

## OECD Watch Submission to the 2017 Review of the Australian National Contact Point

20 July 2017

OECD Watch is pleased that the Foreign Investment Division within Treasury has commissioned this 2017 Review of the Australian National Contact Point (ANCP). The review seeks to examine the Australian Government's commitments and obligations under the OECD Guidelines for Multinational Enterprises (the Guidelines) and evaluates the effectiveness of the current structure and location of the ANCP within the government.

In this year's [G20 Leaders Declaration](#), the Australian Government has made a commitment to "support access to remedy, and where applicable, non-judicial grievance mechanisms, such as the National Contact Points for the OECD MNE Guidelines (NCPs). We will encourage multinational companies to conclude international framework agreements as appropriate." Furthermore, the 2017 [G20 Labour and Employment Ministerial Declaration](#) highlights commitment that "Countries amongst us that adhere to the OECD Guidelines will strengthen and increase the visibility of the OECD National Contact Points."

In order to meet these commitments, along with the Australian Government's own binding obligations under the Guidelines to establish National Contact Points that meets the core criteria of visibility, accessibility, transparency and accountability, reform of the ANCP is necessary. OECD Watch, hereby, provides this submission with a series of recommendations aimed at strengthening the ANCP's compliance with the Guidelines, as well as improving the effectiveness of the ANCP to facilitate access to remedy for victims of corporate abuse.

### **In your view, what makes a National Contact Point (NCP) successful?**

NCPs are established in order to further the effectiveness of the Guidelines and serve as a non-judicial grievance mechanism that contributes to the resolution of disputes and facilitates access to remedy for people harmed by companies' non-compliance with the Guidelines. In order for an NCP to be successful, OECD Watch believes that NCPs must achieve these central objectives, while also meeting the Guidelines' Procedural Guidance, which are the rules that govern the work of all NCPs. As such an NCP must operate according to the core criteria for functional equivalence, which are visibility, accessibility, transparency and accountability. When handling complaints, an NCP must follow the Guiding Principles for Specific Instances by effectively handling complaints in a manner that is impartial, predictable, equitable and compatible with the Guidelines. Furthermore, an NCP must command stakeholder confidence.

The test of effectiveness and impact of an NCP should be whether the NCP is effectively promoting responsible business conduct through adherence of the Guidelines, and

delivering meaningful outcomes that are compatible with the principles and standards expressed in the Guidelines and provide access to remedy.

**Are there any aspects of the Australian NCP's (ANCP) current structure or location you consider problematic?**

According to the Guidelines' Commentary on the Procedural Guidance for NCPs, all governments adhering to the Guidelines must set up a NCP that is impartial with leadership that retains the confidence of all stakeholders.

The ANCP is a Senior Executive of the Foreign Investment Division, located in the Australian Government's Department of the Treasury. The ANCP has an Oversight Committee composed of representatives from various government ministries. The Oversight Committee is [reported to be inactive](#), having only met once since 2012. The Committee also lacks a publicly accessible terms of reference. There is no input or representation from civil society or other stakeholders, such as trade unions, academia or business.

As a result, the current institutional structure of the ANCP risks being perceived as lacking independence and being partial to the interests of the Treasury. Furthermore, the ANCP does not command a strong level of confidence amongst civil society organisations due to the following weaknesses:

