



Australian National Contact Point  
for the OECD Guidelines for Multinational Enterprises

# Final Statement

---

Complaint by Andrew Starkey and Robert Starkey regarding  
ElectraNet Pty Ltd

Published Wednesday, 9 June 2021

## Disclaimer

The information contained within this document is intended to inform the reader of the general processes and undertakings arising from a specific instance complaint raised with the Australian National Contact Point for the OECD Guidelines for Multinational Enterprises. It is made available on the understanding that the Australian Treasury, as a result of providing this information, is not engaged in providing professional or legal advice, nor does it accept any responsibility for the accuracy or completeness of any material contained herein. Readers should exercise their own judgement with respect to interpretation. This material includes the views of third parties, which do not necessarily reflect the views of the Commonwealth, or indicate its commitment to a particular course of action. Links to other websites and listings of other people or organisations are included for convenience and do not constitute endorsement of those sites, products or services. The Commonwealth Government respects the privacy of personal and commercially sensitive information provided by parties, as per the requirements of the Privacy Act 1988 and the Freedom of Information Act 1982.

© Commonwealth of Australia 2021

This publication is available for your use under a [Creative Commons Attribution 3.0 Australia](https://creativecommons.org/licenses/by/3.0/au/legalcode) licence, with the exception of the Commonwealth Coat of Arms, the Treasury logo, photographs, images, signatures and where otherwise stated. The full licence terms are available from [http://creativecommons.org/licenses/by/3.0/au/legalcode](https://creativecommons.org/licenses/by/3.0/au/legalcode).



Use of Treasury material under a [Creative Commons Attribution 3.0 Australia](https://creativecommons.org/licenses/by/3.0/au/legalcode) licence requires you to attribute the work (but not in any way that suggests that the Treasury endorses you or your use of the work).

*Treasury material used 'as supplied'.*

Provided you have not modified or transformed Treasury material in any way including, for example, by changing the Treasury text; calculating percentage changes; graphing or charting data; or deriving new statistics from published Treasury statistics — then Treasury prefers the following attribution:

*Source: The Australian Government the Treasury*

### **Derivative material**

If you have modified or transformed Treasury material, or derived new material from those of the Treasury in any way, then Treasury prefers the following attribution:

*Based on The Australian Government the Treasury data*

### **Use of the Coat of Arms**

The terms under which the Coat of Arms can be used are set out on the It's an Honour website (see [www.itsanhonour.gov.au](http://www.itsanhonour.gov.au)).

### **Other uses**

Enquiries regarding this licence and any other use of this document are welcome at:

Manager, Media Unit  
The Treasury  
Langton Crescent  
Parkes ACT 2600  
Email: [medialiaison@treasury.gov.au](mailto:medialiaison@treasury.gov.au)

# CONTENTS

---

<b>EXECUTIVE SUMMARY .....</b>	<b>4</b>
<b>COMPLAINT: PARTIES AND POSITIONS.....</b>	<b>5</b>
<b>AusNCP PROCEEDINGS.....</b>	<b>7</b>
<b>Initial Assessment.....</b>	<b>7</b>
Preliminary issues .....	7
Criterion 1: Parties' identities and interests .....	9
Criterion 2: Is the issue material and substantiated? .....	9
Criterion 3: Link between the enterprise's activities and the issue .....	10
Criterion 4: Applicable law and procedures.....	10
Criterion 5: Treatment of similar issues in domestic or international proceedings .....	11
Criterion 6: The purposes and effectiveness of the OECD Guidelines .....	15
<b>Proposed Good Offices.....</b>	<b>16</b>
<b>Further Examination.....</b>	<b>17</b>
<b>CONCLUSIONS AND RECOMMENDATIONS .....</b>	<b>20</b>
<b>General observations from the OECD Guidelines .....</b>	<b>20</b>
<b>Specific observations and recommendations .....</b>	<b>21</b>
<b>ANNEXURES.....</b>	<b>24</b>
<b>Map showing relevant locations.....</b>	<b>24</b>
<b>Overview of the AusNCP and its role.....</b>	<b>25</b>
<b>Schedule of events .....</b>	<b>27</b>
<b>Endnotes .....</b>	<b>28</b>

# EXECUTIVE SUMMARY

---

1. In October 2020, the Australian National Contact Point (**AusNCP**) received a complaint (**Complaint**) on behalf of Andrew Starkey and Robert Starkey (**Starkeys**) against ElectraNet Pty Ltd (**ElectraNet**). The Complaint alleged that ElectraNet's construction of electricity facilities in South Australia damaged Aboriginal heritage sites (for which the Starkeys have traditional custodial responsibilities) contrary to the *OECD Guidelines for Multinational Enterprises (OECD Guidelines)*.
2. The Independent Examiner assessed the Complaint, engaged with the parties, and determined to accept some aspects of the Complaint. In February 2021, the Independent Examiner published its Initial Assessment and offered its 'good offices' process under the OECD Guidelines, to assist the parties' engagement and focus on ElectraNet's governance concerning one site.
3. ElectraNet was unwilling to engage in good offices, and so the Independent Examiner has assessed the Complaint and made the following assessment and recommendations.
  - 3.1 The Starkeys demonstrated they have relevant interest in the matter, and there is link between ElectraNet and the issues raised in the Complaint.
  - 3.2 Given the multinational aspects to ElectraNet's shareholding and management, it was inappropriate to reject the Complaint as being outside the scope of the OECD Guidelines.
  - 3.3 The Guidelines outline expectations on enterprises where their actions impact Indigenous people. Relevant here are standards about group rights, which are not determined by the presence or absence of agreement with individual Indigenous persons.
  - 3.4 The construction affecting *most* sites (all the sites except one) occurred after an agreement with Indigenous bodies with the authority to represent those Aboriginal people with rights to maintain and protect sites of cultural significance in the area. There was no indication, from those bodies, of concerns with the agreements nor ElectraNet's actions. The Complaint was not accepted concerning those sites.
  - 3.5 However one location (Davenport Mythological Site) was outside those areas. Regarding the Davenport Mythological Site, nothing has been provided to the Independent Examiner indicating ElectraNet engaged with the Starkeys consistently with the expectations of the Guidelines.
  - 3.6 ElectraNet should ensure familiarity with the OECD Guidelines and procedures, and that throughout its operations, ElectraNet acts in accordance with those principles.
4. This statement is available on the AusNCP website at [www.ausncp.gov.au](http://www.ausncp.gov.au).

## COMPLAINT: PARTIES AND POSITIONS

---

5. On 28 October 2020, the AusNCP received a complaint under the OECD Guidelines<sup>1</sup> from the Starkeys, through their lawyer John Podgorelec. The Complaint was against the company ElectraNet.
6. Much of the Complaint repeated material and statements the Starkeys had already made to a national Parliamentary inquiry about impacts on Indigenous heritage. That inquiry had published the submission by the Starkeys<sup>2</sup> and also a submission in response by ElectraNet.<sup>3</sup> Those documents were also considered in assessing the Complaint.
7. The Complaint alleged that, in constructing an electricity transmission line for OZ Minerals, ElectraNet 'destroyed or disturbed at least 20 Aboriginal heritage sites' for which the Starkeys 'have traditional custodial responsibilities'. The Complaint acknowledged that ElectraNet consulted with a relevant Aboriginal group (Kokatha Aboriginal Corporation or **KAC**) regarding 'the majority of sites'. However the Complaint asserted that 'The failure of the Enterprise (or any of its project partners) to consult the registered holders of the confidential site information [the Starkeys], at any stage of construction, confirms that the required standard of due diligence [in the OECD Guidelines] was not met'. In the Complaint, the Starkeys sought commitments from ElectraNet to fund a heritage and human rights impact assessment, contribute to a fund to assist long-term heritage site protection, and provide compensation for the loss and harm from the impacts.
8. The Complaint alleged that ElectraNet 'failed to observe ... the following sections of the Guidelines:  
  
*Ch. II General Policies*  
  
*Paras 10 & 14 - for failing to a) "carry out risk-based due diligence" and b) "engage with relevant stakeholders"*  
  
*Para 2 - for failing to "respect... internationally recognised human rights"*  
  
*Paras 11-13 - failing to avoid causing or contributing to adverse impacts and address such impacts*  
  
*Ch. IV Human Rights*  
  
*Paras 1-3 - for failing to respect, prevent and avoid infringing human rights and failing to address the same*  
  
*Para 5 - for failing to "carry out human rights due diligence"*  
  
*Para 6 - for failing to "[remediate]... adverse human rights impacts... that they have caused or contributed to... ." '*
9. ElectraNet was notified that a complaint had been made and provided with a copy of the Complaint.

10. ElectraNet explained, in response to the Complaint and in its submission to the Parliamentary inquiry, that:

*The Project traverses the native title determination land of three native title groups, namely Kokatha Aboriginal Corporation (KAC), Barngarla Determination Aboriginal Corporation (BDAC) and Nukunu Wapma Thura Aboriginal Corporation (Nukunu)...*

*'[The South Australian] Department for Premier and Cabinet – Aboriginal Affairs and Reconciliation (DPC-AAR) identified the relevant traditional owner groups representing the Kokatha people, Barngarla people and Nukunu people in response to the search of the central archive Register of Aboriginal Sites and Objects ...*

*The Project was undertaken subject to heritage protection and/or native title agreements in accordance with the advice provided by DPC-AAR... [and] An agreement between OZ Minerals and KAC is the relevant agreement for the period of construction...*

*Detailed Cultural Heritage Management Plans were developed in collaboration with the heritage teams nominated by KAC, BDAC and or Nukunu and implemented for the Project [which included] In-field flagging-off of all cultural heritage sites by traditional owner monitors prior to ground disturbing works to physically demarcate the sites; In-field cultural heritage monitoring in line with the recommendations in the cultural heritage survey report; [and] In the Kokatha Native Title Determination Area this included monitoring of all ground. ...*

*[T]he conduct of heritage surveys in advance of any ground disturbing works and monitoring of infield construction work [was] to ensure the proper identification and protection of Aboriginal sites, objects or remains in line with the abovementioned agreements and as required by the [South Australian] Aboriginal Heritage Act 1988.*

11. A map, in the Annexures (page 23), shows relevant locations drawn from the parties' materials and publicly available information.<sup>4</sup>

## Initial Assessment

12. When an NCP receives a complaint under the OECD Guidelines, the NCP should conduct an 'initial assessment'.<sup>5</sup> 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).<sup>6</sup> The AusNCP has procedures,<sup>7</sup> mirroring the OECD Guidelines, which specify that in deciding whether to accept a complaint, six admissibility criteria are assessed:
  - 12.1 the identity of the party [who submitted the complaint] 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.<sup>8</sup>
13. The six admissibility criteria are 'interrelated and necessitate examination as a whole'.<sup>9</sup> An initial assessment should be undertaken in a manner which promotes accessibility, predictability, transparency, impartiality, and compatibility with the OECD Guidelines.<sup>10</sup>
14. The Independent Examiner engaged with the Starkeys (through their lawyer) and ElectraNet, from October to December 2020, in gathering more information and inviting submissions on issues relevant to the Complaint. In early 2021, the Independent Examiner assessed the Complaint, and decided to accept *some* aspects by reference to the six admissibility criteria, as outlined below. A summary of the Initial Assessment was published by the AusNCP in February 2021. The reasoning of the Initial Assessment criteria and some further explanation is provided below to explain the application of the Guidelines in the circumstances of this complaint.

