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**Submission to the Review of the Australian National Contact Point for the OECD  
Guidelines for Multinational Enterprises**

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## Contents

1. Introduction .....	3
2. Structure of the ANCP.....	4
A) ANCP .....	4
B) Oversight Committee .....	5
3. Procedure in Specific Instances .....	6
A) Initial Assessments .....	6
B) Final Statements .....	8
C) Follow-Up .....	10
D) Appeal/Review .....	11
4. Engagement with Stakeholders.....	12
5. Website and Provision of Information.....	12
6. Integration with Other Policies.....	13
Conclusions and further steps.....	13
Recommendations.....	14

## 1. Introduction

The OECD Guidelines for Multinational Enterprises, as revised in 2011, are an essential part of the international framework for promoting and ensuring responsible, or sustainable, business practice. The OECD as an international organisation emphasises technocratic expertise and peer learning. The 2011 revision brought the Guidelines into line with the UN Guiding Principles on Business and Human Rights,<sup>1</sup> and incorporated the concept of human rights due diligence (HRDD) into the Guidelines.<sup>2</sup> However, the Guidelines go beyond the Guiding Principles in applying due diligence to all policy areas, not just human rights, by including the concept in the General Policies chapter.

The Guidelines are unusual as international instruments in having a decentralised form of implementation. Each adhering state (OECD member states and some others) must establish a National Contact Point (NCP). The Guidelines themselves provide few requirements as to structure and operation of NCPs. A key function, however, since the 2000 revision of the Guidelines is to receive and process complaints called specific instances. The specific instance procedure is a non-judicial dispute resolution process which allows stakeholders to make complaints that a multinational enterprise is failing in some respect to observe the Guidelines.

The Australian National Contact Point (ANCP) is located in the Commonwealth Treasury. The present review is directed to its structure and functioning.

The terms of reference for the current review include the following questions:

1. In your view, what makes a National Contact Point (NCP) successful?
2. Are there any aspects of the Australian NCP's (ANCP) current structure or location you consider problematic?
3. In the future, what administrative structure do you think will work best for the ANCP?
4. Please include in your response: your vision for how it would work; the relative advantages and disadvantages for all stakeholders under your preferred model, including the ANCP's ability to handle specific instances (complaints) and promote the Guidelines; and any comparative models proven to be effective (e.g. other NCPs or non-judicial mechanisms for redress).
5. How can the ANCP engage most effectively with non-government organisations, including business, unions, industry groups, academia and civil society?
6. To what extent has your organisation engaged with the OECD Guidelines for Multinational Enterprises or the ANCP?
7. What support should the ANCP provide to complainants and MNEs when handling complaints under the OECD Guidelines?
8. Do you have any other views for the ANCP Review to consider?

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<sup>1</sup> UN Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', 17<sup>th</sup> sess, Agenda Item 3, A/HRC/17/31 (21 March 2011).

<sup>2</sup> Holly Cullen, 'The Irresistible Rise of Human Rights Due Diligence: Conflict Minerals and Beyond' (2016) 48 *George Washington International Law Review* 743.

This submission, while addressing the above questions, is structured in a different way. It begins with an analysis of the structure of the ANCP and its Oversight Committee in **Section two**. It then proceeds to a critique of the ANCP's procedure in specific instances in **Section three**. **Section four** addresses the ANCP's engagement with stakeholders. **Section five** addresses concerns about the dissemination of information by the ANCP, particularly via its website. **Section six** looks to the future at how, beyond the institutional considerations set out in Section two, the ANCP can coordinate with other policy areas in government concerning responsible business. The submission ends with conclusions and a number of recommendations for improvement of the structure and functioning of the ANCP.

The ANCP has been minimalist and low-profile. As yet, it has not had much impact. The former President of the Australian Human Rights Commission, the Honourable Catherine Branson QC, speaking of the current structure of the NCP, concluded that it appears that Australia is not 'particularly anxious to have an active and influential NCP.'<sup>3</sup> The present review is to be welcomed as an opportunity for the ANCP to realise its potential for both action and influence.

