therefore consistent with the Guidelines.

34. On 28 June 2024, the Independent Examiner again invited the enterprise to provide access to documents, and copies of the policies and information referred to in [30] above, noting that no documents had been provided to corroborate the information contained in the enterprise's letter.
35. On 11 July 2024, the Independent Examiner had a discussion with Saab Australia's Deputy General Counsel. The Independent Examiner clarified the relevance of the requested policies, noting that in her view, issues regarding the enterprise's human rights due diligence were not limited to the period in which the ordnance was supplied. The Independent Examiner noted that the ordnance was on the land in the WPA for at least 10 years after 2011, which was the year in which the OECD Guidelines were revised to include the expectation that enterprises should respect human rights and undertake human rights due diligence (discussed further below). Particularly in light of the dangerous nature of the types of products supplied by the enterprise, and that ordnances can have failures that result in the hazardous risk posed by such products subsisting for a very long time, the enterprise's human rights due diligence policies throughout the period were relevant to examining the complaint.
36. On 29 August 2024, the enterprise provided information including the following:
 - 36.1. Prior to 2020, Saab's human rights commitments were primarily outlined in the then current version of Saab's Code of Conduct (2019),¹⁸ Export Control Policy¹⁹ and commitment to the United Nations Global Compact (UN Global Compact) to which Saab has been a signatory since 2011.
 - 36.2. Saab's Responsible Sales Policy was formally adopted in 2022, with development initially commencing in late 2020.²⁰ The enterprise stated that this global policy is based on the UN Guiding Principles and the OECD Guidelines, and clarifies Saab's responsibilities around due diligence and management of risks.
 - 36.3. Saab created a dedicated business and human rights function, responsible for the implementation of the Responsible Sales Policy.
 - 36.4. Saab is the first, and as of today only, major global defence company who has implemented the UN Guiding Principles for sales of military products.
 - 36.5. Under Swedish export control laws, Saab requires a licence to export military products of Swedish origin. This can only occur if there are security and defence policy reasons for the export, and the export is compatible with Swedish foreign policy interests. Decisions on export authorizations are decided by the Swedish national export control authority, the Inspectorate of Strategic Products (ISP), on a case-by-case basis. The ISP

¹⁸ A copy of which was supplied by the enterprise.

¹⁹ Saab, *Export Control Policy*, available at <https://www.saab.com/globalassets/corporate/sustainability/policy/export-control-policy-02.pdf>

²⁰ Saab, *Responsible Sales Policy*, available at <https://www.saab.com/globalassets/corporate/sustainability/policy/responsible-sales-policy.pdf>.

considers a number of criteria in its overall assessment, including the type of product being assessed, and the recipient country's position relating to democracy, respect for human rights and compliance with international humanitarian law.

- 36.6. Information regarding how Saab Dynamics was able to identify the RBS70 model (Mk1) and approximate age of the ordnance. The enterprise stated that the model was supplied to Australia²¹ in the mid-1980s and production ceased in 1990, when a later RBS70 model (Mk2) was released. As the service life of the ordnance ended in 2005, the enterprise does not hold failure rate information for the model.

Information sought from the notifiers

37. The notifiers were requested to provide:

- 37.1. any update to the facts alleged in the complaint since their initial submissions dated 14 October 2021
- 37.2. any update to the outcomes sought by the notifiers, and
- 37.3. information on whether the notifiers had engaged with KAC about the matters raised in the complaint, and if so, provide written confirmation from KAC as to their position.

38. On 31 May 2024, the notifiers responded to the Independent Examiner's request for further information. The notifiers' response included the following:

- 38.1. A copy of a report documenting the removal of the ordnance found within the Lake Hart West site
- 38.2. A letter from KAC stating that KAC supported the notifiers' position in the complaint
- 38.3. A copy of correspondence between the notifiers and Defence, and
- 38.4. An update of the outcomes sought by the notifiers, as follows:

- (a) Saab to engage the notifiers to:
 - (i) regularly undertake site inspections of the heritage sites they registered and have access rights to within the vicinity of Saab missile use, and
 - (ii) prepare site inspection reports and offer feedback to Saab and/or Defence to (A) identify, rectify, remedy and remediate misuse and other incursions and (B) refine testing procedures and minimise the risk of any future misuse and incursions
- (b) Saab to create an operational-level grievance mechanism

²¹ The enterprise reports that the ordnance was supplied to the Commonwealth of Australia's Department of Defence.

- (c) Saab to offer satisfactory compensation to the notifiers
 - (d) To ensure its products are being used in a manner consistent with export licence permits and in accordance with the OECD Guidelines, Saab:
 - (i) ensure all products have individual serial numbers
 - (ii) require its customers to properly track and record delivery and product use, and
 - (iii) facilitate independent verification of tracking and record data.
39. In November 2024, the Independent Examiner had a meeting with Andrew Starkey and his legal representatives. Robert Starkey was unavailable for the meeting. The purpose of the meeting was for the Independent Examiner to better understand the history of, and outcomes sought by, the claim, the position of KAC, and how that interacted with the outcomes sought.²²

Information from other sources

40. In April 2024, the Independent Examiner contacted the Swedish National Contact Point for Responsible Business Conduct (Swedish NCP) seeking information regarding the Swedish Government’s export control process, and whether it includes a human rights due diligence process (expressly or in practice). On 7 May 2024, the Swedish NCP advised that the Ministry of Foreign Affairs is responsible for the ISP,²³ which conducts an overall assessment on a case-by-case basis for every export licence. The Ministry informed the Swedish NCP that the “human rights situation of the recipient country” is considered in these assessments. The Swedish NCP also provided a copy of the Swedish Government’s most recent communication regarding Strategic Export Control.²⁴
41. In late November 2024, the Independent Examiner held discussions with KAC regarding the meaning of its statement of support to the notifiers.
42. The Independent Examiner also obtained information from publicly available sources including:
- 42.1. copies of relevant legislation and caselaw²⁵
 - 42.2. reports and policies of the enterprise²⁶

²² In June 2025, the Independent Examiner had a further meeting with the notifiers, including Robert Starkey, and their legal representatives to discuss issues raised by Defence.

²³ More information about the Inspectorate of Strategic Products is available at <https://isp.se/eng/>.

²⁴ Swedish Government Communication, *Strategic Export Control in 2022 – Military Equipment and Dual-Use Items*, 2022/23:114, 13 April 2023, available at <https://www.regeringen.se>.

²⁵ Including the *Aboriginal Heritage Act 1988* (SA); *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth); *Native Title Act 1993* (Cth); *Mabo v Queensland No 2* [1992] HCA 23; 175 CLR 1; *Starkey v State of South Australia* [2014] FCA 924; 319 ALR 231.

²⁶ Saab annual and sustainability reports, policies, announcements and statements, available on the enterprise’s website, www.saab.com, and archived versions available on http://web.archive.org/web/20240000000000*/saab.com.

- 42.3. international reports and documents on explosive weapons, unexploded ordnances, and human rights responsibilities of arms manufacturers²⁷
 - 42.4. documents relating to the operation of Swedish export controls,²⁸ and
 - 42.5. information regarding the WPA.²⁹
43. Consistent with AusNCP Complaint Procedures 63, 65 and 67, a draft of this Final Statement was provided to the following entities and persons. A further draft was provided for a second round of consultation regarding changes arising from the initial comments. All comments were received and reviewed by the Independent Examiner and addressed in the Final Statement at her discretion.
- 43.1. AusNCP Governance and Advisory Board
 - 43.2. Defence
 - 43.3. Defence SA
 - 43.4. National Indigenous Australians Agency
 - 43.5. KAC
 - 43.6. Swedish NCP, and

²⁷ In addition to materials cited in this report, consideration was given to United Nations Working Group on Business and Human Rights, *Information Note - Responsible business conduct in the arms sector: Ensuring business practice in line with the UN Guiding Principles on Business and Human Rights* (2022), available at <https://www.ohchr.org/sites/default/files/2022-08/BHR-Arms-sector-info-note.pdf>; Norwegian People's Aid, *A Persistent Danger: Unexploded Ordnance in Populated Areas*, (2020) available at <https://www.npaid.org/publications/a-persistent-danger-unexploded-ordnance-in-populated-areas>.

²⁸ Swedish Government Communication, *Strategic Export Controls in 2018 – Military Equipment and Dual-Use Items*, 2018/19:114, (2019); Swedish Inspectorate of Strategic Products, *Annual Report 2018*, available at https://isp.se/media/1327/isp_annualreport2018_web.pdf; Swedish Ministry for Foreign Affairs, *National Action Plan for Business and Human Rights* (2015) available at <https://globalnaps.org/wp-content/uploads/2024/01/NAP-Sweden-2017-open-Swedish.pdf>; European Council Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (2009), L 134/1, available at <https://eur-lex.europa.eu/eli/reg/2009/428/2021-10-07/eng>.

²⁹ Department of Defence and Department of Industry, Innovation and Science, *Post Implementation Review Government Response to the Review of the Woomera Prohibited Area*, (2016), available at https://oia.pmc.gov.au/sites/default/files/posts/2017/04/woomera_prohibited_area_pir.docx; Department of Defence, *Woomera Range Remediation Facilities, Statement of Evidence to the Parliamentary Standing Committee on Public Works*, (2016) available at <https://www.aph.gov.au/DocumentStore.ashx?id=354f416c-c6b1-48f2-a2d9-490d2cdf3cdc&subId=459791>; "Woomera Prohibited Area", *Australian Government – Defence* (Web Page) available at <https://www.defence.gov.au/bases-locations/sa/woomera>; *Memorandum of Understanding Regarding the Woomera Prohibited Area Coexistence Arrangements, Commonwealth and State of South Australia*, signed 10 October 2019, available at <https://www.defence.gov.au/sites/default/files/2020-10/MOU%20regarding%20WPA%20coexistence%20arrangements.pdf>; Dr Gordon de Brouwer, *Coexistence in the Woomera Prohibited Area 2018 Review*, available at <https://www.defence.gov.au/about/reviews-inquiries/2018-review-woomera-prohibited-area-coexistence-framework>; "Kokatha Patrolling the Woomera Prohibited Area", *Kokatha* (Web Page), available at <https://kokatha.com.au>.

43.7. the parties.

44. The Independent Examiner commends the parties, their legal representatives and KAC for their constructive engagement in the examination process, and to all persons who provided comments and feedback on the draft Final Statement.

Application of the OECD Guidelines

45. The complaint was raised on 28 September 2021, regarding the discovery of the ordnance in 2021 and the responses of the enterprise following its discovery.
46. The notifiers alleged that the enterprise had failed “to undertake ... or ... maintain adequate human rights due diligence which could prevent their product from being used in potential human rights violations ...[and to] respect ... the Notifiers’ [human rights] to protect and preserve the integrity of heritage sites for which they have custodial responsibilities”. The notifiers alleged that this conduct constituted a failure to observe the following provisions of the OECD Guidelines then in effect (2011 OECD Guidelines):³⁰

Ch. II General Policies

Enterprises should: ...

2. Respect the internationally recognised human rights of those affected by their activities.

...

10. Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts [...] and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation.

11. Avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur.

12. Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship.

13. In addition to addressing adverse impacts in relation to matters covered by the Guidelines, encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of responsible business conduct compatible with the Guidelines.

³⁰ OECD, *OECD Guidelines for Multinational Enterprises*, 2011 Edition, OECD Publishing, Paris, <https://doi.org/10.1787/9789264115415-en> (2011 OECD Guidelines).

14. Engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities.

Ch. 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. ...
 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.
47. It must be observed that enterprises can only have been expected to comply with provisions of the OECD Guidelines from the point at which such provisions were declared by the OECD. The OECD Guidelines have been reviewed and periodically amended since they were first declared in 1976. The above text is contained in the 2011 version of the OECD Guidelines.
48. The enterprise identified, and the Independent Examiner accepts, that:
- 48.1. the ordnance was an RBS70 Mk1 model which has a service life of approximately 15 years
 - 48.2. this model was supplied to Australia in or about the mid-1980s and was last supplied to Australia in the early 1990s, and
 - 48.3. production ceased in 1990, when a later RBS70 model (Mk2) was released.
- Accordingly, the ordnance was manufactured and supplied by the enterprise to Australia prior to the existence of the provisions in the 2011 OECD Guidelines on which the notifiers rely.
49. The version of the OECD Guidelines that existed in the period 1980 to 1999, during which the ordnance was made and supplied, referred to employee rights but otherwise contained no express reference to human rights.

50. In 2000, the OECD Guidelines were reviewed and updated. The 2000 OECD Guidelines included a new provision in the General Policies Chapter that enterprises should “[r]espect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.”³¹ The 2000 OECD Guidelines also referred to the expectation that enterprises should consider the views of other stakeholders, and disclose material information on issues regarding employees and other stakeholders.³²
51. Neither the 2000 OECD Guidelines nor its predecessor versions reflected an expectation that enterprises should undertake risk-based human rights due diligence. It was not until after the concept of human rights due diligence was developed between 2005 and 2011,³³ that it entered the OECD Guidelines text. Both the human rights chapter (Chapter IV) and paragraphs 10 to 14 of the General Policies chapter (Chapter II) on which the notifiers rely, were first introduced in 2011.
52. A revised version of the OECD Guidelines was published in 2023, which reflects a strengthened expectation by OECD adherent governments that enterprises should undertake risk-based due diligence. The revised 2023 OECD Guidelines text is referred to where relevant in this Final Statement.

³¹ OECD, *OECD Guidelines for Multinational Enterprises*, 27 June 2000, OECD Publishing, Paris, (2000 OECD Guidelines), Ch II General Policies [2].

³² 2000 OECD Guidelines, Ch III Disclosure [4(f)].

³³ The concept was developed by the United Nations Special Representative of the Secretary General on Human Rights and Transnational Corporations and Other Business Enterprises, culminating in the UN Guiding Principles (see n 3 above).

Observations and recommendations

Observations regarding the complaint

53. The ordnance was discovered between Lake Hanson and Lake Hart in South Australia, close to the north-western edge of Lake Hart, approximately 475km northwest of Adelaide.

54. The area in which the ordnance was found is part of the WPA, a long-range weapons testing facility declared by the Australian Government in 1947. In addition to being a weapons testing range, the WPA has served as a launch point for space activity and at one point had the second highest number of rocket launches in the world after NASA's Cape Canaveral facilities in Florida.³⁴ The WPA once covered 270,000 square kilometres and currently encompasses 122,000 square kilometres. It is approximately the size of England and "remains the largest land-based test range in the Western world... its importance for test and evaluation has steadily increased since the late 1990s".³⁵ The WPA encompasses the traditional lands of six Aboriginal groups, including the Kokatha People, of which the notifiers are members.



Map 1 - In blue - examples of cultural features of significance within registered recorded or known heritage sites in and around Lake Hart - see page 4 for descriptions

³⁴ "History of the Woomera Prohibited Area", Australian Government – Defence (Web Page), available at <https://www.defence.gov.au/bases-locations/sa/woomera/about>, accessed 11 December 2024.

³⁵ Ibid.

55. The notifiers describe the area in which the ordnance was found as being within the Lake Hart West Aboriginal heritage site. They identify that the ordnance was located near artefacts and other items of cultural significance. The notifiers provided the AusNCP with a map of the area where the ordnance was found, and collocated examples of cultural features of significance within registered recorded or known heritage sites in and around Lake Hart (see Map 1).

56. As part of their submissions during the examination phase, the notifiers provided the AusNCP with a report containing information regarding the cultural and spiritual significance of the area to Western Desert Aboriginal Men.³⁶ The report identified the importance of artefacts, rock art and other features in the area, specifically including myall (*Gadaja*) trees. These trees are identified in the report as having been used as shelter for women who would traditionally give birth under them, to make implements such as bowls, spears and nulla nulla, and to store sacred objects. The report referred to an important mythological zone that encompasses the area in which the ordnance was found. These matters are not disputed by the enterprise. The significance of the area for First Nations people is also recognised by Defence (see text box). Accordingly, the examination proceeds on the basis that the cultural significance of the area in which the ordnance was found is not in dispute and is accepted.

Aboriginal Groups in the Woomera Prohibited Area

“The Woomera Prohibited Area (WPA) encompasses the traditional lands of six Aboriginal groups. Maralinga Tjarutja and Anangu Pitjantjatjara Yankunytjatjara hold almost 30 per cent of the land in the west of the WPA as freehold title granted under South Australian legislation. Four other groups – Antakirinja Matu-Yankunytjatjara, Arabana, Gawler Ranges and Kokatha – hold native title over areas in the WPA.

“The history of these people and their deep ties to the land in the WPA date back over many thousands of years. The WPA contains sites of enduring significance to Aboriginal people, including stone arrangements associated with traditional ceremony and ritual, rock art sites, ceremonial sites, cultural sites manifested in topographical features such as watercourses, and archaeological sites that show how people lived in and used their environment.

“Aboriginal people continue their traditions by accessing the WPA for traditional ceremonies, hunting, heritage site protection, and cultural activities.”

Source: Defence, History of the Woomera Prohibited Area, <https://www.defence.gov.au/bases-locations/sa/woomera/about>

57. As both the notifiers and KAC observed, the Kokatha People share a cultural heritage extending back thousands of years. Legal recognition of that ancient connection has occurred only relatively recently. Until the mid-1960s, Aboriginal heritage was provided scant legislative protection in Australia. South Australia introduced legislation in 1965.³⁷ Following the 1967 referendum which resulted in a change to the Australian Constitution to recognise for the first time that Aboriginal and Torres Strait Islander people are persons to be counted as part of the population, legislation was also introduced at the Commonwealth level addressing Aboriginal

³⁶ Starkey, “Lake Hart West Saab Missile Removal Report” submitted to the AusNCP, 29 May 2024.

³⁷ *Aboriginal and Historic Relics Preservation Act 1965 (SA)*.

heritage.³⁸ In 1988, South Australia introduced legislation,³⁹ which replaced existing State legislation and provided a process by which Traditional Owners could register and obtain rights to access and protect sites and objects of significance according to Aboriginal tradition.⁴⁰ After the High Court overturned the legal fiction of ‘terra nullius’ in 1992,⁴¹ the *Native Title Act 1993* (Cth) was introduced so as to provide for the recognition and protection of native title across Australia.⁴² The legislation recognises Aboriginal and Torres Strait Islander peoples’ pre-existing rights and interests in relation to land and waters according to their Traditional laws and customs. In 2014, with the agreement of Andrew Starkey as an applicant in the process,⁴³ KAC became the registered native title body corporate responsible for managing native title rights and interests on behalf of common law holders. The notifiers are members of KAC.⁴⁴

58. The notifiers claim to exercise rights pursuant to the *Aboriginal Heritage Act* to access and protect sites with significant cultural heritage value. The foundation for those legal rights pre-date the recognition of native title in respect of Kokatha Country. However, KAC as the registered native title body has also been appointed as a Recognised Aboriginal Representative Body under the *Aboriginal Heritage Act*.⁴⁵ The effect of this appointment is that KAC can enter into local heritage agreements with proponents to manage impacts on Aboriginal heritage. In performing this role, KAC is required to ascertain and represent the views of all Traditional Owners in relation to the Aboriginal heritage within its area of responsibility. It is noteworthy that under the *Aboriginal Heritage Act*, the Minister may authorise an Aboriginal person to enter any land for the purpose of gaining access to an Aboriginal site (s 36(1)). Section 37 also states that, “Nothing in this Act prevents Aboriginal people from doing anything in relation to Aboriginal sites, objects or remains in accordance with Aboriginal tradition”. Accordingly, as stated in the Initial Assessment for this complaint, both the notifiers and KAC have rights and obligations in respect of the Lake Hart West area and there is no right of exclusivity by the notifiers in respect of consultations regarding the Lake Hart West area. Within this context, it is significant that KAC has indicated that it supports the notifiers in their complaint. When questioned as to what this support signified, the Chief Executive Officer (CEO) of KAC explained that it means that KAC agrees that companies operating in the area should uphold international standards of responsible business conduct. He stated that if the notifiers’ complaint can achieve this result, then KAC is supportive of it. The CEO also referred to Andrew Starkey’s rights under the *Aboriginal Heritage Act* and spoke respectfully of his depth of cultural knowledge and connection with Kokatha Country.

59. The notifiers advised the AusNCP that the ordnance was removed in January 2022 without the need for any detonation. The notifiers conducted a site visit in July 2022 and confirmed that

³⁸ *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).

³⁹ *Aboriginal Heritage Act 1988* (SA).

⁴⁰ Ibid

⁴¹ *Mabo v Queensland No 2* [1992] HCA 23; 175 CLR 1.

⁴² *Native Title Act 1993* (Cth), s 3.

⁴³ *Starkey v State of South Australia* [2014] FCA 924; 319 ALR 231.

⁴⁴ See KAC Member Lists published from time to time by the Office of the Registrar of Indigenous Corporations, available at <https://register.oric.gov.au/document.aspx?concernID=3797233>, last accessed 27 March 2025.

⁴⁵ The appointment occurred on 29 October 2021. See “RARB Contact Information”, *Attorney-General’s Department* (Web Page), <https://www.agd.sa.gov.au/aboriginal-affairs-and-reconciliation/aboriginal-heritage/recognised-aboriginal-representative-bodies/rarb-contact-information>, last accessed 23 September 2025.

the removal of the ordnance had taken place. They also confirmed that although the location where the ordnance was found was in close proximity to many cultural and heritage features, it did not appear to have damaged any of those features.⁴⁶ However, the notifiers claimed that the presence of the ordnance for at least one year prevented them and other Traditional Owners from accessing the area. They stated that this “disrupted not only their enjoyment of the site but also important site verification activity in the area”. The notifiers stated that the fact that the ordnance did not damage any of the cultural and heritage values of the area was a matter of luck. The notifiers observed other weaponry debris of unknown manufacture at the Lake Hart West site. The notifiers claimed that the presence of the ordnance along with other weapons debris was an interference with the heritage value of the area.⁴⁷ They stated “the existence of the missile itself reflects a failure in existing heritage protection measures”.⁴⁸ In their original complaint documents, the notifiers also raised that they are unable to ascertain whether other similar ordnances exist within Lake Hart West or neighbouring sites.

60. Defence denies that it “restricted access to the area during the period it was working with the notifiers to locate the ordnance”, but accepts that access “was restricted for periods of time in 2021 due to scheduled testing activity”. Defence stated that from the time in which it was aware of the ordnance in May 2021 until the ordnance was cleared in January 2022, it granted all but two requests for access to the lands of the Kokatha People in the WPA, and that this included granting requests to access the lands for cultural purposes. Other than the two requests for access that were not granted, Defence has no record of access to the site being impeded between May 2021 and January 2022.
61. Whether or not the notifiers and other Traditional Owners were officially restricted by Defence from accessing the area, personal safety concerns may have led to a practical impediment. Defence informed the Independent Examiner that “[u]pon receipt of a photograph of the debris in July 2021, Defence verbally advised the Notifiers that the debris was inert and posed no risk to their safety”. The notifiers stated they had no recollection of such verbal reassurance and stated that in any event it would have been negated by subsequent written communications from Defence and the notifiers’ own training. The notifiers provided the AusNCP with a copy of an email from Defence dated 5 November 2021 which included the following:

*Based on the photographic information provided to us, Defence **suspects the war materiel in question to be inert however a physical inspection is required to confirm the initial assessment...** to date, the Range staff have not been able to locate the debris to undertake assessment and retrieval ...*

*As stated previously in earlier **correspondence ... dated 20 July 2021, this type of debris is classified as ‘war materiel’, which could include unexploded ordnance (UXO) or other dangerous materials, and must not be touched, removed or otherwise interfered with.** Defence has a specialist team at Woomera to*

⁴⁶ Starkey, “Lake Hart West Saab Missile Removal Report”, 10.