### *Preliminary issues*

15. A complaint under the OECD Guidelines is *not* about compliance nor breach of Australian laws but, instead, meeting the expectations in the Guidelines. Actions which parties take, in following Australian law, *can* also be relevant to meeting the Guidelines. Equally, rulings by Australian courts and tribunals *may* identify matters relevant to meeting the Guidelines. But the Guidelines' complaint process is not an exercise of determining compliance with domestic law.

Accordingly, the parties' assertions about consistency or breach of laws (including the *Aboriginal Heritage Act 1988*, *Native Title Act 1993*, Australian corporate law and negligence law) are not relevant to determining whether the Complaint meets the six admissibility criteria. Nor are these determinative of whether ElectraNet has complied with the OECD Guidelines.

16. There was a preliminary issue of whether the OECD Guidelines apply given this was an Australian corporation and the events complained of occurred in Australia. In short: is there a relevant 'multinational' aspect? Both parties addressed this question.

- 16.1 The Starkeys asserted that ElectraNet is 80% owned by international investors/entities and that 7 of 11 positions on its management board are 'representing' international investors/entities.

- 16.2 ElectraNet's position is that it is an Australian-registered corporation with no offices or operations outside South Australia. ElectraNet also explained, regarding foreign parties in its shareholding and management, that: 'ElectraNet's business operates under the governance of a board of directors, which represent the shareholding entities, as well as an independent chairman [and that it has] corporate governance arrangements in place which regulate the relationship between management, the board of directors and the shareholders'.<sup>11</sup>

17. ElectraNet's website, under 'Ownership and Governance',<sup>12</sup> indicated that majority control and ownership of ElectraNet was multinational. In its response to a draft Initial Assessment, ElectraNet maintained that 'no multinational enterprise exists' and so 'the OECD Guidelines do not apply in this case'. ElectraNet's letter also stated:

*ElectraNet's business operates under the governance of a board of directors which represent the shareholding entities. ...*

*[O]perations [are] undertaken by management with the guidance and under direction of the board comprising representative directors from each shareholder.*

18. Some NCP decisions have rejected complaints on the basis the relevant entity is not multinational.<sup>13</sup> The OECD's *Guide on Initial Assessments* notes 'cases which do not concern multinational enterprises ... may be outside the scope of the mechanism'.<sup>14</sup> However, other cases confirm the Guidelines can apply to NCPs examining activities of companies incorporated within their own country because the particular events involve a multinational aspect.<sup>15</sup> The Guidelines specifically avoid defining 'multinational enterprise',<sup>16</sup> instead emphasising:

*The Guidelines are not aimed at introducing differences of treatment between multinational and domestic enterprises; they reflect good practice for all. Accordingly, multinational and domestic enterprises are subject to the same expectations in respect of their conduct wherever the Guidelines are relevant to both.*<sup>17</sup>



*The Guidelines are addressed to all the entities within the multinational enterprise (parent companies and/or local entities). According to the actual distribution of responsibilities among them, the different entities are expected to co-operate and to assist one another to facilitate observance of the Guidelines.*<sup>18</sup>

19. In this case, the majority of controlling interests in ElectraNet mean that, at some stage in its governance and activities, there should be consideration of the issues and expectations in the OECD Guidelines. The Guidelines apply throughout corporate structures, and do not envisage different standards depending on a particular entity's management. It would be inappropriate to make conclusions about where, within ElectraNet's management and shareholding, the OECD Guidelines apply. Accordingly, the Complaint was not refused on this aspect.

### *Criterion 1: Parties' identities and interests*

20. The first admissibility criteria is 'the identity of the party concerned and its interest in the matter'. The parties submitting a complaint 'should have some interest in the matters they raise in their submissions'.<sup>19</sup>
21. The Starkeys have been recognised in court proceedings and decisions as having traditional, cultural interests in the land identified in the Complaint.<sup>20</sup> The Starkeys provided additional material, describing their connection and the impact they have incurred as a result of ElectraNet's activities. This demonstrated the Starkeys' interest in raising the Complaint. There is a separate issue about *group* identity and interests – and ElectraNet's engagement with these – which is addressed under criteria five and six.

### *Criterion 2: Is the issue material and substantiated?*

22. The second admissibility criteria, 'whether the issue is material and substantiated', assesses whether 'the issues are plausible and related to the application of the OECD Guidelines, and that there is a plausible link between the enterprise's activities and the issues raised'.<sup>21</sup> The materiality of issues is assessed against the recommendations and standards of the OECD Guidelines, not in relation to Australian law.<sup>22</sup> There is no need, at the initial assessment stage, for a complaint to provide formal evidence of a causal link between the enterprise and the issues.<sup>23</sup>
23. The Starkeys provided various information and material describing impacts arising from ElectraNet's activities. ElectraNet did not contest there was construction at various locations but describes this as having occurred after, and following procedures in, agreements with relevant Aboriginal groups. The matter is sufficiently substantiated for an Initial Assessment of the Guidelines, and the implications of the agreements are addressed under criteria five and six.

### *Criterion 3: Link between the enterprise's activities and the issue*

24. The third criteria to be examined is 'whether there seems to be a link between the enterprise's activities and the issue raised in the complaint'. There was material here linking ElectraNet's activities to the issues raised in the Complaint, identified in the paragraphs above.
25. A key issue, in determining ElectraNet's compliance with the Guidelines, was the company's engagement and agreement with relevant Indigenous groups. The Starkeys noted that KAC 'endorsed the *ElectraNet Electricity Infrastructure and Access Deed* (Infrastructure Deed) via community meeting in December 2018. At the meeting the community was not made aware of any sites that would be affected by the transmission line construction nor was there any consent to interfere with any site'. ElectraNet was invited to provide copies or extracts of the relevant documents (with the Independent Examiner offering to enter appropriate confidentiality arrangements) but opted not to do so.<sup>24</sup> As a result, it was not possible to determine whether the relevant engagement and agreements with various parties were consistent with the OECD Guidelines. Participation in the Good Offices procedure could have assisted to explore this issue further and in a confidential setting. There was a sufficient link between the enterprise's activities and the issues, to satisfy Initial Assessment.

### *Criterion 4: Applicable law and procedures*

26. 'The relevance of applicable law and procedures, including court rulings' is the fourth of the admissibility criteria. The Guidelines contain a broad due-diligence expectation of enterprises, explained in the OECD's 2018 Guidance:

*Enterprises should 'carry out risk-based due diligence ... to identify, prevent and mitigate actual and potential adverse impacts', [and should] 'Engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities'.*<sup>25</sup>

27. The OECD Guidelines outline human rights expectations of enterprises<sup>26</sup> which, in the context of impacts concerning Indigenous groups, incorporate various international materials.<sup>27</sup> The OECD has a 2017 publication *Engaging with indigenous peoples* which is annexed to its 'Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector' and is relevant to developments even if they are not strictly extractives operations.<sup>28</sup>
28. Guidance from the OECD's *Engaging with indigenous peoples*, and other NCP cases, indicates that corporate due diligence and engagement with Indigenous peoples should be informed by standards from:

28.1 the *Universal Declaration of Human Rights*;<sup>29</sup>

- 28.2 the international treaties on civil rights and eliminating racial discrimination (and their subsequent explication by treaty-monitoring bodies);<sup>30</sup>
- 28.3 the *UN Declaration on the Rights of Indigenous Peoples (UNDRIP)*<sup>31</sup> and the *UN Guiding Principles on Business and Human Rights (UNGPs)*;<sup>32</sup>
- 28.4 International Labour Organisation Convention 169 *Convention concerning Indigenous and Tribal Peoples in Independent Countries*;<sup>33</sup>
- 28.5 the *Convention on Biological Diversity* and its *Akwé: Kon Guidelines* about cultural, environmental and social impact assessments;<sup>34</sup> and
- 28.6 performance standards of the International Finance Corporation,<sup>35</sup> such as *Performance Standard 7: Indigenous Peoples*.<sup>36</sup>
29. There is an Australian national legal system about Indigenous customary rights and title in land (where that customary title has been maintained since the imposition of British sovereignty) and the interaction of that title with other rights and activities on the land (such as construction and industrial developments). This is regulated through the national *Native Title Act 1993*.<sup>37</sup> There are also Australian laws and procedures about protection of Indigenous heritage, both at the national level<sup>38</sup> and a sub-national level.<sup>39</sup>
30. The NCP complaint process does not examine compliance with domestic law<sup>40</sup> because that is for domestic authorities,<sup>41</sup> and compliance with domestic law does not necessarily ensure consistency with the requirements of the OECD Guidelines.<sup>42</sup> Accordingly, the Starkeys' concerns that ElectraNet may not have complied with the Aboriginal heritage protection law of South Australia is not an issue which will be examined in an OECD Guidelines complaint.

### *Criterion 5: Treatment of similar issues in domestic or international proceedings*

31. The fifth admissibility criteria is 'how similar issues have been, or are being, treated in other domestic or international proceedings'. This assists in ensuring relevant precedents are known, to promote consistency and avoid duplication.
32. Relevant law and procedures were summarised above. A significant issue from these, relevant here, is expectations around 'obtaining the Free, Prior and Informed Consent [**FPIC**] of indigenous peoples affected by the effects of works of high environmental and social impact'.<sup>43</sup> The Swedish and Norwegian NCPs have noted some ambiguity around FPIC's requirements,<sup>44</sup> but also that FPIC has an accepted and understood core which should be applied.

*[T]here is no international consensus on all aspects of the requirement for FPIC. However, it is undisputed that an enterprise engaged in a project that will affect indigenous peoples' rights is expected to enter into fair and proper negotiations with a view to obtaining the other party's free, prior and informed consent. ... [C]onsultations are a continuing process that must be upheld and adapted so that new circumstances are also*

*addressed, for example that the consultations must be adapted when it subsequently emerges that the impacts of the wind power development are greater than originally expected.*<sup>45</sup>

33. A recent decision regarding FPIC was published by the Committee on the Elimination of Racial Discrimination in December 2020.<sup>46</sup> The Committee ruled the process of two mineral grants in Sweden contravened the treaty against racial discrimination.<sup>47</sup> Relevant here, the Committee made the following observation.

