



Australian National Contact Point
Independent Examiner

The OECD Guidelines for Multinational Enterprises and NCPs

for webinar *Business human rights issues for mining pursuits*
(International Bar Association, Rocky Mountain Mineral Law Foundation,
Columbia Centre on Sustainable Investment), 11 February 2021

The [OECD Guidelines for Multinational Enterprises](#) is an international standard about responsible business conduct. The Guidelines cover many areas including Human Rights, Employment and Industrial Relations, Environment, Competition, and Taxation. The Guidelines are the only multilaterally agreed code of responsible business conduct that governments have committed to promoting, and require adhering governments to:

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

Standards relevant to mining operations and their financing

The OECD Guidelines incorporate other documents and standards, including the OECD's (2018) [Due Diligence Guidance for Responsible Business Conduct](#) (which applies to all businesses), and others with specific relevance to mining operations and their financing.

- The [Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas](#) guide (2016) 'provides a framework for detailed due diligence as a basis for responsible supply chain management of all minerals',¹ having grown from its origins dealing only with tin, tantalum and tungsten. There is also a guide on [Practical actions for companies regarding child labour in mineral supply chains](#) and a recommendation that companies follow the [OECD Transfer Pricing Guidelines](#).²
- There is a specific [Stakeholder engagement in extractive industries](#) guide (2017), with annexures addressing 'Engaging with indigenous peoples', 'Monitoring and evaluation framework for meaningful stakeholder engagement', and 'Engaging with women'.
- The G20/OECD [Principles of Corporate Governance](#)³ address effective corporate governance, shareholder rights and equitable treatment, the role of stakeholders in corporate governance, disclosure & transparency, and responsibilities of the board. There are also separate principles on [Corporate Governance of State-Owned Enterprises](#) which the Guidelines apply to state-owned entities.⁴

- The OECD-FAO [Guidance for Responsible Agricultural Supply Chains](#) addresses issues such as tenure rights over and access to natural resources, and sustainable use of natural resources.
- Guides on [Responsible Corporate Lending and Securities Underwriting](#) (2019) and [Responsible Business Conduct for Institutional Investors](#) (2017) both apply to banks and other financial entities, and address complexities in those areas around 'business relationship', due diligence, risk assessment, stakeholder engagement and 'remediation under the OECD Guidelines'.
- Concepts of the UN's [Guiding Principles on Business and Human Rights \(UNGPs\)](#) are included in the OECD Guidelines ch IV, and the UNGPs help further detail what is expected of companies regarding policy, due-diligence and remediation.

Due diligence and risk assessment

A central tool in the Guideline's standards for corporate conduct is 'risk-based due diligence' for companies to identify, prevent and mitigate actual and potential impacts in their operations and supply chains. The OECD Guidelines, and the various due-diligence guides, offer assistance for working through difficult decisions where every action or response may involve some impact, with tools for risk-based assessment and prioritising.

Risk assessment, covering an entity's operations *and its business relations*, should include four areas:⁵

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

To guide appropriate due-diligence, options can be prioritised by *assessing the likelihood and severity of impact*, with 'severity' informed by considering three factors:⁶

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

The OECD's Due Diligence Guidance for Responsible Business Conduct (p43) shows how these might be considered, in this example concerning workforce decisions.

Examples of indicators of scale, scope and irremediable character

ADVERSE IMPACT	EXAMPLES OF SCALE	EXAMPLES OF SCOPE	EXAMPLES OF THE IRREMIABLE CHARACTER
Labour	<ul style="list-style-type: none"> ● Extent of impact on workers' health or safety ● Whether the violation concerns a fundamental right at work 	<ul style="list-style-type: none"> ● Number of workers/ employees impacted ● Extent to which impacts are systemic (e.g. to a particular geography, industry or sub-sector) ● Extent to which some groups are disproportionately affected by the impacts (e.g. minorities, women, etc.) 	<ul style="list-style-type: none"> ● Extent to which the impact can be rectified (e.g. through compensation, reinstatement, etc.) ● Whether the workers affected can be restored to the prior enjoyment of the right in question ● The extent to which intimidation of workers for forming or joining a trade union will effectively deny workers the right to representation

Complaints under the OECD Guidelines

For multinational enterprises operating in, or from, each country which 'adheres' to the OECD Guidelines, compliance with the Guidelines is encouraged by the NCP of that adhering country (Australia is one example).⁷ Companies acting inconsistently with the Guidelines can be subject to a complaint to, and 'good offices' (typically, mediation), by an NCP.

The basis for a complaint (or 'specific instance') under the Guidelines is about 'issues that arise relating to the implementation of the Guidelines'.⁸ So issues or disputes that are not 'relating to the implementation of the Guidelines' are not envisaged within NCPs' complaint functions. A useful resource, in understanding complaints under the Guidelines, is the OECD's [database](#) of complaints to (and statements by) NCPs.