## 2. Structure of the ANCP

The current structure of the ANCP is described as follows on its website: 'The Australian National Contact Point (ANCP) is Ms Victoria Anderson, Principal Adviser, Foreign Investment Division, the Treasury. The ANCP draws on expertise from other government agencies through an informal inter-governmental network.'<sup>4</sup>

The Oversight Committee is described as follows:

'The Australian National Contact Point (ANCP) will chair the Oversight Committee. The Committee will also include representatives from the Department of Foreign Affairs and Trade, the Department of Industry, Innovation and Science, the Department of Employment, the Australian Trade and Investment Commission (Austrade), the Attorney-General's Department, the Department of Immigration and Border Protection, and the Export Finance and Insurance Corporation. Other Departments may participate in Committee meetings on an ad hoc basis when issues of interest arise.'<sup>5</sup>

In the case of both the ANCP itself and the Oversight Committee, the structure does not draw upon the best practices of OECD member states, and fails to take into account the progress, albeit gradual, towards quadripartitism and independence of these bodies. Changes to both bodies are suggested in order to increase confidence of stakeholders in the procedures operated by the ANCP. Such changes will not be costless, and some increase in resources available to the ANCP should be considered.

### A) ANCP

An NCP which is embodied in a single official is a minimalist implementation of Australia's obligation under the Guidelines. While Australia is not alone in this approach, several states have NCPs with broader membership. Other options include a government-only NCP with

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<sup>3</sup> The Honourable Catherine Branson QC, 'Business and Human Rights: The New Global Consensus?' (2014) 16 *Flinders Law Journal* 187, 197.

<sup>4</sup> <http://www.ausncp.gov.au/content/Content.aspx?doc=ancp/contactpoint.htm>.

<sup>5</sup> <http://www.ausncp.gov.au/content/Content.aspx?doc=ancp/oversight.htm>.

participation from several ministries; a government-only NCP assisted by a tripartite<sup>6</sup> or quadripartite<sup>7</sup> advisory committee; a tripartite NCP; a quadripartite NCP; or a fully independent NCP.

Examples of each may be found amongst the adhering states:

- Multi-ministry NCP: Brazil; Canada; Korea; Portugal; Slovenia;
- Government-only NCP (single or multi-ministry) assisted by tripartite or quadripartite advisory committee: Austria; Chile; Colombia; Egypt, Germany, Israel, Italy, Japan; New Zealand; Switzerland; United Kingdom; United States;
- Tripartite NCP: Belgium; France; Latvia; Lithuania; Luxembourg; Sweden; Tunisia;
- Quadripartite NCP: Finland;
- Independent NCP: Denmark; Netherlands; Norway.

Another issue is where an NCP should be housed within the government of an adhering state. Again, Australia is not unique in housing its NCP in an economic ministry. However, there may be some advantage to housing an NCP at least partially in a foreign affairs ministry, possibly because this locates responsible business policy as adjacent to international development issues. In Australia, DFAT administers the Kimberley Process Certification Scheme for conflict diamonds,<sup>8</sup> which also relates to responsible business conduct, and increasingly has overlaps with OECD responsible business policy in the mining sector.<sup>9</sup> This policy overlap, discussed further below in **Section six**, would suggest either co-housing the ANCP in DFAT or moving it there entirely. A substantial minority of adhering states have their NCPs at least partly housed in foreign affairs. The United Kingdom NCP is housed within the Department for International Trade but co-funded by the Department for International Development.<sup>10</sup> Argentina, Canada, Chile, Japan, Latvia, the Netherlands, Sweden, Tunisia and the United States have their NCPs in foreign affairs ministries.

## **B) Oversight Committee**

At present, the Oversight Committee for the ANCP runs the risk of appearing to lack independence from the NCP itself, which is of particular concern because the Oversight Committee operates the review of contested decisions in the specific instance procedure, discussed further below. The relative lack of independence of the Oversight Committee raised particular concern in the specific instance brought by the Human Rights Law Centre and Rights and Accountability in Development against G4S, where the Commonwealth

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<sup>6</sup> A tripartite body in this context is one with representation from government, business and organised labour, similar to the practice of the International Labour Organisation, and the OECD itself, which has a Business and Industry Advisory Committee and a Trade Union Advisory Committee.

<sup>7</sup> A quadripartite body in this context is like a tripartite body as described in the previous footnote, but also including representation from broader civil society such as human rights or development organisations.

<sup>8</sup> <https://www.kimberleyprocess.com/>; Holly Cullen, 'Is There a Future for the Kimberley Process Certification Scheme for Conflict Diamonds' (2013) 12 Macquarie Law Journal 61.

<sup>9</sup> OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, <http://mneguidelines.oecd.org/stakeholder-engagement-extractive-industries.htm>; OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, 3<sup>rd</sup> ed., <http://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf>.

