

Initial Assessment

Complaint submitted by Human Rights Law Centre (on behalf of affected individuals)

against

Rio Tinto

15 September 2023

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Executive summary

1. In September 2020 the Australian National Contact Point for Responsible Business Conduct (AusNCP) received a complaint from the Human Rights Law Centre (HRLC) on behalf of residents in Bougainville impacted by the previous operation (and current state) a mine called Panguna.
2. In October 2020, Rio Tinto issued a statement confirming their willingness to participate in discussion with stakeholders around issues raised in the complaint and engage with the AusNCP process. Given both parties committed to constructively engage, the AusNCP conducted a prompt initial assessment, and made a formal offer of good offices to the parties in November 2020 which was accepted. This statement publicly documents the initial assessment which was provided to the parties in November 2020.
3. Since November 2020, the AusNCP good offices conciliation processes have assisted HRLC, the complainants from Bougainville it represents, and Rio Tinto in working on the issues in the complaint. The AusNCP has published information about progress with the complaint and the good offices conciliation through several update statements.
4. In 2022 the HRLC identified landowners in the Loloho and Rorovana areas of Bougainville who also have experienced similar issues to those in the complaint. HRLC and Rio Tinto considered it was appropriate these additional landowners be included within the current processes. The AusNCP confirmed the additional landowners came within the initial assessment criteria and that it was appropriate they be added to the AusNCP complaint and the good offices conciliation. As the additional landowners' situation was consistent with the initial assessment accessibility criteria, no changes were required to the good offices scope.
5. This statement is available on the AusNCP website at www.ausncp.gov.au.

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Initial assessment

Parties, complaint and outcomes sought

6. On 29 September 2020 the AusNCP received a complaint from the Human Rights Law Centre (HRLC) against the mining company Rio Tinto Group, in relation to the Panguna copper and gold mine in Bougainville. The complaint is on behalf of residents in Bougainville impacted by the previous operation (and current state) of the Panguna mine.
7. The complaint identifies the Rio Tinto Group as comprising of Rio Tinto Limited (an Australian company) and Rio Tinto plc (a British company). The complaint says that since 1995, these two companies have been joined in a dual listed company structure as a single economic entity. The complaint concerns impacts arising from previous mining operations at the Panguna mine which Bougainville Copper Limited, a company that was majority owned by Rio Tinto, used to operate.
8. The complaint identifies issues under the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (OECD Guidelines), connected with the Panguna mine, alleging that ‘through failing to address these ongoing impacts ... Rio Tinto is responsible for significant breaches of its human rights and environmental obligations under Chapters II, IV and VI of OECD Guidelines’. The complaint seeks commitments from Rio Tinto to:
 - *‘Engage with ... Panguna mine-affected communities to help find solutions to these urgent problems and undertake formal reconciliation as per Bougainvillean custom*
 - *Fund an independent environmental and human rights impact assessment of the mine site by a team of qualified local and international experts to map impacts – in particular those posing serious risks to public health and safety – and to develop recommendations to address these. ...*
 - *Contribute to a substantial, independently-managed fund, to help address the harms caused by the mine and assist long-term rehabilitation efforts in accordance with the recommendations of the assessment and the needs identified by local communities. ...’*
9. Shortly after the complaint was received by the AusNCP, Rio Tinto published a statement on its website, including the following text.

... Whilst we do not wholly accept the claims in the complaint, we are aware of the deteriorating mining infrastructure at the site and surrounding areas, and acknowledge that there are environmental and human rights considerations.

We are ready to enter into discussions with the communities that have filed the complaint, along with other relevant parties such as BCL [Bougainville Copper Limited], the Autonomous Bougainville Government (ABG) and the Papua New Guinea (PNG) Government. We will also engage with the AusNCP as it considers its initial assessment of the complaint.¹

¹ Rio Tinto, ‘Update on the Panguna Mine’, 14 October 2020, accessed 30 January 2023, <https://web.archive.org/web/20201014094337/https://www.riotinto.com/news/panguna-mine>.

