



Independent Review

Australian National Contact Point under the OECD Guidelines for Multinational Enterprises

Australian National Contact Point – Independent Review 2017

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1. Executive Summary: Key Findings and Recommendations

1.1 Key Findings

The Australian Government has various legally binding commitments under the Decision of the OECD Council (OECD Council's Decision) relating to the OECD Guidelines for Multinational Enterprises (Guidelines).¹

These obligations include establishing and appropriately resourcing a National Contact Point and ensuring the business community, worker organisations, non-governmental organisations and other interested parties are informed about the Guidelines and the availability of the National Contact Point.²

Currently, the Australian National Contact Point (ANCP) is falling short of fulfilling these commitments and, across a range of indicators, is ranked among the poorest performing National Contact Points (NCPs) internationally.

As this report outlines, the Independent Review has evaluated the effectiveness of the current ANCP structure against thirteen criteria, including the OECD's core criteria of visibility, accessibility, transparency and accountability;³ and the guiding principles for specific instances (that NCPs will deal with complaints in a way that is impartial, predictable, equitable and compatible with the principles and standards of the Guidelines).⁴ Against each of these criteria – and five other criteria determined by the Independent Review to be key indicators of effectiveness⁵ – the ANCP is significantly lacking.

Over time there has been a clear move away from monopartite NCPs towards either a multiagency or independent structure. Comparing the experiences and successes of other countries' NCPs with those of the ANCP, is highly instructive. While NCPs have great potential to provide victims of corporate abuses under the Guidelines with access to remedy, at the same time, it is important to acknowledge the limitations of the NCP process and the fact that no one NCP structure offers a panacea. Despite this, the Independent Review concludes that by transitioning from Australia's current monopartite structure within Treasury, to a more independent model would address many of the deficiencies the Review identifies in this Report. To be successful, any restructure must be accompanied by adequate funding and support, both at the ministerial and bureaucratic levels.

The Australian Government is currently progressing important initiatives as part of a whole-of-government strategy to implement its commitments under the UN Guiding Principles on Business and Human Rights. Strengthening the ANCP by ensuring that it is properly resourced, and as independent, transparent and effective as possible, is one of the best ways the Government can practically

¹ *Decision of the Council on the OECD Guidelines for Multinational Enterprises*, 27 June 2000 (amended 25 May 2011) (OECD Council's Decision): C(2000)96/FINAL. Note: The OECD Council's Decision on the Guidelines imposes legally binding obligations on Australia. Meanwhile, the Guidelines themselves are non-binding principles and standards to assist with the implementation of the Council's Decision. For more information, see section 4 below.

² OECD Council's Decision, [(1)].

³ Procedural Guidance to the OECD Council's Decision, [I].

⁴ Procedural Guidance to the OECD Council's Decision, [I(C)].

⁵ These criteria are outlined in detail in section five. They are: resourcing; confidence of social partners and other stakeholders; complaints/mediation expertise; subject matter expertise; and policy coherence.

implement its commitments under the UN Guiding Principles and the Guidelines. Failing to do so, risks undermining whole-of-government strategy in this area.

1.2 Summary of Recommendations⁶

Recommendation 1

1. Implement an independent NCP, assisted by a government-based secretariat located in the Department of Foreign Affairs and Trade (DFAT). The NCP would be comprised of: an expert panel of three to five members; a secretariat; and an advisory group, consisting of government and non-government members.

Recommendation 2

2. *Only if recommendation 1 is rejected*, implement a quadripartite NCP, comprising representatives from government, corporates, civil society and trade unions and chaired by DFAT.

Recommendation 3

3. Develop and implement revised operating procedures based directly on the Guidelines and Procedural Guidance.

Recommendation 4

4. Develop and implement a proactive engagement and promotion strategy based on international best practice for NCPs.

Recommendation 5

5. Assign a dedicated staff (as outlined at Recommendation 1) and a dedicated budget to the ANCP, sufficient to allow it to effectively perform its responsibilities.

⁶ The Independent Review's recommendations are set out in full at section 8.

2. Introduction

2.1 The Independent Review

On 7 June 2017, Alex Newton was appointed by the Treasury to conduct an Independent Review of the ANCP under the Guidelines. This final report comprises the Independent Review's findings and recommendations to Treasury.

The broad purpose of the Review was to examine the Australian Government's commitments and obligations under the Guidelines and to assess how the ANCP function should be structured to meet its obligations and fit within whole-of-government strategy. The Terms of Reference for the Review are at [Annexe A](#).

The outcomes of the Review may also be used to inform the OECD's National Contact Point Peer Review, a voluntary process in which Australia is currently scheduled to participate in 2019.

2.2 Methodology

On commencing the Review, the Independent Reviewer examined relevant information, including: materials provided by the ANCP (consisting of both public and classified documentation)⁷; the ANCP's website and publications; OECD publications; NGO and academic publications on the ANCP, specifically, and on NCPs, more broadly; and publications of the UN Working Group on Business and Human Rights relating to access to remedy.

Following this, a consultation strategy was prepared detailing the planned consultation process that would be followed, its rationale, objectives and methods.

Relevantly, the Terms of Reference provide that:

“The independent reviewer will seek input from other stakeholders including academics, NGOs and large Australian-based multinationals captured by the Guidelines. There will be close consultation with other Australian Government agencies via the ANCP Oversight Committee.”

Despite the relatively short time frame for the Review,⁸ it was critical to the integrity and outcomes of the process that an inclusive approach was adopted to consultation. Accordingly, the Reviewer conducted extensive consultations with government and non-government stakeholders, including:

- a) Four consultation forums: two forums in Sydney (one for corporates and one for NGO/academic stakeholders, respectively); and two forums in Melbourne (for corporates and NGO/academics, respectively). Treasury jointly hosted the forums with the Reviewer. At each forum, Treasury officials presented a brief overview of the ANCP's work and the Guidelines, and were available to answer any questions raised by participants. Otherwise, Treasury officials attended the forums in an observer capacity.
- b) An online consultation mechanism, hosted by the ANCP's website. The online consultation remained open for four weeks – from 26 June until 21 July 2017. To foster accessibility and ease

⁷ The Independent Review received authority from Treasury to access this material.

⁸ The Independent Review was conducted over the course of three months: from 7 June to mid-September 2017.

of response, nine questions (based on the Terms of Reference) were included in the online consultation form. Some stakeholders chose to make a submission directly framed around the Terms of Reference instead of responding to the online consultation form. This was equally acceptable and useful to the Review process. The online consultation was broadly promoted on Treasury's and DFAT's websites; on social media by the Attorney-General's Department (Twitter) and by the Australian Human Rights Commission (Facebook); through the UN Global Compact Network Australia's newsletter; and by the OECD secretariat to the NCP network. The online consultation questions and a list of the submissions received are at [Annexe B](#).

- c) Meetings with Australian Government officials (past and present) from the Treasury; Department of the Prime Minister and Cabinet (PM&C); DFAT; Attorney-General's Department (AGD); Australian Trade and Investment Commission (Austrade); Department of Industry, Innovation and Science; and Department of Employment. The Reviewer also interviewed three former ANCPs: Mr Gerry Antioch, Ms Sam Reinhardt and Mr Rob Donnelly.
- d) Attendance at the Oversight Committee's meeting in Canberra on 19 July 2017.
- e) Interviews with other NCPs including: the Norwegian NCP; the New Zealand NCP; and a former member of the UK NCP's Steering Board.
- f) Interviews with leading experts on NCPs domestically and internationally, including with senior officials and staff at: the OECD, the UN Working Group on Business and Human Rights, OECD Watch, the Trade Union Advisory Committee, Transparency International and other leading NGOs.

A list of stakeholders consulted is at [Annexe C](#).

In addition to the consultation process outlined, extensive desk-based research was also conducted throughout the Independent Review.

2.3 Structure of the Report

This report is structured around the Terms of Reference, while also addressing additional contextual and substantive issues where relevant.

Section three provides an overview of the ANCP's current structure, including its history, institutional framework, resources and staffing, review mechanisms and reporting.

Section four outlines the Australian Government's commitments and obligations under the Guidelines and the extent to which these are legally binding.

Section five evaluates the effectiveness of the current ANCP structure against relevant criteria, including the OECD's core criteria and the guiding principles for specific instances, as set out in the Procedural Guidance.

Section six evaluates how the ANCP compares with NCP structures in other OECD countries, including resourcing and international best-practice.

Section seven examines the most suitable area of Government to effectively perform the ANCP function. As part of this, the ANCP's role within whole-of-government strategy is considered, along with the ANCP's two core functions: (i) promotion of the Guidelines; and (ii) the ability to successfully manage specific instances (or complaints).

Section eight sets out the Independent Reviewer's recommendations to Treasury.

Section nine addresses monitoring and implementation of the Independent Review's recommendations.

3. An Overview of the ANCP's Structure

3.1 History

In 2000 work began to establish the ANCP in the Business Review Unit of the Foreign Investment and Trade Policy Division in Treasury. The Australian Government conducted consultations on the best administrative structure for the ANCP, both before it was established and, again, in 2002.

Promotion

In 2002, the ANCP's [website](#) was launched, promoting the Guidelines and providing information on how specific instance complaints can be lodged. The Foreign Investment Review Board's website also promotes the Guidelines on its "Investor obligations" page. In its early years, it seems that the ANCP met biannually with stakeholders from different sectors in Melbourne and Sydney. Less formally, Treasury officials refer to the Guidelines when engaging with business stakeholders. Other agencies, in particular, DFAT and AGD, also promote the Guidelines to their stakeholders.

While the ANCP has continued to host events from time to time in subsequent years, it appears that the ANCP's commitment to – and the quality of – promotion and stakeholder engagement has varied depending on the approach taken by the senior official performing the ANCP role at the time.

Other than informal working documents, the Reviewer could not locate any records of formal promotional plans on the Guidelines by the ANCP. Notably, the OECD's 2016 Annual Report records that in 2016 the ANCP did not organise, co-organise, or participate in any events to promote the Guidelines.⁹

Specific instances

In 2005, the ANCP received its first specific instance complaint against GSL (now G4S plc) relating to GSL's contract with the Australian Government to provide immigration detention services.

To date, the ANCP has handled 16 specific instance complaints. This includes five complaints that are still ongoing as at September 2017; and 3 complaints that were transferred to other NCPs.¹⁰ Of the remaining 8 complaints, 3 involved mediation.

⁹ OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2016* (2017), p41
<http://www.oecd.org/daf/inv/mne/2016-Annual-Report-MNE-Guidelines-EN.pdf>

¹⁰ This excludes transfers and advice on complaints led by other NCPs.

3.2 Institutional Framework

NCP

The ANCP role is held by a senior executive in the Foreign Investment Division of Treasury: currently Ms Victoria Anderson.

Secretariat

The ANCP is supported by a secretariat, located in the same Division. The size of the secretariat has fluctuated over the years from approximately 0.7 full-time equivalent (FTE) staff members to almost 1.5 FTE staff currently.

Oversight Committee

The Oversight Committee was established in November 2012 to oversee and monitor the effectiveness of the ANCP, and to provide guidance on procedural matters. While the Oversight Committee does not make decisions on specific instances, it is empowered to consider requests for review of specific instance decisions on procedural grounds only. (The review process is discussed in more detail at section 3.4 below).

The Oversight Committee is chaired by the ANCP and includes representatives from the following agencies:

- Department of Foreign Affairs and Trade (DFAT)
- Department of Industry, Innovation and Science
- Department of Employment
- Australian Trade and Investment Commission (Austrade)
- Attorney-General's Department (AGD)
- Department of Immigration and Border Protection (DIBP)
- Export Finance and Insurance Corporation (EFIC), and
- Other departments, as relevant.

The ANCP's website states that "the Oversight Committee will aim to operate in an open and transparent manner" and "[e]xcept when confidential matters are concerned (for example, in the case of private or personal matters or business sensitive information being discussed) minutes of Oversight Committee meetings will also appear on the ANCP website." Currently no Oversight Committee meeting minutes are available on the ANCP's website.¹¹ Treasury has advised the Review that the reason for this is the sensitive nature of the material.

The ANCP's website also states that: "The Oversight Committee meet biannually (at a minimum) or more often if the Oversight Committee Chair considers it appropriate." While in 2017 and 2016, the Committee met twice, in earlier years (from 2012 to 2015) it appears to have met less often – generally once per year formally and offline informally.

¹¹ ANCP's website, accessed on 17/8/17. No Oversight Committee meeting minutes were available on this date: <http://www.ausncp.gov.au/content/Content.aspx?doc=publications.htm>

3.3 Resources and staff

The ANCP has no dedicated budget or staff. Based on Treasury records, it appears that this has been the case since the function was established. The ANCP's costs relating to staffing, travel, mediation, translating services and other administrative matters are met within the Foreign Investment Division's annual budget.

Currently, the ANCP is resourced by approximately 1.5 FTE staff members. This includes the ANCP decision-maker plus the secretariat, and is shared over four individuals all working on the function part-time. It comprises 2 APS-level employees, 1 Executive-level employee and 1 Senior Executive-level employee. These staff members undertake their ANCP duties alongside their other Foreign Investment Division policy-related responsibilities.

Over 20 different APS or Executive-level staff have worked on ANCP issues between 2012 and 2017, with rarely more than 0.7 FTE staff at any one time. In the period from 2002 to 2017, approximately nine senior executive officials in total have held the role of the ANCP at different times.

Until early 2017, the ANCP role (as distinct from the ANCP secretariat) was performed by the General Manager (or Division Head) of the Foreign Investment Division. This person was also an Executive Member of the Foreign Investment Review Board (FIRB). In early 2017, the decision was taken to appoint a Principal Advisor, Ms Victoria Anderson, to the role of the ANCP, rather than the Division Head (who the Principal Advisor reports to). This change, combined with the increase in staffing described above (from approximately 0.7 to 1.5 FTE), was intended to improve operational efficiencies, specific instance timelines, access to decision-makers and to facilitate this review. The change also responds to significant increases in specific instances lodged in recent years.

3.4 Review mechanisms

Under the ANCP's current structure, a party to a specific instance may request a review of the ANCP's decision in their matter where either: (i) the ANCP does not accept a specific instance in its initial assessment; or (ii) following the conclusion of a complaint and the issue of the final statement to the parties. Notably, many NCP structures in other countries do not have review mechanisms in place.¹²

The ANCP's review process only considers procedural errors in the ANCP's decision-making. There is no mechanism to seek a review based on the merits of a decision.

