

Submission to the Australian National Contact Point Review



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About this submission

This submission has been prepared on behalf of the Non-Judicial Human Rights Redress Mechanisms Project, responding to the Terms of Reference for the Review. We are particularly excited to participate in the review, given our long interest in mechanisms of this type and express our gratitude for the opportunity to submit a written submission as well as presenting orally.

The Australian National Contact Point is a type of non-judicial redress mechanism. These mechanisms are mandated to receive complaints and mediate grievances, but are not empowered to produce legally-binding adjudications. The focus of the project is on analysing the effectiveness of these mechanisms in responding to alleged human rights violations associated with transnational business activity.

The 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 that:

- non-judicial mechanisms can provide redress and justice to vulnerable communities and workers;
- non-government organisations and worker representatives can more effectively utilise the mechanisms to provide support for and represent vulnerable communities and workers; and
- redress mechanisms can contribute to long-term and sustainable respect and remedy of human rights by businesses throughout their operations, supply chains and other business relationships.

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.

The Non-Judicial Human Rights Redress Mechanisms Project is an academic research collaboration between the University of Melbourne, the University of Newcastle, RMIT University, Deakin University and the University of Essex. The project was funded by the Australian Research Council with support provided by a number of non-government organisations, including CORE Coalition UK, HomeWorkers Worldwide, Oxfam Australia and ActionAid Australia. Principal researchers on the team include Dr Samantha Balaton-Chrimes, Dr Tim Connor, Dr Annie Delaney, Prof Fiona Haines, Dr Kate Macdonald, Dr Shelley Marshall, May Miller-Dawkins and Sarah Rennie. The project was coordinated by Dr Kate Macdonald and Dr Shelley Marshall.

Key Recommendations

This submission proposes that there are ten key areas that require attention in order to improve the performance of the ANCP:

1. Better resourcing;
2. Greater transparency and accountability;
3. Greater independence;
4. Greater adherence to the Guidelines in processing complaints;
5. Better outreach and support
6. Greater use of leverage or enforceability;
7. Greater within government coordination;
8. Greater cross-country coordination;
9. Efforts to encourage long term improvements in human rights practices in businesses;
10. Coordination with institutions in the country where the grievance occurred.

To promote these objectives, we recommend the following structural and procedural reforms:

1. The ANCP should be properly resourced to provide a fair and effective dispute resolution service that actively seeks to address resource imbalances between the parties.
2. The ANCP should be moved out of Treasury to an area with greater independence, subject-matter and dispute resolution expertise and which is better placed to promote public visibility of its role, such as DFAT, the Attorney General's Department, or the Australian Human Rights Commission;
3. Assuming the ANCP remains within government, a mechanism should be developed for independent advice to be sought where a complaint raises a potential conflict of interest, to ensure that the ANCP can fulfil its obligations with independence and integrity;
4. Independent oversight should be strengthened through the appointment of external stakeholder representatives from civil society, unions and business onto the Oversight Committee in a fair and transparent process;
5. A separate roster of independent subject-matter experts should be appointed to advise the ANCP as required in the areas covered by the Guidelines;
6. The ANCP should develop and publish more detailed guidance regarding its processes and criteria for decision-making in accordance with the objectives and Procedural Guidance set out in the Guidelines;
7. The ANCP should be properly resourced to actively promote its function through outreach at home and abroad and should develop a clear strategy for doing so.

Effectiveness of the current ANCP structure

This section of the submission evaluates the effectiveness of the ANCP structure, responding to the questions posed in the Terms of Reference.

The ANCP's role in the context of alternative mechanism(s) for redress

The ANCP is particularly important because it is the only avenue for redress for many communities and individuals affected by Australian business outside our national borders. Australia does not have a legal framework that specifically regulates the human rights obligations of Australian corporations overseas.¹ Communities and individuals who live in jurisdictions with weak legal systems or those plagued by bias and corruption face great barriers to accessing justice in their own countries against companies domiciled in Australia. The ANCP is a transnational human rights mechanism that allows grievances to be addressed in accordance with international human rights norms. Given its central role in the Australian human rights landscape, it is vital that it offers effective redress.

