



Submission to the Review of the Australian National Contact Point (ANCP)

17 JULY 2017

About Oxfam Australia

Oxfam Australia is an independent, not-for-profit, secular development agency whose vision is of a just world without poverty. Oxfam Australia:

- undertakes long-term development programs;
- provides emergency response during disaster and conflict;
- undertakes research, advocacy and campaigns to advance the rights of poor and marginalised people, including women and works with them to achieve equality; and
- promotes fair trade, supporting local artisans and producers throughout shops and Fairtrade foo brand.

We are a long-term Australian Government development partner.

In the 2015-16 financial year, Oxfam Australia directly reached more than 2.5 million people: 1.3 million through our long-term development work, and more than 1.2 million affected by disaster. Through our advocacy and policy work, we have reached millions more. Oxfam Shops also supports hundreds of producer partners and artisans in countries around the world, including Indigenous Australian producers and businesses.

More than half a million Australians annually support Oxfam Australia by contributing skills, time and financial support to advance our work.

Oxfam Australia is a member of Oxfam International, a global confederation of organisations that work together, last year collectively reaching more than tens of millions of people around the world.

Contact

Mal Larsen

Oxfam Australia

Level 5, 33-35 Ainslie Place

Canberra ACT 2600

T: 02 8204 3966

E: malcolml@oxfam.org.au

W: <https://www.oxfam.org.au>

Table of Contents

Executive Summary and Recommendations	3
What Makes an NCP Successful?	4
Problematic ANCP Structure & Location	7
Future Administrative Structure	9
How the ANCP Can Engage More Effectively	10
Engagement with the OECD Guidelines & ANCP	11
What Support the NCP Should Provide to Complainants	12
Other Issues	14

1. Executive Summary

Australia is a trading nation, with a significant business footprint throughout the world. It is entirely appropriate that Australia adheres to the *OECD Guidelines for Multinational Enterprises* to provide principles and standards for responsible business conduct in a variety of areas including human rights, anti-corruption, taxation, labour relations, environment, information disclosure, and consumer protection.

There is significant scope to improve the effectiveness of the Australian National Contact Point (ANCP) so that it is able to undertake its responsibility to support and promote the OECD Guidelines and offer appropriate redress to complainants for breaches of those Guidelines by Australian companies, as envisaged by the OECD and in accordance with the expectations of the Australian community.

The effectiveness of the ANCP will be improved by implementing the following reforms.

Recommendations

1. The ANCP should improve the transparency of its investigation and mediation functions;
2. The ANCP should be more rigorous when undertaking investigative activities in addressing specific complaints;
3. The Australian Government should increase resources to the ANCP to allow it to undertake its responsibilities to promote the *OECD Guidelines for Multinational Enterprises*, and investigate and mediate specific complaints. An appropriate resourcing benchmark is three fulltime staff, commensurate with effective Contact points in Denmark, the UK and the US.
4. The ANCP should be an independent body with sufficient authority to investigate incidents that occur in other countries and make statements independent of government. If the ANCP is to remain in Treasury, it should have independent status, separated from any foreign investment and trade related functions;
5. The Oversight Committee should be strengthened and broadened to include a number of industry and civil society leaders;
6. An Advisory Committee should be established to enable the ANCP to seek advice about the breadth of Australian international business activity and the unique nature of the human rights and labour standards domains, and other specialist expertise such as operating in high conflict zones;
7. The ANCP should develop and implement an engagement plan to improve understanding of the OECD Guidelines in business and civil society;
8. The ANCP should improve guidance material to assist stakeholders who may wish to raise specific instance complaints;
9. The ANCP should be more flexible to enable communication with complainants who may be in isolated parts of the world;
10. ANCP officers should receive specialist advice and training in undertaking investigations related to human rights abuses.

11. The ANCP should be prepared to reach determinations based on the evidence presented to it, along with recommendations for remediation, when a company refuses to take part in mediation.

2. Responses to Review Questions

1. In your view, what makes a National Contact Point (NCP) successful?

The Australian National Contact Point (ANCP) should enjoy the confidence of all stakeholders that it effectively promotes the *OECD Guidelines for Multinational Enterprises* on responsible business conduct to Australian multinationals and that it operates as an effective non-judicial grievance mechanism.