*Development and exploitation of natural resources, as a legitimate public interest, does not absolve States parties from their obligation not to discriminate against an indigenous community that depends on the land in question by mechanically applying a procedure of consultation without sufficient guarantees or evidence that the free, prior and informed consent of the members of the community can be effectively sought and won.*<sup>48</sup>

34. Previous NCP cases show that whether FPIC exists is not determined simply by identifying some agreement reached with an Indigenous party. In particular, an agreement with only *some* groups or covering *some* activities/land, but not encompassing *all* the land and Indigenous peoples impacted, may not constitute sufficient compliance with the OECD Guidelines.<sup>49</sup>

35. Equally, however, the fact that some individuals within an Indigenous group disagree with the group's position does not preclude the possibility of the group's FPIC.

35.1 The FPIC provisions in UNDRIP are expressed as the right of 'indigenous peoples,'<sup>50</sup> not as the right of an individual.<sup>51</sup> UNDRIP also emphasises the primacy of the group regarding the responsibilities of individuals.<sup>52</sup>

35.2 The Human Rights Committee (which examines compliance with the International Covenant on Civil and Political Rights or **ICCPR**) examined a complaint by some Indigenous people against a nationwide negotiation and settlement of Indigenous fishing rights and arrangements in New Zealand.<sup>53</sup> The Committee ruled the ICCPR rights had not been breached, largely because of the comprehensive negotiations and approval involving the broader Maori population.<sup>54</sup>

35.3 The International Finance Corporation has a Performance Standard, and related commentary, regarding Indigenous Peoples. These address the complexity of group FPIC, and indicate FPIC can exist occur even where there may be some internal disagreement.<sup>55</sup>

36. Australia's native title law also emphasises the importance of *group* rights and decision-making.

- 36.1 Native title claims must include *all* persons having traditional rights in the area.<sup>56</sup> When a court has determined that native title rights exist in an area (either by all parties' agreement or after a contested hearing) the court must identify the content of those rights and who holds those rights (which are invariably communal rights, held by a group<sup>57</sup>).
- 36.2 Where the court's decision has recognised native title rights, the group must then nominate an Aboriginal Corporation to represent them in dealings with other parties.<sup>58</sup> That Aboriginal Corporation has 'responsibility for the stewardship of property held for the native title holding group',<sup>59</sup> and there are regulatory requirements when it undertakes any consultation and consent.<sup>60</sup>
- 36.3 Where a native title group has had the opportunity to consider and decide on a matter, and has done so, the group's decisions have been upheld by courts even where there has been dissent within the group.<sup>61</sup> Decisions need not require consensus of everyone in the entire group, *provided* all persons in the group had sufficient opportunity to be involved in the decision-making process.<sup>62</sup>
- 36.4 It is important to reiterate: the OECD Guidelines, and their complaint processes, are not about determining compliance with domestic law. However, processes and actions undertaken as part of domestic law can create relevant facts or aspects to consider in determining compliance with the OECD Guidelines. That is the situation here, as explained below.
37. The sites identified in this Complaint are within two areas of differing status under Australia's native title system. As apparent from the map (*Annexure*, p24), only one of the sites identified by the Starkeys lies outside the Kokatha Determination Area which was established by a 2014 court decision.<sup>63</sup>
- 37.1 The 2014 decision finalised six years of court proceedings which Andrew Starkey (and another person) commenced on behalf of the Kokatha People.
- 37.2 The Court's decision, to recognise the native title rights of the Kokatha People, was made on terms agreed by all parties to the litigation,<sup>64</sup> including Andrew Starkey, OZ Minerals, and the South Australian Government. The Court noted these parties consented to the terms of the decision, and that they had 'independent and competent legal advice in the proceeding'.<sup>65</sup>
- 37.3 The Court's orders – agreed by the parties – resulted in the legal recognition and protection of native title rights (including to maintain and protect sites of cultural significance<sup>66</sup>) 'for communal use',<sup>67</sup> and that KAC is to 'act as agent or representative of the common law holders in respect of matters relating to the native title'.<sup>68</sup>

37.4 The Court confirmed its decision – like all native title determinations – ‘will apply not just between the parties who have participated in the proceeding, but to all the people of Australia’.<sup>69</sup>

38. This makes KAC the appropriate party for companies to engage and agree with, concerning potential impacts to sites of cultural significance in the Kokatha Determination Area. ElectraNet's construction relevant to the sites in Kokatha determination area occurred after an agreement with the KAC. In such a situation, the relevant international standards and Australian law weigh against considering complaints *from individuals* about impacts on that *group's* rights (such as impacts on sites and the group culture). Accordingly, the complaint is not accepted in relation to the sites in the Kokatha Determination Area.
39. However there is one area of land within the Complaint for which KAC does not have authority under the 2014 Court determination. The Starkeys identified the site as the ‘Davenport Mythological Site’, at the southern end of the power line route, near Port Augusta. This site is in an area where there are current native title proceedings in the court, with different parties contesting the native title rights.<sup>70</sup> The Court has dismissed a claim over the area as ‘Kokatha country’,<sup>71</sup> but Andrew Starkey has been accepted by the Court as an appropriate party to the proceedings because he has Indigenous cultural interests in that area including ‘custodial responsibilities in sites of significance’.<sup>72</sup> The Court specifically indicated that these interests can be separate to native title rights under Australia's native title law, observing ‘there may be more than one Aboriginal group having interests in the preservation of sites, objects or information of cultural or historical significance in relation to the same area’.<sup>73</sup> Those types of rights/interests are among those meriting attention under the OECD Guidelines (informed by human rights standards identified above).
40. ElectraNet indicates there are agreements with the Barnjarla Determination Aboriginal Corporation and Nukunu Wapma Thura Aboriginal Corporation. From the publicly available information, however, it is not apparent either of those organisations are necessarily relevant parties concerning the Davenport Mythological Site.<sup>74</sup> The Nukunu Corporation is the corporation identified with the Nukunu determination<sup>75</sup> which covers areas to the east and south of Davenport Mythological Site; and the Barnjarla Corporation is the corporation identified with the Barnjarla determination<sup>76</sup> which covers areas west, north and south of the Davenport Mythological Site.
41. Thus, in considering ‘treatment of similar issues in domestic or international proceedings’ it is apparent there are two different categories.
  - 41.1 Some involves land where Australian court processes have determined and recognised native title, identified the relevant Indigenous group, and endorsed the body nominated by that group to act on their behalf in dealings with companies and others. For these areas, domestic and international proceedings indicate it is appropriate for ElectraNet to engage with the nominated corporate body regarding Indigenous cultural impacts in those areas.



41.2 There is, however, some land involved in ElectraNet's work which was outside these determined areas. The Starkeys have some cultural interest and connection here (para 39 above). For this area, domestic and international proceedings indicate ElectraNet should engage with the Starkeys regarding impacts in those areas.

### *Criterion 6: The purposes and effectiveness of the OECD Guidelines*

42. The final admissibility criteria is 'whether the consideration of the complaint would contribute to the purposes and effectiveness of the OECD Guidelines'. This criteria 'is intentionally broad and can encompass a wide range of issues'.<sup>77</sup> This includes considering 'whether providing good offices through facilitating an exchange between the parties, discussing the issues and expectations of the Guidelines with the enterprises in question, or developing meaningful recommendations with respect to enterprise conduct would support or encourage the resolution of the issues.'<sup>78</sup>
43. It appears there has been considerable engagement and agreement between ElectraNet (or OZ Minerals) and KAC about avoiding or managing impacts in the Kokatha determination area. Much of what is explained in ElectraNet's response, concerning the agreement and arrangements with KAC in the Kokatha determination area, is the type of activity envisaged by due diligence under the *OECD Guidelines*. The Independent Examiner raised, with both parties, whether KAC had any issues of concern in relation to the *OECD Guidelines*.<sup>79</sup> The Starkeys asserted that KAC 'was not authorised to speak for the senior men' and 'the fact that they [the Starkeys] were not consulted in respect of works being undertaken in and around the relevant sites was not in accordance with Kokatha traditional law and custom and decision making processes'. ElectraNet did not address this aspect in its communication with the Independent Examiner. There has been no information provided to the Independent Examiner indicating that KAC has concerns about the agreement or its implementation.
44. The Starkeys have raised concerns about those arrangements and the KAC. Differences about internal governance and decision-making by KAC are matters more appropriately addressed by procedures of the KAC and Kokatha culture. These are not amenable for engagement with a company in an NCP 'good offices' process. Accordingly, for those sites within the Kokatha determination and where there is agreement with the KAC, the Complaint is rejected. It would not contribute to the purposes and effectiveness of the *OECD Guidelines* for those matters to be the subject of good offices.
45. As noted above, however, the Davenport Mythological Site is outside the Kokatha Determination area. The parties have different understandings about the consultation and arrangements concerning the Davenport Mythological Site.

- 45.1 The Starkeys' complaint states they 'have traditional custodial responsibilities' regarding the site, that they 'hold the confidential information used to support original registration of the sites ... [and] were not consulted on how to manage works in and around the sites' and 'KAC ... does not have access to the confidential site information'.
- 45.2 The Court has indicated Andrew Starkey has a cultural association and responsibility for land around the Davenport Mythological Site.
- 45.3 ElectraNet, in its response to the draft Initial Assessment, stated 'that the Starkeys were informed at a KAC community meeting that an agreement had been reached with ElectraNet for heritage protection work', but also that 'KAC did not raise any express interest ... outside of its native title boundaries, nor did it seek to conduct a heritage survey in the area of the Davenport Mythological Site'.
- 45.4 ElectraNet stated that it 'also consulted the Davenport Community Council (DCC), being the Aboriginal organisation which leases the land containing the Davenport Mythological Site' and this 'recorded a senior Kokatha elder, member of the DCC, noted the importance of the protection of the Davenport Mythological Site.'
46. ElectraNet was invited to provide the relevant agreements (or extracts thereof), but chose not to do so, saying 'ElectraNet does not intend to take any further action in respect of the Complaint unless and until the Starkeys satisfy the AusNCP that ElectraNet is a "multi-national enterprise" for the purposes of the OECD Guidelines'. Thus, the Independent Examiner was provided with no action or material which would substantiate that due-diligence, consistent with the OECD Guidelines, occurred in relation to the impacts which the Starkeys have raised regarding the Davenport Mythological Site.

