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25 June 2018

Ms Victoria Anderson
The Australian National Contact Point
c/- The Treasury
Langton Crescent
CANBERRA ACT 2600
Sent via email: ANCP@treasury.gov.au

Dear Ms Anderson,

ALHR Submission on the Australian OECD National Contact Point Procedures

Australian Lawyers for Human Rights (**ALHR**) is grateful for the opportunity to make this submission in response to the Australian OECD National Contact Point's (**AusNCP**) discussion paper dated 22 May 2018 titled 'Improving Specific Instance Procedures' (**Discussion Paper**).

This submission is supplementary to ALHR's 2017 Submission (**2017 Submission**) in response to the 2017 Independent Review of the AusNCP (**Independent Review**).¹

ALHR welcomes the AusNCP taking steps to improve the AusNCP's Procedures, in response to the Independent Review report (**Review Report**),² which recommended the 'development and implementation of revised operating procedures based directly on the Guidelines and Procedural Guidance.'³

However, while procedural change is welcome, if the AusNCP is to be effective and overcome its historically poor track record, it must be properly resourced and appropriately structured. Therefore, ALHR urges the Government to implement all the recommendations in the Review Report, to allow the AusNCP to effectively fulfill its mandate and reflect best practice. ALHR looks forward to continuing to work with the AusNCP to this end.

¹ <http://ausncp.gov.au/contactpoint/2017-review/>

² Alex Newton, *Independent Review: Australian National Contact Point under the OECD Guidelines for Multinational Enterprises*, (2017), <http://ausncp.gov.au/contactpoint/2017-review/> (**Review Report**)

³ Recommendation 3, Review Report, 45

ALHR was established in 1993 and is a national network of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

If you would like to discuss any aspect of this submission, please do not hesitate to contact Kerry Weste, President of ALHR, by email at president@alhr.org.au.

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Background

1. The AusNCP is established under the OECD Guidelines for Multinational Enterprises (**Guidelines**), which provide ‘voluntary principles and standards for responsible business conduct,’ including in relation to upholding human rights, which signatory states ‘make a binding commitment to implement’.⁴
2. Signatory states to the Guidelines are required to establish a National Contact Point (**NCP**).⁵ The role of the NCP is to further the effectiveness of the Guidelines by:
 - helping resolve complaints (called ‘specific instances’) about breaches of the Guidelines by MNEs; and
 - promoting the Guidelines.⁶
3. The AusNCP is Australia’s most important non-judicial grievance mechanism available for challenging breaches of human rights perpetrated by multinational enterprises (**MNEs**) operating in Australia and Australian MNEs operating overseas.

Context for this submission

4. The Discussion Paper poses eight Consultation Questions regarding proposals for reform to the AusNCP Procedures, being:
 - Will the proposed planning stage of good offices improve the predictability of the process for the parties involved?
 - Are there any other improvements that could assist the effectiveness of the ‘good offices’ stage?
 - What is your view on the proposal to shift the majority of the AusNCP’s examination responsibilities so they occur after the good offices stage?
 - Are further changes needed to improve the procedures for the conclusion stage?
 - Will follow-up processes improve the transparency of the AusNCP? Is 12 months an appropriate timeframe?
 - Do stakeholders see value in having a review mechanism as part of any future AusNCP structure, and if so, in what form?
 - Do stakeholders have any comments on the proposed timeframes?
 - Have stakeholders found this specific instance tracking tool valuable?
5. This Submission responds to the eight questions in the Discussion Paper, and to the proposals raised in the Discussion Paper in relation to the Initial Assessment stage of the specific instance process.
6. ALHR’s responses and recommendations in this Submission are made in the context of a range of standards for best practice both in the Guidelines and in the

⁴ Guidelines, Part I, Preface, Paragraph 1, 13

⁵ OECD, *The OECD Guidelines for Multinational Enterprises* (2011 update), 18.

⁶ OECD Council, Amendment of the Decision of the Council on the OECD Guidelines for Multinational Enterprises, Section I, at [1], in OECD, *The OECD Guidelines for Multinational Enterprises* (OECD Publishing: 2011 version), 68.

*United Nations Guiding Principles for Business and Human Rights 2011*⁷ (UNGP), which the AusNCP should be measured against to determine if it is effectively carrying out its mandate.

7. As noted in ALHR's 2017 Submission:

'Since 2011⁸ the Guidelines have required that NCPs' complaint handling should be impartial, predictable, equitable and compatible with the principles and standards of the Guidelines.'⁹ NCPs are required under the Guidelines to operate in a manner that is visible, accessible, transparent and accountable.¹⁰

...Australia has also recently committed to the implementation of the UNGPs,¹¹ which expressly underpin the 2011 expansion of the human rights obligations in the Guidelines.¹² The UNGPs provide that companies have a duty to respect human rights (Pillar I) and States have a duty to protect human rights (Pillar II). Importantly, Pillar III of the UNGPs also requires states to ensure access to effective remedies for human rights violations, through judicial and non-judicial grievance mechanisms (NJGM).

The UN has recognised NCPs as an important non-judicial NJGM.¹³ The success of the ANCP should therefore also be judged against the seven 'effectiveness criteria' in the UNGPs that act as benchmarks against which all NJGMs should be 'designed, revised or assessed.'¹⁴ The criteria require that all NJGMs are legitimate, accessible, predictable, equitable, transparent, rights compatible and a source of continuous learning.^{15,16}

8. In addition, ALHR's submission also draws upon the *2012 NCP Mediation Manual*¹⁷ (**Mediation Manual**) referenced in the Discussion Paper, which the AusNCP explains

⁷ UN 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 and A/HRC/17/31 (United Nations, 2011) http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> The UN Human Rights Council endorsed the UNGPs in resolution 17/4 of 16 June 2011.