⁴⁷ Ibid, iv.

⁴⁸ Ibid, 15. Defence disagrees with the notifiers’ statement, observing that the firing of the ordnance occurred before the existing heritage protection measures were put in place in 2017, and that fragments and debris from historical testing activities may still be present on the range. Defence refers to its ‘clean range’ policy as requiring Defence to make every reasonable effort to ensure that all unexploded ordnance is located and destroyed. Defence asserts that it followed the process of engagement set out in the Woomera Range Complex Environment and Heritage Management Plan 2017 (updated July 2021) prior to entering sites that are of potential heritage value in its search for and removal of the ordnance.

undertake this work and will make arrangements for qualified ordnance disposal experts to assess the materiel and, if necessary, render the materiel safe and remove it.”

(Emphasis added)

62. In addition to Defence communications warning of the potential danger posed by the ordnance, the notifiers allege they had been trained and advised by experts to never approach a missile as it may have multiple detonators and could cause serious harm even without a warhead. They also noted that in circumstances where Defence had been unable to locate and assess the ordnance, the notifiers could not know if it was safe to enter the area.
63. Having heard directly from both notifiers, the Independent Examiner accepts that the discovery of the ordnance caused distress and a well-founded fear for personal safety. The Lake Hart West area holds deep cultural significance for the Traditional Owners, including the notifiers, and concerns about the possible effect of the ordnance on nearby artefacts added to that distress. The presence of the ordnance also gave rise to reasonable concerns that it posed a risk to safety, and that there may be other unsafe ordnances in the area. That fear was unlikely to have been alleviated by a verbal assurance that the ordnance was likely inert, particularly in circumstances where Defence also conveyed that the ordnance may be dangerous. In all the circumstances, the Independent Examiner accepts that the notifiers were inhibited from entering the area until the ordnance had been assessed and cleared by Defence. Accordingly, the notifiers and potentially other Traditional Owners were impeded in accessing the area following the discovery of the ordnance until it was cleared on 18 January 2022.
64. It is accepted by the Independent Examiner that during the period between the discovery of the ordnance in January 2021 and its removal in January 2022, the notifiers were unable to attend the site to undertake site verification activity, practice Culture or otherwise enjoy the site. In addition to the risk the ordnance potentially posed to safety and to life (albeit, it was later determined not to have required detonation), the presence of the ordnance prevented the notifiers and potentially other Traditional Owners from carrying out their custodial duties. Under international human rights law, Indigenous peoples have rights to self-determination, enjoy culture and take part in cultural life.⁴⁹ Indigenous peoples also have internationally recognised rights to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands and to uphold their responsibilities to future generations.⁵⁰ The Independent Examiner accepts that the discovery and presence of the ordnance in the Lake Hart West area adversely impacted the ability of the notifiers and other relevant Traditional Owners to enjoy these human rights.
65. The notifiers have extensive experience in and familiarity with the Lake Hart West area and other customarily significant sites in the region. They are Kokatha *Badu*, meaning they are

⁴⁹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), arts 1 and 27; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976), arts 1 and 15(1)(a). See also *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), UN GAOR, 66th sess, 89th plen mtg, UN Doc A/RES/66/142 (30 March 2012), in particular arts 3 (read with art 46), 5, 8, 11, 12, 14, 15 and 31. The UNDRIP was endorsed by Australia in 2009.

⁵⁰ UNDRIP, art 25. States should also take effective measures to ensure that no storage or disposal of hazardous materials take place in the lands and territories of Indigenous peoples without their free prior and informed consent: UNDRIP, art 29(2).

senior members of the Kokatha People who hold information and responsibilities in respect of the Lake Hart West heritage site.⁵¹ The notifiers' experience includes:⁵²

- 65.1. Andrew Starkey: over 40 years' experience in the field of Aboriginal heritage protection including 16 years with the Defence, and chair of multiple entities that represented Kokatha for 20 years.
 - 65.2. Robert Starkey: over 40 years' experience in the field of Aboriginal heritage protection, including as a ranger in multiple national parks and with large multinational defence contractor and mining companies – all within South Australia.
66. Given their extensive experience, cultural connection to and familiarity with the Lake Hart West area, it is anticipated that if it were possible to identify the provenance, the notifiers would be aware of other examples of the enterprise's ordnances being discovered in the area. The Independent Examiner observes that one of the outcomes sought by the notifiers is that the enterprise ensures all products have individual serial numbers. The enterprise informed the Independent Examiner that, "All Saab products are identifiable by serial number. In this case, a serial number would have originally been present on the outside of the ordnance as found. However, it appears from the photographs supplied that this has worn away over time". During discussions with Andrew Starkey, the Independent Examiner queried whether there had been prior incidents of ordnances manufactured or supplied by the enterprise being discovered in the Lake Hart West area. Mr Starkey stated that he had picked up debris from weapons, but that it is often not possible to determine the manufacturer of the debris. He did not refer to other instances in which the largely intact remains of an ordnance were identified.
67. The notifiers provided the AusNCP with information regarding the Lake Hart West area and the WPA, including extracts of a Heritage Management Plan dated February 2020. The Heritage Management Plan was prepared by the KAC and GML Pty Ltd. While the Heritage Management Plan states that it was prepared with contributions by the notifiers, this was disputed by Andrew Starkey during discussions with the Independent Examiner. The Heritage Management Plan states that "Defence does not use the area associated with Lake Hart West", the "Lake Hart area is located outside a Defence use area" and "the main threats are associated with unintended Defence activities and environmental impacts".⁵³ Andrew Starkey reported to the Independent Examiner that while the Lake Hart West area is not a live fire area, it sits within the safety trace area of adjacent live fire areas. As such, the Lake Hart Area is susceptible to the effects of munitions testing that misses the intended target area. Mr Starkey reported the presence of munitions debris in the Lake Hart West area in and around the area in which the ordnance was discovered.
68. The notifiers informed the AusNCP as to their views regarding Defence activities and who should be involved in monitoring and supervising their impacts on Aboriginal Culture. The notifiers stated that they do not take the position that all Defence activities should cease in the area. They informed the AusNCP they believe "that the management of the archaeological/cultural site/s can co-exist with the ongoing Defence activities provided that

⁵¹ Starkey Response to AusNCP Questions of 5 October 2021, 14 October 2021, 4.

⁵² Starkey, "Lake Hart West Saab Missile Removal Report", 1.

⁵³ GML Heritage Pty Ltd, *Woomera Prohibited Area - Heritage Management Plan, Kokatha Country*, February 2020, 71, extracts attached to Starkey Response to AusNCP Questions of 5 October 2021, 14 October 2021.

due care is taken for archaeological artefacts happened across [sic] during Defence exercises”.⁵⁴ In order to achieve this, the notifiers claim that they (the notifiers) should supervise or monitor the site and the protection of affected artefacts in accordance with Aboriginal heritage discovery protocols. However, these are matters for discussion between the notifiers, KAC and other Traditional Owners and are not within the remit of the AusNCP. Accordingly, this Final Statement does not examine which Traditional Owners should be engaged with supervising and monitoring the area.

Observations regarding the enterprise’s compliance with the OECD Guidelines

69. The following observations are made regarding the enterprise’s conduct from the approximate date the ordnance was manufactured until the date this Final Statement was drafted, during which period the text of the OECD Guidelines underwent various changes.

Prior to 2011 OECD Guidelines

70. As referred to above at [48], the ordnance was likely manufactured in the 1980s and supplied by the enterprise to Australia in the 1990s. During this period, the OECD Guidelines did not contain text that addressed matters of human rights or risk-based due diligence. Societal expectations regarding corporate responsibility for human rights existed well before the incorporation of a human rights chapter into the OECD Guidelines in 2011. As such, a company committed to responsible business conduct may have established its human rights policies and conducted human rights due diligence in advance of such matters being incorporated into the OECD Guidelines. However, a failure to have human rights policies and put in place overarching human rights due diligence prior to 2011 would not have amounted to non-observance of the OECD Guidelines as drafted at that time.
71. Accordingly, the Independent Examiner considers that a failure by Saab to conduct human rights due diligence in the period before 2011, including in respect of the earlier manufacture and supply of the ordnance, was not contrary to the OECD Guidelines.

After 2011 OECD Guidelines and before discovery of the ordnance

72. In 2011, the OECD Guidelines underwent a significant review that led to the Human Rights Chapter (IV) and references to human rights due diligence being included in the OECD Guidelines. As set out at [46] above, the 2011 OECD Guidelines included that enterprises should “respect the internationally recognised human rights of those affected by their activities” (General Policies, A.2), “carry out risk-based due diligence” (General Policies, A.10) and “carry out human rights due diligence” (Human Rights, 5). Saab, as a multinational enterprise operating in and from OECD adhering countries, was and is expected to comply with these human rights and due diligence standards in all of its operations.
73. The manufacture and supply of arms is an activity that may have extremely grave impacts on human rights. Where those impacts occur, an arms manufacturer and/or supplier may in some

⁵⁴ Starkey, “Lake Hart West Saab Missile Removal Report”, 15.

circumstances contribute to adverse human rights impacts even if they are not directly involved in the use of the weaponry. Further, as explained in paragraph 16 of the commentary to Chapter II General Policies, even if an enterprise has not caused or contributed to the adverse impact, it can be directly linked to it by reason of business relationships. Such direct linkage can occur even where the entity that causes the impact is a State entity:

16. ... The Guidelines concern those adverse impacts that are either caused or contributed to by the enterprise, or are directly linked to their operations, products or services by a business relationship ...

17. The term **‘business relationship’** includes relationships with ... **State entities** directly linked to its business operations, products or services.

(Emphasis added).

The OECD Guidelines make clear that enterprises are expected to carry out due diligence in order to identify, prevent, mitigate and account for how they address their actual and potential adverse impacts, including specifically human rights impacts. This is so, even though the direct cause of the impact may be a State entity with whom the enterprise has a business relationship.

74. The notifiers allege that Saab failed to undertake or maintain adequate human rights due diligence. In its response to the complaint, Saab did not seek to argue that it did undertake or maintain human rights due diligence separate from the process established by Swedish export controls. As referred to at [36.5] above, in its response to the complaint, Saab referred to the export control processes to which it is subject by the Swedish government. The Swedish NCP advised the AusNCP that the ISP “conducts an overall assessment on a case-by-case basis for every export license ... [and the] human rights situation of the recipient country is always considered in these assessments.” Swedish Government Communications regarding Strategic Export Control state that since 2018, the Swedish regulatory framework for exports of military equipment makes the democratic status of the recipient country, along with its respect of human rights, a key condition in the assessment of licence applications.⁵⁵
75. While government export controls represent an important element in the control of arms, and consideration of such export controls may be an important part of human rights due diligence, there remains an expectation on enterprises under the OECD Guidelines that they will carry out their own human rights due diligence. As noted in the UN Guiding Principles (with which the OECD Guidelines are consistent), the business responsibility to respect human rights “exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations”.⁵⁶ The focus of assessment by the ISP may not cover the full extent of adverse human rights impacts that can arise from the supply of arms to a particular country. For example, there is no information available from the Swedish ISP as to whether respect for the rights of Indigenous peoples by recipient countries is assessed. Further, the ISP has noted that while serious and extensive human rights violations can constitute an obstacle to the granting of a permit, permission can still be granted if there are significant national defence or security

⁵⁵ Swedish Government Communication, *Strategic Export Control in 2022 – Military Equipment and Dual-Use Items*, 2022/23:114, at 7, available at <https://www.regeringen.se>.

⁵⁶ UN Guiding Principles, commentary to GP 11.

policy interests for foreign cooperation.⁵⁷ Accordingly, while the Swedish export controls would be an element for consideration in any human rights due diligence undertaken by Saab, reliance solely on those processes would not be sufficient to meet the expectations under the OECD Guidelines.