The request for review must be made in writing within 10 working days of the date of the ANCP's final statement; or, in the case of a specific instance that is declined at the initial assessment stage, within 10 working days of the parties being notified of the ANCP's decision. The ANCP's website states that: "The final recommendation approved by the Oversight Committee will normally be published promptly on the ANCP website."¹³

The Review Panel will be comprised of members of the Oversight Committee, with a quorum of three. The ANCP herself, who chairs the Oversight Committee, would not sit on a Review Panel. Notwithstanding this fact, the Independent Review considers that the ANCP's closeness to the review

¹² As of January 2016, only six NCPs had oversight bodies in place. *Implementing the OECD Guidelines for Multinational Enterprises: the National Contact Points from 2000 to 2015* (Key Findings), 2016, p7.

¹³ ANCP's website, accessed on 18/8/17:

<http://www.ausncp.gov.au/content/Content.aspx?doc=anncp/reviewing.htm>

process, combined with the fact that the ANCP secretariat also performs the secretariat role for the Oversight Committee, creates potential conflicts of interest and may compromise the independence of the review process.

Further, as noted in Adjunct Professor Cullen's submission to the Independent Review, "[e]ven if a review panel finds procedural error and makes recommendations to the Oversight Committee, it is not inevitable that the specific instance will be reconsidered. One option for the Committee is to 'acknowledge that there were deficiencies in the ANCP process in the Specific Instance and make recommendations as to how those errors can be avoided in the future.'"¹⁴

The Independent Review shares Adjunct Professor Cullen's concerns, and recommends that addressing each of these deficiencies in the ANCP's structure (as it relates to the review process) would enhance the ANCP's effectiveness and that of the Oversight Committee.

On record, only one appeal has been considered by the Oversight Committee to date: on 2 July 2015, the Human Rights Law Centre and Rights and Accountability in Development (RAID) appealed the ANCP's rejection of the specific instance complaint brought against G4S, the company contracted by the Australian Government to operate the Manus Island Regional Processing Centre.¹⁵ The Independent Review understands that the appeal has been finalised but is unpublished at the date of this Report.

3.5 Reporting

The Procedural Guidance (attached to the OECD Council's Decision) outlines the expectation that adhering countries will report annually to the OECD Investment Committee.¹⁶

The ANCP's first Annual Report to the OECD was provided in 2003/4. Subsequently, the ANCP has submitted Annual Reports to the OECD in 2008/9, 2012/13, 2013/14, 2014/15 and 2016. The level of detail in each year's report has varied.

It is unclear why there have been significant gaps in reporting, despite the fact that activities were occurring at the ANCP in these intervening years. It is possible that this may be explained by poor record keeping or that the omissions occurred during periods of staff turnover at the ANCP. It is also unclear why so few reports have been made publicly available on the ANCP's website.¹⁷ While it is possible that some reports may contain case-sensitive information, it seems unlikely that this concern has negated public reporting in all years except 2008/09: the one annual report currently available on the ANCP's website.

Similarly, reporting on the ANCP's work in Treasury's Annual Reports has also been mixed. Based on a review of Treasury's Annual Reports for the past five years, references to the ANCP's activities are either minimal or absent. For example:

- In 2015/16: there was no reference to the ANCP in the Annual Report.

¹⁴ Professor Holly Cullen, University of Western Australia, submission to the Independent Review, July 2017, p11.

¹⁵ Human Rights Law Centre website, accessed on 18/9/17: <https://www.hrlc.org.au/news/australian-national-contact-point-rejects-complaint-against-g4s?rq=ANCP%20decision>

¹⁶ OECD Council's Decision, Procedural Guidance, I(D)1.

¹⁷ Currently only the ANCP's Annual Report to the OECD from 2008-2009 is available on the ANCP's website.

- In 2014/15: there was a very brief mention of the ANCP. The Annual Report states: “The Division contributed to the work of the OECD Investment Committee, and is the home of the Australian National Contact Point for the OECD Guidelines.”¹⁸
- 2013/14: there was a very brief mention of the ANCP: “Markets Group also contributed to the work of the OECD Investment Committee, and is the home of the Australian National Contact Point for the OECD Guidelines for Multinational Enterprises. Additional information on this role is provided at www.ausncp.gov.au.”¹⁹
- 2012/13: there was a slightly longer reference to the ANCP: “In 2012-13, the Australian National Contact Point received one specific instance complaint under the guidelines. This complaint concerned the operation of an Australian mining company in the Eastern Cape region of South Africa. The ANCP was not able to accept the matter as a specific instance complaint under the guidelines.”²⁰
- 2011/12: there was a reference to the ANCP receiving one specific instance complaint that year – which was transferred to the Chilean National Contact Point.²¹

As illustrated by the summary above, none of these entries in Treasury’s Annual Reports for the past five years provides any substantive insights into the work of the ANCP.

Further, unlike many other countries’ NCPs, the ANCP does not have any structures or procedures in place to report to the Australian Parliament.

Regular reporting at both the international and domestic levels is an important way that NCPs can demonstrate transparency and accountability. Transparency and accountability are two of the OECD’s four core criteria (along with visibility and accessibility) that should be incorporated into all NCP structures. Accordingly, the Independent Review encourages the ANCP to consider the current reporting mechanisms built into its structure, how these are implemented in practice, and improvements that can be made in the future.

¹⁸ Australian Treasury, 2014/15 Annual Report, (under the heading “Foreign Investment”), p48:
[http://annualreport.treasury.gov.au/files/2015/10/Treasury Annual Report 2014-15 Complete.pdf](http://annualreport.treasury.gov.au/files/2015/10/Treasury%20Annual%20Report%202014-15%20Complete.pdf)

¹⁹ Australian Treasury, 2013/14 Annual Report, p50:
<http://www.treasury.gov.au/~media/Treasury/Publications%20and%20Media/Publications/2014/Treasury%20AR%202013%2014/Downloads/PDF/Treasury%20Annual%20Report%202013-2014.ashx>

²⁰ Australian Treasury, 2012/13 Annual Report, p61:
[http://www.treasury.gov.au/~media/Treasury/Publications%20and%20Media/Publications/2013/Treasury%20Annual%20Report%202012%202013/Documents/Treasury annual report 2012-13.ashx](http://www.treasury.gov.au/~media/Treasury/Publications%20and%20Media/Publications/2013/Treasury%20Annual%20Report%202012%202013/Documents/Treasury%20annual%20report%202012-13.ashx)

²¹ Australian Treasury, 2011/12 Annual Report, p77:
[http://www.treasury.gov.au/~media/Treasury/Publications%20and%20Media/Publications/2012/Treasury%20Annual%20Report%202011%202012/Documents/Treasury annual report 2011-12.ashx](http://www.treasury.gov.au/~media/Treasury/Publications%20and%20Media/Publications/2012/Treasury%20Annual%20Report%202011%202012/Documents/Treasury%20annual%20report%202011-12.ashx)

4. The Australian Government's commitments and obligations under the OECD Guidelines

"The Australian Government has made a range of legally binding commitments under the OECD Guidelines. The ANCP currently does not meet all of these commitments and, across a range of indicators, is unfortunately ranked among the poorest performing NCPs internationally.

Many NCPs were reformed after the OECD Guidelines' review in 2011. However, the Australian NCP has never adapted to the revised procedures. I welcome the Independent Review of the ANCP and encourage the Australian Government to take urgent steps to improve the effectiveness of the ANCP."

Professor Roel Nieuwenkamp, Chair of the OECD Working Party on Responsible Business Conduct (August 2017)

4.1 What commitments have been made?

Legally binding commitments²²

The Decision of the OECD Council (the OECD's governing body) on the Guidelines dated 27 June 2000 (and amended on 25 May 2011) imposes legally binding obligations on Australia. Meanwhile, the Guidelines themselves are non-binding principles and standards to assist with the implementation of the Council's Decision.

By way of background: the Guidelines were adopted in 1976 as part of the OECD Declaration on International Investment and Multinational Enterprises (the Investment Declaration). All governments adhering to the Investment Declaration are also required to adhere to the Council's Decision on the Guidelines.²³

The Council's Decision requires the Australian Government to:

- a) establish an NCP to further the effectiveness of the Guidelines by undertaking promotional activities, handling enquiries and contributing to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances.
- b) co-operate with NCPs in other countries if the need arises, on any matter related to the Guidelines relevant to their activities.

²² No part of this report should be taken as legal advice. The Australian Government should seek and rely on its own legal advice in these matters.

²³ Council Decisions are legally binding on all those Member countries which do not abstain at the time they are adopted. While they are not international treaties, they do entail the same kind of legal obligations as those subscribed to under international treaties and members are obliged to take the measures necessary to implement such decisions: *Convention on the Organisation for Economic Cooperation and Development*, signed 14 December 1960, [1971] ATS 11 (entered into force 30 September 1961). See also: OECD website, accessed on 28/7/17: <https://www.oecd.org/legal/legal-instruments.htm>

- c) meet regularly to share experiences and report to the Investment Committee.
- d) make available human and financial resources to their NCP so that they can effectively fulfil their responsibilities, taking into account internal budget priorities and practices.²⁴

The Procedural Guidance attached to the Council’s Decision gives adhering countries significant flexibility in determining the institutional arrangements for their NCPs. It sets out the OECD’s expectation that: “NCPs will operate in accordance with the core criteria of visibility, accessibility, transparency and accountability to further the objective of functional equivalence.”²⁵ In addition, it provides the guiding principles for specific instances: that NCPs will deal with complaints “in a manner that is impartial, predictable, equitable and compatible with the principles and standards of the Guidelines.”²⁶

Given that the Procedural Guidance uses the language of “will,” rather than “shall,” it appears that it is not intended to be legally binding. Instead, it imposes an obligation on OECD Member States to “take account” of it in the fulfilment of paragraphs I(1) – (4) of the Council’s Decision.

Accordingly, the Council’s Decision is the only OECD instrument governing NCPs that imposes legally binding obligations on Australia.

Non-legally binding commitments

While not legally binding, senior members of the Australian Government have recently made undertakings relating to the Guidelines and NCPs. These include:

- a) Support for the 2017 [OECD Ministerial Council Statement](#) (chaired by Denmark and vice-chaired by Australia and the UK). This states: “We commit to having **fully functioning and adequately resourced National Contact Points**, and to undertake a peer learning, capacity building exercise or a peer review by 2021, with the aim of having all countries peer reviewed by 2023” (emphasis added).²⁷
- b) Support for the [G20 Leaders’ Declaration in July 2017](#). The Declaration states: “Those countries that adhere to the OECD Guidelines for Multinational Enterprises (OECD MNE Guidelines) **commit to fostering them and welcome others to follow**... We support access to remedy and, where applicable, non-judicial grievance mechanisms, such as the National Contact Points” (emphasis added).²⁸
- c) Support for the [2017 G20 Labour and Employment Ministerial Declaration](#). This includes the commitment that: “Countries amongst us that adhere to the OECD Guidelines **will strengthen and increase the visibility of the OECD National Contact Points**.”²⁹

The statement and declarations above are unlikely to be enforceable in any legal sense. Despite this, by making repeated, public statements actively supporting and fostering fully-functioning, effective and

²⁴ OECD Council Decision, C(2000)96/FINAL, paragraph 1 (1.1 to 1.4).

²⁵ Procedural Guidance attached to OECD Council Decision, as cited above, I.

²⁶ As above, C.

²⁷ Meeting of the OECD Council at Ministerial Level, 7/8 June 2017, paragraph 17.3.

²⁸ G20 Leaders’ Declaration: “Shaping an interconnected world,” Hamburg, 7/8 July 2017, page 4 – 5.

²⁹ G20 Ministerial Declaration: “Towards an Inclusive Future: Shaping the World of Work,” Germany, 18/19 May 2017, p8.

adequately resourced NCPs, senior members of the Australian Government are evincing their intention to do so. Accordingly, the Review expects that the Government will face ongoing scrutiny and criticism on these matters if its actions in relation to the ANCP do not match its public statements.

5. Evaluate the effectiveness of the current ANCP structure

“Over time, the ANCP has declined from being one of the better performing NCPs globally to being one of the very worst. We’ve seen a decline in everything: transparency, accessibility, sharing of information, the timeliness of handling specific instances, stakeholder engagement and promotional activities.

A particular problem has been the high turnover of officials performing the ANCP role: since 2002, there have been nine officials in the role at different times. The ANCP role has never been given adequate priority or status – it’s always been bolted on to the role of the General Manager of the Foreign Investment Review Board. Former ANCP Patrick Colmer publicly stated in Brussels that less than one per cent of his time and budget was allocated to the NCP.”

Ms Serena Lillywhite, CEO, Transparency International Australia (August 2017)

Section five evaluates the effectiveness of the current ANCP structure against a set of thirteen criteria developed by the Independent Review: see Table A. These criteria include the OECD’s core criteria and the guiding principles for specific instances, as set out in the Procedural Guidance attached to the Council Decision.³⁰ They also reflect UN Guiding Principle 31: Effectiveness criteria for non-judicial grievance mechanisms, which were incorporated in the Guidelines as part of their 2011 Review.

In addition, the criteria incorporate five other factors that the Review has identified as being essential to an effective NCP.³¹ These criteria take into consideration feedback from the Review’s consultations with government, corporate and civil society stakeholders, and broader research on NCP best practice. They are: adequate resourcing;³² the confidence of social partners and other stakeholders,³³ complaints/mediation expertise; subject matter expertise; and policy coherence. These criteria will also be considered in section 7: the most suitable area of government to perform the ANCP function.

³⁰ OECD Guidelines for Multinational Enterprises (2011). Section I.22 in the Commentary on the Implementation Procedures. [See Table A: Core Criteria: 1 – 4; Guiding Principles for Specific Instances: 5 – 8].

³¹ See Table A: Additional criteria: 9 – 13.

³² OECD Council’s Decision, 27 June 2000 (amended on 25 May 2011) stated: “Adhering countries shall make available human and financial resources to their National Contact Points so that they can effectively fulfil their responsibilities, taking into account internal budget priorities and practices.” In addition, the 2017 OECD Ministerial Council Statement (chaired by Denmark and vice-chaired by Australia and the UK), para 17.3 stated: “We commit to having fully functioning and adequately resourced National Contact Points, and to undertake a peer learning, capacity building exercise or a peer review by 2021, with the aim of having all countries peer reviewed by 2023.”

³³ Commentary on the Procedural Guidance, page 80, para 10: NCP leadership should be such that it retains the confidence of social partners and other stakeholders, and fosters the public profile of the Guidelines.

