



OECD Guidelines for Multinational Enterprises
National Contact Point Peer Reviews
AUSTRALIA



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Foreword

The OECD Guidelines for Multinational Enterprises (the Guidelines) are recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards. The OECD Guidelines are the only multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promoting.

Governments adhering to the Guidelines are required to set up a National Contact Point (NCP) for Responsible Business Conduct that functions in a visible, accessible, transparent and accountable manner. During the 2011 update of the Guidelines, NCPs agreed to reinforce their joint peer learning activities, in particular, with respect to conducting voluntary peer reviews.

The peer reviews are led by representatives of 2 to 4 other NCPs who assess the NCP under review and provide recommendations. The reviews give NCPs a mapping of their strengths and accomplishments, while also identifying opportunities for improvement. More information can be found online at <https://mneguidelines.oecd.org/ncppeerreviews.htm>.

This report presents the peer review of the Australian NCP. The peer review report of the Australian National Contact Point (NCP or AusNCP) was prepared by a team comprising reviewers from the NCPs of New Zealand, Italy and Sweden with the support of the OECD Secretariat. The NCP of New Zealand was represented by Adam Dubas. The NCP of Italy was represented by Candia Savastano and Daniele Branchini. The NCP of Sweden was represented by Helmer Broberg. The OECD Centre for Responsible Business Conduct was represented by Nicolas Hachez, Emily Halstead, and Carissa Munro. The report was informed by dialogue between the peer review team, the NCP of Australia and relevant stakeholders during a virtual fact-finding mission on 6-16 September 2021. The peer review team wishes to acknowledge the NCP for the quality of the preparation of the peer review and organisation of the virtual visit. The NCP of Australia was represented by Tom Dickson, Laura Lewellyn, Amy Burke, Michelle Evans and Carmela Magnocavallo. This report also benefited from comments by OECD delegations to the Working Party on Responsible Business Conduct and institutional stakeholders (BIAC, OECD Watch, TUAC).

Table of contents

Key findings	5
Introduction	9
1. Institutional arrangements	11
2. Promotion of the Guidelines	20
3. Specific instances	27
List of organisations submitting responses to the NCP peer review questionnaire	45
List of organisations that participated in the NCP peer review on-site visit	46
Promotional events 2019-2020	47
Overview of specific instances handled by AusNCP as the leading NCP	49

Tables

Table 1.1. Permanent Membership on Governance and Advisory Board	16
Table 3.1. Glossary of key terms	28
Table 3.2. Specific instances where the AusNCP has cooperated with other NCPs	43
Table 3.3. Promotional activities in 2020 organised by the NCP	47
Table 3.4. Events in 2020 participated in by the NCP	47
Table 3.5. Promotional activities in 2019 organised by the NCP	47
Table 3.6. Events in 2019 participated in by the NCP	48

Figures

Figure 1.1. AusNCP structure	14
Figure 1.2. Organisational chart for AusNCP	14

Boxes

Box 1.1. Former structure of the Australian NCP	11
Box 2.1. Leveraging the website as a key communication tool	24
Box 3.1. AusNCP online form for complaint submission	29
Box 3.2. ElectraNet Pty Limited and Messrs Andrew and Robert Starkey (2021)	31
Box 3.3. ANZ Banking Group and Inclusive Development International and Equitable Cambodia	35
Box 3.4. Deutsche Bank Australia and Mr. Robert Palin	38

Key findings

Institutional arrangements

The AusNCP has a hybrid structure composed of a Secretariat located in Treasury responsible for the daily operation of the NCP, for the promotional aspect of the NCP mandate, and for representing the NCP internationally. It also has an Independent Examiner, responsible for all aspects of specific instance handling along with promotional duties. The Secretariat and the Independent Examiner are supported by a multistakeholder Governance and Advisory Board, responsible for raising awareness of the AusNCP and Guidelines within their respective networks, advising on specific instances including draft statements, and conducting procedural reviews for specific instances when required. There are two full time and three part time members in the Secretariat, a part-time Independent Examiner and twelve permanent and four proxy members of the Governance and Advisory Board. The NCP will add a second Independent Examiner position to manage the increased volume of specific instances since 2020.

This structure was reformed in 2018 - 2019, upon the heels of criticism from stakeholders regarding the former single-agency structure. It was informed by a self-initiated independent review carried out in 2017, and the outcomes of a substantiated submission filed the same year by OECD Watch with the OECD Investment Committee. The substantiated submission process commenced after the reforms were announced in 2018. All stakeholders agreed that the reforms were a success and expressed satisfaction with the improved performance of the NCP, and optimism that progress would continue. Stakeholders highlighted in particular the professionalism and reactivity of the Secretariat, the substantive and mediation-related expertise of the Independent Examiner, as well as the value of having a multi-stakeholder Governance and Advisory Board for representativeness and expertise-sharing.

The basis for this structure however rests solely on the general mandate of Treasury to implement the Guidelines and is not recorded in an official legal or administrative document. Stakeholders indicated that having such a document would increase confidence in the NCP, as it would add stability and authority to the NCP. Likewise, although stakeholders agreed that the new structure, particularly with the addition of an Independent Examiner, allowed for more guarantees of impartiality, they still expressed concerns about possible conflicts of interests linked with the location of the NCP in Treasury, and the fact that Treasury hires the Independent Examiner on one year terms (up to a maximum of three years) and funds its contract. They in this regard cited the example of whether impartiality could be guaranteed in the context of a case touching upon state policy. It would be useful in that regard for the AusNCP to communicate on safeguards put in place to ensure continued impartiality.

	Finding	Recommendation
1.1	The NCP structure was reformed as part of the general mandate of Treasury as regards RBC and the Guidelines, but is not formalised in a legal or official document. Stakeholders have shared that they would have more trust in the NCP and would view its structure as more stable and its authority as better established if it was established in such a document	Australia could consider ways to lend more stability and authority to the NCP by formalising its structure in a legal or administrative document.
1.2	The NCP structure is viewed as conducive to impartiality, notably as cases are handled by an Independent Examiner, but stakeholders have questions regarding how impartiality can be guaranteed in some circumstances (e.g. case that touches upon government policy).	More communication could be done to clarify and explain the safeguards that are in place to maintain impartiality (e.g. enhance the existing conflict of interest policy, extent of independence of the independent examiner, etc.)

Promotional activities

The AusNCP has adopted a promotional plan, called the ‘Engagement Strategy’ for the years 2020-2021. The plan foresees a number of activities and deliverables categorised into products, stakeholder engagement and policy information and advice.

Under this plan, the AusNCP has produced a number of information and promotion materials such as fact sheets and brochures, or more innovative formats such as contributing to a podcast. The website of the NCP plays a key role in the dissemination of these materials and is modern and user friendly, although stakeholders have invited the NCP to increase the use of the website in its promotional efforts, and to provide some content in languages other than English to increase accessibility.

The AusNCP has also organised promotional events and participated in events organised by others. Organisation and participation in events has been limited to date, with a handful of events per year, and was described by stakeholders as mainly ‘reactive’. The promotional plan aimed to increase activity around events, but this was hampered by the Covid-19 pandemic.

As a result of the above, the visibility of the NCP remains limited beyond a small circle of very engaged stakeholder organisations, some of which are part of the Governance and Advisory Board. In that regard, it appears that the NCP’s structure allows for numerous promotional opportunities that are not all fully exploited by the promotional plan.

The NCP also fosters policy coherence by maintaining relationships with key government departments, through (but not limited to) membership in the Governance and Advisory Board, and by providing input into policy relevant processes. This is also a specific objective of the AusNCP’s promotional plan. Overall, precise knowledge of the NCP and the Guidelines across government remains limited, and the RBC field is dominated by other initiatives, such as the implementation of the 2018 Modern Slavery Act, with little involvement from the NCP.

	Finding	Recommendation
2.1	The structure of the NCP offers many opportunities for promotion, through the Secretariat, the Independent Examiner, and the Governance and Advisory Board, whose own activities and contacts can act as relays for the NCP's promotion efforts. However, these opportunities are not fully explored in the promotional plan.	The promotional plan should be revised to more strategically leverage key actors and relationships, in particular the secretariat (strategically located in treasury), advisory board, independent examiner, stakeholder networks. It could set clearer dissemination objectives and be publicised with stakeholders.
2.2	The AusNCP's website is modern, user-friendly and easily accessible. It plays an important part in the AusNCP's promotional efforts and in its accessibility, and this role could be further increased.	The use of the website as a tool for accessibility and visibility should be enhanced, e.g. by including more guidance materials produced by the NCP, an agenda of promotional events, and key information (such as a fact sheet on submitting specific instances) in relevant foreign languages.
2.3	The AusNCP maintains relationships with key government agencies, notably through the Governance and Advisory Board, and provides policy inputs related to the Guidelines where necessary, but knowledge of the NCP across government remains low and the RBC field is dominated by other initiatives.	The AusNCP should enhance its contribution to policy coherence by promoting use of the Guidelines by key government actors, and by seeking further opportunities for promoting the Guidelines and the NCP through related agendas, such as policies on modern slavery.

Specific instances

The AusNCP has received 27 specific instances as of the completion of the virtual on site visit on 16 September 2021. Its case activity has been sharply increasing in recent years, which is a sign of the renewed confidence of users in the NCP after the 2018 reforms. Stakeholders were generally satisfied with the handling of cases since the reform, and noted improvements in the respect of the indicative timelines, and in the outcomes obtained.

To ensure that the NCP can continue to handle this increased caseload in a timely and efficient manner, Treasury intends to appoint two Independent Examiners upon the expiry of the current Examiner's mandate. This is a welcome development, but may pose coordination challenges, such as the risk of inconsistent application of the procedures, which should be carefully managed.

The AusNCP has an elaborate set of rules of procedures (RoP) that were adopted following the reform and with the benefit of a public consultation. Stakeholders are generally satisfied with these RoP, which are very sophisticated in some respects (e.g. the review procedure by the Governance and Advisory board) and enable the NCP to handle specific instances in accordance with the guiding principles of impartiality, predictability, equitability and compatibility with the Guidelines.

A number of aspects could however be reviewed in light of the recent practice. In particular, the fact that initial assessments are published at the discretion of the Independent Examiner was viewed as lacking in transparency. Likewise, the procedure for obtaining the feedback of the Governance and Advisory Board on draft statements is not described clearly in the RoP.

Additionally, the safeguards to avoid conflicts of interests in the handling of a case are scattered across several documents which could be consolidated, and the template used by the AusNCP to formalise confidentiality commitments could be revised to be better suited to the context of an NCP mediation.

	Finding	Recommendation
3.1	The AusNCP is faced with a sharp increase in case activity following the reforms, which may pose challenges to the Independent Examiner's ability to handle cases in a timely and efficient manner. Treasury decided to appoint at least two Examiners going forward. This is a welcome development but may pose coordination challenges between the two examiners.	Arrangements should be made regarding coordination between Examiners to avoid inconsistent decisions while protecting the independence of each Examiner. A clear, transparent and objective process should also be designed for assigning cases to Examiners, taking into account relevant factors.
3.2	The AusNCP has a detailed and elaborate set of RoP that were incepted following the reforms and after public consultation. The RoP are strong, but practice has evidenced that certain aspects could be revised to enhance perceptions of impartiality, transparency, and accessibility.	The AusNCP should consider reviewing notably the following aspects of its RoP: (i) publication of initial assessments; (ii) advice of Board on draft statements; (iii) consolidation of conflict of interest policy into one document; (iv) confidentiality agreement template.

Introduction

The Australian NCP at a glance

Established: 2001

Structure: Hybrid single-agency and expert decision-making

Location: Secretariat is located in the Department of the Treasury. The AusNCP includes an Independent Examiner and is supported by a Governance and Advisory Board composed of government and non-government stakeholder representatives.

Staffing: Two full time and three part time members in the Secretariat, a part-time Independent Examiner and twelve permanent and four proxy members of the Governance and Advisory Board.

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

Specific instances received: 27 with 17 concluded, 4 transferred and 6 ongoing as of 16 September 2021.

The implementation procedures of the Guidelines require NCPs to operate in accordance with the core criteria of visibility, accessibility, transparency and accountability. In addition, the guiding principles for specific instances recommend that NCPs deal with specific instances in a manner that is impartial, predictable, equitable and compatible with the Guidelines. This report assesses conformity of the Australian NCP with the core criteria and with the Procedural Guidance contained in the implementation procedures.

Australia adhered to the OECD Declaration on International Investment and Multinational Enterprises (Investment Declaration) in 1976. The OECD Guidelines for Multinational Enterprises (the Guidelines) are part of the Investment Declaration. The Guidelines are recommendations on responsible business conduct (RBC) addressed by governments to multinational enterprises operating in or from adhering countries. The Guidelines have been updated five times since 1976; the most recent revision took place in 2011.

Countries that adhere to the Investment Declaration are required to establish National Contact Points (NCPs). NCPs are set up to further the effectiveness of the Guidelines and adhering countries are required to make human and financial resources available to their NCPs so they can effectively fulfil their responsibilities, taking into account internal budget priorities and practices.¹ NCPs are “agencies established by adhering governments to promote and implement the Guidelines. The NCPs assist enterprises and their stakeholders to take appropriate measures to further the implementation of the Guidelines. They also provide a mediation and conciliation platform for resolving practical issues that may arise.”²

The Procedural Guidance covers the role and functions of NCPs in four parts: institutional arrangements, information and promotion, implementation in specific instances and reporting. In 2011, the Procedural Guidance was strengthened. In particular, a new provision was added to invite the OECD Investment

¹ Amendment of the Decision of the Council on the OECD Guidelines for Multinational Enterprises, para I(4)

² OECD Guidelines for Multinational Enterprises (2011), Foreword

Committee to facilitate voluntary peer evaluations. In the commentary to the Procedural Guidance, NCPs are encouraged to engage in such evaluations.

The objectives of peer reviews as set out in the Core Template for National Contact Point Peer Reviews³ are to assess that the NCP is functioning in accordance with the core criteria set out in the implementation procedures; to identify the NCP's strengths and possibilities for improvement; to make recommendations for improvement; and to serve as a learning tool for all NCPs involved.

This report was prepared based on information provided by the NCP and in particular, its responses to the NCP questionnaire set out in the core template as well as responses to requests for additional information. The report also draws on responses to the stakeholder questionnaire which was completed by 19 organisations representing enterprises, civil society, trade unions/representative organisations of the workers' own choosing (worker organisations), international organisations, academic institutions and government agencies. Additionally, six NCPs provided feedback on cooperation and coordination with the AusNCP (see Annex A for a complete list of stakeholders who submitted written feedback) and information provided during the virtual visit.

The peer review of the NCP was conducted by a peer review team made up of reviewers from the NCPs of New Zealand, Italy and Sweden, along with representatives of the OECD Secretariat. Due to Covid-19 travel restrictions, a virtual fact-finding mission took place from 6-16 September 2021 and included interviews with the NCP, other relevant government representatives and stakeholders. A list of organisations that participated in the virtual visit is set out in Annex B. The peer review team wishes to acknowledge the NCP for the quality of the preparation of the peer review and organisation of the virtual visit. The basis for this peer review is the 2011 version of the Guidelines. The specific instances considered during the peer review date back to 2005. The methodology for the peer review is that set out in the core template.