¹ Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination, Australia*, 77th sess, UN Doc CERD/C/AUS/CO/15-17 (13 September 2010) [13]. It has implemented anti-corruption laws that impact the operation of Australian companies that interact with foreign governments abroad: *Criminal Code Act 1995* (Cth) s 70.2, which implements the requirement in the OECD Anti-Bribery Convention to make it an offence to bribe a foreign public official. However, unlike other implementing countries like the UK and the US, Australia has had no successful prosecutions under its anti-bribery of foreign public officials laws: see Cindy Davids and Grant Schubert, 'The Global Architecture of Foreign Bribery Control: Applying the OECD Bribery Convention' in Adam Graycar and Russell G Smith (eds), *Handbook of Global Research and Practice in Corruption* (Edward Elgar, 2011) 319, 326, 328, 337; see also OECD, *Progress Report 2015: Assessing Enforcement of the OECD Convention on Combatting Foreign Bribery* (2015) 15.

NCPs were designed as a relatively cheap way for communities, workers and individuals to access remedy, free from confusing procedural rules and precedent. When compared with other mechanisms and litigation, NCPs have six major strengths:

1. ease of complaint lodgement and broad formal rules of standing;
2. broad interpretation of human rights standards;
3. acknowledgment of business responsibility for supply chains and investments;
4. acknowledgment of positive duties to mitigate harm for businesses in relation to human rights;
5. high degree of legitimacy in findings because NCPs are state-based; and
6. cost-efficient and timely in comparison to litigation.

This submission advocates that the ANCP is reformed in order to make use of the potential strengths availed by the OECD Guidelines for Multinational Enterprises. The following paragraphs explore in greater detail how this could occur.

Improving accessibility

One of the strengths of NCPs is the ease of complaint lodgement, including the broad rules of standing. In *formal* terms, NCPs are highly accessible. However, the inadequate funding of the ANCP diminishes its capacity to provide outreach to the vulnerable communities that most need assistance to access remedies. It also reduces its ability to conduct investigations which might overcome barriers for vulnerable communities in presenting evidence. It restricts the capacity of the ANCP to conduct follow-up meetings or conduct mediations in the place that the grievance took place. This makes the ANCP less accessible *in practice*. Communities that suffer grievances at the hands of transnational business are often in remote locations, and have little chance of knowing that the ANCP might offer an avenue for redress. Unless these communities are provided with assistance to access the mechanisms, including help with constructing the claim, this crucial means for redress is lost to them. Our research suggests that the NCPs that are better funded handle many more disputes than those that receive less funding. This is not because multinational enterprises based in the countries with well-funded NCPs have worse human rights records, but rather because those NCPs are more proactive and accessible. The current structure of the ANCP does not reflect recognition of the disparities in power and resources between claimants and business respondents. The failure to consider such disparities further diminishes the capacity of the ANCP to deliver redress to those who most need it.

Improving mediation and utilising other methods of conflict resolution

Following the 2011 update of the Guidelines increasing emphasis has been placed on mediation, and the preferred outcome of any complaint from the OECD's perspective is an agreement between the parties: 'The benchmark of success is the ability of NCPs to facilitate mediation and dialogue and stakeholders are beginning to appreciate this non-judicial grievance mechanism.'² NCPs are encouraged to consider themselves as 'informal problem solvers in corporate responsibility disputes'.³ Improving the mediation skills of the ANCP should be a high priority.⁴

² OECD Annual Report on the OECD Guidelines for Multinational Enterprises 2014, p. 41. http://www.keepeek.com/Digital-Asset-Management/oecd/governance/annual-report-on-the-oecd-guidelinesfor-multinational-enterprises-2014_mne-2014-en#page46.

³ OECD (2012) Annual Report on the OECD Guidelines for Multinational Enterprises 2012: Mediation and Consensus Building OECD Publishing, p 42.