Given the complexity of the Independent Review’s task, no framework can be considered perfect or all-encompassing. However, the thirteen criteria provide an appropriate and an objective (as possible) template against which to evaluate the effectiveness of the current ANCP structure.

In applying the criteria to evaluate the effectiveness of the ANCP structure, the Independent Reviewer has analysed the ANCP’s operation in theory as well as practice. “Effectiveness” is defined as “the degree to which something is successful in producing a desired result; success.”³⁴ Accordingly, consideration of the ANCP structure’s success in producing desired results (or its performance) is inextricable from a consideration of its effectiveness. In this context, it is important to note that aspects of the ANCP’s structure would seem, in theory, to provide a reasonable degree of transparency, accountability and predictability (among other criteria listed in [Table A](#)) – for example: the ANCP’s reporting commitments and review mechanisms. However, in terms of their implementation in practice, the Review considers that this is not always the case.

1. Visibility
2. Accessibility
3. Transparency
4. Accountability (legitimacy)
5. Impartial (↑independence; ↓conflicts of interest)
6. Predictable
7. Equitable
8. Compatible with the OECD Guidelines (rights-compatible)
9. Resourcing
10. Confidence of social partners and other stakeholders
11. Complaints/mediation expertise
12. Subject matter expertise
13. Policy coherence

Table A: Independent Review’s criteria for evaluating the ANCP’s structure and location

However, before the ANCP’s structure is examined against the criteria in [Table A](#), the NCP’s role and importance in the context of alternative mechanisms for redress will first be considered.

³⁴ Oxford English Dictionary, accessed online on 20/9/17.

5.1 The ANCP's role in the context of alternative mechanisms for redress

"Pillar three of the UN Guiding Principles on Business and Human Rights (Access to Remedy) remains the weakest in terms of its implementation by governments. Strengthening national contact points, and ensuring that they are as independent and effective as possible, is one of the best ways governments can practically implement their commitments under the UN Guiding Principles.

As part of the Australian Government's consideration of a National Action Plan on Business and Human Rights, I would urge it to significantly strengthen the ANCP, and to address the concerns raised by stakeholders in the independent review process regarding the ANCP's current lack of impartiality, independence, accessibility, transparency and policy coherence."

Mr Dante Pesce, Executive Director of the Vincular Center at the Catholic University of Valparaiso (Chile) and Member of the United Nations Working Group on Business and Human Rights (August 2017)

Pillar three of the UN Guiding Principles on Business and Human Rights provides that, as part of the State duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within its territory and/or jurisdiction, those who are affected have access to an effective remedy. The importance of state-based non-judicial grievance mechanisms, such as NCPs, is highlighted by UN Guiding Principle 27.

Allens Linklaters' April 2017 Report: *Stocktake on Business and Human Rights in Australia* (B&HR Stocktake) – which was commissioned by the Australian Government – identifies a suite of state-based non-judicial mechanisms for redress available in Australia. In addition to the ANCP, these include:

- complaints mechanisms made available by the Australian and state/territory human rights commissions;
- the Fair Work Commission's dispute resolution mechanisms;
- EFIC's grievance mechanism;
- state and territory Ombudsmen; and
- industry Ombudsmen (such as the Telecommunication Industry Ombudsman).³⁵

In addition, the B&HR Stocktake surveys non-state based grievance mechanisms that are supported or facilitated by the Australian Government at international and regional levels. These include:

- UN treaty body complaints mechanisms;
- complaints made to UN Special Rapporteurs and other UN special procedure mandate holders;
- investigations by the International Criminal Court;
- the World Bank Compliance Advisor Ombudsman; and
- industry level grievance mechanisms supported by the Australian Government.³⁶

³⁵ Allens Linklaters' *Stocktake on Business and Human Rights in Australia*, April 2017, p21 and pp100 – 103.

³⁶ As above, p22 and pp103 - 105.

Within the matrix of alternative mechanisms for redress, NCPs perform a crucial role and provide an essential avenue for complainants to seek remedy in relation to harms they may have suffered under the Guidelines. NCPs potentially offer numerous benefits as an alternative state-based method of dispute settlement. These include:

- a consensual and non-adversarial method of dispute resolution which is generally cheaper, faster, more flexible and more accessible to parties than legal proceedings.
- ease of complaint lodgement and broad formal rules of standing.
- unlike most state-based non-judicial mechanisms, NCPs can consider complaints arising internationally, such as those occurring in multinational companies' supply chains.
- NCPs can potentially address power imbalances between the parties to a complaint, and additional barriers to access faced by individuals or groups in situations of vulnerability or marginalisation.
- a high degree of legitimacy in findings because NCPs are state-based.

Recognising the unique benefits of NCPs, the Law Council of Australia's submission to the Review states:

"The Law Council considers that having an effective ANCP is critical as it represents the only non-judicial, low-cost mechanism that allows individuals and communities to seek redress for harm caused by Australian companies operating abroad, particularly those operating in non-OECD countries without their own NCP. More broadly, the Law Council considers that reforming the ANCP is an essential part of Australia aligning its strategy on business and human rights with international efforts."³⁷

Further, as submissions from both the Human Rights Law Centre and the Non-Judicial Human Rights Redress Mechanisms (NJHRM) Project highlight, for many communities and individuals harmed by Australian companies' operations overseas, the ANCP's importance is underlined by the fact that it may represent complainants' *only* means of raising grievances or seeking a remedy.³⁸ In many cases, they may "live in weak governance zones, or those plagued by bias or corruption, where the courts cannot be relied upon to deliver justice or simply cannot be accessed because there is no form of legal aid funding."³⁹

While the Independent Review considers that NCPs unequivocally play a critical and unique role in the context of state-based non-judicial grievance mechanisms, it also acknowledges that NCPs have certain limitations and do not provide a panacea for all harms caused by corporations. In the case of state-based NCPs (like the ANCP), the nexus with government generally enhances an NCP's legitimacy and fosters trust among its stakeholders. Yet, at the same time, many NCPs located within (or connected to) government have struggled to reconcile this relationship with their impartial role, for example in specific instances that negatively implicate either government policy or government actors in the corporate harms alleged. In the Australian context, this dilemma has arisen most frequently in relation to complaints brought against multinationals contracted by the Australian Government to provide immigration detention services.

³⁷ Law Council of Australia, submission to the Independent Review, July 2017, p5.

³⁸ Human Rights Law Centre, submission to the Independent Review, July 2017, p5; Non-Judicial Human Rights Redress Mechanisms (NJHRM) Project, submission to the Independent Review, July 2017, p3.

³⁹ Human Rights Law Centre, submission to the Independent Review, July 2017, p5.

Indeed, even for independent NCPs, such as the Norwegian NCP, navigating its relationship with government has been challenging in some specific instances. While the Norwegian NCP is widely regarded as an example of an exemplary NCP, its outgoing Chair, Dr Hans Petter Graver, claimed that the Norwegian Government's decision not to renew his mandate and to leave the NCP unstaffed for almost a year was "connected with" the NCP's handling of the 2013 Norwegian Bank Investment Management (NBIM) case (also known as the "POSCO case"). (NBIM is a state-owned enterprise which was found by the Norwegian NCP to have breached the Guidelines).⁴⁰ The Independent Review makes no judgement on the veracity of the former Chair's claims. However, it highlights this case as an example of the complex dynamics NCPs (both within and outside government) can face in navigating their interaction with government.

Further, in terms of its efficacy in providing access to remedy for complainants, the ANCP is certainly not alone in the difficulties it faces. In its 2015 Report, *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 found that: "NCPs have the potential to serve as a valuable tool in promoting responsible business conduct and ensuring access to remedy, but they are currently not meeting that potential."⁴¹ Further, the Report states that "the overwhelming majority of complaints have failed to bring an end to corporate misconduct or provide remedy for past or on-going abuses, leaving complainants in the same or worse position as they were in before they filed their complaint."⁴²

In its analysis of 250 complaints filed with NCPs over the course of fifteen years, OECD Watch revealed weaknesses throughout the NCP system including: practical and procedural barriers preventing complainants from lodging a complaint, a perceived lack of independence and impartiality of some NCPs, policies that prioritise confidentiality over transparency, nonconformity with procedural guidelines, and outcomes incompatible with the Guidelines.⁴³ The Independent Review agrees with OECD Watch's suggestion that addressing many of these issues systematically – for example through the Procedural Guidance to the Guidelines – would be highly beneficial for all NCPs.

Acknowledging the potential benefits *and* limitations of NCPs in the context of alternative mechanisms for redress, is useful background against which to consider the structure's effectiveness under the Review's criteria.

5.2 Analysis of the ANCP structure's effectiveness against the Independent Review's Criteria

In this section, the effectiveness of the ANCP's structure is analysed against the thirteen criteria identified above. At the outset, it is essential to note that while each criterion is important and useful to

⁴⁰ OECD Watch, submission to WPRBC, paragraph 6, March 2015, accessed on 21/9/17 at: http://www.forumfor.no/assets/docs/OECD-Watch-submission-to-WPRBC-March-2015_Norwegian-NCP.pdf The NCP's Final Statement in the case (dated 27 May 2013) is at: http://www.responsiblebusiness.no/files/2013/12/nbim_final.pdf

⁴¹ 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* (Remedy Remains Rare), June 2015, p5.

⁴² Remedy Remains Rare, p5.

⁴³ Remedy Remains Rare, p5.

consider discretely, there is inevitably a degree of overlap between some of the criteria and the issues that pertain to them. Accordingly, some issues will arise more than once in the sections below.

a) Visibility

Currently, the ANCP's visibility within and outside Government appears to be low. Feedback received through the stakeholder consultation process indicated that many people do not know that the ANCP exists. Even among stakeholders who are aware of the OECD Guidelines, and/or among those closely involved in the business and human rights or responsible business areas, there was often minimal or no knowledge of the ANCP or its role.⁴⁴ Likewise, within Government – other than officials directly involved in the ANCP's work through the Oversight Committee – awareness of the ANCP's function and work was generally very minimal. This echoes similar comments made about the Danish NCP which, before its review and restructure, was located exclusively in a government department which called it “the best kept secret in Denmark.”⁴⁵

It is likely that there are several reasons for the ANCP's poor visibility among stakeholders. These include the lack of promotional and stakeholder engagement activities carried out by the ANCP in recent years; the absence of a strategic promotional plan; its lack of visibility through its website which has limited information, is not updated regularly, and is difficult to locate, even via Treasury's website homepage; and the shortage of interconnections and policy coherence with policy areas across the Australian Government (to be discussed in more detail in section m) (policy coherence) below).

The visibility of the ANCP could be greatly enhanced by a targeted and strategic promotional and stakeholder engagement plan and through the re-design (and re-launch) of its website. More systemic changes to the ANCP's structure and location (as outlined below) to strengthen its connections to complementary areas of government policy and practice, for example the business and human rights area, would also improve its visibility among stakeholders and allow it to leverage existing activities already occurring in these areas.

b) Accessibility

According to UNGP 31 (Effectiveness criteria for non-judicial mechanisms), accessibility means that a non-judicial mechanism be known to all stakeholder groups for whose use it is intended, and provide adequate assistance for those who may face particular barriers to access. These barriers may include (among others): language, literacy, costs, physical location and fears of reprisal.⁴⁶

The ANCP has been strongly criticised as being deficient on this basis. NGOs, in particular, expressed their concern that for complainants in developing countries with few resources, technical knowledge, or expertise in the Guidelines, it can be difficult (and sometimes impossible) to access the ANCP's specific instance process without the assistance of a lawyer or NGO advocate.

In part, this has been attributed to the absence of translation services and to the fact that the ANCP's procedures and related documents on its website are only available in English. Added to this, some stakeholders suggested that a 'plain English' version of the specific instance procedures and other materials on the website would greatly improve the ANCP's accessibility to potential complainants.

⁴⁴ Corporate and NGO/academic consultations, 6, 7, 12 and 13 July 2017, Melbourne and Sydney.

⁴⁵ OECD, *Denmark NCP Voluntary Peer Review Report* (2011) 17 <<https://mneguidelines.oecd.org/Denmark-NCP-Peer-Review-2015.pdf>>.

⁴⁶ UN Guiding Principle 31. See also Commentary on the Implementation Procedures of the OECD Guidelines: I. (Core Criteria for Functional Equivalence in the Activities of NCPs).

Numerous stakeholders suggested that greater resources for fact-finding or investigations on the part of the ANCP (as provided by the Danish NCP, for example) would enhance accessibility for complainants. Given the distant location of many complainants in specific instances from the ANCP in Canberra and the resource-intensive nature of investigations and fact-finding missions, it is probable that this may not be feasible in practice – except in perhaps exceptional cases. Instead, the Independent Review supports lower cost measures, including updating the ANCP’s website to make it more user-friendly, providing information online in languages other than English, and facilitating videoconference or Skype calls with complainants and their representatives overseas (where meeting or mediation in-person is not feasible).

c) Transparency

As noted in the commentary to UNGP 31(e), “Communicating regularly with parties about the progress of individual grievances can be essential to retaining confidence in the process. Providing transparency about the mechanism’s performance to wider stakeholders, through statistics, case studies or more detailed information about the handling of certain cases, can be important to demonstrate its legitimacy and retain broad trust.”⁴⁷

For those stakeholders who have engaged with the ANCP’s specific instance process, significant concerns were expressed to the Review regarding the process’ transparency. One NGO representative said that, based on their organisation’s experience, the ANCP process was “almost completely opaque.”⁴⁸ Meanwhile, corporate representatives with experience of the specific instance process, said that the process could have been made clearer to them at the outset.⁴⁹

The monopartite structure of the ANCP is inherently problematic for ensuring transparency. Transparency appears to be a serious concern on a range of levels including: the ANCP’s policies and procedures; the outcomes (or lack of outcomes) in specific instance complaints; information flow between the ANCP and the respective parties to a complaint; and in the ANCP’s public reporting.

First, greater clarity and consistency in the ANCP’s policies and procedures was requested throughout the Review’s consultations. While the ANCP’s website sets out “[Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises](#),” it appears that there are many cases where the ANCP did not follow its own procedures in practice. For example: while the Procedures state that “the ANCP will aim to complete each Specific Instance within a year of receiving the complaint,” the average time taken to resolve complaints in Australia is almost twice this period at 22 months, with the longest time taken to resolve a complaint being 43 months.⁵⁰

Likewise, from time to time the ANCP appears to have rejected complaints for reasons falling outside the Guidelines and its own procedures. These include: where accepting the complaint would require comment on government policy; that the parties are unwilling to mediate; where the company has complied with domestic law and so is also assumed to have complied with the Guidelines; or the mere fact that there are parallel proceedings underway (without assessing any risks to those proceedings). However, in making this point, it should also be noted that under paragraph 20 of the ANCP’s procedures (which reflect the Commentary on the Implementation Procedures of the OECD Guidelines), the ANCP has significant discretion to consider a broad range of factors in making its initial assessment,

⁴⁷ Commentary to UN Guiding Principle 31(e). See also Commentary on the Implementation Procedures of the OECD Guidelines: I. (Core Criteria for Functional Equivalence in the Activities of NCPs).