According to the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, non-judicial grievance mechanisms must be: legitimate, accessible, predictable, equitable, rights-compatible and transparent.¹ Effective non-judicial grievance mechanisms should also provide opportunities for engagement and dialogue, be culturally-appropriate, proportional, empowering and have principles of continual improvement.²

In Oxfam Australia's experience, for an NCP to operate effectively it should:

- ensure the complaints grievance process is transparent
- be resourced with appropriately skilled and senior personnel to undertake both its promotion and information dissemination role and its role investigating and managing specific complaints;
- have its activities overseen by a diverse range of industry leaders sourced from business, civil society, trade unions and public servants empowered to genuinely lead it;
- be positioned within the machinery of government in a manner that gives confidence to its objectivity in resolving complaints;
- be respected by industry who feel obliged to cooperate with its activities; and
- provide clear guidance material that assists stakeholders who may wish to raise specific instance complaints.

Procedural Transparency

The ANCPs current procedural guidance for making a complaint leaves a significant amount of uncertainty about the process to be undertaken. For instance, claimants have been left in the situation of not being informed about responses from companies, and accordingly not having the opportunity to respond. Further, the lack of a template for published statements from the ANCP means that not all matters are addressed in a consistent and predictable manner.

¹ Human Rights Council, 2008, <https://business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf>, p.24

² Centre for Social Responsibility in Mining (CSRM), 2009, Community Complaints and Grievance Mechanisms and The Australian Minerals Industry, Second Discussion Paper Commissioned by the Minerals Council of Australia, available at <https://www.csrmining.edu.au/docs/CSRM%20Community%20Complaints%20and%20Grievance%20Discussion%20Paper%202009%20FINAL%20REPORT.pdf>

Lack of transparency of process can put complainants in danger if they are not aware of decisions that are going to be published prior to them being made public. Impunity for violence, poorly functioning judicial systems and weak rule of law are examples of local contexts that may lead communities to pursue non-judicial remedies under the OECD Guidelines. In such contexts complainants are highly vulnerable.

Greater detail should be provided by the ANCP so claimants understand matters such as the process the ANCP will follow, what is expected of claimants, how responses are sought from either party, and shared between them, how claims for confidentiality will be treated, and how the ANCP will seek to find remedies acceptable to the parties. A template should be used to ensure consistency in published statements.

Strong investigative capacity, human rights, and mediation expertise are critical to the safety and security of complainants

A strong investigative capacity, and human rights and mediation expertise are key to ensuring that the ANCP has the skills to accurately interpret the OECD Guidelines, undergo a systemic process for the assessment of Specific Instance Complaints, and work constructively with complainants and industry to resolve complaints. This is critical to ensure clear communications from the ANCP, including the scope and extent of its findings.

Determinations or final statements in the absence of in-depth research

While there is certainly merit in the ANCP issuing clear statements or determinations to encourage companies to engage with the process, these statements should be measured. The ANCP should specifically describe in these statements their modes of investigation, analysis, third party review and processes surrounding opportunities for parties to respond, in order to explain how their views were reached. The ANCP should avoid making catch-all statements on aspects of cases, and instead should only describe what it has specifically investigated or reviewed.

Oxfam Australia has deep concerns that if the ANCP issues statements on events and abuses that it has not independently and rigorously examined, there is a serious risk that these uninformed statements may be used by others to justify violence against already vulnerable complainants. Complainants should not face additional, unnecessary risks due to the ANCP's handling of a complaint.

Where the ANCP is unable to investigate particular points made by complainants, it should state clearly that it did not have the investigative capacity to determine whether the allegation is true, rather than state that there is no evidence that the statement is true. Statements should not be made on points that the ANCP does not have the ability to investigate comprehensively and consideration must be made by the ANCP of adverse impacts if statements are made based on limited investigation.

Recommendations:

1. The ANCP should improve the transparency of its investigation and mediation functions.
2. The ANCP should be more rigorous when undertaking investigative activities in addressing specific complaints.

