



26 July 2019

Ms. Victoria Anderson
The Australian National Contact Point
c/- Foreign Investment Division
The Treasury
Langton Crescent
Canberra ACT 2600

Dear Victoria,

We write in regard to the revised draft Specific Instance Procedures (**Procedures**) released by the Australian Treasury on 10 July 2019, which build on the changes already made in 2018.

We are pleased to see that the Australian NCP (**AusNCP**) has adopted a number of further reforms to improve its complaint handling procedures and enhance its accessibility. We welcome many of the changes proposed, as well as the AusNCP's commitment to working with external stakeholders to continue to improve the process.

Several important shortcomings remain in the draft which will impact the accessibility and equity of the process. We have set out a number of recommendations below which we believe will address these shortcomings and ensure the complaints procedure is clear and accessible for complainants.

Recommendation 1: The Procedures should more clearly set out the role of the Independent Examiner and the scope of their mandate.

The definition of the Independent Examiner as set out in the glossary and at section 1.3 of the revised Procedures currently states that their role is to “manage complaints brought to the AusNCP...publicly share their views and make recommendations for reform on cases...”

This minimal definition provides the lay reader with little useful information about what the Examiner's role actually involves or the scope of their mandate.

We recommend replacing 1.3 with the following definition: “The role of the Independent Examiner is to handle complaints brought to the AusNCP about alleged breaches of the OECD Guidelines. The Examiner is empowered in line with these Procedures to investigate the substance and validity of complaints and to try to resolve complaints by facilitating discussions between the parties. The Examiner has the authority to publicly share their views through formal AusNCP case publications,

to issue determinations on whether an enterprise's actions were consistent with the Guidelines and, where appropriate, to make recommendations to improve observance of the Guidelines.”

Recommendation 2: The Procedures should include an ‘Investigation’ stage setting out the steps the Independent Examiner will take to assess the validity of the complaint if mediation is refused or fails to reach agreement.

The revised Procedures currently clearly outline the process that will be followed by the Independent Examiner at the Initial Assessment stage to decide whether a complaint should be accepted for further examination, but say very little about what that further examination will involve. By skipping from the ‘Good Offices’ stage to the ‘Final Statement’ stage, they leave the impression that the only function of the Independent Examiner is to act as a conciliator.

This omission means there is no clarity or transparency in the Procedures either for the Examiner or the parties as to how the substantive examination of a complaint will proceed, what additional information the Examiner may seek, and from whom, to inform their Final Statement, with whom that information will be shared, or what opportunity parties will be afforded to comment on any information not directly provided by them.¹

The UK NCP Procedures are much clearer in this regard. Section 4.6 (p 17) of the UK Procedures explicitly sets out that in cases where mediation is refused or fails to achieve agreement, the complaint will then return to the NCP for examination, with the objective of ‘investigating the complaint to assess whether the complaint is justified’.

¹ The AusNCP's open tender for the Independent Examiner role clarifies that in preparing their Final Statement in relation to a complaint, the Independent Examiner will set out “the documents and consultations it took into account to reach its conclusions”, “the parameters of the investigations undertaken” and the “reasons for the Examiner's decisions.” This is not adequately reflected in the Procedures, however.

UK National Contact Point Procedures for Dealing with Complaints Brought under the OECD Guidelines for Multinational Enterprises

4.6 The Examination Process

4.6.1 If mediation is refused or fails to achieve agreement, the complaint will return to the NCP for examination. The NCP may also decide that mediation cannot continue under the NCP process, and in this case will offer the parties the option of continuing outside the process. Where mediation is taking place outside the NCP process, the NCP will usually expect to receive a notification of failure to reach agreement from the parties (or from one party with the knowledge of the other party).

4.6.2 The objective of the examination is for the NCP to investigate the complaint in order to assess whether the complaint is justified.

4.6.3 At the outset of the investigation the NCP will identify the steps it intends to take in order to proceed with the investigation and will notify both parties in writing. The NCP will inform both parties in writing of any amendments it considers necessary to these steps. If, as a result of the investigation, the NCP decides that additional steps are required in order to complete the investigation, it will notify both parties of the additional steps it intends to take.

4.6.4 The examination is likely to involve the NCP collecting further information or statements from the complainant or the company. It may also seek advice from other relevant government departments, UK diplomatic missions or overseas DFID offices, business associations, NGOs or other agencies. If appropriate it will seek informed independent opinion.