Assessment criteria

10. The OECD Guidelines require a National Contact Point for Responsible Business Conduct (NCP) to conduct an initial assessment when it receives a complaint. The initial assessment is to determine whether the issues raised by the Notifier are 'bona fide' (in other words real or authentic) and related to implementation of the OECD Guidelines (in other words within the OECD Guidelines' scope of coverage).² The AusNCP has procedures³ mirroring the OECD Guidelines, which specify the initial assessment is undertaken by an Independent Examiner⁴ and that the Examiner will take into account only these six admissibility criteria in deciding whether to accept a complaint:

1. the identity of the party concerned and its interest in the matter
2. whether the issue is material and substantiated
3. whether there seems to be a link between the enterprise's activities and the issue raised in the complaint
4. the relevance of applicable law and procedures, including court rulings
5. how similar issues have been, or are being, treated in other domestic or international proceedings
6. whether the consideration of the complaint would contribute to the purposes and effectiveness of the OECD Guidelines.

11. These admissibility criteria are sometimes 'interrelated and necessitate examination as a whole'.⁵ The initial assessment should be undertaken in a manner which promotes accessibility, predictability, transparency, impartiality, and compatibility with the OECD Guidelines.⁶

12. The initial assessment was conducted in 2020 on the basis of the complaint and material then available, and that decision provided to the parties in November 2020. In 2023 the AusNCP decided to publish the initial assessment, after confirming its relevance regarding additional landowners who were identified and included in the complaint (see paragraph 18 below).

13. In examining the six criteria for initial assessment, the AusNCP decided it appropriate to accept the complaint submitted by the HRLC regarding Rio Tinto.

13.1. The 'identity of the party concerned and its interest in the matter' is sufficient.

HRLC explained it had previously worked with the Catholic Diocese of Bougainville and affected communities to engage Rio Tinto, but that these efforts had not resulted in any

² OECD, *Guide for National Contacts Points on the Initial Assessment of Specific Instances*, OECD Publishing, Paris, 2019, p 5, accessed 26 February 2020, <https://mneguidelines.oecd.org/Guide-for-National-Contact-Points-on-the-Initial-Assessment-of-Specific-Instances.pdf>.

³ Australian National Contact Point for Responsible Business Conduct (AusNCP), *Complaint Procedures*, AusNCP, Australian Government, July 2022, accessed 15 August 2022, <https://ausncp.gov.au/sites/default/files/2022-07/AusNCP-complaint-procedures.pdf>.

⁴ AusNCP, 'Complaint Procedures' (above n 3), part 4.

⁵ OECD, *Guide for National Contacts Points on the Initial Assessment of Specific Instances* (above n2) p 6.

⁶ Adhering Governments, *OECD Guidelines for Multinational Enterprises*, OECD Publishing, Paris, 2011, accessed 9 February 2023, <https://www.oecd.org/daf/inv/mne/48004323.pdf>.

commitments by the company to address their legacy, nor to engage in any further dialogue with local communities about the problems they faced.

HRLC lodged the complaint on behalf of residents in Bougainville impacted by the previous operation and current state of the Panguna mine. HRLC provided a detailed report, and authorities to act on behalf of 156 persons, explaining they were ‘residents and traditional landowners from the villages of Dapera, Enamira, Pangkarinaru (also called Java), Kobalu, Pirurari, Veleteba, Dutumani, Parakaikasi, Ariere, Makosi, Konepoi, Meua, Katauli, Palamato, Maile, Kokore, Kobaru, Namunsa, Topu, Konia and Derevai villages. These villages are located downstream of the mine in areas known as the Special Mine Lease area, Upper Tailings, Middle Tailings and Lower Tailings’. A map identifying these areas, extracted from the complaint, is provided in **Annex B**.

13.2. *The issues are ‘material and substantiated’, including ‘a plausible link between the enterprise’s activities and the issues raised’.*

The complaint is accompanied by an extensive report conducted by HRLC and published in 2020 which stated it also drew on ‘the findings of the Panguna Listening Project commissioned by the Catholic Diocese of Bougainville, which undertook story-telling sessions with over 300 residents from mine affected communities between 2017 and 2019.’⁷ The final report of that project, *We are crying for our land: stories from the Panguna Listening Project*, was published in October 2019.⁸ The complaint describes the Panguna mine as developed and majority-owned by Rio Tinto, between 1972 and 1989, and one of the world’s largest copper and gold mines. The complaint alleges that Rio Tinto’s subsidiary, Bougainville Copper Limited, discharged over a billion tonnes of mine waste into local river systems, devastating the environment and the health and livelihoods of local communities.

