



Australian National Contact Point  
for the OECD Guidelines for Multinational Enterprises

# Initial Assessment

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Complaint submitted by Parella Law (for affected individual)  
against Australian-based enterprise (property and  
infrastructure sector)

Published 22 December 2021

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## EXECUTIVE SUMMARY

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1. In August 2021, the Australian National Contact Point (**AusNCP**) received a complaint from Parella Law on behalf of an affected individual (**Notifier**) against an Australian multinational enterprise (**Enterprise**). The Complaint alleges the discriminatory treatment of the Notifier, during his employment by a subsidiary of the Enterprise, was a breach of the *OECD Guidelines for Multinational Enterprises* (**Guidelines**).
2. The AusNCP Independent Examiner considered the six admissibility criteria of the Initial Assessment process, engaged with the parties, and determined to accept some aspects of the Complaint and offer 'good offices' to the parties.
3. The following observations were made during the Initial Assessment.
  - 3.1 The Guidelines have expectations of multinational enterprises in relation to equality and discrimination in the workplace. The Guidelines also recommend the OECD Principles of Corporate Governance, and they contain guidance about board's understanding of diversity, and ensuring employees are not victimised for raising concerns of illegal or unethical practises.
  - 3.2 The admissibility criteria are sufficiently met for the purposes of Initial Assessment including the Notifier's identity and interest in the matter; issues which are material and substantiated; and the link between the Enterprise's activities and the issues raised in the Complaint. There are relevant standards and laws in the Guidelines and related international standards about the issues raised by the Notifier.
4. The Independent Examiner considers the Complaint merits further consideration. The AusNCP will offer its 'good offices', within the Guidelines, to facilitate the exchange of information between the parties which can include conciliation, formal mediation or facilitated discussions, with the aim of arriving at a mutually agreed resolution.

5. There are three topics for potential good offices which would be consistent with the Guidelines' purpose and effectiveness. These topics focus on the role of parent Enterprise based in Australia:
  - 5.1 *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).*
  - 5.2 *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.*
  - 5.3 *What future actions or procedures the Enterprise will have regarding discrimination, particularly to ensure awareness of, and responses by, subsidiary entities.*
6. The AusNCP will continue to consult with the United States National Contact Point (USNCP) on relevant matters for this complaint that arise during the good offices process. This Initial Assessment is not a determination on the merits of the claims presented, nor is it an assessment of whether the Enterprise's actions are consistent with the OECD Guidelines.
7. This statement is available on the AusNCP website at [www.ausncp.gov.au](http://www.ausncp.gov.au).

## INITIAL ASSESSMENT

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### Parties, complaint and outcomes sought

8. On 20 August 2021, the New York law firm Parella Law submitted to the AusNCP a complaint under the Guidelines,<sup>1</sup> on behalf of the Notifier, against the Enterprise. The Complaint alleges that the Enterprise has 'contributed to, permitted, and refused to correct a systemically racist workplace at its related entity [in the United States]', contrary to the Guidelines.
9. In summary, the Notifier alleges he was subject to discrimination (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'. The Notifier specified various outcomes sought from the Enterprise, including: its Australian management board acting to 'end systemic race discrimination' which the Notifier alleges to exist in the US subsidiary, have greater diversity in management,

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<sup>1</sup> Adhering Governments, *OECD Guidelines for Multinational Enterprises* (2011, OECD Publishing, 25 May 2011) (**Guidelines**).

strengthening grievance mechanisms, and increased training and awareness of disadvantage and diversity in its workforce and procedures.

10. The Guidelines have expectations of multinational enterprises in relation to equality and discrimination in the workplace.<sup>2</sup> The Guidelines also recommend the *OECD Principles of Corporate Governance*,<sup>3</sup> and they contain guidance about board's understanding of diversity, and ensuring employees are not victimised for raising concerns of illegal or unethical practises.
11. Consistent with *AusNCP Complaint Procedures*,<sup>4</sup> the Enterprise was notified that a complaint had been made and provided with a copy of the Complaint. The AusNCP also informed the US NCP, about the fact (but not the detailed substance) of the Complaint.
12. In response to the Complaint, the Enterprise denied there are discriminatory or retaliatory practises in its US subsidiary and is defending these claims which the Notifier has also raised in other proceedings. The Enterprise also claimed the following.
  - 12.1 The Enterprise identified various policies and procedures the US subsidiary has in place about discrimination, diversity and inclusion, various breach and reporting mechanisms, and protections against retaliation for such reporting.
  - 12.2 The Notifier had been employed by the subsidiary for many years and had been promoted and provided opportunities. The Notifier was one of 138 employees who were terminated in a 'reduction in force' arising from the COVID-19 pandemic and public health responses
  - 12.3 The subsidiary's criteria for the 'reduction in force' terminations were objective, have not been challenged by the Notifier, and resulted in two lawyers from the subsidiary's legal team being retrenched - the Notifier and another (white, female) attorney.