4.6.5 The examination may also involve further meetings between the NCP and the parties. In each case the meeting will have an agenda and be minuted.

4.6.6 In exceptional cases the NCP may consider it necessary to undertake a field visit. The NCP will seek to agree terms of reference for the field visit with both parties in advance of the visit. The NCP will share a report of the visit with both parties for their comment.

4.6.7 Unless a good case is made for information to be withheld, information and evidence received by the NCP will be shared with the parties. Where information is sensitive, the preferred course is to agree appropriate conditions of confidentiality.

4.6.8 The NCP will then review all the information it has gathered and make a decision as to whether the Guidelines have been breached.

We strongly recommend that the AusNCP inserts an equivalent section into the revised Procedures between the current ‘Good Offices’ and ‘Final Statement’ stages to ensure that all parties clearly understand the role of the Independent Examiner, the parameters of the information they may seek during their assessment of the complaint and what factors and information they may take into account in their decision making.

Recommendation 3: Examination of a complaint should not be contingent upon the parties engaging in discussions.

Section 4.4 of the Revised Procedures states that the Examiner will seek the consent of both parties to engage in discussions and if:

“... b) the notifier does not agree, the Examiner will prepare a final statement summarizing the process followed to date, but will not make any further assessment of the issues raised.”

This provision compels a complainant to engage in discussions with a company if they want their complaint to be examined by the Independent Examiner, irrespective of whether such discussions would be appropriate.

While the AusNCP’s role is oriented primarily towards dispute resolution, there are many possible situations where a breach of the Guidelines may have occurred, but where discussions between the parties may not be an appropriate way to resolve the matter.

We are aware, for instance, of past complaints involving allegations of sexual abuse by company security guards, or where threats of been made against community representatives attempting to speak out against a company’s activities. In such situations, complainants may not feel safe even to have their identities shared with the company, let alone engage with them directly.

In other circumstances, a complaint to the AusNCP may be a final resort following years of unsuccessful discussions in which trust between the parties has already broken down.

It is precisely in these such situations where the AusNCP’s examination of the issues and recommendations for reform may be most needed to address potential impacts occurring to the complainants and promote business’ understanding of the Guidelines. We therefore urge, in alignment with Recommendation 2 above, that in all situations in which mediations are refused or fail to achieve agreement, the Independent Examiner proceed to investigate the complaint in full before preparing a Final Statement with a determination and recommendations.

Recommendation 4: The Procedures should use consistent and accessible language throughout and should clearly explain the purpose of each stage of the process.

One of the key recommendations of the 2017 Independent Review of the AusNCP was that the revised procedures ‘set out a clear and transparent process...in a plain English style’.

The revised Procedures have made a number of improvements in this regard, such as the substitution of the term ‘complaint’ for ‘specific instance’. There are still a number of places where the language is unnecessarily technical, however.

In particular, the continued use of the term ‘Good Offices’ to describe the dispute resolution stage of the process is unhelpful and confusing for anyone unfamiliar with the process. ‘Mediation’, ‘dispute resolution’ or ‘conciliation’ would all be far more familiar terms to lay people reading the Procedures.

The Glossary should ideally be placed at the front of the Procedures and the Procedure text should then not re-define terms differently.

For clarity, we also strongly recommend inserting a sentence at the start of each stage of the process outlining the purpose of that stage of the process.

Recommendation 5: The Procedures should ensure the ability of complainants to engage in cases anonymously when security conditions require this.

Communities impacted by business activities sometimes desire, when risks against their personal safety are particularly serious, to file a specific instance via another party and remain anonymous to the company. We recommend that the Procedures provision 2.1 be amended to reflect the AusNCP's procedures for enabling such anonymous filing of complaints in such special circumstances. The AusNCP may require, for example, the third party helper to show evidence of the need for anonymity of the impacted community.

Recommendation 6: The Procedures should explicitly limit the admissibility criteria to the six ones identified in the Procedural Guidance.

In OECD Watch's experience supporting specific instances filed to NCPs, OECD Watch has seen that many NCP's effectively add admissibility criteria to those enumerated in the Procedural Guidance, such as a criteria that the company be willing to engage in the complaint, or a criteria that the NCP itself believes dispute resolution can be successful. Such additional criteria undermine the predictability of the process and accessibility of the NCP to complainants. We therefore urge that the last sentence in the beginning of provision 3.7 be modified slightly as follows: "In this context, the Examiner will take into account only the six admissibility criteria outlined in the OECD Guidelines Procedural Guidance, namely: ...".