There are two ways that mediation can be structured. Most NCPs conduct mediation themselves. The advantage of this approach is that it would enable the ANCP to build expertise and knowledge in the mediation of frequently occurring types of disputes, and to mediate with knowledge of the Guidelines. A further disadvantage is that the ANCP may lack the specialised mediation expertise of a professional mediator. A second option then is to appoint external, professional mediators to facilitate dialogue. This has been the practice of the UK NCP since 2008, for example. Australia has been at the forefront of developing alternative dispute mechanisms. In light of Australia's leadership in the development of mediation as a profession and the great number of highly professional mediators who work in Australia, the ANCP would be served well by drawing on these experts.

Mediation is sometimes fraught with complexity. Complaints are often made to the ANCP after long and protracted disputes. This has two consequences. First, it may be difficult to bring parties to the table and the ANCP might need to use its leverage to do so, or to use additional and novel methods described further below. Second, it may sometimes be necessary to give up on mediation and instead issue Final Statements. The threat of a Final Statement should act as an incentive to bring parties to the table.

In some cases that have come before the ANCP, parties are reluctant to enter into mediation. For example, in the case of *CEDHA vs. BHP Billiton*, the complaint was closed as the Argentine NCP was unable to convince Xstrata to enter into the mediation process. However, there is no indication that the ANCP followed up with the Argentine NCP to offer support in bringing Xstrata to the table, or even if it did and was refused, that it sought to engage with Xstrata in Australia. While Xstrata is noted as having a "decentralised company structure", that the company is registered and listed in Australia may have meant the ANCP held more sway with the company. Likewise, in *CFMEU vs. Xstrata*, the ANCP was unable to bring Xstrata to the table, and although it "expressed disappointment" to Xstrata, it is not clear what steps the ANCP took to encourage the company to engage with the mediation process.

In some cases in which parties are reluctant to engage in mediation, other methods should be used in order to resolve conflicts. We outline two novel methods here.

Novel methods: Shuttle diplomacy

In some Specific Instances, direct communication between the parties may not initially be possible. There are cases in which community members fear reprisal if their identities become known (the reprisal may not be from the company, but from local authorities who have an interest in the business activity going ahead). Alternatively, in cases where conflict has been going on for years, sometimes seeing the other side can cause a setback. Rather than allowing for the exchange of views and producing compromise, direct communication may sometimes result in the simple repetition of demands, lending support to the perception of the conflict's intractability. Parties may attempt to convey their side in a favourable light and to make the other side look as bad as possible.

Shuttle diplomacy, or mediated communication, can be useful in these types of situations, at least in the early stages when direct communication is likely to be counterproductive. The essence of shuttle

⁴ OECD Annual Report on the OECD Guidelines for Multinational Enterprises 2012: Mediation and Consensus Building OECD Publishing, available at: <http://www.oecd.org/corporate/mne/2012annualreportontheguidelinesformnes.htm> p. 43.

diplomacy is the use of a third party to convey information back and forth between the parties, serving as a reliable means of communication less susceptible to the grandstanding of face-to-face or media-based communication. The intermediary serves not only as a relay for questions and answers, but can also provide suggestions for moving the conflict toward resolution, and does so in private.⁵

Shuttle diplomacy was used by other non-judicial mechanisms that we studied. The World Bank Group's International Finance Corporation's Compliance Advisory Ombudsman often uses shuttle diplomacy.

Shuttle Diplomacy by the World Bank's CAO

The CAO's Dispute Resolution function of the Ombudsman works with stakeholders to help resolve grievances about the social and environmental impacts of IFC/MIGA projects. Dispute resolution processes typically involve approaches common to alternative dispute resolution (ADR), including mediation, joint fact-finding, information sharing and facilitated dialogue.

In a Cambodian case which the CAO intervened in (referred to by the CAO as Cambodia Airport 11-02), the Dispute Resolution function combined separate meetings and "shuttle diplomacy". CAO facilitated indirect and informal communication among the parties to clarify issues, explore topics of mutual concern, and reach a mutually satisfactory solution. The parties did not initially talk to each other directly. Instead, the CAO moved between the parties separately.