2. Are there any aspects of the ANCP current structure or location you consider problematic?

There is significant necessary, legitimate and appropriate interaction between companies, and Treasury, as well as between the various divisions of Treasury. The placement of the ANCP within the Foreign Investment and Trade Policy division of Treasury could therefore give rise to the perception by community stakeholders that it is not objective in its deliberations on disputes between complainants and companies. The interaction between Treasury and companies also gives rise to concerns that the ANCP may have an implicit or unconscious bias. For example if, through being located in Treasury, the ANCP is already exposed to a company, its staff or corporate culture, it may more readily communicate and engage with them than with the complainants in a case. This is even more likely if the ANCP does not have human rights expertise as it will likely find it difficult to understand the context in which complainants operate.

For example, in relation to ANZ, Treasury has many diverse interactions with the bank. In 2015 ANZ bank held an AUD\$1.75 million contract with the Australian Office of Financial Management.³ Furthermore a senior advisor in the Department of Treasury's Sydney office's immediate prior role was as Chief Economist at ANZ bank,⁴ and ANZ's Chief Financial Officer is listed as a current member of the government's Takeovers Panel overseen by Treasury.⁵

These close relationships are entirely appropriate given Treasury's role as the Australian Government's key economic agency. However, the placement of the ANCP within the Foreign Investment and Trade Policy Division of Treasury means that the external perception of neutrality is compromised. Further in contrast to corporate actors, complainants are unlikely to have any interaction with Treasury officials beyond the ANCP process. This gives rise to a concern that the ANCP will be biased in favour of multinational enterprises over complainants.

Resourcing

The ANCP is not resourced to undertake its mandate effectively. Currently the ANCP consists of only a part time Senior Executive, and the ANCP function carries no discernible budget. There is no expenditure on promotion and outreach apart from a website, and little awareness amongst industry or stakeholder groups about its scope and role or the OECD Guidelines it is meant to support and promote.

Australia's NCP part-time staffing resources places it on the least-staffed rung of countries with NCPs, equivalent with Colombia, Ireland, Luxembourg, Slovenia, New Zealand and

³ Contract notice CN2980762. Agency: Australian Office of Financial Management. Publish date, 13 April 2015. As accessed via the Aus Tender website. <https://www.tenders.gov.au/?event=public.cn.view&CNUUID=E3D4EA17-E737-84E0-0FEA476030E5CE4B>

⁴ 'Treasury Sydney office celebrates one year of operation and announces key staff appointment'. Media release. Department of Treasury. 18 August 2016. See also "Organisational Structure". Department of Treasury.

⁵ See Takeovers Panel, Panel Members. http://www.takeovers.gov.au/content/DisplayDoc.aspx?doc=about/panel_members.htm

Romania. Australia should set a staffing benchmark equivalent to the more active NCPs which include Denmark, the United Kingdom and the United States, each of which engage three full-time staff.⁶

Oxfam Australia believes that full-time dedicated resources should be devoted to the promotional, investigative and mediation roles of the ANCP, which could be supplemented by short term contingent resources from time to time.

Lack of promotion of the OECD Guidelines and ANCP process:

The ANCP is little used - only 15 complaints have been received since 2005. There is low awareness of it in civil society and little confidence of its effectiveness within the NGO and trade union sectors. This observation is not in any way a reflection on the individual currently involved in the process.

Very few companies are aware of the OECD Guidelines even though they are the most comprehensive instrument in existence to promote responsible international business practice, and one that Australia and other OECD countries have endorsed.

Similarly, in terms of financial resources for NCP activity, the ANCP currently does not organise any promotion of its role, or attend any events related to NCP activity apart from NCP meetings at the OECD. This places Australia in the rung of countries with the least active NCPs⁷. Other NCPs, including Brazil, Finland, Israel, Italy, Hungary and Poland have hosted peer learning events, where good practice amongst NCPs has been shared, and industry –outreach activities undertaken.

Australia needs to increase the resourcing to outreach and promotion to engender greater awareness of the OECD Guidelines and the ANCP. That in turn will lead to greater utilisation of its services.

Recommendations:

3. The Australian Government should increase resources to the ANCP to allow it to undertake its responsibilities to promote the *OECD Guidelines for Multinational Enterprises*, and investigate and mediate specific complaints. An appropriate resourcing benchmark is three fulltime staff, commensurate with effective National Contact points in Denmark, the UK and the US.