⁸ OECD, *2011 Update of the OECD Guidelines for Multinational Enterprises: Comparative table of changes made to the 2000 text*, (OECD:2011), 87, 99

⁹ Guidelines, Procedural Guidance, Chapter I National Contact Points, Part C, Implementation and Specific Instance, 72

¹⁰ Guidelines, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, Chapter I Commentary on the Procedural Guidance for NCPs, Paragraph 9, 78; Guidelines, Procedural Guidance, Chapter I National Contact Points, 71

¹¹ See Australia's statement to the UN Human Rights Council at the adoption of the Report of the UPR Working Group on 17 March 2016 <https://www.ag.gov.au/RightsAndProtections/HumanRights/United-Nations-Human-Rights-Reporting/Documents/UPR-Adoption-Statement.pdf> access at <https://www.ag.gov.au/RightsAndProtections/HumanRights/United-Nations-Human-Rights-Reporting/Pages/Australias-Universal-Periodic-Review.aspx>

¹² OECD, *The OECD Guidelines for Multinational Enterprises* (2011 update), Chapter IV Human Rights, Commentary on Human Rights, 31; Trade Union Advisory Council (TUAC), *The OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context - Trade Union Guide*, (TUAC: 2012), p.4 <<http://www.tuacoecdmguidelines.org/Docs/TradeUnionGuide.pdf>>

¹³ UN 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 and A/HRC/17/31, Part III Access to Remedy, Principle 25, 28 (United Nations, 2011) http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> The UN Human Rights Council endorsed the UNGPs in resolution 17/4 of 16 June 2011; Bernadette Maheandiran, 'Calling for Clarity: How Uncertainty Undermines the Legitimacy of the Dispute Resolution System Under the OECD Guidelines for Multinational Enterprises,' (2015)(20) *Harvard Negotiation Law Review* 205, 206 and 2010-11. See

¹⁴ Principle 31, UNGPs

¹⁵ Principle 31, UNGPs

¹⁶ ALHR's 2017 Submission, 4

¹⁷ *NCP Mediation Manual*, Consensus Building Institute, July 2012, <http://www.oecdguidelines.nl/binaries/oecd-guidelines/documents/leaflet/2015/1/6/ncp-mediation->

was 'prepared by the Consensus Building Institute and sponsored by the NCPs of the Netherlands, Norway and the United Kingdom.'¹⁸ ALHR notes that the Mediation Manual was specifically endorsed by the Annual Report on the *OECD Guidelines for Multinational Enterprises 2012: Mediation and Consensus Building (2012 OECD Annual Report)*.¹⁹

Initial Assessment Stage

Initial Assessment Form

9. The Discussion Paper outlines a new requirement that specific instances be submitted via an online form introduced on 8 February 2018.²⁰ The Consultation Paper notes that 'the complaint submission will undergo a validity test, involving a review for completeness and a check that the complaint should be handled by the AusNCP',²¹ and that the 'online form would need to be completed in full for a complaint submission to be valid.'²² ALHR also notes the flowchart at the back of the Discussion Paper identifies that incomplete submissions will be considered invalid and rejected.
10. ALHR is concerned that this requirement, strictly construed, places an unnecessary barrier to accessing the specific complaint mechanism, and is out of step with the requirement in the Guidelines that NCPs operate in an 'accessible' manner.²³ As noted in ALHR's 2017 Submission, '(c)omplainants may face a wide range of barriers to accessing the NCP including lack of access to technical, technological and financial resources, language differences, literacy issues, physical distance from the NCP and concerns about reprisal.'^{24,25}
11. Some of the questions in the form, such as those outlined below, require and presume a level of understanding of the OECD Guidelines, the mediation process, and the role and limits of the AusNCP, that not all complainants will have. For example:

What sections of the OECD Guidelines does the submission relate to?
Please describe the situation and how the issues relate to the OECD Guidelines.
Do you wish to participate in mediation?
12. Complainants without legal or NGO representation may not be able to complete all the questions in the form without assistance. Therefore, the AusNCP Procedures should provide that potential complainants should be given reasonable assistance

¹⁸ Discussion Paper, 4

¹⁹ https://read.oecd-ilibrary.org/governance/annual-report-on-the-oecd-guidelines-for-multinational-enterprises-2012_mne-2012-en#page46

²⁰ Discussion Paper, pp 5-6. The online form is accessible via the following website: <https://ausncp.gov.au/specific-instances/submitting-a-complaint/>.

²¹ Discussion Paper, p 5.

²² Discussion Paper, p 6.

²³ Guidelines, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, Chapter I Commentary on the Procedural Guidance for NCPs, Paragraph 9, 78; Guidelines, Procedural Guidance, Chapter I National Contact Points, 71

²⁴ Principle 31, Commentary (b), UNGPs

²⁵ ALHR's 2017 Submission, 11

by the AusNCP, where necessary, to complete the form and prepare their complaint. The AusNCP should be prepared to raise deficiencies with complainants, and be given an opportunity to rectify their complaint. ALHR also endorses the submissions by other stakeholders that the AusNCP should refer complainants who lack representation in Australia to civil society organisations or trade unions.

