



Australian National Contact Point
for the OECD Guidelines for Multinational Enterprises

Initial Assessment

Complaint submitted by Andrew and Robert Starkey
regarding Saab Australia and Saab Group, Sweden

(AusNCP case # 28)

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EXECUTIVE SUMMARY

1. In September 2021, the Australian National Contact Point (**AusNCP**) received a complaint from Andrew and Robert Starkey (**Notifiers**) against Saab Australia P/L (**Enterprise**). The Complaint, about an item of military equipment (**Ordnance**) that the Notifiers discovered on their traditional country, and their concerns about safety and heritage impacts arising from that. The Ordnance was made by a company (Saab AB from Sweden), of which the Enterprise is a subsidiary. The Complaint alleges the Enterprise breached the *OECD Guidelines for Multinational Enterprises* (**Guidelines**).
2. The AusNCP Independent Examiner considered the six admissibility criteria of the Initial Assessment process. The following observations were made during the Initial Assessment and are detailed in the following statement.
 - 2.1 The admissibility criteria are sufficiently met for the purposes of Initial Assessment including the Notifiers' identity and interest in the matter; issues which are material and substantiated; and the link between the Enterprise's activities and the issues raised in the Complaint. There are relevant standards and laws in the Guidelines and related international standards about the issues raised by the Notifiers.
 - 2.2 The Independent Examiner considers the Complaint merits further consideration, and the AusNCP will offer its 'good offices' to the parties, to facilitate their engagement seeking to resolve the Complaint.
 - 2.3 There are two areas proposed for 'good offices', consistent with the Guidelines' purpose and effectiveness. These are: (a) the due-diligence policies and procedures of the Enterprise (and its parent company) regarding impacts of its products/services which could affect persons and places in testing areas like the Woomera Prohibited Area; and (b) any proposed changes in the companies as a result of learning of the Ordnance being found by the Notifiers.
3. Other aspects of the Complaint are not appropriate for good offices, being:
 - 3.1 questions about the parent company's future supply of Ordnance to the Australian Government (**Government**), or relations between those two parties more generally;
 - 3.2 questions about heritage impact and compensation regarding Kokatha culture, without the involvement of the Kokatha Aboriginal Corporation; and
 - 3.3 the Government's actions in using this particular piece of Ordnance, and actions about its removal or rehabilitation.
4. This Initial Assessment is not a determination on the merits of the claims presented, nor is it an assessment of whether the Enterprise's actions are consistent with the OECD Guidelines.
5. This statement is available on the AusNCP website at www.ausncp.gov.au.

INITIAL ASSESSMENT

Parties, background, and outcomes sought

6. On 28 September 2021, lawyer John Podgorelec submitted a complaint to the AusNCP, on behalf of the Notifiers, alleging a multinational enterprise had contravened the Guidelines.¹ The Complaint arises from the Notifiers' discovery of the Ordnance (and their safety and heritage concerns from that) on their traditional country around Lake Hart West, in southern central Australia. Lake Hart West is within a larger area regulated by the Government, known as the 'Woomera Prohibited Area'. The Woomera Prohibited Area, which is about 450 kilometres north-west of Adelaide and 122,000 sq kilometres in size, is used by the Government for weapons testing.²
7. The Government, through the Department of Defence (**Defence**), has arrangements with Aboriginal groups about their use and interests in the area. The Government also has arrangements with various enterprises to provide goods or services which may be used in the Woomera Prohibited Area. The Ordnance had been built by a parent-company of the Enterprise (which is an Australian registered company, wholly owned by a public company of another country).
8. The Notifiers allege the Enterprise as breaching the Guidelines in failing 'to undertake ... or ... maintain adequate human rights due diligence which could prevent their product from being used in potential human rights violations ...[and to] respect ... the Notifiers' [human rights] to protect and preserve the integrity of heritage sites for which they have custodial responsibilities'. The Notifiers sought to engage with the Enterprise. After not obtaining the outcomes sought, the Notifiers lodged the Complaint with the AusNCP. The Notifiers sought, through a 'good offices' process, for the Enterprise to commit to:
 - 8.1 'fund an independent heritage and human rights impact assessment of the ...areas' where the Ordnance (and its equivalents) are used, including 'to map the full extent of impacts and to develop recommendations to address these'
 - 8.2 'Provide full compensation for heritage site damage or loss and all fees and costs incurred as a consequence of the Enterprises' harmful impacts'.
 - 8.3 'Immediately suspend deliveries of [the Ordnance] to Defence and make a formal request to Defence to suspend all testing' until assessments have occurred
 - 8.4 'Contribute to a substantial fund to help address the loss caused by the ham to the heritage sites and to assist long-term heritage site protection'.
9. The Enterprise's position was that the Ordnance's construction and provision to the Government occurred through its parent company (Saab AB which is part of Saab Group), meaning the Enterprise had insufficient connection for the Complaint. Nevertheless, the Enterprise had engaged with Defence and its parent company in relation to the issues raised, and responded to the Complaint. The Enterprise

