

# Final Statement

Complaint submitted by SAVEducation Pty Limited against an  
Indian software development company

6 June 2023

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## Executive summary

1. On 18 December 2022, the Australian National Contact Point for Responsible Business Conduct (AusNCP) received a complaint from SAVEducation Pty Limited (the notifier) against a software development company registered in India (the enterprise).
2. The complaint raised allegations of bribery, bribe solicitation and extortion.
3. Shortly after the AusNCP engaged with the enterprise, the notifier and the enterprise commenced negotiations directly between themselves. The notifier requested the complaint be suspended.
4. On 11 April 2023, the notifier advised the AusNCP that the parties had reached a resolution and requested that the complaint be withdrawn.
5. As the complaint was withdrawn prior to an initial assessment being completed, this statement sets out briefly the parties and process, but does not make a determination on whether the complaint would have been accepted, transferred to another NCP or rejected. This statement also does not make a determination on the merits of the claims presented, nor does it assess whether the enterprise's actions were consistent with the OECD Guidelines for Multinational Enterprises (OECD Guidelines).
6. This statement constitutes the only statement published by the AusNCP in respect of the complaint. It is available on the AusNCP website at [www.ausncp.gov.au](http://www.ausncp.gov.au).

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# Parties and process

## Background

7. The notifier is an Australian-registered company engaged in business in the education sector. Two of the notifier's key personnel are based in Australia, while a third person was based in India and is referred to in this statement as the notifier's agent.
8. The enterprise is a company with its registered office in India that provides software development services.
9. The notifier engaged the enterprise to develop an online education portal.
10. The complaint alleged that the enterprise entered into an illicit agreement with the notifier's Indian-based agent pursuant to which the enterprise would raise invoices and the notifier's agent would approve the invoices for payment by the notifier. It was alleged that the notifier's agent received a commission from the enterprise for each invoice he approved.
11. The enterprise's view was that the AusNCP had no jurisdiction to consider the complaint on the grounds that it alleged:
  - 11.1. the agreement between the notifier and it was governed by the laws of India and subject to an exclusive jurisdiction clause in favour of the Courts of Pune, India;
  - 11.2. the enterprise does not have any offices or base of operation in Australia;
  - 11.3. India is not a member of the OECD or adhering government of the OECD Guidelines;
  - 11.4. the contract was performed in India; and
  - 11.5. the AusNCP is not a convenient forum.

## Circumstances in which this statement is made

12. The notifier withdrew the complaint prior to the Independent Examiner undertaking an initial assessment to determine whether to accept the complaint.
13. Accordingly, there has been no assessment of either the issues raised by the notifier or of the enterprise's contentions as to lack of jurisdiction.

## AusNCP proceedings

14. The Implementation Procedures of the OECD Guidelines state that an NCP should make the results of its procedures publicly available.<sup>1</sup> In circumstances where parties have reached agreement on the issues raised, the public statement should describe the issues raised, the procedures initiated and when agreement was reached.
15. The Implementation Procedures of the OECD Guidelines anticipate that such a statement would ordinarily occur after an initial assessment is made of whether the issues raised merit further examination.
16. The AusNCP Procedures provide that, in conducting the initial assessment, the Independent Examiner must determine whether the complaint is made in good faith and is related to the implementation of the OECD Guidelines.<sup>2</sup> In doing so, the Examiner will take into account only the six admissibility criteria outlined in the OECD Procedural Guidance, namely:
  - 16.1. The identity of the party concerned and its interest in the matter.
  - 16.2. Whether the issue is material and substantiated.
  - 16.3. Whether there seems to be a link between the enterprise's activities and the issue raised in the complaint.
  - 16.4. The relevance of applicable law and procedures, including court rulings.
  - 16.5. How similar issues have been, or are being, treated in other domestic or international proceedings.
  - 16.6. Whether the consideration of the complaint would contribute to the purposes and effectiveness of the OECD Guidelines.
17. As the complaint was withdrawn prior to the Independent Examiner conducting an initial assessment, it has not been determined that the complaint would have been accepted.