Australia's National Contact Point

The Australian National Contact Point (**AusNCP**) is a function established by the Australian Government, which is hosted and funded by the Department of the Treasury. The AusNCP is staffed by Treasury officials, and supported by a Governance and Advisory Board which includes members from other Australian Government departments, and representatives of civil society, unions and the business community.

Complaints made to the AusNCP about multinational enterprises are managed by an independent decision-maker, known as an Independent Examiner, who is contracted by the Treasury.⁹ Broadly, there are three potential outcomes for a complaint, with the following examples from the AusNCP's work under the OECD Guidelines.

- (1) A complaint may be assessed as **not suitable to progress**, and a statement is made explaining why. A recent example is the decision and [statement not to accept the complaint regarding Deutsche Bank Australia](#).
- (2) The complaint may be assessed as suitable to proceed, 'good offices' are offered to the parties, but **the company does not engage**. In this case, **the**

AusNCP will assess the case and issue a final statement which ‘will where possible include a statement as to whether the enterprise’s actions were consistent with the OECD Guidelines’.¹⁰ A recent example is the [statement regarding a complaint against Mercer PR](#).

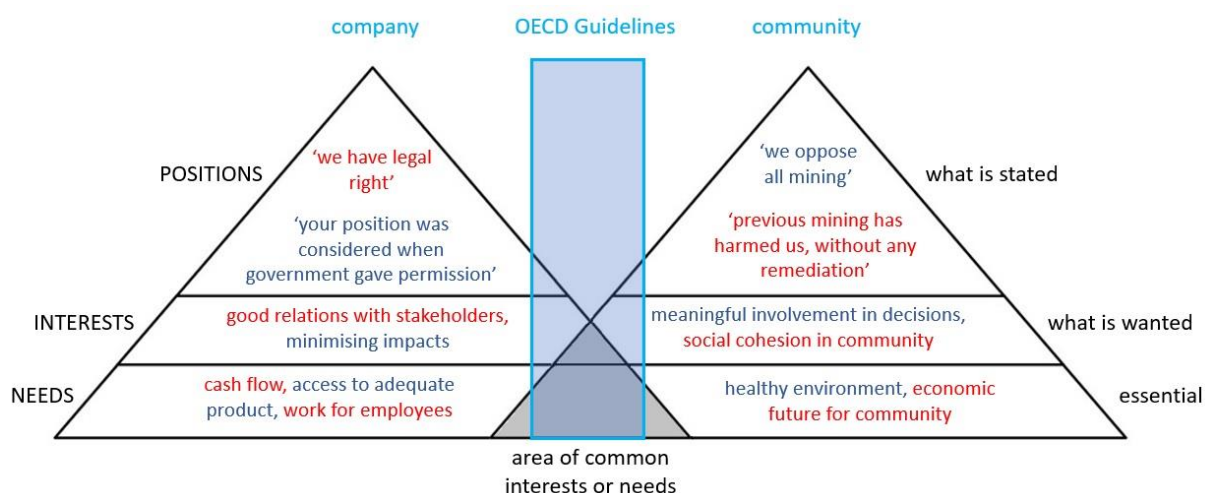
- (3) The complaint has merit and the parties engage in the ‘good offices’ facilitated by the AusNCP. **On completion of good offices, a statement is made reporting on that outcome.** A recent example is the case concerning impacts associated with an historic ANZ loan in Cambodia. There was mediation which did not reach agreement, reported in the [2018 final statement](#). As part of the AusNCP’s follow-up, the parties undertook further mediation and agreed an outcome, which was reported in the [2020 follow up statement](#).

So, when a complaint is received by the AusNCP, the first stage is ‘initial assessment’ by the Independent Examiner, and the *only* factors considered are the six admissibility criteria contained in the OECD Guidelines.¹¹ Where the Independent Examiner accepts the complaint, the parties are then encouraged to participate in a ‘good offices’ process.

‘Good offices’ engagement to help parties resolve issues

The Guidelines envisage flexibility in ‘good offices’, that the NCP will ‘offer, and with the agreement of the parties involved, facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist the parties in dealing with the issues’.¹² So the process does not *have* to be conciliation, but does have to be (1) consensual, and (2) not inconsistent with Guidelines. It is not a process which enforces parties’ rights. Mediation/conciliation only works where parties are prepared to engage, and the Independent Examiner works with parties to get agreement about process first, before facilitating direct engagement between the parties.

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



This diagram is developed from one demonstrating voluntary mediation.¹³ Each party likely has stated positions, but also desired interests and essential needs. Mediation seeks to help the parties find whether, and what, interests or needs they may share and, if there is common ground, to reach some agreement about that. The extent to which the parties do (or do not) have common interests and needs will determine the potential outcome of the mediation. This is indicated above ('area of common interests or needs'), with possible examples from the community and mining company.