Novel methods: Investigations and Joint Fact Finding missions

Often, one of the biggest problems that NCPs face is that parties have provided conflicting evidence concerning the extent of problems or the nature of breaches of the OECD Guidelines.

Joint Fact-Finding (JFF) is a process for reconciling existing evidence in ways that better ensure the credibility and accuracy of the studies in the eyes of all stakeholders. JFF is recommended when parties can reasonably anticipate that findings will be challenged by stakeholders who may be opposed to or sceptical about the evidence upon which a decision is based. JFF is an antidote to "advocacy science" – the selective use of science to support or oppose a controversial position or action.

The CAO's Dispute Resolution process of the Ombudsman function have utilised Joint Fact Finding to resolve disputes with extremely positive results.

Joint Fact Finding by the World Bank's CAO

In 2008, there was a complaint from local residents and former sugarcane workers of Nicaragua Sugar Estates Limited (NSEL) regarding an epidemic of Chronic Kidney Disease (CKD). The complainants claimed the disease was caused by exposure to company agrichemicals. The company strongly denied this claim. The parties were deadlocked in a cycle of recrimination and denial. The CAO negotiated a Framework agreement (2008) between parties to investigate the cause of CKD.

⁵ Brahm, Eric and Heidi Burgess. "Shuttle Diplomacy." *Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder. Posted: November 2003 <<http://www.beyondintractability.org/essay/shuttle-diplomacy>>.

The Parties jointly selected Boston University to carry out an independent study into disease causes. An Initial Scoping Study was conducted to gather available information on CKD in the region, identify data gaps, and recommend research activities. Six research activities were then implemented regarding different aspects of the disease. The outcome was an unprecedented scientific study with full collaboration between the company and community as well as increased understanding about the disease and treatment options. This in turn informed broader public and private sector of potential impacts of the disease on the workforce.

Mediation or Final Statement concerning breaches?

We recommend that clearer policies are required in relation to the extent that mediation and dialogue should be privileged over other processes.

A focus on ‘problem-solving’ may sometimes lead to the rejection of politically sensitive cases or to failing to examine critical or complex aspects of complaints that are not amenable to amicable settlement.⁶

In the case of *Amadiba Crisis Committee vs. MRC Ltd* the ANCP rejected the specific instance, and claimed its decision was based on the fact that “the focus of the ANCP process is to facilitate mediation between parties, [and] the complainant has clearly stated that the local community is not interested in mediation”.⁷ While the focus of the ANCP Process may be to facilitate mediation between the parties, willingness of a party to mediate is not relevant to the admissibility of a complaint at the initial assessment stage. If the ANCP had accepted this complaint, and the complainant maintained its position on refusing mediation, the ANCP would then have to consider issuing a Final Statement on whether or not the company had breached the Guidelines. Indeed, this was one of the remedies sought by the complainants.⁸ By rejecting the complaint at the initial assessment stage, it allowed the ANCP to avoid having to issue the Final Statement.

The issuing of a Final Statement which states whether and what breaches of the Guidelines has occurred has been found to have positive human rights impacts. The UK NCP’s Final Statement concerning Vedanta resulted in Vedanta adopting a whole of company human rights policy, for instance. Follow up is particularly important in promoting long term improvements, also.

The role of the ANCP Oversight Committee

Our research found that the Oversight Committee does not appear to be effective in its intended function of providing independent oversight. The ANCP Oversight Committee is modelled on the UK NCP’s Steering Board,⁹ which has been lauded internationally for giving the UK NCP a degree of independence as it has four external-to-government members involved in providing advice and reviews of the UK NCP.¹⁰ By contrast, the ANCP Oversight Committee has no external-to-government

⁶ Amnesty International, *Obstacle course: How the UK’s National Contact Point handles human rights complaints under the OECD guidelines for multinational enterprises*, 2016, 48.

⁷ Australian National Contact Point, *Specific Instance – Australian Multinational Mining Company*.