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<sup>1</sup> OECD (2011), *OECD Guidelines for Multinational Enterprises*, OECD Publishing, <http://dx.doi.org/10.1787/9789264115415-en> (OECD Guidelines), Part II, Procedural Guidance Part I(C), par 3. It is noted that the OECD Guidelines underwent a review in 2023, however, the updated OECD Guidelines have yet to come into effect as at the date of preparing this Final Statement. Accordingly, all comments and references in this Final Statement are to the OECD Guidelines published in 2011.

<sup>2</sup> AusNCP complaint procedures 2022, available at <https://ausncp.gov.au/sites/default/files/2022-07/AusNCP-complaint-procedures.pdf>, (*AusNCP Procedures*), [4.11].

# Application of the OECD Guidelines

## OECD Guidelines

18. The notifier raised its complaint under Chapter VII (Combating Bribery, Bribe Solicitation and Extortion) of the OECD Guidelines, which provides that:

*Enterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage. Enterprises should also resist the solicitation of bribes and extortion. In particular, enterprises should:*

*1. Not offer, promise or give undue pecuniary or other advantage ... the employees of business partners. Likewise, enterprises should not request, agree to or accept undue pecuniary or other advantage from ... the employees of business partners.*

## Role of NCPs

19. An issue that would have warranted consideration as part of the initial assessment was whether the complaint raised matters related to the implementation of the OECD Guidelines.
20. The OECD Guidelines are recommendations made by the governments of adhering countries to multinational enterprises 'operating in or from' their territories.<sup>3</sup> The initial assessment of the complaint therefore would have involved consideration of whether the enterprise 'operated in or from' an adhering country.
- 20.1. India is not an adhering country. Australia is an adhering country.
- 20.2. The enterprise is registered in India and the work under the contract was conducted in India. An issue to consider would have been whether the enterprise 'operated from' anywhere other than India.
- 20.3. The complaint was made about the conduct of an enterprise that provided services remotely to an Australian-based entity for use by that entity in its operations in Australia. An issue to consider would have been whether the enterprise 'operated in' Australia.
21. If the initial assessment determined that the enterprise did not 'operate in or from' an adhering country, then under the AusNCP's Procedures, the complaint would not have been accepted.<sup>4</sup>

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<sup>3</sup> The OECD Guidelines apply to all 38 OECD countries and 13 non-OECD countries that have adhered to the Declaration: OECD Guidelines, Declaration on International Investment and Multinational Enterprises; available at <https://www.oecd.org/investment/mne/oecddeclarationanddecisions.htm> (accessed 18 April 2023).

<sup>4</sup> AusNCP Procedures [3.2] read with [4.1]. It is noted, however, that the text of the OECD Guidelines is equivocal as to whether there may yet be a role for an NCP in circumstances where an NCP does not accept a complaint due to the enterprise not operating 'in or from' the territory. Under the OECD Guidelines, if issues arise in non-adhering countries NCPs are required to "take steps to develop an understanding of the issues involved, and follow these procedures where relevant and practicable": OECD Guidelines, Part II, Procedural Guidance Part I(C), par 5. The OECD's Investment Committee is tasked under the Guidelines with

22. As the complaint was withdrawn prior to comprehensive consideration of these issues including as regards any submissions that may have been made by the parties, no determination is made. These are not matters that are necessary to resolve for the issuing of this final statement.

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engaging with non-adhering countries on matters covered by the Guidelines and NCPs can request the Investment Committee for assistance in carrying out their activities: Amendment of the Decision of the Council on the OECD Guidelines for Multinational Enterprises, Part II, par 3; and OECD Guidelines, Part II, Procedural Guidance Part II, par 1. Thus, an issue for consideration would have been whether the AusNCP may have made a request to the OECD's Investment Committee. This issue was not resolved as the complaint was withdrawn at an early stage.