Economic context

Australia's economy is dominated by the service sector, representing 71% of GDP. Regarding foreign direct investment (FDI), the inward stock of FDI, which represents the accumulated value of FDI in the Australian economy over time, was USD 791 billion in 2020, equivalent to 59 percent of Australia's GDP. The outward stock of FDI was USD 627 billion in 2020, representing 47 percent of Australia's GDP. In 2020, Australia's exports of goods were USD 251 billion and exports of services were USD 49 billion while imports of goods were USD 210 billion and imports of services were USD 39 billion.

The main investors in Australia are the United States, Japan, the United Kingdom, the Netherlands, Canada, and China, and the main inward investment sectors are mining and quarrying, real estate, and finance and insurance. The main destinations for outward investment are the United States, the United Kingdom, New Zealand, the European Union, Canada and Singapore, and the most important sectors are manufacturing, mining and quarrying, and finance and insurance. The most important partner countries for exports of goods are the China, Japan, Korea, the United States and the United Kingdom, while the most important source countries for imports of goods are China, the United States, Japan, Thailand and Germany. The most important destinations for exports of services are China, the United States, India, the United Kingdom and New Zealand, and the most important sources for imports of services are the United States, the United Kingdom, Singapore, New Zealand and Germany.

³ OECD (2021), National Contact Point Peer Reviews: Core Template, <http://mneguidelines.oecd.org/national-contact-point-peer-reviews-core-template.pdf>

1. Institutional arrangements

Under the Procedural Guidance of the Guidelines, Section I (A): “Since governments are according flexibility in the way they organise NCPs, NCPs should function in a visible, accessible, transparent and accountable manner.”

Legal basis

Australia’s government adhered to the OECD Investment Declaration in 1976. The AusNCP was formally established in 2001 with the update of the Guidelines. In 2018-2019, the AusNCP was reformed, following an independent review initiated by the Australian Department of the Treasury (herein “Treasury”).

2017-2019 review and reform of the Australian National Contact Point

In 2017, Treasury commissioned an Independent Review, which included evaluating the structure of the then-called Australian NCP or “ANCP” (see Box 1.1). The terms of reference also included an examination of Australia’s commitments and obligations under the Guidelines, how the ANCP function should fit within whole of-government strategy and evaluate the most suitable area of Government to effectively perform the ANCP function.⁴

Box 1.1. Former structure of the Australian NCP

Prior to the reforms, the ANCP was a single agency NCP housed in the Policy Unit of the Foreign Investment Division in the Department of Treasury.

A senior executive in the Foreign Investment Division of Treasury, who was supported by a Secretariat located in the same division, headed the NCP. Until 2016, the ANCP did not have dedicated staff. Until 2018, the ANCP did not have a dedicated budget: costs related to staffing, travel, mediation and other administrative services were allocated from the Foreign Investment Division’s budget. Concerning staff, those assigned to the ANCP fluctuated from approximately 0.7 full-time equivalent staff members to 1.5 staff members at the time of the Independent Review.

An advisory body – the Oversight Committee – was established in 2012 to “oversee and monitor the effectiveness of the ANCP, and to provide guidance on procedural matters”. It was comprised of representatives of Australian government agencies, including:

- Department of the Treasury
- Department of Foreign Affairs and Trade

⁴ Newton, A. (2017), Independent Review: Australian National Contact Point under the OECD Guidelines for Multinational Enterprises

- Department of Industry, Innovation and Science
- Department of Employment
- Australian Trade and Investment Commission (Austrade)
- Attorney-General's Department
- Department of Home Affairs
- Export Finance and Insurance Corporation

Source: Australian NCP Annual Report to OECD (2017); Australian NCP Annual Report to OECD (2018); Newton, A. (2017), Independent Review: Australian National Contact Point under the OECD Guidelines for Multinational Enterprises

The review of the ANCP came on the heels of criticism by a number of stakeholders regarding the NCP's functioning. In particular, concerns were raised regarding the ANCP's visibility, accessibility, transparency and accountability (it is also worth noting that during this period, a substantiated submission⁵ was submitted by OECD Watch to the OECD Investment Committee concerning the ANCP's handling of a specific instance submitted in 2014 by the Human Rights Law Centre and Rights and Accountability in Development, against security firm G4S Australia). These various concerns were the result of a number of factors, including a lack of human and financial resources at the ANCP, lack of promotion amongst key stakeholders, high thresholds for passing initial assessment and failure to meet indicative timelines, and lack of public access to key documents (annual reports, meeting minutes, etc.).⁶ Moreover, with regards to the handling of specific instances, stakeholders noted concerns across all four guiding principles: impartiality, predictability, equitability and compatibility with the Guidelines. For example, stakeholders questioned the impartiality of the NCP in cases that touched on government policy being rejected at initial assessment stage, raised concerns about predictability resulting from lack of adherence to the ANCP's own rules of procedure, and raised concerns about equitability, as little accommodation was made to support parties engagement with the ANCP.⁷

Conducted by an Independent Reviewer, the review was informed by both internal and external materials related to the functioning of the ANCP, as well as broader materials analysing the role of non-judicial grievance mechanisms. The review was also informed by stakeholder consultations, interviews with Australian Government officials, other NCPs and international experts (OECD, UN Working Group on Business and Human Rights, TUAC, OECD Watch and leading NGOs).

Informed by the desk research, consultations and interviews, the Independent Reviewer laid out 5 recommendations, as follows:

- Implement an independent NCP, assisted by a government-based secretariat located in the Department of Foreign Affairs and Trade (DFAT). The NCP would be comprised of: an expert panel of three to five members; a secretariat; and an advisory group, consisting of government and non-government members.

⁵ See OECD (2018), Response by the Investment Committee to the Substantiated Submission by OECD Watch regarding the Australian National Contact Point, https://ausncp.gov.au/sites/default/files/inline-files/substantiated_sub-Nov2018.pdf

⁶ See for example Newton, A. (2017), *Independent Review: Australian National Contact Point under the OECD Guidelines for Multinational Enterprises* and Zornada, K. (2017), *The Australian OECD National Contact Point: How can it be reformed?*, Corporate Accountability Research

⁷ See for example Newton, A. (2017), *Independent Review: Australian National Contact Point under the OECD Guidelines for Multinational Enterprises* and Zornada, K. (2017), *The Australian OECD National Contact Point: How can it be reformed?*, Corporate Accountability Research

- Implement a quadripartite NCP, comprising representatives from government, corporates, civil society and trade unions and chaired by DFAT (only if recommendation 1 is rejected).
- Develop and implement revised operating procedures based directly on the Guidelines and Procedural Guidance.
- Develop and implement a proactive engagement and promotion strategy based on international best practice for NCPs.
- Assign a dedicated staff and a dedicated budget to the ANCP, sufficient to allow it to effectively perform its responsibilities.⁸

In response to the review, the Treasury set out the five initiatives it would undertake over the following 12 months to restructure the Australian NCP. These initiatives were as follows:

- Introduce an independent expert examiner for specific instances, to autonomously undertake all specific instance case work, including decision-making. Access to professional services and support from the existing Treasury secretariat. Supported by advice and expertise from the advisory body.
- Introduce a new advisory body to replace the previous Oversight Committee. The advisory body would be composed of government and external members (two corporate and two civil society positions) and meet biannually to consider specific instance case work and contribute to promotion activity.
- Improve the procedural guidance revised in 2018 to reflect new role of independent expert examiner and advisory body. Consult with stakeholders on the draft procedures.
- Strengthen the resource commitment, by continuing access to professional services, allocating a dedicated budget to the AusNCP and assigning three staff.
- Improve outreach and promotion, by commitment to undertake a minimum of two outreach events per year and invite the new advisory body to contribute to outreach amongst their networks.⁹

NCP Structure

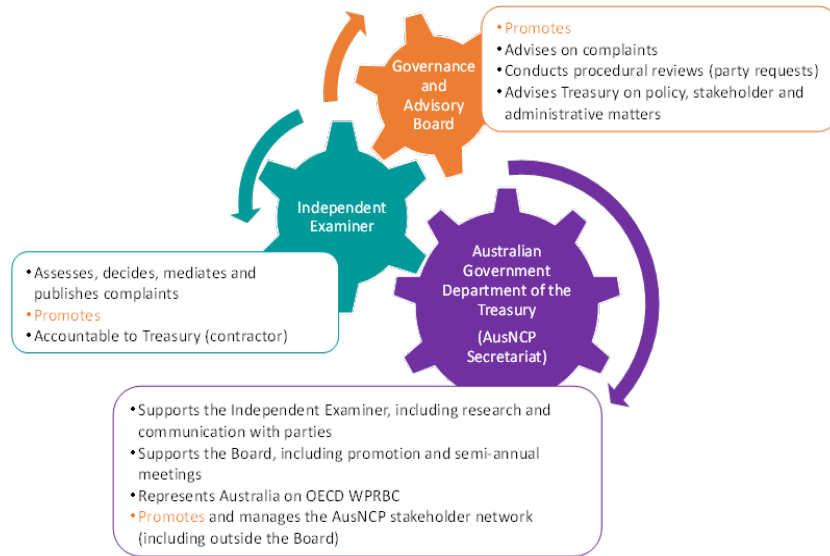
In light of the recommendations, the AusNCP was reformed into a hybrid structure: semi-independent single agency with expert decision making (see Figure 1.1). It is composed of an Independent Examiner who handles the specific instances, a Secretariat which is based in the Treasury, and a Governance and Advisory Board that provides advice and assistance to the AusNCP and the Independent Examiner on cases and promotion. All stakeholders participating in the review have expressed satisfaction at the reforms introduced at the AusNCP, and indicated that they viewed the new structure as a major improvement, which had allowed to regain the confidence of stakeholders.

The basis for the new structure rests on the general mandate of the Australian Government to implement the OECD Guidelines and operate the NCP, and therefore the NCP's structure is not formalised in a legal or otherwise official document, except for the Independent Examiner's contract with Treasury, which details his duties, remuneration, and other modalities of work, but which is not made public given that it contains personal information. Stakeholders have shared that they would have more trust in the NCP and would view its structure as more stable and its authority as better established if its structure was recorded in such a document, which could clarify the exact roles of the different component parts of the NCP, and their relationship to each other.

⁸ Newton, A. (2017), Independent Review: Australian National Contact Point under the OECD Guidelines for Multinational Enterprises

⁹ Australian Government – Treasury (2018), Treasury Response to the 2017 AusNCP Independent Review

Figure 1.1. AusNCP structure



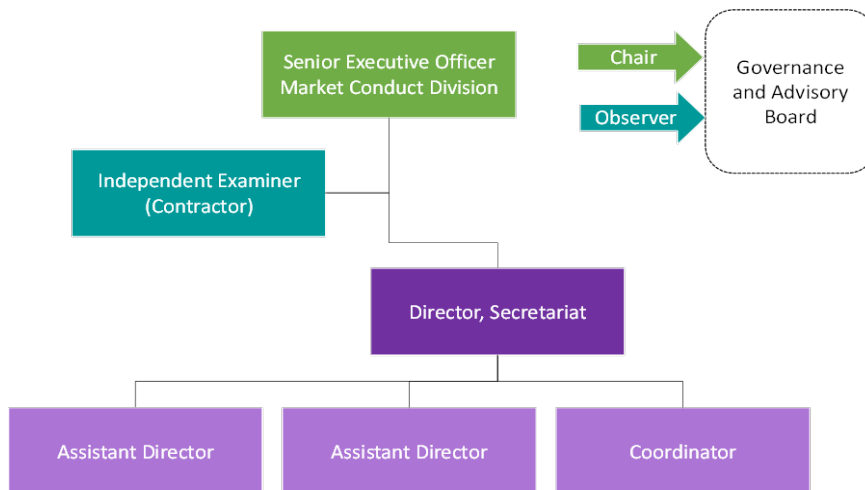
Source: Peer review questionnaire for the AusNCP (2021)

Note: the questionnaire is provided by the NCP under review during the peer review preparatory phase.

Composition

The current organisational chart is shown in Figure 1.2.

Figure 1.2. Organisational chart for AusNCP



Source: Peer review questionnaire for the AusNCP (2021)

Note: the questionnaire is provided by the NCP under review during the peer review preparatory phase.

The AusNCP Secretariat is staffed by members of the Treasury and is located in the Market Conduct Division. The Assistant Secretary of the Corporations Branch – currently Mr Tom Dickson – is responsible for the AusNCP.¹⁰

In 2020, the AusNCP had two dedicated full-time staff members: a Secretariat Assistant Director and a Communication and Event Coordinator, as well as three dedicated part-time staff members: a Senior Executive Officer, the Secretariat Director, and a second Secretariat Assistant Director.¹¹ Stakeholders all consider the NCP staff to be competent, impartial and reactive, notably citing as evidence the quick reaction times to new specific instance submissions.

The Independent Examiner operates in a part-time capacity, and is contracted and remunerated by Treasury.¹² To encourage applications from a broad range of backgrounds, there are no mandatory background requirements for the position holder, but qualifications or significant experience in mediation, international law and/or corporate governance are considered desirable.¹³ According to the AusNCP, the current Independent Examiner has a unique skillset and experience that benefits both mediation and promotion.¹⁴ He is an accredited mediator and brings to the AusNCP experience from academic lecturing, litigation and private sector consultancy work.

All stakeholders praised the work of the Independent Examiner, and viewed him as a competent, reactive and reliable professional, indicating that his independent position, in-depth knowledge of RBC and mediation skills had allowed the handling of specific instances to greatly improve. It is telling in this regard that the caseload of the NCP has significantly increased since the appointment of the Independent Examiner in 2019. Since then, the NCP received eight new cases (including three during the sole duration of the on-site visit), compared to three during the previous two years.

The peer review team welcomes these developments and notes that, while the appointment of two Independent Examiners will increase the capacity of the NCP to handle cases in a timely and efficient manner, it may also present challenges, such as the risk of inconsistent interpretations of the Guidelines. It will therefore be important for the NCP to clearly determine how the two Independent Examiners will relate to each other, the extent to which they will need to coordinate while retaining their independence vis-à-vis each other (see section 3).

The Assistant Secretary of the Corporations Branch (e.g. the senior executive officer of the AusNCP), convenes and chairs the Governance and Advisory Board (herein “Board”) and seeks appointments of members on the basis of their expertise, experience and stakeholder networks. Vacant positions are advertised publicly for non-government seats. The Board is composed of a maximum of 12 permanent members and four proxy members, requiring a quorum of four government and two external members to conduct a Board meeting. Members are made up of representatives from government (eight seats, no proxy appointments), business (two seats), unions (one seat) and civil society (one seat). For each of the four non-government seats, an additional proxy member is appointed to provide advice where the permanent member may be conflicted and to support promotion activities. The Independent Examiner is a

¹⁰ Taken from website “About” section: <https://ausncp.gov.au/about>

¹¹ According to Annual Report for 2020

¹² AusNCP Independent Examiner – Position Description, <https://ausncp.gov.au/sites/default/files/2020-02/Position%20Description.pdf>

¹³ AusNCP Independent Examiner – Position Description, <https://ausncp.gov.au/sites/default/files/2020-02/Position%20Description.pdf>

¹⁴ Due to a declared conflict of interest, the AusNCP informed the peer review team that an alternate IE was appointed for a new case received after the on-site visit

permanent observer of the Board. Organisations with permanent membership on the Board, along with the proxy organisations, are identified in Table 1.1 below.