<sup>10</sup> Portugal's NCP is co-hosted by bodies in economic and foreign affairs ministries.

government's own policies were in issue.<sup>11</sup> The Oversight Committee is chaired by the official who acts as ANCP, which gives the appearance of a lack of independence and impartiality – and as in courts of law, the appearance of bias is as significant as its presence in undermining the legitimacy of a body. Concerns about impartiality are likely to be exacerbated by the fact that the Committee has no non-government members. The Committee's membership should be altered to include relevant stakeholders, in other words to be quadripartite. Its chair should ideally be a non-government member of the Committee, but at the very least should not be the ANCP or a member of the ANCP if the model of NCP is changed to a multi-member body.

The potential for conflict of interest in designating the ANCP as a single official is likewise present in her participation in OECD bodies. The ANCP also sits as the Australian government representative on the OECD's Investment Committee, which has general oversight of the Guidelines, including the possibility of issuing interpretations of the Guidelines and their procedures.<sup>12</sup>

### **3. Procedure in Specific Instances**

The Procedural Guidance for the OECD Guidelines for Multinational Enterprises sets out a two-stage procedure. The NCP first conducts an initial assessment of the complaint, and then offers good offices towards resolving the dispute between the parties. This often involves a mediation process.

Of the specific instances filed with the Australian NCP,<sup>13</sup> only three have been given a Final Statement following successful mediation. Four were transferred to other NCPs, and one was recommended for transfer but without certainty that any other NCP had jurisdiction. Two ended because of the refusal of one party to engage in mediation, in one case the business and in one case the complainant. Two cases were fully rejected on initial assessment, and one rejected in part, although the remainder of the complaint went to a successful mediation.

#### **A) Initial Assessments**

The approach of the ANCP, particularly its strict approach to the conditions for accepting a specific instance is evident from its recent statement on the initial assessment of the Human Rights Law Centre/Rights and Accountability in Development complaint about G4S's operation of offshore detention centres.<sup>14</sup> Three grounds were given for not taking the specific instance further. The first was that the NCP was not the appropriate forum for the complaint because it involved government policy and G4S is not responsible for government policy, nor is it the role of the NCP to comment on government policies or law. The second

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<sup>11</sup> Australian National Contact Point, Statement by the Australian National Contact Point on Specific Instance - G4S Australia Pty Ltd, 10 June 2015,

[http://www.ausncp.gov.au/content/Content.aspx?doc=publications/reports/general/G4S\\_Aus.htm](http://www.ausncp.gov.au/content/Content.aspx?doc=publications/reports/general/G4S_Aus.htm).

<sup>12</sup> Leyla Davarnejad, 'In the Shadow of Soft Law: The Handling of Corporate Social Responsibility Disputes under the OECD Guidelines for Multinational Enterprises' [2011] *Journal of Dispute Resolution* 351, 361.

<sup>13</sup> See list on Australian National Contact Point, <http://www.ausncp.gov.au/content/Content.aspx?doc=publications.htm>.

<sup>14</sup> Australian National Contact Point, Statement by the Australian National Contact Point on Specific Instance - G4S Australia Pty Ltd, 10 June 2015:

[http://www.ausncp.gov.au/content/Content.aspx?doc=publications/reports/general/G4S\\_Aus.htm](http://www.ausncp.gov.au/content/Content.aspx?doc=publications/reports/general/G4S_Aus.htm).

was that although the conduct of G4S employees is relevant to the application of the MNE Guidelines, that conduct had been reviewed by government bodies and that there was no value to be added by the specific instance process. Finally, the complaint was rejected on the ground that the same issues were before courts in Victoria and Papua New Guinea.

It is worth noting that the approach of the United Kingdom NCP to two of these issues has been significantly different to the approach taken here by the ANCP. On the issue of government contractors, the United Kingdom NCP accepted a complaint by Lawyers for Palestinian Human Rights against G4S in June 2014 on an initial assessment.<sup>15</sup> On the question of parallel legal proceedings, the United Kingdom NCP issued guidance, most recently updated in 2011, which sets out a policy that parallel proceedings will only be a bar to further consideration where there would be ‘serious prejudice to a party to parallel proceedings.’<sup>16</sup> Furthermore, even where the NCP is of the view that parallel proceedings could cause prejudice to a party, it encourages the parties to continue with the specific instance process nonetheless:

