

# Final Statement

Complaint submitted by Parella Law on behalf of an affected individual against an Australian multinational enterprise (property and infrastructure sector)

1 February 2023

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## Executive summary

1. On 20 August 2021, the Australian National Contact Point for Responsible Business Conduct (AusNCP) received a complaint from Parella Law on behalf of an affected individual (the notifier), against an Australian multinational enterprise (the enterprise).
2. The complaint alleged systemic racism in the United States (US) based subsidiary of the enterprise, and discriminatory treatment of the notifier on the basis of race and sexuality during his employment, in breach of the OECD Guidelines for Multinational Enterprises (OECD Guidelines).<sup>1</sup>
3. The enterprise denied there are discriminatory or retaliatory practices in its US subsidiary.
4. An [Initial Assessment](#) was published on 21 December 2021, identifying that the AusNCP accepted some aspects of the complaint and offered good offices to the parties with the aim of arriving at a mutually agreed resolution.<sup>2</sup>
5. During the early preparation stage of good offices, the parties were able to reach a resolution of the complaint independently of the AusNCP process. As part of the resolution, the parties requested that their names and the terms of the resolution remain confidential and the complaint be closed.
6. The Independent Examiner agreed to close the complaint and prepare this Final Statement consistent with the [AusNCP procedures](#) in circumstances where a notifier withdraws a complaint.
7. A schedule of events setting out each of the steps taken in the complaint is set out in this Final Statement. A summary of the AusNCP governance and institutional arrangements are also included in this statement.
8. The AusNCP notes that as the complaint was closed at an early stage, this Final Statement is not a determination on the merits of the claims presented, nor is it an assessment of whether the enterprise's actions are consistent with the OECD Guidelines. No conclusions or recommendations have been made by the AusNCP in respect of the complaint.
9. This statement is available on the AusNCP website at [www.ausncp.gov.au](http://www.ausncp.gov.au).

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<sup>1</sup> Adhering Governments, OECD Guidelines for Multinational Enterprises, OECD Publishing, Paris, 2011, accessed 8 January 2023. <https://www.oecd.org/daf/inv/mne/48004323.pdf>

<sup>2</sup> Australian National Contact Point for Multinational Enterprises (AusNCP), 'Initial Assessment complaint submitted by Parella Law', AusNCP, Australian Government, 22 December 2021, accessed 8 January 2023. [https://ausncp.gov.au/sites/default/files/2021-12/25\\_AusNCP\\_Initial\\_Assessment.pdf](https://ausncp.gov.au/sites/default/files/2021-12/25_AusNCP_Initial_Assessment.pdf)

## Parties and process

### Background and progress of complaint

10. On 20 August 2021, the New York law firm Parella Law (the notifier) submitted to the AusNCP a complaint under the OECD Guidelines on behalf of the affected individual, against the enterprise.
11. The enterprise is an Australian-based multinational enterprise in the property and infrastructure sector, with operations in multiple jurisdictions, including the US.
12. The complaint was that the enterprise had ‘contributed to, permitted, and refused to correct a systemically racist workplace at its related entity [in the US]’, contrary to the OECD Guidelines.
13. In summary, in addition to alleging that other employees had been subjected to racism, the notifier alleged that he was subject to discrimination on the basis of his race and sexuality during his employment at a US subsidiary of the enterprise, and that his employment was terminated because of his race and because he ‘often spoke up about racism’.
14. The enterprise denied the allegations including those relating to discriminatory or retaliatory practices in its US subsidiary.
15. The outcomes sought by the notifier included that the Australian management board act to ‘end systemic race discrimination’ which the notifier alleged to exist in the US subsidiary, have greater diversity in management, strengthened grievance mechanisms, and increased training and awareness of disadvantage and diversity in its workforce and procedures.