## Assessment criteria

13. The Guidelines require an NCP, when it receives a complaint, to conduct an 'initial assessment'. This Initial Assessment is to determine whether the issues raised by the Notifier are 'bona fide' (in other words real or authentic) and related to the implementation of the OECD Guidelines (in other words within their scope of coverage).<sup>5</sup> The AusNCP has procedures,<sup>6</sup> mirroring the Guidelines, which specify that in deciding whether to accept a complaint, six admissibility criteria are assessed:
  - 13.1 the identity of the party concerned and its interest in the matter;
  - 13.2 whether the issue is material and substantiated;

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<sup>2</sup> *Guidelines* (above n1), ch IV (human rights), [4]-[6] and ch V (employment), [1e].

<sup>3</sup> OECD Council, *G20/OECD Principles of Corporate Governance* (2015, OECD Publishing, 8 July 2015).

<sup>4</sup> Australian National Contact Point *Complaint Procedures* (September 2019) Treasury, [4.8] & [4.9].

<sup>5</sup> Secretary-General of the OECD, *Guide for National Contacts Points on the Initial Assessment of Specific Instances* (2019, OECD Publishing), 5.

<sup>6</sup> *AusNCP Complaint Procedures* (September 2019) Treasury.

- 13.3 whether there seems to be a link between the enterprise's activities and the issue raised in the complaint;
  - 13.4 the relevance of applicable law and procedures, including court rulings;
  - 13.5 how similar issues have been, or are being, treated in other domestic or international proceedings; and
  - 13.6 whether the consideration of the complaint would contribute to the purposes and effectiveness of the OECD Guidelines.<sup>7</sup>
14. The Independent Examiner engaged with the Notifier (through Parella Law) and the Enterprise, from August to October 2020, in gathering more information and inviting submissions on various aspects.
  15. Detailed observations regarding each of the six admissibility criteria are contained in an Annexure to this Initial Assessment. The Annexure is not published with this Initial Assessment but has been provided to the parties, so that they are aware of the reasoning and detail. If, after the completion of any 'good offices stage', any material in the Annexure remains relevant, that will be incorporated into the AusNCP's (public) Final Statement on completion of this matter. The main points in the Annexure are summarised in the paragraphs below.
  16. Most of the admissibility criteria are sufficiently evident for the purposes of Initial Assessment. This includes: the Notifier's identity and interest in the matter; issues which are material and substantiated; and the link between the Enterprise's activities and the issues raised in the Complaint. There are applicable laws (in the Guidelines and related international standards) relevant to the issues raised by the Notifier.
  17. The Notifier is engaged in current proceedings in the US, against the US subsidiary, before a human rights commission. The issues raised in this Complaint, regarding the Enterprise, do not necessarily duplicate the US proceedings and so they do not preclude the AusNCP's assessment of this Complaint.
  18. The Independent Examiner considers there are three topics for potential good offices which would be consistent with the Guidelines' purpose and effectiveness:
    - 18.1 *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);
    - 18.2 *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; and
    - 18.3 *what future actions or procedures the Enterprise will have regarding discrimination*, particularly to ensure awareness of, and responses by, subsidiary entities.

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<sup>7</sup> AusNCP Complaint Procedures (above n5), 4.10.

## Conclusion

19. In the circumstances, the Independent Examiner considers the Complaint merits further consideration. The AusNCP will offer its 'good offices', within the Guidelines, to facilitate the exchange of information between the parties (which can include conciliation, formal mediation or facilitated discussions) with the aim of arriving at a mutually agreed resolution.
  - 19.1 Any engagement would be facilitated by an AusNCP Independent Examiner, and focus on the issues identified in paragraph 18 above. The AusNCP would liaise with the US NCP, and keep the US NCP informed of progress (subject to appropriate confidentiality).
  - 19.2 If, through the good offices, the parties reach an agreement the AusNCP will then publish a final statement with the results of the proceedings. Information regarding the *contents* of the discussions and the agreement would only be published with the consent of the parties.
  - 19.3 If no agreement is reached, or one of the parties is not willing to take part in the proceedings, the AusNCP's procedures require that to be identified in a published final statement.
20. A draft of this Initial Assessment was provided, for comment, to the AusNCP's Governance and Advisory Board, and then to the parties. All comments were considered by the Independent Examiner, in finalising this Initial Assessment, with the decision remaining the responsibility (and discretion) of the Independent Examiner.
21. 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'.<sup>8</sup>
22. The Independent Examiner invites both parties to consider these reasons carefully, including what is (and what is not) proposed for good offices, and the indications and detail of the relevant expectations in the Guidelines. After the Initial Assessment has been finalised by the Independent Examiner, the AusNCP Secretariat will contact both parties in relation to the potential good offices.

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<sup>8</sup> AusNCP Complaint Procedures (above n5), 4.16.