‘Before suspending a complaint, the UK NCP will expect the parties to give serious consideration to the benefits of conciliation/mediation which can lead to a quicker and more cost effective solution to the issues raised.’<sup>17</sup>

The United Kingdom NCP also applies the principle of severability to the issue of parallel proceedings and may proceed with a specific instance in part.<sup>18</sup> It may also continue with a specific instance after parallel proceedings have completed.<sup>19</sup>

In terms of the admissibility of specific instances relating to aspects of government policy, it is worth noting that the ANCP itself allowed in part a complaint against another contractor of services in relation to refugee detention,<sup>20</sup> and that the Norwegian NCP allowed a complaint against Norwegian company Aker Kvaerner in relation to work done by its American subsidiary at the American Marine Base at Guantanamo Bay.<sup>21</sup> The complaint by the Lawyers Committee for Palestinian Human Rights against G4S, considered by the United Kingdom NCP, passed the initial assessment, and following the refusal of G4S to engage in mediation, was examined by the United Kingdom NCP which concluded that ‘there are adverse human rights impacts associated with the facilities and locations referred to in the

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<sup>15</sup> United Kingdom National Contact Point, Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Complaint from Lawyers for Palestinian Human Rights (LPHR) against G4S, 22 May 2014, Ref. BIS/14/854, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/315104/bis-14-854-palestinian-lawyers-complaint-against-g4s-ncp-initial-assessment.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/315104/bis-14-854-palestinian-lawyers-complaint-against-g4s-ncp-initial-assessment.pdf).

<sup>16</sup> United Kingdom Department for International Development and Department for Business, Innovation and Skills, Approach of the UK National Contact Point to Specific Instances in Which There Are Parallel Proceedings, 16 September 2009, updated 14 January 2011, URN 11/652, paragraph 3: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31717/11-652-approach-national-contact-point-parallel-proceedings.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31717/11-652-approach-national-contact-point-parallel-proceedings.pdf). The Australian NCP uses similar guidelines but did not refer to them in its initial assessment of the G4S complaint.

<sup>17</sup> Ibid, paragraph 5.

<sup>18</sup> Ibid, paragraph 6.

<sup>19</sup> Ibid, paragraph 14.

<sup>20</sup> Australian National Contact Point, Statement by the Australian National Contact Point ‘GSL Australia Specific Instance, 6 April 2006: [http://www.ausncp.gov.au/content/publications/reports/general/GSL\\_Statement.pdf](http://www.ausncp.gov.au/content/publications/reports/general/GSL_Statement.pdf).

<sup>21</sup> Norwegian National Contact Point, Statement, 29 November 2005.

complaint [but that none] of the information reviewed by the UK NCP suggested that G4S staff or equipment play a direct part in these impacts.’

The current practice of the ANCP in relation to initial assessment has been criticised. In July 2015, the Human Rights Law Centre and Rights and Accountability in Development requested a review of the initial assessment of the specific instance initiated by them, on the basis of the application by the ANCP of conditions for initial assessment not mentioned in the MNE Guidelines and incorrect interpretation of the parallel proceedings bar.<sup>22</sup> They also argued that previous reviews of conduct at the Manus Regional Processing Centre do not cover all the facts alleged in the complaint. Finally, they complained that the initial assessment took approximately eight months to complete rather than the three months mandated by the MNE Guidelines.<sup>23</sup>

## **B) Final Statements**

As noted above, the model of dispute resolution for the specific instance procedure is mediation rather than a quasi-judicial model. However, the application of a mediation model does not necessarily exclude the possibility of the ANCP following the practice of the United Kingdom NCP and making findings and interpretations in relation to the Guidelines in its Final Statements. In practice, the ANCP Final Statements have been descriptive and have focused on the procedural aspects of the specific instance. For example, the Final Statement in the complaint by IndustriALL and other unions against Ansell, described the process and gave a summary of key points from the Memorandum of Understanding between the parties at the end of the mediation.<sup>24</sup>

A common understanding of mediation is that the mediator does not make findings of fact or law. This model of mediation is described as *facilitative* mediation.<sup>25</sup> However, there are other models, notably *evaluative* mediation, where the mediator is more active and is more focussed on the legal rights of the parties.<sup>26</sup> In practice, mediators often move between different models or approaches within a single dispute resolution process.<sup>27</sup>

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<sup>22</sup> Letter from HRLC and RAID to the Australian NCP, 2 July 2015, <http://hrhc.org.au/wp-content/uploads/2015/07/HRLC-RAID-letter-to-ANCP-2-7-15.pdf>.