## Proposed Good Offices

47. On the basis of the above, the Independent Examiner considered that *parts* of the Complaint merited further consideration. On 18 February 2021, the AusNCP offered its 'good offices', within the OECD Guidelines, to facilitate the exchange of information between the parties with the aim of arriving at a mutually agreed resolution.
- 47.1 Any engagement would focus only on the Davenport Mythological Site, the due-diligence requirements of the OECD Guidelines, and ElectraNet's governance concerning that site.
- 47.2 The aim of the good offices process would be to help the parties' exchange and determine whether they can reach any agreement consistent with the OECD Guidelines.
48. The Independent Examiner and the AusNCP Secretariat outlined the good offices process to the parties. The Starkeys indicated they wished to engage in the good offices. ElectraNet indicated it did not wish to engage in the good offices and the matter could proceed to a Final Statement. ElectraNet stated: 'Following careful consideration of the complex issues associated with the



Complaint and consultation with key stakeholders, ElectraNet has decided to decline the offer to engage further in the good offices in relation to the Complaint for the reasons outlined in ElectraNet's previous correspondence to your office regarding the Complaint'.<sup>80</sup> The 'reasons outlined' in ElectraNet's previous correspondence included:

- 48.1 the 'multinational' issue (which ElectraNet maintained was not present and therefore the Guidelines did not apply);
- 48.2 that it was engaging with relevant Indigenous parties and 'there was no obligation on ElectraNet to engage specifically or solely with the Starkeys in relation to this Project'; and
- 48.3 that 'ElectraNet met its duty of care in undertaking appropriate due diligence activities and, engaging directly with those Indigenous parties identified by DPC-AAR [South Australian agency], and the professional consultants which the Indigenous parties appointed to survey the relevant area'.<sup>81</sup>

## Further Examination

- 49. Where parties have not reached agreement through good offices, the AusNCP Procedures require the Independent Examiner to make a final statement including 'where possible ...a statement as to whether the enterprise's actions were consistent with the OECD Guidelines' and 'recommendations to the enterprise or other relevant bodies where appropriate'.<sup>82</sup>
- 50. The AusNCP, to inform its understanding and Final Statement for this Complaint, undertook further examination from publicly available information. In addition to the matters already explained above, more information was learnt, as set out in the following chronology.

Date	Notes
30 Mar 2019	Meeting of Kokatha People consented to KAC entering agreement for construction of the transmission line <sup>83</sup>
10 Mar 2020	Andrew Starkey Federal Court affidavit, about damage to Davenport Mythological Site included the statement: 'It was a site that under Kokatha traditional system of law my family and I have responsibility to protect and preserve to keep our law culture and heritage strong. ... The loss to my culture and heritage is great. Most likely Kokatha will not visit that site anymore.' <sup>84</sup>
31 Jul 2020	Starkeys' submission to Parliament, asserting damage during construction of the transmission line.
23 Aug 2020	Andrew Starkey informed Kokatha Aboriginal Corporation ( <b>KAC</b> ) of Parliamentary submission and requested the Board take action. KAC Board (? in 25-27 August 2020 meeting) decided to arrange an independent evaluation of the sites. <sup>85</sup>

28 Aug 2020	ElectraNet submission to Parliament, in response to Starkeys' submission. ElectraNet's submission was publicly available from, at least, 16 September 2020. <sup>86</sup>
Sep 2020	Ecology and Heritage Partners engaged to undertake independent evaluation of the sites, and 'prepare a review of [Starkeys] Submission' <sup>87</sup>  This evaluation and report was commissioned by KAC and OZ Minerals 'in consultation with DPC-AAR' (Aboriginal Affairs and Reconciliation in SA Department of Premier and Cabinet). <sup>88</sup>
Sep/Oct 2020	'AAR Central Archives Review of [Starkeys] Submission 42 Damage Claim' prepared by DPC-AAR, which states:  <i>The Davenport [Mythological] site ... is recorded in the central archives as site 6433–5968. While reported and recorded, the site has not been determined to be an Aboriginal site by the minister under section 12 of the Act. This is common. Nonetheless, all heritage sites are protected, whether undiscovered, recorded, reported or determined. It is clear to AAR that the Davenport site is in fact a site.</i> <sup>89</sup>
28 Oct 2020	Starkeys submitted complaint to AusNCP. In relation to the Davenport Mythology Site, the Complaint contained no further information beyond an extract from the Starkeys' submission to Parliament.
30 Oct 2020	KAC Board briefed on 'the process implemented to independently evaluate the [Starkey] Submission 42 claims'
7 Dec 2020	Final Report <sup>90</sup> of 'Independent evaluation of the claims by Ecology Heritage Partners which outlines the results of visiting each of the alleged damage sites listed in the Starkey submission'. <sup>91</sup>
21 Jan 2021	KAC Board Meeting, 21-22 January, received the Ecology Heritage Partners report, and 'decided to ... Refer the report to a special meeting of the CHC [cultural heritage committee] requesting their comments'. <sup>92</sup>

51. As indicated in this chronology, KAC commissioned an investigation into the Starkeys' concerns about site damage. That investigation, and its report, does not address the Davenport Mythological Site.<sup>93</sup> However, in relation to all the other areas identified in the Starkeys' Parliamentary submission (and thus the AusNCP Complaint) the report makes the following conclusions.

*EHP was contracted to deliver a report detailing the outcomes of its on-ground assessments, and with respect to the areas of site disturbance claims referenced in the [Starkeys'] Submission 42, give its independent and professional opinion ...*

*This report concludes that there is no evidence of damage to any Determined, Reported or Archived Sites. All works carried out by the consultant were undertaken in consultation with the KAC RNTBC. ...*

*All works inspected were in compliance with the consultant's Recommendations and work did not occur in Exclusion Zones and was within agreed Conditions. ...*

*There is no evidence that works carried out by H2H project [the electricity transmission line ...[to] Port Augusta] activities damaged, disturbed or interfered with Aboriginal sites, objects or remains.<sup>94</sup>*

# CONCLUSIONS AND RECOMMENDATIONS

---

## General observations from the OECD Guidelines

52. The OECD Guidelines, and particularly its complaint process, form part of the 'protect, respect, remedy' framework agreed by the UN in 2008<sup>95</sup> and given definition in the UNGPs. As such, the UNGP provisions around remedy have guidance for enterprises and government.<sup>96</sup>
53. The Australian Government's position is that '**Companies operating in Australia** and Australian companies operating overseas **are expected to act in accordance with the principles set out in the Guidelines** and to perform to the standards they suggest'.<sup>97</sup> Those standards include the OECD Guidelines' procedural aspects around remedy,<sup>98</sup> comprising both the Initial Assessment and good offices stages.<sup>99</sup>
54. It is not obligatory that issues *must* be resolved through an NCP complaint process. What *is* expected, however, is that an enterprise will 'cooperate with legitimate remediation mechanisms'<sup>100</sup> such as: judicial or other state-based systems, operational-level grievance mechanisms (such as company or third-party complaint systems), collective agreement processes, or the NCP procedures.<sup>101</sup> Where an enterprise follows any of these legitimate remediation mechanisms (namely something consistent with the UN guidance on grievance mechanisms<sup>102</sup>) that will accord with the OECD Guidelines' expectations regarding remedy.<sup>103</sup> However where a complaint is accepted by an NCP, but the enterprise neither engages in good offices nor demonstrates how it is otherwise cooperating with legitimate remediation mechanisms, that does not accord with the OECD Guidelines.
55. The Guidelines *supplement* domestic laws. If any domestic law actually prohibits particular actions expected by the Guidelines, then an Enterprise is not required to undertake those actions. Usually, however the Guidelines can be met in a way that does not contravene domestic law:

*[T]he Guidelines extend beyond the law in many cases, ...[and] enterprises should seek ways to honour such principles and standards to the fullest extent which does not place them in violation of domestic law.*<sup>104</sup>

56. This dynamic is particularly relevant to issues of Indigenous impact arising in Australia's native title system, aspects of which have been identified as not consistent with international legal standards.<sup>105</sup> Many enterprises negotiate and make agreements with Indigenous groups, beyond the legal minimums required by Australian law, which is a way to address FPIC expectations in international standards and the Guidelines.

57. The Guidelines' requirements regarding due diligence are continuous. Thus, where new information or circumstances arise, indicating an enterprise's operations may involve human rights impacts, these should be carefully examined by the enterprise. It may be that existing arrangements adequately address the situation in a manner consistent with the Guidelines. Or it could be that earlier arrangements are insufficient and further action is needed by the enterprise in order to ensure consistency with the Guidelines' due diligence expectations.<sup>106</sup>
58. The Guidelines' incorporation of international standards, including those concerning FPIC and Indigenous rights, necessitate a distinction between group and individual rights (see para 35 above). In cases where there are established agreements between an enterprise and a group, any OECD Guidelines' complaint about impacts on *the group's* cultural rights should ensure effective engagement and involvement of that group as *part of the NCP complaint*. Differences within an Indigenous group, about their agreement and engagement with an enterprise, will rarely be appropriate for a good offices process with the enterprise.
59. Where a Guidelines' complaint is made concerning an entity with various international relationships and shareholding, careful consideration should be given to which entities are complained against. If the complainant is uncertain of the internal structures and management, it may be appropriate for a complaint to be made against multiple entities in that structure. Such an approach would enable the complaint to be considered by the NCP in a manner promoting predictability and compatibility with the implementation of the OECD Guidelines. It would also be consistent with not introducing differences of treatment between multinational and domestic enterprises.

## **Specific observations and recommendations**

60. In this case, ElectraNet has engaged, and made agreements, with various Indigenous groups. In relation to the determined areas (i.e. where court procedures have identified relevant cultural rights and groups, recorded in a public decision), there has been nothing provided to the Independent Examiner which indicates the groups with whom agreements were made have concerns about non-compliance with the OECD Guidelines.
61. Some of ElectraNet's work was said to impact a site the Starkeys identified as the 'Davenport Mythological Site', located within an area for which there has been no court determination identifying the relevant Indigenous groups and rights. ElectraNet appears to have entered agreements with some groups regarding this area, and that may be appropriate and required under Australian laws. From at least July 2020, however, there has been publicly available information documenting the Starkeys' concerns about impacts on the Davenport Mythological Site in this area, where there has been no court determination.<sup>107</sup> For ElectraNet to engage with the Starkeys, consistent with the Guideline's due-diligence expectations, would not place ElectraNet 'in violation of domestic laws'. While ElectraNet had some agreements and arrangements in place, from

the time it was made aware of the Starkeys' concerns regarding the Davenport Mythological Site, ElectraNet should have engaged with the Starkeys. There has been nothing provided to the Independent Examiner to indicate such engagement occurred consistent with the Guidelines' expectations. ElectraNet was invited to provide relevant materials demonstrating this has occurred, and also engage with the Starkeys through the good offices process, but opted not to do so. In the circumstances, ElectraNet has not acted consistently with the Guidelines by declining to engage with the Starkeys through the good offices process or provide evidence of otherwise complying with the Guidelines' expectations concerning the Starkeys and the Davenport Mythological Site.

