



29 July 2019

Ms Victoria Anderson
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c/- Foreign Investment Division
The Treasury
Langton Crescent
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Dear Victoria

Feedback on the proposed July 2019 draft updates to the AusNCP Procedures

Thank you for providing the opportunity for the Australian Human Rights Commission (Commission) to comment on the proposed draft updates to the Australian National Contact Point's (AusNCP) Procedures released for public consultation in July 2019 (Procedures). The Commission commends the AusNCP's commitment to the ongoing improvement of its Procedures and functions, and welcomes many of the proposed changes to the Procedures.

This letter sets out a range of recommended changes to the Procedures for your consideration. Some of the recommendations relate to process-related matters arising from 2018 or recent proposed changes to the Procedures, while other recommendations seek to enhance the accessibility of the Procedures through 'plain language' suggestions.

The Commission's recommendations aim to ensure the AusNCP Procedures reflect the *OECD Guidelines for Multinational Enterprises'* (OECD Guidelines) requirement that the AusNCP's complaint handling is impartial, predictable, equitable and compatible with the principles and standards in the Guidelines.¹ In addition, as you know, the 2011 *United Nations Guiding Principles on Business and Human Rights* (UNGPs) also highlight National Contact Points (NCPs) as key state-based, non-judicial grievance mechanism for providing remedy to victims of business-related human rights abuses.² Therefore the Commission's

recommendations also seek to assist the AusNCP to reflect the seven 'effectiveness' criteria for non-judicial grievance mechanism set out in the UNGPs, being: legitimacy, accessibility, predictability, equitability, transparency, rights compatibility and being a source of continuous learning.³

The Commission's feedback below draws on both the Commission's business and human rights expertise, and also the Commission's extensive experience with mediation and conciliation arising from the Commission's Investigation and Conciliation Service (ICS). The ICS engages with a wide range of stakeholders, including businesses and individuals from disadvantaged groups. In 2017-2018 the ICS received 2,046 complaints about discrimination and breaches of human rights and conducted 1,262 conciliation processes of which 74% were successfully resolved.

Accessibility

Recommendation 1: Conduct a 'plain English' review of the Procedures and the online form for submitting a complaint.⁴

This recommendation aims to ensure that the AusNCP's Procedures and online complaint form are accessible and equitable for all participants, including individuals from different disadvantaged groups who may not be familiar with dispute settlement procedures. The review should take into consideration:

- 'plain English' writing and style, in accordance with Government plain language guidelines, and
- the use of inclusive language to address barriers faced by different groups of participants in a manner which enables increased participation.

Recommendation 1 also reflects recommendation 3(a) of the 2017 Independent Review of the AusNCP which recommended that revised procedures should '(s)et out a clear and transparent process for handling specific instances in a plain English style.'⁵

The Commission recognises that there is a small amount of technical language in the Procedures from the OECD Guidelines, which could be helpful to retain in the Procedures to demonstrate the AusNCP's 'functional equivalence' with other National Contact Points (NCPs).⁶ However, in the Commission's view, the use of complex or technical language reduces the accessibility of the AusNCP.

The specific instance process

Recommendation 2: Clearly define the purpose of the complaint process

The Commission recommends that the Procedures clearly articulate the purpose of the specific instance process. A range of information about the purpose of the specific instance process (for example, former paragraphs 2 and 33) was included in the original Procedures, however, this was removed in the 2018 update.

It would also be helpful to provide stakeholders with a summary of the aim of each stage of the specific instance process, including the various sub-stages within the good offices (i.e. the 'preparation' stage and the 'proceedings' stage).

Recommendation 3: Ensure the accessibility of the complaint process

The Commission recommends that the Procedures are amended in Part 4 to highlight that the AusNCP will take reasonable steps to ensure the good offices phase is accessible to notifiers especially notifiers from overseas. Such steps, which reflect the practice of NCPs elsewhere, can include through use of technology, translation services, facilitation of discussion in the local setting where appropriate, translation of the AusNCP Procedures and the OECD Guidelines into relevant languages and placement of information about the AusNCP in Australian embassies.

We understand that in practice the AusNCP has used a range of methods to ensure that the complaint process is accessible to the parties, including using translation services and organising meetings with the parties in the relevant country. The Commission welcomes this practice and encourages for it to be formally included in the Procedures.

