



Australian National Contact Point
for the OECD Guidelines for Multinational Enterprises

Initial Assessment

This complaint was submitted by Friends of the Earth Australia and others, against Australia and New Zealand Banking Group Limited

Published 24 November 2020

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EXECUTIVE SUMMARY

1. The Australian National Contact Point (**AusNCP**) received a complaint from the NGO 'Friends of the Earth Australia' (**FoE**) and three individuals (collectively, the **Notifiers**) against the Australia and New Zealand Banking Group Ltd (**ANZ**).
2. The Complaint alleges ANZ's lending and investment practices do not adhere to the *OECD Guidelines for Multinational Enterprises* (**OECD Guidelines**), regarding issues around fossil fuels, greenhouse gas (**GHG**) emissions and climate change. The Complaint identifies aspects of ANZ's disclosure, investments, target-setting and scenario-analysis as breaching the OECD Guidelines.
3. The AusNCP Independent Examiner considered the six admissibility criteria of the Initial Assessment process, engaged with the parties (the Notifiers and ANZ), and determined to accept the complaint and offer 'good offices' to the parties.
4. The following observations were made during the Initial Assessment.
 - 4.1 The Complaint raises multiple issues, some of which are outside the scope of the OECD Guidelines – particularly regarding divestment from fossil fuels. But most aspects of the Complaint are within the scope of the OECD Guidelines – particularly regarding disclosure, target-setting and scenario analysis. These are issues of responsible business conduct, and the subject of expectations in the OECD Guidelines.
 - 4.2 The issue of investment in fossil fuel and renewable energy, and addressing climate change impacts, are broader than whatever may be agreed (or disputed) between ANZ and the Notifiers. Some of these issues are also being addressed in other processes underway in Australia – the Royal Commission into National Natural Disaster Arrangements (**Royal Commission**) and the Australian Sustainable Finance Initiative (**ASFI**). The AusNCP Independent Examiner will provide a copy of this Initial Assessment to ASFI for its consideration.
 - 4.3 The AusNCP 'good offices' processes will be offered to the parties, to be facilitated by the Independent Examiner, focussing on the issues around disclosure, target-setting and scenario analysis.
5. A draft of this Initial Assessment was provided for comment to the AusNCP Governance and Advisory Board, and then to the parties. The finalisation and publication of the Initial Assessment was delayed because of responses to the COVID-19 pandemic.
6. The Initial Assessment is not a determination on the merits of the claims presented, nor is it an assessment of whether ANZ's actions are consistent with the OECD Guidelines.
7. This statement is available on the AusNCP website at www.ausncp.gov.au.

INITIAL ASSESSMENT

Parties, complaint and outcomes sought

8. A Complaint was submitted by FoE and three individuals (Jack Egan, Joanna Dodds and Patrick Simons) on 30 January 2020 (**Complaint**). The Complaint alleges the ANZ has not adhered to the OECD Guidelines, focussing on three aspects of ANZ conduct: (1) lack of disclosure and inadequate due diligence, (2) inadequate environmental policies and management, and (3) disregard for consumer interests. The Complaint contains various requests of ANZ, including that it:
 - 8.1 'disclose high risk greenhouse gas emissions, including indirect emissions resulting from business lending and investment';
 - 8.2 'disclose which investments are stranded assets which will need to be divested from in order to meet the Paris Agreement goals';
 - 8.3 'responsibly divest from investing in coal';
 - 8.4 'phase out its investment in other fossil fuel industries', later stated as 'reduce its investment in other fossil fuel industries';
 - 8.5 'commit to greenhouse gas emission targets that are in line with the Paris Agreement';
 - 8.6 'publish ambitious, concrete and measurable targets to lower its indirect greenhouse gas emissions...[to] bring emissions financed by ANZ in line with efforts to limit global warming to 1.5°C, as agreed under the Paris Agreement'; and
 - 8.7 'conduct and disclose comprehensive climate-related scenario analysis for all sectors financed by ANZ', which was later expanded to be 'Publish complete and clear climate-related scenario-analysis in line with the Paris Agreement goals, for all the sectors financed by ANZ'.
9. The Complaint alleges that ANZ 'is in breach of the following provisions of the OECD guidelines':
 - 9.1 Chapter II ('General Policies') articles 10 & 12;
 - 9.2 Chapter III ('Disclosure'), articles 2 & 3;
 - 9.3 Chapter VI ('Environment'), articles 1, 4 & 6; and
 - 9.4 Chapter VIII ('Consumer Interests'), articles 2 & 4
10. The Complaint also requests four actions by the AusNCP:
 - 10.1 offer good offices to facilitate mediation between FOE and ANZ on the issues in the Complaint, 'in particular, focusing on how divestment from fossil fuel investment could occur';
 - 10.2 if the parties do not agree, the AusNCP is requested to 'examine the facts and make a determination as to whether or not ANZ has breached the Guidelines';
 - 10.3 recommend the Australian Government 'develop a new regulatory framework for greenhouse and energy reporting'; and

