



**British Institute of
International and
Comparative Law**



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The British Institute of International and Comparative Law (“**BIICL**”) makes the following submissions in response to the Treasury of the Australian Government’s call for consultation on the questions set out in “Australian National Contact Point for the OECD Guidelines for Multinational Enterprises: Improving specific instance procedures” published 22 May 2018. Consultation questions responded to appear in bold below.

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

BIICL considers that the proposed forward planning stage of good offices would be of assistance to the parties, allowing them greater input into the process, facilitating greater engagement and in so doing may engender greater willingness to participate in the mediation of a specific instance.

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

It would be of enormous benefit to the satisfactory resolution of specific instances if the AusNCP would consider adopting the model used by the UK NCP and recruit professional mediators with expertise necessary to understand the complex issues that arise when business and human rights intersect, and interpret them in line with the OECD Guidelines for Multinational Enterprises¹ (the “**Guidelines**”).

The AusNCP should consider reconstituting the AusNCP to incorporate a panel of experts with human rights and environmental experience, such as judges, arbitrators, mediators academics, lawyers and others to examine specific instances at the initial assessment stage to ensure that specific instances which ought proceed to the good offices stage are not rejected following the initial assessment.

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?

BIICL strongly endorses the proposal to shift the majority of the AusNCP’s examination responsibilities to after the good offices stage.

As a recent report by Amnesty International on the UK NCP’s handling of human rights complaints notes, a large proportion of specific instances are rejected at the initial assessment stage, reflecting a high evidential threshold that is imposed on complainants.² In nine of the twenty-two cases rejected by the UK NCP since 2011, the UK NCP cited the reason for rejecting the complaint as being that “the link between the activities of the company and the issue raised is not substantiated”.³ However, the OECD’s Procedural Guidance⁴ states that this is a factor that an NCP should take into account, but “only to determine whether the issue is bona fide and relevant to the implementation of the Guidelines”.⁵ We concur with Amnesty International’s conclusion that this threshold goes beyond the requirements of the Guidelines.

¹ OECD, *OECD Guidelines for Multinational Enterprises*, 2011.

² Amnesty International *Obstacle Course: How the UK’s National Contact Point handles human rights complaints under the OECD Guidelines for Multinational Enterprises*, February 2016 at p4.

³ Amnesty International *Obstacle Course: How the UK’s National Contact Point handles human rights complaints under the OECD Guidelines for Multinational Enterprises*, February 2016 at p4.

⁴ OECD, *Implementation Procedures of the OECD Guidelines for Multinational Enterprises*, 2011.

⁵ OECD, *OECD Guidelines for Multinational Enterprises*, 2011, Commentary on the Implementation Procedures, Para 25, Initial Assessment.

Shifting substantive consideration of the complaint to after the good offices stage will clarify that the initial assessment phase is limited to a determination of whether a specific instance is bona fide and relevant to the application of the Guidelines, and mitigate the possibility of specific instances which ought proceed to the good offices stage being rejected at the initial assessment phase because of the application of an unduly onerous evidentiary threshold.

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

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

The implementation of follow up processes would greatly improve the transparency of the AusNCP. To further facilitate transparency, the AusNCP should ensure that it publishes the results of any follow up review.

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

Independent oversight of the AusNCP is of crucial importance in ensuring that the AusNCP is fulfilling its duties in accordance with the Guidelines and the Procedural Guidance and ensuring that the correct standards are being applied in consideration of specific instances in a consistent manner.

The AusNCP ought consider the creation of a steering committee which is independent, objective and impartial and empowered to review determinations of the AusNCP to ensure that they are being undertaken in line with the Guidelines and Procedural Guidelines. To ensure independence, any such steering committee should include members external to the Australian Government sourced from civil society, NGOS, academia and the legal profession including lawyers, judges and arbitrators. Rules for such a steering committee's interactions with the AusNCP and the parties should be clearly defined and codified in the terms of reference for the steering committee.

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

The proposed timeframes are consistent with the Guidelines and Procedural Guidelines. Lengthy delays in the resolution of specific instances have the effect of undermining the value of the NCP process. Accordingly, all efforts should be made to adequately resource the AusNCP to ensure that it has the capacity to meet the timeframes proposed.

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

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