⁴⁸ NGO and academic consultations, 7 and 12 July 2017, Melbourne and Sydney.

⁴⁹ Corporate consultations, 6 and 13 July 2017, Melbourne and Sydney.

⁵⁰ Information provided by Treasury to the Independent Reviewer, July 2017.

including “whether consideration of the Specific Instance would contribute to the purposes and effectiveness of the Guidelines.”⁵¹

The Human Rights Law Centre’s submission to the Independent Review claims there were a range of ways in which the ANCP did not follow its own policies and procedures in its management of the G4S case (brought in 2014 by the Human Rights Law Centre and Rights & Action in Development (RAID)). These include: taking nine months (that is, three times the expected time outlined in the ANCP’s procedures) to make an Initial Assessment regarding whether to accept the complaint for further investigation; not providing a revised timetable or reasons for the delay until six months later and only after being pressed by the complainant; rejecting the case for reasons they argue are unrelated to those in the Procedural Guidance; not sharing G4S’ response to the complaint with the complainant, or indeed any correspondence between the ANCP and G4S. In addition, the Human Rights Law Centre asserts that the ANCP did not provide the complainant with any information regarding whether there had in fact been a response, or any correspondence, from the company.⁵²

In addition to assertions that the ANCP’s policies and procedures were not followed in numerous cases, concerns were also expressed by some stakeholders that there are important issues on which the ANCP’s procedures are silent leading to a lack of clarity and confusion among prospective complainants. For example, various NGOs indicated to the Review that clarification regarding which multinational enterprises the ANCP process does and does not cover would greatly assist their determination of whether to commit resources to filing a specific instance with the ANCP.

Second, concerns were repeatedly raised regarding the ANCP’s reticence to publish the initial assessments or outcomes of specific instance complaints in many cases. For instance, where one or other party refuses to engage in the mediation process, or if mediation fails, the ANCP has the capacity under the Procedural Guidance (and under its own procedures) to conduct an examination of the case and to make a statement regarding whether the Guidelines have been breached.⁵³ The ANCP has not used this power to date. Several stakeholders argue that this “incentivises bad behaviour by companies and effectively penalises those trying to do the right thing.”⁵⁴

As the Law Council of Australia notes in its submission to the Review, other NCPs have used this function to positive effect in various cases. For example, the UK NCP issued an initial determination that a complaint about Formula One and potential human rights abuses in the lead-up to the Bahrain Grand Prix had merit. This caused Formula One to reverse a previously long-held position not to concern itself with human rights issues in countries where its races are held, and led to the creation of its first ever human rights policy.⁵⁵ Likewise, as noted in NJHRM Project’s submission, the UK NCP’s action in issuing a final statement in the complaint brought by Survival International against Vedanta (despite the

⁵¹ ANCP website, Procedures for dealing with complaints brought under the OECD Guidelines, accessed on 22 September 2017, para 20.3.3: <http://www.ausncp.gov.au/content/Content.aspx?doc=anpc/complaints.htm>

⁵² Human Rights Law Centre, submission to the Independent Review, July 2017, p8.

⁵³ ANCP website, Procedures for dealing with complaints brought under the OECD Guidelines, accessed on 27 August 2017, paras 47 - 52: <http://www.ausncp.gov.au/content/Content.aspx?doc=anpc/complaints.htm>

⁵⁴ Human Rights Law Centre, submission to the Independent Review, July 2017, p14.

⁵⁵ Law Council of Australia, submission to the Independent Review, July 2017, p19, citing 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) 17 <https://www.oecdwatch.org/publications-en/Publication_4201

company's refusal to engage in mediation, or with the NCP process, more broadly) resulted in Vedanta adopting a whole of company human rights policy.⁵⁶

Third, information flow between the ANCP and the respective parties to a complaint appears in some cases to have impeded the transparency of the process. It was argued (by both complainants and respondents to complaints) that more frequent and substantive communication with parties to complaints – for example through an online portal accessible through a secure system – would allow parties to stay up to date and to understand the progress of their matter and the reasons for any delays.

Fourth, the ANCP's public reporting has not always supported the transparency of the function. As outlined in section 3.5 (Reporting), the OECD Investment Committee expects that countries adhering to the Guidelines will report to it annually. In total, the ANCP has submitted annual reports to the OECD only six times in seventeen years. Currently, only one of the ANCP's reports to the OECD (from 2008/9) is available on the ANCP's website.

Similarly, reporting on the ANCP's work in Treasury's Annual Report has also been minimal and lacking in detail. For example, the Review has considered Treasury's Annual Reports for the past five years and has found references to the ANCP function to be either cursory in nature, or absent entirely. Given that this has been a relatively busy period in terms of the ANCP's specific instance caseload this seems incongruent. The Independent Review recommends that, in future, it would be appropriate for the ANCP to report on the details of promotional and stakeholder engagement activity undertaken over the course of the year. In addition, the annual report could note any specific instances finalised, initial assessments issued and appeals lodged. Lastly, it could comment on any emerging trends observed, along with upcoming challenges and initiatives for the future.

Lastly, there has been minimal transparency of the Oversight Committee's work and processes. Despite the ANCP's stated intention that the Oversight Committee should operate in an open and transparent manner (see section 3.2), in fact, this has not happened in practice. To date, very limited information is publicly available regarding the Oversight Committee's terms of reference, meeting dates, topics of discussion, matters under review, or minutes. Some of these details are necessarily confidential at different points in the process depending on the sensitivities involved and wishes of the parties to specific instances. Nonetheless, it is difficult to rationalise the lack of public information on the Oversight Committee's operations with the ANCP's stated intention that the body operate openly and transparently.

d) Accountability

Based on the Independent Review's analysis, the ANCP requires improvements in its structure to ensure greater accountability. This includes: in the management of specific instances; the review of specific instance decisions; and, overall, for evaluating (and monitoring) the ANCP's effectiveness.

While the ANCP's [Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises](#) outline time frames, policies and procedures for handling specific instances, there appear to be no repercussions for not following these procedures.

Second, as outlined at section 3.4 (Review Mechanisms), even if a procedural error is found by the Oversight Committee in the course of reviewing an ANCP decision, the decision will not necessarily be

⁵⁶ NJHRM Project, submission to the Independent Review, July 2017, p7.

reconsidered. Instead, the deficiency may merely be “acknowledged” and recommendations made as to how those errors can be avoided by the ANCP in the future. From a complainant’s or respondent’s perspective, this is likely to undermine confidence and trust in the validity of the ANCP process.

Third, the minimal nature of reporting by (or about) the ANCP further detracts from its accountability. As noted in section 3.5 and in section c)c) above, the limited number and extent of the ANCP’s Annual Reports to the OECD’s Investment Committee and in Treasury’s Annual Reports is very concerning and has contributed to the lack of public accountability for the function as stakeholders outside of government are not equipped with even basic information to assess the ANCP’s performance and effectiveness from year to year.

Stakeholders consulted by the Review consider that much better monitoring and evaluation is needed for the ANCP, including through more regular reporting to the OECD and improved metrics for measuring success.

In addition to better and more frequent reporting to the OECD and in the host agency’s Annual Reports, publishing Oversight Committee meeting minutes (in some form), initial assessment decisions, final statements or determinations, and decisions on review would greatly enhance the ANCP’s accountability.

e) Impartiality

The perceived partiality of the ANCP was repeatedly raised as a concern throughout the Review’s consultation process by NGOs, academics and corporate stakeholders. These concerns are based on both the structure and the location of the ANCP within Treasury.

First, in terms of the ANCP’s structure: until the appointment of the current ANCP, Ms Victoria Anderson, in early 2017, the ANCP role was held by the General Manager (or Division Head) of the Foreign Investment Division. This senior executive concurrently held the position of the Executive Member of the Foreign Investment Review Board (FIRB). Given FIRB’s role in advising the Treasurer and Government on foreign investment policy and applications to Australia, this has been perceived by many outside of government to be a conflict of interest with the ANCP role, and is of particular concern to complainants in specific instances. Treasury acknowledges these perceptions, but maintains that there have not been any actual conflicts of interest in the way the ANCP’s role has been undertaken. Further, the Independent Reviewer is not aware of any actual conflicts of interest between the ANCP and FIRB roles in specific instances to date.

Another structural issue that potentially compromises the ANCP’s independence (or its perceived independence), is the ANCP’s role as the Chair of the Oversight Committee. As noted above, the Oversight Committee oversees and monitors the effectiveness of the ANCP, and can consider requests for review of specific instance decisions based on procedural grounds. There appears to be a logical inconsistency with the ANCP herself heading the body that monitors the effectiveness of the NCP function. Further, in the event of a procedural review of a specific instance decision occurring, the ANCP’s closeness to the process as Chair of the Oversight Committee is highly problematic, even taking into account paragraphs 28 and 29 of the [Review Procedure](#) (Impartiality of Committee Members) – which disqualifies a Committee Member who has participated in the decision-making process of a complaint from participating in the Review Panel.

Second, in terms of the ANCP’s location in Treasury: many stakeholders consulted by the Review – particularly from the NGO sector, but also from the corporate sector – consider that Treasury’s strong

ties with business render it an inappropriate location to house the ANCP. Several participants gave examples where they allege that business was treated more favourably by Treasury in the context of specific instance complaints in comparison to the complainants involved. Without further information from the corporations involved, and from Treasury, the Independent Reviewer cannot test the veracity of these claims.

In relation to impartiality, the Australian Lawyers for Human Rights' submission to the Independent Review stated:

“The current structure of the ANCP does not lend itself to impartial handling of complaints. Commentators including Professor John Ruggie (author of the UNGPs), have pointed to the potential conflict of interest that arises where NCPs are located solely within government agencies, especially agencies relating to the promotion of business and trade.”⁵⁷

In addition to concerns about the ANCP's perceived partiality in favour of business, stakeholders consulted by the Review also raised their concerns about the ANCP's handling of complaints where there is a conflict of interest with Australian Government policy. This is not only a problem for the ANCP, but potentially for all NCPs located within governments which are asked to determine specific instance cases involving multinational corporations contracting with their home governments.

In the Australian context, this problem has been most salient in complaints regarding multinational enterprises contracted by the Australian Government to provide services to Australian immigration detention centres. To date, the issue has arisen in several specific instance complaints to the ANCP, including the following:

- (i) in 2005/6 in the complaint against GSL brought by the Human Rights Council of Australia and others;
- (ii) in 2014/15 in the complaint against G4S brought by the Human Rights Law Centre and Rights & Action in Development; and
- (iii) in a 2015 complaint against SERCO Group brought by Professor Ben Saul, University of Sydney.

In the ANCP's Final Statement in the SERCO complaint, published on 10 August 2017, the ANCP stated, “Although the issues raised could be material and substantive, weight has been given to whether the consideration of the Specific Instance will contribute to the purposes and effectiveness of the OECD Guidelines.”⁵⁸ It also states that: “A range of complex policy and national security considerations underpin this arrangement.”⁵⁹

As no other reasons are provided for why the ANCP considers that the purposes and effectiveness of the Guidelines would not be furthered by proceeding to a full assessment of this complaint, the underlying rationale for the decision is unclear to the Independent Review. It is possible that the reference to complex policy and national security considerations may underscore a fundamental reason for the

⁵⁷ Benedict Coyne and Lauren Zanetti, Australian Lawyers for Human Rights (ALHR), submission to the Independent Review, July 2017, p5 at para 3.2.2.

⁵⁸ ANCP Final Statement, Specific Instance complaint against Serco Group, 10 August 2017, para 22.

⁵⁹ As above, para 24.

complaint's rejection, despite the ANCP's acknowledgement that the issues it raises may be material and substantive.

Likewise, in the complaint brought against G4S, the ANCP explained its rejection of the complaint by commenting that:

"G4S as a service provider is not accountable for government policy and other mechanisms exist for review and scrutiny of policy. The ANCP is not the most appropriate vehicle for resolution of such matters. It is not the role of the ANCP to issue commentary, whether intended or otherwise, on government policies or law."⁶⁰

Notably, Professor Roel Nieuwenkamp, Chair of the OECD Working Party on Responsible Business, has observed:

"The ANCP tried not to get involved in a specific instance where there may be a link with Australian Government policy. In avoiding to get involved in these cases, the ANCP was basically implying it was not impartial, which is a legally binding criteria for NCPs."⁶¹

In each of the three cases above, the ANCP's refusal to accept complaints (either in full or in part) where there was a conflict with Australian Government policy, underscores the ANCP structure's intrinsic limitations in handling specific instances of this kind. This should not be interpreted in any way to be a criticism of the government officials managing these specific instances (or of the ANCP herself). Instead, it demonstrates the imperative for restructuring the ANCP to an independent decision-making structure while maintaining its linkage to government.

Overall, for the reasons outlined, the Review concludes that the ANCP's current structure and location in Treasury's Foreign Investment Division undermines its independence. Moving to an independent decision-making structure comprised of a panel of experts, supported by a government-based secretariat, would address many of the issues identified above. This recommendation is widely supported by corporate and NGO stakeholders consulted by the Review, the majority of whom indicated their preference for an independent NCP, either outside of government or with a government-located secretariat. However, if the function were to stay within Government, stakeholders broadly support the involvement of multi-stakeholder actors (business, NGOs, trade unions and academics) in either an advisory, decision-making, oversight or review capacity.

f) Predictability

The UN Guiding Principles specify that a predictable mechanism should provide a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation.⁶² As part of this, time frames for each stage should be respected wherever possible, while allowing that flexibility may sometimes be needed.⁶³

Similarly, the Commentary on the Procedural Guidance provides that: "NCPs should ensure predictability by providing clear and publicly available information on their role in the resolution of specific instances, including the provision of good offices, the stages of the specific instance process

⁶⁰ ANCP Statement, Specific Instance complaint against G4S Australia, 10 June 2015.

⁶¹ Professor Roel Nieuwenkamp, Chair of the OECD Working Party on Responsible Business, Interview, August 2017.