- 10.4 'encourage the Australian Government to introduce legislation that ensures' that all Australian banks' activities 'are aligned with the objective of limiting global warming to +1.5°C'.
11. Consistent with AusNCP Complaint Procedures 4.8 and 4.9, ANZ was notified that a complaint had been made and that identity of both parties would be disclosed on the AusNCP website, as the matter was already in the public domain.
12. ANZ is an Australian bank with operations in many countries. It is a multinational enterprise and therefore expected to comply with the OECD Guidelines.
13. The Independent Examiner identified matters raising a potential perception of bias (he holds a savings account with ANZ, and he previously worked with environmental NGOs). These matters were explained to the Notifiers and ANZ; and the parties confirmed no concerns arising. On receipt of that confirmation, the Independent Examiner commenced assessing the Complaint on 3 March 2020.
14. The COVID-19 pandemic, and public-health responses, delayed the Initial Assessment by affecting the capacity of the parties and also the AusNCP's staff and board. The AusNCP has kept the parties informed, and has endeavoured to minimise divergence from normal procedure and timing.
- 14.1 The Independent Examiner provided a draft assessment, for comment, to the AusNCP Governance and Advisory Board on 20 March 2020 and wrote to the parties on 27 March, explaining there would be a delay from the normal time-frame.
- 14.2 ANZ informed the AusNCP that, because of the extensive impacts across the economy, there would be difficulties for ANZ to properly engage at that time, and requested the matter be adjourned until 30 September 2020. That timing was consistent with positions of the various Australian Government agencies, which had announced the temporary suspensions of some policy and supervision initiatives in response to the impact of COVID-19. The Independent Examiner informed the parties that the matter would be suspended until 30 September 2020, and provided a draft assessment to the parties.
- 14.3 In early October 2020, on resumption of this matter, the Independent Examiner had contact with both parties. The Notifiers explained they had engaged with the Royal Commission and ASFI, but with little meaningful opportunity to address the issues identified in the Complaint. ANZ explained its climate change policy has been reviewed, to be published in late October 2020, and that it welcomes dialogue with stakeholders regarding whether its "actions are appropriate to help support efforts to limit temperature increased to well below 2 degrees in line with the Paris Agreement".

Assessment criteria

15. The OECD Guidelines require an NCP, when it receives a complaint, to conduct an 'initial assessment'. This is to determine whether the issues are 'bona fide' (in other words real or authentic) and relevant to the implementation of the OECD Guidelines (in other words within their scope of coverage).¹ The AusNCP has procedures,²

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

15.1 the identity of the party concerned and its interest in the matter;

15.2 whether the issue is material and substantiated;

15.3 whether there seems to be a link between the enterprise's activities and the issue raised in the complaint;

15.4 the relevance of applicable law and procedures, including court rulings;

15.5 how similar issues have been, or are being, treated in other domestic or international proceedings; and

15.6 whether the consideration of the complaint would contribute to the purposes and effectiveness of the OECD Guidelines.³

16. Detailed observations regarding each of these criteria are contained in the Annexure to this Initial Assessment. The main points are summarised in the paragraphs below.
17. The identities and interests of FoE and ANZ are suitable for a complaint to be addressed under the OECD Guidelines. The Complaint is also made by three individuals whose properties were damaged or destroyed by fires. The Complaint does not explain the interest(s) which these property owners have in ANZ's disclosure practices, environmental standards and application of due diligence principles.
18. Issues of climate change, fossil fuels (and associated GHG) are sufficiently material to responsible business conduct understood by the OECD Guidelines. The information in the Complaint is plausible and relevant to the application of the OECD Guidelines.
19. In relation to 'a link between the enterprise's activities and the issue raised in the complaint', the 'issue' must concern provisions within the OECD Guidelines. The Complaint encompasses four types of claim: (1) disclosure, (2) target-setting, (3) scenario-analysis, and (4) divestment. The first three involve sufficient links between ANZ's activities and the issues raised in the Complaint. However the divestment issue is different because divestment from fossil fuel is not a requirement of the OECD Guidelines. Those aspects of the Complaint are not accepted to progress under 'good offices' .
20. Regarding 'proceedings' - there are two other processes which have been underway in Australia during the initial assessment process concerning issues of climate change, fires, and the need for change. These are the recently completed Commonwealth Government's Royal Commission into National Natural Disaster Arrangements (**Royal Commission**), and the multi-stakeholder Australian Sustainable Finance Initiative (**ASFI**). Good offices by an NCP ought not duplicate other proceedings where identical issues and exchanges are occurring. The Notifiers state they have engaged with both ASFI and the Royal Commission, but have had little opportunity to address the main focus of the Complaint. The Independent Examiner will provide this Initial Assessment, when published, to ASFI because there are relevant issues for their consideration. The ASFI and Royal Commission proceedings do not preclude an NCP's 'good offices' process.
21. As for the Guidelines' purpose and effectiveness – NCP's can provide a forum for discussion and to assist the parties concerned to address the issues raised. By

accepting this Complaint, and offering a confidential conciliation, the AusNCP could help the parties reach a mutually acceptable outcome concerning the issues raised.