- **Insufficient Resources:** The ANCP lacks the sufficient human and financial resources necessary to effectively fulfill its responsibilities. According to the [2016 Annual Report](#) of the OECD Guidelines, the ANCP only has one part-time dedicated staff. Additionally, the ANCP reported that in 2016, they had no dedicated financial resources available for organizing promotional events and as a consequence no promotional activities were organized by the ANCP. As a result, the ANCP did not meet its responsibility to undertake promotion activities.
- **Lack of Balanced Perspective:** The current location of ANCP in the Foreign Investment Division, compounded with its current structure that represents only the interests of Treasury, does not command stakeholder confidence as it lacks a balanced perspective.
- **Insufficient Oversight:** In addition to being reportedly inactive, the Oversight Committee's current appeals mechanism only allows it to examine procedural errors and lacks the authoritative oversight to examine the substance of a complaint, thereby making it difficult for the Oversight Committee to ensure that the ANCP is operating in a manner that is compatible with the Guidelines. Furthermore, there is also no commitment by the Oversight Committee to publish a summary of the review's findings, which instead is left in their discretion to decide whether or not to publish its conclusions.
- **Lack of transparency and accountability:** While the ANCP has reported annually to the OECD's Investment Committee, they have not made any of their reports accessible for public scrutiny. Furthermore, the ANCP does not appear to have any regular reporting procedures in place for them to report to the Australian Parliament.

**In the future, what administrative structure do you think will work best for the ANCP? Please include in your response: your vision for how it would work; the relative advantages and disadvantages for all stakeholders under your preferred model, including the ANCP's ability to handle specific instances (complaints) and promote the Guidelines; and any comparative models proven to be effective (e.g. other NCPs or non-judicial mechanisms for redress).**

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<sup>1</sup>.

As such, we would recommend that the ANCP move away from the monopartite structure currently in place and consider implementing the following changes:

- ***Restructure and relocate the ANCP:*** As the current structure of the ANCP does command stakeholder confidence and impartiality, OECD Watch advises the Australian government to revise its structure, while also reconsider the location of where the ANCP is housed. As such, we recommend that the ANCP consider the following points when developing a new structure:
  - Develop an independent structure of experts or a quadripartite structure that consists of representation from several ministries and formally integrates representatives from civil society, trade unions, academia and business;
  - If the structure continues to be located in the government, the Department of Foreign Affairs and Trade may be a better location to house the ANCP, given their government responsibilities under the UN Guiding Principles on Business and Human Rights and their work towards preparing Australia's National Action Plan on Business and Human Rights;
  - Develop a new oversight committee, that is charged with oversight and the ability to insert additional accountability measures into the ANCP's decision-making process;
  - Consider supplementing the official structure of the new ANCP with a stakeholder advisory board made up of experts that represent a variety of viewpoints;
  - Improve transparency and clarity over decision-making processes by publishing a terms of references for the new structure on the ANCP's website; and,
  - Ensure that members for the new ANCP structure are selected through an open and transparent process.
- ***Develop procedures for accountability:*** The new structure should ensure greater accountability by publicly reporting on an annual basis to the Australian Parliament, in addition to the OECD's Investment Committee.

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<sup>1</sup> OECD Watch, [A '4 x 10' Plan For Why and How to Unlock the Potential of the OECD Guidelines](#). 2016

- **Enhance policy coherence:** The Australian government should instruct the ANCP to enhance policy coherence through the following means:
  - Make determinations for all accepted complaints that do not result with a mediated agreement;
  - Enhance the powers of the ANCP so that is able to carry out fact-finding investigations when handling specific instance complaints; and,
  - Attach material consequences on companies that are found to have breached the Guidelines, this could include exclusion from public procurement contracts, export credit guarantees, private sector development aid, international trade and investment serves.
- **Adequately resource the ANCP:** The ANCP should have dedicated staffing and financial resources necessary to effectively fulfill its role in furthering the effectiveness of the Guidelines, while serving as an effective non-judicial grievance mechanism.

### **How can the ANCP engage most effectively with non-government organisations, including business, unions, industry groups, academia and civil society?**

In addition to restructuring the ANCP to have an impartial institutional structure that commands stakeholder confidence, OECD Watch recommends that the ANCP hold regular stakeholder consultation sessions with civil society, trade unions, academia and business/industry associations, in order to seek feedback on the ANCP's performance and handling of complaints. Furthermore, the ANCP should use these consultations as a way to seek input on how best the ANCP can promote the Guidelines amongst companies within Australia and in the countries abroad in which Australian companies operate, as well as how to effectively raise awareness amongst civil society and trade unions regarding its function to handle complaints related to business breaches to the Guidelines.