## Conclusion

23. The complaint raised issues relevant to Chapter VII of the OECD Guidelines, which covers matters of bribery.
24. However, the complaint related to an enterprise that did not operate from Australia or an adhering country. A determination would have been required as to whether the enterprise operated in Australia for the purposes of the OCED Guidelines.
25. As the complaint was withdrawn prior to an initial assessment, this statement does not determine that the complaint would have been accepted.
26. The notifier expressed their gratitude to the AusNCP that the complaint was progressed according to the AusNCP Procedures.
27. The Independent Examiner thanks the parties for entering into constructive dialogue in order to resolve their differences at an early stage.

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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 notifier.</li></ul>  | 18 December 2022 |
| <ul style="list-style-type: none"><li>AusNCP acknowledged receipt of the complaint from the notifier and requested further information.</li></ul>   | 20 December 2022 |
| <ul style="list-style-type: none"><li>Governance and Advisory Board notified by the AusNCP.</li></ul>   | 20 December 2022 |
| <ul style="list-style-type: none"><li>OECD notified of new AusNCP complaint</li></ul>   | 20 December 2022 |
| <ul style="list-style-type: none"><li>AusNCP website updated to list new complaint, enterprise not named</li></ul>  | 22 December 2022 |
| <ul style="list-style-type: none"><li>Enterprise notified by the AusNCP.</li></ul>  | 10 January 2023  |
| <ul style="list-style-type: none"><li>Enterprise acknowledged receipt of AusNCP complaint</li></ul>   | 18 January 2023  |
| Initial Assessment  |                  |
| <ul style="list-style-type: none"><li>Enterprise responded to complaint submission</li></ul>  | 25 January 2023  |
| <ul style="list-style-type: none"><li>Notifier advised the AusNCP that the enterprise had offered settlement dialogue outside AusNCP process</li></ul>  | 31 January 2023  |
| <ul style="list-style-type: none"><li>Notifier advised the AusNCP that they would be entering into settlement discussions outside AusNCP process</li></ul>  | 10 February 2023 |
| <ul style="list-style-type: none"><li>Notifier provided update on settlement discussions and requested for the complaint to be on hold to enable discussions between parties outside AusNCP process</li></ul> | 10 March 2023    |
| <ul style="list-style-type: none"><li>Notifier requested that the complaint be withdrawn as parties reached a resolution independent of the AusNCP complaint process</li></ul>                                | 11 April 2023    |
| <ul style="list-style-type: none"><li>AusNCP Secretariat informed the parties of the process for closing the complaint following publication of a final statement</li></ul>                                   | 13 April 2023    |
| <ul style="list-style-type: none"><li>Independent Examiner consulted with the enterprise regarding closing the complaint</li></ul>  | 18 April 2023    |
| Final Statement   |                  |
| <ul style="list-style-type: none"><li>Draft final statement provided to the AusNCP Governance and Advisory Board for comment.</li></ul>   | 21 April 2023    |
| <ul style="list-style-type: none"><li>Draft final statement provided to the parties for comment.</li></ul>  | 16 May 2023      |
| <ul style="list-style-type: none"><li>AusNCP finalised Final statement and provided an advance copy to the parties and the AusNCP Governance and Advisory Board.</li></ul>                                    | 2 June 2023      |
| <ul style="list-style-type: none"><li>Final Statement published on <a href="http://www.AusNCP.gov.au">www.AusNCP.gov.au</a> and reported to the OECD.</li></ul>   | 6 June 2023      |

## Annex B: 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 honour such principles and standards to the fullest extent, 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 C: Governance

5. Governments adhering to the OECD Guidelines have flexibility in organising their National Contact Points for Responsible Business Conduct (NCPs). NCPs are expected to meet core effectiveness criteria, by operating in a manner that is visible, accessible, transparent, accountable, impartial and equitable, predictable, and compatible with the OECD Guidelines. NCPs are also expected to seek the active support of social partners, other stakeholders and relevant government agencies.
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.