⁶² UN Guiding Principle 31(c).

⁶³ Commentary to UN Guiding Principle 31(c).

including indicative timeframes, and the potential role they can play in monitoring the implementation of agreements reached between the parties.”⁶⁴

Currently, predictability of the ANCP’s structure and process is very low. As noted above, there are many instances where the ANCP’s policies and procedures have not been followed. For example, it appears to be the exception (rather than the rule) that its indicative timeframes are met.

Likewise, at stage one of a specific instance complaint (from receipt of the complaint to initial assessment), the ANCP’s application of the grounds for deciding whether or not to accept a specific instance (at [paragraph 20](#) of the ANCP’s procedures) is often unclear and not well understood by parties to complaints. Ms Kristen Zornada, in her report, *The Australian OECD National Contact Point: How it can be reformed* states: “Most claims that are rejected at the initial assessment stage are for reasons that fall outside the admissibility criteria for complaints.”⁶⁵

While the Independent Review does not endorse this statement, it acknowledges the very broad discretion NCPs have to either accept or reject a complaint at the initial assessment stage; for example: “whether consideration of the Specific Instance would contribute to the purposes and effectiveness of the Guidelines” and “whether there are any other factors which should be taken into account.”⁶⁶ At subsequent stages of a specific instance’s consideration, the lack of transparency regarding the factors that have, and have not, been taken into account by the ANCP further impacts the process’ predictability.

Related to this, another criticism is that the publication of decisions (and the format of decisions themselves) is unpredictable and inconsistent from case to case. In its submission to the Review, OECD Watch stated:

“The quality of the Final Statements produced by the ANCP has been poor to date with little information provided as to how the ANCP reached its decision on whether or not to accept a complaint, as well as few recommendations provided in terms of how a business could remediate the situation. In order to improve the complaint process, the ANCP should make determinations if a company is found in breach of the Guidelines, along with recommendations for improvement, when a company refuses to engage in mediation or a mediated agreement has not been reached.”⁶⁷

Similarly, Adjunct Professor Cullen commented that: “In practice, the ANCP’s Final Statements have been descriptive and have focused on the procedural aspects of the specific instance.”⁶⁸ By focusing on the procedural aspects of a complaint, rather than the substantive reasons for the ANCP’s decision, predictability of the process is not advanced.

⁶⁴ Commentary on the Procedural Guidance, Guiding Principles for Specific Instances, I.

⁶⁵ Kristen Zornada, *The Australian OECD National Contact Point: How it can be reformed*, Corporate Accountability Research, p7.

⁶⁶ ANCP website, Procedures for dealing with complaints brought under the OECD Guidelines, accessed on 22 September 2017, para 20.3: <http://www.ausncp.gov.au/content/Content.aspx?doc=ancp/complaints.htm>

⁶⁷ OECD Watch, submission to the Independent Review, p5. Oxfam, in its submission to the Review, also stated: “The lack of a template for published statements from the ANCP means that not all matters are addressed in a consistent and predictable manner,” p5.

⁶⁸ Adjunct Professor Holly Cullen, University of Western Australia, submission to the Independent Review, July 2017, p8.

To address these concerns and enhance predictability for all parties, the Review strongly encourages the ANCP to provide more substantive explanation and details of the factors weighed in favour (and against) its decisions at different stages in the specific instance process. Further, publishing decisions in a consistent format and as promptly as possible, would greatly improve the function's predictability.

g) Equitable

An equitable non-judicial grievance mechanism ensures that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in the grievance process on fair, informed and respectful terms.⁶⁹ As the Commentary to UN Guiding Principle 31(d) notes:

“In grievances or disputes between business enterprises and affected stakeholders, the latter frequently have much less access to information and expert resources, and often lack the financial resources to pay for them. Where this imbalance is not redressed, it can reduce both the achievement and perception of a fair process and make it harder to arrive at durable solutions.”

The monopartite structure of the ANCP (which does not formally incorporate non-government perspectives), combined with its location in Treasury (which is perceived by many to be closely aligned with business interests) is problematic for its reputation as an equitable non-judicial grievance mechanism.

The equity of the ANCP's processes and structure have been criticised by some NGO stakeholders, in particular. For example, in a recent specific instance complaint an NGO acting for the complainants alleged that the ANCP demonstrated bias in favour of the respondent multinational corporation throughout the complaint process. The NGO alleged that this manifested in the ANCP's handling of consultations and the mediation process. The Independent Review is not in a position to test the accuracy of these claims. Nonetheless, they are noted here given their relevance to the equity of the ANCP's structure – and its perception by stakeholders as an equitable structure.

On this point, ALHR's submission to the Review should also be noted. It states: “The ANCP's past failure to date to make a determination about whether there has been a breach of the Guidelines where mediation fails, exacerbates the power imbalance between parties to complaints. Without the possibility that the ANCP may make an independent determination of an MNE's compliance with the Guidelines, the complaints process is weak.”⁷⁰

h) Compatible with the OECD Guidelines

An effective NCP should be compatible with the OECD Guidelines and, more broadly, it should ensure that its outcomes and remedies accord with internationally recognised human rights.⁷¹ The Guidelines state that where there is a conflict between a particular state's law and the Guidelines, enterprises should find ways to honour the principles “to the fullest extent that does not place them in violation of domestic law.”⁷²

⁶⁹ UN Guiding Principle 31(d).

⁷⁰ ALHR, submission to the Independent Review, July 2017, p 12 at para 3.6.4.

⁷¹ UN Guiding Principle 31(f).

⁷² OECD Guidelines, I(2).

Importantly, compliance with domestic laws does not equate to compliance with the Guidelines. In various specific instances, this distinction has been misunderstood (and/or misapplied) by the ANCP resulting in outcomes that are not compatible with the Guidelines.

According to the CFMEU and ACTU's joint submission to the Review, this issue arose in an early complaint to the ANCP brought by the ACTU against Rio Tinto. The ANCP dismissed the complaint on the basis that Rio Tinto was not a multi-national enterprise, and that the company had complied with Australian laws and, therefore, with the Guidelines. After seeking clarification from the OECD's Investment Committee, it was confirmed that compliance with domestic law does not equate to compliance with the Guidelines, and that Rio Tinto was a multinational enterprise. Nonetheless, the decision was not revisited by the ANCP.⁷³

Likewise, in the specific instance complaint brought against G4S, the issue of G4S' compliance with Australian Government policy and law arose in the context of the company's management of the Manus Regional Processing Centre.

In its submission to the Independent Review, the Human Rights Law Centre stated: "Corporate responsibility for upholding the Guidelines exists independently of government policy and companies are not exempt from the application of the Guidelines on the basis that their activities are consistent with domestic law or policy." And further that: "The role of the ANCP should likewise be to advise companies on whether their activities are in compliance with the Guidelines, irrespective of Government policy and practice."⁷⁴

This is another example of how restructuring the ANCP to be independent of government would increase the likelihood that its decisions and outcomes would be compatible with the OECD Guidelines, irrespective of domestic law and government policy.

i) Resourcing

The ANCP's inadequate resources were repeatedly raised with the Independent Reviewer as a crucial factor undermining its effectiveness. Stakeholders recognise that, without a baseline level of human and financial resources, many of the NCP's deficiencies will go unaddressed. Accordingly, the Review recommends that increasing the ANCP's human and financial resources to a sustainable level should be a key consideration as part of its restructure and relocation.

Compared to other NCPs, as profiled in the 2016 Annual Report of the OECD Guidelines, Australia's NCP has less resources. The report notes that the ANCP only has one part-time dedicated staff member. Additionally, in 2016, it states that the ANCP had no dedicated financial resources available for organising promotional events and, as a consequence, no promotional activities were organised. As a result, the ANCP did not meet its responsibility to undertake promotion activities.⁷⁵ In addition, in 2016 the ANCP had no financial resources to either attend events organised by other NCPs, or by other stakeholders.

⁷³ CFMEU/ACTU, joint submission to the Independent Review, July 2017, p2.

⁷⁴ Human Rights Law Centre, submission to the Independent Review, July 2017, p9.

⁷⁵ OECD (2017), Annual Report on the OECD Guidelines for Multinational Enterprises 2016, p40.

In contrast to Australia, the Canadian NCP has two full-time staff and six part-time staff. It also had funds available for each of the five areas outlined in the OECD Guidelines' Annual Report.⁷⁶ Likewise, the United Kingdom's NCP has two full-time staff and one part-time staff member. It also had funds for activities in each of the five areas. Thirdly, the Netherlands has three full-time staff and allocated funds to each of these areas.⁷⁷ Examples of other NCP structures and resources are discussed in more detail in section 6.

In considering alternatives to properly resource the ANCP, it is critical that both a dedicated budget and staff are provided. A dedicated budget ameliorates the concern that, when caseloads fluctuate (as they tend to do for most NCPs globally), funds may be withdrawn from the NCP rather than being used for important, ongoing activities such as promotion and stakeholder engagement. More capacity for the ANCP to monitor and follow up decisions would also be valuable.

Likewise, having dedicated staff will improve continuity, preserve corporate knowledge within the ANCP, and ensure targeted recruitment of individuals with appropriate expertise and skills to perform the function.

Given Australia's geographic location and distance from both the OECD, and many of the countries in which specific instance complaints implicating Australian MNEs arise, the ANCP faces some additional pressures on its resourcing in comparison to more centrally located NCPs. This should be taken into consideration in determining an appropriate funding allocation to fulfil Australia's obligations under the Guidelines. Further, where relevant and feasible, the ANCP should consider partnering with New Zealand's NCP in sharing best-practice lessons and co-hosting promotional events for stakeholders.

If resourcing and capacity of the ANCP is increased, it is likely that this will be fully utilised in future. On this matter, the Reviewer agrees with the NJHRM Project's submission which observes that, "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."⁷⁸

j) Confidence of social partners and other stakeholders

To be effective, an NCP must retain the confidence of social partners and other stakeholders and foster the public profile of the Guidelines.⁷⁹ This criterion incorporates elements of legitimacy (enabling trust from the stakeholder groups for whose use they are intended) and accountability (ensuring that the parties to a grievance process cannot interfere with its fair conduct).

From the Review's consultations and submissions received, it appears that stakeholders' confidence in the ANCP is currently at a crisis point. For example, in her submission to the Review, Ms Brynn O'Brien, Executive Director of the Australasian Centre for Corporate Responsibility stated: "My organisations –

⁷⁶ As above. The five areas are: specific instances, organising promotional events, attending NCP meetings at the OECD, attending events organised by other NCPs, attending events organised by other stakeholders.

⁷⁷ As above.

⁷⁸ NJHRM Project, submission to the Independent Review, July 2017, p4.

⁷⁹ Commentary on the Procedural Guidance for NCPs, Institutional Arrangements, paragraph 10, 80; OECD, 2011 *Update of the OECD Guidelines for Multinational Enterprises: Comparative table of changes made to the 2000 text*, (OECD:2011), 85.

and communities which we serve – have been reluctant to engage with the ANCP in recent years given its lack of credibility in carrying out its mandate.”⁸⁰

A participant in the NGO/academic consultation forum also provided an insight into a stakeholder consultation some time ago that was: “one of the least successful meetings I’ve ever attended.” The participant said that Treasury officials were very sensitive and defensive: “It was a shame because stakeholders had come along with goodwill and left feeling damaged.” He said that positive and regular engagement with stakeholders is “absolutely crucial” to promoting the Guidelines and rebuilding confidence in the ANCP.⁸¹

Likewise, from the corporate perspective, a general manager for corporate social responsibility for a large Australian MNE, stated that she had never seen the ANCP, had never been contacted by the ANCP, nor was she familiar with how the ANCP might help her company. She said an 18-month time frame to settle complaints would be unacceptable to her business, and that they wouldn’t engage with a process that took years to complete.⁸² Another senior executive from a large MNE, whose company had been involved in a specific instance complaint several years ago, said that while overall the process was balanced and objective, the timeframe followed was significantly longer than the Guidelines and aspects of the process were unclear. Given this, the company has not gone back to the ANCP subsequently, despite some issues with the particular operation being ongoing.⁸³

Should the Government implement a restructured, independent NCP – as recommended by the Independent Review – this would provide an excellent opportunity to reset relationships with government and non-government stakeholders alike, and to rebuild the confidence of social partners in the ANCP function.

k) Complaints/mediation expertise

Given the centrality of complaints handling and mediation to NCPs’ function as alternative dispute resolution mechanisms, performance against this criterion is imperative for assessing the effectiveness of the ANCP structure.

Indeed, one attendee at the Independent Review’s consultations asserted that “far and away the most important criterion,” is the strength of the entity at complaints handling. As an example, he noted the Australian Human Rights Commission’s experience with complaints handling and its 90% satisfaction rate with both respondents and applicants. A less important criterion (in this participant’s view) is extensive expertise across all areas of the Guidelines – given that no one entity or person is likely to have all this expertise.⁸⁴

The consistent feedback received by the Review was that, in its current location in Treasury, the ANCP does not have access to staff with the appropriate complaints handling or mediation expertise required to perform the function successfully. The ANCP’s use of external expert mediators from time to time was welcomed by stakeholders and regarded as positive and necessary given the lack of mediation expertise in-house.

⁸⁰ Brynn O’Brien, Australasian Centre for Corporate Responsibility, submission to the Independent Review, July 2017.

⁸¹ NGO/academic consultation forums conducted by the Independent Review, 7 and 12 July 2017.

⁸² Corporate consultation forums conducted by the Independent Review, 6 and 13 July 2017.

⁸³ Corporate consultation forums conducted by the Independent Review, 6 and 13 July 2017.

⁸⁴ NGO/academic consultation forums conducted by the Independent Review, 7 and 12 July 2017.

The Independent Review recommends that, either: (i) the practice of using external expert mediators be extended by the ANCP to the majority of specific instance complaints; or (ii) mediation and complaints handling expertise be included as a key selection criterion for ANCP decision maker/s in the future.

I) Subject matter expertise

As noted above, the Guidelines cover a broad range of subject matter areas – from human rights, employment and industrial relations to the environment, bribery and corruption, consumer interests, and science and technology. In recent years, the largest number of specific instance complaints to NCPs globally have come under the following chapters of the Guidelines: Employment and industrial relations (54%); General policies (46%); Human rights (28%); and Environment (20%), noting that many complaints concern more than one chapter of the Guidelines.⁸⁵ Further, since the Guidelines’ revision in 2011 (and the inclusion of Chapter 4 on human rights), there has been a significant increase in complaints relating to human rights issues.