76. In the course of the examination, the Independent Examiner sought from Saab information regarding and copies of its human right due diligence policies in the period prior to the initiation of the complaint. Saab stated that prior to the introduction of a Responsible Sales Policy in 2023 (discussed below), Saab's human rights commitments were outlined in Saab's:

76.1. Code of Conduct 2019⁵⁸

76.2. Export Control Policy, and

76.3. Commitment to the UN Global Compact since 2011.

77. The Saab Code of Conduct 2019 contained a statement of Saab's belief that companies have an obligation to respect human rights. It stated that this belief is why Saab has endorsed the UN Global Compact, which encourages businesses to align their operations with principles that include respect for human rights. The Code of Conduct did not contain information on how these commitments were to be implemented, other than by making suppliers aware of the UN Global Compact and Saab's own Supplier Code of Conduct. The Code of Conduct did not state whether, or if so how, Saab would undertake human rights due diligence, including in respect of its downstream supply chain which would include the use and users of Saab manufactured arms.

78. The Export Control Policy contained no reference to human rights or human rights due diligence. It consisted of a statement that "Saab is acting in a highly regulated field of business and is committed to always complying with applicable export control laws, regulations, authorisations, end user undertakings and sanctions" and seven bullet points on how this will be achieved. One of the bullet points relevantly stated it would be achieved through "investigating internally and reporting violations to the authorities and implementing corrective measures". Given the context, the reference to violations is understood to mean contraventions of export control laws, regulations, authorisations, end user undertakings and sanctions. While investigating violations of such restrictions may incidentally involve investigations that involve breaches of human rights, the Export Control Policy does not amount to a commitment to undertake human rights due diligence.

79. Saab has been a member of the UN Global Compact since 2011. The first two principles of the UN Global Compact are:

Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights

⁵⁷ Swedish Inspectorate of Strategic Products, *Annual Report* (2018), 12-13, available at https://isp.se/media/1327/isp_annualreport2018_web.pdf. See also <https://isp.se/nyheter/kommentar-pa-andrade-riktlinjer-for-krigsmaterielexport/>

⁵⁸ Copy supplied by Saab dated 2016 and said to be applicable in 2019.

Principle 2: Businesses should make sure that they are not complicit in human rights abuses.

Underlying these principles, the UN Global Compact urges member companies to undertake human rights due diligence.⁵⁹

80. In order to understand how the enterprise implemented its commitment to the UN Global Compact, the Independent Examiner reviewed Saab's Communications on Progress available on the UN Global Compact website.⁶⁰ The documents linked at that site were the enterprise's annual financial reports since 2012, into which it incorporated matters of sustainability.
81. The enterprise's annual financial and sustainability reports referred to Saab's commitment to the UN Global Compact. Between 2012 and 2017, while Saab expressed a commitment to human rights and undertook management of anti-corruption issues utilising due diligence processes,⁶¹ much of its emphasis was on the impacts that Saab's suppliers might have on human rights, rather than the impacts of the enterprise's own products. In respect of the impacts of its own products, Saab referred to and relied on Swedish export control processes.
82. In 2017, Saab "began to identify all of its risks associated with human rights which will be completed in 2018".⁶² This appears to be the first recognition by Saab that human rights due diligence ought not be limited to the 'upstream' human rights impacts of its suppliers, but also the 'downstream' human rights impacts of Saab's own products being supplied to others. However, Saab's consideration of its downstream impacts remained closely associated with compliance with export regulatory requirements. In its 2018 Annual and Sustainability Report, the enterprise reported:

Saab uses the UN guiding principles for business and human rights to support its work. According to these principles, companies are expected to identify their most important human rights issues, where there is a risk of serious adverse consequences from the company's operations. Saab has identified compliance with export regulations (right to life, freedom and personal safety) and responsible supplier relationships (right to fair working conditions) as its most important issues.⁶³

83. As in previous years, Saab continued to refer to and rely upon its compliance with Swedish export control processes as providing a means of meeting human rights standards.⁶⁴ The enterprise further stated that "Saab also has its own internal processes to weigh the risks associated with among other things human rights to evaluate new business opportunities [and] ... makes a comprehensive assessment in which several factors are considered."⁶⁵ Read

⁵⁹ See UN Global Compact website, <https://unglobalcompact.org/what-is-gc/mission/principles/principle-1> and <https://unglobalcompact.org/what-is-gc/mission/principles/principle-2>

⁶⁰ "Company Information – Saab AB," *UN Global Compact* (Web Page), <https://unglobalcompact.org/what-is-gc/participants/13555-Saab-AB-publ> All business participants of the UN Global Compact are required to report annually on implementation of the principles by way of a Communication on Progress.

⁶¹ Saab appointed a unit to undertake due diligence regarding anti-corruption and ethics in the context of appointing consultants and business partners. See for example the Saab annual reports for 2013 (at 34); 2016 (at 29); and 2017 (at 40).

⁶² Saab, *Annual and Sustainability Report 2017*, 43.

⁶³ Saab, *Annual and Sustainability Report 2018*, 62.

⁶⁴ Ibid, 54 and 62.

⁶⁵ Ibid, 62. This same statement is repeated in each annual report from 2018 until 2022.

most favourably, the statement (which was repeated in subsequent years) suggested that Saab's downstream human rights due diligence was limited to assessments of new business opportunities. Precisely what the internal processes were or how the risk of adverse human rights impacts of its own products (specifically, weaponry) or existing business relationships were incorporated are not revealed by the reports or policies to which the Independent Examiner was referred. The reports did not make clear whether Saab undertook an independent assessment of downstream human rights impacts of its products supplied to existing customers (such as Australia). It appears that in respect of such customers, Saab's policy remained focused on compliance with export regulatory controls.

84. The OECD Guidelines provide that enterprises should 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.⁶⁶ The purpose of human rights due diligence is for enterprises to proactively identify, prevent and manage actual and potential adverse impacts on human rights and other matters covered by the OECD Guidelines.
85. Human rights due diligence consists of:⁶⁷
 - 85.1. Identifying and assessing actual or potential adverse human rights impacts
 - 85.2. Integrating findings from impact assessments across relevant company processes and taking appropriate action
 - 85.3. Tracking the effectiveness of measures and processes to know if they are working, and
 - 85.4. Communicating on how impacts are being addressed and showing stakeholders – in particular affected stakeholders – that there are adequate policies and processes in place.
86. Importantly, an effective human rights due diligence process is iterative such that information gleaned throughout is reflected in policies and practices so as to improve outcomes. Human rights due diligence should take into account significant changes in circumstances and is an ongoing, proactive and reactive process.
87. Saab was encouraged on multiple occasions by the Independent Examiner to provide information regarding its human rights due diligence policies and procedures in the period before the complaint was initiated. It is notable that the information that was supplied did not enable the enterprise to clearly communicate and show that adequate human rights policies and human rights due diligence processes were in place – whether upstream or downstream. Instead, the Independent Examiner had to seek to identify and distil the relevant information from multiple documents. That information indicated that in the period from 2011 to 2017, the enterprise did not undertake any human rights due diligence on the downstream impacts of Saab's weaponry manufacture and supply. Between 2017 and 2018, a human rights risk assessment was undertaken, following which the enterprise made some improvements to its incorporation of human rights issues into decision making. However, it is not clear that Saab

⁶⁶ OECD Guidelines, Human Rights Chapter (IV), 5.

⁶⁷ UN Working Group on Business and Human Rights, *Corporate human rights due diligence – identifying and leveraging emerging practices*, (2018) available at <https://www.ohchr.org/en/special-procedures/wg-business/corporate-human-rights-due-diligence-identifying-and-leveraging-emerging-practices>.

undertook human rights due diligence that included identifying and managing the potential adverse impacts of past supplies of weaponry, or the adverse impacts in respect of supply to existing (rather than new) business arrangements and partnerships.

88. While it is encouraging that Saab made improvements in respect of implementing its human rights commitments between 2011 and 2021, the Independent Examiner finds that the enterprise did not undertake human rights due diligence related to the production and supply of weaponry consistent with the standards set out in the OECD Guidelines. Particularly in circumstances where weaponry would have a failure rate that could lead to unexploded ordnances posing a threat to civilians, appropriate human rights due diligence of a weapons manufacturer would be expected to assess the human rights risks associated with the past production and supply of its weaponry and of existing business relationships, not just new business relationships.

After notifying discovery of the ordnance (9 September 2021 to date)

89. The notifiers first engaged with the enterprise on 9 September 2021, approximately three weeks prior to filing their complaint with the AusNCP on 28 September 2021. At that time, the notifiers stated that through their legal counsel they had discussed their concerns with a member of the enterprise but had not had contact since. In their submissions to the AusNCP during the Initial Assessment, the notifiers stated the enterprise had also not responded to correspondence sent on 5 October 2021, and claimed that “regardless of ample opportunity, the enterprise has failed to act (by, for example, using their leverage) or at least correspond to convey that they have undertaken any form of human rights due diligence or an intention to assist in the mitigation of the threats their product currently pose”.⁶⁸
90. Both the General Principles Chapter (II) A.12 and the Human Rights Chapter (IV) 3 of the 2011 OECD Guidelines provided that enterprises should 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. The 2023 OECD Guidelines expand on this expectation to include providing for or co-operating in the remediation of adverse impacts. An enterprise fulfils this expectation by exercising leverage on the entity that caused or contributed to the adverse human rights impact to take appropriate action.⁶⁹
91. The enterprise stated that on the same day it first became aware of the discovery of the ordnance on 9 September 2021, Saab Australia contacted a colleague at Defence SA with links to the WPA to bring the ordnance to their attention. The following day, Defence SA responded to confirm that Defence was aware of the issue, in negotiations with the Traditional Owners

⁶⁸ Starkey Response to AusNCP Questions of 5 October 2021, 14 October 2021, p 1-2.

⁶⁹ When a multinational enterprise is encouraged to exercise leverage over a government pursuant to the OECD Guidelines to prevent, mitigate and remediation human rights, this does not encourage inappropriate lobbying. Multinational enterprises are expected to also ensure transparency and integrity in lobbying activities under Chapter II: General Policies paragraph 5, and to abide by Chapter VII of the OECD Guidelines: Combating Bribery and Other Forms of Corruption. See also OECD, *Recommendation on Principles for Transparency and Integrity in Lobbying* [OECD/LEGAL/0379].

of the land and considering how to best deal with the issue.⁷⁰ The enterprise did not immediately communicate with the notifiers that it had taken these steps. On 5 October 2021, the notifiers' legal representative contacted the enterprise to say that the issue remained unresolved. On 18 October 2021, the enterprise informed the notifiers' legal representative of the actions it had taken on 9 September 2021 and stated that Saab did not consider there was any further action it could take. However, the enterprise informed the AusNCP that upon receiving the notifiers' 5 October 2021 email, Saab Australia did take further steps to contact Saab Dynamics to understand whether any additional assistance could be provided to Defence to resolve the issue raised by the Notifiers. The enterprise stated any support offered by Saab Dynamics would likely be dependent on COVID-19 travel restrictions, as specialist personnel are all based in Sweden.

92. On 20 October 2021, the AusNCP informed the enterprise of the complaint having been initiated by the notifiers. In its response to the AusNCP, the enterprise stated that upon receiving the complaint, Saab Australia sought further details from contacts in Defence to understand the status of the issue. From those enquiries, Saab Australia understood that:⁷¹
 - 92.1. The initial delay in commencing searches for the ordnance arose because Defence was required to seek KAC consent to commence searches. That engagement took some time due to the ill health of key KAC representatives
 - 92.2. Searches for the ordnance required a specialist team. That team had limited availability due to ongoing responsibilities around the operation of the WPA
 - 92.3. Defence had completed two searches of the area and had requested further detail from the notifiers to progress.
93. According to Defence, Saab also notified Defence of the discovery of the ordnance in November 2021.
94. The ordnance was removed by Defence on 18 January 2022.
95. The Independent Examiner considers that the response of the enterprise from 9 September 2021, by which it used its leverage to encourage Defence to act, was compliant with the expectations set out in General Principles Chapter (II) A.12 and the Human Rights Chapter (IV) 3 of the OECD Guidelines 2011. For the purposes of assessing the enterprise' conduct as against the expectations of the OECD Guidelines, it is not determinative as to whether or not Defence would have removed the ordnance in the absence of the enterprise's conduct.

