

Submission to the ANCP consultation: Improving specific instance procedures

29 June 2018

Introduction

OECD Watch commends the Foreign Investment Division within the Australian Treasury (Treasury) for commissioning the ongoing review of the procedures of the Australian National Contact Point (AusNCP). We appreciate the opportunity to share views on the issues and proposals raised by Treasury in its 22 May 2018 request for feedback on “Improving specific instance procedures”.

This OECD Watch submission:

- Summarizes OECD Watch’s recommendations to the AusNCP; and
- Responds to each of the proposed changes as well as a few other topics of concern to OECD Watch and its members.

Summary of recommendations

1. The AusNCP should provide personalized guidance to complainants before, during, and after the drafting and submission of complaints, to help complainants understand what additional information is needed to make their complaints complete and acceptable.
2. In determining whether an issue raised merits further examination at the initial assessment phase, the AusNCP should apply the admissibility criteria as listed in the Procedural Guidance of the OECD Guidelines, but clarify that it interprets “material and substantiated” to mean that “the issues are plausible and related to the application of the Guidelines, and that there is a plausible link between the enterprise’s activities and the issues raised”.
3. The AusNCP should establish a transparency policy applicable to all specific instances that sets a baseline presumption of transparency regarding complaints, with limited exceptions for confidentiality. The AusNCP’s procedures should state clearly that information shared only with one party will not be used by the NCP in its initial assessment or final determination.
4. The AusNCP should commit to issuing determinations of companies’ compliance or non-compliance with the Guidelines in cases that do not reach resolution through mediation.
5. The AusNCP should commit to recommending that relevant Australian government ministries apply material consequences to companies that refuse to engage or do not engage constructively in the specific instance process.
6. The AusNCP should undertake follow-up 12 months after conclusion of all cases resulting in an agreement or recommendations.
7. The AusNCP should commit to recommending that relevant Australian government ministries apply material consequences to companies that are found not to have implemented the NCP’s recommendations.
8. The existing Oversight Committee should be retained and strengthened until a more effective oversight and review structure is put in place. As regards future reform of the Oversight Committee, OECD Watch recommends a structure akin to that of the United Kingdom NCP’s Steering Board.

9. The AusNCP should ensure that all forward plans, although tailored to individual cases, track closely with the timelines recommended in the consultation paper. If, in implementing the forward plan, the identified timelines are not met, the AusNCP should clearly communicate the reason for the delay to the parties and immediately set a revised timeline.
10. The specific instance tracker should be improved to provide more information about cases.
11. The AusNCP should be better resourced to fulfil its mandate and support complainants.
12. The AusNCP should develop a safety protocol containing essential information, tools, guidance, and (emergency) contacts for prevention and mitigation of security risks faced by users of the NCP mechanism.

Responses to each proposal/question

1. Proposed changes to the Initial Assessment stage.

OECD Watch welcomes Treasury's desire to clarify and streamline the AusNCP's complaint submission procedures. We highlight here a few key recommendations to help the AusNCP best achieve this goal.

Treasury proposes to develop an online form to guide complainants in knowing what type of information the AusNCP seeks in complaints. This is a good step in simplifying the submission process. However, many complainants still require individualized help to understand how they can best present their case. Many complainants have available to them the evidence or arguments missing from their submission, but do not know how best to include them. The online form may not suffice to clarify for such complainants what their particular complaint needs.

We also note with concern that the specific instance flowchart currently provided in the consultation paper shows that incomplete submissions will be declared invalid and rejected. While the online form may help reduce the number of cases rejected unnecessarily at the initial assessment stage, it may not, as argued above, catch all valid complaints.