Conclusion

22. In the circumstances, the Independent Examiner considers this Complaint merits further consideration. The AusNCP will offer its 'good offices', within the OECD Guidelines, and to facilitate the exchange of information between the parties (which can include conciliation, formal mediation or facilitated discussions) with the aim of arriving at a mutually agreed resolution;
 - 22.1 Any engagement would be facilitated by the Independent Examiner, and focus on the disclosure, target setting and scenario analysis claims. The aim of the 'good offices' process would be to help the parties' exchange and determine whether there is agreement regarding any of these claims, consistent with the OECD Guidelines.
 - 22.2 Divestment from all fossil fuels is not something required by the OECD Guidelines. Accordingly, the Notifiers' claims which address only that outcome are not proposed to be facilitated through the 'good offices' process.
 - 22.3 The AusNCP will formally ask the parties whether they are willing to engage in the 'good offices' process. This would involve the Independent Examiner providing information to the parties on the complaint process and prepare a framework for handling any conciliation, mediation or facilitated discussions. Subject to their response, the Independent Examiner will liaise with the parties to arrange the how the 'good offices' will proceed.
 - 22.4 If the parties reach an agreement, the AusNCP will publish a final statement with the results of the proceedings. Information regarding the *contents* of the discussions and the agreement would only be published with the consent of the parties involved.
 - 22.5 If no agreement is reached, or one of the parties is not willing to take part in the proceedings, the AusNCP's procedures require that to be identified in a published final statement. The final statement, by the Independent Examiner, would include analysis of the issue and whether the enterprise's actions were consistent with the OECD Guidelines. It may also include recommendations to the enterprise or other relevant bodies where appropriate.
23. A draft of this Initial Assessment was provided, for comment, to the AusNCP's Governance and Advisory Board, and then to the parties.
24. The AusNCP Procedures specify that 'acceptance or rejection of a complaint is not an assessment of whether the enterprise's actions are consistent with the OECD Guidelines'.⁴

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OECD Guidelines for Multinational Enterprises

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ANNEXURES

Schedule of events

Submission	Date
<ul style="list-style-type: none">Complaint submitted to the AusNCP.	30 January, 2020
<ul style="list-style-type: none">Complaint acknowledged by the AusNCP and further information sought.	3 February, 2020
<ul style="list-style-type: none">AusNCP notified the MNE.	4 February, 2020
<ul style="list-style-type: none">Governance and Advisory Board notified by the AusNCP.	12 February, 2020
Initial Assessment	
<ul style="list-style-type: none">Draft assessment, by Independent Examiner, provided to the Governance and Advisory Board for review and advice.	20 March, 2020
<ul style="list-style-type: none">Draft assessment provided to the parties for comment; and matter adjourned due to COVID responses and impact	24 April, 2020
<ul style="list-style-type: none">Independent Examiner engaged with the parties	Sep/Oct 2020
<ul style="list-style-type: none">Initial Assessment, by Independent Examiner, provided to the Governance and Advisory Board for review and advice.	19 October 2020
<ul style="list-style-type: none">AusNCP finalised Initial Assessment and provided an advance copy to the parties and the Governance and Advisory Board.	17 November 2020
<ul style="list-style-type: none">Initial Assessment published on www.AusNCP.gov.au and reported to the OECD.	24 November 2020

Publications

<http://mneguidelines.oecd.org/database/>

<https://ausnccp.gov.au/complaints/view-closed-complaint>

Institutional arrangements and Governance of the AusNCP

25. 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.
26. 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.

27. 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.
28. The OECD Guidelines can be seen as:
 - 28.1 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);
 - 28.2 **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
 - 28.3 **providing** an informal structure for resolving issues that may arise in relation to implementation of the OECD Guidelines in complaints.

Governance

29. 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.
30. Accordingly, the OECD Guidelines stipulate that NCPs:
 - 30.1 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;
 - 30.2 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
 - 30.3 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.
31. 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.
32. 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.
33. **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.

34. From September 2019, all new cases are managed by an Independent Examiner, who is supported by the AusNCP Secretariat and the Board. The Australian National Contact Point, held by a Senior Executive official in the Treasury, retains responsibility for complaints submitted prior to September 2019.

Observations regarding Guidelines assessment criteria

Criterion 1: Parties' identities and interests

35. 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'.⁵
36. This criteria is present here.
 - 36.1 The Complaint states FOE has engaged with ANZ for more than five years, through the project 'MarketForces' which 'has campaigned ANZ to divest from fossil fuels and support Australia's transition to a low carbon economy'. FOE, and its international associates, have long interest and involvement in carbon emissions, climate change and related business activities. Organisations which have a mandate or objectives related to issues in the OECD Guidelines may have the requisite interest.⁶ FOE has a legitimate interest in this Complaint.
 - 36.2 The Complaint is also made by three individuals who described their properties as lost or badly burnt by fires in 2019 (in 'catastrophic Australian bushfires') and 2018 (in 'fire due to unprecedented weather conditions which fanned sparks from power lines'). The Complaint does not explain the interest(s) which these property owners have in ANZ's disclosure practices, environmental standards and application of due diligence principles. However, the Complaint asserts ANZ's financing of fossil fuels has 'indirect environmental impact' and repeatedly refers to the 'Bank's climate impact'.