⁶ Annual Report on the *OECD Guidelines for Multinational Enterprises* 2016 p39

⁷ Ibid pp40-41

3. In the future, what administrative structure do you think will work best for the ANCP?

The ANCP should be restructured so that it becomes independent of those parts of Government whose role it is to promote and fund international business activity. Its remit to promote the OECD Guidelines and offer a grievance mechanism ought to be its sole focus. Ideally, the ANCP would be better as a stand-alone agency with sufficient powers to undertake its functions, including investigating incidents that occur overseas. However, if the ANCP is to remain within Treasury, then it ought to have a stand-alone status within the organisation's structure.

The Oversight Committee ought to be reformed to have a genuine governance role. A number of positions should to be filled by industry representatives, including business, NGOs and trade unions, as well as senior public servants. The Oversight Committee should operate as a Board of Management, overseeing the ANCP's activities, setting direction for its promotion and outreach as well as the complaints handling process.

Decisions of the Contact Point subject to review ought to be dealt with by the Oversight Committee.

Staff should be engaged to undertake the communication/outreach and complaints handling role of the Contact Point and dedicated to that role. Outsourced services should only be used to supplement the activity of core Contact Point staff.

A broader and larger Advisory Committee should be established that is able to give the Contact Point advice about the breadth of Australian international business activity and the unique nature of the human rights, and labour standards domains, and other specialist expertise such as operating in high conflict zones.

Recommendations:

4. The ANCP should be an independent body with sufficient authority to investigate incidents that occur in other countries and make statements independent of government. If the ANCP is to remain in Treasury, it should have independent status, separated from any foreign investment and trade related functions.
5. The Oversight Committee should be strengthened and broadened to include a number of industry and civil society leaders.
6. An Advisory Committee should be established to enable the ANCP to seek advice about the breadth of Australian international business activity and the unique nature of the human rights, and labour standards domains, and other specialist expertise such as operating in high conflict zones.

7. How can the ANCP engage most effectively with non-government organisations, including business, unions, industry groups, academia and civil society?

In line with international best practice, the ANCP should develop a proactive plan for stakeholder engagement to promote the OECD Guidelines.

As a starting point, the ANCP should engage with other Contact Points of developed trading countries such as the United Kingdom, Denmark, France, United States and the Netherlands.

Specifically, the Contact Point should familiarise itself with some sector specific guidelines relating to ensuring companies undertake due diligence for responsible supply chains in the minerals, extractives, agriculture, garment and footwear and financial sectors.

An engagement plan should cover:

- Target priority industries, sectors or businesses for engagement.
- Key stakeholders in the business, NGO, union and civil society space.
- A series of seminars and training modules in capital cities to advise industry about the application of the OECD Guidelines and Contact Point process.
- Engaging Australian embassies, consulates and trade missions to increase awareness and effectiveness amongst industry and civil society.

The Contact Point needs to be resourced to undertake these outreach activities.

Recommendations:

7. That the ANCP should develop and implement an engagement plan to improve understanding of the OECD Guidelines in business and civil society.

8. To what extent has your organisation engaged with the OECD Guidelines for Multinational Enterprises or the ANCP?

Redacted

Informally Oxfam Australia has also voiced concerns to the ANCP about how statements by the office can potentially exacerbate, or be used to justify, violence and threats to human rights defenders. This could include affected communities and other complainants raising complaints about human rights abuses. Oxfam Australia has strongly cautioned the ANCP to ensure the accuracy of its public statements, ensure that its investigations and statements closely respond to the specific details raised in the complaint, and to act in ways that do not compromise the safety and security of complainants.

Oxfam Australia has engaged with an organisation in South Africa that submitted a complaint about Mineral Commodities Ltd (ASX: MRC) in 2013, the Amadiba Crisis Committee (ACC). The complaint was rejected on the basis that the ACC did not wish to engage in mediation with the company.

9. What support should the ANCP provide to complainants and MNEs when handling complaints under the OECD Guidelines?

Provide guidance/guidelines on the ANCP process for complainants/companies

Lack of information about the complaints process makes it difficult for prospective complainants to determine what level of information is necessary to pursue a complaint. This information needs to be transparent and clear to facilitate engagement in the process in Australia.