To strengthen the AusNCP's guidance and support to complainants at the submission and initial assessment stage, OECD Watch recommends the following:

- The AusNCP should follow the practice of NCPs such as the Dutch, Norwegian, and French to provide direct guidance by phone or email to complainants who seek it, both before and during complaint drafting, to help complainants understand what other arguments or evidence they would need to provide to render their complaints acceptable. OECD Watch understands that the AusNCP's current practice when an incomplete submission is received is to inform the complainants about what information their complaint lacks and allow them to subsequently submit any additional information necessary. We welcome this approach, and encourage that it be reflected in the AusNCP's procedures and specific instance flowchart, and continued notwithstanding the additional support envisioned through creation of the online form.
- During its pre-complaint engagement with complainants, OECD Watch recommends that the AusNCP refer complainants who lack representation in Australia to relevant civil society organisations or trade unions for assistance. The AusNCP should consult stakeholders to develop a referral list.

Treasury also proposes that submitted complaints "undergo a validity test, involving a review for completeness and a check that the complaint should be handled by the AusNCP". A review for completeness is important, but the vague, innocuous-seeming step to "check that the complaint should be handled by the AusNCP" could create a loophole by which complaints are rejected even before they are formally submitted. There are no grounds, beyond non-fulfilment of the admissibility criteria of the Procedural Guidance, on which a complaint may be rejected during or before the initial

assessment phase. The AusNCP must therefore accept complaints meeting the admissibility criteria even if the AusNCP thinks the complaints should be handled, or might be differently or better handled, elsewhere. Complainants likely have valid reasons for pursuing the particular forum of the NCP, among other potential venues.

- The AusNCP should drop any notion – and any mention in its procedures – that complaints will be preliminarily validated based on whether they “should” be handled by the AusNCP. The AusNCP may (and likely should) share its view with the complainant that another forum might be better suited to resolving the complaint. But the AusNCP cannot turn away such a complaint on that ground.

OECD Watch also approves of Treasury’s plan to interpret the term “material and substantiated” in terms of “plausibility.” This same interpretation has been advocated by Dr. Roel Nieuwenkamp, outgoing Chair of the OECD Working Party on Responsible Business Conduct.¹ Confusion around the correct interpretation of “substantiated” has in the past led the AusNCP, among others, to require claims to be fully established or proven at the moment of their submission, leading to an unduly extensive or legalistic examination of the issues at the initial assessment phase. 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.

Additionally, globally there have been a number of specific instances where, due to companies’ refusal to share information about their business activities or relationships, it has been difficult for the complainants to determine with certainty whether or not the company in question is indeed linked to the issue raised. Some NCPs (such as the UK NCP²) have appropriately accepted complaints demonstrating a plausible link between the company and a (potential) impact, to enable discussion between the parties about the harms and their source.

While linking “substantiated” to “plausible” is positive, in the interest of ensuring predictability across the entire NCP system, OECD Watch does not recommend the AusNCP to adopt new admissibility criteria for the initial assessment. Instead, continuing to use the Procedural Guidance’s admissibility criteria will preserve functional equivalence across NCPs, while clarifying the “plausible” meaning of “substantiated” will help promote among NCPs that correct interpretation of the term.

- Based on the above analysis, OECD Watch recommends that the AusNCP keep the same admissibility criteria as those proposed in the Procedural Guidance. The AusNCP should then clarify in its own procedures that it interprets “material and substantiated” to mean that “the issue is plausible and related to the application of the Guidelines, and that there is a plausible link [not a “clear and relevant link” as currently phrased in proposed criterion #3] between the enterprise’s activities and the issue raised”.

2. Proposed changes to the Good Offices stage: 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?

OECD Watch welcomes Treasury’s proposal to establish an early planning stage during which it will meet with both parties to determine the most productive path for ongoing discussions and engagements. While forward plans should be tailored to the circumstances of the specific instance, a few core practices must be maintained for all cases.

First, it is critical that the AusNCP apply a transparency policy to all specific instances that sets transparency as the baseline presumption, with limited exceptions for confidentiality on a few topics. Transparency is prioritized under the Guidelines as one of the four core criteria for NCPs.

¹ OECD, Draft summary record of the joint meeting of the WPRBC and NCPs held on 4 December 2014.

² C. Daniel, J. Wilde-Ramsing, K. M. G. Genovese, and V. Sandjojo, “Remedy remains rare,” *OECD Watch Report* (Amsterdam: OECD Watch, 2015), at 27.