Table 1.1. Permanent Membership on Governance and Advisory Board

Government	Business	Civil Society and Unions
Department of the Treasury (Chair)	Primary: Pillar Two Proxy: DLA Piper Australia	Primary: Australian Council of Trade Unions Proxy: Construction Forestry Maritime Mining Energy Union
Attorney-General's Department (law and justice portfolio)	Primary: Australian Chamber of Commerce and Industry Proxy: Business Council of Australia	Australian Corporate Accountability Network Primary: Human Rights Law Centre Proxy: Transparency International Australia
Australian Human Rights Commission (human rights agency)		
Department of Home Affairs [Australian Border Force] (immigration and customs border portfolio)		
Department of Foreign Affairs and Trade (foreign affairs and trade portfolio)		
Export Finance Australia (export credit agency)		
Australian Trade and Investment Commission (Austrade) (trade, investment, and education promotion agency))		
Department of Industry, Science, Energy and Resources (industry, energy, resources and science portfolio)		
Independent Examiner (Observer)		

Source: AusNCP website, Governance and Advisory Board, <https://ausncp.gov.au/about/governance-and-advisory-board>

Functions

As the AusNCP secretariat, Treasury provides secretariat services to the Independent Examiner and the Board, carries out promotion of the AusNCP and the Guidelines, and is responsible for representing AusNCP internationally (including at the OECD Working Party on RBC).¹⁵ It also facilitates access to National Contact Point Network Meetings for the Independent Examiner, where relevant.

The Independent Examiner is responsible for handling the specific instance process. The Independent Examiner's duties include:

- Managing all complaints under the Guidelines, including: consideration of issues raised, conciliation and decision-making consistent with published procedures ;
 - leading conciliation with parties, including working with mediators where necessary;
 - leading all communication with parties to a complaint, coordinating with the Secretariat;

¹⁵ AusNCP Governance and Advisory Board – Terms of Reference (p.2)

- writing succinct statements for publication on the AusNCP website, including the rationale behind key decisions and any recommendations;
- providing updates to, and seeking advice from, the Board, particularly in relation to geopolitical sensitivities and interpretation of the Guidelines, including attending Board meetings as an observer; and
- providing advice or assistance on cases managed by other Independent Examiners and NCPs, when invited; and
- ensuring adequate records are maintained through the Secretariat.
- Advising Treasury on opportunities to improve the effectiveness of the AusNCP, including on operational and structural matters, and when invited to contribute to the views on responsible business conduct policy matters.
- Contributing to the promotion of the Guidelines and AusNCP, as requested by Treasury, undertaking a minimum of two domestic events annually and by contributing to the preparation of additional public guidance material.¹⁶

The Board, which meets twice a year and engages by email out of session (for example notifying case updates, checking conflicts of interest, communicating about promotional activities, seeking advice on new website content), provides advice and assistance to the AusNCP Secretariat and the Independent Examiner on complaints and on promotion. The Board also provides their expertise to assist the AusNCP's mediation and conciliation functions, and holds a review function, whereby proxy Board members can conduct a procedural review of the AusNCP complaints when requested by one of the parties to a complaint.¹⁷ As detailed in the Terms of Reference, the Board's specific duties are as follows:

- Assisting the Treasury in promoting the AusNCP and the Guidelines in accordance with the annual promotional plans, and promoting the application of the Guidelines as appropriate in their ordinary business
- Supporting the effective handling of complaints, including providing input on, and oversight of, matters of procedural fairness. This includes:
 - advising the Independent Examiner on the application of the Guidelines and procedures in relation to complaint handling and decision making.
 - recommending or facilitating access to additional expertise on issues outside the Board and Independent Examiner's knowledge and experience.
 - contributing to Treasury and the Independent Examiner's understanding of broader contexts and emerging issues relevant to complaints under consideration.
 - conducting procedural reviews of AusNCP complaints when necessary and in accordance with AusNCP procedural guidance.¹⁸

The Terms of Reference also clarify that the Board is not responsible for the following: the Independent Examiner's decisions or statements on complaints; decisions concerning resources, reporting or other organisational matters (although the Board may provide advice to Treasury when invited); and representing the AusNCP in a formal capacity (domestic or international) except where invited by Treasury.¹⁹

¹⁶ Duties section taken directly from AusNCP Independent Examiners – Position Description, updated July 2021

¹⁷ AusNCP Governance and Advisory Board – Terms of Reference (p.2)

¹⁸ AusNCP Governance and Advisory Board – Terms of Reference (pp. 1-2), <https://ausncp.gov.au/sites/default/files/2021-01/gab-tor-2021.pdf>

¹⁹ AusNCP Governance and Advisory Board – Terms of Reference (p.2), <https://ausncp.gov.au/sites/default/files/2021-01/gab-tor-2021.pdf>

The AusNCP reported that the structure of the NCP was consciously designed to leverage broad stakeholder expertise, in particular to ensure that all views were understood and addressed during decision making and planning. The Board's role is particularly vital in this area, given its broad representation of different stakeholder groups.

The board is viewed as a key asset of the NCP, in particular to provide expertise and a variety of viewpoints, and to act as relays of the NCPs with stakeholders and on promotion. Some stakeholders and board members also pointed out to some possible gaps in the expertise represented on the board, citing notably a lack of specific expertise on environmental matters.

The Procedural Guidance requires the composition and organisation of the NCP to enable it to 'to operate in an impartial manner while maintaining an adequate level of accountability to the adhering government.'²⁰ All stakeholders viewed the NCP and its members as impartial, and thought the new structure was instrumental in maintaining impartiality, in particular as a clear separation is made between the functions of the Secretariat in Treasury, and those of the Independent Examiner, who is the sole responsible for handling specific instances. Some stakeholders have however raised concerns regarding impartiality due to the location of the AusNCP Secretariat in Treasury, particularly because the Treasury is also responsible for foreign investment regulation and approvals through its Foreign Investment Review Board. Besides, some stakeholders had questions regarding how impartiality could be maintained in some circumstances, such as a case touching upon government policy.

The NCP clarified that "the reform process included relocating the AusNCP unit to Treasury's Market Conduct Division" so that "the two functions [Foreign Investment and the NCP] now sit well apart, where the first common manager is the Secretary (Head) of Treasury". However, in light of concerns expressed, more communication could be done to clarify and explain the safeguards that are in place to maintain impartiality. For example, the conflict of interest policy is now an annex to the Governance and Advisory Board's terms of reference, and are made applicable to the Independent Examiner by a provision of the rules or procedure, which make them inaccessible to the public. Likewise, it would be important to specify how the independence of the Independent Examiner can be guaranteed in such cases, in light of the fact that Treasury hires the Independent Examiner for a term of one year (renewable up to three times) and funds his/her contract.

Resources

Following the reforms, human and financial resources were increased by the Treasury to support an Independent Examiner position, additional staffing, events and other promotional activities. Previous financial resources of the AusNCP have been maintained and include allowances for professional services (legal, translation, mediation, desktop research, expert technical advice) and travel (domestic and international travel). Stakeholder responses however noted that more financial resources could be provided to facilitate promotional activities, including translation of key documents (MNE Guidelines, due diligence material) and procedures (complaint submission form, etc.) into the various languages of the regions where Australian MNEs operate.

The human resources of the AusNCP have remained steady since its restructure. There are currently four permanent and dedicated NCP staff (3.5 full time equivalent (FTE)). Stakeholders welcomed the staff increase, some of them calling for further increases in future years, notably to enhance the capacity of the NCP to promote RBC and to handle specific instances. As indicated above, in response to the NCP's growing caseload, budget approval has been given to contract two part-time Independent Examiners annually, allowing for 68 days/0.2 FTE each, upon the expiration of the current Examiner's term, in 2022. The peer review team welcomes the expansion of the NCP's staff resources and is of the opinion that, in

²⁰ Procedural Guidance, I.A.1.

order for the NCP to effectively fulfil its mandate and notably to expand its visibility (see below), staff resources should at least be maintained at the current level going forward.

Reporting

The AusNCP has the opportunity to report three times a year to the Parliament of Australia, with the primary reporting method via the Treasury's Annual Report. This report includes a short review of the AusNCP's activities for the fiscal year. Additionally, when the Treasury appears before the Senate Economics Committee on a biannual basis, the Australian Senate can ask questions about the AusNCP (although no questions have been asked recently). The AusNCP noted that occasionally, other government agencies receive questions that link to AusNCP work (for example, the Department of Foreign Affairs and Trade – which is a member of the AusNCP Board).

The AusNCP also reports annually on its activities, including the results of specific instance procedures, to the OECD Secretariat via the reporting questionnaire. It also reports specific instance outcomes throughout the year via its website and specific instance database update notifications. Recently, the AusNCP introduced a new annual communication product – the Annual Outlook – which includes the published questionnaire response and also provides additional context for stakeholders in the form of a message from the Secretariat and a message from the Independent Examiner. The most recent Annual Outlook, published in March 2021, includes for example information about the ongoing stocktaking exercise of the Guidelines, as well as summary information about the cases handled and promotional events that took place.

	Finding	Recommendation
1.1	The NCP structure was reformed as part of the general mandate of Treasury as regards RBC and the Guidelines, but is not formalised in a legal or official document. Stakeholders have shared that they would have more trust in the NCP and would view its structure as more stable and its authority as better established if it was established in such a document	Australia could consider ways to lend more stability and authority to the NCP by formalising its structure in a legal or administrative document.
1.2	The NCP structure is viewed as conducive to impartiality, notably as cases are handled by an Independent Examiner, but stakeholders have questions regarding how impartiality can be guaranteed in some circumstances (e.g. case that touches upon government policy).	More communication could be done to clarify and explain the safeguards that are in place to maintain impartiality (e.g. enhance the existing conflict of interest policy, extent of independence of the independent examiner, etc.)

2. Promotion of the Guidelines

Promotional plan

The AusNCP has a promotional plan – the AusNCP Engagement Strategy – for 2020-2021. The primary goals of the engagement strategy are as follows:

- To encourage enterprises to become aware of the standards and principles set out in the Guidelines and to apply those to internal systems and structures wherever relevant improvements could be made; and
- To broaden awareness to domestic stakeholder groups regarding the conciliation services available through the AusNCP.²¹

To achieve the goals, the engagement strategy includes an Activity Plan that is categorised into products, stakeholder engagement, and policy information and advice. Across each of these categories, the key activities and their description, the expected outcome, and the work undertaken in 2020 and proposed activity for 2021, are identified.

The engagement strategy also identifies the targeted stakeholder groups under a dedicated section and includes MNEs operating in Australia, Australian enterprises operating abroad, high risk and underperforming sectors, Australian government agencies not currently represented on the Board, and NGOs. The Activity Plan that follows takes a broader scope, and includes Australian SMEs with an interest in operating globally.

The engagement strategy will be reviewed at the end of 2021, with the results of the review informing the development of the 2022-2023 strategy. The AusNCP notes that the Governance and Advisory Board will play a key role in informing and finalising the strategy. Stakeholders viewed the promotional plan as an important aspect of the NCP's strategy to increase awareness of the Guidelines in Australia, and to increase its own visibility (see below). Stakeholders also agreed with the priority sectors identified in the promotional plan (extractives and finance), though some suggested also focusing on the agricultural sector.

In this regard, it appears that the structure of the NCP offers many opportunities for promotion, through the Secretariat (strategically located in the very visible department of Treasury), the Independent Examiner, and the Governance and Advisory Board, whose members' own activities and contacts can act as relays for the NCP's promotion efforts. However, these opportunities are not fully explored in the promotional plan, and the NCP could seek to be more strategic in leveraging the various bodies that compose its structure for promotional purposes. Another aspect that stakeholders shared could be reinforced in the plan was the need to do some promotion in overseas regions where Australian NCPs are active and may have impacts, for example through diplomatic posts.

²¹ AusNCP Engagement Strategy 2020-2021

Information and promotional materials

The information and promotional materials are outlined in the Activity Plan, which includes a mix of activities and outputs to reach different stakeholder groups. The scope of these activities and outputs are broad, ranging from promotional material to tailored advice, tools and guidance. The Activity Plan also notes AusNCP's intention to pinpoint high-risk areas and sectors to provide additional tailored support.

In terms of materials prepared by the AusNCP, in 2020 the AusNCP published reports related to the Guidelines and specific sectors, prepared brochures and factsheets on the AusNCP, and added new tools to the website to increase transparency (such as an overview of events the AusNCP engages in). Over the course of 2021, the AusNCP reported continuing to prepare products and tools for various stakeholder groups. For example, the AusNCP is preparing new guidance material that focuses on particular sectors and provides a link to other relevant domestic and international framework that are relevant to responsible business conduct. The AusNCP is also working on a project to embed promotion of the Guidelines into relevant professional academic curricula, as well as adopting more contemporary forms of communication (such as contributing to a podcast released in August 2021).

In addition to guidance materials, the AusNCP has also been reaching out to different stakeholder groups to build relationships and partnerships for promoting the guidelines. Within government, the AusNCP is continuing its engagement with relevant agencies who have a RBC remit, both those that sit on their Board and those that do not. For example, the AusNCP met with the Australian Ambassador for People Smuggling and Human Trafficking to explore opportunities for cross-promotional activities, and with the Department of Finance on public procurement and RBC.

In addition to the work undertaken by Treasury to promote the Guidelines within government, Board members are also referencing the Guidelines and relevant due diligence guidance in their respective materials. For example, the Department of Home Affairs (Australian Border Force) includes mention of the Guidelines and due diligence materials in the Australian Modern Slavery Act guidance material), and the Australian Human Rights Commission mentions the Guidelines and due diligence material in their RBC Guidance for the Vietnam Garment sector.

Externally, the AusNCP is currently working with the Law Council of Australia to develop tailored guidance for the legal sector and will hold a webinar for Council members in October 2021. Additionally, to broaden their reach across different stakeholder groups, the AusNCP noted its intention to continue its regular participation in external events, such as the Department of Home Affairs Industry Summit and the Global Compact Network Australia. On engagement with NGOs, it is worth noting that the activities planned for 2021 are less precisely described; for example, the strategy states that the Independent Examiner and the Board will promote the Guidelines and AusNCP at NGO events, but it not clear which events. This approach was deliberately taken to ensure flexibility given the Covid-19 related disruptions.

