

Conciliating Responsible Business Conduct Claims against Multinational Enterprises

John Southalan*

Abstract

The OECD Guidelines for Multinational Enterprises are internationally agreed standards for responsible business conduct, covering human rights, labour relations, environment, consumer interests and other areas. Australia is one of 50 countries which has joined the Guidelines, encouraging multinational enterprises to observe these standards: and establishing a National Contact Point (the 'AusNCP' – within the Commonwealth Department of the Treasury). One of the AusNCP's roles is to receive, and assist the resolution of, complaints about non-compliance with the Guidelines by a multinational enterprise operating in or from Australia. This can comprise mediation between the complainant and the multinational and must include the AusNCP's public statement on the outcome. Essentially: a conciliation informed by the Guidelines. The AusNCP contracts this conciliation function to an Independent Examiner, for independent and impartial assessment and management of cases. Over the last few years, the AusNCP has handled cases about impacts from mining in Bougainville, port operations in Western Australia, sugar processing in Cambodia, energy infrastructure in South Australia, public relations in Nauru and Australia, financing and climate changes, and others. This article summarises the work and functions of the AusNCP, emphasising its role in resolving disputes about responsible business conduct.

Introduction

The *OECD Guidelines for Multinational Enterprises* ('Guidelines') is an international standard about responsible business conduct.² 'Responsible business conduct' may be considered amorphous, bringing to mind the saying 'beauty is in the eye of the beholder'. The Guidelines, however, give this concept far more objectivity than any beholder's eye. The Guidelines sub-title describes them as 'Recommendations for Responsible Business Conduct in a Global Context', and they involve government bodies encouraging compliance with a complaints function based around mediation.

* Mediator (NMAS), Barrister (WA Bar Association), Adjunct Professor (UWA, Murdoch).

Disclosure: the author holds the (part-time) role of Independent Examiner for the AusNCP. This article is written in personal capacity, and does not represent the views of the AusNCP, the Australian Government, the OECD, nor any organisation with which the author is associated

² OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing, 2011) ('Guidelines') available at <http://dx.doi.org/10.1787/9789264115415-en>.

The Guidelines cover many areas including Human Rights, Employment and Industrial Relations, Environment, Competition, and Taxation. The Guidelines are the only multilaterally agreed code of responsible business conduct that governments have committed to promoting. There are currently 50 governments which have joined (or ‘adhered to’, as the process is formally termed) the Guidelines. That involves a commitment from each of those governments to:

- encourage multinational companies in, or from, their country to follow the Guidelines;³ and
- establish a National Contact Point (or ‘NCP’) to promote the Guidelines and receive and consider complaints about companies not meeting the Guidelines.⁴

Summary of Guidelines

The Guidelines commence with two general chapters (about Concepts and Principles, and General Policies), followed by nine chapters addressing particular topics:

- III. Disclosure
- IV. Human Rights
- V. Employment and Industrial Relations
- VI. Environment
- VII. Combating Bribery, Bribe Solicitation and Extortion
- VIII. Consumer Interests
- IX. Science and Technology
- X. Competition
- XI. Taxation

Each chapter identifies expectations of what an enterprise should do, followed by commentary further explaining how these standards operate or can be implemented. A central tool in the Guideline’s standards for corporate conduct is ‘risk-based due diligence’ for companies to identify, prevent and mitigate actual and potential impacts in their operations and supply chains. The OECD Secretariat has published comprehensive guidance documents to assist companies and others understand the Guidelines’ content and operation.

- The *Due Diligence Guidance for Responsible Business Conduct*⁵ provides plain language explanations of the due diligence recommendations in the Guidelines for all businesses;
- *Corporate Lending and Securities Underwriting*⁶ details the due diligence recommendations for banks and other financial institutions in their corporate lending and underwriting activities, expanding on aspects of the 2017 *Responsible Business Conduct for Institutional Investors*;⁷

³ *Guidelines* (n 1) I Concepts and Policies, [3].

⁴ *Guidelines* (n 1) Part II Implementation Procedures of the OECD Guidelines for Multinational Enterprises, I National Contact Points [1].

⁵ OECD, *Due Diligence Guidance for Responsible Business Conduct* (OECD, 2018) available at <<https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm>> (‘Responsible Business Guide’).