Transparency is vital to raise public awareness about complaints and maintain legitimacy. Public attention in turn serves a variety of valuable purposes: it helps counterbalance the voluntary nature of the specific instance process by incentivizing companies to join mediation; it enables responsible investors to learn of cases and encourage companies to engage in more responsible business conduct; and it enables the NCP itself to broadcast its own good work in advancing adherence to the Guidelines.

The AusNCP should allow exceptions to the general presumption favouring transparency on just a few limited topics: to protect trade secrets; individuals' personally-identifying details and personal security; and information exchanged between the parties during mediation. It is not legitimate for a company to be allowed to keep the text of a complaint confidential because it wishes to avoid any media attention at all on the case. Nor may a company mask its overall desire for secrecy with an unjustified claim that any and all information it shares is tied to a trade secret. The AusNCP should scrutinize such arguments and respond to them in reasonable fashion. Other details, such as the existence of a complaint, the allegations raised and evidence presented, and the general stages of the procedure, should be public.

- The AusNCP should establish a transparency policy applicable to all specific instances that sets a baseline presumption of transparency regarding complaints, with limited exceptions for confidentiality. Paragraph 51 of the current procedures of the AusNCP states that “unless a good case is made for information to be withheld, all the information and evidence received by the AusNCP may be shared with the parties.” This approach should be extended slightly by ensuring that all information and evidence not subject to one of the limited exceptions for confidentiality may be shared publicly, not only with the parties.

Beyond the issue of publicity regarding cases, transparency also figures critically into an NCP's use of confidential information. While an NCP may accept confidential documents from parties and engage in confidential discussions, material that is not shared with both parties should not be used to form key decisions in the initial assessment or final statement phase of a case. The AusNCP has in the past used in initial assessment decisions information that is shared with just one party. This has compromised stakeholders' perception of the AusNCP's impartiality and equitability.

- The AusNCP's procedures should state clearly that information shared only with one party will not be used in the NCP's initial assessment or final determination.

3. Proposed changes to the Conclusion 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?

OECD Watch welcomes Treasury's proposal to shift the majority of the AusNCP's examination responsibilities until after the good offices stage. This will empower parties to try to develop, through mediation, their own remedies for the harms identified, while preserving the responsibility of the NCP itself to examine the issues if mediation is not successful. OECD Watch also welcomes Treasury's proposal to allow parties an opportunity to submit their views to the AusNCP in a final submission after the good offices stage.

OECD Watch offers a couple recommendations to help the AusNCP strengthen the good offices and conclusion stages. Given the AusNCP's interest in refocusing the specific instance process on the good offices period, OECD Watch strongly recommends that the AusNCP incorporate into its procedures a commitment to issue determinations on a company's compliance with the Guidelines whenever mediation is not successful.

The 2017 Draft Annual Report on the OECD Guidelines for Multinational Enterprises acknowledges that “determinations can help companies better understand the Guidelines and what steps they can

take to fully observe them.”³ OECD Watch, as well as many NCPs, have found that a commitment to making determinations has a positive impact on encouraging corporations to engage meaningfully in mediation. One NCP peer review showed that determinations provided leverage to encourage parties to engage in dialogue.⁴ Businesses have also indicated that the prospect of a determination makes them more inclined to resolve disputes through mediation.⁵ For companies, awareness that an NCP will, of its own accord, issue a compliance determination adds pressure for them to mediate in good faith, proactively discovering their own missteps and identifying meaningful corrective actions. In contrast, the lack of a threat of determinations by the NCP may encourage companies to drag the mediation process out without reaching a conclusion.

The OECD has recently published a draft scoping paper identifying 17 NCPs either whose rules of procedure mention determinations or who have, since 2011, issued determinations in cases. The OECD’s analysis shows a rising trend in the number of cases concluded with a determination, from 11% of cases closed in 2012 to 27% of cases closed in 2017. OECD Watch’s own analysis of all the cases filed by NGOs and communities since 2000 reveals that out of the 31 cases that resulted in an agreement between parties, 22, or a full 71%, were facilitated by NCPs that make determinations. The numbers suggest a correlation between achieving agreements and the practice of issuing determinations.