13.3. *The complaint identifies ‘a link between the enterprise’s activities and the issue raised in the complaint’.*

When examining a complaint, the term ‘issue’ relates to the provisions of the OECD Guidelines. The complaint asserts that the Panguna mine ceased operating in 1989 associated with a civil war in Bougainville, and that, Rio Tinto divested from the mine in 2016, leaving the significant waste and pollution from the mine unaddressed. The complaint identifies various existing impacts and ongoing risks from the Panguna mine and infrastructure. The complaint is framed in respect of matters within the OECD Guidelines. Particularly relevant here are questions of corporate responsibility under the OECD Guidelines relating to current environmental and social impacts from an operation in which a company has previously been involved. There is sufficient link identified here at this initial assessment stage.

⁷ Adams, K & Kerwin, H, *After the mine: Living with Rio Tinto’s deadly legacy*, 1 March 2020, Human Rights Law Centre, Melbourne, accessed 30 January 2023, <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/5e7d7c7c7f816da86005f/1585282297310/AfterTheMineRioTintoDeadlyLegacy.pdf>.

⁸ Catholic Diocese of Bougainville, *We are crying for our land*, Misereor eV, 2019, accessed 30 January 2023, https://www.misereor.org/fileadmin/user_upload_misereororg/publication/en/plp-bougainville-stories.pdf.

13.4. Regarding *'applicable law and procedures, including court rulings'* - there is nothing identified here which would prevent a good offices engagement, and equally nothing which would be prejudiced by it.

13.5. This is also the case regarding *'How similar issues have been, or are being, treated in other domestic or international proceedings'*.

There is also no precedent, nor previous NCP decisions, which identify exactly what the outcome of these circumstances should be under the OECD Guidelines.

13.6. *Consideration of the complaint would 'contribute to the purposes and effectiveness of the OECD Guidelines'*.

The complaint identifies complex issues under the OECD Guidelines, including the proactive actions that could have been taken to avoid serious environmental damage, the due diligence that informed the 2016 divestment decision, and remedial actions that are expected in the circumstances of the company's connection here. However, the complaint frames its requests of Rio Tinto within the scope of the OECD Guidelines, including engaging with stakeholders, attending to environmental and social impacts, and contributing to redress mechanisms. It would be an appropriate use of good offices to assist the parties' engagement on these issues. Equally, if the complaint is not resolved by agreement, these matters could be examined and addressed in a final statement by the AusNCP.⁹

Good offices commenced

14. Statements from Rio Tinto and HRLC indicated their willingness to constructively engage and there was value in enabling that to commence promptly. The formal offer of good offices from the AusNCP to the parties was made in November 2020. The offer drew on the complaint submission and proposed conciliation between the parties about:

- Rio Tinto engaging with the notifiers *'and other Panguna mine-affected communities'* concerning impacts from the mine
- an independent environmental and human rights impact assessments of the mine and its impacts
- the role/establishment of a fund (or other suitable mechanism) to address the impacts from the mine and rehabilitation.

15. In the offer of good offices, the Examiner noted further issues and information which would likely need attention as part of any significant engagement or potential agreement between the parties. The Examiner considered these would be better addressed early *within* a good offices process, rather than as part of the initial assessment. In particular, the Examiner flagged the kinds of matters he expected may arise as including:

⁹ Under part 5 of AusNCP, 'Complaint Procedures' (above n 3).