62. Separate from what the parties provided/explained to the AusNCP, there is public material relevant to the impacts asserted in the Complaint. In particular, an independent assessment of most sites (para 50-51 above) concluded there was no evidence those sites had been damaged or disturbed by the transmission line's construction. This is contrary to the assertions in the Complaint. In those circumstances, it would be inappropriate for the Independent Examiner to state whether ElectraNet's actions were consistent with the OECD Guidelines, beyond that noted in the preceding paragraph.
63. ElectraNet should ensure that, somewhere in its governance including international shareholders and directors, there is familiarity with the OECD Guidelines. This will help ElectraNet's operations act in accordance with the principles set out in the Guidelines. In particular, ElectraNet should, in the future, take the opportunity to engage in any complaint processes arising under the OECD Guidelines, noting that participation in mediation is a confidential process and not an admission of liability. Benefits of engagement are emphasised in the OECD's 2018 Guidance:

*Grievance and remediation processes interact with, and may ultimately support due diligence by providing channels through which the enterprise can become aware of and respond to RBC [responsible business conduct] impacts. Inputs and feedback from remediation processes can help strengthen identification of real and potential adverse impacts by highlighting issues that may not have received sufficient attention, and by providing inputs on how to effectively respond to adverse impacts.<sup>108</sup>*

64. The Independent Examiner considers dialogue between ElectraNet and the Starkeys, around the Davenport Mythological Site, would benefit in moving towards resolution of the issues raised in the Complaint.
65. The AusNCP will follow up on these recommendations in 12 months. Its conciliation services remain available to the parties should they both wish to re-engage prior.

66. The Independent Examiner also recommends this Final Statement to each government agency in Australia (Commonwealth, State or Territory) with responsibilities concerning impacts on Indigenous heritage. The relevance of the international standards, and their application through the Guidelines to company conduct,<sup>109</sup> are matters which may be of interest to such agencies. Where agencies' procedures or requirements can encourage actions consistent with the Guidelines, that would assist enterprises approaching these agencies.
67. A draft of this Final Statement was provided, for comment, to the AusNCP's Governance and Advisory Board, and to the parties (for them to identify any concerns with the Independent Examiner about the Statement's content; however each party stated that they sought no changes to the Statement). All comments were considered by the Independent Examiner, in finalising this Statement, with the decision remaining the responsibility (and discretion) of the Independent Examiner.

John Southalan

**Independent Examiner**

Australian National Contact Point

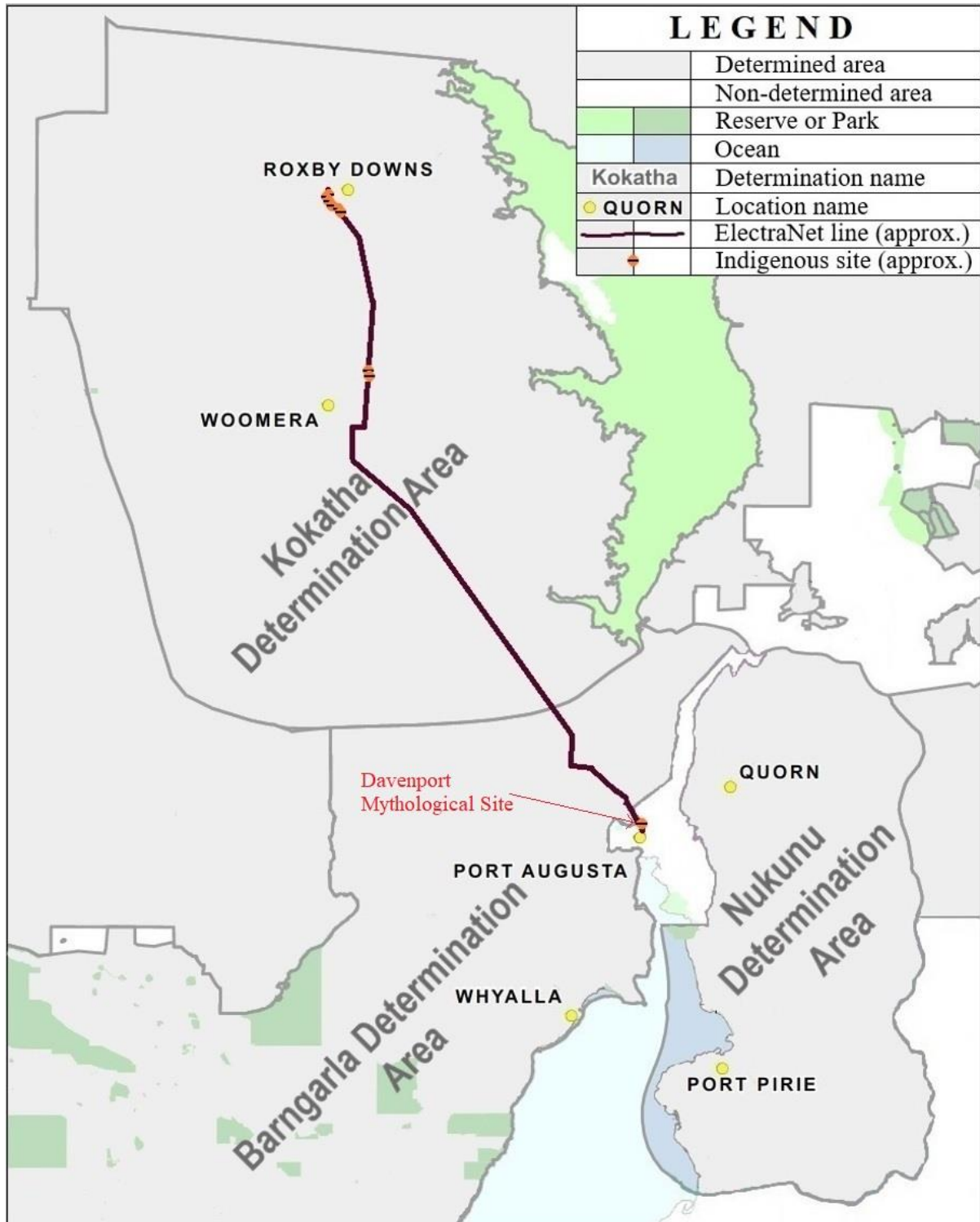
OECD Guidelines for Multinational Enterprises

Email: [IndependentExaminer@AusNCP.gov.au](mailto:IndependentExaminer@AusNCP.gov.au)



# ANNEXURES

Map showing relevant locations (para 11)





## Overview of the AusNCP and its role

1. The Australian Government is committed to promoting the use of the OECD Guidelines and implementing them effectively and consistently. Through business cooperation and support, the OECD Guidelines can positively influence business conduct and ultimately economic, environmental and social progress.
2. The OECD Guidelines are recommendations on responsible business conduct addressed by governments, including Australia, to multinational enterprises. Importantly, while the OECD Guidelines have been endorsed within the OECD international forum, they are not a substitute for, nor do they override, Australian or international law. They represent standards of behaviour that supplement Australian law and therefore do not create conflicting requirements.
3. Companies operating in Australia and Australian companies operating overseas are expected to act in accordance with the principles set out in the OECD Guidelines and to perform to — at minimum — the standards they recommend.
4. The OECD Guidelines can be seen as:
  - 4.1 a useful aid to business in developing their own code of conduct (they are not aimed at replacing or preventing companies from developing their own codes);
  - 4.2 complementary to other business, national and international initiatives on corporate responsibility, including domestic and international law in specific areas such as human rights and bribery; and
  - 4.3 providing an informal structure for resolving issues that may arise in relation to implementation of the OECD Guidelines in complaints.

## Governance

5. Countries adhering to the OECD Guidelines have flexibility in organising their National Contact Points (NCPs) and in seeking the active support of social partners, including the business community, worker organisations, other non-governmental organisations, and other interested parties.
6. Accordingly, the OECD Guidelines stipulate that NCPs:
  - 6.1 will be composed and organised such that they provide an effective basis for dealing with the broad range of issues covered by the OECD Guidelines and enable the NCP to operate in an impartial manner while maintaining an adequate level of accountability to the adhering government;
  - 6.2 can use different forms of organisation to meet this objective. An NCP can consist of senior representatives from one or more ministries, may be a senior government official or a government office headed by a senior official, be an interagency group, or one that contains independent experts. Representatives of the business community, worker organisations and other non-governmental organisations may also be included; and

- 6.3 will develop and maintain relations with representatives of the business community, worker organisations and other interested parties that are able to contribute to the effective functioning of the OECD Guidelines.
7. The AusNCP Governance and Advisory Board (the Board), which includes non-government members as well as representatives from key government agencies, provides advice and assistance to the AusNCP Secretariat in relation to the handling of complaints. The Board was consulted in the development of this statement.
  8. The Board helps to ensure that the AusNCP is visible, accessible, transparent and accountable, in accordance with its obligations under the OECD Guidelines for Multinational Enterprises. Members may be called on to conduct procedural reviews of AusNCP complaints and may be consulted on various operational and administrative matters as needed.
  9. Conflicts of interest are managed through the AusNCP Complaint Procedures and the Governance and Advisory Board Terms of Reference. Before assessing this complaint, the Independent Examiner checked any actual or perceived conflicts of interest with the parties and received no objections.