Criterion 2: Is the issue material and substantiated?

37. The second of the admissibility criteria is 'whether the issue is material and substantiated', assessing 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'.⁷ The materiality of issues is assessed against the recommendations and standards of the OECD Guidelines, not in relation to Australian law.⁸ 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.⁹
38. The Complaint, lodged in January 2020, referenced an ANZ 'Climate Change Statement of February 2019'.¹⁰ ANZ has a, publicly available, updated statement from 1 October 2019,¹¹ and that has been used in assessing the Complaint.

39. The OECD Guidelines do not explicitly mention 'climate change' but there is brief reference to GHG 'emissions',¹² and these issues should be part of a company's due diligence, particularly in relation to potential environmental and human rights impacts.¹³ At the 2019 Conference of the Parties (meeting regarding the UN Framework Convention on Climate Change), the OECD and UN Climate Change convened a meeting on *Global Climate Action and Responsible Business Conduct*. The Background Note, published by the OECD Secretariat, emphasised the significance of these matters.

The latest UNEP Emissions Gap Report 2019 indicates that global greenhouse gas emissions require reductions of 7.6% annually if the Paris Agreement's target of pursuing a below 1.5 degrees Celsius increase in temperature rise is to be met. Currently we are on a trajectory for a 3.2 degrees Celsius temperature rise, which will have catastrophic consequences for people and the planet. There remains an urgent need for collective action requiring necessary and unprecedented leadership from not just governments but also the private sector. On the part of the private sector, this means ambitious mitigation action to reduce greenhouse gas (GHG) emissions and thereby the adverse climate related impacts of their operations, on people and the planet.¹⁴

40. These matters are also sufficiently substantiated through the explanations in the Complaint. Accordingly, the issues are sufficiently material and substantiated for the purposes of the complaints process of the OECD Guidelines.

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

41. 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'. The term 'issue', in examining a complaint, is limited to the provisions of the OECD Guidelines because issues which do not concern the chapters of the Guidelines are outside the scope of what an NCP can address.¹⁵

42. As the Notifiers acknowledge, the OECD's 'Due Diligence for Responsible Corporate Lending and Securities Underwriting' is relevant. That document advised the following.

For adverse impacts that are collective, diffuse and transboundary in nature such as climate change, a more nuanced analysis may be needed to understand the relationship between financing and the specific activities of the client causing harm.¹⁶

43. The Complaint raises multiple issues and it is necessary to consider each. As against ANZ, there are four types of claim.

43.1 **Disclosure claims**, in which the Notifiers request ANZ disclose 'greenhouse gas emissions [presumably from the bank itself as well as], including indirect emissions resulting from business lending and investment'. There is a sufficient link between ANZ's activities and this issue. The information ANZ chooses to publish, or maintain to itself, is wholly within its control, and the OECD Guidelines encourage examination and publication of an enterprise's environmental impact, and particularly disclosure regarding GHG.

43.2 **Divestment claims**, encompassing the Notifier's requests for ANZ to divest / phase out / reduce its investment in coal and fossil fuel industries; and also to

'disclose which investments ... need to be divested from in order to meet the Paris Agreement goals'. This aspect of the Complaint is framed by reference to an end (investment in fossil fuel projects) rather than impacts and ANZ's due-diligence / remediation regarding those impacts. As noted above, analysis of 'adverse impacts [involves] understanding the relationship between the financing *and the specific activities of the client* causing harm'.¹⁷ This aspect of the Complaint is not about particular ANZ clients or business relations; nor of measures ANZ has taken (or neglected) regarding particular impacts related to those clients. Rather, the Complaint focusses on *any* connection to fossil fuel. As explained under the following criteria,¹⁸ the OECD Guidelines do not approach responsible business conduct and fossil fuel simply in terms of connection or exclusion. Separation from fossil fuel is not an expectation of the OECD Guidelines. There is, therefore, insufficient connection between these (divestment) aspects of the Complaint about ANZ and an issue within the OECD Guidelines.

43.3 **Target-setting claims**, are those where the Complaint references targets 'in line with the Paris Agreement'. This is similar to the disclosure claims. There is a sufficient link between ANZ's activities and issues arising under the OECD Guidelines (such as providing 'adequate, measurable and verifiable ... information on the potential environment, health and safety impacts of the activities of the enterprise').

43.4 **Scenario-analysis claims**, entailing the Complaint's focus on 'climate-related scenario analysis'. The Notifiers suggests that climate-related scenario analysis is 'a commonly accepted way to' conduct adequate due diligence required by the OECD Guidelines. Like the disclosure claims, there is a sufficient link between ANZ's activities and issues arising under the OECD Guidelines.

Criterion 4: Applicable law and procedures

44. 'The relevance of applicable law and procedures, including court rulings' is the fourth of the admissibility criteria.