⁶ OECD, *Due Diligence for Responsible Corporate Lending and Securities Underwriting* (OECD, 2019) available at <<https://www.oecd.org/investment/due-diligence-for-responsible-corporate-lending-and-securities-underwriting.htm>> (‘Due Diligence Lending Guide’).

⁷ OECD, *Responsible business conduct for institutional investors* (Secretary-General of the OECD, 2017, Organisation for Economic Cooperation and Development) available at <<https://www.oecd.org/corporate/RBC-for-Institutional-Investors.pdf>>.

- *Extractive Sector Stakeholder Engagement*⁸ and *Mineral Supply Chains*⁹ both address due-diligence and stakeholder engagement in the mining and petroleum sectors;
- *Textile and Garment Supply Chains*¹⁰ and *Agricultural Supply Chains*¹¹ cover issues and examples arising in those sectors;
- Concepts of the UN's *Guiding Principles on Business and Human Rights*¹² ('UNGPs') are incorporated into the Guidelines, and the UNGPs help further detail what is expected of companies regarding policy, due-diligence and remediation.

The Guidelines, and these various due-diligence guides, offer assistance for working through complex situations where every action or response may involve some impact, through tools for risk-based assessment and prioritising. Risk assessment, covering an entity's operations *and its business relations*, should include four areas:¹³

- sector risks (specific characteristics or issues such as the extractive sector needing to carefully examine land impacts, labour-intensive production examining working conditions etc);
- product risks (related to inputs or production processes, such as care around chemicals, sourcing etc);
- geographic risks (any prevalent human rights problems where the operations occur); and
- enterprise risks (deriving from the particular organisation undertaking the activities – its corporate history, current governance, capacity issues etc).

Examination and information about each of those risks can then guide appropriate due-diligence and prioritisation by *assessing the likelihood and severity of impact*. The OECD documents explain 'severity' is informed by considering three factors:¹⁴

- scale (the gravity of a potential impact);
- scope (the reach of the impact, particularly the number of individuals potentially affected); and
- reversibility (whether there are limits on the ability to restore a situation before the adverse impact).

⁸ OECD, *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector* (OECD Publishing, 2017) available at <<https://read.oecd.org/10.1787/9789264252462-en?format=pdf>>.

⁹ OECD, *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (OECD Publishing, 3rd ed, 2016) available at <<https://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf>>.

¹⁰ OECD, *Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector* (OECD Publishing, 2018) available at <<http://dx.doi.org/10.1787/9789264290587-en>>.

¹¹ OECD, *OECD-FAO Guidance for Responsible Agricultural Supply Chains* (OECD Publishing, 2016) available at <<http://dx.doi.org/10.1787/9789264251052-en>>.

¹² UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (United Nations, 2011) available at <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>.

¹³ Further detail in *Responsible Business Guide* (n 4) 25-28 and *Due Diligence Lending Guide* (n 5) 34-36.

¹⁴ Further detail in *Responsible Business Guide* (n 4) 42-45 and *Due Diligence Lending Guide* (n 5) 17-18.

Guidelines' Complaints Process

For multinational enterprises operating in, or from, each country which 'adheres' to the OECD Guidelines, compliance with the Guidelines is encouraged by the NCP of that adhering country.¹⁵ Companies acting inconsistently with the Guidelines can be subject to a complaint to, and 'good offices' (typically, mediation), by an NCP. The formal term for a 'complaint' which the Guidelines use is a 'specific instance', and the procedure is not a judicial process. Participation is voluntary and relies on the goodwill of the parties to resolve a dispute. The OECD has characterised the complaint procedure as 'intended to provide a consensual, non-adversarial, forward-looking "forum for discussion" for issues that arise relating to implementation of the Guidelines'.¹⁶

The basis for a complaint under the Guidelines is about 'issues that arise relating to the implementation of the Guidelines'.¹⁷ So issues or disputes that are not 'relating to the implementation of the Guidelines' are not envisaged within NCPs' complaint functions. The overall NCP complaint process has been summarised by the OECD, explaining the steps in the following diagram:

