



Submission to Australian National Contact Point (AusNCP)

Improving Specific Instance Procedures

8 JUNE 2018

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- undertakes long-term development programs;
- provides emergency response during disaster and conflict;
- undertakes research, advocacy and campaigns to advance the rights of poor and marginalised people, including women and works with them to achieve equality; and
- promotes fair trade, supporting local artisans and producers throughout shops and Fairtrade food brand.

We are a long-term Australian Government development partner.

In the 2015-16 financial year, Oxfam Australia directly reached more than 2.5 million people: 1.3 million through our long-term development work, and more than 1.2 million affected by disaster. Through our advocacy and policy work, we have reached millions more. Oxfam Shops also supports hundreds of producer partners and artisans in countries around the world, including Indigenous Australian producers and businesses.

More than half a million Australians annually support Oxfam Australia by contributing skills, time and financial support to advance our work.

Oxfam Australia is a member of Oxfam International, a global confederation of organisations that work together, last year collectively reaching more than tens of millions of people around the world.

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1. Executive Summary

Oxfam Australia supports the majority of revisions to specific instance procedures proposed in the Consultation paper.

Oxfam Australia does not support the intention to remove review rights.

The changes will marginally improve the effectiveness of the AusNCP in offering its services to resolve specific instance complaints brought against Australian multi-national enterprises.

However the revisions need to go further in order to ensure the AusNCP is as effective as is envisioned in the OECD Guidelines for Multinational Enterprises. Most significantly, changes to the AusNCP's structure and resourcing are necessary to ensure that it adheres to the OECD core criteria of visibility, accessibility, transparency and accountability¹.

The AusNCP should become more assertive in the exercise of its functions: of offering its good offices to assist the parties to resolve their differences, in examining the issues relevant to a complaint, in making a statement on the application of the guidelines and making recommendations relevant to the complaint. Oxfam Australia has made a series of recommendations in addition to responding to the consultation questions.

Oxfam Australia's recommendations relate to improving the initial assessment criteria, the need for specialist human rights and conflict training and expertise, the benefit of a greater preparedness and resourcing to travel to complaint regions to undertake its functions, the necessity for the AusNCP to issue a Final Statement, the need to retain review rights and maintaining a multifaceted stakeholder engagement capacity.

Implementing these additional changes would see the AusNCP taken more seriously by Australian companies, who would be incentivised to participate in its processes in good faith; and civil society, who are looking for a genuine Australian state actor to promote the OECD Guidelines and ensure the domestic implementation the UN Guiding Principles on Business and Human Rights.

¹ OECD Guidelines for Multinational Enterprises, 2011 edition, OECD p79

1.1. Consolidated Recommendations

Recommendation 1: Add a precursor to the proposed initial assessment criteria so it reads as: *In making an initial assessment of whether the issue raised merits further examination, the NCP will need to determine whether the issue is bona fide and relevant to the implementation of the Guidelines. In this context the National Contact point will take into account*

- *The identity of the notifying party and its interest in the matter*
- *Is the issue plausible and related to the application of the guidelines?*
- *Is there a clear and relevant link between the enterprise's activities and the issues raised?*
- *Would acceptance of the specific instance complaint contribute to the purposes and effectiveness of the guidelines?*

Recommendation 2: AusNCP staff are given specialist advice and training in undertaking investigations and good offices processes with people living and working in situations of high risk and human rights abuses.

Recommendation 3: AusNCP should be prepared to take a more active role in undertaking its functions. This should include more flexibly communicating with complainants who may be in isolated parts of the world, and travelling to relevant regions in order to undertake good offices, mediation and examination functions.

Recommendation 4: AusNCP should ensure that translation services are offered to complainants whose primary language is not English.

Recommendation 5: It is recommended that paragraphs 52 and 53 of the procedures be amended to require the AusNCP to issue a final statement as to whether the guidelines have been breached.

Recommendation 6: That the current Review mechanism be retained and similar mechanism maintained when the Treasury response to the independent review is released.

Recommendation 7- Whilst the tracker is supported, AusNCP must maintain a suite of communication and engagement tools that are best suited to the needs of specific complainants and parties to specific instance complaints.

2. Detailed submission, including response to consultation questions and recommendations

2.1. Initial Assessment

The revised Initial Assessment Criteria proposes to clarify and simplify the process of initial assessment. The substantive examination of complaints will be moved to a later stage in the process, after the good offices mediation phase, reducing the current practice of often having a prolonged initial assessment phase.

This will be beneficial because cases will be dealt with more quickly and more cases will be able to be subject to mediation services of the good offices phase.

Oxfam Australia supports the intent of the revised procedures on initial assessment.

However this intent could be enhanced even further if the AusNCP adopted language directly from the Commentary of the Implementation Procedures of the OECD Guidelines for Multinational Enterprises

“..In making an initial assessment of whether the issue raised merits further examination, the NCP will need to determine whether the issue is bona fide and relevant to the implementation of the Guidelines” (OECD Guidelines, pp82-83).

The four numbered criteria in the revised procedures should be taken into account in determining their contribution to the above initial assessment criteria.