Recommendation 4: Clarify the test for acceptance of a complaint at section 3.7

The current online version of the Procedures provides at section 3.7 states that:

Consistent with the Procedural Guidance and Commentary in the OECD Guidelines, in deciding whether to accept a case, the AusNCP will consider whether the issue/s raised merit/s further examination by determining whether the issue is bona fide and relevant to the implementation of the OECD Guidelines...

The Commission notes that the AusNCP is proposing to change the word 'bona fide' to 'legitimate'. The word 'bona fide' is found in the Procedural Guidance and Commentary in the OECD Guidelines.⁷ The Commission welcomes the AusNCP's attempt to make the AusNCP Procedures more accessible. However, the Commission is concerned that changing the term 'bona fide,' to 'legitimate,' which can be interpreted in a number of ways, could unintentionally create an additional hurdle for the acceptance of a complaint. With a view to also ensuring functional equivalence with other NCPs, the Commission encourages the use of the term 'good faith' (which is closer to the meaning of 'bona fide') instead of the word 'legitimate.' This approach also reflects the practice of other NCPs, such as Norway.⁸

In addition, to ensure the predictability and legitimacy of the AusNCP's initial assessment process, the Commission recommends that the AusNCP clarify at section 3.7 that the factors listed in (a) to (f) are the *only* factors the Independent Examiner will take into account when deciding whether to accept the complaint. In the Commission's view this is the intention of the Procedural Guidance and Commentary in the OECD Guidelines,⁹ and is reflected in the approach taken by United Kingdom (UK) NCP's Procedures.¹⁰

Recommendation 5: Reinstate the full powers available to the Examiner in the Examination phase

The Commission recommends that the Procedures should clarify and strengthen the role of the AusNCP during the 'Examination' stage, in line with the original Procedures (sections 47 to 52). In the original Procedures, this Examination stage allowed the AusNCP to 'examine' the case where mediation is refused or fails to achieve agreement, which included:

- 'collecting' (i.e. requesting) further information from the parties
- having further meetings with the parties
- seeking advice from other stakeholders including relevant Government agencies, NGOs, diplomatic missions, business associations and informed independent opinions
- reviewing all information that has been gathered.

In contrast, current section 5.2 in Part 5 – Final Statement has limited the Independent Examiner's examination powers by providing that the Independent Examiner may to do the following before drafting a final statement:

- review materials 'provided by' the parties, publicly available information or other information revealed during the good offices process
- consult other sources such as the Board, other NCPs or subject matter experts.

In certain circumstances the notifier may not agree to engage in discussions or mediation for appropriate reasons such as a genuine fear of retaliation or other reasonable grounds.

In the Commission's view, the AusNCP should consider amending section 4.4(b) to allow the Examiner discretion in such circumstances to consider the complaint in the examination phase and to make an assessment of the issues raised in the Final Statement. Without this option, the Procedures unintentionally create a perverse incentive for threats and retaliation to be used in order to prevent a complaint from proceeding.

Final statement

Recommendation 6: Provide at section 5.3.2 that the Independent Examiner 'will,' not 'may,' make a determination about whether the OECD Guidelines appear to have been breached by the relevant enterprise in cases where:

- **a complaint has been accepted but the enterprise failed to engage in the specific instance process, or**
- **the good offices process did not result in an agreed outcome.**

This recommendation reflects Recommendation 3(f) from the *2017 Independent Review of the AusNCP (Independent Review)*,¹¹ and the practices of a range of other NCPs including the UK, Norwegian, Netherlands and Brazilian NCPs.

OECD Watch's 2015 report *Remedy Remains Rare*, highlights the importance of NCPs' willingness to make determinations about an enterprise's compliance with the OECD Guidelines:

'In the 2014 Peer Review of the Norwegian NCP, several stakeholders noted that the NCP's practice of issuing compliance determinations provides it with leverage to encourage parties to engage in the NCP-facilitated dialogue process. Corporations that were party to NCP complaints have also indicated that they decided to participate in the mediation process in part to avoid a compliance determination. Further, 27 of the 35 cases (77%) that OECD Watch identified as having resulted in a

remedy-related outcome were produced by NCPs that have demonstrated that they will make determinations of non-compliance with the Guidelines if mediation fails.¹²

If the Procedures ensure that the AusNCP will make a determination about an enterprise's compliance with the OECD Guidelines in the above circumstances, it will go some way to helping Australia fulfil its duty to provide access to an effective, state-based non-judicial grievance mechanism for victims of business related human rights harms under the UNGPs.