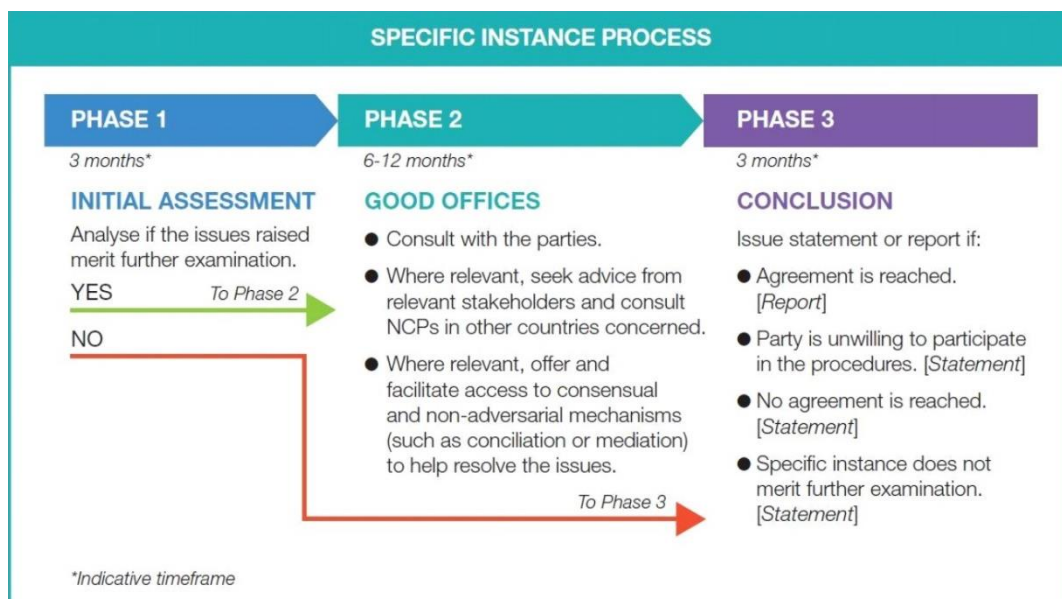


Figure 1: Specific Instance Process¹⁸

¹⁵ As at April 2021, there are 50 countries adhering to the Guidelines: Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, Colombia, Costa Rica, Czech Republic, Croatia, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Korea, Latvia, Lithuania, Luxembourg, Mexico, Morocco, Netherlands, New Zealand, Norway, Peru, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Tunisia, Turkey, Ukraine, United Kingdom, and United States. Contact details for each NCP of these countries can be found at OECD, *National Contact Points* (Web Page) available at <http://mneguidelines.oecd.org/ncps/>.

¹⁶ OECD, *Guide for National Contact Points on Recommendations and Determinations* (OECD, 2019) 4.

¹⁷ *Guidelines* (n 1) Implementation Procedures, I [1].

¹⁸ From OECD, 'National Contact Points: An Overview' (Paper presented at the Global Forum on Responsible Business Conduct, Paris (France), 19 June 2015) 9.

When a complaint is received by an NCP, the first stage is ‘initial assessment’ which takes into account these six aspects:¹⁹

- ‘*the identity of the party concerned and its interest in the matter*’ – this mainly considers the interest of the party submitting the complaint (which does not need to satisfy legal ‘standing’ but should demonstrate some tangible personal/professional interest in the matter), but also relevant is whether the entity complained against is an ‘enterprise’ addressed by the Guidelines (some NCPs have rejected complaints lodged against government and semi-government bodies);²⁰
- ‘*whether the issue is material and substantiated*’ – not requiring formal proof, but something more than just assertions of breach;
- ‘*whether there seems to be a link between the enterprise’s activities and the issue raised in the specific instance*’;
- ‘*the relevance of applicable law and procedures, including court rulings*’;
- ‘*how similar issues have been, or are being, treated in other domestic or international proceedings*’ – parallel proceedings do not preclude an NCP complaint process (particularly if addressing different issues) but if there is no potential for mediation-type engagement between the parties without prejudicing existing proceedings, that may influence the NCP’s decision on whether a complaint ought to proceed at the current time; and
- ‘*whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines*’ – this is a broad concept and includes considering:

whether providing good offices through facilitating an exchange between the parties, discussing the issues and expectations of the Guidelines with the enterprises in question, or developing meaningful recommendations with respect to enterprise conduct, would support or encourage the resolution of the issues.²¹

These criteria are replicated in the AusNCP’s *Complaint Procedures*, which specify these are the *only basis* by which initial assessment occurs for the AusNCP.²² The OECD has also published a 2019 guide on how NCPs conduct initial assessments.²³ Where an NCP’s initial assessment accepts the complaint, the parties are then encouraged to participate in a ‘good offices’ process.

¹⁹ The following quotes from the *Guidelines* (n 1) Procedural Guidance, Commentary, I, [25].