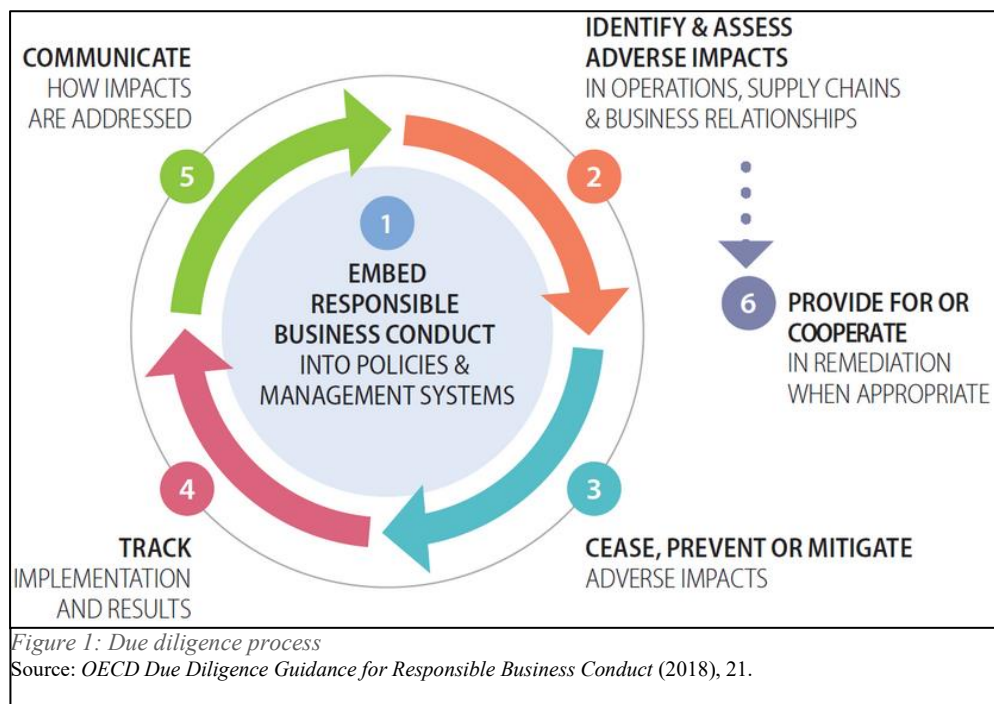
⁷⁰ It is noted that Defence informed the Independent Examiner that it was in communication with the notifiers and in the process of locating the ordnance when the enterprise contacted Defence SA. Defence maintains that "the enterprise was not involved during the retrieval attempts, and did not influence the actions of Defence".

⁷¹ Letter from Saab to AusNCP dated 16 November 2021.

Recommendations

Human rights due diligence

96. The OECD Guidelines state that enterprises are expected to undertake human rights due diligence. The OECD has produced publications that provide practical support to enterprises on the implementation of the OECD Guidelines by providing plain-language explanations of its due diligence recommendations and associated provisions.⁷² The expectation to conduct due diligence has also been further emphasised in the 2023 refresh of the OECD Guidelines. This expectation continues to apply to the enterprise since the discovery of the ordnance.



97. Human rights due diligence is ongoing, iterative and takes into account information received.⁷³ A question arises therefore as to whether, and if so how, the following information has factored into the enterprise's human rights due diligence processes since 2021:

- 97.1. discovery of the ordnance on 9 September 2021
- 97.2. the risks the ordnance posed to the human rights of the notifiers and others, and
- 97.3. the delays in Defence removing the ordnance.

⁷² OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (2018), available at <https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf> (*OECD Due Diligence Guidance*).

⁷³ *Ibid*, 10.

98. The enterprise informed the Independent Examiner that since 2022, Saab has adopted a Responsible Sales Policy based on the UN Guiding Principles and the OECD Guidelines.⁷⁴ The policy is said to clarify Saab’s responsibilities around due diligence and management of risks, and complements existing export control laws. The enterprise stated the “Responsible Sales framework includes a process for screening, risk identification, risk mitigation and informed decision-making, including in the area of human rights due diligence”. The policy states:

Saab is committed to respecting human rights and to mitigating the risk of adverse human rights impacts in connection with the sales of Saab’s products and services, in line with the UN Guiding Principles on Business and Human Rights.

This will be achieved through:

- viewing adverse human rights impacts by our partners and customers as a business risk
- adopting a model for evaluating risks in relation to the sales of Saab’s products and services
- providing guidance for due diligence of high-risk sales
- establishing requirements regarding decision-making and documentation
- providing training regarding Saab’s responsible sales policy to relevant personnel
- annually evaluating the work and reporting key metrics.

In conjunction with the introduction of the Responsible Sales Policy, Saab Group established a dedicated business and human rights function, which is tasked with producing risk assessments for flagged business opportunities.

99. The enterprise referred the Independent Examiner to its 2023 annual and sustainability report for further information. The report states, “Saab’s global Responsible Sales Policy clarifies and strengthens the commitment to human rights due diligence, relating to the end-use of Saab’s products”.⁷⁵ This is the clearest statement made by the enterprise of a commitment to human rights due diligence in respect of its downstream impacts arising from the manufacture and supply of its own products, including weaponry. It is a welcome improvement on the enterprise’s prior materials, discussed at [72] – [88] above.
100. Despite this positive development, it is not clear whether, and if so how, the information brought to the enterprise’s attention by the complaint has been incorporated into the enterprise’s human rights due diligence in respect of its past or current sales of weaponry to Australia.
101. The Independent Examiner recommends that the enterprise incorporate consideration of the issues raised in this Final Statement into its human rights due diligence process, specifically including the potential adverse impacts posed by Saab products to the rights of First Nations peoples by reason of the risk of use and failure to clear ordnances in the WPA. Such due diligence can be undertaken in collaboration with other stakeholders. For example, a collaborative initiative may include other industry actors, Defence, and Defence SA. The OECD’s guidance on due diligence notes that “collaboration can be beneficial in pooling knowledge on sector risks and solutions, increasing leverage, to the extent feasible, with

⁷⁴ Saab, *Responsible Sales Policy*, available at <https://www.saab.com/globalassets/corporate/sustainability/policy/responsible-sales-policy.pdf>

⁷⁵ Saab, *Annual and Sustainability Report 2023*, 50.

shared business relationships, and making due diligence more efficient for all” and includes recommendations for good governance for due diligence collaborative initiatives.⁷⁶

102. The Independent Examiner recommends that in undertaking such human rights due diligence the enterprise undertake meaningful engagement with First Nations people with rights and interests in the WPA. The OECD Guidelines commentary to General Policies chapter II, paragraph 28, states that:

Meaningful stakeholder engagement is a key component of the due diligence process. In some cases, stakeholder engagement may also be a right in and of itself. Stakeholder engagement involves interactive processes of engagement with relevant stakeholders, through, for example, meetings, hearings or consultation proceedings. Relevant stakeholders are persons or groups, or their legitimate representatives, who have rights or interests related to the matters covered by the Guidelines that are or could be affected by adverse impacts associated with the enterprise’s operations, products or services. ... Meaningful stakeholder engagement refers to ongoing engagement with stakeholders that is two-way, conducted in good faith by the participants on both sides and responsive to stakeholders’ views.

Such consultation would include but not be exclusive to the Recognised Aboriginal Representative Bodies under the Aboriginal Heritage Act with rights over land within the WPA. As discussed above at [58], while such recognised bodies are tasked with certain functions, that does not exclude the rights and interests of other First Nations individuals, who continue to hold rights in relation to Aboriginal sites, objects or remains in accordance with Aboriginal tradition. Particularly in circumstances where KAC is supportive of the notifiers’ claim, stakeholder engagement may involve further consultation with the notifiers.

103. The outcomes of such consultation will inform the responses that the enterprise develops to prevent and mitigate the risks posed by its products to human rights in the WPA. Amongst the potential responses are those proposed by the notifiers as outcomes sought by the initiation of the complaint to the AusNCP (as set out at [38.4] above). These are matters appropriate for consultation with relevant stakeholders as part of the due diligence process. Other responses may include incorporating key terms into client contracts to prevent and mitigate risk, which could include terms requiring the submission of periodic reports confirming clearance of unexploded ordnances and the remains of ordnances from the WPA.⁷⁷ Effective monitoring of the use of weaponry and services may also be facilitated by audits and site inspections, open-source information collection, and stakeholder engagement.⁷⁸
104. The Independent Examiner notes that in the complaint the notifiers proposed an operational level grievance mechanism. The commentary to the OECD Guidelines recommends the establishment of grievance mechanisms where enterprises identify that they have caused or contributed to an adverse impact.⁷⁹ Such grievance mechanisms can play a role in the provision

⁷⁶ OECD Due Diligence Guidance, (above n 72), 52.

⁷⁷ See for useful guidance, American Bar Association Center for Human Rights, *Defense Industry Human Rights Due Diligence Guidance* (2022).

⁷⁸ Ibid, 19.

⁷⁹ OECD Guidelines 2023, Chapter IV commentary [51].

of remedy (which is further discussed below). In addition, grievance mechanisms are useful for the purposes of maintaining effective human rights due diligence.⁸⁰

105. Saab identified to the Independent Examiner that it has a Whistleblowing Hotline. According to the Saab Whistleblowing Policy, the Hotline is for reporting actual or suspected violations of Saab's Code of Conduct.⁸¹ Information on Saab's website refers to the Hotline as being for "employees, customers and business partners to report suspected violations of law or Saab's Code of Conduct".⁸² The Independent Examiner has no information as to how suited or well-known the Hotline is for use by First Nations stakeholders in and around the WPA and whether First Nations stakeholders find the Hotline accessible. These are appropriate issues for consideration by Saab in assessing the provision of an effective grievance mechanism. Such a mechanism could facilitate the early notification of instances of ordnances in the WPA that have not been cleared so that prompt action can be undertaken by Defence. Further, such a mechanism would enable the enterprise to monitor the extent to which the continued presence of ordnances is a prevalent issue, which would feed into the enterprise's ongoing response.
106. Defence informed the Independent Examiner that it also has mechanisms through which stakeholders can notify Defence of identified ordnances, range products and debris or raise grievances. Defence identified these as including:
 - 106.1. a District Liaison Officer located at the Woomera Test Range and contactable by email or a 24-hour phone line
 - 106.2. a National Unexploded Ordnance Program which provides strategic management and remediation of unexploded ordnances (UXO) on the Defence estate and includes a mapping function which highlights areas of potential concern
 - 106.3. the Woomera Prohibited Area public hotline for stakeholders to make enquiries, and to report issues.

Such mechanisms are to be encouraged. If the notifiers and other Traditional Owners contend that those mechanisms are insufficient, this would be appropriate for discussion between Traditional Owners and Defence. The availability, accessibility and effectiveness of such government-provided mechanisms should also inform whether an operational level grievance mechanism involving the enterprise is warranted.

107. The Independent Examiner recommends that the issue of whether an operational level grievance mechanism involving the enterprise would be beneficial should be the subject of further consultation by the enterprise with relevant stakeholders, including the notifiers. Such consultations should consider whether the enterprise has a role in encouraging improvements to existing mechanisms, or whether an additional grievance mechanism established by the

⁸⁰ The OECD's due diligence guidance includes the recommendation that as part of the process of carrying out due diligence, enterprises "Consider information raised through early warning systems (e.g. hotlines) and grievance mechanisms": *OECD Due Diligence Guidance*, (above n 72), 25 at [2.1(d)].

⁸¹ Saab Whistleblowing Policy dated 23 May 2022, available at <https://www.saab.com/globalassets/corporate/sustainability/policy/whistleblowing-policy.pdf>.