### Circumstances in which this statement is made

16. The complaint raised issues regarding the practices of a US-based subsidiary of the enterprise. Further, the complaint was brought to the AusNCP after proceedings had been initiated by the notifier against the US-subsiary of the enterprise before an adjudicative body in the US.
17. However, the complaint identified that the notifier wished to engage with the Australian head-office of the enterprise in the event good offices were offered. The issues raised in the complaint, regarding the enterprise, did not necessarily duplicate the US proceedings. The Independent Examiner determined that the existence of the US proceedings did not preclude the AusNCP’s assessment of the complaint.
18. As part of the process of assessing the complaint, the Independent Examiner engaged in discussions with the United States National Contact Point (USNCP).
19. The AusNCP accepted the complaint, while agreeing with the USNCP that the AusNCP would keep the USNCP informed about the complaint.

# AusNCP proceedings

## Initial assessment

20. Between 21 August and 2 November 2021, the Independent Examiner sought and obtained information and clarification from both parties. The information included a significant volume of additional materials from the notifier and written responses from the enterprise. The parties' documentation was shared with the other party with the consent of the submitting party.
21. A draft Initial Assessment was provided by the Independent Examiner to the AusNCP Governance and Advisory Board for comment on 2 November 2021 and the parties for comment on 21 November 2021.
22. The enterprise provided comments on the draft Initial Assessment on 10 December 2021 and indicated a willingness to participate in good offices.
23. On 15 December 2021, an embargoed final Initial Assessment was provided to the parties.
24. On 22 December 2021, the AusNCP published the Independent Examiner's initial assessment of the complaint.<sup>3</sup> The Independent Examiner considered the complaint merited further consideration.
25. The Initial Assessment determined three topics for good offices:
  - 25.1. *What policies and procedures the enterprise has in place to address discrimination in subsidiaries, including: grievance mechanisms, termination during COVID response, and what the enterprise does if/when it learns of discriminatory statements by employees (in general).*
  - 25.2. *The enterprise's actions and responses when learning of the concerns raised about treatment of the notifier, focussed on the circumstances of the notifier, and not covering the allegations made about treatment of other persons described in complaint.*
  - 25.3. *What future actions or procedures the enterprise will have regarding discrimination, particularly to ensure awareness of, and responses by, subsidiary entities.*
26. 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.

## Good offices

27. During March 2022, the notifier raised further matters regarding allegedly racist public commentary by senior employees of the enterprise's US subsidiary.
28. On 13 April 2022, the AusNCP transferred the case to the current Independent Examiner to provide good offices to balance resourcing requirements across the Independent Examiners.

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<sup>3</sup> AusNCP, 'Initial Assessment complaint submitted by Parella Law'.

29. The good offices process begins with a preparation stage to enable the Independent Examiner to provide information to the parties on the complaint process and prepare a framework for handling any conciliation, mediation or facilitated discussions.
30. Between June 2022 and July 2022, the Independent Examiner liaised with the notifier via video and in correspondence regarding the structure and content of the good offices process. The opportunity for similar discussion was offered by the Independent Examiner to the enterprise.
31. During the preparation stage of good offices, the parties made the Independent Examiner aware that they were also engaged in discussions directly, outside the AusNCP process.
32. On 18 August 2022, the enterprise and notifier informed the Independent Examiner that the parties had reached an in-principle resolution and requested a postponement of the AusNCP good offices. The Independent Examiner agreed to the request.
33. On 13 September 2022, the enterprise informed the Independent Examiner that the parties had reached a confidential resolution of the issue and requested the complaint be 'closed'.
34. On 14 September 2022, the notifier confirmed that they requested the case be closed, which the Independent Examiner determined to be akin to a request to withdraw the case under the AusNCP procedures.
35. The notifier also requested that the names of the parties remain confidential. Transparency is a core principle of the OECD Guidelines and a central criterion of the procedures under which the AusNCP operates. It is an important principle not lightly to be disregarded. In the circumstances of this complaint, however, which included that the notifier requested the preservation of anonymity, the notifier was legally represented, and the parties had reached a mutual agreement to resolve the complaint, the Independent Examiner determined it was appropriate to abide by the request in this specific instance.

## Application of the OECD Guidelines

36. The overarching **General Policies** set out in Chapter II the OECD Guidelines include that:

*Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard:*

*A. Enterprises should:*

...

*2. Respect the internationally recognised human rights of those affected by their activities.*

...