¹ Adhering Governments, *OECD Guidelines for Multinational Enterprises* (2011 Edition, 25 May 2011) (**Guidelines**).

² Australian Government <https://www.defence.gov.au/bases-locations/sg/woomera/about> (accessed 16 December 2021).

contended the Complaint should be refused by the AusNCP, on the basis of the Enterprise's position that:

- 9.1 the supply of the Ordnance to the Government was 'subject to strict export control laws... to prevent the use of regulated products in harmful ways', including Swedish export controls which requires human rights issues to be considered, and that there are also arrangements between the parent company and Defence about the use of equipment including the Ordnance,
 - 9.2 there is also 'an agreement in place between Defence' and relevant Aboriginal groups, through which Aboriginal groups have 'consented to the testing of war materials within the Woomera Prohibited Area' (although the Enterprise is not a party to those agreements),
 - 9.3 '[I]t appears that Defence, as the owner of the ... Ordnance, had authorisation from the [relevant Aboriginal group] to test the ... Ordnance within the Woomera Prohibited Area',
 - 9.4 'On that basis and noting that [the parent company] held necessary authorisations to supply the ... Ordnance to Defence, it is difficult to understand how [the company] could (or should) have taken action to prevent this authorised use',
 - 9.5 the Enterprise had, nevertheless, endeavoured to assist Defence and the Notifiers in dealing with the Ordnance, and
 - 9.6 the company 'has done all it reasonably can to bring the matter to those best placed to resolve the issue'.
10. The points made by the parties, in their submissions and material, have been considered by the Independent Examiner in conducting the Initial Assessment. These are assessed in accordance with the AusNCP procedures (explained below), and the Independent Examiner understands the parties' positions do not represent the Government.³
11. While the Initial Assessment was underway, the Notifiers expanded their Complaint to also include Saab AB and Saab Bofors Dynamics (part of the Saab Group) in addition to the Enterprise. The Notifiers also engaged with Defence, who arranged for the Ordnance to be removed in January 2022.

Assessment criteria

12. The NCP complaint process is about the Guidelines' expectations of *enterprises*. The Guidelines require an NCP, when it receives a complaint, to conduct an 'initial assessment'. This is to determine whether the issues are 'bona fide' (in other words real or authentic) and relevant to the implementation of the OECD Guidelines (in other words within their scope of coverage).⁴ The AusNCP has procedures,⁵ mirroring the

³ Defence requested its following comment be noted in relation to para 9.3 (above): 'Defence notes this is the Enterprise's perspective however, this does not reflect the full extent of Defence's processes. Defence has operational documents such as the Range Standing Orders for the operation of the Woomera Prohibited Area and a Heritage Management Plan that outlines protection of cultural heritage and robust consultation requirements with Traditional Owners'.

⁴ Secretary-General of the OECD, *Guide for National Contacts Points on the Initial Assessment of Specific Instances* (OECD Guidelines for Multinational Enterprises, , 5 (**OECD Initial Assessments Guide**)).