13. In addition, ALHR's 2017 Submission recommended that:

'The ANCP's website should also be reviewed to ensure it provides clearer guidance to prospective complainants about how to make a complaint. It should also have information for MNEs about what human rights are, and how they might be able to identify if they are in breach of the human rights chapter of the Guidelines...'²⁶

In order to deal equitably with complaints, ANCP should consider measures undertaken by the Norwegian and Dutch NCPs such as:

- providing advisory services to prospective complainants;²⁷
- providing translation services,²⁸ and consultants to vulnerable complainants.^{29,30}

14. To ensure the accessibility of the specific instance process, the AusNCP's webpage '*Submit a specific instance*'³¹ where the form currently sits, should be updated to provide further explanation and guidance to potential complainants and assist them with the process of making a complaint. The Norwegian NCP provides an example of best practice in this regard. The Norwegian NCP has a complaint form that sits on the Norwegian NCP's webpage '*How to Submit a Complaint*'.³² Unlike the equivalent AusNCP webpage it:

- explains that those preparing a complaint can contact the Norwegian NCP with questions about preparing a complaint; and
- provides additional guidance to applicants by way of two documents, the 'NCP Guiding form for submitting complaints' and 'Advice to complainants from OECD Watch'.

15. The Norwegian NCP uses the word 'complaint' on its website rather than 'specific instance.' In ALHR's view the word 'complaint' is more accessible than the term 'specific instance' for both complainants and business stakeholders.

16. The Norwegian NCP's website provides a range of guidance, explanations and resources for business and complainants about the Guidelines, specific instances, OECD sectoral guidance, along with links to related resources. ALHR recommends

²⁶ ALHR Submission 2017, 10

²⁷ Véronique Van Der Plancke, Valérie Van Goethem, Geneviève Paul, Elin Wrzoncki, Marion Cadier, *Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms (3rd Edition)*, (FIDH: May 2016), 408

²⁸ Roberta Pinamonti and Peter Nestor, *Grievance Mechanisms in the Dutch Hard Coal Supply Chain: An assessment of the effectiveness of three grievance mechanisms against the UN Guiding Principles on Business and Human Rights*, (BSR: 2014), 20

²⁹ Véronique Van Der Plancke, Valérie Van Goethem, Geneviève Paul, Elin Wrzoncki, Marion Cadier, *Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms (3rd Edition)*, (FIDH: May 2016), 408 referencing OeCDWatch, NorwegianSupportCommitteeforWesternSaharavsJovik, http://oecdwatch.org/cases/Case_247

³⁰ ALHR's 2017 Submission, 11

³¹ <http://ausncp.gov.au/specific-instances/submitting-a-complaint/>

³² <http://www.responsiblebusiness.no/en/dialogue-and-mediation/how-to-submit-a-complaint/>

that the AusNCP increase the accessibility of the specific instance process by modelling the AusNCP's website's content on the Norwegian NCP's website. Further, ALHR supports information being presented in visual form including the use of infographics, video and animation.

17. In addition, ALHR reiterates Recommendation 3(k) of the Review Report, that the AusNCP's website and Procedures should be translated into the most common languages of complainants filing specific instances with the AusNCP.³³

Initial Assessment Criteria

18. ALHR's notes the proposal at page 6 of the Discussion Paper to change the Initial Assessment criteria in the AusNCP Guidelines (at paragraph 20) to a more streamlined test, set out below:

- 1) What is the identity of the notifying party concerned and its interest in the matter?
- 2) Is the issue plausible and related to the application of the Guidelines?
- 3) Is there a clear and relevant link between the enterprise's activities and the issue raised?
- 4) Would acceptance of the specific instance contribute to the purposes and effectiveness of the Guidelines?'

19. ALHR commends the intent of the changes to the initial assessment criteria, which appear to take into account criticism around the manner in which the AusNCP has applied (or failed to apply) the initial assessment in the past, resulting in an unreasonably high threshold for acceptance of complaints.

20. In ALHR's view, the initial assessment criteria at paragraph 20 of the current AusNCP Procedures should be updated to directly reflect the initial criteria set out in the Commentary on the Guidelines.³⁴ That is, by adding the words underlined below to the current wording in paragraph 20 of the AusNCP Procedures:

Initial Assessment

25. In making an initial assessment of whether the issue raised merits further examination, the NCP will need to determine whether the issue is bona fide and relevant to the implementation of the Guidelines. In this context, the NCP will take into account:

- the identity of the party concerned and its interest in the matter.
- whether the issue is material and substantiated.
- whether there seems to be a link between the enterprise's activities and the issue raised in the specific instance.
- the relevance of applicable law and procedures, including court rulings.
- how similar issues have been, or are being, treated in other domestic or international proceedings.
- whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines.

³³ Review Report, 46

³⁴ Guidelines, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, Chapter I Commentary on the Procedural Guidance for NCPs, Paragraph 25, 82

21. As submitted by Human Rights Law Centre (**HRLC**), this approach will ensure that the overriding test is whether the issue ‘merits further examination’ and is ‘bona fide and relevant to the implementation of the Guidelines’. This approach will also assist in maintaining ‘functional equivalence’³⁵ between NCPs and aligns with Recommendation 3 of the Review Report.
22. In addition, ALHR also agrees with HRLC’s submission that the updated initial assessment criteria should be accompanied by commentary that explains how the initial assessment criteria should be interpreted and applied. ALHR notes the Discussion Paper’s suggestion that the initial assessment of a complaint should turn on whether the complaint is ‘plausible,’ and that the complaint does not need to be ‘substantiated’ in a technical legal sense at the initial assessment stage. This approach accords with OECD Watch’s commentary that:

‘The substantiation standard in the Procedural Guidance is intended to establish whether a complaint is bona fide, and **should only require that the factual allegations be plausible**. Dr. Roel Nieuwenkamp, Chair of the OECD Working Party for Responsible Business Conduct, has stated that the “material and substantiated” standard was intended to prevent frivolous complaints without setting an unreasonable threshold for offering good offices.³²”

[Footnote 32: Draft summary record of the joint meeting of the WPRBC and NCPs held on 4/12/2014, OECD.]