<sup>23</sup> It is worth noting that this complaint was the only specific instance under active consideration at the time.

<sup>24</sup> [http://www.ausncp.gov.au/content/publications/reports/general/Final\\_Statement-Ansell\\_and\\_IndustriALL.pdf](http://www.ausncp.gov.au/content/publications/reports/general/Final_Statement-Ansell_and_IndustriALL.pdf).

<sup>25</sup> The distinction was introduced by Leonard L. Riskin, ‘Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed’ (1996) 1 *Harvard Negotiation Law Review* 7. In a later article, he clarified that these two approaches to mediation were not exclusive, and should be seen as two ends of a continuum rather than a dichotomy: Leonard Riskin, ‘Decisionmaking in Mediation: The New Old Grid and the New New Grid System’ (2003) 79 *Notre Dame Law Review* 1, 13-14.

<sup>26</sup> Laurence Boulle, *Mediation: Principles, Process, Practice*, 3<sup>rd</sup> ed. (LexisNexis, 2011), 44-46. Evaluative mediation is now the mainstream form of mediation for large American companies, see Thomas J. Stipanowich and J. Ryan Lamare, ‘Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations’ (2014) 19 *Harvard Negotiation Law Review* 1, 19, 62. In the context of business and human rights, see Caroline Rees, *Mediation in Business-Related Human Rights Disputes: Objections, Opportunities and Challenges*, Harvard Kennedy School Working Paper No. 56, February 2010, 4-5.

<sup>27</sup> Susan Oberman, ‘Style vs. Model: Why Quibble?’ (2008) 9 *Pepperdine Dispute Resolution Law Journal* 1, 24-25.



Another way to distinguish between different approaches to mediation is based on the function of norms, legal or otherwise, in the mediation.<sup>28</sup> In norm-generating mediation, which broadly maps on to facilitative mediation, there are no norms which constrain the agreement which the parties may reach, and in particular no constraints emanate from the mediator.<sup>29</sup> The norms which form the outcome of the mediation process are designed and agreed by the parties themselves. Where, however, because of the strong public interest in enforcing norms, or because of power imbalance between the parties, a stronger role for norms is called for, norm-advocating mediation should be used.<sup>30</sup> In this model of mediation, the mediator not only informs parties about relevant norms, but insists on their incorporation in the agreement between the parties.<sup>31</sup> The failure to adhere to norms is seen as the source of the conflict between the parties.<sup>32</sup> This will, of course, limit the potential contents of the settlement of the dispute, but not fully dictate the result in the way that arbitration or litigation would do. Norm-advocating mediation is appropriate for contexts like those which may arise under the MNE Guidelines.

A manual for mediation produced by the Consensus Building Institute and sponsored by the UK, Norwegian and Dutch NCPs describes the advantages of mediation in the context of the MNE Guidelines as follows:

Problem solving through mediation can yield more positive results than a formal findings process. The latter might not prompt constructive action by the corporation. Moreover, the findings process focuses narrowly on producing findings that the NCP can substantiate; it does not seek to improve relationships among the affected parties in an effort to head-off future disagreements.<sup>33</sup>

The mediation orientation of the specific instances system is a strength, and despite concerns about the ability of businesses to avoid engaging in the process, a change to a quasi-judicial model would not be advisable. It is true that sometimes businesses refuse to engage with the specific instance process, preventing it from continuing. The possibility of refusing to take up an NCP's good offices without sanction or reprimand has been criticised, but supporters of the process argue that voluntariness is necessary to ensure the success of the solutions reached in mediation, and remind critics that the process is not intended to be punitive.<sup>34</sup> Despite the right to refuse to cooperate, many businesses do in fact engage. This may be in part because the process is mediation rather than quasi-judicial. Large businesses have shown

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<sup>28</sup> Ellen A. Waldman, 'Identifying the Role of Social Norms in Mediation: A Multiple Model Approach' (1996-1997) 48 *Hastings Law Journal* 703. Susan Oberman, 'Mediation Theory vs. Practice: What Are We Really Doing? Re-Solving a Professional Conundrum' (2005) 20 *Ohio State Journal on Dispute Resolution* 775, 793, prefers Waldman's models to the facilitative/evaluative dichotomy as a better explanation of the practice of mediators.

<sup>29</sup> Waldman, *ibid.* 710-719.