²⁰ See, eg, UK NCP, *Global Witness Complaint to the UK NCP about UK Export Finance* (UK National Contact Point for the OECD Guidelines for Multinational Enterprises, 2020) available at <<https://www.gov.uk/government/publications/global-witness-complaint-to-the-uk-ncp-about-uk-export-finance>>; BRA NCP, *Relatório Inicial Van Oord [Initial Assessment Van Oord Ltda]* (Ponto de Contato Nacional, 2015, Brasil National Contact Point).

²¹ OECD, *Guide for National Contacts Points on the Initial Assessment of Specific Instances* (OECD, 2019) 12 (‘Initial Assessments Guide’).

²² The AusNCP’s Australian National Contact Point, *Complaint Procedures* (September 2019, Treasury) available at <<https://ausncp.gov.au/complaints/ausncp-procedures>> (‘AusNCP Procedures’) include initial assessment criteria in [4.10].

²³ *Initial Assessments Guide* (n 21).

The Guidelines envisage flexibility in ‘good offices’, that the NCP will ‘offer, and with the agreement of the parties involved, facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist the parties in dealing with the issues’.²⁴ So the process does not *have* to be a traditional mediation, but does have to be (1) consensual, and (2) not inconsistent with Guidelines. It is not a process which enforces parties’ rights. Mediation/conciliation only works where parties are prepared to engage, and the NCPs generally work with parties to get agreement about *process* first, including confidentiality, before facilitating direct engagement between the parties.

The strength of the Guidelines’ ‘good offices’ process is their identification of standards for responsible business but also the flexibility to exceed these. The good offices’ engagement, facilitated by NCPs, enables parties to engage and endeavour to find outcomes (within the Guidelines) which best meet their various perspectives. The OECD’s many due diligence guides (summarised above) provide various examples of different ways in which enterprises can comply with the Guidelines.

A useful resource, in understanding complaints under the Guidelines, are databases of complaints to (and statements by) NCPs. One database is maintained by the OECD²⁵ and another by the NGO, OECD Watch.²⁶ The OECD Watch has a formal institutional role under the Guidelines, together with international business and union organisations.²⁷

AusNCP Procedures, Process and Examples

The AusNCP is a function established by the Australian Government, which is hosted and funded by the Department of the Treasury. The AusNCP is staffed by Treasury officials, and supported by a Governance and Advisory Board, a multi-stakeholder group including members from the Australian Government, civil society, unions and the business community. Complaints made to the AusNCP about multinational enterprises are managed by an independent decision-maker, known as an Independent Examiner, who is recruited through a public process and contracted by the Treasury. The AusNCP publishes procedures governing the complaint process, which includes the functions of the Independent Examiner and the Board, and a review process for any party who considers the procedures have not been followed.²⁸

²⁴ *Guidelines* (n 1) 73 Procedural Guidance I.C.[2](d); reflected in AusNCP Procedures (n 23) [5.1].

²⁵ OECD, *Database of Specific Instances* (Web Page) <<https://mneguidelines.oecd.org/database/>>.

²⁶ OECD Watch, *Complaints Database* (Web Page) <<https://www.oecdwatch.org/complaints-database/>>.

²⁷ Under the *Guidelines* (n 1) Implementation Procedures II [2]. Along with OECD Watch the other organisations are the *Business and Industry Advisory Committee* (<https://biac.org/>) and the *Trade Union Advisory Committee* (<https://tuac.org/>).

²⁸ AusNCP Procedures (above n 23), with the review process in ‘8. Procedural Review’.

Recent examples of AusNCP statements and cases include the following.²⁹ As the position of Independent Examiner is new, some of these are earlier statements and action of the AusNCP which would now be undertaken by the Independent Examiner.