Recommendation 7: The Procedures should clarify that existence of proceedings parallel to a specific instance will not be an automatic ground for dismissal of the complaint.

The OECD Guidelines clarify that when parallel proceedings exist alongside a specific instance filed to an NCP, they shall not constitute a reason for the NCP to automatically reject the complaint. Instead, the Guidelines direct the NCP to consider whether and how, including if absolutely necessary by narrowing elements of the claims, the complaint may be handled without causing prejudice to those parallel proceedings. Despite this clear language, this issue remains misinterpreted by many NCPs, including the AusNCP in the past.

To address this issue, we strongly urge the AusNCP to insert language after provision 3.8 on how it will handle complaints subject to parallel proceedings in alignment with the Guidelines. The following language has been adapted from the UK NCP approach to parallel proceedings and should be adopted in the Procedures:

3.9 The fact that parallel proceedings exist will not of itself cause a suspension of its investigation and/or its determination of any dispute.

3.10 The AusNCP will suspend a complaint only where it is satisfied that it is necessary in order to avoid serious prejudice to a party to parallel proceedings and appropriate in all the circumstances;

3.10 The AusNCP will only consider suspension of a complaint upon an application by a party to the complaint.

Recommendation 8: The Procedures should ensure input of the Advisory Board and notification of the parties before a case is transferred to another NCP or jointly-managed with another NCP.

Notifiers typically take great care in filing their complaint to the appropriate NCP and the one best-equipped to help resolve their dispute. Notifiers may have logistical, safety, or other reasons why they prefer the AusNCP to handle their complaint as opposed to another NCP, even when another NCP might also take a lead or supporting role. To ensure that notifiers' preferences and concerns are met, the Procedures should be modified to clarify that the Examiner must consult the Board and the parties before transferring a case to another NCP or seeking to co-manage a complaint with another NCP.

Note that provision 3.9 appears to address this general issue, but it simply requires the Examiner to advise, rather than consult, the Board and parties. We recommend instead that provision 3.5, which addresses the general issue of transfer or coordination between NCPs on a case, be amended to reflect a requirement for the Examiner to seek input of the Board and parties before making a transfer or coordination decision.

Recommendation 9: The Procedures should explicitly enable the Examiner to recommend consequences for an enterprise either for its bad faith toward the NCP's process or its breach of the Guidelines.

OECD Watch conducted an examination of complaint handling by NCPs. The examination found that when NCPs are empowered to recommend that Government ministries apply penalties to an enterprise (either to penalise the enterprise's bad faith toward the NCP's process or its breach of the Guidelines) the penalties created a meaningful incentive for enterprises to engage and to better align their activities with the Guidelines' standards.

It is not clear to us if language currently in place in 5.3.3 is meant to reflect this. We support the statement, in 5.3.3, that the Examiner may make recommendations to another relevant body. But we urge that the Procedures section 5 be additionally clarified to reflect the Examiner's authority to recommend that consequences be applied to certain enterprises in the above-stated circumstances. This might include, for example, a recommendation to AusTrade that the enterprise be denied future trade assistance until it rectifies its conduct, in accordance with AusTrade's requirements that to receive trade assistance, businesses must be committed to maintaining business ethics and legal obligations, including but not limited to anti-bribery laws, within Australia and overseas.²

Recommendation 10: The Procedures should ensure the Independent Examiner shares follow-up statements with relevant government offices.

Various government offices may benefit from understanding whether and how a multinational is found to be implementing recommendations the AusNCP gave it in a Final Statement. To ensure

² <https://www.austrade.gov.au/Australian/How-Austrade-can-help/Trade-services/Opportunities-terms-and-conditions>. We note that the United Nations Working Group on Business and Human Rights has explicitly recommended that Governments consider such ways to incentivize business compliance with international human rights standards.

relevant government ministries have access to the AusNCP's follow-up assessments, provision 6.6 should be amended accordingly.

Recommendation 11: The Procedures should ensure re-examination by the Examiner of every complaint for which a procedural review found irregularity in the Examiner's handling of the complaint.

As the Procedures are currently drafted in provisions 7.8(a) and 7.8(b), two outcomes are possible if a procedural review finds irregularities in the Examiner's adherence to these Specific Instance Procedures in handling a complaint: either re-examination of the case by the Examiner for re-consideration, or a broad recommendation for the Examiner to avoid the errors in future.