... Recommendation

NCPs should maintain a reasonable standard of substantiation at the initial assessment phase, aimed at preventing fabricated or frivolous claims, while promoting the use of the NCP’s voluntary good offices wherever possible to resolve bona fide claims. The OECD Investment Committee and Working Party on Responsible Business Conduct should revise the Procedural Guidance to include a definition of “substantiated” **that clarifies that this standard** is meant to assess whether the **factual allegations are** plausible and that legalistic proof of the claims raised is not necessary.^{36,}

[Emphasis added]

23. Similarly the Mediation Manual encourages NCPs to take a ‘problem solving approach’ to the initial assessment phase, which ‘seeks to identify as many opportunities as possible for NCPs to implement the spirit of the Guidelines.’³⁷
24. In addition, ALHR endorses HRLC’s recommendation that the Commentary to the Guidelines at paragraph 26 regarding parallel proceedings be incorporated into the AusNCP Procedures:

‘When assessing the significance for the specific instance procedure of other domestic or international proceedings addressing similar issues in parallel, NCPs should not decide that issues do not merit further consideration solely because parallel proceedings have been conducted, are under way or are available to the parties

³⁵ Guidelines, Procedural Guidance, Chapter I National Contact Points, 71

³⁶ 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), 26

³⁷ Mediation Manual, 22

concerned. NCPs should evaluate whether an offer of good offices could make a positive contribution to the resolution of the issues raised and would not create serious prejudice for either of the parties involved in these other proceedings or cause a contempt of court situation. In making such an evaluation, NCPs could take into account practice among other NCPs and, where appropriate, consult with the institutions in which the parallel proceeding is being or could be conducted.³⁸

25. ALHR also reiterates Recommendations 3(b), (d) and (e) of the Review Report, that the revised AusNCP Procedures should:

- clarify which MNEs will be encompassed by the ANCP's specific instance procedures;³⁹ and
- include provision for hosting an introductory meeting with parties after a complaint has been lodged, but before the initial assessment has been completed. This provides an opportunity to gather additional material required to assess the complaint, and to clarify the parties' expectations of the AusNCP process;⁴⁰
- include a provision for publishing initial assessment decisions, and outline the circumstances where this would not be possible (for example: risks to complainants, serious confidentiality concerns).⁴¹

26. Given the extensive criticism of the application of the initial assessment criteria by the AusNCP in the past, and the importance of the initial assessment in ensuring the accessibility of the specific instance mechanism, ALHR encourages the AusNCP to consult with stakeholders about the wording of the draft commentary on the interpretation of the revised initial assessment criteria in the AusNCP Procedures.

Response to Consultation Questions

Question 1 – Will the proposed planning stage of good offices improve the predictability of the process for the parties involved?

27. Yes. ALHR welcomes the formal introduction of a planning stage as part of the good offices, with a view to improving the predictability of the specific instance process. ALHR notes that this approach reflects the 'Pre-planning meeting' preparation recommended by the Mediation Manual, but not the more substantive 'Stakeholder Assessment' also recommended, where needed, by the Mediation Manual (discussed below).

Question 2 – Are there any other improvements that could assist the effectiveness of the 'good offices' stage?

28. ALHR supports submission from Transparency International (and other stakeholders) that a transparency policy should be developed, with input from

³⁸ Guidelines, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, Chapter I Commentary on the Procedural Guidance for NCPs, Paragraph 26, 83

³⁹ Recommendation 3(b), Review Report, 45

⁴⁰ Recommendation 3(d), Review Report, 46

⁴¹ Recommendation 3(e), Review Report, 46

stakeholders, to clarify the position on the confidentiality of information provided during the specific instance process. ALHR notes the current position in the AusNCP's Procedures at paragraph 16 that 'unless a good case is made for information to be withheld, all information and evidence received by the ANCP may be shared with the parties,' reflects the correct starting point for a transparency policy.

29. ALHR reiterates its recommendations around the need to accommodate vulnerable complainants (outlined at paragraphs 10 and 12 above). In addition, as submitted by ALHR in its 2017 Submission and by other stakeholders, where appropriate, the AusNCP should be resourced to travel to the site country to conduct its mediation or examination functions, or for complainant's travel to be funded, in order to ensure the accessibility and equitability of the specific instance process for vulnerable complainants.
30. ALHR supports the discussion in the Review Report around the importance of ensuring that AusNCP staff and mediators have (or, have the option to bring in) specific subject matter expertise, including in relation to the application of the Guideline's chapter on human rights.⁴²

Question 3 – What is your view on the proposal to shift the majority of the AusNCP's examination responsibilities so they occur after the good offices stage?

31. ALHR welcomes the shift of the NCP's examination responsibilities away from the initial assessment phase. In ALHR's view this change reflects the intention of the Guidelines and will facilitate faster and more effective specific instances processes and outcomes.
32. However, given the likely power and information imbalance between the parties, the AusNCP should still have the flexibility to undertake investigations during the 'good offices' stage, if needed, in particular with a view to making the mediation more effective. This would go beyond the 'planning' described in the Discussion Paper, which is primarily procedural.
33. The concept of 'good offices' is wider than just mediation, and accommodates the above approach, as does actual NCP practice.⁴³ This approach is also reflected in the Mediation Manual, which envisages both a 'Pre-Mediation meetings' but also (if necessary) a much more detailed 'Stakeholder Assessment' process with extensive interviews prior to mediation to help prioritise and frame the issues.⁴⁴ The 2012 OECD Annual Report endorses the Mediation Manual as a 'useful tool' and specifically outlines the 'pre-planning,' 'stakeholder assessment' and mediation processes.⁴⁵

⁴² Review Report, 33

⁴³ Guidelines, Procedural Guidance, Chapter I National Contact Points, 72

⁴⁴ Mediation Manual, 28-50

⁴⁵ 2012 OECD Annual Report, 5-49

Question 4 – Are further changes needed to improve the procedures for the conclusion stage?