Examples relevant to mining

The following are some examples relevant to the Australian extractives sector.

- Royal Dutch Shell, Nigeria ([Feb 2020, Dutch NCP](#)) regarding impacts resulting from a gas fire eruption in 1998. Dutch NCP offered 'good offices' but Shell subsidiary did not agree. NCP's Final Statement noted the subsidiary failed to demonstrate its grievance mechanism was consistent with the OECD Guidelines, and recommended more transparency regarding its grievance mechanism. Also recommended Royal Dutch Shell use leverage ensuring the subsidiary's grievance mechanism meets OECD Guidelines.
- Vale SA and BHP, Brazil ([Nov 2019, Brazilian NCP](#)) regarding compensation following the 2015 Fundão dam accident, and issues of work and safety conditions. Vale SA did not agree to mediation. NCP's Final Statement included recommendations to the companies including increased attention and resources to due-diligence. Also called for companies to exercise influence/leverage 'so that Samarco acts in accordance with the OECD Guidelines'.
- ENI SpA, Nigeria ([Jul 2019, Italian NCP](#)) regarding flooding associated with oil drilling since 1970s, involving ENI affiliate and subsidiary. Matter conciliated and the parties agreed to terms of settlement, involving the engagement of independent expert to determining the necessity and positioning of new infrastructure to address flooding.
- Grupo Mexico, USA ([Aug 2016, USA NCP](#)) about industrial relations and negotiations involving its US subsidiary. The companies declined mediation. NCP's Final Statement included recommendations on the application of the OECD Guidelines and that the 'parent entity should ensure compliance with the law and relevant standards'.
- Statkraft SCA Vind ([Feb 2016, Norwegian NCP](#)), complaint about wind-power project impacting Indigenous rights, NCP statement noted company's 'consultations in line with the expectations set out in the OECD Guidelines'.
- Posco, Dutch & Norwegian pension funds - complaint regarding impacts from iron/steel development in India, and responsibility of investor pension funds. The Norwegian NCP Final Statement ([May 2013](#)) stated the Norwegian pension fund 'violates the OECD Guidelines...[1] by refusing to cooperate with the OECD NCP ...[and 2] by not having any strategy on how to react if it becomes aware of human rights risks related to companies in which NBIM [the Fund] is invested, apart from child labour violations'. The Dutch NCP ([Sep](#)

[2013](#)) examined the Dutch pension funds' efforts to encourage POSCO to ameliorate impacts, and indicated these sufficient for OECD Guidelines.

- BHP Cerrejon ([Jun 2009, AusNCP](#)) mediation about environmental & social impacts of BHP subsidiary in Colombia. Agreement on payments regarding legacy impacts, and also ongoing pollution monitoring and reporting.

Endnotes

- ¹ OECD (2016), [OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas](#): Third Edition, p4.
- ² Referred to in *OECD Guidelines*, XI Taxation, Commentary, [106].
- ³ Referred to in *OECD Guidelines*, II General Policies, Commentary, [7] and III Disclosure, Commentary, [29].
- ⁴ Referred to in *OECD Guidelines*, II General Policies, Commentary, [10].
- ⁵ Further detail in, eg., OECD [Due Diligence Guidance for Responsible Business Conduct](#), 25-28 and OECD guidance on [Responsible Corporate Lending and Securities Underwriting](#), 34-36.
- ⁶ Further detail in, eg. OECD [Due Diligence Guidance for Responsible Business Conduct](#), 42-45 and OECD guidance on [Responsible Corporate Lending and Securities Underwriting](#), 17-18.
- ⁷ As at 9 February 2021, there are 49 countries adhering to the Guidelines: Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, Colombia, Costa Rica, Czech Republic, Croatia, Denmark, Egypt, Estonia, Finland, France (General / News), Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, , Japan, Jordan, Kazakhstan, Korea, Latvia, Lithuania, Luxembourg, Mexico, Morocco, Netherlands, New Zealand, Norway, Peru, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Tunisia, Turkey, Ukraine, United Kingdom, and United States. Contact details for each NCP of these countries available at: <http://mneguidelines.oecd.org/ncps/>
- ⁸ *OECD Guidelines*, Implementation Procedures, I [1].
- ⁹ As the position of Independent Examiner is new, some of the examples in this paper are of earlier statements and action of the AusNCP which would now be undertaken by the Independent Examiner.
- ¹⁰ [AusNCP Complaint Procedures](#) 6.2.2.
- ¹¹ Detailed in 4.10 of [AusNCP Complaint Procedures](#).
- ¹² OECD Guidelines, Procedural Guidance IC, [2](d). Reflected in of [AusNCP Complaint Procedures](#), 5.1.
- ¹³ Acland, *A Sudden Outbreak of Common Sense: Managing Conflict Through Mediation* (Hutchison Business, 1990).