45. The Complaint identifies the Paris Agreement as 'the most relevant and current international standard'. The terms of the Paris Agreement were finalised in December 2015.¹⁹ That agreement seeks to address climate change by limiting increases in global average temperature, and its main legal mechanism is each nation state committing Nationally Determined Contributions (or **NDCs**). NDCs specify the nation's plan for addressing climate change including a target for reducing GHG emissions and how that target will be achieved. Australia's NDC involves reducing GHG 'emissions to 26–28 per cent on 2005 levels by 2030'.²⁰ The Paris Agreement does not, in its text, contain obligations or targets for business, and there are various ways in which companies have responded.

46. The OECD Guidelines do not mention 'climate change'. GHG emissions feature in only two paragraphs, which is the Environmental requirements in Ch VI:

*'6 ...[E]nterprises should ... Continually seek to **improve corporate environmental performance, at the level of the enterprise and, where appropriate, of its supply chain, by encouraging** such activities as:*

*b) development and provision of **products or services that ...reduce greenhouse gas emissions***

c) promoting **higher levels of awareness among customers ...including**, by providing accurate **information on** their products (for example, on **greenhouse gas emissions...**' [emphasis added]

47. The only other reference in the OECD Guidelines, to GHG, is in the commentary of the Disclosure chapter III:

'33. **The Guidelines** also **encourage** a second set of **disclosure or communication practices in** areas where reporting standards are still evolving such as, for example, social, environmental and risk reporting. This is particularly the case with **greenhouse gas emissions, as the scope of their monitoring is expanding to cover direct and indirect, current and future, corporate and product emissions ...**' [emphasis added]

48. Due diligence guides, published by the OECD, provide greater detail on company responsibilities under the OECD Guidelines. Relevant here are the following four OECD guides.

48.1 The OECD Recommendation on the Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector was adopted by the OECD Council in July 2016. It is significant this was adopted after the Paris Agreement and it specifically references oil and gas, indicating these operations are not, of themselves, contrary to the OECD Guidelines.²¹ Rather, responsible business conduct regarding these fossil fuels (oil, gas, some minerals) is seen to provide benefits and be acceptable provided due diligence addresses related impacts.

'Enterprises involved in the exploration and extraction of oil, gas and minerals have the potential to generate income, sustain livelihoods, foster local development and generate significant revenues in the areas in which they operate. ... However, extractive operations can have a significant social and environmental footprint and thus are often at risk of causing or contributing to adverse impacts, such as human rights infringements, economic set-backs and environmental degradation.

*...Regardless of the requirements in law, meaningful stakeholder engagement is critical to avoiding some of the potential adverse impacts of extractive operations as well as optimising potential contributions. ... The aim of **the present document is to offer practical guidance for the extractive sector** in line with the provisions of the OECD Guidelines on due diligence for stakeholder engagement. **Extractive sector enterprises** are considered to **include enterprises conducting exploration, development, extraction, processing, transport, and/or storage of oil, gas and minerals.**'²²*

Apart from indicating the application of the OECD Guidelines to oil and gas operations, this 2016 guidance contains little of direct relevance to GHG emissions, climate change or bank responsibilities. They are addressed in other OECD guides.

48.2 In February 2017, the OECD Investment Committee approved the *Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises*. This makes no reference to fossil fuel but addresses GHG or related emissions.²³ The Guidance

emphasised that conducting due diligence pursuant to the OECD Guidelines is how a bank should address climate change issues.

'By carrying out due diligence in line with the OECD Guidelines, investors will not only be able to avoid negative impacts of their investments on society and the environment, but also avoid financial and reputational risks, respond to expectations of their clients and beneficiaries and contribute to global goals on climate and sustainable development'.²⁴

- 48.3 In 2018, the OECD published its general *Due Diligence Guidance for Responsible Business Conduct*.²⁵ This has one reference to GHG, and none to fossil fuel nor climate change.

'Meaningful stakeholder engagement is important throughout the due diligence process. ... For certain types of adverse impacts which result in collective harms (such as corruption which collectively harms the populations of the jurisdiction in which it occurs or greenhouse gas emissions which contribute to collective, transboundary harms), broad engagement with impacted or potentially impacted stakeholders and rightsholders may not be possible. In these cases, engagement with credible stakeholder representatives or proxy organisations (e.g. NGOs, representative public bodies, etc.) may be useful'.²⁶

- 48.4 In 2019, the OECD published the *Due Diligence for Responsible Corporate Lending and Securities Underwriting*.²⁷ As the Complaint notes, the opening sentences of the OECD's Foreword frame that document within climate change.

'Financial institutions have a key role to play in driving global sustainability through directing financing towards measures to achieve the Sustainable Development Goals and the Paris Climate Agreement and through seeking to avoid and address environmental and social risks associated with their activities.

This paper helps banks and other financial institutions implement the due diligence recommendations of the OECD Guidelines for Multinational Enterprises in the context of their corporate lending and underwriting activities'.²⁸

The document says nothing about fossil fuels, and 'emissions' features once only (as an example in tracking a client's carbon emissions over time).²⁹

49. The OECD has recently published a Background Note on *Global Climate Action and Responsible Business Conduct: What does it mean for business to act responsibly in the face of a climate emergency?*.³⁰ This is not a formal law or procedure. However, it was issued in the month preceding this Complaint, and so provides the most recent OECD indication of the standards relevant to this Complaint.