⁸² "Speak Up", Saab (Web Page), <https://www.saab.com/sustainability/whistleblowing>, accessed 18 July 2025.

enterprise or in collaboration with others, would operate as an adjunct to existing mechanisms provided by Defence.

Remedy

108. The notifiers seek remediation, including by way of payment of compensation. During the preparation of this Final Statement, it was alleged by Defence that “[i]n 2022 Defence was requested, and made, a discretionary payment to the Notifiers”. The notifiers stated that this payment was for provision of services by the notifiers to Defence, specifically “for their time and expenses to attend the search visits and to re-visit the site and write a follow-up cultural and heritage site assessment report upon the removal of the missile”. The notifiers denied that any money has been paid by Defence or the enterprise for site remediation or compensation in respect of the complaint.
109. Under the OECD Guidelines, the issue of whether an enterprise is expected to provide or contribute to remediation flows from whether or not the enterprise caused or contributed to a human rights harm. The OECD Guidelines state that an enterprise should “provide for or cooperate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.” While the wording of the standard places the burden on the enterprise to identify that it has caused or contributed to adverse human rights impacts, in the context of providing recommendations, the Independent Examiner considers it appropriate for these matters to be the subject of AusNCP consideration, including so as to identify means by which to improve observance of the OECD Guidelines. Within that context, the Independent Examiner makes the following observations.

Did Saab cause or contribute to adverse human rights impacts?

110. There is no bright line distinction between causing, contributing to or being directly linked to an adverse human rights impact.
111. Determining the role of the enterprise requires consideration of the full context. This may include “the extent to which a business enabled, encouraged, or motivated human rights harm by another; the extent to which it could or should have known about such harm; and the quality of any mitigating steps it has taken to address it”.⁸³ It has similarly been suggested that questions for consideration relevantly include:⁸⁴

- (a) Did the enterprise’s actions on their own cause human rights harm?
- (b) Did the enterprise facilitate, enable, or incentivise other parties to cause harm?

⁸³ See discussion regarding ‘cause’, ‘contribute’ and ‘directly linked’ in letter from Prof J Ruggie to Prof R Nieuwenkamp dated 6 March 2017, available at <https://www.business-humanrights.org/en/latest-news/john-ruggie-clarifies-key-terms-of-un-guiding-principles-including-cause-contribute-directly-linked/>

⁸⁴ BSR, *White Paper - Seven Questions to Help Determine When a Company Should Remedy Human Rights Harm under the UNGPs*, available at https://www.bsr.org/reports/Seven_Questions_to_Help_Determine_When_a_Company_Should_Remedy_Human_Rights_Harm_under_the_UNGPs.pdf.

- (c) Could or should the enterprise have known about or foreseen the potential harm?
- (d) Did the enterprise take steps that likely could have prevented the harm from occurring?

112. Adopting these approaches, the Independent Examiner considers the following questions in turn:

- (a) Did the enterprise's actions on their own cause the human rights harm?
- (b) Did the enterprise play a role in bringing about the conduct of another party that caused the human rights harm?
- (c) Was the potential harm reasonably foreseeable? and
- (d) Did the enterprise take mitigating steps to address the harm and, if so, what was the quality of those steps?

(a) Did the enterprise's actions on their own cause the human rights harm?

113. The enterprise supplied the ordnance to Australia. As stated in the Initial Assessment for this complaint, the direct cause of any human rights harms arising from the ordnance was Defence's use of the ordnance and subsequent failure to promptly clear it until 2022. The enterprise's action of supplying the ordnance to Australia did not on its own cause the subsequent human rights harms.

114. Defence informed the Independent Examiner that it operates a "Clean Range Policy (CRP)", which was introduced in 1988. Defence stated that the version of the CRP in effect at the time of the ordnance's discovery required "activities such as live firing exercises and demolitions be conducted so as to minimise the extent and degree of contamination from unexploded ordnance (UXO)", and that "all locatable hazardous and non-hazardous debris is to be made safe by destruction (UXO) or removed (other items)". Defence disputed that there was a failure to remove the ordnance. Defence stated, "From the time the notifiers legal representative first communicated concerns about missile debris in May 2021, Defence maintained ongoing communication with the notifiers, seeking the location of the ordnance. Following the notifiers providing Defence the coordinates of the ordnance on 17 January 2022, Defence removed the ordnance on 18 January 2022". While Defence may have acted promptly after receiving coordinates from the notifiers, the responsibility for locating and clearing ordnances used in the WPA rested with Defence, not the notifiers. No information was provided by Defence as to how the ordnance came to remain on site for potentially 20 to 30 years prior to the notifiers' discovery despite the CRP.

115. The enterprise stated that the product was supplied by Saab Dynamics to the Commonwealth of Australia's Department of Defence. The enterprise stated that "Saab [Dynamics] is not involved in missile storage or use, does not attend any regular firing activities and does not receive firing reports from the Commonwealth and is not aware of any issues observed during the conduct of firing" and "Saab [Dynamics] is not responsible for, or involved in any way, in the disposal of equipment that is suspected to have malfunctioned. This is a specialist Defence responsibility." The enterprise also stated, "Saab Australia may support Commonwealth operational test & evaluation events where this equipment is fired, however, this is solely in

its capacity as maintainer of other sub-systems within the RBS70 Air Defence System including radars, communications, and command & control". Saab also informed the Independent Examiner that as the service life of the ordnance ended at latest in 2005, Saab does not hold failure rate information for the model in question.

116. In light of the above, there is insufficient information to identify why the ordnance was found largely intact, whether or not it had exploded on impact when first used by Defence, or why it was left uncleared after its use. However, it is clear that the firing of the ordnance and duty to promptly remove it were the responsibility of Defence, not the enterprise. The enterprise supplied the ordnance to Defence. However, it was Defence's firing of the ordnance without promptly clearing the remains that led to the ordnance remaining on the notifiers' Country and causing the human rights harms.

(b) Did the enterprise play a role in bringing about the conduct of another party that caused the human rights harm?

117. The use of the ordnance may not have resulted in any human rights impact on the notifiers if the debris had been immediately cleared.

118. There is no suggestion that the enterprise played any role in – whether by encouraging, motivating, or otherwise – Defence's conduct of using the ordnance without promptly determining whether debris remained and clearing it.

(c) Was the potential harm reasonably foreseeable?

119. The extent to which the enterprise could or should have known about or foreseen the potential harm is a more vexed issue. As referred to above at [88], the Independent Examiner has concluded that in the period 2011 to 2021 the enterprise did not undertake human rights due diligence related to the supply of weaponry to existing customers. A question arises as to whether, if it had undertaken human rights due diligence in respect of its supply of weaponry to existing customers, the enterprise would likely have been alerted to the risk of Saab ordnances remaining in the WPA and that therefore it could and should have foreseen the potential harm.

120. Relevant to this question are matters that include the enterprise's relationship with the Australian Government throughout the relevant period, the risk of Saab weapons not detonating, the risk of Saab weapons being used on traditional lands in Australia, and the potential failure to protect the rights of First Nations peoples in the process of such use. These matters are considered in turn:

120.1. The enterprise maintained an ongoing business relationship with the Australian Government during the period 2011 – 2021. It continued to supply Australia with arms and services in contracts worth tens of millions of dollars.⁸⁵

⁸⁵ According to media releases by the enterprise during the period, for example: "Saab Receives Order For RBS 70 NG" (21 Sept 2016) available at <https://www.saab.com/markets/australia/news/press/2016/saab-receives-order-for-rbs-70-ng>; "Australian Army ground based air defence enhancements" (18 Aug 2018) available at <https://www.saab.com/markets/australia/news/press/2016/australian-army-ground-based-air-defence-enhancements>; "Saab Receives Australian Order for Carl-Gustaf M4" (5 Sept 2018) available at

- 120.2. As a sophisticated weapons manufacturer, the enterprise would be aware that its munitions have a failure rate that can lead to unexploded ordnances lying dormant and continuing to pose a risk.
- 120.3. The WPA is world-renowned and has been in active use since 1947. It has been the site of rocket, missile and satellite launches throughout that period. With an Adelaide-based entity, it is unlikely the enterprise would not have been aware of the use by Defence of the WPA or that the WPA encompasses Aboriginal land.
- 120.4. It is also well established that Australia has been the subject of significant international and national criticism for not upholding the rights of First Nations people.⁸⁶ Such criticism is both historical and ongoing and includes specifically the failure to protect First Nations peoples from harms arising from the Australian Government's use of the WPA. The WPA included Maralinga which the Australian Government permitted the British to use as a nuclear testing site.⁸⁷ The report of the Royal Commission into British Nuclear Tests in Australia under Justice James McClelland released in 1985,⁸⁸ was highly critical of both the British and Australian Governments. The report specifically condemned the lack of Australian Government commitment to ensuring the safety and welfare of First Nations people in the conduct of such testing.

The ready availability of the above information should have informed (and should in future inform) human rights due diligence regarding the supply of weaponry that may be used within the WPA. If human rights due diligence had been undertaken relating to the supply of weaponry to Australia, the enterprise may have been alerted to the risk its business posed to the rights of First Nations peoples in the WPA.

121. However other factors suggest that even if Saab had undertaken such human rights due diligence, it may not have been put on notice that the ordnance or any other ordnance posed a risk. In their complaint, the notifiers identified that:

<https://www.saab.com/markets/australia/news/press/2018/saab-receives-australian-order-for-carl-gustaf-m4>; "Supporting Australian Army's GBAD and C-RAM capability" (23 Aug 2019) available at <https://www.saab.com/markets/australia/news/press/2019/supporting-australian-armys-gbad-and-c-ram-capability>; "Saab Receives Order for Carl-Gustaf Ammunition to the Australian Army" (11 Apr 2019) available at <https://www.saab.com/markets/australia/news/press/2019/saab-receives-order-for-carl-gustaf-ammunition-to-the-australian-army>.

⁸⁶ See for example, "End of Mission Statement by the United Nations Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz on Her Visit to Australia", *United Nations Office of the High Commissioner for Human Rights* (Web Page) 02 April 2017, available at <https://www.ohchr.org/en/statements/2017/04/end-mission-statement-united-nations-special-rapporteur-rights-indigenous>

⁸⁷ The precise location of the outer border of the WPA and Maralinga nuclear testing sites is available at <https://map.sarig.sa.gov.au>, which demonstrates that one of the Maralinga nuclear testing sites remains within the WPA. Another is located to the immediate southwest border of the current WPA outer boundary. See also, "Defining Moments – Maralinga", *National Museum of Australia* (Web Page), <https://www.nma.gov.au/defining-moments/resources/maralinga>.

⁸⁸ See JR McClelland J, *Royal Commission into British Nuclear Tests in Australia* (1985), Parliamentary Paper No 483/1985, Volumes I, II, and III Conclusions and Recommendations,, available at <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22publications%2Ftabledpapers%2FHPP032016010930%22>

Defence operates a “clean range” policy and endeavours to remove any debris once a weapons testing program has been completed. In the event that ordnance cannot be located, access to the area may be restricted to Defence personnel. Missing ordnance may be identified as unexploded ordnance [*sic*] or “UXO”.

In circumstances where the notifiers accept that Defence endeavours to remove any debris once a weapons testing program has been completed, and given there was no report of a failure to remove such debris in the 2011-2021 period, it would have been reasonable for the enterprise to undertake human rights due diligence on the basis that Defence did in fact remove such debris.

122. Human rights due diligence is to be undertaken in a manner commensurate with the risks, taking into account the relevant context. If it was reasonable for the enterprise to act on the basis that Defence was removing weapons debris after testing, appropriate human rights due diligence may not have involved a comprehensive survey of the Lake Hart West site. There is also no evidence to suggest that if Saab had undertaken consultation with First Nations people as relevant stakeholders that it would have been alerted to the risk of ordnances remaining in the WPA. As noted at [66] above, the notifiers have not identified any other examples of Saab manufactured ordnances being located in the WPA. As the parties both agree, the first time Saab was made aware that the ordnance was within the Lake Hart West Aboriginal heritage site was on 9 September 2021. Accordingly, it is not clear that if human rights due diligence had been undertaken by the enterprise that it would have resulted in early identification and removal of ordnances, including the ordnance that was subsequently found by the notifiers. As such, the Independent Examiner does not consider the potential harm was reasonably foreseeable prior to the discovery of the ordnance.