- The complaint states that 12,000-14,000 people in neighbouring and downstream communities are impacted by the Panguna mine. If engagement or agreement is expected with Rio Tinto by some people (the complaint indicates ‘156 residents’), how does that propose to relate to other persons who may be impacted by the mine?
 - What stage was reached regarding environmental and social impact assessments (proposed in 2014), including the involvement of the United Nations Environmental Program?
 - What were the divestment arrangements and agreements in 2016? Were there any measures addressing the kinds of activities and action expected by the OECD Guidelines – in particular, what due diligence occurred leading to the 2016 decision?
 - There may be some matters relevant from Rio Tinto’s engagement in 2013-2014 when (according to the complaint) there were discussions about reopening the mine. The government’s removal of various mining rights in 2014 may also be relevant.
 - What extent of compensation/redress has already been provided by Bougainville Copper Limited or any other authorities/parties?
 - The timing of various actions of Rio Tinto which are criticised in the complaint (which include events from 1960s to 2020) and the relevant OECD Guidelines extant at each time.
 - To what extent (if at all) does there need to be any consideration/engagement/information regarding Bougainville Copper Limited, the Autonomous Bougainville Government, and the Papua New Guinea Government?
16. Since November 2020, the AusNCP’s good offices conciliation processes have assisted HRLC, the complainants from Bougainville it represents, and Rio Tinto to work toward resolving the complaint. There have been periodic public updates of this good offices process, through the AusNCP releasing ‘update statements’.¹⁰
17. The AusNCP’s update statements report that, through the good offices:
- 17.1. the parties agreed to first focus on the independent environmental and human rights impact assessment, which can then inform the parties’ engagement in relation to the assessment’s recommendations and other aspects of the complaint
 - 17.2. the parties then agreed on the scope for an independent Legacy Impact Assessment (impact assessment) to assess the mine’s environmental impacts and the social and human rights impacts directly connected to those environmental impacts
 - 17.3. the parties have worked with the Autonomous Bougainville Government and other stakeholders in establishing a Panguna Mine Legacy Impact Assessment Oversight Committee (committee), in an effort to ensure the impact assessment is done in a way that is supported by the majority of stakeholders and that the broader community has trust in the process. The Committee comprises senior landowner and community representatives, as well as members from the Autonomous Bougainville Government, Rio Tinto, the Human

¹⁰AusNCP, ‘Update July 2021 – Complaint by Human Rights Law Centre (on behalf of affected individuals) regarding Rio Tinto’, Australian Government, 21 July 2021, accessed 13 January 2023, https://ausncp.gov.au/sites/default/files/2021-07/210721_update_statement_AusNCP.pdf.

Rights Law Centre, the Independent State of Papua New Guinea, and Bougainville Copper Limited. The Committee is chaired by an Independent Facilitator who is independent from all Committee members including the PNG Government and the Autonomous Bougainville Government, Rio Tinto, Human Rights Law Centre and the complainants. The Committee is overseeing the Legacy Impact Assessment process and is supported by a secretariat team. The Committee's Secretariat maintains a website which publishes details about the process, the Committee and the progress (and reports) of the Legacy Impact Assessment. The Committee's Secretariat also runs a community-led dialogue project to help support community participation and engagement in the impact assessment, which has included engagement with mine affected communities.

- 17.4. Rio Tinto agreed to predominantly fund the impact assessment, with Bougainville Copper Limited also contributing through a separate funding company with independent directors.

Additional complainants in 2022

18. As part of its ongoing work, in 2022, the HRLC met with landowners in the Loloho and Rorovana areas of Bougainville (north-east of the Panguna mine area). The HRLC subsequently explained to the AusNCP that these landowners identified concerns about ongoing impacts associated with the previous mining and infrastructure, which are similar to the concerns detailed in the original complaint lodged with the AusNCP in September 2020.
19. The landowners in the Loloho and Rorovana areas of Bougainville asked to be added to the AusNCP complaint. HRLC provided written authority to represent these additional landowners and for these individuals to be added as parties to complaint with the AusNCP. After discussions with the original complainants on whose behalf the complaint was filed, and Rio Tinto, those parties agreed with this request. The parties agreed this did not require any change in the AusNCP good offices processes already underway.
20. The Examiner assessed the six admissibility criteria in relation to the issues which the HRLC raised regarding the landowners in the Loloho and Rorovana areas. For similar reasons explained in relation to the September 2020 complaint (see paragraph 13 above), these issues have also been accepted for good offices.
21. The Examiner decided it was appropriate to include the additional landowners represented by the HRLC in the AusNCP complaint, and their interests will be included in the existing good offices process already underway.

Conclusion

22. The Examiner consulted with the AusNCP Governance and Advisory Board regarding the initial assessment decision in October 2020 and again in February 2023 for the addition of the landowners from Loloho and Rorovana, as required by the AusNCP's Procedures.¹¹ The parties to the complaint were provided with a draft of this initial assessment statement and invited to make any comments/corrections. While the Independent Examiner considered all comments received on the draft, the initial assessment decision remains his responsibility.¹²
23. This statement publicly documents the initial assessment which was provided to the parties in November 2020 to ensure there is a public record about acceptance of the complaint. This initial assessment also publicly confirms the inclusion of the additional landowners (see paragraphs 18-21 above).
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'.¹³

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¹¹ AusNCP, 'Complaint Procedures' (above n 3), paragraph 4.12.