Stakeholders welcomed the increase in promotional activities by the AusNCP, however across the different stakeholders surveyed, there was a general consensus that more promotional efforts are necessary to increase awareness and promotion. In particular, stakeholders noted that there is a limited understanding of Guidelines and the role of the AusNCP, both domestically and in countries where Australian MNEs are active. To address this, stakeholders suggested a number of initiatives that could be adopted across the different target groups:

- Developing tailored brochures, guidance, courses and seminars, etc. which focus on role of AusNCP and the complaints process as well as the Guidelines and their application across sectors in Australian context.
- Using existing newsletter / emails to explain the role of the AusNCP and the Guidelines, and how companies can benefit from engaging in the process, what it means to have a complaint with the NCP, etc.

- Working with key government partners like DFAT, AusTrade and the Australian Border Force to raise awareness amongst Australian businesses operating overseas
- Working with Australian embassies and consulates overseas to raise awareness of the AusNCP and its grievance mechanism amongst civil society groups and trade unions
- Leveraging international fora like ASEAN, UN Responsible Business & Human Rights Forum Asia-Pacific to promote the AusNCP and the Guidelines and due diligence
- Leveraging Australian Chamber of Commerce and Industry and other industry/business associations to raise awareness amongst business at home and abroad

Stakeholders also suggested that the AusNCP work with media outlets in Australia to share outcomes of cases and mobilise journalists to help spread awareness of the AusNCP. One stakeholder pointed out that media coverage is critical to raising public knowledge, which in turn is a significant incentive for MNEs to change their behaviour, and suggested that the AusNCP publicise the outcomes and findings of the Independent Examiner. Another stakeholder mentioned that the AusNCP could engage more with media to clarify how the Guidelines help support ESG requirements.

Promotional events

The year 2020 brought new challenges and opportunities for promotion across the NCP network as a whole. The Covid-19 pandemic and resulting global lockdowns has meant that previously in-person events were no longer possible, leading to a growth of online events and postponement of others.

By the time of the virtual on-site visit (September 2021), the AusNCP had so far hosted or co-hosted five events, and participated in an additional six events. These events range from meetings to presentations, and cover a number of different stakeholders – including government, civil society, academia and business.

In its 2020 Annual Report to the OECD, the AusNCP reported organising or co-organising one event, targeted to academia and focused on the content and processes of the AusNCP and the OECD Guidelines. As a webinar, the event had attendance of between 50-100 participants (see Annex C).

The AusNCP also participated in three events organised by others with the aim of promoting the Guidelines and the NCP. These included:

Webinar on Modern Slavery Reporting at the University of Western Australia Law School (Independent Examiner)

Webinar on focusing on the AusNCP and the OECD Guidelines during the Diplomacy Training Programme – Accountability Mechanisms at the University of New South Wales (Independent Examiner)

Webinar on the theme of *Access to remedy – available forums for resolving human rights grievances* at the 1st UN Pacific Forum on Business and Human Rights (Independent Examiner)

The AusNCP also reported attending external events to promote the Guidelines, as well as improve their own understanding of emerging issues and high risk sectors for Australian businesses, for example events held by the Australian Sustainable Finance Initiative. The perceived limited engagement in promotional events can, in part, be explained by the difficulties of the COVID-19 pandemic and the resulting lockdowns. More broadly, stakeholders consider the AusNCP is not particularly active when it comes to organising or co-organising promotional events – in 2019, it organised or co-organised two events, and in 2018, it organised or co-organised 5 events (see Annex for overview of 2019-2020 events). The AusNCP has been slightly more active in participating in events organised by others – in 2019 for example, participating in 10 external events. For both 2018 and 2020 however, the AusNCP participated in only three events organised by others. The relative imbalance between events organised by the AusNCP and events organised by others to which the AusNCP has participated until this year has led some stakeholders to describe the

promotional activity of the AusNCP as ‘reactive’ more than ‘proactive’, linking to the recommendation above that NCP’s promotional plan more strategically leverage opportunities offered by its structure regarding promotion, and that the NCP could more actively create promotional opportunities in addition to responding to invitations.

As a result of its promotional efforts, but also of the inclusion of stakeholders into its structure as part of the Governance and Advisory Board, the NCP can count on a circle of very engaged stakeholders that regularly interact with it, spread the word about it, and are very well versed into RBC and the NCP process. However, the visibility of the NCP remains limited beyond this circle, and the NCP should work to expand its audience by increasing the dissemination of promotional materials and the events it organises or participates in. In particular, the relatively low engagement with stakeholders around environmental questions was flagged during the review.

Website

The AusNCP’s website is in English. It is easily identified through online search engines. The AusNCP reported using the website and its subscription service as a key tool for facilitating transparency and communicating with stakeholders, with key information provided on:

- The OECD Guidelines, including background and key content, as well as a ‘summary checklist’ for companies to check their compatibility with the Guidelines²²
- The associated OECD sector due diligence guidance
- The NCP’s structure, including the Secretariat, the Independent Examiner and the Governance and Advisory Board (along with the relevant Terms of Reference and position description)
- The AusNCP’s mandate as a non-judicial grievance mechanism for handling complaints, how to submit a complaint and an online form, an indicative timeline of the complaint process, the AusNCP Rules of Procedure, a tracking tool for open complaints, and closed complaints (including initial assessment, final statement, follow up statement and transfer statement (as appropriate)).
- Consultations and public submissions (e.g. current OECD stocktaking exercise; 2017 Independent Review Consultation and Report, etc.)
- Job vacancies
- Contact details (email, mail and telephone)
- Links to other relevant resources

The website also currently includes a section on the Peer Review process, including an overview of the Peer Review process, information on the review panel and invitation to provide stakeholder feedback in writing or by attending.

²² Note: this tool was originally prepared by the New Zealand NCP and reproduced by the AusNCP with permission.

Box 2.1. Leveraging the website as a key communication tool

The AusNCP's made ample use of its website to advertise its peer review, and invite feedback from stakeholders. It published information about the peer review process in a dedicated tab of the website, and turned the stakeholder questionnaire into an online form to make it easier for stakeholders to submit feedback. Eighteen responses were submitted in this way, thereby enhancing stakeholder participation in the process.

A general comment from stakeholders was that the AusNCP's website was user-friendly, but could be further exploited as a promotion and awareness tool. A suggestion that was frequently made was to translate selected sections of the website in different languages (e.g. languages of the Asia-Pacific region and UN official languages) to facilitate access for non-English speakers. Stakeholders also suggested that the AusNCP prepare a fact-sheet in plain language, and translated into all relevant languages, on how to submit a complaint and the evidence needed to support a complaint, citing as an example the website of the Australian Human Rights Commission, that has information about its complaint mechanism available in 64 languages.²³ It was further suggested to add guidance from OECD Watch on submitting complaints. It is worth noting that the AusNCP has prepared a Fact Sheet for companies²⁴, available in October 2021. Stakeholders also noted that minutes of board meetings prior to 2017²⁵, as well as annual reports to the OECD (a requirement since the 2011 update of the Guidelines), are not currently included on the website.

Promotion of policy coherence

The AusNCP Engagement Strategy 2020-2021 commits the AusNCP to “inform and advise the Australian Government”, with three key outcomes expected:

- Relevant Australian Government agencies are well informed about the Guidelines and relevant policies, and incorporate them into their briefings and stakeholder engagement where appropriate
- Agencies also help to promote the Guidelines and inform the AusNCP whenever they do
- Relevant Australian Government agencies are actively involved in the 2021 peer review of the AusNCP, to demonstrate Australia's whole-of-government approach and wide range of initiatives that directly encourage responsible business conduct²⁶

The AusNCP reported that, to date, it has maintained key relationships with government agencies, and have provided policy inputs related to the Guidelines where necessary. Moreover, the AusNCP has identified where relevant agencies can communicate the Guidelines across their respective networks. Going forward, the AusNCP plans to continue these efforts, as well as:

- Broaden and renew connections through the OECD MNE Stocktaking exercise;
- Identify new opportunities to apply the principles of the Guidelines in the development of relevant Australian Government initiatives and policies; and

²³ See <https://humanrights.gov.au/about/translated-information>

²⁴ See <https://ausnccp.gov.au/sites/default/files/2021-10/AusNCCP-factsheet.pdf>, published after on-site visit

²⁵ The AusNCP reported that, under the previous structure, the board minutes contained sensitive case information that was not suitable for publication.

²⁶ AusNCP (2020), *The AusNCP Engagement Strategy 2020-2021*

- Continue engaging with Australia's diplomatic missions abroad to encourage promotion of the AusNCP services and awareness of the Guidelines.²⁷

Additionally, the AusNCP noted that it informs key Government stakeholders of its findings in relevant statements and reports, including officials responsible for trade missions, foreign trade and investment incentives, and public procurement.²⁸ The structure of the AusNCP's Board provides further opportunities to promote policy coherence, given the number of government agencies represented. In particular, the presence of the Export Credit Agency and of AusTrade on the Board is an opportunity because these agencies are encouraged to rely on NCP statements when making decisions to support exporting companies. Important opportunities remain in this regard to ensure that this is effectively the case. For example, AusTrade's internal guidelines for determining which companies qualify for assistance do have a general reference to RBC, but do not specifically mention the Guidelines or the NCP.

Moreover, Australia was one of the first countries to implement mandatory due diligence laws, through the introduction of the *2018 Modern Slavery Act*. Appendix 5 of the Guidance for Reporting Entities under the Modern Slavery Act, mentions the OECD MNE Guidelines, related due diligence and the AusNCP's promotional role. It does not however mention the AusNCP's role as a non-judicial grievance mechanism.²⁹ Some participants to the peer review indicated that Australia's policies on modern slavery could be seen as dominating the RBC agenda in the country, leaving little space to the NCP or other agencies to promote the Guidelines or communicate around RBC issues. The peer review encourages the NCP to further explore ways in which synergies could be created with the Australian Border Force at the Department of Home Affairs, so as to take advantage of the dynamics created by the Modern Slavery Act for further promotion of the Guidelines. The presence of the Australian Border Force on the Governance and Advisory Board is an opportunity in this regard.

Requests for information

The AusNCP has their contact details listed on the website and invites users to contact for any enquiries. The AusNCP noted that they receive phone calls and email enquiries relating to aspects of its services, as well as interpretation of the Guidelines or procedures.

Cooperation amongst NCPs

The Activity Plan of the Engagement Strategy 2020-2021 commits the AusNCP to continue collaborating with other NCPs (activity 6). In particular, the Activity Plan notes that the AusNCP will partner with other NCPs will help increase reach across different stakeholders and contribute to peer learning, as well as position the AusNCP to share best practices. Given its proximity, the New Zealand NCP was identified as a strategic partner for promoting further collaboration.

Over the course of 2020, the AusNCP reported participating in meetings and events organised by other NCPs, and maintaining regular outreach with them. For 2021, the AusNCP identified as priority building relationships with the NCP Peer Reviewers (if known) and continuing to participate in events organised by other NCPs. The AusNCP also noted a peer learning meeting was held with the UK NCP in April to exchange good practices across the NCP. In 2019 it spoke with the US NCP regarding preparation for

²⁷ AusNCP (2020), *The AusNCP Engagement Strategy 2020-2021*

²⁸ 2020 National Contact Point Annual Reporting Questionnaire

²⁹ Commonwealth Modern Slavery Act 2018, Guidance for Reporting Entities, <https://www.homeaffairs.gov.au/criminal-justice/files/modern-slavery-reporting-entities.pdf>

peer review and their promotional activities, and participated in the Korean NCP's Peer Review in support of one of its regional partners.

As per procedure, the NCP network was consulted by means of a questionnaire so that NCPs having worked closely with the AusNCP provide feedback on their experience. Six NCPs responded (see Annex A), and praised the NCP for its reactivity and professionalism in responding to enquiries and other requests, indicating that the AusNCP's responses were timely, useful and went above and beyond what was required. One NCP for example shared that the AusNCP was forthcoming in sharing details of its reforms, which proved useful to the said NCP's own reform process.

	Finding	Recommendation
2.1	The structure of the NCP offers many opportunities for promotion, through the Secretariat, the Independent Examiner, and the Governance and Advisory Board, whose own activities and contacts can act as relays for the NCP's promotion efforts. However, these opportunities are not fully explored in the promotional plan.	The promotional plan should be revised to more strategically leverage key actors and relationships, in particular the secretariat (strategically located in treasury), advisory board, independent examiner, stakeholder networks. It could set clearer dissemination objectives and be publicised with stakeholders.
2.2	The AusNCP's website is modern, user-friendly and easily accessible. It plays an important part in the AusNCP's promotional efforts and in its accessibility, and this role could be further increased.	The use of the website as a tool for accessibility and visibility should be enhanced, e.g. by including more guidance materials produced by the NCP, an agenda of promotional events, and key information (such as a fact sheet on submitting specific instances) in relevant foreign languages.
2.3	The AusNCP maintains relationships with key government agencies, notably through the Governance and Advisory Board, and provides policy inputs related to the Guidelines where necessary, but knowledge of the NCP across government remains low and the RBC field is dominated by other initiatives.	The AusNCP should enhance its contribution to policy coherence by promoting use of the Guidelines by key government actors, and by seeking further opportunities for promoting the Guidelines and the NCP through related agendas, such as policies on modern slavery.

3. Specific instances

The AusNCP had received 27 specific instances as of the date of the on-site visit³⁰, which is the 8th highest number in the NCP network, and the highest in the Asia-Pacific region. 17 specific instances have been concluded by the NCP (eight accepted and nine not accepted), four were transferred to another NCP and six are ongoing. An overview of all cases handled by the NCP is available in Annex D.

As indicated above, following the 2018 reforms, the NCP has experienced a sharp rise in its case activity. This is a clear indication that stakeholders are increasingly relying on the NCP for solving issues linked with the implementation of the Guidelines, and therefore that the reforms can be considered as success. The reform and the appointment of the Independent Examiner also correlate with more timely and efficient handling of the cases, as evidenced by improved timelines and successful case outcomes. Recognising that, going forward, the Independent Examiner may not be able to absorb this increase in caseload, the NCP decided to appoint two Examiners upon the expiration of the current Examiner's initial mandate. A merit pool based on applications received will also be constituted, whereby high quality applicants who have not been appointed may also be considered for further work opportunities with the AusNCP.

The peer reviewers welcome these developments, which also meet stakeholder expectations that the NCP consolidate progress yielded by the reforms with increased resources. The peer reviewers understand that each Examiner would be assigned to cases, which they would handle alone, and note that arrangements should be made to ensure coordination between the two Examiners and avoid challenges such as inconsistent decisions while protecting the independence of each Examiner. The AusNCP has also indicated that it would make decisions on the allocation of individual cases to examiners, considering each Examiner's contractual availability, expertise, potential conflicts of interest and any other relevant factors. A clear, transparent and objective process should be designed in this regard.

Rules of Procedure

The AusNCP produced its current version of the "Australian National Contact Point Complaint Procedures" (the RoP) in September 2019, which reflected the new structure of the NCP. The updated procedures were informed by feedback received during a public consultation, and were revised with a focus on 'plain language', for example use of the term 'complaint' rather than 'specific instance'. Stakeholders however have noted that the current version still contains technical language that could benefit from further revision to facilitate accessibility.