Recommendation 7: Final statements and follow-up statements should recommend that government agencies apply relevant consequences to enterprises that have:

- **failed to engage with the specific instance process**
- **are found to have breached the OECD Guidelines, or**
- **upon follow-up, have failed to provide evidence of having taken meaningful steps to implement the AusNCP's recommendation.**

This recommendation reflects Recommendation 3(g) of the Independent Review.¹³ Such ramifications could include an enterprises' ability to access export credit finance, trade-related support and Australian embassy support. Additional consequences could include eligibility to tender to Australian government contracts.¹⁴ This approach reflects the approach of the Canadian and German NCPs, and commitments to similar approaches by the UK and Dutch Governments.

Post-completion: Follow-up

Recommendation 8: Update section 6.6 to clarify that multiple follow-ups to a Final Statement are possible

The Commission welcomes the proposed updates to section 6.3 of Procedures to allow for:

- multiple follow-up statements by the Examiner following the Final Statement, where necessary
- follow-up statements to comment on the extent to which recommendations in the Final Statement or any mediated outcome have been implemented.

This practice aligns with the follow-up practices of other NCPs, such as the Swiss and French NCPs.¹⁵ The 2012 *NCP Mediation Manual* authored by the Consensus Building Institute and National Contact Points from Norway, The Netherlands and the UK highlight that NCPs should monitor the implementation of a mediated agreement.¹⁶ Drawing on comments from OECD Watch, the *NCP Mediation Manual* also explains:

“[An] NCP’s inability or unwillingness to monitor adherence allows companies simply to ignore the statement and continue business as usual with no consequences”... without proper oversight and enforcement of Final Statement recommendations, the specific instance process can be undermined.’¹⁷

To ensure this amendment is given proper effect, the Commission recommends that section 6.6. is amended as follows:

The Each finalised follow-up statement will be published on the AusNCP website and shared with the parties and members of the Board.

This amendment would ensure that each finalised follow-up statement (not just one ‘final’ follow-up statement) is published on the AusNCP website following the parties’ opportunity to comment on each draft follow-up statement.

Post-completion: Procedural review

Recommendation 9: Update the Procedures at section 7.8 so that findings of ‘material procedural irregularities’ are always remitted to the Examiner for rectification

Section 7.8 of the Procedures provides that where the Committee determines that material procedural irregularities occurred during a complaint process, the Committee ‘may’:

- remit the decision to the Examiner with instructions for rectification (section 7.8(a)), *or*
- acknowledge there were deficiencies in the Examiner’s handling of the complaint and make recommendations about avoiding those errors in future (section 7.8(b)).

The Commission recommends that the Procedures should be updated in section 7.8 to ensure where material procedural irregularities are identified by the

Committee, the Committee 'will' rather than 'may' take *both* of the actions outlined in section 7.8(a) and 7.8(b).

Without this change, the Committee could identify a material procedural irregularity in the handling of a complaint and decide to not to take any action, or simply identify there had been a material procedural deficiency but not take any action to ensure it is rectified. In the Commission's view, given section 7.8 requires the presence of a 'material' procedural irregularity, the Committee should not have the discretion to take no action upon making such a finding, and the action the Committee should take in response is outlined in both section 7.8(a) and 7.8(b).

Recommendation 10: Clarify the meaning of 'written assessment' in section 7.11

It is unclear what the reference to 'written assessment' in section 7.11 refers to:

- the Committee's determination regarding whether there was a material procedural irregularity as referenced in section 7.8, or
- the draft public statement referenced in section 7.10.

Additional guidance

Recommendation 11: The AusNCP should include additional guidance on its website about how to make a complaint.

For example, the Dutch and Norwegian NCP provide guidance their websites¹⁸ about how to make a complaint, including a guide from OECD Watch about how to make complaints to an NCP.¹⁹ In addition, the Norwegian NCP's website also highlights that a complainant can contact the Norwegian NCP with queries about how to make a complaint.²⁰ The Dutch NCP also has a guide for businesses titled 'If you are the subject of complaint.'²¹

If you would like to discuss any aspect of this feedback, please do not hesitate to let me know.