## Schedule of events

Submission	Date
• Complaint submitted to the AusNCP.	28 October 2020
• Complaint acknowledged by the AusNCP.	28 October 2020
• AusNCP notified the MNE, OECD and Governance and Advisory Board.	29 October 2020
• AusNCP website updated (MNE not yet identified).	6 November 2020
Initial Assessment	
• Parties invited to, and provided, additional information and submissions.	3 November – 11 December 2020
• Party correspondence acknowledged and procedural update provided.	11 December 2020
• Update provided to the Governance and Advisory Board.	22 December 2020
• AusNCP email updates sent to both parties.	23 December 2020
• Draft Initial Assessment to Governance and Advisory Board for comment.	14-22 January 2021
• Draft Initial Assessment to parties for comment (includes extension requested by ElectraNet).	27 January – 10 February 2021
• Embargo copy of final Initial Assessment to parties (with offer of Good Offices) and to GAB.	18 February 2021
• Good Offices accepted by the Starkeys.	19 February 2021
• Initial Assessment Published and OECD update provided.	25 February 2021
• Good offices declined by ElectraNet (includes extension requested by ElectraNet).	5 March 2021
• Starkeys notified procedural move to Final Statement phase.	17 March 2021
• Governance and Advisory Board notified procedural move to Final Statement phase.	29 March 2021
Final Statement	
• Draft final statement provided to the Governance and Advisory Board for comment.	15-23 April 2021
• Draft final statement provided to the parties for comment.	13 May 2021
• Independent Examiner teleconference call with parties, initiated by Starkeys.	26 May 2021
• Embargo copy of Final Statement to parties and to the Governance and Advisory Board.	7 June 2021
• Final Statement published on <a href="http://www.AusNCP.gov.au">www.AusNCP.gov.au</a> and reported to the OECD.	9 June 2021
Follow Up	
• Follow up procedure due to commence.	8 June 2022

## Endnotes

- <sup>1</sup> OECD, *OECD Guidelines for Multinational Enterprises* (2011, OECD Publishing, 25 May 2011).
- <sup>2</sup> *Submission [42] to the Senate Inquiry into the destruction at the Juukan Gorge*, Messrs Andrew and Robert Starkey, 31 July 2020 (<https://www.aph.gov.au/DocumentStore.ashx?id=0f686706-f899-4797-be45-5eacd681a095&subId=690533> accessed 4 Jan 2021).
- <sup>3</sup> [Submission 113] *ElectraNet Response to Starkey Submission to the Senate Inquiry*, 28 August 2020 (<https://www.aph.gov.au/DocumentStore.ashx?id=fac565c9-354e-4441-9620-725817e34e31&subId=691299> accessed 4 Jan 2021).
- <sup>4</sup> In addition to the site locations (approximate) from the Starkeys' complaint, the map includes information from National Native Title Tribunal, *South Australia: Native Title Claimant Applications and Determination Areas as per the Federal Court, 14 January 2021* (2021, Australian Government, 14 January 2021) and Manna, A, 2019. *ElectraNet Flagship Projects Update*. Paper presented to 'GMUSG Conference & Trade Expo' (Global Maintenance Upper Spencer Gulf), Port Pirie (AUS), 22 August 2019. A. Manna, *ElectraNet Flagship Projects Update* (paper presented to 'GMUSG Conference & Trade Expo' (Global Maintenance Upper Spencer Gulf), 22 August 2019).
- <sup>5</sup> Under the OECD Guidelines, a complaint is entitled a 'specific instance' (e.g. Implementation Procedures, Procedural Guidance, I C) but the AusNCP Procedures uses 'complaint', and that is how it is termed in this Statement.
- <sup>6</sup> OECD, *Guide for National Contacts Points on the Initial Assessment of Specific Instances* (2019, OECD Publishing), 5.
- <sup>7</sup> *AusNCP Complaint Procedures* (September 2019) Treasury.
- <sup>8</sup> *AusNCP Complaint Procedures* (above n7), 4.10.
- <sup>9</sup> OECD *Guide for Initial Assessments* (above n6), 6.
- <sup>10</sup> OECD *Guide for Initial Assessments* (above n6), 19-20, drawing from OECD *Guidelines* (above n1), *Procedural Guidance, I C & Commentary* [9] & [22]; and UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (2011, United Nations Human Rights Council, 21 March 2011) (**UNGPs**).
- <sup>11</sup> *ElectraNet letter to Independent Examiner*, 3 December 2020.
- <sup>12</sup> <https://www.electranet.com.au/who-we-are/ownership/> (accessed 2 Jan 2021), which states as follows (emphasis added).  
 'The **owners of ElectraNet Pty Ltd, trading as ElectraNet, are:**
- |                                                                                                                                                                                                                                                    |               |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------|
| State Grid International Development Asia and Australia Holding Company Limited ... <b>The international arm of the State Grid Corporation of China</b> ...[which is] the ultimate parent company ... is the largest utility provider in the world | <b>46.56%</b> |
| YTL Power Investments Limited ... <b>An investment company</b> of YTL Power International Berhad ... <b>headquartered in Kuala Lumpur</b> and listed on Bursa Malaysia                                                                             | <b>33.5%</b>  |
| Australian Utilities Pty Ltd                                                                                                                                                                                                                       | 19.94%        |
- ...
- ElectraNet Board of Directors**  
 Independent Chairman – ...  
 Company Secretary – ...  
**Representing State Grid International Development Asia & Australia Holding Company**
- ...
- Representing YTL Power Investments Ltd**
- ...
- Representing Australian Utilities Pty Ltd ...'**
- <sup>13</sup> Examples include:
- CVTC and Usibelli Coal Mine (USA & JPN NCPs, July 2012). The OECD Watch website reports this as a complaint filed by The Chickaloon Village Traditional Council alleging the Usibelli Coal Mine Company (UCM) and Tokyo-based J-Power breached the OECD Guidelines in activities related to a coal mine in Alaska; and that US and Japanese NCPs issued a statement 'signed by both NCPs in July 2012...[which] acknowledged the relevance of the issues raised by the complainants ...[but] rejected the case against UCM on the grounds that the company has only domestic (US) operations and is thus not a multinational enterprise [and also] rejected the case against J-Power, claiming that the business relationship between the two companies is "not strong enough to require the

- 
- application of the Guidelines" ([https://complaints.oecdwatch.org/cases/Case\\_214](https://complaints.oecdwatch.org/cases/Case_214) accessed 2 Jan 2021). This reported statement of the NCPs is not available on their websites nor in the OECD's Database of specific instances (<https://mneguidelines.oecd.org/database/> accessed 2 Jan 2021).
- *Bahrain Watch and Dae Kwang Chemical Corp* (KOR NCP, December 2014) was a complaint to the South Korean NCP about Dae Kwang Chemical Corporation concerning the export of tear gas to Bahrain. The Korean NCP rejected the complaint, concluding 'Dae Kwang, is not a multinational enterprise as defined by the OECD Guidelines ... It does not conduct any business operations overseas and cannot be judged as a multinational enterprise simply because it exports its products to another country when it does not have a single office or branch overseas. Furthermore, Dae Kwang is not a 'domestic company' operating within the territory of Bahrain ... As such, the OECD Guidelines cannot be applied to the Defendant, and therefore, Korea NCP does not find it appropriate to continue with additional procedures': KOR NCP, *Initial Assessment of the Complaint* (2014, Ministry of Trade Industry and Energy, 19 December 2014), 15, see also 11 & 13-14
- <sup>14</sup> OECD *Guide for Initial Assessments* (above n6), 10.
- <sup>15</sup> Examples include:
- AusNCP, *Final Statement: Specific Instance by Australian Women Without Borders against Mercer PR* (2019, Treasury, 9 July 2019) - a decision of the AusNCP, concerning a small Australian enterprise but 'While Mercer PR is based in Australia, in this matter its client, and thus its operational reach, was overseas. As Mercer PR also maintains several international contact numbers it is apparent that it – either previously, currently, or potentially in the future – may have further overseas clients that cause its operations to extend outside Australia': [27].
  - NLD NCP, *Initial Assessment* (2018, Dutch National Contact Point for OECD Guidelines, 19 June 2018), concerned a complaint by a farming community against a wind-farm development in the Netherlands being undertaken by a Dutch company (which had Swedish investors). The NCP accepted the complaint, noting 'The fact that the alleged violation took place in the Netherlands does not... negate the applicability of the Guidelines: Nuon Energy N.V. is a Dutch enterprise ... and is part of the Swedish energy company Vattenfall, which carries out transnational activities in various countries', 5.
- <sup>16</sup> 'A precise definition of multinational enterprises is not required for the purposes of the Guidelines': OECD *Guidelines*, I. Concepts and Principles, [4].
- <sup>17</sup> OECD *Guidelines* (above n1), I. Concepts and Principles, [5].
- <sup>18</sup> OECD *Guidelines* (above n1), I. Concepts and Principles, [4].
- <sup>19</sup> OECD *Guide for Initial Assessments* (above n6), 6.
- <sup>20</sup> e.g. *Starkey -v- South Australia* [2014] FCA 924, order 6 and reasons [28], [41]-[43]; *Croft (Barngarla Group) -v- South Australia* [2020] FCA 888, reasons [65]-[73] & [77].
- <sup>21</sup> AusNCP *Complaint Procedures* (above n7), 4.10(b) & 4.11.
- <sup>22</sup> OECD *Guide for Initial Assessments* (above n6), 21.
- <sup>23</sup> OECD *Guide for Initial Assessments* (above n6), 20.
- <sup>24</sup> On 22 December 2020, ElectraNet informed the AusNCP that 'ElectraNet does not intend to take any further action in respect of the Complaint unless and until the Starkeys satisfy the AusNCP that ElectraNet is a "multi-national enterprise" for the purposes of the OECD Guidelines for Multinational Enterprises'.
- <sup>25</sup> *Guidelines Ch II, [10] & [14] and commentary*
- <sup>26</sup> OECD *Guidelines* (above n1), Ch IV
- <sup>27</sup> OECD *Guidelines* (above n1), Ch IV, [39] & [40].
- <sup>28</sup> e.g. NOR NCP, *Jijnjevaerie Saami village – Statkraft SCA Vind AB (SSVAB)* (2016, Norwegian National Contact Point for the OECD Guidelines for Multinational Enterprises, 8 February 2016), 16 (referenced in relation to a wind-power development and its impact on Indigenous groups). Another annex on Engagement with indigenous peoples was published in the OECD, *OECD-FAO Guidance for Responsible Agricultural Supply Chains* (2016, Organisation for Economic Co-operation & Development, 11 March 2016).
- <sup>29</sup> e.g. OECD, *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector* (2017, Organisation for Economic Co-Operation and Development, 2 February 2017), 47.
- <sup>30</sup> e.g. OECD *Guidelines* (above n1), Ch IV Commentary, [39] & [40]; NOR NCP, *Complaint from The Future In Our Hands (FIOH) against Intex Resources Asa and the Mindoro Nickel Project* (2011, Norwegian National Contact Point for the OECD Guidelines for Multinational Enterprises, 30 November 2011), 21-23; NOR NCP *Statkraft SCA Final Statement* (above n28), 11.
- <sup>31</sup> e.g. NOR NCP *Intex Resources Final Statement* (above n30), 21-23; OECD *Guidance for Agricultural Supply Chains* (above n28), 75 & 78 (fn 159).
- <sup>32</sup> The UNGPs are above n10. Their relevance to due-diligence and Indigenous people is indicated in OECD *Guidance for the Extractives Sector* (above n29), 15 & 75-76; NOR NCP *Intex Resources Final Statement* (above n30), 47.

