



Australian National Contact Point Independent Examiner

The OECD Guidelines for Multinational Enterprises and the AusNCP (for DTP webinar *UN and Human Rights Accountability Processes*, 27 Oct 2020)

The [OECD Guidelines for Multinational Enterprises](#) is an international standard about responsible business conduct. 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, and require adhering governments (including Australia) to:

- encourage multinational companies in, or from, their country to follow the Guidelines, and
- establish a National Contact Point to promote the Guidelines and receive and consider complaints about companies not meeting the Guidelines.

Complaints under the OECD Guidelines

The basis for a complaint (or 'specific instance') under the Guidelines is about 'issues that arise relating to the implementation of the Guidelines'.¹ So issues or disputes that are not 'relating to the implementation of the Guidelines' are not envisaged within NCPs' complaint functions. However the Guidelines incorporate *other* documents and standards; and reference to those can be central to resolving a complaint. These include the OECD's [Due Diligence Guidance for Responsible Business Conduct](#), which applies to all businesses, and also other documents focussed on particular issues.

- The G20/OECD [Principles of Corporate Governance](#)² address effective corporate governance, shareholder rights and equitable treatment, the role of stakeholders in corporate governance, disclosure & transparency, and responsibilities of the board. There are also separate principles on [Corporate Governance of State-Owned Enterprises](#) which the Guidelines apply to state-owned entities.³
- The OECD-FAO [Guidance for Responsible Agricultural Supply Chains](#) addresses issues such as labour rights, health and safety, tenure rights over and access to natural resources, animal welfare, and sustainable use of natural resources.
- The [Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas](#) guide 'provides a framework for detailed due diligence as a basis for responsible supply chain management of all minerals',⁴ having grown from its origins dealing only with tin, tantalum and tungsten. There is also a guide on [Practical actions for companies regarding child labour in mineral supply chains](#) and a recommendation that companies follow the [OECD Transfer Pricing Guidelines](#).⁵

- Guides on [Responsible Corporate Lending and Securities Underwriting](#) and [Responsible Business Conduct for Institutional Investors](#) both apply to banks and other financial entities, and address complexities in those areas around 'business relationship', due diligence, risk assessment, stakeholder engagement and 'remediation under the OECD Guidelines'.
- A [Stakeholder engagement in extractive industries](#) guide is particularly relevant for issues in Australia in the annexures addressing 'Engaging with indigenous peoples', 'Monitoring and evaluation framework for meaningful stakeholder engagement', and 'Engaging with women'.
- The [Garment & Footwear Sector](#) guide addresses areas including supply chain investigation and remediation, child labour, working time and wages, collective bargaining, hazardous chemicals, and responsible sourcing from homeworkers.
- Concepts of the UN's [Guiding Principles on Business and Human Rights \(UNGPs\)](#) are included in the OECD Guidelines ch IV, but the UNGPs help further detail what is expected of companies regarding policy, due-diligence and remediation.
- The OECD Guidelines reference various recommendations and declarations of the International Labour Organization,⁶ relevant to issues regarding the workplace and workforce;
- The OECD Guidelines also reference UN and other OECD materials regarding bribery and corruption.⁷

A useful resource, in understanding complaints under the Guidelines, is the OECD's [database](#) of complaints to (and statements by) NCPs.

Australia's National Contact Point (AusNCP)

The AusNCP has an Independent Examiner to manage the complaint process.⁸ Broadly, there are three potential outcomes for a complaint.