123. While the harm caused by the subject ordnance was not reasonably foreseeable prior to 2021, the enterprise is now on notice as to any similar potential harms in future.

(d) Did the enterprise take mitigating steps to address the harm and, if so, what was the quality of those steps?

124. As set out above, there is no clear basis for contending that the enterprise ought to have known about or foreseen the potential harm. Concomitantly, it cannot be said that the enterprise had a responsibility to take mitigating steps before it was made aware of the ordnance in September 2021. Once the enterprise was alerted to the presence of the ordnance, it immediately notified Defence to ensure they were aware of and dealing with the ordnance. Those steps were appropriate as a means of exercising leverage to prevent further impact.

Conclusion as to whether the enterprise caused or contributed to the human rights impact

125. In light of the foregoing, the Independent Examiner considers there is a reasonable basis to conclude that the enterprise did not cause or contribute to the impact that the ordnance had on the human rights of the notifiers.

Was the enterprise directly linked to adverse human rights impacts?

126. While there is a reasonable basis to consider that the enterprise did not cause or contribute to adverse human rights impacts, there is a clear and direct link between the enterprise’s

manufacture and supply of the product and the adverse human rights impacts caused by its use by Defence and non-clearance. The enterprise manufactured and supplied the ordnance found by the notifiers on Country. The enterprise had and continues to have a business relationship with the Commonwealth of Australia, which (via Defence) used the ordnance and did not remove it promptly afterwards.

127. The OECD Guidelines state that enterprises should seek to prevent or mitigate an adverse impact including an adverse human rights impact where they have not contributed to that impact, but the impact is nevertheless directly linked to their products by a business relationship.⁸⁹ The OECD Guidelines commentary states that where an enterprise has a direct link with adverse impacts, the enterprise “is not responsible for providing remediation, though it may take a role in doing so”.⁹⁰ An enterprise with a direct link to the adverse human rights impact is, however, expected to use its leverage to “influence the entity causing the adverse impact to prevent, mitigate or remediate that impact”.⁹¹

128. In this circumstance, the enterprise stated that it has limited leverage. To the extent that leverage is limited, the OECD Guidelines urges enterprises to examine ways to enhance their leverage so as to influence the entity to prevent, mitigate or remediate an identified adverse impact. The OECD Guidelines contain illustrative means by which enterprises can use or increase their leverage to influence entities with which they have a business relationship. The commentary to the 2023 OECD Guidelines states:⁹²

Where an enterprise does not have sufficient leverage, it should consider ways to enhance its leverage. Enterprises can use or increase leverage in a number of ways to influence entities with which it has business relationships, for example, through ... engagement to urge them to prevent and/or mitigate impacts; building expectations around responsible business conduct and due diligence specifically into commercial contracts ... engaging with regulators and policymakers on responsible business conduct issues; communicating the possibility of responsible disengagement if expectations around responsible business conduct are not respected, collaborating with other enterprises (at sectoral, risk or country level) to pool leverage and implementing common standards of responsible business conduct.

129. Saab is a multi-billion-dollar enterprise⁹³ that has had a long-standing business relationship with Defence and continues to secure contracts with the Australian Government worth tens, if not hundreds, of millions of dollars.⁹⁴ It is a well-recognised brand that espouses its commitment to human rights and is active globally. As its outreach to Defence SA on 9 September 2021 demonstrated, the enterprise has immediate access to government in ways the notifiers do not. The enterprise’s ability to exercise leverage with government in line with the OECD Guidelines should not be understated. Consistent with the OECD Guidelines, Saab appropriately exercised its leverage to notify Defence about the ordnance for its removal. Saab’s conduct in this regard was commendable. It may also be possible for Saab to use its leverage to encourage Defence to provide remediation to the notifiers and other affected

⁸⁹ OECD Guidelines 2023, General Policies [A.13], and Human Rights [3].

⁹⁰ Ibid, General Policies Commentary [23].

⁹¹ Ibid. See similarly, Human Rights Commentary [48], and UN Guiding Principle 13.

⁹² Ibid, General Policies Commentary [23].

⁹³ Saab, *Annual and Sustainability Report 2023*, [104] reports that the group has consolidated total assets of SEK82.7 billion, equating to approximately US\$7.5 billion.

⁹⁴ Ibid, [102] reports 6.6% of total sales are to “Australia, etc”, amounting to SEK 3.4 billion (US\$312.0 million).

Traditional Owners for the adverse human rights impacts and to improve practices to prevent future adverse impacts.

130. The manner in which the enterprise exercises leverage need not be solely directly with Defence. There are other bodies with which the enterprise may have leverage and which may play a role in preventing future adverse impacts. As referred to above, one of the effects of the incident that is the subject of this complaint has been to produce uncertainty and fear as to the potential existence of unexploded ordnances within areas of Aboriginal heritage value. In dialogue with the Independent Examiner, the notifiers identified the Woomera Prohibited Area Advisory Board (the WPA Board). The WPA Board “is the primary governance body for the WPA coexistence framework [and] ... is led by an independent Chair and Deputy Chair who are supported by stakeholder Commonwealth and South Australian government agencies”.⁹⁵ The WPA coexistence framework recognises the need to manage the WPA as a place of national significance for Aboriginal cultural heritage.⁹⁶ The notifiers proposed it would be advantageous for preventing future adverse impacts on human rights for there to be First Nations representatives on the WPA Board. Defence advised the Independent Examiner that the WPA Board is a Commonwealth and South Australia government mechanism, is not a decision-making body and does not determine Defence policy regarding the WPA. Defence stated that the WPA Board is in place to oversee, monitor and report on the balance between national security, economic and cultural interests within the WPA. Given the role of the WPA Board, it would seem advantageous for it to hear from and have regard to the views of First Nations people as to the appropriate weight to be given to cultural matters. Several Saab former or current employees are past or present participants on the WPA Board or have had high level positions in Defence at Commonwealth and State levels.⁹⁷ In light of these connections, the enterprise may be in a position to encourage the WPA Board to seek input from Traditional Owners and formalise such views into its deliberations.
131. A factor that may be relevant when an enterprise assesses whether to be involved in remedy is whether stakeholders, including rightsholders, believe that the enterprise caused, contributed to, or was directly linked to the harm, or that the enterprise should otherwise provide or contribute to remedy.⁹⁸ Here, the notifiers do consider there is a basis for the

⁹⁵ “Woomera Prohibited Area Advisory Board”, *Australian Government – Defence* (Web Page), <https://www.defence.gov.au/bases-locations/sa/woomera/management/advisory-board>.

⁹⁶ The terms of reference for the WPA Board identify one of its key functions is to “Oversee and advise on the implementation of the coexistence policy”, consistent with the Commonwealth Government’s acceptance of the 2018 Review of Coexistence in the Woomera Prohibited Area report. The 2018 Review recognised the importance of Aboriginal heritage in the area and working with Aboriginal groups. For example, one of the recommendations in the report was that “Defence and Aboriginal groups in the WPA should continue to build on their already strong relationships. Priority should be given to finalising Working Level Agreements and the WPA Heritage Management Plan. A program of structured dialogue between Defence, the South Australian Government and Aboriginal groups in the WPA should investigate options for further mutually beneficial economic and cultural cooperation”: *Coexistence in the Woomera Prohibited Area 2018 Review* (above n 29) at 69.

⁹⁷ The notifiers reported significant links between membership of the Woomera Prohibited Area Advisory Board and the enterprise including: Matt Opie - SAAB Australia former Head of Industry Engagement 2007-2017, current Chief Executive, Defence SA and current ex-officio member of Woomera Prohibited Area Advisory Board; Andy Keough - SAAB Australia’s current Managing Director (MD), former ADF member and former Defence SA Chief Executive; Richard Price - SAAB Australia’s former Managing Director, former Defence SA Chief Executive and a member of the Woomera Prohibited Area Advisory Board until late 2023.

⁹⁸ This consideration is highlighted in BSR’s *White Paper*, above n 84.

enterprise to provide for remedy. The Independent Examiner considers that the enterprise is directly linked to the adverse impacts. Further, the Independent Examiner has recommended that the enterprise consult with other First Nations representatives as part of its human rights due diligence. These views may cause the enterprise to assess that it could play a role in the provision of remedy. The Independent Examiner considers that the provision of remedy by the enterprise is not expected by the OECD Guidelines, but remains an option.

132. The 2023 OECD Guidelines encourage enterprises directly linked with an adverse human rights impact to exercise leverage to influence the entity that caused the impact to remediate it. This does not, however, shift responsibility for remediation to the enterprise.⁹⁹ In this case, the entity with responsibility for causing an adverse impact is part of the Australian Government, with which Saab has a business relationship. It is for the Australian Government to provide remedy whether or not the enterprise takes part in the provision of that remedy.

133. In circumstances where the OECD Guidelines expect a multinational enterprise to use leverage to influence the Australian Government to uphold human rights, consideration should be given to the role of the AusNCP, which is housed within an arm of the Australian Government. The OECD Guidelines Implementation Procedures state that:¹⁰⁰

In furthering the effectiveness of the Guidelines, NCPs may, where appropriate and in coordination with relevant government agencies, support efforts by their government to develop, implement, and foster coherence of policies aimed at promoting responsible business conduct.

In order to promote responsible business conduct, governments that adhere to the OECD Guidelines should be cognisant of the potential for their own actions to lead a multinational enterprise to be directly linked with an adverse human rights impact caused by that government. This is an issue for further discussion and liaison within the Australian Government including with Defence, which the AusNCP is well placed to lead.

134. The nature of any remedy to be provided by the Australian Government to the notifiers is outside the remit of the OECD Guidelines and the role of the AusNCP. While international law addresses the right to remedy and the State's duty to fulfil that right including in circumstances where the State is the entity that breaches a human right, this is not within the subject matter of the OECD Guidelines. Accordingly, this Final Statement does not make a recommendation to Defence in respect of remediating the human rights harms discussed. Instead, it is recommended that the AusNCP liaise with Defence and other government departments and agencies with responsibilities for Indigenous rights within the WPA and encourage their further consideration of the matters raised in this Final Statement.

Summary of recommendations:

135. It is recommended that the enterprise:

135.1. incorporate consideration of the issues raised in this Final Statement into its human rights due diligence process, specifically including the potential adverse impacts posed

⁹⁹ OECD Guidelines 2023, General Policies A.13, Commentary [23].