In 2018, following the structural review, the AusNCP did an interim update, which also incorporated feedback from a public consultation. Prior to the reforms, the RoP used by the AusNCP were first issued in 2001. The current version, as well as the 2018 and 2001 versions, are published on the AusNCP's website. The 2018 version applies to cases received between July 2018 and August 2019, and the 2001 version applies to cases received prior to July 2018. It should be noted that the RoP are written and ultimately adopted by the Secretariat of the NCP located in Treasury. Placing such a framework around

³⁰ The AusNCP informed the peer review team of three more SIs between the on-site visit and the preparation of this report. They are not included as they are considered to fall outside of the scope of this report

the Independent Examiner's independence as described by the NCP as a way to ensure accountability of the Independent Examiner.

The updated RoP include a glossary of key terms, which can be found in Table 3.1 below.

Table 3.1. Glossary of key terms

Key term	Definition
AusNCP Secretariat	The Australian National Contact Point. The AusNCP will provide secretariat and other support services to the Examiner, including enabling procurement of professional services as required (such as formal mediation, conciliation and/or translation services and legal advice). The Secretariat will be staffed by the Australian Department of the Treasury.
Complaint / Case / Specific Instance	A complaint concerning an enterprise's conduct in relation to the OECD Guidelines. The terms specific instance, complaint and case are used synonymously.
Enterprise	The multinational company against which the complaint is made.
Good offices	Conciliation and/or facilitated discussion services offered by the Independent Examiner and supported by the AusNCP, intended to help resolve a complaint once it has been accepted by the Independent Examiner. Mediation, whether formal or informal, may form part of the good offices stage.
Governance and Advisory Board	The multi-stakeholder body supporting the AusNCP and Independent Examiner. [...] The AusNCP Governance and Advisory Board (Board) and its members are available to the Independent Examiner to provide advice throughout the handling of complaints. Members of the Board may also conduct procedural reviews in accordance with these procedures.
Independent Examiner	An independent person, contracted by the Commonwealth of Australia, to manage complaints brought to the AusNCP about alleged non-observance of the OECD Guidelines. The Examiner is empowered in line with these Procedures to examine the substance and validity of complaints and to try to resolve complaints by facilitating discussions between the parties. The Examiner has the authority to publicly share their views through AusNCP case publications, to issue determinations on whether an enterprise's actions were consistent with the Guidelines and, where appropriate, to make recommendations to improve observance of the Guidelines.
Notifier	The individual or entity who submits a complaint to the AusNCP. The notifier may be any interested party. Generally however, they require a close interest in the issue in order to be able to supply the AusNCP with adequate information.
OECD	Organisation for Economic Cooperation and Development
OECD Guidelines	The OECD Guidelines for Multinational Enterprises – an OECD document that articulates international best practice standards for responsible business conduct.
OECD Procedural Guidance	Procedural Guidance and Commentary within the OECD Guidelines
Parties	The notifier and the enterprise

Source: National Contact Point Reporting Questionnaire (2019), *AusNCP Complaint Procedures*, <https://ausncp.gov.au/complaints/ausncp-procedures>

The RoP contain four key phases, with two additional phases depending on the case. All six phases are as follows:

1. Submitting a complaint
2. Initial assessment

3. Good offices and examination
4. Final statement
5. Case follow up (depending on final statement outcome)
6. Procedural review (depending on request from one or both parties)

Submitting a complaint

The first phase set out in the RoP is detailed in Section 3 and provides guidance to notifiers for submitting a complaint. As per the Glossary, a notifier "...may be any interested party". The RoP allow for anonymous complaints to be filed via third parties, for example "where there are risks to the personal safety of the notifier and/or the threat or risk of reprisals", and clarify that third parties must be able to "demonstrate their authority to do so", as well as provide evidence as to why anonymity is required (Paragraph 3.5).

A complaint can be submitted in several ways, with preference given to the online complaint form on the AusNCP website (the link is provided) (See paragraph 3.1). The online form, which underwent consultations with the Board and user testing, details the information required for the submission (see Box 3.1). The RoP clarify that if a notifier has accessibility concerns, they can submit their complaint via email, request translation services, or be connected to a relevant third party for assistance in preparing their case (Paragraph 3.1). To facilitate accessibility, the AusNCP noted that submitters who use the complaint form incorrectly receive ongoing support from the Secretariat via phone/email to help ensure they submit a complaint that meets the minimum criteria.³¹

Box 3.1. AusNCP online form for complaint submission

The online form on the AusNCP website asks complainants to provide the following information:

- Submitter details
 - Name, organisation, position, contact details (phone, email, post address)
- Alternate contact person
 - Name, organisation, position and contact details (phone, email, post address)
- Submission details:
 - Are you bringing the submission on behalf of others (e.g. on behalf of a local union or community)?
 - If yes:
 - Explain your interest in this case and relationship to the affected parties.
 - What sections of the OECD Guidelines does the submission relate to?
 - In which country or territory did the situation occur?
 - Please describe the situation and how the issues relate to the OECD Guidelines.
 - What do you hope to achieve through the complaint process?
 - Do you wish to participate in mediation
 - If yes:
 - What is your desired outcome(s) of mediation?

³¹ AusNCP mentioned in their questionnaire response to the OECD that this type of support was provided during Complaint 24 – Port Hedland Community Progress Association vs. Australian-based enterprise (mining sector). Final Statement to be published 1 September.

- What actions do you think the enterprise should take to resolve the situation?
 - If no:
 - What actions do you think the enterprise should take to resolve the situation?
- About the multinational enterprise
 - Please indicate the identity and location of the company this submission relates to and explain why you brought the case to this NCP
 - Has your organisation been in contact with the organisation named in the submission?
 - If yes, please give an account of how this was done and the outcome
- Other proceedings
 - Have there been other attempts to resolve this situation?
 - If yes:
 - If yes, what were the outcomes of the attempts to resolve the situation?
 - How did the organisation respond to the outcomes of these proceedings?
 - Has this submission been brought to the attention of other forums or other NCPs? If so, give an account of any steps taken and the outcome.
 - If no:
 - Has this submission been brought to the attention of other forums or other NCPs? If so, give an account of any steps taken and the outcome.
- Supporting documents
 - Please provide/list documentation, reports, testimonies or other types of material to support the submission
- Consent – notifiers are asked to provide their consent for the AusNCP to share the information provided, including any attachments, with the enterprise. If notifiers choose the ‘No, I DO NOT consent’ option, then the form notes that the AusNCP Secretariat will be in content to discuss information sharing.

Source: <https://ausncp.gov.au/complaints/submit-complaint>

Notifiers can bring complaints to the AusNCP concerning either a foreign or Australian MNE operating in Australia, or an Australian MNE operating overseas, even if the country is not an adherent to the Guidelines (Paragraph 3.2). The RoP note that the Examiner will take a broad view to the understanding of the term ‘multinational enterprise’ and clarifies that factors “such as the entity’s corporate identity and scope of management or control in Australia will be considered (Paragraph 3.3.)” (See Box 3.2). The RoP further note that complaints should clearly demonstrate that there is a link between the issue(s) raised and the enterprise’s actions or responsibilities (Paragraph 3.4).

Box 3.2. ElectraNet Pty Limited and Messrs Andrew and Robert Starkey (2021)

On 28 October 2020, Messrs Andrew and Robert Starkey, two individuals, submitted a specific instance to the Australian NCP alleging that ElectraNet Pty Limited, an electricity transmission company, did not observe the General Policies (Chapter II) and Human Rights (Chapter IV) provisions of the Guidelines in relation to damage of around 20 Indigenous heritage sites during the construction of a new project in South Australia. The complainants sought an independent impact assessment, funds to address and prevent harms, and compensation for fees and costs.

On 25 February 2021, the NCP published the initial assessment partially accepting the case. One of the key issues examined in the initial assessment was whether the Guidelines applied to ElectraNet, as the company argued that was wholly domestic. The NCP determined that there were 'some multinational aspects to ElectraNet's shareholding and management. The majority of controlling interests in ElectraNet are international, so at some stage in its governance and activities, there should be consideration of the issues and expectations in the OECD Guidelines.'

Good offices were offered in relation to one of the indigenous sites but ElectraNet declined to participate. The other sites were considered out of scope, due to existing agreements in place between the enterprise and other Indigenous groups who have formally recognised custodial rights at those locations.

On 9 June 2021, the NCP published the final statement. The NCP concluded that ElectraNet had not acted consistently with the Guidelines, by declining to engage through the good offices process, nor providing evidence of otherwise complying with the Guidelines' expectations for the examined site. The Independent Examiner (i.e. the body of the Australian NCP in charge of handling cases) recommends that the statement be read by Australian government agencies with responsibilities concerning impacts on Indigenous heritage. The NCP issued recommendations for ElectraNet, notably that the company should ensure that, somewhere in its governance including international shareholders and directors, there is familiarity with the OECD Guidelines. The NCP further recommended the company to take the opportunity to participate in the NCP process should the need arise again.

A follow-up is planned in 12 months of conclusion and the AusNCP remains available should both parties wish to engage prior.

Source: OECD NCP case database.

In general, stakeholders praised the AusNCP for its efforts in ensuring a widely accessible submission process, although some of them indicated that certain categories of submitters may have difficulties accessing the NCP, citing for example indigenous communities with no familiarity with government-based dispute-settlement mechanisms.

Another comment in this regard was that (with the agreement of the parties) some flexibility could be built into the NCP procedures and timeframes to take into account indigenous dispute-settlement mechanisms, where relevant. Stakeholders noted that to improve accessibility to the AusNCP for those publics, the online form could for example be made available in the languages of the regions where Australian MNEs are active.

Initial assessment

Section 4 of the RoP lay out the process for the initial assessment, detailing that the main objective of the initial assessment is “to determine whether a complaint should be accepted, transferred to another NCP, or rejected” (Paragraph 4.1). The main criteria for determining whether to accept a complaint or not mirror the criteria from the Procedural Guidance. The RoP also define how the Examiner interprets “material and substantiated” (Paragraph 4.10).

The initial assessment contains two stages: first, receipt of the complaint by the AusNCP Secretariat and second, initial assessment by the Independent Examiner. The RoP provide for a timeline of five working days to acknowledge receipt of complaint, and a further five working days (10 in total) to note the existence of the complaint on the NCP’s website (Paragraphs 4.2 and 4.3.). The RoP also allow the AusNCP Secretariat to work with the notifier to clarify what additional information is required (Paragraph 4.4). Stakeholders praised the NCP for its reactivity to new complaints and for the support provided in ensuring that files were complete.

Once formally received, as part of the admissibility criteria, the Independent Examiner reviews the complaint to determine whether similar issues are, or have been, treated in other domestic or international proceedings. The RoP clarify that parallel proceedings (whether judicial or non-judicial) are not sufficient to determine that a case does not merit further examination (Paragraph 4.6). However, in reviewing the complaint, the RoP note that the Independent Examiner seeks to determine whether an offer of good offices could contribute positively to resolving the issues raised. In particular, the RoP clarify that the complaint may not be considered valid if the substance is not markedly different from a complaint already heard by the AusNCP or another NCP (Paragraph 4.5.1).

The process regarding transfer and coordination with other NCPs is as follows: if the Examiner determines that the AusNCP is not the correct entity to handle the complaint, it may transfer the case to another NCP during the initial assessment stage (Paragraph 4.7). Before making the decision however, the Examiner will consult the Board on the outcome of the initial assessment, including on whether it intends to transfer the case (Paragraph 4.12). The RoP provide that the Examiner may also consult with the notifier before taking a decision to transfer the case, to identify whether there is a specific reason for having the AusNCP handle the case. The final decision to transfer the case will not be made by the Examiner until they have advised the Board, the notifier and the enterprise (Paragraph 4.12).

The RoP provide a number of measures to ensure transparency in the handling of the initial assessment, in particular clarifying that the AusNCP will list the names of the parties, the location of the alleged incident, and whether the Examiner has accepted, transferred or rejected the case on the AusNCP website (Paragraph 4.8). However, only the name of the notifier will be included on the website during the initial assessment stage, with the company name provided only when information is already available in the public domain. Measures are also included on how the Examiner will protect the identity of the parties when this is required, in particular by “duly consider[ing] any representations and determine whether it is appropriate to withhold identifying information” (Paragraph 4.13).

Of the 17 cases closed as at the date of the on-site visit, eight were not accepted for further examination prior to the 2019 reforms. The reasons for not accepting were as follows:

- One case was not accepted due to lack of information received. The NCP encouraged the parties to consider dialogue.³²

³² ANZ Banking Group and Five NGOS Australian Conservation Foundation et al, 2006 (ID# 2)

- One case was not accepted due to a lack of information received. The local community also informed the NCP that they were not interested in mediation.³³
- One case was not accepted as the NCP deemed it was not the correct entity to handle the case, on the grounds that it concerned government policy, parallel proceedings were ongoing, and the company was no longer involved (e.g. operating the processing centre, which was a core component of the complaint). The decision was appealed by the submitters through the procedural review mechanism of the former Rules of Procedure³⁴ and parts of the complaint were re-examined, but the NCP held their position.³⁵
- One case was not accepted as the multinational in question was not an Australian MNE. Attempts to contact the MNE were unsuccessful.³⁶
- One case was not accepted as the NCP was unable to identify the MNE and the notifier was unable to provide sufficient information to help identify them.³⁷
- One case was not accepted as it was deemed unlikely to contribute the purposes and effectiveness of the OECD Guidelines. In particular, the case concerned a company operating an immigration detention centre, and the broader government policy on which such centres operated had been criticised by the United Nations Human Rights Committee. The Australian government held its position regarding the legality of such centres, and the Australian NCP concluded that bringing the parties together would not lead to a different outcome.³⁸
- One case was not accepted as the NCP deemed that the issues were not covered by the Guidelines (e.g. because the Guidelines did not exist at the time the alleged issues took place). The notifier later asked the NCP to review their decision and a procedural review statement was issued in May 2020, which concluded that the AusNCP Complaint Procedures had been followed.³⁹
- One case was not accepted as it was deemed not to be materially different from a case raised by the same submitter to the US NCP in 2019. The NCP determined that bringing the parties together again to re-examine the issues were not contribute to further the purposes and effectiveness of the OECD Guidelines.⁴⁰

Good offices

Section 5 of the RoP details the good offices phase, specifying that the main objective is to have parties arrive at a mutually agreed resolution through conciliation, formal mediation or facilitated discussion

³³ Australian mining company and representative of a community organisation from the Eastern Cape region of South Africa, 2013 (ID #8)

³⁴ The 2001-2018 Rules of Procedure allowed parties to request a procedural review. The review was carried out by a panel of three members from the Oversight Committee, which was comprised of other Australian government agencies. See pp. 10-13 in AusNCP Procedures ([2001-2018 AusNCP Procedures version.pdf](#)).