<sup>30</sup> *Ibid.*, 753-56.

<sup>31</sup> *Ibid.*, 745.

<sup>32</sup> Susan Oberman, 'Mediation Theory vs. Practice: What Are We Really Doing? Re-Solving a Professional Conundrum' (2005) 20 *Ohio State Journal on Dispute Resolution* 775, 815.

<sup>33</sup> Consensus-Building Institute, *NCP Mediation Manual* (Norwegian National Contact Point, Netherlands National Contact Point, United Kingdom Department for Business, Innovation and Skills and United Kingdom Department for International Development, 2012), 17.

<sup>34</sup> David Collins, 'Alternative Dispute Resolution for Stakeholders in International Investment Law' (2012) 15 *Journal of International Economic Law* 673, 689-690.

a growing preference for mediation over other forms of dispute resolution.<sup>35</sup> Nonetheless, a greater willingness by the ANCP to issue Final Statements with substantive findings even where there is no cooperation by the business, as the United Kingdom NCP has done on occasion, would possibly provide a greater incentive for businesses involved with specific instances to engage positively.

### **C) Follow-Up**

One advantage of a mediation style of dispute resolution is that it can provide for ongoing dialogue about points of conflict between the parties. Even a successful mediation under the specific instance process may require follow-up. The ANCP procedure provides for the possibility of follow-up.<sup>36</sup> However, in practice this has been left to the parties themselves without any supervision by the ANCP. Other NCPs have had recourse to asking the parties for reporting back as a form of follow-up at least in the short to medium term. The Canadian NCP asked the parties to a specific instance involving Barrick Gold to provide a report on the matters agreed between them after a year.<sup>37</sup> Follow-up by means of reporting back by the parties may be of limited value, since it will depend on their level of engagement. It also appears that follow-up reports have only been requested in the short term, usually after a year. Given that disputes underlying specific instances often involve business projects that last many years, a single round of follow-up reports may not be adequate to capture the problems that may occur, or recur.

It is beyond the scope of this review to consider optimal models of follow-up to mediated agreements resolving specific instances, but it is worth noting one example of a more in-depth follow-up. The 2011 specific instance concerning Barrick Gold's Porgera Joint Venture mine included a commitment to provide a remedy to victims of sexual violence in the local area of the mine. The adequacy of the remedial mechanism was the subject of longer-term research by the Columbia and Harvard Human Rights Clinics, which was published in late 2015.<sup>38</sup> Their report was the result of a large number of interviews with survivors of sexual violence and employees of Barrick Gold and its agents. It identified good practice and lessons to be learned for the future. However, this was a major research undertaking which only addressed one issue of a wide-ranging complaint under the specific instance procedure. It is probably a high-water mark for independent follow-up.

### **D) Review/Appeal**

The ANCP provides a procedure for review on the ground of procedural errors, including lack of fairness.<sup>39</sup> However, the review is conducted by a panel drawn from the Oversight Committee, which then makes recommendations to the Committee for final decision. The Committee, as noted above, includes only government members and is chaired by the ANCP.

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<sup>35</sup> Thomas J. Stipanowich and J. Ryan Lamare, 'Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations' (2014) 19 *Harvard Negotiation Law Review* 1, 6, 44-51.

<sup>36</sup> <http://www.ausncp.gov.au/content/Content.aspx?doc=ancp/complaints.htm>, paragraphs 56-57.

<sup>37</sup> Canadian National Contact Point Final Statement on Barrick Gold, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/statement-declaration.aspx?lang=eng>.

<sup>38</sup> *Righting Wrongs?* – Columbia/Harvard human rights clinics report, <http://hrp.law.harvard.edu/wp-content/uploads/2015/11/FINALBARRICK.pdf>.

<sup>39</sup> <http://www.ausncp.gov.au/content/Content.aspx?doc=ancp/reviewing.htm>.