*4. Encourage human capital formation, in particular by creating employment opportunities and facilitating training opportunities for employees.*

...

*6. Support and uphold good corporate governance principles and develop and apply good corporate governance practices, including throughout enterprise groups.*

...

*9. Refrain from discriminatory or disciplinary action against workers who make bona fide reports to management or, as appropriate, to the competent public authorities, on practices that contravene the law, the Guidelines or the enterprise's policies.*

*10. Carry out risk-based due diligence ... to identify, prevent and mitigate actual and potential adverse impacts ...*

*11. ... [Address] adverse impacts on matters covered by the Guidelines... when they occur.*

37. The Initial Assessment noted that matters covered by the Guidelines raised in the complaint included chapters IV and V of the OECD Guidelines, relevant parts of which are set out below.<sup>4</sup>

### Chapter IV - Human rights

*Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations:*

...

*4. Have a policy commitment to respect human rights.*

*5. Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.*

*6. Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.*

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<sup>4</sup>AusNCP, 'Initial Assessment complaint submitted by Parella Law', p 5.



38. The Commentary on Chapter IV of the OECD Guidelines includes at paragraph 39 reference “[i]n all cases and irrespective of the country or specific context of enterprises’ operations” to the application of the “Bill of Human Rights, consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and to the principles concerning fundamental rights set out in the 1998 International Labour Organisation Declaration on Fundamental Principles and Rights at Work.” These foundational texts relevantly include the human rights to equality and non-discrimination, and entitlement to the right to work and to be afforded just and favourable conditions of work without distinction of any kind, such as race, colour, sex or other status.<sup>5</sup>

## Chapter V - Employment and Industrial Relations

*Enterprises should, within the framework of applicable law, regulations and prevailing labour relations and employment practices and applicable international labour standards:*

...

1(e) *Be guided throughout their operations by the principle of equality of opportunity and treatment in employment and not discriminate against their workers with respect to employment or occupation on such grounds as race, colour, sex, religion, political opinion, national extraction or social origin, or other status, unless selectivity concerning worker characteristics furthers established governmental policies which specifically promote greater equality of employment opportunity or relates to the inherent requirements of a job.*

39. The Commentary on Chapter V of the OECD Guidelines elaborates upon the expectation set out in paragraph 1(e):

51 *Paragraph 1 of this chapter is designed to echo all four fundamental principles and rights at work which are contained in the ILO’s 1998 Declaration, namely the freedom of association and right to collective bargaining, the effective abolition of child labour, the elimination of all forms of forced or compulsory labour, and non-discrimination in employment and occupation. These principles and rights have been developed in the form of specific rights and obligations in ILO Conventions recognised as fundamental.*

...

54 *The reference to the principle of non-discrimination with respect to employment and occupation in paragraph 1e is considered to apply to such terms and conditions as hiring, job assignment, discharge, pay and benefits, promotion, transfer or relocation, termination, training and retirement. The list of non-permissible grounds for discrimination which is taken from ILO Convention 111 of 1958, the Maternity Protection Convention 183 of 2000, Employment (Disabled Persons) Convention 159 of 1983, the Older Workers Recommendation 162 of 1980 and the HIV and AIDS at Work*

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<sup>5</sup> *Universal Declaration of Human Rights*, (United Nations General Assembly Resolution A/RES/217(III) A (1948) Arts 2, 7 and 23; *International Covenant on Economic, Social and Cultural Rights*, done at New York on 16 December 1966 ([1976] ATS 5), Arts 2(2), 6(1), 7; *International Covenant on Civil and Political Rights*, done at New York on 16 December 1966 ([1980] ATS 23), Art 26; ILO, *Declaration on Fundamental Principles and Rights at Work*, adopted in 1998 and amended in 2022, available at [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/normativeinstrument/wcms\\_716594.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/normativeinstrument/wcms_716594.pdf), par 2(e).