³⁵ G4S Australia Pty Ltd and Human Rights Law Centre (HRLC) and Rights and Accountability in Development (RAID), 2015 (ID #10)

³⁶ Bayswater Contracting and Mining Group and Mr. Karembé on behalf of the National Federation of Mining and Energy (FENAME) of Mali, 2016 (ID #14)

³⁷ Unidentified multinational enterprise in the scientific services sector in Mali and Notifier based in Mali, 2018 (ID# 17)

³⁸ SERCO Group PLC and Professor Ben Saul on behalf of parties in Papua New Guinea, 2017 (ID#12)

³⁹ Deutsche Bank Australia and Mr. Robert Palin, 2019 (ID #19)

⁴⁰ Coca-Cola Amatil and International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers Associations (IUF) on behalf of affected individuals, 2019 (ID #18)

(Paragraph 5.1). In doing so, the Examiner seeks to facilitate the exchange of information between the parties, seek further information as necessary, and draft a final statement (Paragraph 5.1).

The RoP lay out the various stages of the good offices: the preparation stage, the discussion stage, and the final statement preparation stage. Across these three stages, flexibility on the part of the Examiner to adapt to the dynamics of each case is emphasised (Paragraph 5.2.1).

The preparation stage begins with the Examiner meeting separately with both parties, to share information on the process. Ensuring accessibility is key, and the RoP details the various measures the Examiner and the AusNCP will implement to ensure that the good offices stage is accessible to the notifiers (Paragraph 5.3.1). Such measures include providing translation services, using technology, or engaging Australian embassies overseas. In this regard, the NCP indicated having reached out to diplomatic posts in several specific instances, underlining the usefulness of this collaboration for fact-finding or for making practical arrangements for the good offices. Provisions are also included in the RoP for a notifier who is unable to participate in the good offices due to personal security concerns; in particular, the Examiner may “seek to agree alternative arrangements that would allow for the notifier to participate indirectly” (Paragraph 5.6). The NCP has indicated that it had to date not had to face outright instances of retaliation against a submitter, but that some of its cases were part of a context of tensions that influenced the handling of the case, timeframes and submitters’ capacity to engage. The NCP indicated that it had carefully navigated these issues, with support from the Department of Foreign Affairs and Trade.

The discussion stage requires agreement by both parties to begin the good offices. If parties agree, discussions begin. However, the RoP also outline what will happen if either the notifier or the company do not agree to participate in the good offices:

if the notifier does not agree, the Examiner will prepare a final statement but not make any further assessment of issues raised;

if the company does not agree, the Examiner will prepare a final statement that includes further assessment of the issues raised (Paragraph 5.5).

The RoP clarify that throughout the discussion stage, the Examiner will regularly review the progress. If good offices are refused or it becomes clear that agreement will not be reached, the Examiner will examine the issues (Paragraph 5.8). Similarly, the Examiner may also decide that the NCP process will not progress the complaint, and offer the parties the option of suspending the case and continuing outside the process. If this approach is taken, then the Examiner will request an update of the status from the parties every six months to determine if the complaint needs to be reopened (Paragraph 5.9.1).

In the final statement preparation stage, the Examiner reviews the information gathered and determines whether additional consultation with other parties is necessary to close the case. The Examiner has access to relevant stakeholders, including government agencies, NGOs, Australian government overseas missions, business associations and other informed independent opinions (Paragraph 5.10).

The AusNCP decided that, out of the 16 cases it closed, eight merited further examination and mediation was offered in all but one case (as this case was concluded with agreement outside the NCP process).⁴¹ Of the remaining seven, six were concluded prior to the 2019 reforms:

- Two cases were concluded with agreement between the parties after mediation.⁴²

⁴¹ Ansell Limited and its subsidiaries and IndustriALL Global Union, 2017 (ID #9)

⁴² BHP-Billiton and Individual Mr. Ralph Bleechmore on behalf of parties in Colombia, 2009 (ID #3) and GSL (Australia) and several Australian NGOs and overseas NGOs Brotherhood of St Laurence et al, 2006 (ID #1)

- One case was concluded with agreement following a follow-up of the case conducted by the NCP (note: the follow-up case was conducted after the reforms by the Independent Examiner; see Box 3.3).⁴³
- One case was concluded without agreement after the company declined to participate in mediation with the NCP.⁴⁴
- One case was concluded without agreement after one party withdrew consent for mediation; the NCP concluded the case and issued recommendations.⁴⁵
- One case was partially accepted by the NCP; both parties participated in good offices and the case was concluded with recommendations.⁴⁶

Box 3.3. ANZ Banking Group and Inclusive Development International and Equitable Cambodia

In October 2014, Equitable Cambodia (EC) and Inclusive Development International (IDI) submitted a specific instance to the Australian NCP on behalf of 681 Cambodian families alleging that ANZ Bank had not observed the Guidelines' chapters on General Policies and Human Rights. The issues concerned the company's provision of a loan to Phnom Penh Sugar (PPS) for the development of a sugar plantation and refinery project in Cambodia, which is alleged to have forcibly displaced the families and dispossessed them of their land and productive resources.

Under its former structure, the Australian NCP provided the services of an external mediator to conduct mediation but the parties could not reach agreement on the issues. In 2018, the AusNCP made a finding and recommended that the company instigate methods to promote compliance with its stated human rights and due diligence standards in its lending activities, and establish a grievance resolution mechanism to support the effective operation of its corporate standards in relation to human rights.

Civil society actors on the ground continued to raise the issue of compensation and provided essential support to the AusNCP to facilitate this during the follow up phase. As a result, during follow up, the parties engaged constructively again and reached an agreement whereby the bank recognised the continuing hardships faced by the affected communities, and agreed to pay them profit it earned from the loan.

This case was amongst the longest handled by the NCP, with over five years between submission and agreement. While the process exceeded the indicative timelines, it clearly appears that the passage of time was an enabling factor in helping reach an agreement in this case. The appointment of the Independent Examiner and the related changes in the handling process were also instrumental in reaching an agreement during the follow up phase, as was the close involvement of diplomatic posts in the region.

Source: OECD website, *20 Years: National Contact Points for Responsible Business Conduct*, <http://mneguidelines.oecd.org/ncps/ncps-at-20/>

⁴³ ANZ Banking Group and Equitable Cambodia and Inclusive Development International, 2018 (ID #11)

⁴⁴ Xstrata Coal Pty Ltd and Australian Trade Union – Construction, Forestry, Mining, Energy Union (CFMEU), 2011 (ID #5)

⁴⁵ Mercer PR and National Justice Project for Australian Women without Borders on behalf of an affected individual, 2019 (ID #15)

⁴⁶ Australian Laboratory Services and Mr. Yacouba Traoré on behalf of the Former Employees Collective of the Australian Laboratory Services Mali SARL Laboratory Group, 2019 (ID #13)

The one case that has been concluded since the 2019 reform was concluded without agreement after one party declined to participate in mediation. The NCP made determinations and recommendations, and follow-up is planned (see Box 3.2 above).⁴⁷

Stakeholders expressed satisfaction at the outcomes obtained in recent cases, though they pointed out that the parties in those cases were experienced or represented by experienced professionals, had in-depth knowledge of the Guidelines and the NCP system, and were committed to engaging in good faith in the process, which they considered important success factors. They believed that obtaining such outcomes would likely be more difficult in cases submitted by individuals with little knowledge of the mechanism, or involving companies unwilling to engage. They encourage the AusNCP and the Independent Examiner to prepare themselves for these situations, to the extent necessary.

Reporting on specific instances

Initial assessments

The RoP note that information related to the case will be published on the AusNCP website, and will include: the names of the parties, the location of the alleged incident, and whether the Examiner has accepted, transferred or rejected the case (Paragraph 4.13).

According to the RoP, it is not mandatory to publish an initial assessment report on the website (Paragraph 6.2.1). The AusNCP noted that it is general practice for the AusNCP to publish the initial assessments to ensure full transparency and explain the decision, however stakeholders have pointed out that initial assessments are in fact rarely published. On the website, there is one initial assessment published out of the 16 closed cases, and of the six ongoing cases, only one initial assessment is published as they have not yet moved into good offices or final statement stages. The Independent Examiner indicated exercising discretion regarding the publication of initial assessments, depending on the dynamics at hand and the impact of such publication on the chances of success of the good offices. However, the Independent Examiner indicated that a detailed summary of the initial assessment was always included as part of the final statement.

Some stakeholders pointed out that the current process of publishing initial assessments on an *ad hoc* basis does not facilitate transparency and can make it difficult for potential complainants to gauge the basis on which a complaint will be assessed. Others saw the lack of availability of initial assessments as a missed opportunity to deter companies that may undertake conduct in breach of the Guidelines.

Final statements

The RoP specify the content of the final statements (Section 6), namely:

- An overview of the complaint and the process taken by the Examiner to manage the case
- The Examiner's analysis on the issue and whether the enterprise's actions were consistent with the Guidelines, which can be included when:
 - The complaint was accepted but good offices did not result in an agreed outcome
 - When the enterprise did not engage in the complaint process
- Recommendations to the company or other relevant bodies (where appropriate) to improve observance of the Guidelines
- Timeline for follow up (detailed in Section 7).

The content of the final statement is informed by materials provided by both parties, publicly available information, and other information provided during the good offices and examination phases (Paragraph

⁴⁷ ElectraNet Pty Limited and Messrs Andrew and Robert Starkey, 2021 (ID# 22)

6.2). According to the RoP at any point during the drafting of the final statement, the Examiner may initiate or resume the good offices process, if it is considered useful and agreed upon by the parties.

Regarding the use of determinations, a number of stakeholders from civil society and trade unions indicated that the AusNCP could adopt a consistent practice of making determinations. In particular, these stakeholders underscored the role that determinations play in bringing companies to the table, though they recognised that this practice may require more resources, in particular to conduct the research and fact finding necessary to establish whether or not there was a breach of the Guidelines in the case at hand.

The RoP provide that the Examiner will share a draft of the final statement with the Board for their review and advice. The Examiner has discretion when taking the Board's input into account, and the advice is not shared with the parties. Following this, the Examiner will share the draft final statement with both parties for comment; changes are made at the discretion of the Examiner. Once the statement is finalised, the AusNCP will share an embargoed copy with the Board and the parties, post the final statement on their website, share it with the OECD, and provide a copy of it to any relevant Australian authorities.

The Independent Examiner clarified the process for obtaining the advice of the Board on draft statements as follows. The draft statement is sent to all Board members individually, and members send their input individually as well, meaning that there is no discussion within the board about the draft statement, or any consolidated advice of the board. However, Board members are encouraged to, and often do, share their comments with other members after writing. This process could be clarified in the RoP, and the NCP could consider whether draft statements may not benefit from a discussion with the Board as a whole, so as to for example avoid receiving contradictory advice.

Several stakeholders also indicated that the structure of the final statements could be adapted to be more user-friendly. For example, one stakeholder suggested revising the introduction to be more succinct, by immediately identifying the alleged issues, the decisions taken, and the key reasoning behind the decisions.

Case follow-up

The RoP specify that the final statement will identify a timeframe for follow-up, if deemed appropriate in the context of the issues involved. The objective of follow-up is to examine the extent to which the recommendations in the final statement have been implemented, and whether any further engagement from the Examiner or the AusNCP is needed (Paragraph 7.1).

Currently, of the cases handled under the new structure, the final statements indicate follow up.⁴⁸ Of the cases handled under the former structure, two statements indicated follow up.⁴⁹ It is also worth noting that follow up was carried out in an additional case, even though the final statement did not plan for it.⁵⁰ According to the AusNCP, follow-up statements are generally published.

Procedural Review

According to the RoP, either party to the case can request a procedural review if there are concerns the Examiner has not conducted the process in line with the procedures. Australia is one of the few adherents to provide for such a review process for NCP cases. The focus of the review is strictly on procedural

⁴⁸ Note: so far only one case has been concluded under the new structure, see *ElectraNet Pty Limited and Messrs Andrew and Robert Starkey, 2021 (ID #22)*

⁴⁹ See *Mercer PR and National Justice Project for Australian Women without Borders on behalf of an affected individual, 2019 (ID #15)* and *ANZ Banking Group and Equitable Cambodia and Inclusive Development International, 2018 (ID #11)*

⁵⁰ See *Ansell Limited and its subsidiaries and IndustriALL Global Union, 2017 (ID #9)*

elements, and does not look at the substance of the Examiner's decision (Paragraph 8.8). A procedural review may be requested six weeks from receipt of the completed version of the final statement.

The procedural review is carried out by a Review Committee that is comprised of proxy members of the Board. The composition of the Review Committee generally includes one government representative and two non-government representatives (the latter requiring a balance between business and civil society/union members). Board members volunteer, and should there be a surplus, the Chair has final discretion over who to select to the Review Committee (Paragraph 8.4).

To ensure impartiality, the RoP specify that any Board member or their proxy who has a conflict of interest should not volunteer for the Review Committee (Paragraph 8.5). If a majority of the Board members consider a volunteer to have a conflict of interest, that volunteer may not sit on the Review Committee. If there is no suitable candidate to be drawn from the existing Board or their proxy membership, then the Board may nominate one or more external candidates to the Board; the external candidates must be agreed by a majority of the Board (Paragraph 8.5).

The RoP also specify that the Review Committees decision will be informed by written comments on the review procedure and relevant background information provided by the Examiner, enquiries of persons involved in the original matter, as well as consultations with other NCPs and the OECD Secretariat (Paragraph 8.7).

If the Review Committee finds procedural irregularities, they will send instructions to the Examiner on how to rectify the irregularities, and make recommendations to both the AusNCP and the Examiner to ensure such irregularities do not happen in the future (Paragraph 8.8). Upon receipt of the recommendations, the Examiner is required to re-open the complaint in accordance with the instructions of the Committee, correct the procedural irregularities, and where necessary, reconsider the final statement. The RoP further provide that no additional request for review of the case may be made (Paragraph 8.9). A public statement detailing the request for review, the process undertaken, the Review Committee's assessment and any recommendations, will be prepared, reviewed by the AusNCP and Examiner, and published on the AusNCP's website.

In two instances, the procedural review function has been initiated – the first⁵¹ prior to the 2019 reforms and the second⁵² after the reforms (see Box 3.4 below).

Box 3.4. Deutsche Bank Australia and Mr. Robert Palin

On 14 July 2019, Mr. Robert Palin submitted a specific instance alleging that Deutsche Bank was directly involved with the German National Socialist Regime in the illegal and forced expropriation of substantial financial assets belonging to the Weiss family, namely family-owned company shareholdings in Erste Böhmisches Glasindustrie AG (EBG, also known as First Bohemian Glassworks Ltd and the Olovi factory).

On 13 December 2019, the NCP decided not to accept the case. This conclusion was based on the fact that the complaint did not relate to the implementation of the OECD Guidelines (first adopted in 1976), which did not exist at the time of the alleged original actions that underpin his claims (1939).

⁵¹ G4S Australia Pty Ltd and Human Rights Law Centre (HRLC) and Rights and Accountability in Development (RAID), 2015 (ID #10)

⁵² Deutsche Bank Australia and Mr. Robert Palin, 2019 (ID #19)

In January 2020, the AusNCP was asked by the notifier to initiate a procedural review on the specific instance. The review was conducted by a Committee of the AusNCP Governance and Advisory Board, who published their findings on 14 May 2020.