⁸ OECD Watch, *Amadiba Crisis Committee vs. MRC – Complaint*, above n 68.

⁹ Australian National Contact Point, *Oversight Committee Minutes* (22 November 2012) item 2 <http://www.ausncp.gov.au/content/publications/oversight/20121122_minutes.pdf>.

¹⁰ See *Remedy Remains Rare Report*, above n 22, 33.

members and comprises only representatives from other government departments,¹¹ which limits the ability of the Oversight Committee to provide independent oversight to the ANCP. While the ANCP claims that the Oversight Committee will meet biannually or as required,¹² publicly available records document only one meeting, in 2012.¹³ It is not clear as to why this is the case. To achieve its function of providing independent oversight, the Oversight Committee should appoint independent members in an open, transparent process.¹⁴ Further, to effectively provide advice and oversee the effectiveness of the ANCP, the Oversight Committee needs to meet regularly.

How the ANCP should engage with non-government organisations such as business, unions, industry groups, academia and civil society

The ANCP does not currently provide a means for civil society to participate in oversight or advice.

Best practice

The French NCP has a tripartite structure that is composed of representatives from several ministries, trade unions and an employer's federation, coordinated by the Director-General of Treasury.¹⁵

The Dutch NCP is independent and consists of four independent [members](#) and four advisory members from the government departments most relevant to business and human rights. The [secretariat](#) of the NCP is housed in the Ministry of Foreign Affairs. The Dutch government allocated significant funding (€900 000 over three years) plus two full-time staff to its NCP, in addition to those staff who have responsibilities to the NCP as part of their other duties.¹⁶

Greater **interaction needs to occur with business and civil society organisations in the form of outreach and education, also**. The Dutch NCP is a model here, housed with 'CSR Netherlands' which engages business, employers, unions, sector associations, financial associations, media, NGOs and OECD Watch to promote the Guidelines.

¹¹ As at 2012, representatives from Treasury, Export Finance Insurance Corporation, Austrade, Department of Education, Employment and Workplace Relations, Department of Foreign Affairs and Trade, AusAID (now defunct) and the Department of Resources and Energy: see Australian National Contact Point, *Oversight Committee Minutes*, above n 94.

¹² Australian National Contact Point, *Terms of Reference and Explanation of the Role of the ANCP Oversight Committee* (2011) <<http://www.ausncp.gov.au/content/Content.aspx?doc=ancp/oversight.htm>>.

¹³ There are only minutes from one meeting of the Oversight Committee available on the ANCP website.

¹⁴ See *Remedy Remains Rare Report*, above n 22, 17.

¹⁵ Le ministère de l'Économie et des Finances, *Point de contact national* (2017) <<http://www.tresor.economie.gouv.fr/pcn>>.

¹⁶ OECD Watch, *Model National Contact Point* (2007) 8 <http://www.oecdwatch.org/publications-en/Publication_2223>.

How the ANCP compares with NCP structures in other OECD countries, including resourcing and international best-practice.

Transparency

The ANCP performs badly in relation to transparency. The website is rarely updated. Information about the ANCP Process should be provided in the languages of the primary countries in which Australian businesses operate and grievances are likely to occur, not only in English.

Best practice

The UK NCP has developed a manual that provides clear procedural guidance for affected people with regard to how they can bring a complaint to the NCP.¹⁷

The Brazilian NCP's web site describes the information to be included when submitting a case/specific instance. It also provides links to a legal document setting out detailed procedures, in both Portuguese and English.¹⁸

Outreach

The ANCP performs particularly badly in relation to how much it conducts outreach and publicises its activities. It should **conduct far more outreach activities**, for example, holding workshops and trainings on the Guidelines and the specific instance process for other government departments, business communities, civil society, and any other relevant stakeholders, as well as having active and meaningful involvement in the NCP peer-review process. It should also hold an annual consultation with stakeholders as well as more regular meetings with key stakeholders. Australian Embassies and trade missions should help promote the Guidelines.