34. Yes. The AusNCP Procedures should be amended at paragraphs 52 and 53 to ensure that where mediation fails, or if the MNE refuses to participate in the mediation process, the AusNCP ‘will’ (not ‘may’) make a determination about whether there has been a breach of the Guidelines. This change would give effect to Recommendation 3(f) in the 2017 Independent Review Report.⁴⁶
35. The rationale behind this recommendation is outlined in ALHR’s 2017 Submission, which notes that the current AusNCP Procedures provide:

‘... that if mediation fails the ANCP will examine the complaint further, collect further information and evidence and ‘**may**’ make a statement as to whether the Guidelines have been breached.’⁴⁷ ...

The ANCP’s past failure to date to make a determination about whether there has been a breach of the Guidelines where mediation fails, exacerbates the power imbalance between parties to complaints. Without the possibility that the ANCP may make an independent determination of an MNE’s compliance with the Guidelines, the complaints process is weak.⁴⁸ The ANCP’s approach gives MNEs a perverse incentive to refuse to engage in mediation, and means that only those complaints amenable to mediated resolution are dealt with to the point of resolution by the ANCP.⁴⁹

An adverse NCP finding against an MNE (and its attendant reputational risk) has been recognised as a deterrent to breaching the Guidelines and a form of remedy for complainants.⁵⁰ For example, the Norwegian NCP’s OECD Peer Review noted that MNEs said that avoiding a compliance determination motivated their involvement in the NCP mediation process.⁵¹ OECD Watch’s research has found that 77% of complaints to NCPs resulting in a form of remedy ‘were produced by NCPs that have demonstrated that they will make determinations of non-compliance with the Guidelines if mediation fails.’⁵²

The ANCP’s failure to make a determination about whether there has been a breach of the Guidelines where mediation fails or an MNE refuses to engage in the complaint

⁴⁶ Recommendation 3(f): Include provision for issuing a determination on a specific instance where mediation has either been unsuccessful, or one or both parties have refused to participate in the mediation process.

⁴⁷ Australian Government, ‘Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises,’ *AUSNCP (2017)* <http://www.ausncp.gov.au/content/Content.aspx?doc=anep/complaints.htm> accessed 16 July 2017

⁴⁸ Trade Union Advisory Council (TUAC), *The OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context - Trade Union Guide*, (TUAC: 2012), 44
<<http://www.tuacoecdmguidelines.org/Docs/TradeUnionGuide.pdf>>

⁴⁹ OECD Watch, *Assessment of the NCP Performance in the 2013-2014 Implementation Cycle: OECD Watch Submission to the 2014 Annual Meeting of the National Contact Points*, (June 2014), 19-20 http://www.oecdwatch.org/publications-en/Publication_4090/

⁵⁰ Ochoa Sanchez, ‘The roles and Powers of the OECD National Contact Points,’ (2014) 84 *Nordic Journal of International Law* 89, 116.

⁵¹ See also, 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 referencing (at footnote 86) Interview with Astrid Gade Nielsen, Head of Communications, Arla Foods (11 May 2015); interview with Aukje Berden, Group CSR Manager, Nidera (18 May 2015); OECD Watch, *A ‘4 x10’ Plan for Why and How to Unlock the Potential of the OECD Guidelines: A briefing for policymakers* (June 2016), 3 referencing Norwegian Peer Review Final Report, 2012, 26.

⁵² 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

process, diminishes the effectiveness of the Guidelines⁵³ and does not reflect Australia's commitment under the UNGPs to facilitate both accountability and access to non-judicial remedy, for corporate human rights violations. Where mediation of a complaint fails or an MNE fails to engage in the ANCP complaints handling process, the ANCP should be resourced to investigate the complaint and publish a determination on whether the MNE has breached the Guidelines in the ANCP's Final Statement on the complaint.⁵⁴ [Emphasis added]

Question 5 – Will follow-up processes improve the transparency of the AusNCP? Is 12 months an appropriate timeframe?

36. ALHR welcomes the AusNCP's intention to begin implementing the follow up mechanisms at paragraphs 56 and 57 of AusNCP Procedures. The follow up mechanism is essential for facilitating effective remedy, ensuring the transparency of the specific instance process, and maintaining the confidence of stakeholders. In ALHR's view there are a number of ways in which this important aspect of the specific instance process could be improved and supported.

37. The current AusNCP Procedures provide at paragraph 56 that:

'(w)here the Final Statement includes recommendations to the company, it **may** specify a date by which both parties are asked to provide the AusNCP with a substantiated update on the company's progress towards implementing these recommendations.' [Emphasis added]

38. The AusNCP Procedures provide further at paragraph 57 that:

'(t)he AusNCP will then prepare a Follow up Statement reflecting the parties' response. The AusNCP will also ask the parties to send factual comments on the Follow Up Statement within 10 working days. The AusNCP may then incorporate any necessary factual changes before sending the finalised Follow Up Statement to the parties and publishing the final Follow up Statement on the AusNCP's website.'

39. ALHR agrees with the Discussion Paper that 12 months would generally be an appropriate timeframe for follow up on the implementation of AusNCP recommendations. However, flexibility should be maintained to accommodate different circumstances, for example where urgent changes to MNE practice or remediation are recommended, or where another timeframe is agreed between the parties.