### **To what extent has your organisation engaged with the OECD Guidelines for Multinational Enterprises or the ANCP?**

OECD Watch is an international network of over 100 civil society organisations working to promote corporate accountability. In addition to supporting actual or potential complainants to NCPS (including to the ANCP), OECD Watch acts as a conduit for bringing the perspectives and interests of civil society organisations and disadvantaged communities into policy discussions over the Guidelines. OECD Watch also researches and analyses the implementation and impact of the Guidelines and the effectiveness of the NCP system. Since 2011, we have served as a recognized stakeholder to the Investment Committee of the OECD. The full list of OECD Watch's members, along with our publications and case database can be found here: [www.oecdwatch.org](http://www.oecdwatch.org).

### **What support should the ANCP provide to complainants and MNEs when handling complaints under the OECD Guidelines?**

Most importantly, the ANCP must gain stakeholder confidence, increase its visibility and ensure that they are accessible, transparent and accountable by undertaking the following actions:

- **Command stakeholder confidence:** Restructure the ANCP to ensure multi-stakeholder representation, including representation by civil society, trade unions, academics and business associations in a manner that commands stakeholder confidence.
- **Raise visibility through promotion and consultation:** The ANCP must carry out information and promotion activities both within Australia, as well as in the countries that Australian businesses operate overseas. The ANCP should hold regular consultation sessions with stakeholders in order to explain the complaints procedure, as well as seek input into how they are performing. The ANCP should develop more detailed procedural rules with guidance on how to file a complaint, what mediation entails, and how decisions are made within the NCP. The revised procedural rules should be published on the ANCP's website.
- **Reduce barriers for filing complaints:** Translation services should be available to potential complainants to help overcome language barriers in terms of filing a complaint, translating supporting evidence, and going through mediation. Financial assistance should also be provided to complainants that may need to travel for mediation or there should be the possibility of requesting mediation to occur in the location of where the harm occurred. Furthermore, when assessing whether or not the ANCP should accept a complaint, the complaints should only be evaluated according to the criteria listed within the Guidelines' Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, and not with additional criteria as currently practiced by the ANCP.
- **Increase transparency:** The ANCP should strive to promote transparency of its functions and the procedures in which it handles complaints. The ANCP should commit to publishing initial assessments, in addition to Final Statements.
- **Seek meaningful outcomes:** 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. In order to make mediation as meaningful as possible, the ANCP should consider the possibility of hiring independent mediators or ensuring that its own staff are trained in mediation.
- **Conduct fact-finding missions:** The ANCP should carry out fact-finding investigations or commission experts when necessary, in order to investigate contested disputes or help gather credible evidence when assessing whether to accept a complaint or making a determination.
- **Follow-up on outcomes:** When a mediated agreement has been reached, the ANCP should follow-up with the parties on the progress being made towards the implementation of the mediated agreement and produce public follow-up report(s).
- **Protect activists using the system:** Human rights defenders, as well as other community and labour leaders, seeking to address breaches of the Guidelines

have at times faced threats and harassment for filing complaints with NCPs. For this reason, the ANCP should develop a safety protocol that helps evaluate potential risks, and mitigates, to the extent possible, reprisals that a complainant may face.

**Do you have any other views for the ANCP Review to consider?**

This submission advances recommendations that OECD Watch has previously put forward to the ANCP, as well as to all NCPs, in our 2015 report [Remedy Remains Rare](#), our 2016 [4 x10 Plan for why and how to unlock the potential of the OECD Guidelines](#), and our report on [The Model National Contact Point](#).

Furthermore, OECD Watch recommends that the effectiveness criteria for non-judicial grievance mechanisms set forth in Principle 31 of the UN Guiding Principles for Business and Human Rights, should also be considered during the reorganisation of the ANCP.

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