Best practice

The Dutch NCP is part of a body called CSR Netherlands which engages with businesses, employers unions, sector associations, financial associations, media, NGOs and OECD Watch to promote the Guidelines. This involves holding workshops and presentations at conferences and other meetings. The NCP makes a strategy each year for communication and promotion. The website also has toolkits for companies to assess whether their behaviour is in line with the Guidelines.¹⁹

The Norwegian NCP actively engages with NGOs in Norway through stakeholder meetings, such as KOMPakt, and through the government's consultative forum on CSR. The NCP's website is in

¹⁷ See United Kingdom National Contact Point, *UK National Contact Point Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises* (January 2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270577/bis-14-518-procedural-guidance.pdf>.

¹⁸ Brazilian National Contact Point, *Resolution PCN no 1/2012* (2012) <<http://www.pcn.fazenda.gov.br/assuntos/english/files/resolution-no-01.pdf>>.

¹⁹ Ministry of Foreign Affairs, *National Contact point OECD Guidelines* <<http://www.oesorichtlijnen.nl/en>>.

multiple languages. The website also has tools for companies to assess their behaviour in reference to the Guidelines, and to ascertain whether they are operating in conflict zones. The Norwegian NCP also gives presentations at business conferences and schools.²⁰

Outreach should also take place in the form of assistance for communities who have grievances.

Cooperation with other government departments

As a beginning point, there needs to be stronger cooperation with DFAT in developing programs on human rights risk management, support for access to justice, support for capacity building and outreach for communities. In the UK, DFID has a presence on the oversight board of the NCP. However, it does not appear to be playing an active role in promoting the mechanism in the countries in which it provides aid and runs programs. If DFAT were to play such a role, this would MAKE the ANCP far more accessible to potential complainants.

Fact finding

The ANCP does not carry out fact finding.

Best practice

Six NCPs conduct fact-finding in the countries in which the complaints occurred including the German, Dutch, Canadian and Norwegian NCPs.²¹

Cooperation with the governments in which the grievance occurred

Distance from the place where the human rights grievance occurred could be overcome in a number of ways, such as:

- by requesting evidence from interested parties in the host country;
- by conducting investigations in the host country;
- by coordinating with relevant government and non-government agencies in the host country;
- by communicating Final Statements to stakeholders in the complaint beyond just those named in the complaint.

Use of leverage to promote long-term behavioural change

The ANCP does not utilise sufficient leverage in order to promote better human rights practices in business. The first step towards increasing the leverage of the ANCP is to issue substantive Final Statements concerning breaches of the Guidelines based on the evidence at hand and fact finding. The second step towards increasing the leverage of the ANCP would entail the implementation of novel remedies.

Best practice

²⁰ Norwegian Ministry of Foreign Affairs, *Corporate social responsibility in a global economy* (June 2011), 3 <http://www.regjeringen.no/pages/2203320/PDFS/STM200820090010000EN_PDFS.pdf>.

²¹ Trade Union Cases, *National Contact Point Comparison* (2017) <<http://www.tuacoedmneguidelines.org/NCPcomparisonAll.asp>>.

Some NCPs are increasing their effectiveness by implementing novel remedies. In *Canada Tibet Committee vs China Gold International Resources* (2013) the Canadian NCP imposed sanctions on the breaching company, withdrawing its Trade Commissioner Services and other overseas Canadian advocacy support.²²

Leverage should be used to encourage **long-term behavioural change, not just to address individual grievances**. Our research concerning other non-judicial mechanisms shows that many mechanisms and processes for encouraging human rights compliance require enterprises to demonstrate the adoption of corporate accountability practices across the company or broader compliance with human rights standards. These processes can have a much broader positive impact on the human rights performance of enterprises. If the ANCP continues only to address single instances, a crucial opportunity will be missed for the Australian government to encourage better human rights practices across the whole business in the long term. A further danger is that the ANCP will unwittingly entrench harmful human rights practices.