- Given the evidence of the value of determinations, OECD Watch strongly encourages the AusNCP to follow the lead of NCPs like the UK and amend its procedures to commit therein to issuing determinations as part of its final statement for cases that do not reach an agreement during the good office stage. Issuing determinations will enable the AusNCP to better encourage meaningful mediation by both parties, and to better inform companies of what practices they must change to adhere to the Guidelines.

Similarly, OECD Watch has found that when governments commit to applying consequences for companies that refuse to engage or do not engage constructively in the NCP process, this provides incentives for companies to engage. This does not change the non-legally binding nature of the Guidelines and NCP process.

- Treasury and other Australian government ministries and departments should follow the practice of peers such as Canada, the Netherlands, and Germany to link companies’ willingness to engage meaningfully in the specific instance process with eligibility for public procurement contracts and trade-related support such as access to export credit and investment guarantees, direct lending, participation in trade missions, capacity building activities, and support by embassies. For its part, the AusNCP should commit to recommending that relevant Australian government ministries apply material consequences to companies that refuse to engage or do not engage constructively in the specific instance process.

4. Proposed changes to the Follow-up stage: Will follow-up processes improve the transparency of the AusNCP? Is 12 months an appropriate timeframe?

OECD Watch welcomes Treasury’s proposal for the AusNCP to conduct follow-up one year after cases are concluded. This will provide an important opportunity for both parties to the case to present evidence on whether parties are following through in implementing the recommendations provided to them. Such monitoring activities are critical to ensuring that the NCP process has a long-term impact and that remedies, where achieved, endure.

³ OECD, Draft Annual Report on the OECD Guidelines for Multinational Enterprises 2017, DAF/INV(2018)19, 22 March 2018, paragraph 34.

⁴ Norwegian Peer Review Final Report, 2012, p. 26.

⁵ C. Daniel et al, “Remedy remains rare,” *supra note 2* at 44.

- The procedures of the AusNCP should be amended to *require* the NCP to undertake follow-up 12 months after conclusion of all cases resulting in an agreement or recommendations.

To strengthen the follow-up process, OECD Watch recommends that the Australian government commit to applying the same type of consequences mentioned above to companies that do not implement the measures agreed upon (if mediation is successful) and recommendations the NCP makes.

- To ensure the recommendations made by the NCP are taken seriously by companies, the AusNCP should not only follow-up on companies' implementation of their recommendations, but should also recommend that the Australian government apply material consequences to companies that fail to carry out the recommendations.

5. Proposed change to the Oversight Committee: Do stakeholders see value in having a review mechanism as part of any future AusNCP structure, and if so, in what form?

OECD Watch joins other NGOs in strongly disagreeing with the AusNCP's proposal to replace the current review mechanism of the Oversight Committee with the follow-up procedures discussed in recommendation 4 above.

The follow-up process and review mechanism serve different purposes and target accountability of different entities. Follow-up monitoring seeks accountability among companies by endeavouring to ensure that companies are complying with the AusNCP's recommendations. In contrast, the review mechanism seeks accountability of the AusNCP itself by monitoring whether the AusNCP is applying its own procedures correctly and making decisions that comport with the Guidelines.

In our November 2017 submission to the Independent Review, OECD Watch already called for strengthening of the existing review mechanism. OECD Watch observed that

“the Oversight Committee’s current appeals mechanism only allows it to examine procedural errors and lacks the authoritative oversight to examine the substance of a complaint, thereby making it difficult for the Oversight Committee to ensure that the ANCP [AusNCP] is operating in a manner that is compatible with the Guidelines. Furthermore, there is also no commitment by the Oversight Committee to publish a summary of the review’s findings, which instead is left in their discretion to decide whether or not to publish its conclusions.”

OECD Watch concurs with the consultation paper that “the Oversight Mechanism is not currently structured adequately to provide a genuine opportunity for review.” This, however, is not a reason to abolish the mechanism altogether; there is no reason to adopt a change that would further weaken the transparency and accountability of the AusNCP.