- <sup>33</sup> e.g. NOR NCP *Intex Resources Final Statement* (above n30), 21-23; OECD *Guidance for Agricultural Supply Chains* (above n28), 72, 75 & 78 (fn 159).
- <sup>34</sup> e.g. NOR NCP *Intex Resources Final Statement* (above n30), 11 & 47-48; OECD *Guidance for Agricultural Supply Chains* (above n28), 76.
- <sup>35</sup> e.g. IFC, *Performance Standards on Environmental and Social Sustainability* (2012, World Bank Group, 1 January 2012), see Performance Standard 1, [3] and its Guidance Note [GN44]-[GN45] & [GN108]-[GN109]. World Bank projects from 2018 are subject to the World Bank's new *Environmental and Social Framework* (World Bank, *The Environmental and Social Framework* (2017, International Bank for Reconstruction and Development, 30 March 2017), in which FPIC features in *Environmental and Social Standard 7: Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities: World Bank, Environmental and Social Framework* (2016, International Bank for Reconstruction and Development, 4 August 2016), [24]-[28].
- <sup>36</sup> e.g. NOR NCP *Intex Resources Final Statement* (above n30), 21-23 & 25; ; OECD *Guidance for Agricultural Supply Chains* (above n28), 75 & 77.
- <sup>37</sup> *Native Title Act 1993* (Australian Parliament, No 110 of 1993, 24 December 1993).
- <sup>38</sup> *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Australian Parliament, No 79 of 1984, 25 June 1984)
- <sup>39</sup> Relevant here: *Aboriginal Heritage Act 1988* (South Australian Parliament, No 12 of 1988, 17 March 1988).
- <sup>40</sup> OECD *Guide for Initial Assessments* (above n6) 8.
- <sup>41</sup> e.g. FRA NCP, *Specific Instance "EDF and EDF Renewables in Mexico"* (2020, Ministère de l'Économie et des Finances, 10 March 2020), 14; NOR NCP *Statkraft SCA Final Statement* (above n28), 7 & 10.
- <sup>42</sup> '[A]n enterprise's responsibility [under the OECD Guidelines] to conduct due diligence across business relationships is not a legal expectation in most jurisdictions': OECD *Guide for Initial Assessments* (above n6), 8.
- <sup>43</sup> ITA NCP, *Specific Instance submitted by Survival International Italia against Salini Impregilo SpA* (2017, Ministry of Economic Development, 8 June 2017), [54]. FPIC requirements for enterprises are also explained in OECD *Guidance for Agricultural Supply Chains* (above n28), 73-75; and OECD *Guidance for the Extractives Sector* (above n29), 95-98.
- <sup>44</sup> Differences in the understanding and application of FPIC are also noted in GCNA, *The Australian Business Guide to Implementing the UN Declaration on the Rights of Indigenous Peoples* (2020, Global Compact Network Australia, 21 November 2020), 22-23.
- <sup>45</sup> NOR NCP *Statkraft SCA Final Statement* (above n28), 15.
- <sup>46</sup> *Ågren -v- SWE* (Committee on the Elimination of Racial Discrimination, UN doc CERD/C/102/D/54/2013, 18 Dec 2020). This has relevance through its further explication of the human rights standards relevant to development impacts on Indigenous parties, which inform the OECD Guidelines expectations of business – see para's 27–28 of this Final Statement.
- <sup>47</sup> *Ågren -v- SWE* (above n46), 6.21-6.29.
- <sup>48</sup> *Ågren -v- SWE* (above n46), 6.21.
- <sup>49</sup> e.g. NOR NCP *Intex Resources Final Statement* (above n30), 23, see also 25 'The NCP finds evidence that indigenous peoples who have not been consulted are likely to be affected by the MNP [nickel mining project] both within the site and by associated infrastructure. The NCP has not found evidence of systematic anthropological work and consultation with tribal elders to find out if other indigenous peoples will potentially be affected by the project within and beyond the project site. ... In the view of the NCP, the company should have systematically investigated whether indigenous peoples other than those in the Kabilogan and the Sadaki could be impacted by project components (mine and infrastructure), and if the groups with which they consulted were the legitimate representatives of all the affected indigenous peoples. This should have been done at an early stage in the project in accordance with the OECD Guidelines and IFC Performance Standards'.
- <sup>50</sup> All FPIC rights in **UNDRIP** (*United Nations Declaration on the Rights of Indigenous Peoples* (UN General Assembly, 13 Sep 2007, UN doc A/RES/61/295) are expressed as the rights of 'Indigenous peoples' (emphasis added) meaning an Indigenous group: articles 10 (relocation), 11 (cultural property), 19 (regulatory measures), 28 (land & territories), 29 (environment) and 32 (development & use of land/territories
- <sup>51</sup> UNDRIP differentiates between the rights of 'individuals' and 'Indigenous peoples'. Individual rights under UNDRIP concern issues which are enjoyed or exercised by a person (not a group), emphasising that Indigenous individuals should not be discriminated against. The only mentions in UNDRIP of individual rights are these:
- Indigenous individuals should not be discriminated against in health services (art 24), work conditions (art 17.3), education (art 14.2), or from being Indigenous (arts 2 & 9);
  - rights to 'life, physical and mental integrity, liberty and security of person': art 7(1);
  - 'Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture': art 8(1);



- access to education in own culture/language: art14(3);
  - to enjoy international labour law standards of international or domestic law: art17(1);
  - right to nationality (art 6) and to 'obtain citizenship of the States in which they live': art33;
  - right 'to effective remedies for all infringements of their individual and collective rights': art 40; and
  - UNDRIP rights 'equally guaranteed to male and female Indigenous individuals': art 44.
- <sup>52</sup> '[I]ndividuals have the right to belong to an Indigenous community...in accordance with the traditions and customs of the community': *UNDRIP* (above n50), art 9; 'Indigenous peoples have the right to determine the responsibilities of individuals to their communities': art 35.
- <sup>53</sup> *Mahuika -v- NZL* (Human Rights Committee, UN doc CCPR/C/70/D/547/1993, 16 Nov 2000).
- <sup>54</sup> Key aspects of the Committee's reasoning in *Mahuika -v- NZL* (above n53) included the following (emphasis added).
- 9.6 ... [T]he State party [New Zealand Government] undertook a complicated process of consultation in order to secure broad Maori support to a nation-wide settlement and regulation of fishing activities. Maori communities and national Maori organizations were consulted and their proposals did affect the design of the arrangement. ... The Committee has noted the authors' claims that they and the majority of members of their tribes did not agree with the Settlement and that they claim that their rights as members of the Maori minority have been overridden. In such circumstances, where the right of individuals to enjoy their own culture is in conflict with the exercise of parallel rights by other members of the minority group, or of the minority as a whole, the Committee may consider whether the limitation in issue is in the interests of all members of the minority and whether there is reasonable and objective justification for its application to the individuals who claim to be adversely affected.
- 9.8 **In the consultation process, special attention was paid to the cultural and religious significance of fishing for the Maori, ... [T]he State party has, by engaging itself in the process of broad consultation before proceeding to legislate, and by paying specific attention to the sustainability of Maori fishing activities, taken the necessary steps to ensure that the ...Settlement and its enactment through legislation, ... are compatible with article 27 [of the ICCPR, regarding protection of culture].**
- <sup>55</sup> The IFC Performance Standard requires a process of engagement with affected Indigenous groups which:  
'includes stakeholder analysis and engagement planning, disclosure of information, consultation, and participation, in a culturally appropriate manner. In addition, this process will... Provide sufficient time for Indigenous Peoples' decision-making processes. **Internal decision making processes are generally but not always collective in nature. There may be internal dissent, and decisions may be challenged by some in the community.** The consultation process should be sensitive to such dynamics and allow sufficient time for internal decision making processes to reach conclusions that are considered legitimate by the majority of the concerned participants.  
...[P]rocesses should ensure the meaningful participation of Indigenous Peoples in decision-making, **focusing on achieving agreement while not conferring veto rights to individuals or sub-groups**': IFC Performance Standards (above n35 above), [10] and GN22 (emphasis added).
- <sup>56</sup> *Brown -v- South Australia* [2009] FCA 206, [19]-[20]. Tribunals and courts also avoid representation or submissions being made by individuals separately from those of the native title group: e.g. *Burrabungba -v- QLD* [2017] FCAFC 133, [118] & [122].
- <sup>57</sup> Native title, as a 'communal' right, was indicated in *Mabo -v- QLD (No 2)* [1992] HCA 23; 175 CLR 1, [69]-[70] (p62) and [58] (p109-110); then reflected in *Native Title Act 1993* (above n37), s223; and reaffirmed recently in *Burrabungba -v- Queensland* (above n56), [144].
- <sup>58</sup> *Native Title Act 1993* (above n37), ss 55-57. The bodies are more formally known as 'Registered Native Title Body Corporate': *Native Title Act 1993* (above n37), ss 57 & 263).
- <sup>59</sup> *Dunghutti Elders -v- Registrar of Indigenous Corporations* [2011] FCAFC 88; 195 FCR 318, [42].
- <sup>60</sup> The *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Governor-General, 14 July 1999, No 151 of 1999) (**PBC Regulations**) regulate 'native title decisions' which are decisions which may affect native title rights including 'to agree to, any ... act that would affect the native title rights or interests of the common law holders': r 3(1) & 8(1). To make a native title decision, the Aboriginal Corporation must 'consult with, and obtain the consent of, the common law holders' of native title: r 8(1)(a). The PBC Regulations also specify a procedure to evidence that the requisite consultation and consent has occurred: r9.
- <sup>61</sup> e.g. *Daniel -v- Western Australia* [2002] FCA 1147, [54]; *Lawson (Paakantyi People) -v- New South Wales* [2002] FCA 1517, [27]; *KK (Nyul Nyul people) -v- Western Australia* [2013] FCA 1234; 217 FCR 115, [40]-[41] & [87]-[89].
- <sup>62</sup> See e.g. *Doctor (Bigambul People) -v- Queensland* [2015] FCA 581, [46]; *McGlade -v- SW Aboriginal Corp* [2019] FCAFC 238, [181].
- <sup>63</sup> *Starkey -v- South Australia*, (above n20).
- <sup>64</sup> *Starkey -v- South Australia*, (above n20), [3], [23], [38]