Evaluate the most suitable area of Government to effectively perform the ANCP function

This section of the submission evaluates the most suitable area of Government to effectively perform the ANCP function, in line with the Terms of Reference for the review. NCPs are required to operate impartially throughout the specific instances process.²³ However, the structure and location of an NCP can influence how it handles a complaint. The ANCP is currently located within Treasury. This has caused a raft of problems which we explore further in this section.

Specific problems with the ANCP's location

Consideration of the complaint may require comment on government policy, but this has historically created conflicts of interests for the ANCP. In the case of **Australian Human Rights Centre and RAID vs. G4S**, for example, the ANCP explained in its reasons for rejecting the complaint that the company is “not accountable for government policy”, that other mechanisms exist for review and scrutiny of policy, and that it is “not the role of the ANCP to issue commentary, whether intended or otherwise, on government policies or law”.²⁴ The ANCP took a similar approach in handling *Human Rights Council of Australia vs. GSL*. The ANCP rejected parts of the complaint that it considered pertained to the legality of the Australian Government policy, though it accepted parts of the complaint that related to the company's operating policies and procedures.²⁵ While that complaint process ultimately produced a favourable mediated outcome for both parties, limiting the complaint in this

²² Canadian National Contact Point, *Final Statement on the Request for Review regarding the Operations of China Gold International Resources Corp. Ltd., at the Copper Polymetallic Mine at the Gyama Valley, Tibet Autonomous Region* (2015) <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/statement-gyama-valley.aspx?lang=eng>>.

²³ Department for International Development, ‘UK National Contact Point Procedures for Dealing with Complaints brought under the OECD Guidelines for Multinational Enterprises’ (Media Release, 28 April 2008) 4, <<http://www.bis.gov.uk/assets/biscore/business-sectors/docs/u/11-1092-uk-ncp-procedures-for-complaints-oecd.pdf>>.

²⁴ Australian National Contact Point, *Statement by the Australian National Contact Point: Specific Instance – G4S Australia Pty Ltd* (10 June 2015) <http://www.ausncp.gov.au/content/publications/reports/general/G4S_au.pdf>.

²⁵ Australian National Contact Point, *Statement by the Australian National Contact Point: GSL Australia Specific Instance* (6 April 2006) 5 <http://www.ausncp.gov.au/content/publications/reports/general/GSL_Statement.pdf>.

way had the effect of ignoring the actual human rights abuses alleged to have been committed by the company, by focusing on the company's practices and procedures.²⁶

It is troubling that the ANCP appears to reject cases involving companies contracted to carry out controversial government policies. We found that it gave rise to a perception of bias and lack of independence. This could be overcome by moving the ANCP out of government departments. Independence is frequently achieved for complaints bodies such as Ombudsmen by creating statutory bodies which are independent of government. The Human Rights Commission has independence of this type, making it a possible candidate for housing the ANCP.

Our research further found that the ANCP's location within the Foreign Investment and Trade Division of the Treasury gave rise to an additional conflict of interest. Given the role of this division is to provide advice to the Foreign Investment Review Board, and is therefore focused on foreign investment in Australia, there may be a perceived conflict of interest concerning its role in investigating complaints against companies who invest in Australia. While it is noted that the Foreign Investment and Trade Division has responsibility for implementing Australia's OECD commitments, at least sharing responsibility for the ANCP role with another department, such as the Department of Attorney-General or another relevant department, would bolster independence and decrease any perception of partiality or undue influence (as an alternative to moving it to the Human Rights Commission).²⁷

Should NCPs be located within government?

The question of whether NCPs should be located within government is a fraught one which has received a great deal of attention internationally. Some NCPs are housed in a single government department and managed by that department. Where decision-making ultimately sits within that department, this can result in conflicts of interest.²⁸ Only 13 per cent of NCPs have taken steps to structure themselves so as to promote impartiality, including the UK and French NCPs.²⁹ Professor John Ruggie, the UN Special Representative on Business and Human Rights, has stated that '[t]he housing of some NCPs primarily or wholly within government departments tasked with promoting business, trade and investment raises questions about conflicts of interest.'³⁰ Earth Rights International has criticised the structure of NCPs, stating that the location of NCPs within government agencies responsible for promoting trade and investment imbues NCPs with 'pro-

²⁶ Amnesty International has observed a similar tendency of the UK NCP to reject parts of complaints alleging actual human rights abuses, the ending of which would seem to be one of the underlying purposes of the Guidelines, while accepting for further examination parts of complaints related to general policies and practices of companies regarding human rights: see Amnesty International, above n 19, 4.