This change would make the process more accessible to applicants with legitimate complaints.

It would also assist the AusNCP establish a reputation as being an objective actor, committed to resolving disputes in a non-legalistic manner, and inclusive manner.

Recommendation 1: Add a precursor to the proposed initial assessment criteria so it will read as: *In making an initial assessment of whether the issue raised merits further examination, the NCP will need to determine whether the issue is bona fide and relevant to the implementation of the Guidelines. In this context the National Contact point will take into account:*

- 1. The identity of the notifying party and its interest in the matter*
- 2. Is the issue plausible and related to the application of the guidelines?*
- 3. Is there a clear and relevant link between the enterprise's activities and the issues raised?*
- 4. Would acceptance of the specific instance complaint contribute to the purposes and effectiveness of the guidelines?*

2.2. Good Offices

Consultation Question 1 *Will the proposed planning stage of good offices improve the predictability of the process for the parties involved?*

Oxfam Australia welcomes the proposal to establish an early planning stage, where the AusNCP works with each party to develop a forward plan for the case, which sets out the process for the case and would typically involve each party setting objectives, agreeing the anticipated communication method and confidentiality requirements. This process would set clearer expectations of all parties.

This would also address some of the concerns that Oxfam Australia raised in our Submission to the Independent Review in 2017 about Procedural transparency and the detrimental effects on complainants of inconsistent and unclear processes².

Consultation Question 2 *Are there any other improvements that could assist the effectiveness of the 'good offices stage'*

There appears to be a difference of scope in the definition of 'good offices' between the AusNCP and found in the Commentary to the OECD Guidelines. The Good Offices paragraphs in the Consultation paper seem to restrict the concept of 'good offices' to those of facilitating informal and formal mediation between the parties.

The OECD Guidelines however clearly articulate a more proactive role for the AusNCP beyond the facilitation of discussions:

C Implementation in Specific Instances

...In providing this assistance the NCP will...

2 Where the issues raised merit further examination, offer good offices to help the parties involved to resolve the issues. For this purpose, the NCP will consult with these parties and where relevant:

- a) seek advice from relevant authorities, and/or representatives of the business community, worker organisations, other nongovernmental organisations, and relevant experts;*
- b) consult the NCP in the other country or countries concerned;*
- c) seek the guidance of the Committee if it has doubt about the interpretation of the Guidelines in particular circumstances;*

² Submission to the Review of the Australian National Contact Point, July 2017, Oxfam Australia pp5-6

d) offer and with the agreement of the parties involved, facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist the parties in dealing with the issues³.

The AusNCP is able to undertake a range of investigative activities to help inform its management of the complaint. This is important because its preparedness to make enquiries, identify parties and issues, make recommendations and observations, and issue a statement, is of particular relevance when a company is considering not participating in good faith in the process laid out in the guidelines.

Previously the AusNCP has failed to pursue matters because companies failed to participate in good faith, thereby allowing them to escape accountability. Unless the AusNCP is prepared to exercise its point of leverage and to make statements based on its own inquiries, then there is little incentive for companies to participate in its processes.

The AusNCP has an over-reliance on desk-based, paper driven complaints mechanisms. Whilst it is accepted that allegations ultimately need to be made in writing in order to be properly responded to, these processes could be complemented by improving engagement with complainants through a variety of other means. Issues that could be considered include greater preparedness by AusNCP officers to travel directly to affected countries in order to meet complainants and build engagement and trust in the process, and to carry out mediation and investigation activities in country, as is the practice of the Dutch NCP. Direct and personal engagement presents a human face to the complainant and parties, rather than a distant bureaucracy.

Additionally the AusNCP could be more flexible in utilising digital communication tools such as Skype to contact and engage with complainants in remote parts of the world.

Oxfam Australia acknowledges this will require additional resourcing, but this is preferable to the current provision of a sub-optimal service that is barely utilised by industry or civil society.

Oxfam Australia's submission to the Independent Review also made some recommendations about the need for greater awareness of and sensitivity to many of the issues, drivers and risks facing complainants who may be living and working in high risk situations involving human rights, confidentiality and security risks of a scale and scope unfamiliar to staff of the Australian Treasury in Canberra.⁴ It also raised some of the difficulties that some complainants face who live in remote parts of the world and where communication tools are not all at the same standard as in Australia and the need for translation services to be made available.

Recommendation 2 AusNCP staff are given specialist advice and training in undertaking investigations and good offices processes with people living and working in situations of high risk and human rights abuses.

Recommendation 3 AusNCP should be prepared to take a more active role in undertaking its functions. This should include more flexibly communicating with complainants who may

³ OECD Guidelines for Multinational Enterprises, 2011 edition, OECD, pp72-73

⁴ Oxfam Australia op cit pp12-13

be in isolated parts of the world, and travelling to relevant regions in order to undertake good offices, mediation and examination functions.

Recommendation 4 AusNCP should ensure that translation services are offered to complainants whose prime language is not English.