Although the review procedure stipulates that no one who was involved with the original decision can be a member of the review panel, the fact that the Oversight Committee contains no members who are independent of government means that the review panel will always be made up solely of government officials. Further, there is no obligation on the part of a member of the Oversight Committee to withdraw from consideration of the recommendations of the review panel once it is remitted to the Committee, unless a party to the specific instance explicitly objects to that person's involvement.<sup>40</sup> Even if a review panel finds procedural error and makes recommendations to the Oversight Committee, it is not inevitable that the specific instance will be reconsidered. One option for the Committee is to 'acknowledge that there were deficiencies in the ANCP process in the Specific Instance and make recommendations as to how those errors can be avoided in the future.'<sup>41</sup>

As noted above, a review was requested in mid-2015 by the Human Rights Law Centre and Rights and Accountability in Development of the ANCP's initial assessment rejecting the complaint against G4S.<sup>42</sup> However, there is no information on the ANCP web site concerning the outcome of that review, despite the provision that the final recommendation of the Oversight Committee should be published promptly, unless there are good reasons to do otherwise.<sup>43</sup>

The review procedure could be substantially improved. Restructuring of the Oversight Committee to include independent, non-government members, and to remove the ANCP (if still a single official) as chair would improve the perceived legitimacy of the procedure,<sup>44</sup> particularly if there were a provision guaranteeing a majority of non-government members on review panels. There should be stronger protections against conflict of interest in the procedure. Where procedural error is found in a review, there should be an expectation that the process will be re-run. The possibility of merely acknowledging deficiencies in the procedure and recommending improvements for the future should be restricted to circumstances where re-running the procedure would be pointless, for example where the business in question no longer existed, or where the issues raised in the specific instance had been resolved through other procedures.

#### **4. Engagement with Stakeholders**

It is impossible to say whether the presence of active civil society organisations that are willing and able to bring specific instances to an NCP is a cause or a consequence of an active NCP with well-functioning and legitimate procedures. Nonetheless, the complaint concerning G4S, which was probably the highest-profile specific instance dealt with by the ANCP, was characterised by an evident sense of frustration by the complainant organisations

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<sup>40</sup> Paragraph 29 of the review procedure.

<sup>41</sup> Paragraph 32.2 of the review procedure.

<sup>42</sup> Letter from HRLC and RAID to the Australian NCP, 2 July 2015, <http://hrlc.org.au/wp-content/uploads/2015/07/HRLC-RAID-letter-to-ANCP-2-7-15.pdf>.

<sup>43</sup> Paragraph 36 of the review procedure. Paragraph 35 provides that the rejection of a review request should also be published.

<sup>44</sup> The ANCP review procedure closely follows that of the United Kingdom NCP, but the Steering Committee of that NCP includes independent non-government members: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31819/10-1329-terms-of-reference-ncp-steering-group.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31819/10-1329-terms-of-reference-ncp-steering-group.pdf).

concerning the delays in the process and the approach of the ANCP to the initial assessment.<sup>45</sup>

The Procedural Guidance accompanying the Guidelines includes as a task of the NCP to promote and raise awareness of the Guidelines. Structural reform of the ANCP could improve the situation, although it will primarily be a matter of resourcing the ANCP adequately, whatever its structure. Extending the ANCP beyond a single official and particularly involving multiple ministries and non-governmental members, would greatly assist in both the practical and symbolic (legitimacy-based) aspects of outreach to business, labour and civil society.

Providing better information to stakeholders, see **Section five**, below, would also encourage greater understanding of the Guidelines and more use of the specific instance procedure.

## **5. Website and Provision of Information**

The ANCP website currently holds very little information. There is no information on events or news relating to ANCP.

Information concerning specific instances is presented inconsistently. Some early specific instances included supplementary documents, but now only Final Statements are published. There is also an inconsistency on the format of publication, whether as html or pdf.

NCPs are obliged to submit an annual report to the OECD Investment Committee. The ANCP annual reports were previously published on the ANCP web site – Catherine Branson’s comments noted above were based on the ANCP annual report 2011-12. No subsequent annual reports have been published, and most of the older reports have been removed. The only older report still on the website is from 2008-09.

The Sectoral Guidance page on the ANCP web site lacks links back to the OECD pages on the sectoral issues, or to the relevant reports and guidance documents produced by the OECD.

## **6. Integration with Other Policies**

There are several policy areas across the Commonwealth government which relate to aspects of the Guidelines, but there is no evidence of the ANCP engaging with those policies. As noted above, the Kimberley Process Certification Scheme for conflict diamonds is administered by DFAT. It could be beneficial for the ANCP to work with DFAT on this matter, given the detailed sectoral policies on mining supply chains produced by the OECD in recent years. The Extractive Industries Transparency Initiative, which also relates to mining, is housed in the Department of Industry, Innovation and Science. Coordination with the ANCP could be valuable here too.