The conclusion was that the NCP's procedures had been followed. As it was conducting the review, the Committee had to make multiple requests for further information to the NCP, and therefore recommended that in future reviews, the Committee be provided with all documentation from the outset, with any confidentiality checks or party authorisations completed. The Committee added that all parties involved in a Review should be regularly updated as to its status.

Source: AusNCP, Procedural Review Statement, Complaint 19, 14 May 2020, <https://ausncp.gov.au/sites/default/files/inline-files/ausncp-complaint-19.pdf> and OECD NCP case database.

Timeliness

The indicative timelines are clarified in section 9 of the RoP, with section 3 also providing timelines for the submission of the case. Moreover, an overview of the specific instance process is provided in Appendix A of the RoP.

Taken together, the timelines are as follows:

- 5 working days to acknowledge receipt of a complaint and 5 working days to note receipt on the AusNCP website
- 10-12 weeks for initial assessment
- 10 weeks for the preparation phase and 15-20 weeks for the proceedings phase of good offices
- 15 weeks for the final statement
- 15 weeks for procedural review if required

In total, the current process is estimated to take 50-57 weeks, with an extra 15 weeks should a procedural review be initiated. Prior to the reforms, the AusNCP did not have clear timeframes in place and struggled to meet indicative timelines as suggested in the Guidelines NCP guidance, with the majority of cases exceeding the 90-day indicative timelines for initial assessment, and several cases staying open for close to four years.⁵³ This, coupled with a lack of transparency over the pending cases, was a source of concern for stakeholders and notifiers alike.

Since 2018, there have been concerted efforts to adhere to the indicative timeframes. Moreover, the RoP now clarify that when delays are anticipated, the Examiner will discuss the reason(s) with the parties and consider how to manage the delay (Paragraph 9.2). Delays that are expected to go beyond 5 weeks, or affect multiple cases, will be noted on the AusNCP website to facilitate transparency (Paragraph 9.2). The AusNCP reports that the reformed structure has been effective in improving efficiency and timeliness, which was confirmed by stakeholders and notifiers, while also noting that continuous improvement is necessary to ensure the RoP can accommodate complex cases.

⁵³ Note to Review Team : data is currently being reviewed, but worth noting that of the cases where data on timelines is available, two cases that were accepted for further examination were open for close to four years, and one case was open for close to three years. Of the cases that were not accepted, one was in the initial assessment phase for close to three years, whereas another was in the initial assessment phase for over a year. The remaining cases averaged five months for the initial assessment.

Of the eight cases received since the reforms:

- Three cases were received during the peer review.⁵⁴
- One case completed the full process and was concluded in 6 months.⁵⁵
- One was in the initial assessment phase for 11 months and is currently in the good offices phase.⁵⁶
- One was in the initial assessment phase for two months and is now in good offices⁵⁷ (although there is no initial assessment on the website (as per the request of the parties) and determining the timelines required additional effort on the part of the user).
- One case is in the initial assessment stage, but it is not clear on the website how long it has been in this stage (e.g. it is not clear when the case was received).
- One case was not accepted after the NCP determined that the submitter had not submitted enough information to substantiate the claims and, additionally, other claims largely fell outside the scope of the Guidelines.⁵⁸

Confidentiality and transparency

The specific instance process aims to strike a balance between the principle of transparency with concerns for confidentiality. Informed by the understanding that “it is important for the parties to have confidence that information provided to the AusNCP will be treated sensitively” (Paragraph 10.1), the RoP clarify that information provided by one party will only be shared if the other party provides consent (Paragraph 10.2). However, the RoP further state that should a party wish to withhold information, the Examiner will assess whether the request is reasonable given the circumstances. Moreover, the Examiner will work with the concerned party to determine what sensitive information can be excised, with the intention of sharing as much as possible with the other party to the case. The RoP also note that information that is withheld will “not be able to form part of the Examiner’s consideration of the case” (Paragraph 10.2).

The balance between transparency and confidentiality also informs the various phases of the specific instance process. As noted above, when the AusNCP receives a case, only information regarding the location where the alleged incidents took place will be posted on the website. During the initial assessment stage, the name of the notifier will be listed on the website and should the details of the case already be in the public domain, the name of the enterprise will also be listed (Paragraph 4.8). Once the Examiner has decided to accept, transfer or reject the case, the names of the parties, the country name and the Examiner’s decision, will be added to the website (Paragraph 4.13). An enterprise may however not be identified in some circumstances, for example if the case is rejected for not meeting the minimum admissibility criteria to undertake an assessment. According to the AusNCP, this measure is in place to avoid reputational damage to an MNE where an assessment could not be conducted, or vexatious use of the website to name and shame MNEs without expert assessment. Where there are potential risks to the personal safety of the notifier, the Examiner can decide to withhold identifying information (Paragraphs 3.5 and 5.6). Some stakeholders from civil society felt the AusNCP errs more on the side of protecting

⁵⁴ Australian-based enterprise (property and infrastructure sector) operating in the US and Parella Law on behalf of an affected individual, 2021 (ID #25), Justicia y Reparación on behalf of affected individuals and Australian-based enterprise (mining sector) operating in Chile, 2021 (ID #26), Publish What You Pay Australia on behalf of Myanmar-based civil society organisations and Myanmar Metals Limited, 2021 (ID #27)

⁵⁵ ElectraNet Pty Limited and Messrs Andrew and Robert Starkey, 2021 (ID #22)

⁵⁶ ANZ Banking Group and Friends of the Earth, Egan, Dodds and Simons, 2020 (ID #20)

⁵⁷ RIO Tinto and Human Rights Law Centre, 2020 (ID #21)

⁵⁸ Port Hedland Community Progress Association Inc. and BHP

confidentiality than on promoting transparency. In particular, they noted the lack initial assessment statements online and withholding the company name during the initial assessment process unless information about the complaint is already in the public domain.

The good offices phase, according to the RoP, is governed by a formal confidentiality agreement (often contained as a section within an overarching mediation agreement). In practice, the NCP uses a template agreement provided by Treasury. This agreement, separate to the process, requires that the facilitator (e.g. the Examiner), the parties, and all advisers and representatives of the parties, to:

- Keep the contents of the Agreement confidential;
- Keep all information disclosed during conciliation confidential; and
- Not use any of the information disclosed during the Conciliation for any purpose other than the Conciliation.

The confidentiality agreement allows for several exceptions, with flexibility to allow for different circumstances in each case. Stakeholders however noted that the template used may not always be suitable in the specific instance context, notably as it is drafted in legalistic terms and provides for severe penalties in case of breach.

In publishing the final statement, the Examiner has discretion to accommodate reasonable requests regarding sensitivities concerning content (Paragraph 6.8). No confidentiality measures are anticipated in the preparation or publication of the follow-up statement.

Impartiality in the handling of specific instances

The RoP contain a specific provision in section 10, paragraph 10.6 regarding impartiality in the handling of specific instances. In particular, the RoP specify that the Independent Examiner and the Board are required to declare any conflict of interest that may arise in relation to a complaint, or the functions of the AusNCP more generally. Mitigation measures are clarified, depending on whether the conflict of interest concerns a Board member or the Independent Examiner:

- If a Board member has a conflict of interest, the Board “will agree suitable measures to manage the conflict which may include excluding the member from discussions or correspondence about the complaint or issue in question” (Paragraph 10.6).
- If the Examiner has a conflict of interest that cannot be managed effectively, then the Secretariat in consultation with the Board will make alternative arrangements to ensure the complaint to be handled effectively.

For Treasury employees, impartiality measures are governed by the Treasury’s conflict of interest policy, whereby employees submit their declarations and where necessary, appropriate action is taken by the relevant senior staff member. There is no reference however to such measures in the RoP or on the AusNCP website.

Annex A of the Terms of Reference for the Governance and Advisory Board contain further guidelines for disclosing interests and managing conflicts for both members of the Board and the Independent Examiner. The guidelines define a conflict of interest as occurring when “a Board member or the Independent Examiner’s duty to the AusNCP clashes with their duties, obligations or interests elsewhere, such as their business or workplace interest, or family or friends”.⁵⁹ Different scenarios are included as non-exhaustive examples of the types of situations that could lead to a conflict of interest. Members of the Board and the Independent Examiner are required to submit a declaration of interest each time a complaint is received

⁵⁹ AusNCP Governance and Advisory Board Terms of Reference

by the AusNCP, as well as whenever a new member or Independent Examiner takes up their position. The declarations are recorded in a Register of Interests, which is tabled at each Board meeting, but is otherwise kept confidential by the AusNCP given that it contains personal data regarding Board members. The AusNCP reported that the Register is a new tool and will be referenced in a future update of the Rules of Procedure to ensure all parties are aware of the measures in place to facilitate impartiality.

To address potential challenges related to perceptions of conflict of interest that external members may face, the guidelines specifically clarify that “professional or personal associations with a party to a complaint from the Board members’ stakeholder network or constituency will not generally be assessed as an actual conflict of interest.”⁶⁰ However, in circumstances where the Board member has been directly involved in preparing or lodging the complaint, or is employed by a party to a complaint, the Board member may be considered in a conflict of interest.⁶¹

The guidelines further set out the criteria (real, apparent and potential) by which the AusNCP will assess all declared interests as well as the treatment options available. Options range from limiting access to specific documents, to excluding the member from correspondence or discussions on the case, to temporarily appointing an additional external proxy member to the case. In practice, there are several ongoing cases where Board member are currently recused, with proxy members acting in their stead. The assessment of interests is also kept confidential by the NCP.

The various provisions described above constitute an elaborate framework for the prevention and handling of conflicts of interest, and stakeholders have shared being generally satisfied with these safeguards, although still mentioning certain ‘hard cases’ in which they could be tested, such as specific instances touching upon state policy (see above). Additionally, the NCP’s policy regarding conflict of interest as it applies to the Board or the Independent Examiner, are scattered across various documents (RoP, Board ToRs) and tools (Register), making them difficult to access and understand in practice. It would therefore be useful to consolidate this policy in one document.

Campaigning

The NCP does not have a policy regarding continuation of campaigning during the good offices, although the Independent Examiner indicated that it discussed the requirement of engaging in good faith with the parties, and the possible implications of campaigning during good offices. Stakeholders pointed out that, in one case, continued engagement and campaigning in respect of a case that did not lead to an agreement after the good offices was instrumental in re-engaging with the company during follow up and reaching agreement then (see Box 3.3).

Parallel proceedings

The AusNCP’s approach to parallel proceedings is clarified in paragraph 4.6 of the Rules of Procedure, which states that the AusNCP “will not determine that issues do not merit further consideration solely because the matter is, has been or could be considered in another forum, whether judicial or non-judicial”.⁶²

⁶⁰ AusNCP Governance and Advisory Board Terms of Reference, p.6

⁶¹ AusNCP Governance and Advisory Board Terms of Reference, p.6

⁶² AusNCP Specific Instances Procedure, paragraph 4.6

In one case the NCP did not accept a specific instance for further examination, in part due to the existence of parallel proceedings.⁶³

Cooperation with other NCPs

The RoP also allow for coordination amongst NCPs, with paragraph 4.7.1 detailing how this will be undertaken in line with the Procedural Guidance. To date, the AusNCP has been involved as lead or supporting NCP in 11 cases (see Table 3.2). Of these 11 cases, the AusNCP has been the lead in four and a supporting NCP in seven.

As indicated above, the NCP network was consulted on its cooperation with the AusNCP, and six NCPs responded, notably providing feedback on interactions in the context of cases. Several NCPs engaged with the AusNCP in the context of coordination in recent joint or parallel cases, and were very positive about their interaction, noting that the AusNCP had always been clear about its own processes for coordination with other NCPs and related timelines. The AusNCP also took the lead in several coordination processes, e.g. contacting the parties in joint cases. Finally, several NCPs were positive about their exchanges with the AusNCP on substantive issues of Guidelines interpretation, highlighting the expertise of the AusNCP, in particular the Independent Examiner in this regard.

Table 3.2. Specific instances where the AusNCP has cooperated with other NCPs⁶⁴

Specific instance	Lead NCP	Supporting NCPs
Mining and quarrying in Colombia	Australia	Switzerland
Mercer PR and National Justice Project for Australian Women Without Borders (AWWB) on behalf of an affected individual	Australia	France, United Kingdom
Coca-Cola Amatil and International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF)	Australia	United States
Deutsche Bank Australia and Mr. Robert Palin	Australia	Czech Republic, Germany, United States
Parella Law on behalf of an affected individual and Australian-based enterprise (property and infrastructure sector) operating in the US	Australia	United States
Justicia y Reparación on behalf of affected individuals and Australian-based enterprise (mining sector) operating in Chile	Australia	Chile
Employment contract issues in New Zealand	New Zealand	Australia
Barrick Gold Corporation and FOCO in Argentina	Argentina	Australia
Environmental issues in Australia, Switzerland, and the UK	United States	Australia
Human rights issues involving an Australian multinational insurance company operating in New Zealand	New Zealand	Australia

⁶³ G4S Australia Pty Ltd and Human Rights Law Centre (HRLC) and Rights and Accountability in Development (RAID), 2015 (ID #10)

⁶⁴ Table includes SIs reported as of the on-site visit. The AusNCP has informed the peer review team that it has assisted on another two instances since then

Sakto Group and Bruno Manser Fond	Canada	Australia, United Kingdom, United States
Scientific, Industrial & Environmental Consultants GmbH & Daimler Chrysler	Germany	Australia
French Group in Poland; an Australian family	France	Australia, Austria, Germany, Netherlands, Poland, United States.

Source: OECD NCP database (2021)

Request for clarification and assistance

In 2021, the AusNCP requested the assistance of the Chair of the Working Party on RBC with regard to complex coordination issues with a current specific instance.⁶⁵ The request was made on behalf of the NCPs of UK, Switzerland, Ireland, Colombia and Australia. To date, the AusNCP has not needed to request clarification from the OECD Investment Committee.

	Finding	Recommendation
3.1	The AusNCP is faced with a sharp increase in case activity following the reforms, which may pose challenges to the Independent Examiner's ability to handle cases in a timely and efficient manner. Treasury decided to appoint at least two Examiners going forward. This is a welcome development but may pose coordination challenges between the two examiners.	Arrangements should be made regarding coordination between Examiners to avoid inconsistent decisions while protecting the independence of each Examiner. A clear, transparent and objective process should also be designed for assigning cases to Examiners, taking into account relevant factors.
3.2	The AusNCP has a detailed and elaborate set of RoP that were incepted following the reforms and after public consultation. The RoP are strong, but practice has evidenced that certain aspects could be revised to enhance perceptions of impartiality, transparency, and accessibility.	The AusNCP should consider reviewing notably the following aspects of its RoP: (i) publication of initial assessments; (ii) advice of Board on draft statements; (iii) consolidation of conflict of interest policy into one document; (iv) confidentiality agreement template.