*Recommendation 200 of 2010, considers that any distinction, exclusion or preference on these grounds is in violation of the Conventions, Recommendations and Codes. The term “other status” for the purposes of the Guidelines refers to trade union activity and personal characteristics such as age, disability, pregnancy, marital status, sexual orientation, or HIV status. Consistent with the provisions in paragraph 1e, enterprises are expected to promote equal opportunities for women and men with special emphasis on equal criteria for selection, remuneration, and promotion, and equal application of those criteria, and prevent discrimination or dismissals on the grounds of marriage, pregnancy or parenthood.*

## Conclusions and recommendations

40. As the complaint has been withdrawn, and in circumstances where the notifier was well informed and represented by legal advisers in the US who have assisted the notifier to reach a resolution of the complaint, it is not considered that the AusNCP's further examination of the complaint would be constructive.
41. Accordingly, no conclusions or recommendations have been made by the AusNCP in respect of the complaint.
42. The Independent Examiner thanks the parties for their engagement in the AusNCP process throughout and welcomes the mutually satisfactory resolution of the matters raised in the complaint.

### **Shanta Martin**

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# Annexes

## Annex A: Schedule of events

Submission	Date
<ul style="list-style-type: none"><li>Complaint submitted to the AusNCP by Parella Law on behalf of an affected individual (notifier) against an Australian multinational enterprise (enterprise)</li></ul>	20 August 2021
<ul style="list-style-type: none"><li>AusNCP acknowledged complaint received and confirmed authorisation for Parella Law to represent affected party</li></ul>	23 August 2021
<ul style="list-style-type: none"><li>Enterprise notified that complaint submitted to AusNCP</li></ul>	26 August 2021
<ul style="list-style-type: none"><li>AusNCP corresponded with the notifier about next steps of complaint process</li></ul>	26 August 2021
<ul style="list-style-type: none"><li>AusNCP Governance and Advisory Board notified</li></ul>	26 August 2021
<ul style="list-style-type: none"><li>AusNCP website updated to list new complaint, enterprise not named</li></ul>	26 August 2021
<ul style="list-style-type: none"><li>Enterprise acknowledged receipt of AusNCP complaint</li></ul>	30 August 2021
<ul style="list-style-type: none"><li>OECD notified of new AusNCP complaint</li></ul>	30 August 2021
<ul style="list-style-type: none"><li>AusNCP met with the enterprise to explain AusNCP complaint process</li></ul>	10 September 2021
Initial assessment	
<ul style="list-style-type: none"><li>USNCP notified of new complaint relating to the enterprise's subsidiary activities in the United States</li></ul>	30 August 2021
<ul style="list-style-type: none"><li>USNCP responded to AusNCP about new complaint</li></ul>	9 September 2021
<ul style="list-style-type: none"><li>USNCP and AusNCP met to discuss coordination on new complaint</li></ul>	14 September 2021
<ul style="list-style-type: none"><li>Independent Examiner, John Southalan, wrote a letter to parties requesting further information for Initial Assessment</li></ul>	17 September 2021
<ul style="list-style-type: none"><li>Notifier responded to Examiner letter with further information</li></ul>	5-7 October 2021
<ul style="list-style-type: none"><li>Enterprise responded to Examiner letter with further information</li></ul>	14 October 2021
<ul style="list-style-type: none"><li>Draft Initial Assessment provided to AusNCP Governance and Advisory Board</li></ul>	2 November 2021
<ul style="list-style-type: none"><li>Draft Initial Assessment provided to parties for comment</li></ul>	12 November 2021
<ul style="list-style-type: none"><li>Enterprise provided comments on draft Initial Assessment</li></ul>	10 December 2021
<ul style="list-style-type: none"><li>Embargoed Initial Assessment provided to parties and AusNCP Governance and Advisory Board</li></ul>	15 December 2021
<ul style="list-style-type: none"><li>Initial Assessment published on AusNCP website</li></ul>	22 December 2021
<ul style="list-style-type: none"><li>OECD notified about published Initial Assessment</li></ul>	29 April 2022