The monopartite structure of the ANCP, within Treasury, means that expertise and experience in many of these areas is not readily available. More specifically, Treasury officials’ lack of expertise in the subject areas *most commonly* arising in complaints – human rights, employment and industrial relations – is a particular handicap and an impediment to the ANCP’s effectiveness. This means that, in many instances, the officials directly managing specific instance complaints may lack even a basic understanding of the relevant legal (and non-legal) frameworks and policy settings that apply in these areas, either domestically or internationally.

Given the rapid pace of change and developments, particularly in the business and human rights field in recent years, this lack of familiarity places these officials at a significant disadvantage in seeking to effectively perform their responsibilities under the Guidelines. Moreover, the frequent turnover of ANCP secretariat staff and ANCP decision-makers has only exacerbated these problems; as new officials – generally with very limited background in the Guidelines’ key areas – are having to be re-trained every two to three years.

In theory, the Oversight Committee can provide support and advice to the ANCP in areas where Treasury officials’ subject matter expertise may be lacking. In practice, however, it is not clear whether this is the case. While the Oversight Committee currently meets biannually,⁸⁶ the quality of engagement by its members appears to be mixed. For example: there is a lack of continuity in officials attending Committee meetings, meaning that from time to time officials with little background or experience of the ANCP (or Guidelines) are required to represent their agency. This, combined with a lack of authority (frequently) to represent their agency’s position is a significant impediment to the Committee’s efficacy. Notably, some agencies did not attend the Committee meeting relating to the Independent Review and, when contacted subsequently by the Independent Reviewer seeking their input, in some cases declined to comment.

The Independent Review acknowledges that, given the broad scope of the Guidelines, no one agency has expertise across all these subject matter areas or is ideally placed to house the NCP function. Nevertheless, relative to other agencies such as DFAT and AGD, Treasury appears to be particularly ill-equipped to do so from the perspective of its core business, subject matter expertise, and lack of mediation and complaints handling skills.

⁸⁵ OECD Database, slide from Treasury’s presentation to the Independent Review Consultation Forums, July 2017.

⁸⁶ However, as observed above, records indicate that the frequency of Oversight Committee meetings has often been less than biannual.

m) Policy coherence

The ANCP's location in Treasury's Foreign Investment Division (within the broader Markets Group) has contributed to its poor policy coherence with whole-of-government work in related areas. The Independent Review concludes that the main reasons for this are the anomalous nature of the ANCP's work within the Foreign Investment Division's day-to-day core business, and the lack of substantive connections that have been made between the ANCP's work and agencies working in related areas across Government. From a policy coherence perspective, both of these factors have left the ANCP isolated to a large degree.

The 2011 Revision of the Guidelines requires that NCPs make relevant agencies aware of their reports and statements to foster policy coherence.⁸⁷ It is not clear to what extent this has happened in the ANCP's case. However, as noted by Mr John Southalan in his submission to the Independent Review, it is difficult to locate references to the ANCP and its work on other Commonwealth Departments' websites. Mr Southalan states:

“Despite these international and domestic statements, nowhere on the Attorney General's page about business and human rights is there a reference to the ANCP. That may provide some indication of the Government's attitude to the ANCP's role, as does that a quick google search struggles to identify any Commonwealth agency website that indicates the existence of the ANCP and its role.”⁸⁸

While DFAT's webpage on business and human rights currently includes a reference to the 2017 Independent Review of the ANCP,⁸⁹ the Reviewer understands that before her appointment there was no reference to the ANCP on DFAT's webpage.

As highlighted by the UN Guiding Principles on Business and Human Rights, policy coherence is essential not only on the “horizontal level” of domestic policy, but also on the “vertical level” of international policy. In relation to this, the comments of Mr Pesce, Executive Director of the Vincular Center at the Catholic University of Valparaiso (Chile) and Member of the United Nations Working Group on Business and Human Rights should be noted. He stated:

“To improve policy coherence and overall effectiveness, NCPs should be linked to diplomacy. It's crucial that the Australian NCP engages in direct dialogue with NCPs abroad where Australian businesses are operating. This is not only in the interests of the Government, but also in the interests of Australian business and investors.”⁹⁰

Considering Treasury's policy responsibilities in areas related to the Guidelines – in comparison to those of some other agencies – it appears to be in a relatively worse position to carry out the NCP role from the perspective of whole-of-government policy coherence. Other agencies, such as DFAT or AGD, with greater policy responsibilities for business and human rights, supply chain transparency, modern slavery,

⁸⁷ Commentary on the Implementation Procedures of the OCED Guidelines for Multinational Enterprises, Chapter I Commentary on the Procedural Guidance for NCPs, Conclusion of the Procedures, Paragraph 37, 85.

⁸⁸ John Southalan, submission to the Independent Review, August 2017, p5 para 11.

⁸⁹ DFAT, Business and Human Rights web page, accessed on 2 September 2017: <http://dfat.gov.au/international-relations/themes/human-rights/business/Pages/default.aspx>

⁹⁰ Dante Pesce, Member, UN Working Group on Business and Human Rights, Interview with the Independent Reviewer on 27 July 2017.

the OECD and multilateral relations, and anti-corruption would be relatively better placed. These issues are addressed in more detail in section 7 below.

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

6.1 Overview: the ANCP compared to other NCPs

The ANCP would be much improved by following the example of other OECD countries which have adapted their NCPs to an independent or multi-stakeholder structure.

When assessed across a range of areas – including promotional activities, procedures, reporting and fulfilment of the core criteria – the ANCP is ranked by the OECD as among the worst performing NCPs globally.⁹¹ Currently, the ANCP's performance is rated around the same level as that of Argentina, Iceland, Ireland, Luxembourg, Romania, the Slovak Republic and Slovenia. To place this in context, the only countries ranked in the category below the ANCP are Jordan, Egypt and Tunisia.

Further, in comparison with other NCPs – particularly in reference to countries of similar population size and NCP caseload volumes – the ANCP is significantly under-resourced both in terms of staff and finances.

6.2 Types of institutional frameworks

The OECD's Procedural Guidance provides broad latitude to governments to determine the institutional framework for their NCPs, provided they meet the core criteria of visibility, accessibility, transparency and accountability, and address specific instances in an impartial, predictable, equitable manner, that is compatible with the Guidelines.⁹²

While NCPs are structured in many different ways, the most common frameworks fall into four main categories. These are:

1. Mono-agency: the NCP is composed of one or more representatives from a single ministry. [Note: the ANCP falls into this category.]
2. Inter-agency: the NCP is composed of representatives from two or more ministries.
3. Tri-partite or quadripartite: the NCP is composed of representatives from government, business, trade unions (in the case of a tripartite NCP); and NGOs (in the case of a quadripartite NCP).

⁹¹OECD (2017), Annual Report on the OECD Guidelines for Multinational Enterprises 2016 (based on reports by NCPs).

⁹² OECD Guidelines for Multinational Enterprises (2011), Section I.A in the Commentary on the Implementation Procedures.

4. Independent: the NCP is generally composed of independent experts who are assisted by a secretariat (usually based in a ministry).

Increasingly, in numerous countries, there has been a clear move away from monopartite NCPs towards either a multiagency or independent structure.

In its submission to the Independent Review, OECD Watch has stated:

“OECD Watch has researched the performance of NCPs over the last 17 years and have found that NCPs that are monopartite often contribute to a perceived lack of independence. Based on our research comparing institutional structures, we have found that some NCP’s institutional structures are more conducive to operating effectively and impartially as evidenced by an NCP’s ability to positively resolve complaints and as a result will have one of three organizational structures: 1) a board of independent experts with decision-making authority, 2) a structure that formally integrates stakeholders into NCP governance (e.g. a multipartite structure), or 3) a steering board charged with oversight.”⁹³

This is further supported by OECD Watch’s 2015 Report: *Remedy Remains Rare: An analysis of 15 years of NCP cases and their contribution to improve access to remedy for victims of corporate misconduct*. The Report found that: “(77%) [of] cases OECD Watch considers to have some element of remedy-related outcome were produced by NCPs that are comprised of independent expert bodies, have a balanced tripartite structure, or have a multi-stakeholder oversight body as part of their governance structure.”⁹⁴

Similarly, in her submission to the Independent Review, Adjunct Professor Cullen stated: “In the case of both the ANCP itself and the Oversight Committee, the structure does not draw upon the best practices of OECD member states, and fails to take into account the progress, albeit gradual, towards quadripartitism and independence of these bodies. Changes to both bodies are suggested in order to increase confidence of stakeholders in the procedures operated by the ANCP.”⁹⁵

6.3 Examples in each category

To better illustrate how the ANCP’s structure compares with different NCP structures in other OECD countries, this section provides examples of NCP frameworks in each of the four main categories and outlines some of their key features.⁹⁶ Each of the examples selected incorporates aspects that are considered best-practice and/or are relevant in some way to the Australian experience due to geographic location (for example, New Zealand); or country size (for example, Canada). Considered

⁹³ OECD Watch, submission to the Independent Review, July 2017.

⁹⁴ Caitlin Daniel, Joseph Wilde-Ramsing, Kris Genovese, Virginia Sandjojo, “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), 34-45.

⁹⁵ Adjunct Professor Holly Cullen, University of Western Australia, submission to the Independent Review, July 2017, p4.

⁹⁶ In addition to publicly available information, Section 6.3 draws on a paper produced for the OECD, “Meeting of the Network of National Contact Points for Responsible Business Conduct: Structures and procedures of National Contact Points,” 27 June 2017, DAF/INV/NCP(2017)3. This is an official document provided to the Independent Reviewer by Treasury.

together, they illustrate the diverse structures and institutional arrangements that NCPs are utilising globally.

1. Monoagency

New Zealand:

- Structure and composition: The NCP role is performed by a senior official located within the Ministry of Business, Innovation and Employment. The official performs his NCP duties, along with a broader range of responsibilities within the International Strategy Unit. New Zealand's NCP has an advisory body to promote the Guidelines. It consists of government officials and non-government stakeholders, including the council of trade unions, the business council, employer organisations and New Zealand's Human Rights Commission.
- Operation: The NCP makes decisions on promotion and specific instances after internal reviews in the Ministry and consultations with relevant government bodies. Otherwise, the NCP has authority to make administrative decisions. The NCP has adopted formal rules of procedure which are available online.
- Budget and staff: The NCP has no dedicated budget and one part-time staff member: the NCP senior official. There is no secretariat.

United States:

- Structure and composition: The NCP role is performed by a senior government official who heads the 'NCP office,' within the US Department of State. In addition to the NCP role, the official has broader responsibilities for responsible business conduct. The NCP has two advisory bodies: (i) the Interagency Working Group (IWG), an inter-governmental body which includes representatives from several government bodies; and (ii) the Stakeholder Advisory Board (SAB), a sub-committee of the Advisory Committee on International Economic Policy which includes business and civil society members.
- Operation: All decisions are made and signed by the NCP senior official. The SAB and the IWG advise on promotional strategies and execution. The IWG also provides advice on specific instances. Both advisory bodies meet approximately four times per year. The NCP has adopted formal rules of procedure for handling specific instances which are available online.
- Budget and staff: The NCP is funded by the US State Department and has three full-time staff members.⁹⁷ During 2015, the NCP's budget for mediation was significantly increased.⁹⁸

2. Interagency

Canada:

- Structure and composition: Seven federal departments are represented on the Canadian NCP, each of which represents a specific subject area of expertise (for example: environment, labour, natural resources, indigenous people). A senior official of Global Affairs Canada (GAC) chairs the Committee. The NCP is supported by a secretariat located in GAC. There is no advisory body; instead it has three non-governmental "social partners": the Canadian Chamber of Commerce, the Canadian Labour Congress and the Confederation des syndicats nationaux.

⁹⁷ OECD (2017), Annual Report on the OECD Guidelines for Multinational Enterprises 2016, p39.

⁹⁸ Annual Report by the US National Contact Point for OECD Guidelines for Multinational Enterprises, June 2014 to December 2015, accessed on 31/8/17 at: <https://www.state.gov/e/eb/oecd/usncp/links/rls/258062.htm>

- Operation: The Canadian NCP forms a Working Group to work on each specific instance. The Working Group is comprised of a subset of the NCP's membership and the secretariat, which makes a recommendation to the whole NCP committee on each specific instance. The committee makes decisions by consensus. When consensus cannot be reached, the majority's view prevails. The NCP consults with its social partners for their advice and expertise on promotion, NCP procedures and specific instance processes.
- Budget and staff: The NCP has 2 full-time staff and 6 part-time staff.⁹⁹

3. Tri-partite or quadripartite

France:

- Structure and composition: The NCP of France has a tripartite structure, consisting of: one business association, six trade unions and four different ministries. These are: the Ministry for the Economy and Finance; Ministry for Labour and Employment; Ministry for Foreign Affairs; and the Ministry for the Environment. Each member organisation and government department is responsible for appointing one representative and one alternate. The NCP is chaired by a senior official in the Directorate-General of the Treasury in the Ministry for the Economy and Finance. One official from Treasury is appointed as Secretary-General to provide administrative services.
- Operation: Decisions of the French NCP are adopted by consensus. Failing consensus, the decision reverts to the Chair. The French NCP's formal rules of procedure are encapsulated in the "NCP bylaw," available online in French and English. The NCP organises an Annual Information Meeting, to set out its activities and have an open dialogue with its external stakeholders.
- Budget and staff: The NCP has one full-time staff member and one part-time staff member.¹⁰⁰

4. Independent

Norway:

- Structure and composition: The NCP of Norway is comprised of an expert panel of four independent members. Three members are appointed by the Ministry of Foreign Affairs based on nominations from one trade union confederation, one business federation, and a forum of NGOs on behalf of civil society. The fourth member, who is also the chair, is appointed by the hosting ministry. Appointed members are required to act independently of their nominating organisation. The NCP is supported by a secretariat hosted by the Ministry of Foreign Affairs, which reports to the expert panel.
- Operation: The NCP is established by a decree adopted by the Ministry of Foreign Affairs. The decree notes that the NCP procedure set out in the Guidelines forms the basis for carrying out its work. The NCP meets once per month and decisions are made on consensus. The secretariat assists with general administration, drafting decisions for the NCP and promotional activities. In 2013/14, the Norwegian NCP underwent a peer review which concluded that: "stakeholder groups conveyed a strong sense of ownership of the NCP, which is a testament to its credibility

⁹⁹ OECD (2017), Annual Report on the OECD Guidelines for Multinational Enterprises 2016, p39.