40. There are a range of weaknesses in the follow up mechanism in the AusNCP Procedures. First, the AusNCP Procedures should be amended at paragraph 56 so that a follow up date 'will' (not 'may') be specified in the Final Statement.

41. Next, the Commentary on the Guidelines provides that NCPs can follow up on recommendations made as part of a Final Statement, *and*, with agreement of the

⁵³ Ochoa Sanchez, 'The roles and Powers of the OECD National Contact Points,' (2014) 84 *Nordic Journal of International Law* 89, 107-116.

⁵⁴ ALHR's 2017 Submission, 12

parties NCPs can follow up on the implementation of mediated agreements.⁵⁵ However, the AusNCP Procedures only provide for follow up of AusNCP recommendations. This provides a potential “out” for MNEs in the Guidelines. Therefore, ALHR agrees with Recommendation 3(j) of the Review Report that the Procedures should be amended so that where a mediated outcome is reached, the AusNCP Procedures set out a process and timeline for the AusNCP to follow up the implementation of the agreement.⁵⁶

42. Another weakness of the follow up mechanism in the AusNCP Procedures is that it relies on written substantiation by the parties that the AusNCP’s recommendations have been implemented. As noted earlier, there may be a significant information imbalance between the parties and/or the complainants may face a range of disadvantages (discussed above at paragraph 10) that impact on their ability to substantiate their submission.
43. The AusNCP Procedures, narrowly construed appear to only provide for a ‘one-off’ follow up process (culminating in a ‘Final’ follow up statement), and does not appear to provide for further investigatory or follow-up options, to:
- verify conflicting reports about the implementation of the AusNCP’s recommendations or a mediated agreement; or
 - continue to comment publicly on an MNE’s failure to implement AusNCP recommendations and/or a mediated agreement.
44. In contrast, the Swiss NCP requests further reporting if it does not see progress in its follow up.⁵⁷ The French NCP also follows up parties in appropriate cases and maintains contact for several years, sometimes leading to successful outcomes even where an agreement was not reached in the original process. This can be seen in the example of Michelin Group’s operations in Tamil Nadu who continued to report regularly to the NCP on implementation of the NCP recommendations.⁵⁸
45. ALHR appreciates that in practice the AusNCP may intend to do more follow up than is provided for on a strict reading of the AusNCP Procedures. However, ALHR supports ongoing reporting and follow up of recommendations that, for example, address potential systemic or cultural issues within MNEs, whereby effective change may take longer.
46. If the AusNCP is to be an effective non-judicial grievance mechanism, the AusNCP Procedures should allow AusNCP to go beyond merely summarising, and drawing conclusions from the parties’ responses regarding the implementation of the NCP’s recommendations. The AusNCP Procedures should allow the AusNCP to request further reporting, conduct investigations and make additional public follow up statements on MNE implementation of AusNCP recommendations (or lack thereof)

⁵⁵ Guidelines, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, Chapter I Commentary on the Procedural Guidance for NCPs, Paragraph 25, 82

⁵⁶ Review Report, 46

⁵⁷ ‘Implementing the OECD Guidelines for Multinational Enterprises: The National Contact Points from 2000 to 2015’ (OECD: 2016),

⁵⁸

⁵⁸ Ibid

or a mediated agreement. In addition, ALHR agrees with the recommendations in the 2016 publication *'The Australian OECD National Contact Point: How It Can Be Reformed'* that '(t)he ANCP Process should be amended to require the ANCP to draw conclusions on the extent to which a remedy has been achieved, where appropriate.'⁵⁹

47. ALHR appreciates that the AusNCP has limited resources to follow up on its recommendations to MNEs and to monitor the implementation of mediated agreements, amongst its other functions. In light of this, and in order to foster policy coherence across government and increase the legitimacy of the AusNCP, the AusNCP should leverage its position in government to incentivise constructive participation in the specific instance process and facilitate the implementation of its recommendations.⁶⁰

48. As noted in ALHR's 2017 Submission:

'The 2011 Revision of the Guidelines requires that NCPs make relevant agencies aware of their reports and statements in order to foster 'policy coherence.'⁶¹ It is unclear to what extent this is occurring. The 2015 OECD Annual Report suggests that Australia is taking NCP statements into consideration when export finance applications are considered.⁶² However, best practice in terms of policy coherence is demonstrated rather by the UK and Netherlands' governments' indications that they will link MNEs' refusal to engage in NCP complaint processes or negative compliance determinations on human rights, to the withdrawal of export credit finance.⁶³ For example, the Canadian NCP withdrew Canadian government support (through Trade Commissioner services) from a Canadian MNE that failed to engage in the NCP complaint process.^{64,65}

49. ALHR submits that the ANCP should facilitate coordinated 'follow up' mechanisms by relevant government agencies where:

- an MNE fails to engage in the specific instance process; or
- is the subject of an AusNCP determination that it has breached the Guidelines (where appropriate); or
- fails to implement AusNCP recommendations or a mediated agreement.⁶⁶

⁵⁹ Zornada, *The Australian Oecd National Contact Point: How It Can Be Reformed*, (2016), 14

⁶⁰ OECD Watch, *Our campaign demands for policy makers*, (2018) https://www.somo.nl/wp-content/uploads/2018/04/OECD-Watch_Campaign_demands.pdf, 2

⁶¹ Guidelines, Commentary on the Implementation Procedures of the OCED Guidelines for Multinational Enterprises, Chapter I Commentary on the Procedural Guidance for NCPs, Conclusion of the Procedures, Paragraph 37, 85; Barbara Linder, Karin Lukas, Astrid Steinkellner, *THE RIGHT TO REMEDY: Extrajudicial Complaint Mechanisms for Resolving Conflicts of Interest between Business Actors and Those Affected by their Operations* (Ludwig Boltzmann Institute of Human Rights:2013), 16