- 49.1 The document states the OECD has **'developed specific due diligence guidance to help business address risks, including climate related impacts in specific sectors, e.g., in the garment and footwear, minerals, agriculture and financial sectors'**.³¹ This reinforces the guides already summarised above comprise the OECD's specific guidance regarding climate-related impacts and what is expected by the OECD Guidelines.

- 49.2 **'Business action on climate can take many forms. Implementing due diligence helps companies prioritise and address key climate risks and impacts'**.³² This

reinforces that due diligence involves prioritising, is iterative, and thus not necessarily 'finished' at any point of time.

49.3 **'The OECD recommends that due diligence reporting include information about a company's policies** on climate and other ESG issues, **information on measures taken** to embed those policies into management systems, **identified areas of significant risks**, as well as specific priority risks areas, **and the actions taken** to prevent or mitigate those risks'.³³ This reinforces the relevance of the Complaint's points on reporting and disclosure issues.

50. Examining the applicable law and procedures reveals that some matters in the Complaint are beyond the scope of the OECD Guidelines and what could usefully be progressed in 'good offices' conciliation.

50.1 Broader movements around *divestment* from fossil fuel operations, and government action on climate change, *may* be developing in other fora. However, the OECD Guidelines do not require divestment from fossil fuel. What the OECD Guidelines and guides show, is that a bank's responsibility relating to GHG is primarily focused on the due diligence *in relation to each specific operation, examining their potential impacts, and encouraging lower emissions*. It is impossible to determine whether the necessary due diligence has occurred from the mere fact of investment which has a fossil fuel component.

50.2 The OECD Guidelines more readily have application regarding fossil fuels, in considering an enterprise's GHG emissions. The due-diligence process has obvious implications, for example, regarding an industrial plant which is not using practical emission reduction techniques and technology; or a fossil-fuel producer which is generating its product below best practice in minimising GHG emissions. A bank investing in those types of operations would have clear due diligence obligations, regarding leverage and influencing the conduct of its client(s).

50.3 Issues in relation to disclosure, target-setting and measurement *are* aspects of what the OECD Guidelines envisaged in relation to due diligence and GHG emissions.

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

51. The fifth admissibility criteria to be examined 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, avoiding duplication, and not prejudicing parties involved in litigation if inconsistent with any specific mediation.

52. There are increasing amounts of legal proceedings, in Australia and elsewhere, concerning climate change, with many similar issues to those in this Complaint. Some proceedings are against governments and/or corporations, asserting they are liable for contributing (or not avoiding) the physical and financial impacts associated with GHG emissions.³⁴ Other proceedings oppose proposed fossil fuel projects, asserting that the resultant GHG emissions weigh against these projects being approved to proceed.

53. None of these proceedings are determinative of whether the Complaint should proceed (or be rejected) under the OECD Guidelines, because the OECD Guidelines

apply regardless of domestic law.³⁵ Equally, it does not appear the Notifiers or ANZ are involved in current litigation concerning issues in this Complaint. So, there is no obstacle to 'good offices' conciliation from that perspective.

54. There are other proceedings examining climate change and the need for change currently underway. Relevant to the issues raised in this Complaint – climate change and fires - the Australian Government established a Royal Commission in February 2020. The Commission's terms of reference include the following.

*WHEREAS Australia is experiencing an extreme bushfire season in 2019-2020, resulting in devastating loss of life, property and wildlife, and environmental destruction across the nation. ... AND **the changing global climate carries risks for the Australian environment and Australia's ability to prevent, mitigate and respond to bushfires and other natural disasters.***

*AND recognising that **Australia as a nation must take action**, including the development and implementation of adaptation actions, **to address the consequences of longer, hotter, drier seasons and severe weather events.***

...

***[A] Commission of inquiry...[is] to inquire into** the following matters: ... (b) Australia's arrangements for improving resilience and adapting to changing climatic conditions, **what actions should be taken to mitigate the impacts of natural disasters**, and whether accountability for natural disaster risk management, preparedness, resilience and recovery should be enhanced, including through a nationally consistent accountability and reporting framework and national standards.³⁶*

55. The Commission reported on 28 October 2020. The Commission invited submissions from the public.

56. There is also a multi-stakeholder process currently underway which addresses many of the issues raised in this Complaint: the *Australian Sustainable Finance Initiative (ASFI)*. ASFI issued a *Progress Report* in December 2019,³⁷ and the following is relevant here.

