



8 June 2018

Ms Victoria Anderson  
Australian National Contact Point  
The Treasury  
Canberra

SENT VIA EMAIL: [ancp@treasury.gov.au](mailto:ancp@treasury.gov.au)

Dear Ms Anderson,

**Response to AusNCP consultation paper:  
Improving specific instance procedures**

I write to provide feedback to the consultation paper on behalf of this union. The broad intent and proposed measures are generally supported, though there are some concerns. And most importantly, the proposed measures must not be a substitute for the major reform of the AusNCP recommended by the independent review in 2017.

The Specific Instance mechanism should be a remedy process consistent with the UN Guiding Principles on Business and Human Rights “protect, respect, remedy” framework. The CFMEU response is formulated on that basis.

Initial assessment stage

The proposal to reform the initial assessment process so that the bulk of the assessment occurs later in the process rather than before acceptance of a case is welcomed. However, I note that concerns of the Human Rights Law Centre that the method proposed by the AusNCP may involve further departure from the Guidelines. It is best that the AusNCP seeks to comply with the Guidelines and associated commentary to the greatest extent possible. It is noted and supported that at paragraph 25 of the Commentary on Implementation Procedures that the principle requirement of initial assessment is that the NCP determine that the case is “bona fide and

relevant to the implementation of the Guidelines". The subsequent commentary about "material and substantiated" should only be interpreted as what is adequate to determine bona fides.

The proposed initial assessment criteria with regard to there being a "relevant link between the enterprise's activities and the issues raised" should also not be interpreted restrictively. It should be enough for the enterprise to be in a position to influence the issues raised.

### Good offices stage

The proposal to have forward plans for the handling of a case, so that the "good offices" stage is clearer to the parties, is welcomed.

It is also welcome that the AusNCP now recognises the need for professional mediation in many circumstances. Professional mediation was requested by the union in our complaint concerning Xstrata in 2010-11 but at that time the AusNCP was unwilling to address that need.

The AusNCP should also have a position that views and documentation provided by the parties will be shared unless there is a good case as why they should not be. In the two cases with which the union was directly involved it was apparent that the companies concerned made substantial inputs to the process that were never shared with the union.

### Conclusion stage

It is supported that the bulk of the examination / investigation will now occur at the conclusion stage rather than the initial assessment stage.

That the parties should be able to make final submissions after the good offices stage is supported. So is that final statements by the AusNCP should follow a template or consistent structure so that the statements themselves are more consistent and both the AusNCP and the parties have reasonable expectations of what is meant to be addressed and achieved. Parties should be provided the opportunity to comment on a draft version of the final statement. The final statement structure should be consistent with the UNGP principle of providing remedy.

The language around the AusNCP actions at the conclusion should focus on "will" rather than "may". Especially where mediation has failed, including where a party has refused to participate, the parties should have a clear

expectation that the AusNCP will make findings as to whether a breach has occurred, and will make recommendations to remedy any breach.

### Follow-up processes and specific instance review mechanism

The brief follow-up process proposed is an improvement on the current situation and for that reason is supported. However, it falls short of a rigorous follow-up process.

With respect to the review mechanism it is disappointing that the AusNCP proposes abandonment of the current mechanism without an immediate replacement. It is accepted that the current mechanism is flawed (ie reviews occur in the Oversight Committee which is chaired by the AusNCP, so there is an inherent conflict of interest problem). However, a review/appeal process is important in ensuring that decisions are made consistently and in accordance with fair process. This is even more important where the AusNCP is structured as a single person rather than an expert panel or similar.

The CFMEU urges that future reform of the AusNCP include a domestic review/appeal mechanism rather than rely solely on the OECD Investment Committee.

### Milestones and timeframes

The proposed timeframe of 55 weeks seems lengthy at first glance, but it is accepted that specific instances to date have mostly taken far longer and so the proposal would be an improvement.

### Communication

The specific instance tracking tool has the potential to be useful – but it needs to have sufficient content so as to provide users with basic information. Where the parties are not named, nor the country where the activity occurred, nor the nature of the complaint, it is impossible for a user of the tracking tool to derive any practical information. That someone has complained about some activity by some company – all not further described - in a particular industry, and that it has reached a certain stage, is not useful information.

At the very least, the parties should be named and the nature of the complaint described once the case has been accepted.

If you require further information with respect to the content of this submission, please contact Peter Colley on [pcolley@cfmeu.com.au](mailto:pcolley@cfmeu.com.au)

Yours sincerely,

A handwritten signature in black ink, appearing to be 'P. Colley', written in a cursive style.

**National President**