¹⁰⁰ As above.

and importance among Norwegian efforts to promote responsible business conduct.”¹⁰¹ Further, the review cited a stakeholder who commented on the independence of the NCP’s structure: “(i)t’s not realistic to have people promote Norwegian trade in the morning and handle complaints after lunch.”¹⁰²

- Budget and staff: The NCP has a set annual budget of NOK 4 million (approximately \$AUD 645,000) provided by the Ministry of Foreign Affairs and a secretariat of three full-time staff. The secretariat can draw on other government resources, when needed.¹⁰³

Denmark:

- Structure and composition: Denmark’s NCP has a decision-making body with five members appointed by the government: a chair, an expert member, and three members appointed on the basis of recommendations (from a business association, a trade union confederation and a network of NGOs). The Danish Business Authority, a public authority which promotes economic growth in Denmark, hosts the secretariat.
- Operation: The NCP draws its mandate from an executive order adopted by Parliament in 2012. Based on the legislation, the Danish NCP has also adopted rules of procedures for handling specific instances. The secretariat prepares decisions for the consideration of the NCP members. Decisions are made by a simple majority vote. Final statements in specific instances are subject to follow-up by the NCP one year after they are issued. In 2015, the Danish NCP underwent a peer review which concluded that it is “generally perceived across stakeholder groups as a highly credible institution that is visible, accessible, transparent, impartial and accountable.”¹⁰⁴
- Budget and staff: The NCP has three full-time staff and an annual budget of 3 million Danish Krone (approximately \$AUD 605,000).¹⁰⁵ Funds are administered at the discretion of the secretariat, in consultation with the Chair and the full NCP at certain thresholds.

The Netherlands:

- Structure and composition: The NCP is formally located in the Ministry for Foreign Affairs and consists of up to five independent members,¹⁰⁶ who are nominated by the government after consulting with relevant ministries, business and civil society. The members nominate a chair between them. The independent members must act in a personal capacity and not on behalf of any specific interest group. In addition, the Dutch NCP has four governmental advisory members who act on behalf of different ministries. The NCP is supported by a secretariat located in the Ministry for Foreign Affairs. The NCP has another advisory body called the “NCP Plus,” comprised of external stakeholders from business associations, trade unions and NGOs. The NCP Plus meets every three months.
- Operation: The Dutch NCP was set up under a 2014 Establishment Order. The eight members meet monthly. While the independent (non-government) members are formally appointed as the decision makers, the NCP has a consensus oriented approach which includes the advisory

¹⁰¹ Norwegian Government (2014), Report of the Peer Review Delegation, “Norway National Contact Point: Peer Review Process,” p1, accessed on 31/8/17: <http://www.responsiblebusiness.no/files/2014/02/Peer-review-report-NCP-Norway.pdf>

¹⁰² As above, p34.

¹⁰³ Interview with Mr Frode Elgesem, Member, Norwegian National Contact Point, 21/8/17.

¹⁰⁴ OECD (2015), “Denmark National Contact Point peer review report,” presented in June 2015, accessed on 31/08/17: <https://mneguidelines.oecd.org/Denmark-NCP-Peer-Review-2015.pdf>

¹⁰⁵ As above, p7.

¹⁰⁶ Currently the Dutch NCP consists of four independent members.

members from government. The NCP has adopted formal rules of procedure for handling specific instances which are available online.

- Budget and staff: The Dutch NCP has three full-time staff and a budget of €900 000 (approximately \$AUD 1.3 million) over three years.

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

This section evaluates the most suitable area of Government to perform the ANCP function. Before this analysis is presented, however, it is instructive to consider how the ANCP role fits within whole-of-government strategy, more broadly.

7.1 The ANCP function within whole-of-government strategy

Given the Guidelines' broad and cross-cutting nature, numerous Commonwealth Government agencies have portfolio responsibilities falling under one or more of its chapters. Despite this, no one agency has responsibilities spanning all (or even the majority of) areas covered by the Guidelines. Accordingly, determining the ANCP's function within whole-of-government strategy is, in some respects, a challenging task.

As outlined in section 6 above, several governments in the OECD (notwithstanding their different approaches to their NCP's structure and independence from government) have aligned their NCP function with their foreign affairs agency. For example: the USA, Canada, Norway, the Netherlands and (to some extent) France.

In Australia's case, given recent policy developments and machinery of government changes, aligning the NCP function with DFAT's portfolio appears to be most logical both strategically and practically. There are various reasons for this.

Despite responsibility for human rights and the Australian Human Rights Commission falling within the Attorney-General's portfolio under the Administrative Arrangements Order (AAO),¹⁰⁷ DFAT has lead responsibility for Australian Government activity on business and human rights. As described on its [webpage](#), this includes:

- progressing national consultations on further implementation of the UN Guiding Principles on Business and Human Rights,¹⁰⁸ including consideration of the development of a National Action Plan on Business and Human Rights.
- establishing a Multi-Stakeholder Advisory Group (MSAG) on Implementation of the UN Guiding Principles on Business and Human Rights. The MSAG provides multi-stakeholder expert advice to the Government and met for the first time on 2 May 2017.
- commissioning a [Stocktake on Business and Human Rights in Australia](#) which maps existing laws, policies and practice on business and human rights in Australia.
- establishing partnerships with the Global Compact Network Australia, the Australian Human Rights Commission and the Business and Human Rights Resource Centre in Australasia.

¹⁰⁷ Administrative Arrangements Order, 1/9/2016, C2017Q00008: Part 2 (The Attorney-General's Department).

¹⁰⁸ The Australian Government made this commitment in early 2016, in response to Australia's November 2015 Universal Periodic Review.

- representing Australia in the *Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime*, including engagement with corporations and their supply chains.

The Guidelines are unequivocally much broader than just business and human rights. However, following the 2011 review of the Guidelines and inclusion of Chapter 4, specific instance complaints raising business and human rights-related matters now account for a large proportion of complaints received by NCPs globally. From the perspective of policy coherence and whole-of-government strategy on business and human rights, aligning the ANCP function more closely with DFAT appears to be the most sensible option.

The Review also notes that, under the AAO, DFAT has other responsibilities relevant to the OECD Guidelines. These include: external affairs (including relations and communications with overseas governments and United Nations agencies), international business development, international development co-operation, and diplomatic and consular missions.¹⁰⁹ In addition, DFAT's agenda and role in economic diplomacy, advancing the private sector's role in development, and OECD liaison are all relevant to the ANCP function.

Further, from a practical perspective, DFAT's broad diplomatic networks internationally and existing relationships with business and civil society in the countries in which it has a post would provide excellent opportunities to collaborate with the ANCP in promoting the Guidelines and the role of the ANCP to business and communities adversely impacted by their operations.

As part of this discussion, AGD's work in the context of whole-of-government strategy should also be noted. Like DFAT, AGD has also assumed an active role in relation to business and human rights in recent years, as described in more detail on AGD's [website](#). In particular, AGD's whole-of-government leadership in the following areas should be noted:

- the development of *Australia's National Action Plan to Combat Human Trafficking and Slavery 2015–19* led by the Minister for Justice, the Hon Michael Keenan MP, which provides the strategic framework for Australia's response to human trafficking and slavery.
- the formation and operation of the Supply Chains Working Group from 2014 to 2016 by the Minister for Justice to examine ways to address serious forms of labour exploitation in the supply chains of goods and services.
- implementation of the *OECD Convention on Bribery of Foreign Officials*.
- as the lead advisor to the Government (through the Office of International Law) on international law, including international human rights law.

The Independent Review notes that, with the Government's [announcement](#) on 18 July 2017 of a new Home Affairs Ministry, various machinery of government changes from 2018 are expected to impact the Attorney-General's and Minister for Justice's responsibilities, as they are outlined above.

Another development of particular significance to whole-of-government policy in this area, is the Coalition Government's [announcement](#) on 16 August 2017 that it intends to introduce legislation that will make it a requirement for large businesses to report annually on their actions to address modern slavery. In making this announcement, the Minister for Justice stated:

¹⁰⁹Administrative Arrangements Order, 1/9/2016, C2017Q00008:: Part 9 (The Department of Foreign Affairs and Trade).

"The first step is an extensive consultation period with industry on the Government's *Modern Slavery in Supply Chains Reporting Requirement* discussion paper. The proposed reporting requirement will ensure large businesses and other entities operating in Australia publish annual statements outlining their actions to address this crime. It will support the business community to respond more effectively to modern slavery, raise business awareness of the issue and create a level playing field for business to share information about what they are doing to eliminate modern slavery."¹¹⁰

This announcement came the day before the Interim Report of the Foreign Affairs and Aid Sub-Committee of the Parliament's Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry's into establishing a Modern Slavery Act in Australia was handed down. The Interim Report recommends that the Government consider introducing a Modern Slavery Act in Australia, including supply chain reporting requirements and an Independent Anti-Slavery Commissioner.¹¹¹

Lastly, the Australian Human Rights Commission – although an independent statutory agency (falling under the Attorney-General's portfolio) – also plays an important role in the context of [business and human rights](#). For the past three years, the Australian Human Rights Commission (in collaboration with the UN Global Compact Network Australia) has hosted a national Dialogue on Business and Human Rights. The Dialogue provides an opportunity for corporate, NGO, government and academic stakeholders to share best practice and discuss strategies for advancing business and human rights in Australia.

In addition, through training and educational tools (such as fact sheets), the Australian Human Rights Commission seeks to assist business to incorporate respect for human rights throughout its policies and operations. The Australian Human Rights Commission has also played a leadership role within civil society on business and human rights, for example in 2016 convening a roundtable meeting for civil society representatives, including NGOs and academia. The outcome of the roundtable was a [Joint Civil Society Statement](#) setting out recommendations to the Australian Government on the implementation of the UN Guiding Principles in Australia.

7.2 The most suitable area of Government for the ANCP function

To determine the most suitable area of Government to effectively perform the ANCP function, robust criteria based on the OECD core criteria, the guiding principles for specific instances and the UN Guiding Principles on Business and Human Rights should be applied.

Taking into account the ANCP's role within whole-of-government strategy on responsible business, human rights and related areas (as outlined in section 7.1) the Independent Reviewer has assessed each of Treasury, DFAT, AGD and the Australian Human Rights Commission against the thirteen criteria. In addition, the Reviewer provides her assessment of how an independent NCP would perform against the same criteria. The results are set out at [Annexe D](#).

In summary – the Review has concluded that an independent NCP structure supported by a secretariat located in DFAT is the preferred option.

¹¹⁰ Minister for Justice, Media Release – "Proposed new laws to help end modern slavery," 16 August 2017.

¹¹¹ Parliament of Australia, Media Release – "Interim Report on modern slavery in global supply chains," 17 August 2017.

In reaching this conclusion, the Review has taken into consideration stakeholders' views regarding the most suitable area of Government for the ANCP function.

The Reviewer sought input from government officials in each of the relevant agencies (including those represented on the Oversight Committee), regarding the most suitable location for the function. While many officials provided thoughtful and useful contributions to the Review on the relative merits of one agency in comparison to another, no agency indicated eagerness to house the function – even in a secretariat-only capacity. It appears that concerns about potential conflicts of interest with their existing responsibilities, along with resourcing constraints and pressures (in the event that a restructured NCP is not fully funded) may be the primary reasons for this reticence.

Among non-government stakeholders, a general preference was expressed for greater independence and accountability to be built into the ANCP function through its structure and/or location. Numerous stakeholders – both corporates and NGOs – support an independent NCP structure or, in the alternative, multipartite participation to be incorporated into a government-based NCP through NGO, corporate and union participation in an oversight committee, advisory group, or as an expert panel to be called upon when needed.

Numerous non-government stakeholders favour relocating the ANCP to the Australian Human Rights Commission. In addition to supporting the NCP's independence, they cite the Commission's deep expertise and experience in human rights, along with its expertise and successful record in mediation and complaints handling as strong arguments supporting this approach. Further, the Commission's educational role and experience undertaking community outreach to promote its functions and wider understanding about its grievance mechanisms and human rights, is also noted as an asset.

While recommending the restructure of the ANCP to an independent model, the Reviewer concludes that its supporting secretariat would be best located within government for several reasons. The Guidelines' status as the *only* voluntary standards and principles initiated by governments themselves on responsible business conduct is important. Relocating the ANCP wholly outside of government (to the Australian Human Rights Commission or another independent statutory body) would risk diluting the status and potential leverage of the ANCP with both respondents and complainants as a *state-based* non-judicial mechanism.

Further, human rights are only *one* of the areas canvassed by the Guidelines. While the number of specific instance complaints relating to human rights have increased significantly in recent years (following the introduction of Chapter 4 of the Guidelines), it is not necessarily the case that this trend will continue in the future. If it does not, the Australian Human Rights Commission would need to rely on external expertise to advise on the other areas of the Guidelines.

Thirdly, relocating the ANCP to the Australian Human Rights Commission may potentially lead to the politicisation of the function, given the highly sensitive issues that the Commission is often called to comment and act on.

Having examined the possible alternatives within government to locate a supporting secretariat for an independent NCP, the Review recommends strongly against retaining the NCP function within Treasury.

As noted above, the ANCP's location in Treasury is problematic in various respects. Specifically, many stakeholders perceive a conflict of interest between the ANCP's location in the Foreign Investment Division, and the ANCP's ability to perform its role in an independent and impartial manner. Further, Treasury officials' lack of expertise and experience in the subject matter areas covered by the Guidelines, the basis on which specific instance complaints are made, is a significant impediment to the

ANCP's effectiveness. While no one agency has expertise across all the subject matter areas covered by the broad scope of the Guidelines, in comparison to AGD and DFAT, Treasury appears to be in a relatively worse position to carry out the NCP role from the perspectives of its expertise, experience and overall whole-of-government policy coherence. Importantly, as indicated repeatedly by stakeholders throughout the Review process, Treasury has lost the confidence of social partners and other stakeholders to effectively perform the NCP function.

In comparison to Treasury, both AGD and DFAT would appear to be relatively better placed to house a restructured NCP secretariat, given their greater policy responsibilities in relevant areas as outlined in section 7.1 above.

Assessing both agencies against the criteria set out at [Annexe D](#), the Reviewer concludes that DFAT would be the best location for an independent NCP's secretariat. DFAT has lead responsibility for the Australian Government's work on business and human rights – an area with many intersections with the Guidelines and the ANCP, particularly since the Guidelines' revision in 2011.

Further, DFAT's agenda and role in economic diplomacy, advancing the private sector's role in development, multilateral relations, business engagement and OECD liaison are all directly relevant to the ANCP function.

