



**Submission to the ANCP consultation:
Improving specific instance procedures
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Contact

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Corporate Accountability Research investigates and reports on the ways that business can act with heightened ethics and be more responsive to communities and workers. We are a multi-disciplinary team of academic researchers. One of primary areas of research is ‘access to remedy’. This submission draws on the findings of five years of research about the efficacy of non-judicial human rights mechanisms across the world. Our study conducted 587 interviews, with 1 100 individuals, across the countries and case studies covered by the research. Based on this research, the project has published 20 reports that report on lessons and recommendations regarding ways and our views in this submission reflect the findings of our research concerning what makes non-judicial mechanisms most effective. The reports can be accessed by clicking on this link:

<http://corporateaccountabilityresearch.net/njm-project-publications/#njr-reports>

One of our reports assesses the Australian National Contact Point (ANCP)

(<http://corporateaccountabilityresearch.net/report-xx-ancp>) and another assesses National Contact Points across the OECD more broadly

(<http://corporateaccountabilityresearch.net/njm-report-xvi-oecd-ncp>) . This submission draws on these reports specifically, but also on research about other mechanisms.

We are highly supportive of the ANCP’s decision to proceed with a review of its procedures to ensure these necessary changes are not delayed while the structural changes proposed by the 2017 Review are considered by Treasury. We are grateful for the opportunity to make this written submission, as well as attending the in person consultation.

Our research into the operation of the ANCP suggests that the lack of clarity in the guidance, or inconsistency between the ANCP’s procedures and the Guidelines have contributed to the ANCPs poor past record of handling complaints submitted to it. However, it is our view that the *most* unsatisfactory aspects of the way the ANCP has handled past complaints has stemmed from a failure to apply its existing procedures, rather than problems with the procedures themselves.

We appreciate that the ANCP is waiting for decisions concerning the location and structure of the ANCP, and has sought to address those matters that are within its power to change before decisions of that nature are taken. There are limits, however, to the extent to which procedural matters can address the more significant problems with the way the ANCP handles grievances until the more fundamental structural and resourcing problems identified by the 2017 Review are addressed. We believe that at present the ANCP lacks the human and financial resources necessary to fulfil its responsibilities. We are in strong support of the staffing increase of two additional part-time staff in 2017, and admire the dedication of the current staff, demonstrated in their considerable achievements in a short period. However, the ANCP requires more than the current staff in order to operate properly, particularly with regards to the outreach aspects of its role. The specific instance process is only one part of the overall responsibilities of a good NCP. Just as important are the preventative, educational aspects of its mission promoting knowledge and adherence of the Guidelines. We note that even the best NCPs are

not expensive compared with other government functions, and remain hopeful that the matter of resourcing to be addressed as soon as possible.

An important limitation to the current consultation process is that it is likely that further procedural changes will be required after structural changes occur, in order to ensure coherence between structure and procedure.

Regardless of these concerns or caveats, we are generally in support of the procedural changes set out in the consultation document to promote a more accessible, transparent and effective process. This short submission addresses the questions in the consultation document.

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

Initial assessment: We support the recommendation of the consultation paper to ensure that substantive assessment occur in the later stages of the complaints process to ensure more complaints are advanced quickly to mediation and to promote meaningful outcomes.

2. Are there any other improvements that could assist the effectiveness of the ‘good offices’ stage?

We appreciate the rationale behind the language proposed for the initial assessment criteria. However, we believe it is preferable that the initial assessment criteria mirror the test and criteria set out in paragraphs 25 & 26 of the OECD Commentary. The language proposed by the ANCP could be moved into the commentary.

We note that the high rate of rejection of specific instances at the initial assessment phase in the past may have been partly the result of the resourcing and skill levels of staff, and less due to failings in published procedures. The consultation document addresses this problem by proposing that much of the examination of complaints be moved to a later stage. Much will depend on the spirit in which the procedures are interpreted and applied, as well as future resourcing and staffing.

Parallel Proceedings: We recommend that the ANCP adopt the approach of the UK NCP that parallel proceedings will only be a bar to further consideration where there would be ‘serious prejudice to a party to parallel proceedings.’¹ The principle of severability, which allows specific instances to proceed in part even where the test of serious prejudice is met in relation to some proceedings in relation to the subject matter of the complaint, should also be adopted.