Accessibility to the NCP process

Oxfam Australia recommends the Contact Point commit to providing equal access to both parties in single instance complaints. This includes developing a more flexible and innovative approach to ensure communications with complainants who may be in remote countries. Mobile and communications technologies such as Skype should be utilised to assist remote communication.

Transparency of process and special attention paid to human rights concerns

Where complainants raise concerns about human rights risks, the NCP should have a clear process for responding and should respect that these concerns add greatly to community stress and uncertainty. The ANCP should directly communicate to the complainants as to how it will respond to any concerns related to complainant security and seek specialist advice if necessary. The ANCP should also clearly communicate a timeline for response.

Sensitivity to needs of complaints, particularly in high-risk situations

The ANCP must be acutely aware of how decisions in Australia can impact human rights defenders overseas. Authorities such as the UN Special Rapporteur on the situation of Human Rights Defenders has explicitly documented the risks that individuals and communities can face when raising allegations of human rights abuses. This can include physical threats, psychological threats, denial of employment, sexual violence, arbitrary detention and killings. The Special Rapporteur has noted that particularly vulnerable groups include Indigenous and rural people, as well as advocates working on anti-corruption, environmental and women's rights issues.

Oxfam Australia strongly recommends that the office of the ANCP seek out assistance from the Special Rapporteur, or similarly qualified individuals or groups, to articulate a complainant security strategy. This should include education and training for the office of the ANCP, as well as a process for identifying and raising possible security concerns throughout the ANCP process. Oxfam Australia would be willing to assist the ANCP to connect with experts who could assist in the development of such a strategy.

Critical to the role and respect for the ANCP is the office's ability to investigate and to issue accurate statements on cases, particularly where mediation is not achieved. An over-reliance on desk-based resource and English-language sourcing is likely to internalize a bias against complainants from non-English speaking or oral cultures. In such cases we recommend that the NCP have a strategy to resource investigations, including face-to-face

meetings with complainants and on-the-ground research. Additionally, the ANCP could broker in-kind access to translation services through the Department of Foreign Affairs and Trade, or potentially seek pro-bono translation assistance from independent third parties.

Recommendations

8. The ANCP should improve guidance material to assist stakeholders who may wish to raise specific instance complaints.
9. The ANCP should be more flexible to enable communication with complainants who may be in isolated parts of the world.
10. ANCP officers should receive specialist advice and training in undertaking investigations related to human rights abuses.

10. Do you have any other views for the ANCP Review to consider?

The ANCP should ensure that this review seeks input from overseas-based groups that have active cases with the ANCP or have lodged complaints with the ANCP in recent years.

Refusal to Consider Claims due to lack of commitment to mediation/discussion

The ANCP has a practice of closing claims if either party refuses to participate in mediation. This has the effect of acting as a disincentive for companies to participate in the very processes it is meant to facilitate –mediation and dialogue between the parties in dispute.

The *OECD Guidelines for Multinational Enterprises* and the ANCPs own guidelines determine that participation in mediation is not a determinative criteria in relation to initial assessment or conducting further investigations. In fact there is no prohibition on the ability of NCPs to issue statements making recommendations as to the applicability of the OECD Guidelines to a specific party should that company refuse to participate in dialogue. As a case in point, in *Survival International vs Vedanta* the UK NCP issued Statements that addressed the facts presented in evidence despite the refusal of the company Vedanta to participate. As emphasised above, in such a situation the NCP should independently and rigorously examine the evidence presented. Where the ANCP is unable to investigate particular points made by complainants, it should state clearly that it did not have the investigative capacity to determine whether the allegation is true, rather than state that there is no evidence that the statement is true.

It is imperative that there is an incentive for both parties to participate in mediation, particularly the party against which the complaint is made, and that any benefit from non-participation is minimised. The ANCP is encouraged to be steadfast in its commitment to reaching a conclusion in specific instances brought before it despite the non-participation of a company.

Recommendations

11. That the ANCP be prepared to reach determinations based on the evidence presented to it, along with recommendations for remediation, when a company refuses to take part in mediation.