⁶² *OECD Annual Report*, (2015) <http://mneguidelines.oecd.org/2015-Annual-Report-MNE-Guidelines-EN.pdf>, 75

⁶³ Véronique Van Der Plancke, Valérie Van Goethem, Geneviève Paul, Elin Wrzoncki, Marion Cadier, *Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms (3rd Edition)*, (FIDH: May 2016), 408 – 410; International Corporate Accountability Roundtable (ICAR) and European Coalition for Corporate Justice (ECCJ) *Assessments of Existing National Actions Plans (NAPs) on Business and Human Rights: November 2015 Update*, (ICAR and ECCJ: 2015)

⁶⁴ 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), 46

⁶⁵ ALHR's 2017 Submission, 14

⁶⁶ See also ALHR's 2017 Submission, 14

50. A coordinated government response to the above could include MNE ineligibility for government assistance including import and export licenses, subsidies, export credit, trade financing and advocacy, diplomatic support, and government procurement.⁶⁷ By way of example, Canada has a policy that companies must engage in good faith with the Canadian NCP to receive economic support and trade advocacy.⁶⁸ Support is withdrawn where companies fail to do so, as occurred in 2015 in the case of Canada Tibet Committee vs China Gold Int. Resources.⁶⁹ A UK Joint Parliamentary Committee has previously also stated it would consider reporting UK companies who receive a negative Final Statement from the UK NCP to the Sanctions Committee.⁷⁰
51. Similarly, the OECD Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence recommends that national export credit agencies should consider NCP reports and statements when deciding applications for credit.⁷¹ It is the practice in 25 countries for NCP statements to be considered when deciding export finance applications. Of these, 11 countries have formal procedures to do so.⁷² For example in Germany, export credit applications are not approved unless all agencies in the Interministerial Committee, including those responsible for international human rights and housing the NCP, agree that national and international requirements have been met. NCP reports, as well as complaints received by the NCP, and failure to participate in the specific mechanism process are all considered.⁷³
52. Finally, the AusNCP Procedures should be revised to require the AusNCP to report to Parliament annually on its activities and publish its annual report to the OECD.

Question 6 – Do stakeholders see value in having a review mechanism as part of any future AusNCP structure, and if so, in what form?

53. A follow-up mechanism and a review mechanism are different aspects of NCP best practice, and serve different purposes. ALHR does not endorse the proposal to remove the AusNCP's Oversight Committee, even temporarily, in favour of the follow up mechanism that exists in the AusNCP Procedure. While only one

⁶⁷ See, eg, 'Obstacle Course: How the UK's National Contact Point handles human rights complaints under the OECD Guidelines for Multinational Enterprises' (Amnesty International: February 2016) 9; 'Update on the role of OECD National Contact Points with regards to the extractive sectors' (Meeting report, Institute for Human Rights and Business, London, 22 March 2013) 7;

'Implementing the OECD Guidelines for Multinational Enterprises: The National Contact Points from 2000 to 2015' (OECD: 2016) 18

⁶⁸ '2016 National Contact Point Annual Report' (Global Affairs Canada, Government of Canada, 23 June 2017)

<<http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/report2016-rapport2016.aspx?lang=eng>>

⁶⁹ 'Implementing the OECD Guidelines for Multinational Enterprises: The National Contact Points from 2000 to 2015' (OECD: 2016) 45

⁷⁰ 'Any of our business? Human rights and the UK private sector' (Government response to the Committee's first report of session 2009-10, eleventh report of session 2009-10, report). See <https://www.gov.uk/government/publications/financial-sanctions-consolidated-list-of-targets>

⁷¹ 'Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence' (Working Party on Export Credits and Credit Guarantees, Trade Committee, Organisation for Economic Cooperation and Development, 7 April 2016) TAD/ECG(2016)3

⁷² The 11 countries being Austria, Belgium, Canada, France, Germany, Ireland, Italy, Netherlands, Sweden, Switzerland and UK. See 'National Contact Point Comparison' (Trade Union Cases, OECD Guidelines for Multinational Enterprises)

<<http://www.tuacoecdmguidelines.org/ncpcomparisonall.asp>>

⁷³ 'Human Rights' (Export Credit Guarantees of the Federal Republic of Germany, AGA Portal)

<<https://www.agaportal.de/en/exporte-exportkreditgarantien/grundlagen-exportkreditgarantien/menschenrechte-exportkreditgarantien>>

complaint has been escalated to the AusNCP's Oversight Committee, this is likely to change as the AusNCP gains visibility and a wider range of complaints are accepted.

54. ALHR agrees with the comments in the Discussion Paper that the current structure of the AusNCP's oversight body (where the AusNCP is chair of the oversight body) is not structured adequately to provide a genuine opportunity for review.⁷⁴ ALHR recommends that the Oversight Committee remain, but with a new Chair, until such time as a new AusNCP Oversight Committee structure is implemented.
55. ALHR reiterates our 2017 Submission, which recommended that the AusNCP 'should have an independent Oversight Committee, also underpinned by a tripartite representation, with an advisory function and oversight of appeals on procedural issues.'⁷⁵ Consideration should also be given to the Oversight Committee considering requests for merits review of specific instance related decisions.
56. ALHR also recommended that the AusNCP 'should increase the transparency of its processes by publishing its Oversight Committee minutes (excluding confidential information).'⁷⁶

Question 7 – Do stakeholders have any comments on the proposed timeframes?