- *BHP and Port Hedland Community Progress Association* was about arrangements regarding dust impacts on a town from iron ore processing and loading operations. The Association raised concerns about a government compensation programme and environmental regulation. The Independent Examiner assessed the complaint and determined not to proceed, noting ‘the two main aims the Association identified with its complaint (review BHP’s licence under WA law, and obtain ‘fair’ compensation under a government scheme) are not within the OECD Guidelines’ scope’.³⁰
- *ElectraNet and B & A Starkey* addressed the interaction between Indigenous groups and construction of electricity transmission lines in South Australia. ElectraNet is an Australian company, with majority control and ownership by international parties. The construction affecting most sites (all the sites except one) occurred after an agreement with relevant Indigenous groups, who had raised no concern with those agreements nor ElectraNet’s actions. The complaint was accordingly not accepted in relation to those sites. The Final Statement included two key points. First, ElectraNet should ensure familiarity with the Guidelines and procedures throughout its operations.³¹ Second, that a Guidelines’ complaint about impacts on a *group’s* cultural rights should ensure effective engagement and involvement of that group as part of the NCP complaint.³²
- *ANZ Group and IDI and Equitable Cambodia* arose from lending ANZ made toward palm oil developments in Cambodia. There were social and environmental impacts connected with the development, and ANZ acknowledged it had not undertaken sufficient due diligence prior to making the loan. However, after ANZ raised issues with its customer, the relationship ended. A complaint was lodged with the AusNCP (by Cambodian and US NGOs, acting for the affected Cambodian communities), who facilitated a mediation between them and the ANZ. The parties agreed, after further mediation in February 2020, that ANZ’s profits from the loan would be paid to the affected communities, and ANZ will strengthen its human rights policies and grievance mechanisms.³³

²⁹ Documentation relating to each of the following examples is available via AusNCP, View a Closed Complaint (Web Page) <<https://ausncp.gov.au/complaints/view-closed-complaint>>.

³⁰ Independent Examiner, *Complaint by Complaint by Port Hedland Community Progress Association regarding BHP* (1 September 2021, Australian National Contact Point, Department of Treasury), [3].

³¹ Independent Examiner, *Complaint by Andrew Starkey and Robert Starkey regarding ElectraNet Pty Ltd* (Australian National Contact Point, 9 June 2021) [63].

³² Ibid [58].

³³ Independent Examiner, *Complaint by Equitable Cambodia and Inclusive Development International on behalf of Cambodian families* (Australian National Contact Point, 27 February 2020).

- *Mercer PR and Australian Women Without Borders*, concerned privacy issues from an Australian company's public relations work for the Nauruan Government. The company declined to engage in mediation, and the AusNCP statement noted that even though the company was a 'small enterprise, it is important that it meets the standards government expects of all Australian enterprises operating overseas, including the OECD Guidelines'.³⁴ The AusNCP also recommended relevant company officials undertake human rights training.
- *Australian Laboratory Services and Mr Yacouba Traoré (on behalf of the Former Employees Collective)* concerned allegations about worker health and safety in a factory in Mali, Africa. Following assessment of the complaint and engaging with the parties, the AusNCP concluded the matter, stating it was satisfied the company 'has relevant procedures and processes in place to support the health and safety of its employees and has put in place procedures across its global operations to prevent, identify and manage risks'.³⁵

The AusNCP recently underwent peer review. This is a voluntary process whereby a NCP is reviewed by several other NCP's and the OECD Secretariat, regarding its performance against the OECD's core criteria for NCPs in implementing the Guidelines. Its primary purpose is peer learning and encourages functional equivalence across the global network. Peer review reports are usually made public, and the AusNCP's report is expected to be made public by the OECD next year. There is also information about the AusNCP's work from OECD Watch, which conducts its own evaluation of NCPs and publishes these on its website.³⁶

The Independent Examiner role is relatively new (commenced in 2019) and offered in a part-time capacity. The AusNCP is experiencing a significant increase in complaints submitted.³⁷ At times, the AusNCP has engaged external mediators, which can occur to access particular skill sets or to avoid perceptions of conflict. Any dispute resolution professionals with international experience and interests in the area of responsible business conduct may wish to subscribe to the AusNCP website³⁸ to monitor for advertisements of future opportunities.

³⁴ Victoria Andersen, *Specific Instance by Australian Women Without Borders against Mercer PR* (Australian National Contact Point, 9 July 2019).

³⁵ Victoria Anderson, *Employees Collective of Australian Laboratory Services Mali against Australian Laboratory Services* (Australian National Contact Point, 8 March 2019).

³⁶ OECD Watch, *NCP Australia* (Web Page) <<https://www.oecdwatch.org/ncp/ncp-australia/>>.

³⁷ Current complaints being handled by the AusNCP can be seen here: AusNCP, *Track An Open Complaint* (Web Page) <<https://ausncp.gov.au/complaints/track-open-complaint>>.

³⁸ AusNCP, *Contact Us* (Web Page) <<https://ausncp.gov.au/contact-us>>.