- OECD Watch recommends that the existing Oversight Committee be retained until a more effective oversight and review structure is put in place. The AusNCP should strengthen the existing review mechanism by ensuring the AusNCP is not directly involved in reviewing its own decisions and that the Oversight Committee is staffed with appropriately senior staff from Treasury and other government departments.
- As regards future reform of the Oversight Committee, OECD Watch recommends that the AusNCP adopt a structure akin to that of the United Kingdom's Steering Board. The UK NCP's Steering Board does have meaningful ability to assess whether the UK NCP has followed its own procedures in comportment with the Guidelines.

6. Proposal concerning timelines: Do stakeholders have any comments on the proposed timeframes?

OECD Watch welcomes Treasury's proposal to establish clear and predictable timeframes for the AusNCP to process specific instances. Timelines will promote consistency in the AusNCP's work and increase complainants' and stakeholders' trust in the process.

- The AusNCP should ensure that all forward plans, although they are tailored to individual cases, track closely with the timelines recommended in the consultation paper. If the deadlines set for various phases of the process cannot be met, the AusNCP should clearly communicate the reasons for this to both parties, and a new deadline should be set immediately.

7. Feedback on new specific instance tracker: Have stakeholders found the specific instance tracking tool valuable?

OECD Watch welcomes the creation of the tracking tool, which has the potential to improve transparency and predictability of the AusNCP's specific instance process, as well as accountability of the AusNCP and companies party to complaints. Unfortunately, members of OECD Watch report that, at present, the tracking tool provides insufficient information about specific instances. Based on this feedback, OECD Watch supports the following recommendation:

- In cases where there is no security risk to identifying the parties, the tracking tool should clearly identify the complainant and company. The tracker should identify the nature of the complaint. The tracker should also indicate the process the AusNCP has followed to date, providing statements and rationales issued at each transition in the process (initial acceptance or rejection, initiation of good offices, etc.), including notice of any parts of the complaint found to be outside the Guidelines. Finally, the tracker should outline the next stages in the AusNCP's review. Ensuring transparency regarding these basic details will allow other stakeholders and the public to see how the AusNCP is addressing particular complaints. It will also allow OECD Watch to ensure more accurate and up-to-date information on its own website with respect to complaints handled by the AusNCP.

8. Additional recommendation on resources.

At present, OECD Watch feels that the AusNCP lacks the human and financial resources necessary to fulfil its mandate under the Guidelines. OECD Watch was gratified to learn from the AusNCP's annual report to the OECD that the AusNCP experienced a staffing increase of two additional part-time staff in 2017; however, the AusNCP still retains just one full-time staff-person.⁶ Further, the AusNCP continues to report that it had no designated budget in 2017 to support either its promotional activities or specific instance handling. These resourcing short-falls have direct repercussions on the AusNCP's accessibility to complainants.

- OECD Watch recommends that the AusNCP be adequately resourced to ensure the provision of translation services for non-English speaking complainants; engagement of professional mediators or mediation training for internal staff; and funding for complainants lacking resources to travel to attend mediations.

9. Additional recommendation on support for human rights defenders.

Human rights defenders and other community and labour leaders seeking to address corporate abuse have reported facing threats and harassment for filing NCP complaints. To prepare for such concerns should they arise in connection with a complaint filed at the AusNCP, the AusNCP should develop appropriate security measures.

- OECD Watch recommends that the AusNCP develop a safety protocol containing essential information, tools, guidance, and (emergency) contacts for prevention and mitigation of security risks faced by users of the NCP mechanism.

⁶ National Contact Point Questionnaire (2017) for the Australian NCP, accessed through the OECD.

Conclusion

We urge the AusNCP to heed the input of civil society stakeholders and set an example for other countries by developing procedures that promote adoption of the Guidelines by corporations and meaningful access to remedy for communities and workers. By adopting the recommendations outlined here and in submissions by other civil society, the AusNCP may become a leader in advancing responsible business conduct.

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