⁵ Australian National Contact Point *Complaint Procedures* (September 2019) Department of Treasury (**AusNCP Procedures**).

Guidelines, which specify that in deciding whether to accept a complaint, six admissibility criteria are assessed:

- 12.1 the identity of the party concerned and its interest in the matter;
 - 12.2 whether the issue is material and substantiated;
 - 12.3 whether there seems to be a link between the enterprise's activities and the issue raised in the complaint;
 - 12.4 the relevance of applicable law and procedures, including court rulings;
 - 12.5 how similar issues have been, or are being, treated in other domestic or international proceedings; and
 - 12.6 whether the consideration of the complaint would contribute to the purposes and effectiveness of the OECD Guidelines.⁶
13. The AusNCP engaged with the Notifiers (through their lawyer) and the Enterprise, from September to December 2021, in gathering more information and inviting submissions on various aspects. Detailed observations regarding each of the six admissibility criteria are contained in an Annexure to this Initial Assessment. The Annexure is not published with this Initial Assessment but has been provided to the parties, so that they are aware of the reasoning and detail. If, after the completion of any 'good offices' stage, any material in the Annexure remains relevant, that will be incorporated into the AusNCP's (public) Final Statement on completion of this matter. The main points in the Annexure are summarised in the paragraphs below.
14. Most of the admissibility criteria are sufficiently evident for the purposes of Initial Assessment. This includes: the Notifiers' identity and interest in the matter; issues which are material and substantiated; and a link between the Enterprise's activities and the issues raised in the Complaint. There are relevant laws (in the Guidelines and related international standards) about the issues raised by the Notifiers.
15. The Enterprise, as it is wholly foreign-owned, should ensure that the Guidelines' expectation are brought to the attention of relevant entities within its corporate structure.⁷ The Notifiers' expansion of the Complaint, to also include the parent company, reinforced there was a multinational enterprise here, subject to the Guidelines.
16. There are relevant links between the Enterprise and some issues raised in the Complaint, being the companies' policies and procedures regarding impacts from its products and operations. The Guidelines' due diligence process provides a relevant guide for (and assessment of) the companies' actions.
17. There are, however, other aspects in the Complaint which are quintessentially issues for government, and not appropriate to consider or progress through an NCP 'good offices' engagement between the Notifiers and the Enterprise. These include the actual use of the Ordnance, what occurs with the Ordnance after it has been used, and the future supply/relations between the Enterprise and the Government.

⁶ *AusNCP Procedures* (above n5), 4.10.

⁷ Similar to the reasoning at [19] of *Independent Examiner Complaint by Andrew Starkey and Robert Starkey regarding ElectraNet Pty Ltd* (Final Statement, 9 June 2021) Australian National Contact Point, Department of Treasury.