¹² AusNCP, 'Complaint Procedures' (above n 3), paragraphs 1.1 (definition of 'Independent Examiner') and 4.10; see also paragraphs 6.6 – 6.7.

¹³ AusNCP, 'Complaint Procedures' (above n 3), paragraph 4.16.

Annexes

Annex A: Publications

AusNCP, *Update July 2021*, Australian Government, 21 July 2021, accessed 9 February 2023.
https://ausncp.gov.au/sites/default/files/2021-07/210721_update_statement_AusNCP.pdf

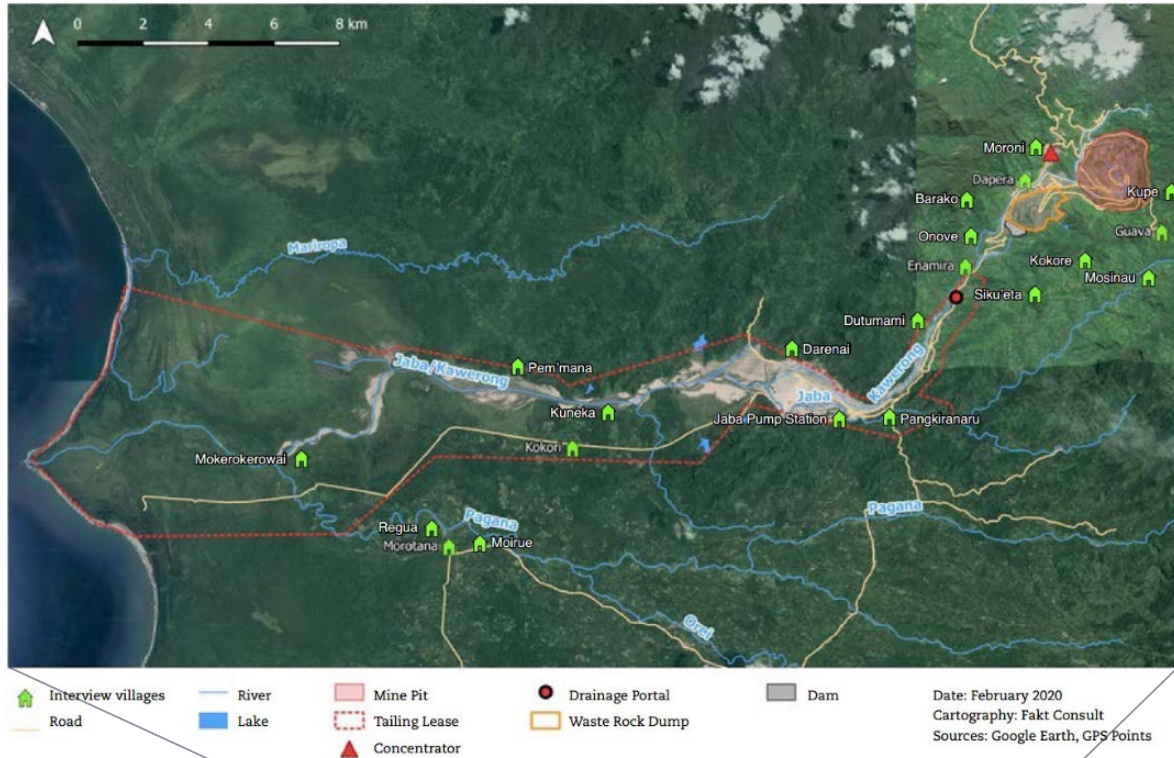
AusNCP, *Update Statement December 2021*, Australian Government, 22 December 2021, accessed 9 February 2023.
https://ausncp.gov.au/sites/default/files/2021-12/21_AusNCP_Update_Statement.pdf

AusNCP, *Update Statement March 2023*, AusNCP, Australian Government, 29 March 2023, accessed 29 August 2023. https://ausncp.gov.au/sites/default/files/2023-03/21_AusNCP_Update_Statement.pdf