57. ALHR welcomes the proposed time frames. However, given the AusNCP's examination functions have now been moved to later stages, it may be appropriate to allocate less time to the initial assessment stage (unless circumstances warrant), especially if time runs from receipt of a 'valid' complaint. The additional time should be moved to the good offices stage.

Question 8 – Have stakeholders found this specific instance tracking tool valuable?

58. ALHR has not used the specific instance tracking tool, however ALHR welcomes a move to increase the transparency of the specific instance process. ALHR echoes the submissions by other stakeholders that the specific instance tracking tool should at least publish initial assessment decisions, and Final Statements and Follow Up Statements.

Conclusion

59. In 2015, G7 leaders⁷⁷ committed to strengthening mechanisms for providing access to remedies through NCPs, by encouraging OECD promotion of peer reviews and ensuring their own NCPs 'are effective and lead by example.'⁷⁸ This sentiment was echoed in the 8 July 2017 G20 Declaration (to which Australia was a party) which

⁷⁴ Discussion Paper, 9

⁷⁵ ALHR's 2017 Submission, 8

⁷⁶ ALHR's 2017 Submission, 15

⁷⁷ Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States.

⁷⁸ G7 Germany, 'Leaders' Declaration: G7 Summit' *G8 Information Centre*, (8 June 2015) <http://www.g8.utoronto.ca/summit/2015elmau/2015-G7-declaration-en.html>

emphasised commitment to the UNGPs and NCPs, and supported access to non-judicial remedy through NCPs in particular.⁷⁹

60. ALHR calls on the Government to fulfill its obligations under the UNGPs by implementing the following recommendations for reform of the AusNCP Procedures, along with all the recommendations in the Review Report, including those going to adequate resourcing and appropriate structuring of the AusNCP.

⁷⁹ G20 Leaders' Declaration Shaping an interconnected world Hamburg, (7/8 July 2017), 4-5
<https://www.g20.org/gipfeldokumente/G20-leaders-declaration.pdf>

Recommendations

1. Recommendation 1 – implementation of the Review Report’s recommendations

The Government should implement the recommendations of the Independent Reviewer in the 2017 Review Report.

2. Recommendation 2 – complaint form

The AusNCP should provide reasonable assistance for complainants (especially vulnerable complainants) to complete the complaint form where necessary, including translation services.

3. Recommendation 3 – AusNCP website

The AusNCP’s website should be updated with more resources for stakeholders, including accessible information and increased guidance for potential complainants about how to make a complaint. The Norwegian NCP’s website is an example of best practice.

4. Recommendation 4 – initial assessment criteria

The initial assessment criteria at paragraph 20 of the current AusNCP Procedures should be revised to directly reflect paragraphs 25 (initial assessment criteria) and 26 (parallel proceedings) in the Commentary to the Guidelines. The AusNCP Procedures should also be updated with commentary on the interpretation of the initial assessment criteria, which should include that the acceptance of the complaint should turn on whether the complaint is ‘plausible’.

The AusNCP should further consult with stakeholders before finalising the commentary on the interpretation of the initial assessment criteria.

5. Recommendation 5 – Confidentiality

The AusNCP should develop a Transparency Policy or commentary dealing with confidentiality during the specific instance process in consultation with stakeholders.

6. Recommendation 6 – shift of examination responsibilities

The AusNCP’s examination functions should be shifted to after the initial assessment stage. However, the AusNCP should be able to undertake investigation of the complaint during the good offices stage, where appropriate.

7. Recommendation 7 – Determination on breach of the Guidelines

Paragraphs 52 and 53 of the AusNCP Procedures should be revised to require that the AUSNCP ‘will’ (not ‘may’) issue a Final Statement with a determination regarding whether the Guidelines were breached.

8. Recommendation 8 – Assistance for complainants

The AusNCP should be resourced to assist vulnerable complainants with independent advisory assistance, travel and translation services where appropriate to ensure equitable access to the complaint process. Complainants without representation in Australia should be referred to civil society organisations or trade unions.

9. Recommendation 9 – Expertise

AusNCP staff and mediators should have specific subject matter expertise, including expertise on the application of the Guideline’s chapter on human rights

10. Recommendation 10 – Follow up mechanism

The AusNCP Procedures should be revised to:

- *provide that the AusNCP ‘will’ (not ‘may’) undertake follow up of AusNCP recommendations to MNEs and mediated agreements; and*
- *allow the AusNCP to request further reporting, conduct investigations and make additional public follow up statements on MNE progress on the implementation of AusNCP recommendations or mediated agreements.*

11. Recommendation 13 – Policy coherence in follow up

The AusNCP should also facilitate a coordinated response by relevant government agencies where:

- *an MNE fails to engage in the specific instance process; or*
- *is the subject of an AusNCP determination that it has breached the Guidelines (where appropriate); or*
- *fails to implement AusNCP recommendations or a mediated agreement.*

12. Recommendation 12 – Oversight Committee

The AusNCP’s current Oversight Committee should be maintained (but with a different Chair) until an improved Oversight Committee structure is implemented.

13. Recommendation 13 – Reporting

The AusNCP Procedures should be revised to require the AusNCP to report to Parliament annually on its activities and publish its annual report to the OECD.

14. Recommendation 14 – Specific instance tracking tool

AusNCP's specific instance tracking tool should publish (at minimum) Initial Assessment decisions, Final Statements and Follow Up Statements.

If you would like to discuss any aspect of this submission, please do not hesitate to contact Kerry Weste, President of ALHR, by email at president@alhr.org.au.

Yours faithfully,

A handwritten signature in blue ink, appearing to be 'KW', on a light-colored background.

Kerry Weste
President, ALHR

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ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.