Early planning stage: An early planning stage should be added once a complaint is accepted, as suggested in the consultation paper, and information from planning meetings shared between the parties to promote transparency.

Confidentiality: Any changes with respect to how confidential information is addressed within the complaints process should preserve the core requirement of the transparent exchange of information between the parties wherever possible.

Assistance for complainants: So as to address problems that vulnerable communities have accessing non-judicial mechanisms, the ANCP should implement the following changes to promote a more equity and accessibility:

- the provision of translation services for non-English speaking complainants;
- referral of complainants who lack representation in Australia to relevant civil society organisations or trade unions for assistance;
- funding for complainants without resources to travel to attend mediations.

Mediation: professional mediators, with relevant experience, should be engaged to mediate disputes. The mediators should have the capacity to use a wide range of mediation techniques, including addressing easier or less controversial issues first, shuttle diplomacy where parties do not want to sit at the same table, and so on.

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?

We are in support of the proposal to shift the majority of the ANCP's examination responsibilities to after the good offices stage. We believe this will reduce the likelihood that meritorious complaints are rejected before they are fully examined. Here, again, resourcing is of the utmost importance. Our research concerning the operation of NCPs and other non-judicial mechanisms in other countries leads us to stress the imbalance of resources and expertise that often exists between the complainant and the business (respondent). It is the job of NCPs to address these power and resources imbalances at all stages of its process. The assistance proposed earlier in this submission is one measure that will help. Providing every opportunity to present evidence, and at times asking for more evidence where it is needed to fill evidential gaps, is another way to address the imbalance. It may be necessary, also, to conducting investigations, as is best practice in non-judicial human rights practice.

As suggested by the consultation paper, parties to a complaint should have the opportunity to provide any final submissions after the "good offices" stage and to provide comments on the ANCP's draft final statement prior to publication. As with other submissions made during the complaints process, these submissions should be shared between the parties to promote equitable and transparent decision-making.

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

Final statements: Paragraphs 52 and 53 of the current procedures should be amended (changing the word “may” in each of these paragraphs to “will”) to ensure that where the ANCP has not been able to achieve a mediated resolution, it issues a final statement which comments on whether or not an enterprise’s actions or practices are in breach of the Guidelines, the reasons for these findings and, where appropriate, recommendations for remedial action. The provision of detailed and substantive final statements are important element of transparency and accountability to the parties. They provide important points of learning for both business and civil society about the standards expected in business behaviour, also.

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

Follow up: The follow up procedures are a vital aspect in encouraging problem solving and sustained behaviour changes which are the strength of non-judicial mechanisms (in contrast to the punitive characteristic of judicial claims). Paragraph 56 of the current procedures should be amended to ensure regular follow-up of any recommendations made by the ANCP after 12 months, unless a different time-frame is agreed by the parties and ANCP. For example, where agreements between parties are particularly complex, or require longer time-frames for business to adopt them, we propose that there be scope for the ANCP to suggest a longer time frame for follow up. We also suggest that steps be mandated to cover the scenario where an enterprise fails to file a progress update. Failure to do so, should be disclosed publicly, on the NCP’s website. Where there is inadequate progress after 12 months, we propose that the ANCP retain the possibility of further follow up.

To encourage transparency, we suggest that a progress update should be filed with the notifier, as well as the NCP, and be published on the NCP’s website, together with the NCP’s progress report.

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

Review: A review process is valuable, both for the parties to a specific instance, and also as a check and learning process for the ANCP. We appreciate that review is currently difficult given the limited resources of the ANCP. Following restructuring, review should be undertaken by a well-appointed Oversight Committee. We appreciate that an interim arrangement may be required before restructuring occurs. This should not entail the removal of the review step.

7. Do stakeholders have any comments on the proposed timeframes?

Timeframes: we support the timeframes proposed in the consultation document. We understand that timeframes cannot always be met. Where this is the case, we suggest that there be transparency about the reason for a delay in order to increase general confidence in the specific instance process.

8. Have stakeholders found this specific instance tracking tool valuable?

Tracking tool: Transparency is a key characteristic required to build confidence in the ANCP. The Specific Instance Tracker should be updated to include further information about the parties and nature of the complaint with respect to complaints already closed. With respect to open complaints, once a complaint is accepted, the ANCP's Initial Assessment should be included on the Tracker. The tracker should note which chapter, or chapters, of the Guidelines have allegedly been breached.