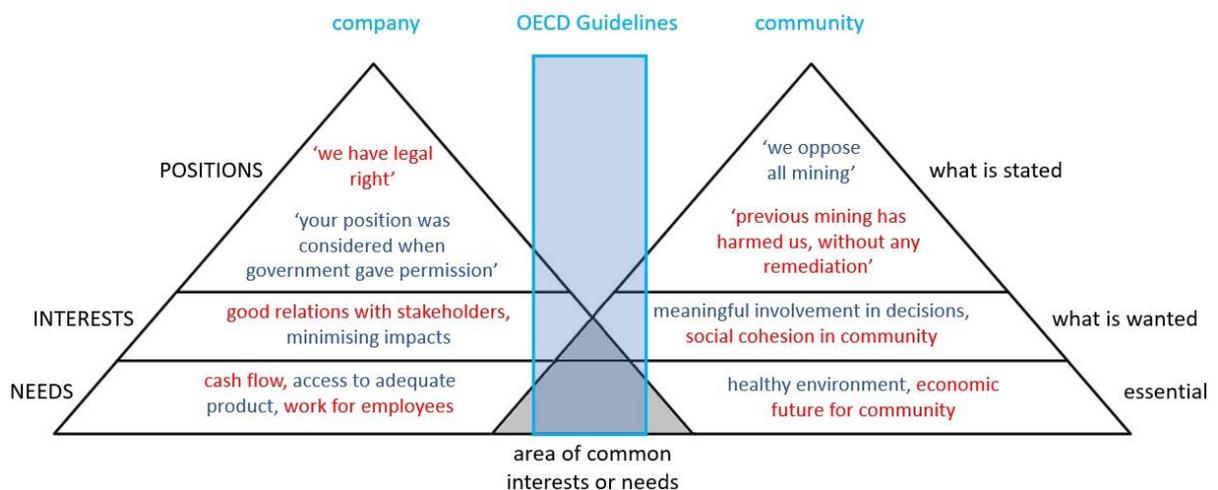
- (1) It is assessed as **not suitable to progress**, and a statement is made explaining why. A recent example is the decision and [statement not to accept the complaint regarding Deutsche Bank Australia](#).
- (2) The complaint is assessed as suitable to proceed, 'good offices' are offered to the parties, but **the company does not engage**. In this case, **the AusNCP will assess the case and issue a final statement** which 'will where possible include a statement as to whether the enterprise's actions were consistent with the OECD Guidelines'.⁹ A recent example is the [statement regarding a complaint against Mercer PR](#).
- (3) The complaint has merit and the parties engaged in the 'good offices' facilitated by the AusNCP. **On completion of good offices, a statement is made reporting on that** outcome. A recent example is the case concerning impacts associated with an historic ANZ loan in Cambodia. There was mediation which did not reach agreement, reported in the [2018 final statement](#). As part of the AusNCP's follow-up, the parties undertook further mediation and agreed an outcome, which was reported in the [2020 follow up statement](#).

So, when a complaint is received by the AusNCP, the first stage is 'initial assessment' by the Independent Examiner, and the *only* factors considered are the six admissibility criteria contained in the OECD Guidelines.¹⁰ Where the Independent Examiner accepts the complaint, the parties are then encouraged to participate in a 'good offices' process.

'Good offices' engagement to help parties resolve issues

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'.¹¹ So the process does not *have* to be conciliation, 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 Independent Examiner works with parties to get agreement about process first, before facilitating direct engagement between the parties.

A diagram can help understand some of these dynamics, and also typical factors present in a 'good offices' engagement under the OECD Guidelines. This uses a hypothetical example of a dispute between a community and a mining company.



This diagram is developed from one demonstrating voluntary mediation.¹² Each party likely has stated positions, but also desired interests and essential needs. Mediation seeks to help the parties find whether, and what, interests or needs they may share and, if there is common ground, to reach some agreement about that. The extent to which the parties do (or do not) have common interests and needs will determine the potential outcome of the mediation. This is indicated above ('area of common interests or needs'), with possible examples from the community and mining company.

Endnotes

- ¹ *OECD Guidelines*, Implementation Procedures, I [1].
- ² Referred to in *OECD Guidelines*, II General Policies, Commentary, [7] and III Disclosure, Commentary, [29].
- ³ Referred to in *OECD Guidelines*, II General Policies, Commentary, [10].
- ⁴ OECD (2016), [*OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*](#): Third Edition, p4.
- ⁵ Referred to in *OECD Guidelines*, XI Taxation, Commentary, [106].
- ⁶ Mostly referenced in the Commentary to *OECD Guidelines*, V. Employment and Industrial Relations.
- ⁷ Mostly referenced in the Commentary to *OECD Guidelines*, VII. Combating Bribery, Bribe Solicitation and Extortion.
- ⁸ As the position of Independent Examiner is new, some of the examples in this paper are of earlier statements and action of the AusNCP which would now be undertaken by the Independent Examiner.
- ⁹ [AusNCP Complaint Procedures](#) 6.2.2.
- ¹⁰ Detailed in 4.10 of [AusNCP Complaint Procedures](#).
- ¹¹ *OECD Guidelines*, Procedural Guidance IC, [2](d). Reflected in of [AusNCP Complaint Procedures](#), 5.1.
- ¹² Acland, *A Sudden Outbreak of Common Sense: Managing Conflict Through Mediation* (Hutchison Business, 1990).