⁶⁵ Anglo American Plc, BHP Group Ltd and Glencore International AG and Global Legal Action Network, 2021 (ID #23)

Annex A. List of organisations submitting responses to the NCP peer review questionnaire

Government
Australian Trade and Investment Commission
Australian Human Rights Commission
Business
Australian Lawyers for Human Rights
Law Council of Australia
ANZ Bank
Trade Unions
Australian Council of Trade Unions
CFMEU
Australian Workers' Union
International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF)
Civil society
Human Rights Law Centre
Global Compact Network Australia
OECD Watch
ActionAid
Inclusive Development Australia
Equitable Cambodia
Indigenous communities
Legal representatives for Andrew and Robert Starkey
Academia
University of Western Australia
Asian Research Institute for Environmental Law
Individuals
Representative of the Palin family
NCPs
France
United Kingdom
Czech Republic
Switzerland
Germany
Canada

Annex B. List of organisations that participated in the NCP peer review on-site visit

Government
Australian Trade and Investment Commission
Australian Human Rights Commission (AHRC)
Attorney-General's Department
Department of Industry, Innovation and Science
Department of Foreign Affairs and Trade (DFAT)
Department of Agriculture, Water and the Environment (DAWE)
Australian Border Force
Business
Australian Chamber of Commerce and Industry
Pillar Two
Rio Tinto
DLA Piper Australia
Responsible Investment Association Australia
Law Council of Australia
Business Council of Australia
Trade Unions
Australian Council of Trade Unions
CFMEU
Australian Workers' Union
International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF)
Civil society
Transparency International Australia
Global Compact Network Australia
Human Rights Law Centre
Inclusive Development Australia
Equitable Cambodia
Indigenous communities
Legal representatives for Andrew and Robert Starkey
Academia
University of Western Australia
University of New South Wales, Diplomacy Training Program (Faculty of Law)

Annex C. Promotional events 2019-2020

Table 3.3. Promotional activities in 2020 organised by the NCP

Title	Date	Location	Size of Audience	Organised or co-organised	Targeted audience
Overview of OECD Guidelines and AusNCP: Content and processes	8/09/2020	Webex	50-100	Co-organised	Academia

Source: National Contact Point Reporting Questionnaire (2020)

Table 3.4. Events in 2020 participated in by the NCP

Title	Date	Location	Size of Audience	Targeted audience
UWA: Modern Slavery Reporting	26/08/2020	Webinar	-	Lawyers
Diplomacy Training Program – Accountability mechanisms	27/10/2020	Webinar	10-50	Private sector, government
1st UN Pacific Forum on Business and Human Rights	02/12/2020	Webinar	-	Business

Source: National Contact Point Reporting Questionnaire (2020)

Table 3.5. Promotional activities in 2019 organised by the NCP

Title	Date	Location	Size of Audience	Organised or co-organised	Targeted audience
Working lunch - Introducing Due Diligence and National Contact Points for Responsible Business Conduct	12/06/2019	UN Conference Centre, Bangkok	50-100	Co-organised	Delegates at Bangkok Business and Human Rights Week events in June 2019
Meeting with Australia-Thailand Chamber of Commerce	10/06/2019	Bangkok	1	Organised	Business representatives

Source: National Contact Point Reporting Questionnaire (2019)

Table 3.6. Events in 2019 participated in by the NCP

Title	Date	Location	Size of Audience	Targeted audience
Australian Chamber of Commerce in South Korea	19/12/2019	Seoul, South Korea	2	Industry representative
Business and Human Rights – Global Developments and Lessons from Australia	11/12/2019	Melbourne	>100	Business representatives, NGOs, Trade unions, Academia, Government representatives
Department of Home Affairs Industry Summit	19/11/2019	Melbourne	>100	Business representatives
Australian Dialogue on Business and Human Rights 2019	17/10/2019	Melbourne	50-100	Business representatives, NGOs, Trade unions, Academia, Government representatives
Responsible Investment Association Australasia (RIAA) Human Rights Working Group	22/08/2019	Canberra	50-100	Institutional investors
UN Global Compact (UNGC)-Global Reporting Initiative (GRI) Sustainability Summit 2019	20-21/08/19	Manila	50-100	Business representatives, NGOs, Government, Investors
ASEAN Intergovernmental Commission on Human Rights (AICHR) Interregional Dialogue – Panel on UNGPs and the role of Institutional Investors	11/06/2019	Bangkok	50-100	Business representatives, NGOs, Government, Investors
OECD Responsible Business and Human Rights Forum – panel on due diligence in project finance	12/06/2019	Bangkok	50-100	Business representatives, NGOs, Government, Investors
OECD Responsible Business and Human Rights Forum – panel on Accountability and access to remedy	13/06/2019	Bangkok	50-100	Business representatives, NGOs, Government, Investors
ASEAN Institutional Investors Forum – panel on Undertaking due diligence for responsible business conduct across investment portfolios	14/06/2019	Bangkok	50-100	Business representatives, NGOs, Government, Investors
Various activities to promote the AusNCP reforms and introduce the new Independent Examiner (not counted)	8/12/2019	Australia	Various	Academia and NGOs

Source: National Contact Point Reporting Questionnaire (2019)

Annex D. Overview of specific instances handled by AusNCP as the leading NCP

ID #	Enterprise	Submitter	Host Country	Chapter(s) of the Guidelines	Date of Submission	Date of Initial Assessment	Date of Conclusion	Outcome	Description	Follow-up	Review
1	GSL (Australia) Pty Ltd (GSL Australia)	several Australian and overseas NGOs Brotherhood of St Laurence et al.	Australia	General Policies (II), Consumer Interests (VIII)	06/01/2005	N/A	13/10/2006	Concluded, mediation with agreement	Both parties agreed to a mediation session with the NCP in which mutually satisfactory outcomes were agreed upon	No	N/A
2	ANZ Banking Group (ANZ)	Five NGOs Australian Conservation Foundation et al.	Papua New Guinea	General Policies (II), Environment (VI)	28/08/2006	N/A	13/10/2006	Not accepted	The NCP received insufficient information to assess the specific instance and the case was not accepted. The NCP encouraged the parties to consider their dialogue.	No	N/A
3	BHP-Billiton	Individual Mr. Ralph Bleachmore on behalf of parties in Colombia	Colombia	General Policies (II), Disclosure (III), Environment (VI)	02/07/2007	N/A	06/12/2009	Concluded, mediation with agreement	An agreement was reached during mediation sessions and external body will monitor further negotiations and progress	Follow-up through external bodies	N/A
4	BHP – Billiton	Justica Ambiental	Mozambique	General Policies (II) Disclosure (III), Environment (VI)	12/09/2010	02/02/2011 (by UK NCP)	13/09/2012 (by UK NCP)	Transferred to UK NCP	Following discussions with the UKNCP, it was determined that the UKNCP would handle the complaint, due to the company's location.	N/A	N/A
5	Xstrata Coal Pty Ltd (XSTRATA)	Australian Trade Union – Construction,	Australia	Competition (X)	12/10/2010	N/A	06/08/2011	Concluded, without mediation, no	The NCP offered its good offices to both parties but XSTRATA only agreed to	No	N/A

		Forestry, Mining, Energy Union – Mining and Energy Division (CFMEU)						agreement	engage with CFMEU at the enterprise level without mediation by the NCP		
6	Argentine non-government organisation	Australian-based multinational enterprise	Argentina	General Policies (II), Disclosure (III), Employment and Industrial Relations (V)	01/06/2011	N/A	08/2018 (by Argentine NCP)	Transferred to Argentine NCP, with AusNCP as supporting NCP	Following discussions with the Argentine NCP it was determined that the Argentine NCP would handle the complaint, due to the location of the issues, the submitter and the company, as well as language	N/A	N/A
7	Chilean auto parts manufacturer	Joint venture majority owned by Australian and United Kingdom-based multinational enterprise	Chile	General Policies (II), Human Rights (IV), Employment and Industrial Relations (V), Consumer Interests (VIII), Science and Technology (IX)	11/01/2012	N/A	10/2013 (by Chilean NCP)	Transferred to Chilean NCP, with AusNCP as supporting NCP	Following discussions with the Chilean NCP it was determined that the Chilean NCP would handle the complaint, due to the location of the issues and the joint venture, as well as language	N/A	N/A
8	Australian mining company	Representative of a community organisation from the Eastern Cape region of South Africa	South Africa	General Policies (II), Disclosure (III), Human Rights (IV), Employment and Industrial Relations (V), and Environment (VI)	01/02/2013	N/A	08/03/2013	Not accepted	Prior to initial assessment, the local community informed of a lack of interest in mediation and there was insufficient information supplied to the NCP to substantiate the case	No	N/A
9	Ansell Limited and its subsidiaries	IndustriALL Global Union	Malaysia, Sri Lanka	General Policies (II), Human Rights (IV), and Employment and Industrial relations (V)	20/11/2013	01/07/2014	01/06/2017	Concluded with agreement	The NCP offered its good offices and mediation but the agreement was ultimately reached in parallel court proceedings	Yes	N/A

10	G4S Australia Pty Ltd	Human Rights Law Centre (HRLC), and Rights and Accountability in Development (RAID)	Papua New Guinea	Human Rights (IV)	23/09/2014	N/A	10/06/2015	Not accepted	The NCP determined that it was not the correct entity to handle the case and parallel proceedings were already underway to address the issues. The NGOs later appealed the NCP's decision but the NCP held their position.	No	N/A
11	ANZ Banking Group	Equitable Cambodia (EC) and Inclusive Development International (IDI)	Cambodia	General Policies (II) and Human Rights (IV)	07/10/2014	N/A	01/10/2018	Concluded with agreement during follow-up	Both parties participated in mediation but were unable to reach agreement. The NCP issued recommendations and an agreement was later reached during a follow-up.	Yes	N/A
12	SERCO Group plc	Professor Ben Saul on behalf of parties in Papua New Guinea	Australia	Human Rights (IV)	14/01/2015	N/A	10/08/2017	Not accepted	The NCP did not accept the case as it was unlikely to contribute to the purposes and effectiveness of the OECD Guidelines.	No	N/A
13	Australian Laboratory Services	Mr. Yacouba Traoré on behalf of the Former Employees Collective of the Australian Laboratory Services Mali SARL Laboratory Group	Mali	General Policies (II), Disclosure (III), Human Rights (IV), Employment and Industrial Relations (V), Environment (VI)	11/05/2015	N/A	06/05/2019	Concluded	The NCP partially accepted the case relating to the notifier's concerns about health and safety. Both parties participated in good offices and the case was concluded with recommendations.	No	N/A
14	Bayswater Contracting and Mining Group (BCM)	Mr. Karembé on behalf of the National Federation of Mining and Energy (FENAME) of Mali	Mali	Employment and Industrial Relations (V)	09/10/2015	N/A	01/12/2016	Not accepted	The NCP determined that it was not the correct entity to handle the case, as BCM is not an Australian MNE.	No	N/A
15	Mercer PR	National Justice Project for Australian Women Without Borders (AWWB) on behalf	Nauru	Human Rights (IV)	27/10/2016	01/02/2018	09/07/2019	Concluded without agreement	Both parties initially agreed to mediation but Mercer PR later withdrew, and the NCP concluded the case, issuing recommendations	Yes	

		of an affected individual									
16	Unidentified multinational enterprise in the scientific services sector in Mali	Notifier based in Mali	Mali	General Policies (II)	13/02/2017	N/A	05/02/2018	Not accepted	The NCP was unable to identify the MNE and could not accept the case due to insufficient information	No	
17	Notifier (union)	Unidentified enterprise (mining and quarrying sector)	Brazil	General Policies (II), Disclosure (III), Human Rights (IV), Employment and Industrial Relations (V), Environment (VI)	26/03/2018		01/11/2019 (by Brazilian NCP)	Transferred to Brazilian NCP, with AusNCP as supporting NCP	The NCPs of UK, Australia and Brazil received a complaint relating to the mining and quarrying sector. The three NCPs agreed that Brazil would lead the handling of this case as it relates to an issue in Brazil.	N/A	N/A
18	Coca-Cola Amatil (CCA)	International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF) on behalf of affected individuals	Indonesia	Human Rights (IV), and Employment and Industrial Relations (V)	20/06/2019	N/A	13/12/2019	Not accepted	The NCP found that this case was not materially different to a case raised to the U.S. NCP in 2019 by the same submitter. The NCP determined that bringing the parties together again to re-examine the issues would not further the effectiveness of the Guidelines.	No	
19	Deutsche Bank Australia	Mr. Robert Palin	Germany	General Policies (II)	14/07/2019	N/A	13/12/2019	Not accepted	The case was not accepted as it did not relate to the implementation of the Guidelines given that they did not exist at the time of original alleged issues. A procedural review was later issued by the NCP.	No	Yes
11	ANZ Banking Group	Friends of the Earth, an NGO, and three individuals (Egan, Dodds and Simons)	Australia	General Policies (II), Disclosure (III), Environment (VI), and Consumer Interests (VIII)	30/01/2020	24/11/2020	N/A	In progress, accepted	The NCP published its initial assessment deciding to accept the case and the case is now in the good offices phase.	N/A	N/A
21	Rio Tinto	Human Rights Law	Papua New	General Policies (II), Human Rights (IV),	28/09/2020	N/A	N/A	In progress,	The case is in the good offices	N/A	N/A

		Centre (HRLC)	Guinea	and Environment (VI)				accepted	phase.		
22	ElectraNet Pty Limited	Messrs Andrew and Robert Starkey	Australia	General Policies (II), and Human Rights (IV)	28/10/2020	25/02/2021	09/06/2021	Concluded without agreement	The NCP accepted the case and offered its good offices, but the company declined to participate. Observations and recommendations were made and a follow-up is planned	Planned	N/A
23	Anglo American Plc, BHP Group Ltd and Glencore International AG	Global Legal Action Network		Human Rights (IV)	19/01/2021	N/A	N/A	In progress	The case is in the initial assessment phase.	N/A	N/A
24	BHP	NGO Port Hedland Community Progress Association Inc.	Australia	Environment (VI)	01/02/2021	N/A	01/09/2021	Not accepted	The NCP did not accept this case largely due to the nature of the issues being unsubstantiated and falling outside of the scope of the Guidelines.	No	N/A
25	Australian-based enterprise (property and infrastructure sector) operating in the US	Parella Law on behalf of an affected individual	United States	Human Rights (IV), Employment and Industrial Relations (V)	20/08/2021	N/A	N/A	In progress	The case is in the initial assessment phase	N/A	N/A
26	Justicia y Reparación on behalf of affected individuals	Australian-based enterprise (mining sector) operating in Chile	Chile	Human Rights (Chapter IV) and Environment (Chapter VI)	03/09/2021	N/A	N/A	In progress	The case is in the initial assessment phase	N/A	N/A
27	Publish What You Pay Australia on behalf of Myanmar-based civil society organisations	Myanmar Metals Limited	Myanmar	General Policies (Chapter II), Disclosure (Chapter III), and Human Rights (Chapter IV)	14/09/2021	N/A	N/A	In progress	The case is in the initial assessment phase	N/A	N/A

National Contact Point Peer Reviews: Australia

Governments adhering to the OECD Guidelines for Multinational Enterprises are required to set up a National Contact Point (NCP) that functions in a visible, accessible, transparent and accountable manner.

This report contains a peer review of the Australian NCP, mapping its strengths and accomplishments and also identifying opportunities for improvement.