From a practical perspective also, DFAT's extensive diplomatic networks around the world could be successfully leveraged by the NCP secretariat to perform its key functions of promoting the Guidelines and carrying out the specific instance function. Moreover, given the complex and sensitive issues that often arise in specific instance complaints, DFAT officials' involvement either at post or via the country desk officer in Canberra would provide invaluable insights into the situation in-country and its potential impacts (and any risks) on parties to a complaint.

If the Independent Reviewer's recommendations are accepted, concerns regarding potential or actual conflicts of interest with DFAT's core business would be ameliorated by the fact that the ANCP's decision-making function would be performed by independent experts, external to government and acting in a personal capacity.

Drawing on the lessons and experiences of other OECD countries' NCPs – as noted in section 6 above – it appears that various successful NCPs around the world have drawn advantages from a foreign-ministry located secretariat. This should provide confidence to the Australian Government that, should it accept the recommended model, it would be aligning the ANCP with global best practice for effective and fully functioning NCPs.

8. Recommendations

The Independent Review makes the following recommendations to Treasury:

Structure and location of the ANCP

- 1) Implement an independent NCP, assisted by a government-based secretariat located in DFAT. The NCP would be structured as follows:
 - a) An expert panel of three to five members appointed by the Government following a transparent and open nomination process. The independent members should act in a

personal capacity and not on behalf of any specific interest group. The expert panel should convene once a month.

- b) A secretariat of 2.5 to 3 full-time staff, comprised of two APS/EL officers responsible for specific instance complaints and promotion/stakeholder engagement, and one APS officer responsible for administration.
- c) An advisory group comprised of government members (from relevant government agencies)¹¹² and non-government members (from corporates, NGOs, trade unions, academia), appointed by the Government through a transparent process. The composition of the advisory group should be approximately half government and half non-government members. The advisory group should convene three times per year, or more often as required.

The terms of reference for the expert panel, secretariat members and advisory group should be publicly available and clearly state the function and responsibilities of each. The expert panel should be remunerated at a level commensurate with members' qualifications and experience. An appropriate framework (also adopted by other NCPs) would be an annual retainer for each member of the panel, supplemented by a separate payment for each specific instance managed by the member.

- 2) *Only if recommendation 1. is rejected*, implement a quadripartite NCP, comprising representatives from government, corporates, civil society and trade unions. Alternate members from each sector should also be appointed, in the event that the primary member is unable to attend a meeting. The NCP could be chaired by DFAT.

Policies and procedures

- 3) Develop and implement public operating procedures based directly on the Guidelines and Procedural Guidance. The revised procedures should:
 - a) Set out a clear and transparent process for handling specific instances in a plain English style, including realistic timelines for each phase of the process.
 - b) Clarify which MNEs are and are not encompassed by the ANCP's specific instance function.
 - c) Clarify the extent of investigation and information gathering that will be carried out by the NCP at the initial assessment phase.
 - d) Include provision for hosting an introductory meeting with parties after a complaint has been lodged, but before the initial assessment has been completed. This provides an opportunity to gather additional material required to assess the complaint, and to clarify parties' expectations of the ANCP process.

¹¹² The Reviewer recommends that the following government agencies be represented on the Advisory Group at an EL2 level or higher: DFAT; AGD; Treasury; Department of Employment; Department of Industry, Innovation and Science; EFIC and Austrade. In addition, there should be a standing position for the Australian Human Rights Commission.

- e) Include provision for publishing initial assessment decisions, and outline the circumstances where this would not be possible (for example: risks to complainants, serious confidentiality concerns).
- f) Include provision for issuing a determination on a specific instance where mediation has either been unsuccessful, or one or both parties have refused to participate in the mediation process.
- g) Outline any material consequences for companies that are found to have breached the Guidelines.¹¹³
- h) Set out a clear and transparent process for handling appeals of ANCP decisions in specific instances.
- i) Set out the ANCP's annual reporting commitments internationally (to the OECD Investment Committee) and introduce a new annual reporting commitment to the Australian Parliament.
- j) Where a mediated outcome is reached, set out a process and timeline for the ANCP to follow up the implementation of the agreement.
- k) Be translated into the most common languages of complainants filing specific instances with the ANCP.

Promotion and stakeholder engagement

- 4) Develop and implement a proactive stakeholder engagement and promotion strategy based on international best practice for NCPs. As part of the strategy, the ANCP should:
 - a) Conduct domestic and international outreach to NGOs, trade unions and corporate stakeholders, including hosting annual stakeholder information meetings in several locations in Australia.
 - b) Speak at and attend events organised by business, civil society and other stakeholder organisations, as well as organising its own events for these audiences.
 - c) Participate in events organised by other NCPs, where possible.
 - d) Redesign the ANCP's website to improve its quality and accessibility. The website should be regularly updated and include all relevant information on specific instance complaints, the ANCP's promotional activities, and reporting. It should also provide online tools for companies to assess their compliance with the Guidelines.

¹¹³ As OECD Watch's submission to the Independent Review states, material consequences for breaching the Guidelines could include: "exclusion from public procurement contracts, export credit guarantees, private sector development aid, international trade and investment services," July 2017, p4.

- e) Produce plain English publications outlining the specific instance process and the ANCP's work, for distribution to Australian and international stakeholders.

Resources

- 5) Assign a dedicated staff (as outlined at Recommendation 1) and a dedicated budget to the ANCP, sufficient to allow it to effectively perform its responsibilities.

9. Monitoring

Following the Government's initial response to the Independent Review's Report and Recommendations, the Reviewer invites it to report publicly on the implementation of these recommendations within one year.

Alex Newton
Independent Reviewer
26 September 2017

Annexes

Annexe A: Terms of Reference for the Independent Review

Annexe B: Online consultation questions and list of submissions received

Annexe C: List of stakeholders consulted

Annexe D: Assessment of the ANCP's location and structure

Annexe A:

Review of the Australian National Contact Point (ANCP) Terms of Reference

Governance

The Foreign Investment Division within Treasury will commission a review of the ANCP to be conducted by an independent party.

Consultation

The independent reviewer will seek input from other stakeholders including academics, NGOs and large Australian-based multinationals captured by the Guidelines. There will be close consultation with other Australian Government agencies via the ANCP Oversight Committee.

Terms of Reference

Examine the Australian Government's commitments and obligations under the OECD Guidelines for Multinational Enterprises (the Guidelines) and assess how the ANCP function should fit within whole-of-government strategy.

Evaluate the effectiveness of the current ANCP structure, specifically:

- the ANCP's role in the context of alternative mechanism(s) for redress;
- the role of the ANCP Oversight Committee;
- how the ANCP should engage with non-government organisations such as business, unions, industry groups, academia and civil society; and
- how the ANCP compares with NCP structures in other OECD countries, including resourcing and international best-practice.

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

- the ability to successfully promote the Guidelines, including access to relevant networks and stakeholder partnerships; and
- 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.

A written report, including recommendations, will be provided to Treasury in September 2017.

Annexe B:

Online consultation questions

1. In your view, what makes a National Contact Point (NCP) successful?
2. Are there any aspects of the Australian NCP's (ANCP) current structure or location you consider problematic?
3. In the future, what administrative structure do you think will work best for the ANCP?
4. How can the ANCP engage most effectively with non-government organisations, including business, unions, industry groups, academia and civil society?
5. To what extent has your organisation engaged with the OECD Guidelines for Multinational Enterprises or the ANCP?
6. What support should the ANCP provide to complainants and MNEs when handling complaints under the OECD Guidelines?
7. Do you have any other views for the ANCP Review to consider?
8. (BUSINESS ONLY) What international guidance or multi-stakeholder initiatives do you use when designing corporate responsibility/sustainability programs and policies for your organisation?
9. (BUSINESS ONLY) How accessible is that guidance? Has it been straight-forward to apply in the Australian context?

List of submissions received

ActionAid Australia

Australian Lawyers for Human Rights

Australasian Centre for Corporate Responsibility

Business and Human Rights Resource Centre

CARE Australia

CFMEU (with ACTU)

Corporate Accountability Research – Non-judicial Human Rights Redress Mechanisms Project

Adjunct Professor Holly Cullen, University of Western Australia

Human Rights Law Centre

Law Council of Australia

OECD Watch

Oxfam Australia

Qantas

Regnan

Mr John Southalan, Barrister and Adjunct Associate Professor

Annexe C:

List of stakeholders consulted

This list includes attendees at the consultation forums (in Sydney and Melbourne) and at the Oversight Committee meeting (in Canberra). In addition, it includes people or organisations that the Independent Reviewer met with, interviewed or corresponded with separately.

Government

- Treasury (Foreign Investment Division, Multilateral Forums Unit)
- Department of the Prime Minister and Cabinet (Open Government Partnership)
- Department of Foreign Affairs and Trade (Human Rights Branch, Investment and Economics Branch)
- Attorney-General's Department (Human Rights Branch, Office of International Law, Criminal Justice Policy, Transnational Crime Branch)
- Department of Industry, Innovation and Science (Mining and Investment, Trade and International Branch)
- Department of Employment (Industry and International Strategies Branch)
- Australian Trade and Investment Commission
- Export Finance and Insurance Corporation (Environmental and Technical Review)

Independent statutory organisation

- Australian Human Rights Commission (Edward Santow, Spela Berlec)

Business and consultants

- Allens Linklaters (Freya Dinshaw, Sarah Rennie)
- ANZ (Ben Walker)
- Australian Centre for Corporate Social Responsibility (Dr Leeora Black)
- Australian Council of Superannuation Investors (Zoey Irvin)
- Australian Institute of Company Directors (Matthew McGirr)
- BHP Billiton (James Ensor, Freya Carkeek)
- Ernst and Young (Nikki Hebenstreit)
- FTI Consulting (Murray Lawson)
- Global Compact Network Australia (Alice Cope)
- G4S (David Rubinek)
- Herbert Smith Freehills (Christine Wong)
- Konica Minolta Australia (Laura McManus)
- KPMG (Meg Brodie)
- Newcrest Mining (Paola Lasso)
- Oil Search (Megan Christensen)
- Qantas (Stephanie Dietz)

- Regnan (Alison Ewings)
- Resolution 88 (Bruce Harvey)
- Shell (Shane Boladeras)
- Melissa Stewart (Independent)

Trade Unions

- Australian Council of Trade Unions (Andrea Maksimovic)
- Australian Manufacturing Workers' Union (Andrew Dettmer)
- Construction, Forestry, Mining and Energy Union (Peter Colley)
- Trade Union Advisory Committee (Kirsty Drew)

NGOs

- ActionAid (Julie Macken)
- Australian Council for International Development (Jocelyn Condon)
- Australian Lawyers for Human Rights (Madeleine Bridgett, Lauren Zanetti)
- Baptist World Aid (Gershon Nimbalker)
- Centre for Policy Development (Sam Hurley)
- Human Rights Law Centre (Keren Adams)
- Inclusive Development International (Dr Natalie Bugalski)
- Jubilee Australia (Luke Fletcher)
- Law Council of Australia (Greg Vickery, Kristen Zornada)
- OECD Watch (Ame Trandem)
- Oxfam Australia (Nina Collins)
- Transparency International Australia (Serena Lillywhite)
- UNICEF (Alison Elliott)

International organisations

OECD

- Working Party on Responsible Business Conduct (Professor Roel Nieuwenkamp)
- Responsible Business Conduct Unit (Kathryn Dovey)

United Nations

- UN Working Group on Business and Human Rights (Dante Pesce)

Academics

- Dr Kate Macdonald (University of Melbourne, School of Social and Political Sciences)
- Rebecca Powell (Monash University, Border Crossing Observatory, School of Social Sciences)
- Professor Paul Redmond (UTS, Law Faculty)
- Rosemary Sainty (UTS, Business Faculty)

- Professor Ben Saul (University of Sydney, Law Faculty)

NCPs

Australia

- Victoria Anderson, ANCP
- Robert Donnelly, former ANCP
- Sam Reinhardt, former ANCP
- Gerry Antioch, former ANCP

New Zealand

- Michael Hobby, New Zealand NCP

Norway

- Frode Elgesem, Member of the Norwegian NCP

UK

- Ben Moxham, former Member (trade union representative) of the UK NCP's Steering Board

Annexe D:

Assessment of the ANCP's Location and Structure

Criterion	UNGP 31	Treasury	DFAT	AGD	AHRC	Independent
Visibility		★	★★★	★★	★★★	★★
Accessibility	✓	★	★★★	★★	★★	★★★
Transparency	✓	★	★★	★★	★★	★★★
Accountability (legitimate)	✓	★	★★★	★★	★★	★★★
Impartial (↑ independence; ↓ conflicts of interest)		★	★★	★★	★★★	★★★
Predictable	✓	★	★★	★★	★★	★★★
Equitable	✓	★	★★	★★	★★	★★★
Compatible with OECD Guidelines (rights-compatible)	✓	★	★★★	★★★	★★★	★★★
Resourcing ⁱ		★	★	★	★	★
Confidence of social partners and other stakeholders ⁱⁱ		★	★★	★★	★★	★★★
Complaints/mediation expertise		★	★	★	★★★	★★
Subject matter expertise		★	★★	★★	★★	★★★
Policy coherence		★	★★★	★★	★	★★★
Total:		13	29	25	28	35

Key:

OECD Core Criteria for determining NCP structures – “VATA”

OECD Procedural Guidance – Guiding Principles for Specific Instances: NCPs must deal with complaints in a way that is impartial, predictable, equitable and compatible with principles and standards of the OECD Guidelines.

★ one star = poor; two stars = average; three stars = good. [One star is the minimum possible rating, while three is the maximum].

Please note: all star ratings are approximate and used for the purposes of comparison, based on information provided to the Independent Review.

ⁱ Decision of the Council on the OECD Guidelines, 27 June 2000 (amended on 25 May 2011) stated: “Adhering countries shall make available human and financial resources to their National Contact Points so that they can effectively fulfil their responsibilities, taking into account internal budget priorities and practices.” In addition, the 2017 OECD Ministerial Council Statement (chaired by Denmark and vice-chaired by Australia and the UK), paragraph 17.3 stated: “We commit to having fully functioning and adequately resourced National Contact Points, and to undertake a peer learning, capacity building exercise or a peer review by 2021, with the aim of having all countries peer reviewed by 2023.”

ⁱⁱ Commentary on the Procedural Guidance, page 80 para 10: NCP leadership should be such that it retains the confidence of social partners and other stakeholders, and fosters the public profile of the Guidelines.