18. The Lake Hart West area, where the Ordnance was located, is part of the Kokatha Determination Area, which has been confirmed in court proceedings (involving the Notifiers and the Government). Those proceedings also indicated that the Kokatha Aboriginal Corporation is the appropriate party for companies to engage and agree with, concerning potential impacts in that area.⁸ This is also consistent with the October 2021 appointment of the Kokatha Aboriginal Corporation as a 'Recognised Aboriginal Representative Body' under heritage laws in South Australia, to 'ascertain and represent the views of all Traditional Owners in relation to the Aboriginal heritage within [its] area of responsibility'⁹ which includes the Lake Hart West area. There is an agreement between the Kokatha Aboriginal Corporation and Defence about heritage arrangements in the Woomera Prohibited Area, and the Notifiers provided extracts of this in their material to the AusNCP. The Notifiers are identified among the 'contributors and authors of' the agreement.
19. The Notifier has made a previous complaint to the AusNCP (about another company and area) about impacts to Kokatha country, much of which had been rejected on the basis there had been no explanation about the involvement or engagement of the Kokatha Aboriginal Corporation.¹⁰ In the current Complaint, the Notifiers provided no explanation of their engagement with the Kokatha Aboriginal Corporation, or proposed involvement if good offices went ahead. They are senior Kokatha men, and they suggest they are the appropriate (and only) party necessary to be involved. It may be correct that only certain persons 'speak' for some areas but, if it is, that is by virtue of Kokatha culture and is not simply because one individual says so. Where, after a transparent and accountable process, an Indigenous group has indicated that specific persons are the appropriate or only persons to speak for an area, then a third party (eg. company, government, NCP) has a justifiable basis for engaging only with those persons in relation to cultural impacts. In the absence of that process, and particularly where there appears to be agreement with the relevant group, third parties are justifiably cautious in seeking to engage about group/cultural impacts, in ways other than according to that agreement and with the group. To do so could prejudice the group's free, prior, informed consent and decisions.
20. The Notifiers' concerns about what happens with the Ordnance, and the future use of the relevant area, are best progressed through engagement with the Government (not the companies). The AusNCP commends the Notifiers' engaging with Defence about removal of the Ordnance. The AusNCP was pleased to learn, in January 2022, that the Ordnance had been safely removed.
21. The Independent Examiner considers there are two areas for potential good offices which would be consistent with the Guidelines' purpose and effectiveness. There are:
 - 21.1 the due-diligence policies and procedures within the Enterprise (and its parent company) regarding impacts of its products/services which could affect places and persons in testing areas like the Woomera Prohibited Area; and
 - 21.2 any proposed changes in the companies as a result of learning of the Ordnance being found by the Notifiers.

⁸ As explained at [37]-[38] of *Complaint by Starkeys regarding ElectraNet* (above n7).

⁹ See South Australian Department of Premier and Cabinet (<https://www.dpc.sa.gov.au/responsibilities/aboriginal-affairs-and-reconciliation/aboriginal-heritage/recognised-aboriginal-representative-bodies> accessed 30 January 2022) and Kokatha Aboriginal Corporation (<https://kokatha.com.au/recognised-aboriginal-representative-body-status/>, accessed 30 January 2022).

¹⁰ See [43]-[44] & [58] of *Complaint by Starkeys regarding ElectraNet* (above n7).

22. Other aspects of the Complaint are not appropriate for good offices, being:
 - 22.1 questions about the parent company's future supply of Ordnance to the Government, or relations between those two parties more generally - these are not appropriate for AusNCP oversight;
 - 22.2 questions about heritage impact and compensation for Kokatha culture without the involvement of the Kokatha Aboriginal Corporation (or indication as to their position), as good offices between the Notifiers and the Enterprise about these matters would be inappropriate; and
 - 22.3 the Government's actions in using this particular piece of Ordnance, and actions about its removal or rehabilitation – these are matters quintessentially within Government control and not something which the Enterprise can address.

Conclusion

23. In the circumstances, the Independent Examiner considers the Complaint merits further consideration. The AusNCP will offer its 'good offices', within the Guidelines, to facilitate the exchange of information between the parties (which can include conciliation, formal mediation or facilitated discussions) with the aim of arriving at a mutually agreed resolution.
 - 23.1 Any engagement would be facilitated by an AusNCP Independent Examiner and focus on the issues identified in paragraph 21 above.
 - 23.2 If, through the good offices, the parties reach an agreement the AusNCP will then publish a final statement with the results of the proceedings. Information regarding the *contents* of the discussions and the agreement would only be published with the consent of the parties.
 - 23.3 If no agreement is reached, or one of the parties is not willing to take part in the proceedings, the AusNCP's procedures require that to be identified in a published final statement.
24. A draft of this Initial Assessment was provided, for comment, to the AusNCP's Governance and Advisory Board (and also to Defence, given some of the factual circumstances involved Defence personnel), and then to the parties. All comments were considered by the Independent Examiner, in finalising this Initial Assessment, with the decision remaining the responsibility (and discretion) of the Independent Examiner.
25. The AusNCP Procedures specify that 'acceptance or rejection of a complaint is not an assessment of whether the enterprise's actions are consistent with the OECD Guidelines'.¹¹

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¹¹ AusNCP Procedures (above n5), 4.16.



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