We see no reason for the "or" here; every instance of irregularity or error should be corrected by the Examiner within the case in which it occurred. Anything short of that is unjust to the complainants who suffered from the irregularity. We recommend that these two provisions be merged as follows:

7.8 (revised): If the Committee determines that material procedural irregularities occurred, they shall acknowledge that there were deficiencies in the Examiner's handling of the complaint, return the decision to the Examiner with instructions on how to rectify the procedural irregularity, and make recommendations to ensure the Examiner's prevention of those errors in future complaints.

Recommendation 12: The Procedures should set transparency as the grounding value of the AusNCP's approach to transparency and confidentiality.

The Guidelines establish transparency, and not confidentiality, as one of the core criteria for all NCPs. To reflect the Guidelines' preferential emphasis on transparency, we strongly urge the revision of provision 9.1 as followings: "9.1 Transparency is one of the core criteria by which the AusNCP operates. At the same time, it is important for the parties..."

Recommendation 13: The Procedures should clearly state that information that cannot be shared between the parties shall not form part of the Examiner's consideration of the case.

It is our understanding that the AusNCP shares our view that information that cannot be shared between the parties shall not form part of the Examiner's consideration of the case. We believe the current phrasing "may not be able" in provision 9.2 could lead to confusion on this point. We therefore recommend clarifying the sentence with clear "shall not" language, as we have in our recommendation here.

Recommendation 14: The Procedures should assert the AusNCP's commitment to proactively identifying and responding when possible to address potential safety risks for notifiers.

OECD Watch has recently conducted research identifying the personal security risks notifiers often face when standing up against harmful impacts of business activity, including in relation to specific instances filed to NCPs. These risks exist notwithstanding the filing of complaints, but pursuit of complaints can also increase risks for notifiers. NCPs are in a unique position to help address this problem, both by proactively identifying when risks may be especially likely given their prevalence

in a particular industry or region, and proactively asking or responding to notifiers to understand what steps the AusNCP can take to help. Steps can include speaking about the matter to the multinational involved, speaking to another government, seeking support of an agency or NGO experienced in providing protective services or advice, publicly condemning the reprisals, or others.

We urge the AusNCP to ensure the Procedures reflect that the Examiner will take strong proactive and responsive action to understand and try to help address such risks, starting by encouraging notifiers to raise concerns with the AusNCP if they feel comfortable doing so. Language on reprisals and support for safety of notifiers (or all parties) could be included in the section on Transparency and Confidentiality, or in a standalone section.

Recommendation 15: The Procedures should reflect the AusNCP’s sensitivity to ensuring an inclusive process for disadvantaged or vulnerable groups, including women and Indigenous peoples.

The filing of specific instances can present particular challenges to certain vulnerable populations, including language and literacy barriers, cultural constraints, and difficulty accessing equal representation. The AusNCP cannot account for all of these barriers, but it can endeavour to do what it may by proactively and sensitively addressing potential issues with complainants and seeking the advice of relevant experts.

To make clear its commitment to an inclusive process, the AusNCP should ensure the Procedures reflect that commitment. The Independent Examiner’s attention to the needs of certain complainants could be reflected in the Introduction and/or the sections on the Initial Assessment, Investigation, and Good Offices stages.

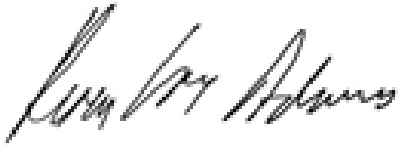
Recommendation 16: The flow chart will need modifications based on these recommendations.

Finally, we note that the flow chart will need amendment to reflect some of the recommendations we make here. Most importantly, it will need amendment to reflect our Recommendation #2 regarding clear creation of an Investigation stage. Second, it also already needs small amendments, for example to reflect that the AusNCP will work with notifiers who submit incomplete complaints, in order to help them make a more complete submission (exampled in provision 3.3).

Alongside the procedural considerations, we reiterate the requirement to ensure that the secretariat is adequately resourced to support the Independent Examiner and encourage widespread awareness raising of the NCP among interested stakeholders.

We welcome your response to the points we highlight in this paper and are available to discuss any questions or concerns you might have.

Yours sincerely,



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ACAN Representative – AusNCP Advisory Board



Dr. Joseph Wilde-Ramsing, Ph.D.
OECD Watch Coordinator

This submission has been endorsed by the following ACAN members:

Australian Lawyers for Human Rights (ALHR)

Australasian Centre for Corporate Responsibility (ACCR)

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