56.1 ASFI has representation from 'Australia's major banks, superannuation funds, insurance companies, financial sector peak bodies and academia'.³⁸ Their aim is 'to develop a Sustainable Finance Roadmap, in consultation with diverse sectors and stakeholders ... to be launched in 2020, [which] will recommend pathways, policies and frameworks to enable the financial services sector to contribute more systematically to the transition to a more resilient and sustainable economy, consistent with global goals such as the UN Sustainable Development Goals and the Paris Agreement on climate change'.³⁹

56.2 The December 2019 Progress Report outlined 'Critical challenges for the financial services sector', noting 'As the financial services sector, we must act now to mitigate future risks and instability to our sector, the economy and – more broadly – society that are occurring as a consequence of global shifts such as a changing climate'.⁴⁰

56.3 ASFI states it 'will be engaging and consulting with stakeholders ... [and] ASFI invites interested parties to make a submission'.⁴¹

57. The aspects of the Complaint dealing with bank disclosures, target-setting and scenario-analysis are all issues which appear relevant to the ASFI process. Additionally,

the way in which these aspects have been couched in the Complaint, mean there would be benefit from broader perspectives and input as to what is required of a bank in those areas. The Complaint repeatedly references the Paris Agreement. ASFI aims to develop policies and frameworks for the financial services sector 'consistent with ...the Paris Agreement' through engaging and consulting with stakeholders.

58. Important considerations will arise when ASFI finishes its process. At that time, it will be possible to examine the consistency of ASFI's outcomes and recommendations with the OECD Guidelines. The AusNCP Independent Examiner recommends the AusNCP provide a copy of this Initial Assessment, when this document is published, to ASFI and emphasise three points.
 - 58.1 The OECD Guidelines have relevance to how banks approach GHG emissions, and investment in fossil fuel projects.
 - 58.2 If ASFI's final recommendations are consistent with the OECD Guidelines, they are assisting banks and stakeholders.
 - 58.3 To the extent any ASFI recommendations are inconsistent with the OECD Guidelines, that may contribute to further complaints and consideration by NCPs.

Criterion 6: The purposes and effectiveness of the OECD Guidelines

59. 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'.⁴²
60. The assessment of whether 'good offices' could contribute to the purposes and effectiveness of the OECD Guidelines is informed by what the particular complaint seeks. This is because initial assessment involves 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'.⁴³
61. The Notifiers requested good offices mediation 'in particular, focusing on how divestment from fossil fuel investment could occur'. As explained above, fossil fuel divestment is not something the OECD Guidelines requires. While a complaint 'should not be rejected on the basis that a specific remedy is sought',⁴⁴ the complaint's requested focus for mediation is relevant in determining what good offices would be productive.
62. It is clear that ANZ and the Notifiers have different views on how to address fossil fuel investment. The Notifiers talk of ANZ needing to 'divest from investing in coal' and 'phase out its investment in other fossil fuel industries'. The ANZ talks of a need to 'facilitate a gradual and orderly transition'.
63. ANZ explained its climate change policy has been reviewed, to be published in late October 2020, and that it welcomes dialogue with stakeholders regarding whether its "actions are appropriate to help support efforts to limit temperature increased to well below two degrees in line with the Paris Agreement".

Endnotes

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- ¹ OECD, *Guide for National Contacts Points on the Initial Assessment of Specific Instances* (2019, OECD Publishing), 5.
- ² AusNCP *Complaint Procedures* (September 2019) Treasury.
- ³ AusNCP *Complaint Procedures* (above n2), 4.10.
- ⁴ AusNCP *Complaint Procedures* (above n2), 4.16.
- ⁵ OECD *Guide for Initial Assessments* (above n1), 6.
- ⁶ OECD *Guide for Initial Assessments* (above n1), 6.
- ⁷ AusNCP *Complaint Procedures* (above n2, 4.10(b) & 4.11.
- ⁸ OECD *Guide for Initial Assessments* (above n1), 21.
- ⁹ OECD *Guide for Initial Assessments* (above n1), 20.
- ¹⁰ eg. 'ANZ's own Climate Change Statement acknowledges the Paris Agreement ... :ANZ Climate Change Statement' (28 February 2019)': Complaint, 3.
- ¹¹ www.anz.com.au/content/dam/anzcomau/documents/pdf/aboutus/climate-change-statement.pdf (accessed 17 March 2020).
- ¹² See *Criterion 4: Applicable law and procedures*.
- ¹³ eg. OECD, *Due Diligence Guidance for Responsible Business Conduct* (2018, OECD Publishing), 49; OECD, *Due Diligence for Responsible Corporate Lending and Securities Underwriting* (2019, OECD Publishing), 33 & 44; Dutch NCP, *Final Statement: Oxfam Novib, Greenpeace Netherlands, BankTrack and Friends of the Earth Netherlands (Milieudefensie) versus ING* (2019, Ministry of Foreign Affairs).
- ¹⁴ OECD Centre for Responsible Business Conduct, *Global Climate Action and Responsible Business Conduct: What does it mean for business to act responsibly in the face of a climate emergency?* (2019, Background Note issued at COP25 Global Climate Action Side Event), 1.
- ¹⁵ OECD *Guide for Initial Assessments* (above n1), 11.
- ¹⁶ OECD *Due Diligence for Corporate Lending* (above n13), 20. This reflects that the OECD Guidelines more readily address direct impact. For instance, in the OECD's examples of links (rather than direct impact), this is the example: 'Likewise, enterprises can be directly linked to impacts caused by business relationships that they do not have a legal or organisational link to. For example, a brand sourcing t-shirts from a manufacturer which is a separate corporate entity may be directly linked to adverse environmental impacts the manufacturer causes in the process of producing the t-shirts': OECD *Guide for Initial Assessments* (above n1), 7. That is far from the situation of an investor funding a project which produces fossil fuel, which may then be used by another party, releasing GHG, which contributes to climate change.
- ¹⁷ OECD *Due Diligence for Corporate Lending* (above n13), 20 (emphasis added).
- ¹⁸ *Criterion 4: Applicable law and procedures*, particularly paragraphs 46-50.
- ¹⁹ [2016] ATS 24.
- ²⁰ Department of Agriculture Water and the Environment *Australia's 2030 climate change target* (2015, Australian Government).
- ²¹ The Council's decision, in adopting the Guidance, specifically directed NCPs to work with oil & gas and other companies, in its recommendation 'that Adherents [Governments] and where relevant their **NCPs...ensure the widest possible dissemination of the Guidance and its active use by enterprises conducting exploration, development, extraction, processing, transport, and/or storage of oil, gas and minerals ...**': *Recommendation of the Council on the Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*, 13 July 2016, III: OECD, *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector* (2017, OECD Publishing), 10 (emphasis added).
- ²² OECD *Due Diligence Guidance for Extractives Sector* (above n21), 14-15 (emphasis added).
- ²³ The three references in OECD *Due Diligence Guidance for Extractives Sector* (above n21) are:
- 2.2 *Implementing due diligence: Identifying actual and potential adverse impacts*, where one of the 'Key considerations for investors' was 'Taking proactive approaches to enhance quality and availability of RBC [responsible business conduct] information' and an example was 'participating in existing industry initiatives to enhance the availability of this type of information – for example, the Carbon Disclosure Project'
 - 2.3 *Implementing due diligence: Seeking to prevent and mitigate adverse impacts*, where appropriate approaches may include 'participation in industry or multi-stakeholder initiatives ... (e.g. PRI Collaboration Platform, UNEP Finance Initiative, investor networks on climate change, Corporate Sustainability Reporting Coalition'; and
 - 2.4 *Implementing due diligence: Accounting through tracking and communicating on results*, where one of the 'Key considerations for investors ...' noted that 'mandatory RBC reporting is becoming increasingly common (e.g. Article 173 of the French Law for Energy Transition and Green Growth'
- ²⁴ OECD, *Responsible business conduct for institutional investors* (2017, OECD Publishing), 3 (emphasis added)