²⁷ OECD Watch has found that multipartite NCPs, composed of representatives from one or more government ministries as well as representatives from business associations, trade unions and/or NGOs should, in theory, "be less prone to bias because they involve input from multiple stakeholder groups with different interests, and are therefore less likely to be influenced by any one party": OECD Watch, *Remedy Remains Rare: An Analysis of 15 Years of NCP Cases and Their Contribution to Improve Access to Remedy for Victims of Corporate Misconduct* (2015) 33 – 34 <http://www.oecdwatch.org/publications-en/Publication_4201>.

²⁸ Caitlin Daniel et al, '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) 33.

²⁹ Caitlin Daniel et al, '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) 35.

³⁰ John Ruggie, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, UN Doc A/HRC/8/5 (7 April 2008) para 98.

corporate bias'.³¹ For example, if a complaint is brought against a company that is a government contractor, or the government is pursuing certain foreign policy aims or industry growth, this could lead to a conflict of interest in the specific instances process.³²

Although institutional independence may be a concern due to the housing of NCPs within government departments, our research suggests that there are great benefits to NCPs being housed within, supported by and working closely with government. NCPs can use their location within government to increase their leverage by embedding the NCPs more thoroughly in the institutions of trade, human rights and corporate accountability in that country. NCPs are uniquely situated to deploy forms of leverage to influence business behaviour that are available to them due to their location within government. These types of leverage could include the staying of import or export licenses, the withholding of government subsidies and aid, or disqualification from government procurement. In the case of *Canada Tibet Committee vs China Gold International Resources* (2013) the Canadian NCP imposed sanctions on the breaching company, withdrawing its Trade Commissioner Services and other overseas Canadian advocacy support.³³ If NCPs were to use such means to penalise offenders and steer business behaviour they would become extremely powerful means of human rights remedy and promotion.

Enhancing independence through other means

Independence and legitimacy could also be enhanced by oversight mechanisms, such as multi-stakeholder boards or inter-departmental steering boards.

The ability to successfully promote the Guidelines, including access to relevant networks and stakeholder partnerships

The ANCP conducts very little outreach work to promote knowledge of the mechanism or access to it and has no formal budget to do so. Given the barriers to accessing redress mechanisms, this is particularly concerning. There is no way for communities to know how to seek redress through the ANCP when affected by relevant business behaviour. Various suggestions have been made in this submission concerning ways that outreach can be improved.

The ability to successfully manage the grievance handling process, including ready access to policy expertise and a working understanding of current international and domestic sensitivities that may relate.

Various recommendations have been made in this submission concerning the importance of fact finding in order to build a nuanced understanding of the international and domestic sensitivities that may relate to complaints. Recommendations have also been made concerning the use of expert mediators and expert advisors in order to augment the expertise of the ANCP.

³¹ EarthRights International, 'OECD Guidelines Update: Substantive Improvements, Procedural Disappointments' (Press Release, 25 May 2011) <<http://www.earthrights.org/campaigns/oecd-guidelines-update-substantive-improvements-procedural-disappointments>>.

³² OECD Watch, 'The OECD Guidelines for MNEs: Are they 'fit for the job'?' (Media Release, June 2009) 7.

³³ Canada National Contact Point, (2015), Final Statement on the Request for Review regarding the Operations of China Gold International Resources Corp. Ltd., at the Copper Polymetallic Mine at the Gyama Valley, Tibet Autonomous Region, accessed at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/statement-gyama-valley.aspx?lang=eng>, May 12 2015.

We welcome the opportunity to discuss our submission in further detail. Please do not hesitate to contact Dr Shelley Marshall on 0425709914.