¹⁰⁰ OECD Guidelines 2023, Implementation Procedures I.D.

by Saab weaponry to the rights of First Nations people by reason that Saab weaponry may be used in the WPA, but remain uncleared from traditional lands

- 135.2. undertake meaningful engagement with stakeholders, including First Nations people with rights and interests in the WPA, when undertaking such human rights due diligence
 - 135.3. informed by its due diligence and consultation with stakeholders, consider the improvement of existing grievance mechanisms or the establishment of complementary mechanisms by the enterprise or in collaboration with others
 - 135.4. clearly communicate the enterprise's human rights policies and human rights due diligence policies and processes, including as they relate to the "downstream" use of Saab weaponry
 - 135.5. use its leverage and create opportunities in which it could exercise leverage as appropriate to influence the Australian Government to prevent, mitigate or remediate the impact on human rights by use of the enterprise's products in the WPA.
136. It is recommended that the AusNCP liaise further with Defence and other relevant government agencies or departments, in order to foster policy coherence across the whole of government in promoting responsible business conduct, noting that:
- 136.1. This Final Statement arises from the use of weaponry in the WPA that was not cleared from traditional lands for a period of potentially 20 to 30 years, despite the existence of Defence's Clean Range Policy (CRP).
 - 136.2. The presence of the ordnance between January 2021 and January 2022 impeded the ability of the notifiers and potentially other Traditional Owners to exercise cultural rights in the area where the ordnance was found, contrary to their human rights.
 - 136.3. While enterprises have responsibilities to respect human rights, the duty to protect, respect and fulfil human rights remains with the State, including the right to effective remedy where human rights are violated.
 - 136.4. The actions of the Australian Government when utilising products supplied by multinational enterprises can harm human rights and enliven the responsibilities of an enterprise under the OECD Guidelines. In such circumstances, the Australian Government remains responsible for preventing, mitigating and remedying any adverse human rights impacts.
 - 136.5. There is currently a dispute between the notifiers and Defence as to whether any remediation has been offered and provided by the Australian Government to the notifiers. That dispute is outside the scope of the AusNCP process. However, it is noted that in line with its international commitments and obligations, it is for the Australian Government to provide access to effective remedy to those whose human rights are adversely impacted by acts or omissions.
 - 136.6. Where adverse human rights impacts are directly linked to a multinational enterprise, the Australian Government should expect - and consistent with the OECD Guidelines,

encourage - enterprises to use and build their leverage to influence the entity causing the adverse impact (which may include government agencies). In this instance, Saab may seek as appropriate to use its leverage to influence the Australian Government to prevent, mitigate or remediate the impact that Defence's use of Saab products in the WPA has had and may have on human rights.

137. The AusNCP will follow up on these recommendations in 12 months.

Annexes

Annex A: Schedule of events

• Ordnance found by the notifiers	January 2021
• Notifiers inform Defence of the discovery of the ordnance	May 2021
• Notifiers provide Defence a photograph of the discovery	July 2021
• Notifiers inform the enterprise of the discovery of the ordnance	9 September 2021
• Enterprise contacts personnel within Defence SA to inform them of the ordnance	9 September 2021
Submission	
• Complaint submitted to the AusNCP by notifier	28 September 2021
• AusNCP Governance and Advisory Board notified about complaint by the AusNCP	1 October 2022
• AusNCP correspondence requesting further information from the notifier	5 October 2021
• Enterprise notified about the new complaint by the AusNCP	20 October 2021
Initial assessment	
• Notifier correspondence providing submission to the AusNCP	14 October 2021
• AusNCP correspondence to enterprise inviting them to provide a submission	20 October 2021
• Enterprise contacts Defence about the ordnance	November 2021
• Enterprise correspondence to AusNCP providing submission	9 and 16 November 2021
• Notifier correspondence to AusNCP requesting addition of the enterprise parent company to the complaint	7 December 2021
• AusNCP correspondence to AusNCP Governance and Advisory Board providing draft Initial Assessment for comment	21 December 2021
• Notifiers provide Department of Defence with precise location of ordnance	17 January 2022
• Ordnance removed by Department of Defence	18 January 2022
• AusNCP correspondence to parties providing draft Initial Assessment for comment	10 February 2022
• Enterprise correspondence to AusNCP providing comments on draft Initial Assessment.	4 March 2022
• Notifier correspondence to AusNCP providing comments on draft Initial Assessment	4 March 2022
• AusNCP correspondence to parties providing embargoed version of Initial Assessment	21 March 2022
• AusNCP correspondence to AusNCP Governance and Advisory Board, Sweden NCP, Defence SA and Defence providing embargoed Initial Assessment	21 March 2022

Initial assessment statement published on AusNCP website www.AusNCP.gov.au.	1 April 2022
Good offices	
AusNCP correspondence to parties about good offices offer	1 – 7 April 2022
AusNCP meeting with enterprise about good offices offer	8 April 2022
AusNCP meeting with notifiers about good offices offer	4 May 2022
AusNCP correspondence to enterprise confirming the notifier's agreement to participate in good offices	5 May 2022
AusNCP correspondence to enterprise about scope of good offices	12 May 2022
AusNCP correspondence to parties about terms for good offices	19 July 2022
Notifier correspondence to AusNCP confirming agreement to draft good offices agreement and terms	11– 13 September 2022
AusNCP correspondence to enterprise confirming notifier has agreed to good offices agreement terms	15 September 2022
Enterprise correspondence to AusNCP with proposed changes to draft good offices agreement and request for parties to sign a non-disclosure agreement	27 September 2022
AusNCP correspondence to enterprise about draft good offices agreement and non-disclosure agreement	19 October – 1 December 2022
Enterprise correspondence to AusNCP confirming terms for draft good offices agreement	1 December 2022
Examiner and AusNCP communication with parties to finalise good offices agreements and providing it to parties for signature	2 – 20 December 2022
Notifier correspondence to AusNCP with signed good offices agreement	3 January 2023
Enterprise correspondence to AusNCP with signed good offices agreement and providing executable non-disclosure agreement for notifier and AusNCP Independent Examiner signature	17 January 2023
Examiner signed non-disclosure agreement.	20 January 2023
Notifier signed non-disclosure agreement and good offices agreement	25 November and 23 January 2023
Enterprise signed non-disclosure agreement	10 February 2023
AusNCP correspondence to parties about good offices meetings	8 February 2023
Good offices meeting and exchanges between the parties	10 February 2023 – 5 February 2024
Examiner proposes to parties that the good offices conclude because unlikely to be productive in achieving a resolution of the complaint, and invites comments from parties	12 February 2024
Enterprise accepts examiner's proposal to terminate good offices	12 February 2024
Notifier responds accepting examiner's proposal to terminate good offices	15 February 2024
Good offices terminated	15 February 2024
AusNCP Independent Examiner John Southalan provides memo to AusNCP Secretariat confirming good offices terminated and providing materials and summary	16 February 2024

Final Statement	
AusNCP Secretariat appoints AusNCP Independent Examiner Shanta Martin (examiner) to conduct examination and prepare final statement	5 March 2024
AusNCP Secretariat collates and provides to the examiner documents from the Initial Assessment phase	14 March 2024
AusNCP requests assistance from NCP of Sweden requesting information on government export controls	19 April 2024
AusNCP correspondence to both parties requesting updates by 3 May to inform examination of the complaint	22 April 2024
Enterprise and examiner correspond about timing of response	23 April – 1 May 2024
Notifier provides partial response and requests extension, which is granted	2 May 2024
Reply from NCP of Sweden regarding government export controls	7 May 2024
Letter received from the Chairperson of the Kokatha Aboriginal Corporation supporting the notifiers' position in the complaint	29 May 2024
Notifier response to examiner's request of 22 April 2024	30 May 2024
Enterprise response to AusNCP request of 22 April 2024, submitted by Saab Australia on behalf of all enterprises covered by the complaint	30 – 31 May 2024
Examiner writes to the enterprise requesting further information to inform examination of the complaint, including copies of relevant policies and procedures	21 June 2024
Examiner video conference with the enterprise to discuss the letter of 21 June 2024	11 July 2024
Notifiers' submissions shared with the enterprise	12 July 2024
Enterprise provides update on timing of reply to examiner's letter of 21 June 2024	22 July 2024
Enterprise provides response to examiner's letter with additional information	29 August 2024
Enterprise provides a final piece of supplementary material and confirms that their material can be shared with notifiers	11 September 2024
AusNCP corresponds with enterprise seeking clarification on aspects of provided materials and enterprise responds	25 September – 7 October 2024
Examiner consults with Kokatha Aboriginal Corporation	21 November 2024
Examiner video conference with notifiers and their legal representatives	28 November 2024
Examiner undertakes examination and prepares Final Statement	7 October 2024 – 16 December 2024
Examiner provides draft Final Statement to AusNCP Secretariat	16 December 2024
- AusNCP Secretariat provides draft Final Statement for comment to: – AusNCP Governance and Advisory Board – Defence and Defence SA – National Indigenous Australians Agency	29 January – 14 February 2025
- AusNCP Secretariat provides draft Final Statement for comment to: – Parties	8 – 12 May 2025

– Kokatha Aboriginal Corporation – Defence – Swedish National Contact Point	
• Comments received	27 May – 6 June 2025
• Independent Examiner considers comments and engages in further communications with parties and Defence, and prepares revised draft Final Statement.	29 May – 2 July 2025
• AusNCP Secretariat provides revised draft Final Statement to: – AusNCP Governance and Advisory Board – Parties – Attorney-General’s Department – Defence – Swedish National Contact Point	8 August 2025
• Comments received	26 August – 8 September 2025
• Embargoed Final Statement provided to: – AusNCP Governance and Advisory Board – Parties – Defence – Swedish National Contact Point	3 October 2025
• Final statement published on AusNCP website and reported to the OECD	17 October 2025

Annex B: Publications and bibliography

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Annex C: Institutional arrangements

1. The Australian Government is committed to promoting the use of the OECD Guidelines for Multinational Enterprises (OECD Guidelines) and implementing them effectively and consistently. Through business cooperation and support, the OECD Guidelines can positively influence business conduct and ultimately economic, environmental and social progress.
2. The OECD Guidelines are recommendations on responsible business conduct addressed by governments, including Australia, to multinational enterprises. They provide voluntary principles and standards for responsible business conduct consistent with applicable laws and internationally recognised standards. Companies operating in Australia and Australian companies operating overseas are expected to act in accordance with the principles set out in the OECD Guidelines and to perform to the standards they recommend. In countries where domestic laws and regulations conflict with the principles and standards of the OECD 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. The OECD Guidelines represent international standards of behaviour, which in some areas, may impose higher standards than Australian Law. Importantly however, while Australia is an adhering country to the OECD Guidelines and the OECD Guidelines have been endorsed within the OECD international forum, they are not a substitute for, nor do they override, Australian or international law.
4. The OECD Guidelines can be seen as:
 - A useful aid to business in developing their own code of conduct. They are not aimed at replacing or preventing companies from developing their own codes.
 - Complementary to other business, national and international initiatives on corporate responsibility, including domestic and international law in specific areas such as human rights and bribery. For example, the human rights chapter in the OECD Guidelines as well as other key concepts align with the [United Nations Guiding Principles on Business and Human Rights](#).
 - Providing an informal structure for resolving issues that may arise in relation to implementation of the OECD Guidelines in complaints.

Annex D: Governance

1. Governments adhering to the OECD Guidelines have flexibility in organising their National Contact Points for Responsible Business Conduct (NCPs). NCPs are expected to meet core effectiveness criteria, by operating in a manner that is visible, accessible, transparent, accountable, impartial and equitable, predictable, and compatible with the OECD Guidelines. NCPs are also expected to seek the active support of social partners, other stakeholders and relevant government agencies.
2. Accordingly, the OECD Guidelines stipulate that:
 - NCPs will be composed, organised and sufficiently resourced to provide an effective basis for dealing with the broad range of issues covered by the OECD Guidelines, have access to expertise on all relevant aspects of the NCP mandate, and operate in an impartial manner and maintain an adequate level of accountability to the adhering government.
 - NCPs can use different forms of organisation to meet the effectiveness criteria and maintain stakeholder confidence.
 - Governments are encouraged to include representatives of the business community, worker organisations, civil society and other non-governmental organisations in advisory or oversight bodies to assist the NCP in its tasks and contribute to the effectiveness of the OECD Guidelines.
3. The [AusNCP Governance and Advisory Board](#) (AusNCP Board) includes representatives from Australian Government agencies, business, civil society and unions. The AusNCP Board provides independent expert advice and assistance to the AusNCP and the Independent Examiners on complaints handling. Board members use their networks, events and publications to promote responsible business conduct standards under the OECD Guidelines and the AusNCP services. The AusNCP Board is consulted on all AusNCP statements.
4. The AusNCP Board helps to ensure that the AusNCP meets the effectiveness criteria of the OECD Guidelines. AusNCP Board Members may be called on to conduct procedural reviews of AusNCP complaints and may be consulted on various operational and administrative matters as needed.
5. From September 2019, all new cases are managed by independent examiners, who are supported by the AusNCP Secretariat and the AusNCP Board.