## Good offices – preparation stage

- Parties advised of process to appoint Independent Examiner and mediator 24 January 2022
- Parties provided an update on appointment of Independent Examiner and mediator 3 March 2022
- Notifier provided further information for good offices mediation 5-7 March 2022
- Enterprise responded to further information from notifier 15 March 2022
- Notifier responded to enterprise comments 16 March 2022
- Parties notified about appointment of Independent Examiner and mediator, Shanta Martin 13 April 2022
- AusNCP engaged with notifier to plan good offices preparatory meeting 1 June 2022
- Independent Examiner met with notifier to prepare for good offices 22 June 2022
- Notifier provided information for good offices 13 July 2022
- AusNCP engaged with enterprise to plan good offices prep-meeting June – July 2022
- Parties jointly requested postponement of AusNCP good offices to enable discussions between parties outside AusNCP process 18 August 2022
- Independent Examiner agreed to parties’ request to postpone good offices 18 August 2022
- The enterprise, with the notifier copied in, stated that the parties had reached a confidential resolution and requested closure of AusNCP complaint 13 September 2022
- Independent Examiner requested confirmation of the request for closure by the notifier 14 September 2022
- Notifier confirmed the request for the complaint to be closed 15 September 2022
- Independent Examiner confirmed to the parties that the case will be closed 15 September 2022
- Independent Examiner informed the parties of the process for closing the complaint following publication of a final statement 17 September 2022
- USNCP advised that complaint would be concluded with publication of final statement 25 October 2022

## Final statement

- Draft final statement provided to the Governance and Advisory Board 4 November 2022
- Draft final statement provided to the parties for comment 30 November 2022
- Final Statement provided to USNCP 18 January 2023
- Embargoed final statement provided to parties and AusNCP Governance and Advisory Board 18 January 2023
- Final Statement published on [www.ausncp.gov.au](http://www.ausncp.gov.au) and reported to the OECD 1 February 2023

## Annex B: Publications

OECD, 'Parella Law (on behalf of an individual) & Australian-based multinational enterprise (property and infrastructure sector)', OECD Database of specific instances, n.d., accessed 8 January 2023. <http://mneguidelines.oecd.org/database/instances/au0020.htm>

Australian National Contact Point for Multinational Enterprises (AusNCP), 'Initial Assessment complaint submitted by Parella Law', AusNCP, Australian Government, 22 December 2021, accessed 8 January 2023. [https://ausncp.gov.au/sites/default/files/2021-12/25\\_AusNCP\\_Initial\\_Assessment.pdf](https://ausncp.gov.au/sites/default/files/2021-12/25_AusNCP_Initial_Assessment.pdf)

## Annex C: Institutional arrangements

43. The Australian Government is committed to promoting the use of the OECD Guidelines for Multinational Enterprises (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.
44. 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.
45. 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 the standards they recommend. In countries where domestic laws and regulations conflict with the principles and standards of the OECD Guidelines, enterprises should seek ways to honour such principles and standards to the fullest extent, which does not place them in violation of domestic law.
46. The OECD Guidelines can be seen as:
  - 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).
  - 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. For example, the human rights chapter in the OECD Guidelines as well as other key concepts align with the [United Nations Guiding Principles on Business and Human Rights](#).
  - Providing an informal structure for resolving issues that may arise in relation to implementation of the OECD Guidelines in complaints.

## Annex D: Governance

47. Countries adhering to the OECD Guidelines have flexibility in organising their National Contact Points for Responsible Business Conduct (NCPs) and in seeking the active support of social partners, including the business community, worker organisations, other non-governmental organisations, and other interested parties.

48. Accordingly, the OECD Guidelines stipulate that:

- NCPs 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.
- NCPs 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.
- NCPs 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.

49. The [AusNCP Governance and Advisory Board](#) (AusNCP Board), which includes representatives from Australian Government agencies, business, civil society and unions, provides advice and assistance to the AusNCP secretariat in relation to the handling of complaints. The AusNCP Board was consulted in the development of this statement.

50. The AusNCP Board helps to ensure that the AusNCP is visible, accessible, transparent and accountable, in accordance with its obligations under the OECD Guidelines. Members may be called on to conduct procedural reviews of AusNCP complaints and may be consulted on various operational and administrative matters as needed.

51. From September 2019, all new cases are managed by Independent Examiners, who are supported by the AusNCP secretariat and the AusNCP Board.