2.3. Conclusion stage

Consultation Question 3 What is your view on the proposal to shift the majority of the AusNCP's examination responsibilities so they occur after the good offices stage?

Oxfam Australia supports provisions which will invite final submissions from parties at the conclusion of the good offices phase. This will make the process of engaging the parties more iterative as it will occur after and be informed by any mediation that has occurred.

Oxfam Australia supports provisions that will enhance the examination capacity of the AusNCP. It will also allow for examination of all issues raised during the good offices phase including from mediation. Current paragraphs 47-55 of the AusNCP Procedures⁵ adequately cover the examination powers and Final Statements.

As stated previously a key reform to ensure that parties take mediation seriously is to establish procedures to ensure that non-co-operation by a party is not rewarded. Moving the examination phase to after the good offices phase sends a clear signal that the AusNCP takes its investigative responsibilities seriously, and that issues ventilated by a complaint will still be examined despite the non-cooperation of a recalcitrant company. This will act as an incentive for co-operation in mediation and a potential disincentive for non-cooperation.

Consultation Question 4 *Are further changes needed to improve the procedures for the consultation stage?*

A deficiency in the current proposal is the retention of the current standard that the AusNCP may only make a Final Statement as to whether the guidelines have been breached⁶. This is particularly unhelpful and undermines the effectiveness of the AusNCP in circumstances where either an Australian company has chosen not to participate in the offer of good offices of the AusNCP, or the parties have failed to reach agreement.

The Implementation procedures of the OECD Guidelines⁷ and the Commentary on the Implementation procedures⁸ are very clear that the issuing of a Statement is not discretionary.

⁵ Procedures for Dealing with Specific Instances Brought Forward under the OECD Guidelines for Multinational Enterprises, Australian National Contact Point

⁶ Ibid par 52

⁷ OECD, ibid p73

⁸ Ibid, p85

Companies are more likely to participate in good faith if they are aware that the AusNCP will continue to issue a Final Statement even if they don't cooperate in good faith or fail to reach an agreement.

The lack of compulsion to make a Statement is inexplicable and undermines the credibility and effectiveness of the AusNCP as an effective and objective actor in resolving disputes between complainants and Australian multinational enterprises.

Recommendation 5: It is recommended that paragraphs 52 and 53 of the procedures be amended to require the AusNCP to issue a final statement as to whether the guidelines have been breached.

2.4. Follow-Up processes and review mechanism

Consultation Question 5 *Will follow-up processes improve the transparency of the AusNCP? Is 12 months an appropriate timeframe?*

Oxfam Australia supports the proposed revisions to allow parties to a complaint to provide for a follow up progress report 12 months after a Final Statement is issued, and the AusNCP to issue a follow up statement.

Consultation Question 6 *Do stakeholders see value in having a review mechanism as part of any future AusNCP structure, and if so, in what form?*

Oxfam Australia opposes the proposal to abolish the review mechanism. The right to review is established throughout government, as a right to ensure procedural fairness, and guard against corruption and malfeasance. We see no justifiable reason to remove it. The paper canvasses the Oversight Committee being not being currently structured to provide the reviews, but also sites there having only been one request for review since the inception of the AusNCP.

Oxfam certainly agrees that the Oversight Committee as currently structured is ill suited to overseeing the AusNCP and made a submission to that effect to the Independent Review of the Australian National Contact Point in July 2017. However until the governance arrangements are finalised, when Treasury responds to the Independent review, there is no case to be made to reduce the rights of parties.

The fact there has only been one review in the entire history of the AusNCP indicates the small risk faced of having a review overseen by an inadequate oversight body.

Oxfam Australia believes, depending on the final decisions pending the structure of an Oversight Committee and the location of the AusNCP, the following principles should be applied to review:

- A small Review Committee should be comprised of members of the AusNCP Oversight/Governing Board, with a chairperson.

- Any action, or non-action of the AusNCP, arising from a specific instant complaint should be the subject of review
- The review process should be governed by the principles of procedural fairness and transparency.

Recommendation 6: *That the current Review mechanism be retained and similar mechanism maintained when the Treasury response to the independent review is released.*

2.5. Milestone and Timeframes

Consultation Question 7 Do stakeholders have any comments on the proposed timeframes?

Oxfam Australia supports the proposed timeframes. Furthermore Oxfam submits that less reliance on paper based processes and a more proactive approach from AusNCP, including a capacity to travel to an effected region in order to be able to undertake consultations, mediation and examination will assist to hasten timeframes. W note that currently timeframes are far too slow to be able to be meaningful.

2.6. Communication

Consultation Question 8 have stakeholders found this specific instance tracking tool valuable?

Oxfam Australia has not dealt with this tracker so can't comment as to its efficacy. In principle, use of such tools is supported, but AusNCP is reminded that many complainants are not necessarily familiar with online trackers and may speak another language.

Therefore the AusNCP also needs to have systems in place to communicate with complainants in more traditional methods.

Recommendation 7- *Whilst the tracker is supported, AusNCP must maintain a suite of communication and engagement tools that are best suited to the needs of specific complainants and parties to specific instance complaints.*