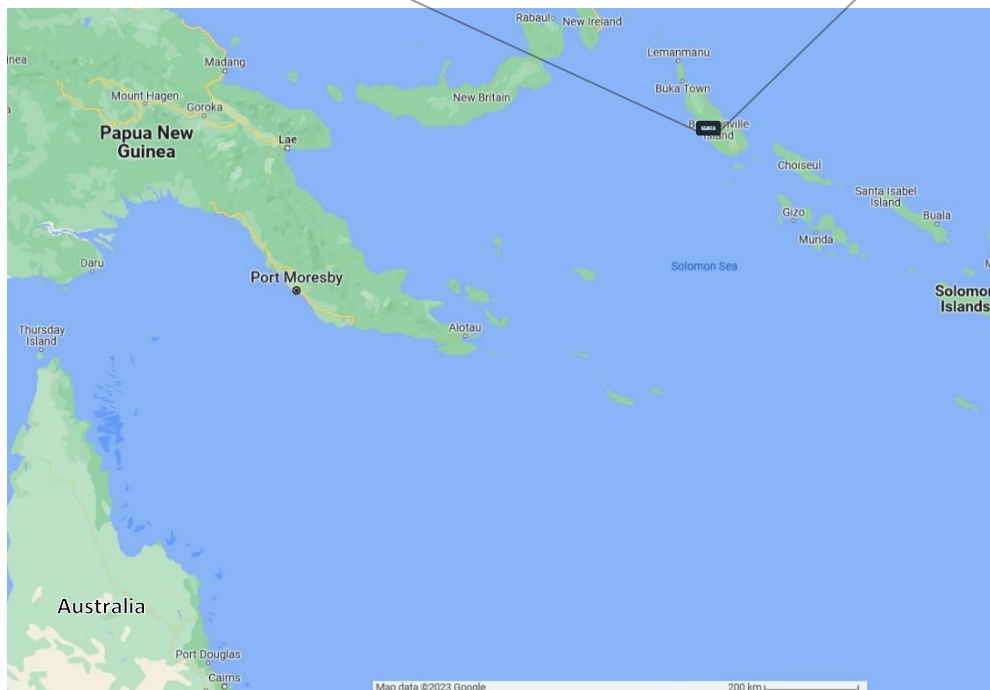
OECD, *Human Rights law Centre (HRLC) on behalf of affected individuals & Rio Tinto*, OECD Database of specific instances, n.d., accessed 9 February 2023.
<http://mneguidelines.oecd.org/database/instances/au0017.htm>

Annex B: Maps

Map of Panguna mine and surrounding area (extracted from complaint): see para 13.1 above



Map of Bougainville and surrounding area (from google maps)



Annex C: Institutional arrangements

1. 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.
2. The OECD Guidelines are recommendations on responsible business conduct addressed by governments, including Australia, to multinational enterprises. They provide voluntary principles and standards for responsible business conduct consistent with applicable laws and internationally recognised standards. 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 fully honour such principles and standards, which does not place them in violation of domestic law.
3. Importantly, while Australia is an adhering country to the OECD Guidelines and 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 legal requirements.
4. 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

5. 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.
6. Accordingly, the OECD Guidelines stipulate that:
 - NCPs will be composed, organised and sufficiently resourced to provide an effective basis for dealing with the broad range of issues covered by the OECD Guidelines, have access to expertise on all relevant aspects of the NCP mandate, and operate in an impartial manner and maintain an adequate level of accountability to the adhering government.
 - NCPs can use different forms of organisation to meet the effectiveness criteria and maintain stakeholder confidence.
 - Governments are encouraged to include representatives of the business community, worker organisations, civil society and other non-governmental organisations in advisory or oversight bodies to assist the NCP in its tasks and contribute to the effectiveness of the OECD Guidelines.
7. The AusNCP Governance and Advisory Board (AusNCP Board) includes representatives from Australian Government agencies, business, civil society and unions. The AusNCP Board provides independent expert advice and assistance to the AusNCP and the Independent Examiners on complaints handling. Board members use their networks, events and publications to promote responsible business conduct standards under the OECD Guidelines and the AusNCP services. The AusNCP Board is consulted on all AusNCP statements.
8. The AusNCP Board helps to ensure that the AusNCP meets the effectiveness criteria of the OECD Guidelines. AusNCP Board 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. From September 2019, all new cases are managed by Independent Examiners, who are supported by the AusNCP Secretariat and the AusNCP Board.