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- ²⁵ OECD *Due Diligence Guidance for RBC* (above n13) (approved by the OECD Investment Committee on 3 April 2018, and adopted by Council at Ministerial level on 30 May 2018).
- ²⁶ OECD *Due Diligence Guidance for RBC* (above n13), 50-51 (emphasis added).
- ²⁷ OECD *Due Diligence for Corporate Lending* (above n13) (the OECD Investment Committee approved the document 7 October 2019).
- ²⁸ OECD *Due Diligence for Corporate Lending* (above n13), 3 (emphasis added).
- ²⁹ 'Key considerations for RBC due diligence in banking transactions ... Measure 4: Track implementation and results' which involves tracking 'the implementation and effectiveness of the enterprise's due diligence activities' including measures such as 'Actual changes with regard to adverse impacts (e.g. changes in carbon emissions rates of clients over time)': OECD *Due Diligence for Corporate Lending* (above n13), 27 & 53-55.
- ³⁰ OECD *Global Climate Action and Responsible Business Conduct* (above n14).
- ³¹ OECD *Global Climate Action and Responsible Business Conduct* (above n14), 3 (emphasis added).
- ³² OECD *Global Climate Action and Responsible Business Conduct* (above n14), 3 (emphasis added).
- ³³ OECD *Global Climate Action and Responsible Business Conduct* (above n14), 3 (emphasis added).
- ³⁴ The most relevant Australian proceedings are *Mark McVeigh v Retail Employees Superannuation* (Federal Court NSD1333/2018) scheduled for hearing in July 2020 by orders of Justice Perram on 22 November 2019 (information from Commonwealth Courts Portal <https://www.comcourts.gov.au/public/eseach/disclaimer> accessed 9 March 2020).
- ³⁵ OECD *Guidelines for Multinational Enterprises* (2011), Part I, [2].
- ³⁶ Governor-General *Letters Patent establishing National Royal Commission into Black Summer bushfires* (20 February 2020) Australian Government, 1-2 (emphasis added).
- ³⁷ ASFI, *Developing an Australian Sustainable Finance Roadmap: Progress Report* (2019, Australian Sustainable Finance Initiative).
- ³⁸ ASFI, *What is ASFI?* <https://www.sustainablefinance.org.au/> (accessed 9 March 2020).
- ³⁹ ASFI *What is ASFI?* (above n38).
- ⁴⁰ ASFI *Progress Report* (above n37), 25.
- ⁴¹ ASFI *Progress Report* (above n37), 36.
- ⁴² OECD *Guide for Initial Assessments* (above n1), 10.
- ⁴³ OECD *Guide for Initial Assessments* (above n1), 12.
- ⁴⁴ OECD *Guide for Initial Assessments* (above n1), 13.