Yours sincerely



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¹ OECD, *OCED Guidelines for Multinational Enterprises* (2011), 71 and 78 (OECD Guidelines)

² United Nations Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN Doc HR/PUB/11/04, Principle 25

³ UNGPs, Principle 31

⁴ AusNCP, *Submit a specific instance*, <http://ausncp.gov.au/specific-instances/submitting-a-complaint/> (accessed at 23 April 2019)

⁵ Alex Newton, *Independent Review: Australian National Contact Point under the OECD Guidelines for Multinational Enterprises*, (2017), 45 <https://cdn.tspace.gov.au/uploads/sites/112/2018/02/Final-Report.pdf>

⁶ OECD Guidelines, 56 at [8]

⁷ *Part II Implementation Procedures of the OECD Guidelines for Multinational Enterprises*, OECD Guidelines for Multinational Enterprises (2011), 82 -83, at [35]

⁸ Norway National Contact Point, *Procedural Guidelines for Handling Complaints* (2013), 4, <https://www.responsiblebusiness.no/files/2013/12/NCP-Norway-Procedural-Guidelines.pdf>

⁹ *Part II Implementation Procedures of the OECD Guidelines for Multinational Enterprises*, OECD Guidelines for Multinational Enterprises (2011), 82 -83, at [35]

¹⁰ UK National Contact Point, *UK National Contact Point Procedures For Dealing With Complaints Brought Under the OECD Guidelines For Multinational Enterprises* (2013),

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/270577/bis-14-518-procedural-guidance.pdf

¹¹ Alex Newton, *Independent Review: Australian National Contact Point under the OECD Guidelines for Multinational Enterprises*, (2017), 46 <https://cdn.tspace.gov.au/uploads/sites/112/2018/02/Final-Report.pdf> (Independent Review)

¹² Caitlin Daniel, Joseph Wilde-Ramsing, Kris Genovese, Virginia Sandjojo, *Remedy Remains Rare: An analysis of 15 years of NCP cases and their contribution to improve access to remedy for victims of corporate misconduct*, (OECD Watch: June 2015), 44

¹³ Independent Review (2017), 46

¹⁴ See further Recommendation 3(g) in Alex Newton, *Independent Review: Australian National Contact Point under the OECD Guidelines for Multinational Enterprises*, (2017), 46 <https://cdn.tspace.gov.au/uploads/sites/112/2018/02/Final-Report.pdf>

¹⁵ OECD, *Implementing the OECD Guidelines for Multinational Enterprises: The National Contact Points from 2000 to 2015*, (2016), 58

¹⁶ Consensus Building Institute, *National Contact Points from Norway, The Netherlands and the UK, NCP Mediation Manual including the relevant texts from the OECD Guidelines as of February 2012*, (2012), 43 and 54. The *NCP Mediation Manual* was endorsed in the OECD's 2012 *Annual Report on the OECD Guidelines for Multinational Enterprises 2012: Mediation and Consensus Building* (2012), 46

¹⁷ *Ibid*, 55

¹⁸ The Danish OECD Contact Point, *How to Complain*, <https://businessconduct.dk/how-to-complain> (accessed at 23 April 2019) and National Contact Point for Responsible Business Norway, *How to Submit a Complaint*, <https://www.responsiblebusiness.no/dialogue-and-mediation/how-to-submit-a-complaint/> (accessed at 23 April 2019)

¹⁹ OECD Watch, *OECD Watch case check: How to file a complaint?* <https://www.oecdwatch.org/how-to-file-a-complaint/tools/oecd-watch-case-check/> (accessed at 23 April 2019)

²⁰ National Contact Point for Responsible Business Norway, *How to Submit a Complaint*, <https://www.responsiblebusiness.no/dialogue-and-mediation/how-to-submit-a-complaint/> (accessed at 23 April 2019)

²¹ The Danish OECD Contact Point, *If you are the subject of a complaint*, <https://businessconduct.dk/if-you-are-the-subject-of-complaint> (accessed at 23 April 2019)