Recently, the Commonwealth government has explored the possibility of adopting a Modern Slavery Act on the model of similar British legislation.<sup>46</sup> The ANCP should be involved with

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<sup>45</sup> Letter from HRLC and RAID to the Australian NCP, 2 July 2015, <http://hrlc.org.au/wp-content/uploads/2015/07/HRLC-RAID-letter-to-ANCP-2-7-15.pdf>.

these efforts, as the OECD has addressed issues such as forced labour and the worst forms of child labour in supply chains as part of its activities under the Guidelines.<sup>47</sup>

## Conclusions and further steps

Although the current structure of the ANCP is compliant with the very loose requirements of the Guidelines, it is far off the best practice. The ideal model would be the creation of a statutory body that is independent of government, supported by an Oversight Committee with membership of all relevant stakeholder groups plus an independent chair. At a minimum the Oversight Committee should be re-designed to provide independent supervision and review of ANCP activities – a majority of non-government members and an independent chair. Such structural changes would also have consequential benefits for some of the concerns expressed above about the procedure operated by the ANCP.

The ANCP should also be either housed or co-housed in DFAT to ensure a greater integration with other relevant policies including any Modern Slavery Act to be adopted in the future. Housing in DFAT could also lead to a greater focus on the development aspects of the Guidelines.

In addition to the consequential changes to procedure resulting from structural changes, there should be changes to the practice of the ANCP with respect to procedure. It should adhere to the timelines in its published procedure. In initial assessments, the ANCP should refuse to proceed only on the basis of published grounds for refusal, and should interpret those grounds in accordance with the goal of the Guidelines to ensure responsible business practice rather than in an overly legalistic and technical manner. The review process should be more clearly independent and have better protections against conflict of interest relating to officials involved in the original decision. Where error is found, there should be a re-run of the original process unless there are good reasons not to do so.

In addition to structural and procedural changes, the ANCP should seek to raise its profile. It should have a programme of engagement with relevant stakeholders. It should publish more information and more timely information, especially on its website.

The Treasury is to be congratulated for initiating the present review. As a next step, the ANCP should volunteer for peer review by the OECD. Several adhering states have undergone peer review,<sup>48</sup> and the Netherlands NCP was significantly reformed following its peer review in 2009.<sup>49</sup> Input by fellow OECD member states would assist Australia in following best practice for the ANCP.

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<sup>46</sup> Inquiry into establishing a Modern Slavery Act in Australia, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Foreign\\_Affairs\\_Defence\\_and\\_Trade/ModernSlavery](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery).

<sup>47</sup> See *Practical actions for companies to identify and address the worst forms of child labour in mineral supply chains*, <https://mneguidelines.oecd.org/child-labour-risks-in-the-minerals-supply-chain.htm>; *OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector*, Module 3: forced labour, <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-Garment-Footwear.pdf>.

<sup>48</sup> <https://mneguidelines.oecd.org/ncppeerreviews.htm>.

<sup>49</sup> Government of the Netherlands, Ministry of Foreign Affairs, National Contact Point OECD Guidelines, *NL NCP Response to Peer Review*, 16 December 2014, NCP Documents, <http://www.oecdguidelines.nl/ncp/documents/report/2014/12/16/nl-ncp-response-to-peer-review>

## Recommendations

1. Institutionally, the ANCP should either be moved to DFAT or co-housed in DFAT and Treasury. There should be improved resources to allow the ANCP to engage in relevant activities. The ANCP should be an independent body established by statute as in Norway, or at least have independent quadripartite Oversight Committee. The Oversight Committee should be more clearly independent of the ANCP, and in particular have an independent chair.
2. Procedurally, the ANCP should take a less restrictive approach to initial assessments, with particular emphasis on using only the reasons set out by the Guidelines and their Procedural Guidance in refusing to proceed with a specific instance. The grounds for refusal to proceed should not be interpreted in an overly legalistic and technical manner. The review process should be more independent from the original process.
3. The ANCP should be less reluctant to provide substantive interpretations of the Guidelines in Final Statements, and should follow a model of norm-advocating mediation.
4. The ANCP should include follow-up procedures as standard in final statements, and where possible work with civil society in follow-up.
5. The ANCP should promote the specific instance procedure with relevant stakeholders.
6. The ANCP should provide more and better information. It should keep its website up to date and provide active links to relevant OECD information.
7. As policies such as the possible adoption of a Modern Slavery Act are developed, there should be coordination with the ANCP's work. This would be facilitated by moving the ANCP to DFAT.
8. Australia should volunteer for peer review of the ANCP.