- 
- <sup>65</sup> *Starkey -v- South Australia*, (above n20), [85].
- <sup>66</sup> *Starkey -v- South Australia*, (above n20), order 8(k).
- <sup>67</sup> *Starkey -v- South Australia*, (above n20), order 9.
- <sup>68</sup> *Starkey -v- South Australia*, (above n20), order 15(b) ('The Kokatha Aboriginal Corporation is to ... perform the functions mentioned in s 57(3) of the NT Act').  
The relevant sections of the *Native Title Act 1993* (above n37) are s57 ('... the body must perform: (a) any functions given to it ... under particular provisions of this Act; and (b) any functions given to it under the regulations') and s58 ('The regulations may make provision for a registered native title body corporate to ... to act as agent or representative of the common law holders in respect of matters relating to the native title'); see also *PBC Regulations* (above n60) r 7(1) ('the body corporate has the following functions: (a) to be the agent prescribed body corporate for those rights and interests; [and] (b) to manage the rights and interests of the common law holders as authorised by the common law holders' ...).
- <sup>69</sup> *Starkey -v- South Australia*, (above n20), [14].
- <sup>70</sup> Federal Court Proceedings: *Rosalie Turner (and others named in Schedule B) v State of South Australia* (SAD 6012 of 1998, **Nukunu Area 2**); and *Barry Croft (and others named in the Schedule) v State of South Australia* (SAD 6011 of 1998, **Barngarla Native Title Claim**).
- <sup>71</sup> *Croft -v- SA (Port Augusta Overlap Proceeding)* [2019] FCA 581, [56] ('Kokatha country'), [70] & [76] (dismissed for no reasonable prospect of success).
- <sup>72</sup> *Croft (Barngarla Group) -v- South Australia* (above n20), [65]-[73] & [77].
- <sup>73</sup> *Croft (Barngarla Group) -v- South Australia* (above n20), [73], see also [69]-[73].
- <sup>74</sup> The native title claims are progressed (and thus agreements concerning impacts must be with) individual persons as the applicant on behalf of their group (see n70 above), not these corporations.
- <sup>75</sup> *Turner (Nukunu People) -v- South Australia* [2019] FCA 863.
- <sup>76</sup> *Croft (Barngarla Group) -v- South Australia* [2016] FCA 724.
- <sup>77</sup> *OECD Guide for Initial Assessments* (above n6), 10.
- <sup>78</sup> *OECD Guide for Initial Assessments* (above n6), 12.
- <sup>79</sup> Email to both parties, 11 December 2020, stating: 'It appears there has been considerable engagement and agreement between ElectraNet and KAC in relation to the impacts arising in the Kokatha People (Part A) determination. Much of what is explained in ElectraNet's response, concerning the agreement and arrangements with KAC about impacts in the Kokatha determination area, appears consistent with the due diligence expectations under the OECD Guidelines. Differences about internal governance and decision-making within Kokatha tradition are not suitable issues for engagement in an OECD NCP 'good offices' process. ... If there are issues of concern to KAC, in relation to the OECD Guidelines and the impacts identified in this complaint in the Kokatha determination area, these should be explained.'
- <sup>80</sup> ElectraNet letter to Independent Examiner, 5 March 2021.
- <sup>81</sup> ElectraNet letter to Independent Examiner, 3 December 2020.
- <sup>82</sup> *AusNCP Complaint Procedures* (above n7), 6.2.2 & 6.3, see also 6.4.
- <sup>83</sup> Noted in De Leuven & Nicolson, *Final Report on Submission [to the Inquiry into Juukan Gorge] by Messrs Andrew and Robert Starkey* (2020, Kokatha Aboriginal Corporation, 7 December 2020), p5; with the notice of the meeting Appendix 4 of that document (p78-80). Note, this document states: 'No part of this report or the images contained therein may be shared or distributed without the express permission of KAC' (p36). Much (or all) of the report is available for public download on the KAC website (<https://kokatha.com.au/wp-content/uploads/2021/02/Warning-Included-KAC-RNTBC-ICN-8093-INDEPENDENT-EVALUATION-OF-SUBMISSION-42.pdf> accessed 28 Apr 2021), suggesting KAC has permitted distribution.
- <sup>84</sup> Para's 3-4 of 'Affidavit of Andrew Starkey filed in Federal Court proceedings SAD/6011 of 1998 and SAD/6012 of 1998', attachment 1 of Starkeys' Submission to Parliament (n2 above).
- <sup>85</sup> KAC, *Board Update on Kokatha Heritage Damage Claims Report* (2021, Kokatha Aboriginal Corporation RNTBC, 8 February 2021).
- <sup>86</sup> On 16 September 2020, submissions 1-126 were available on the Parliamentary Committee's website ([https://web.archive.org/web/20200916230337/https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Northern\\_Australia/CavesatJuukanGorge/Submissions](https://web.archive.org/web/20200916230337/https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Northern_Australia/CavesatJuukanGorge/Submissions)), and ElectraNet's submission was 113.
- <sup>87</sup> De Leuven & Nicolson *Final Report* (above n83), 8.
- <sup>88</sup> De Leuven & Nicolson *Final Report* (above n83), cover and 8.
- <sup>89</sup> Attachment D (p81-82) of De Leuven & Nicolson *Final Report* (above n83).
- <sup>90</sup> De Leuven & Nicolson *Final Report* (above n83).
- <sup>91</sup> KAC *Board Update on Kokatha Heritage Damage Claims Report* (above n85).
- <sup>92</sup> KAC, *Communique - January 2021* (2021, Kokatha Aboriginal Corporation RNTBC), [31].
- <sup>93</sup> The project brief was developed in consultation with DPC-AAR [SA Government Agency] and agreed upon by KAC and OZM [Oz Minerals]. EHP's independent assessment included an on-ground



---

inspection of the specific areas within the Kokatha Determination area referred to by [Starkeys'] Submission 42, excluding the Davenport Mythological Site as the location, as it falls outside of the Kokatha Consent Determination Area': De Leuven & Nicolson *Final Report* (above n83), 8.

<sup>94</sup> De Leuven & Nicolson *Final Report* (above n83), 8 & 37 (and definitions in p5 including 'H2H project') (emphasis added).

<sup>95</sup> Detailed in the report UN, *Report on the issue of human rights and transnational corporations and other business enterprises* (2008, United Nations) which was accepted by UN, *Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises* (2008, United Nations), [1].

<sup>96</sup> The OECD Guidelines 'human rights' chapter 'draws upon the United Nations Framework for Business and Human Rights 'Protect, Respect and Remedy' and is in line with the Guiding Principles for its Implementation': *OECD Guidelines* (above n1), ch IV, Commentary [36].

The OECD's 2018 Due Diligence Guidance 'seeks to promote a common understanding among governments and stakeholders on due diligence for responsible business conduct. The UN Guiding Principles on Business and Human Rights ... contain due diligence recommendations, and this Guidance can help enterprises implement them.': OECD, *Due Diligence Guidance for Responsible Business Conduct* (2018, Organisation for Economic Co-operation & Development), 3 (see also 11). The OECD NCP mechanism is part of state-based, non-judicial mechanisms for remedy: UN 'Protect Respect Remedy' report (above n95), [85].

<sup>97</sup> From <https://ausncp.gov.au/oecd-guidelines> accessed 8 Apr 2021 (emphasis added).

<sup>98</sup> *OECD Guidelines* (above n1), Commentary on implementation procedures, [21] ('The effectiveness of the specific instances procedure depends on good faith behaviour of all parties involved ...[which includes] genuinely engaging in the procedures with a view to finding a solution to the issues raised in accordance with the Guidelines').

<sup>99</sup> See, for example, similar statements concerning the non-engagement by enterprises in NOR NCP, *Industri Energi and the Coordination Council of DNO Yemen Labor Union – DNO ASA II* (2020, 10 February 2020), 13; CAN NCP, *Final Statement on the Request for Review regarding the Operations of China Gold International Resources Corp. Ltd., at the Copper Polymetallic Mine at the Gyama Valley, Tibet Autonomous Region* (2015, Department of Foreign Affairs, Trade and Development Canada, 8 April 2015); NOR NCP, *Lok Shakti Abhiyan, Korean Transnational Corporations Watch, Fair Green and Global Alliance and Forum for Environment and Development vs. POSCO (South Korea), Abp/Apg (Netherlands) and NBIM (Norway)* (2013, National Contact Point for OECD Guidelines, 27 May 2013), 7 ('The Norwegian NCP expects that Norwegian actors respect the OECD Guidelines and cooperate with the OECD NCP. According to the Guidelines, cooperation with NCP is a key part of "responsible business practices". The Guidelines underscore that the effectiveness of the Specific Instances procedure depends on good faith behaviour of all parties involved in the procedures. ...[For] the responding party, good faith means responding to the NCP queries in a timely fashion and "genuinely engaging in the procedures with a view to finding a solution."').

<sup>100</sup> *OECD Due Diligence Guidance for RBC* (above n96), 35 & 89.

<sup>101</sup> *OECD Due Diligence Guidance for RBC* (above n96), 90.

<sup>102</sup> UN *UNGPs* (above n10), GP26 (State based judicial mechanisms) and GP31 (Effectiveness criteria for non-judicial grievance mechanisms).

<sup>103</sup> e.g. *OECD Guidance for the Extractives Sector* (above n29), 75-76; eg. NOR NCP *Intex Resources Final Statement* (above n30), 26, 47 & 50.

<sup>104</sup> *OECD Guidelines* (above n1), ch I, [2] (emphasis added). See, to similar effect, the UN *Guiding Principles on Business and Human Rights* (which are standards expected of enterprises) UN *UNGPs* which state: 'In all contexts, business enterprises should: (a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate; [and] (b) Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements': Principle 23GP23 of UN *UNGPs* (above n10).

<sup>105</sup> Parts of Australia's native title law have been found contrary to international standards (e.g. *Decision 2(55) on Australia* (Committee on the Elimination of Racial Discrimination, 16 Aug 1999, UN doc A/54/18, IIC, p10); *Decision 2(54) on Australia* (Committee on the Elimination of Racial Discrimination, 18 March 1999, UN doc A/54/18, IIA, p5), [7]-[9]; *Concluding observations: Australia* (Human Rights Committee, UN doc A/55/40 para's 498-528, 24 Jul 2000), [507]-[510]). These concern the 'validation' provisions; the 'confirmation of extinguishment' provisions; the primary production upgrade provisions; and restrictions concerning the right of Indigenous title holders to negotiate non-Indigenous land uses (the detail on these four aspects is explained in UN, *Summary Record of the 1323rd Meeting* (1999, United Nations, 19 March 1999). These aspects of the *Native Title Act 1993* have not been amended, which has been identified as a matter requiring attention: e.g. *Concluding observations: Australia* (Human Rights Committee, 7 May 2009, UN doc CCPR/C/AUS/CO/5), [16]; *Concluding observations: Australia* (Committee on the Elimination of Racial Discrimination, 13 Sep 2010, UN doc CERD/C/AUS/CO/15-17), [18].

---

<sup>106</sup> e.g. NLD NCP, *Final Statement Bart Stapert, attorney, vs Mylan* (2016, Ministry of Foreign Affairs, 11 April 2016), 4-5; NOR NCP *Intex Resources Final Statement* (above n30), 22-25.

<sup>107</sup> The Federal Court's decision (joining Andrew Starkey as an interested party) was 25 June 2020; the Starkeys' submission to the Commonwealth Parliament was 31 July 2020 (although not published until later). ElectraNet's submission to the Parliamentary Inquiry was 28 August 2020.

<sup>108</sup> OECD *Due Diligence Guidance for RBC* (above n96), 88.

<sup>109</sup> In particular, these para's of the Final Statement: 26-28, 32-35, 39 & 55-61.