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TI AUSTRALIA SUBMISSION TO THE AUSTRALIAN NATIONAL CONTACT POINT (OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES) INQUIRY INTO IMPROVING SPECIFIC INSTANCE PROCEDURES.

TRANSPARENCY INTERNATIONAL AUSTRALIA

TI Australia (TIA) is the national chapter of [Transparency International \(TI\)](http://www.transparency.org), the global coalition against corruption, with a presence in over 100 countries. We fight corruption and promote transparency, integrity and accountability at all levels and across all sectors of society, including in government.

TIA was launched in March 1995 to raise awareness of corruption in Australia and to initiate moves to combat it. TIA believes that corruption is one of the greatest challenges of the contemporary world. Corruption undermines good government, distorts public policy, leads to the misallocation of resources, harms private and public-sector development and particularly hurts the poor. It drives economic inequality and is a major barrier in poverty eradication. Tackling corruption is only possible with the cooperation of a wide range of stakeholders. We engage with the private sector, government and civil society to build *coalitions against corruption*. Coalitions against corruption will help shape a world in which government, politics, business, civil society and the daily lives of people are free of corruption.

TI Australia, is registered with the Australian Charities and Not-for-Profits Commission (ACNC).

SUMMARY

Transparency International Australia (TIA)¹ welcomes the opportunity to provide feedback on the 'Improving Specific Instance Procedures' consultation paper, dated 22 May 2018.

Our intent is to ensure grievances and complaints raised with the ANCP are handled in a timely, transparent and predictable manner, in accordance with the OECD Guidelines for Multinational Enterprises Procedural Guidance, and meeting the OECD's objective of NCP functional equivalence.

The OECD Guidelines for Multinational Enterprises (The Guidelines) are arguably the most significant non-judicial mechanism to promote responsible business conduct and provide redress when provisions are breached. The ANCP has specific responsibilities to ensure both promotion of The Guidelines to business and other government departments, and access to redress through the Specific Instance process when communities and workers' rights

¹ This submission draws on the extensive experience of the TIA CEO, Serena Lillywhite, who has been actively engaged with the OECD Guidelines for Multinational Enterprises and the ANCP since 2002. This has included submitting a case, supporting other NGOs to submit cases to the ANCP, lobbying for the establishment of the ANCP Oversight Committee, participation in the 2011 review of the OECD Guidelines, active engagement with the OECD Investment Committee and the Responsible Business Conduct Working Group, and associated advisory groups including to develop the OECD Guidance on Meaningful Stakeholder Engagement and Due Diligence in the Extractives Sector. These comments also draw on extensive engagement with OECD Watch (OW), including as a member of the OW Coordination Committee for several years.



have been infringed, the natural environment adversely impacted and other provisions including human rights, disclosure and combating bribery have been breached.

The [ANCP 2017 Review](#), has highlighted the poor track record of the ANCP in performing these functions.

Further, the OECD Watch report [Remedy Remains Rare](#) (2015), identified NCP practices (including the ANCP) that hinder access to remedy. Accessibility to complainants, NCPs' impartiality towards parties, poor transparency and predictability of NCPs' operations were highlighted.

The poor track record of the ANCP resulted in the first substantiated submission by OECD WATCH against the ANCP in November 2017. The submission identified practices that impede the ANCP's accessibility to complainants and impartiality in handling case-related information.

This ANCP's procedural review is an opportunity for the ANCP to address shortcomings in its procedures, and develop improved policies. It is most welcome.

TIA supports the ANCP's decision to proceed with this procedural review, however, we do not believe it is possible to address the more significant problems with the way the ANCP handles grievances until the more fundamental structural and resourcing problems identified by the 2017 Review are addressed.

Transparency International supports the Human Rights Law Centre position that the most unsatisfactory aspects of the way the ANCP has handled past complaints has stemmed from a failure to apply its existing procedures, rather than problems with the procedures themselves.

Further, we fully support the view of OECD Watch, and others, regarding resourcing of the ANCP. Insufficient human and financial resources of the ANCP has been a problem for years and all efforts to date to address this have failed. Consequently, the ANCP has been unable to effectively meet its responsibilities. These resourcing short-falls have direct repercussions on the ANCP's accessibility to complainants. OECD Watch has found that those NCPs which are staffed and resourced sufficiently are also more accessible.

TI AUSTRALIA POSITION

TIA makes the following recommendations:

1. Treasury take immediate steps to implement the recommendations of the 2017 Review to strengthen and restore trust and confidence in the ANCP.
2. The ANCP be adequately resourced to effectively to enable meaningful engagement in the specific instance process.
3. The ANCP ensure Specific Instance Procedures and initial assessment criteria are applied according to the principles of promoting compliance with the Guidelines, facilitating accessibility of the mechanism and support the OECD objectives of NCP functional equivalence.
4. The ANCP determine whether a complaint raises a 'bona fide' issue, and to consider whether the issue is "material and substantiated". In cases where one party refuses to participate, and the case meets the bona fide, material and substantiated test, the ANCP proceed to the examination/conclusion stage.
5. The ANCP standard for substantiation (in addition to recommendation 4) that will apply to allegations of misconduct is 'plausibility'. However, the reference to a 'clear and relevant link' between the enterprise activities and the issues be removed.



6. The ANCP make public the Initial Assessment decision to proceed, or not, to the examination stage
7. The ANCP consider all cases on the basis “bona fide” “material and substantiated”, regardless of existing or proposed Parallel Procedures.
8. The ANCP strengthen its accessibility to complainants by providing support and advise, including guidance on how to re-submit complaints that initially do not meet accessibility criteria.
9. The ANCP issue determinations as well as recommendations when mediation fails to deliver a solution to the parties.
10. The ANCP conduct a follow-up review 12 months after each specific instance has concluded, to ensure companies implement the recommendations given.
11. The ANCP retain and strengthen the existing review process of the Oversight Committee and ensure the Committee is appropriately structured and staffed to undertake its stated function.
12. The Specific Instance Tracker be updated to include information on the parties and nature of the complaint, the ANCP’s Initial Assessment, and the final determination.

Changes to initial assessment stage

TIA welcomes the ANCP’s objective of clarifying and simplifying the initial assessment phase of complaints to ensure that increased numbers of complaints are advanced quickly to the mediation /substantive examination stages.

It is our view that ANCP has previously applied an initial and unreasonably high threshold for the acceptance of complaints, resulting in delays and the rejection of well-founded complaints without a proper examination or attempts to bring the parties together for discussion, and which could achieve a positive resolution if offered a chance at mediation.

We welcome the ANCP’s proposal to move away from this model towards admitting complaints following a lesser amount of review, and shifting the bulk of the substantive examination of complaints into the later stages of the process. This change will ensure the Initial Assessment phase checks the complaint meets the basic requirements of raising an issue as covered by The Guidelines, without the high threshold issues previously encountered.

The ANCP must ensure that the Initial Assessment criteria are applied according to the guiding principles of promoting compliance with The Guidelines, and facilitating accessibility of the mechanism.

The ANCPs processes and guidance must be based on those set by the OECD with respect to how Specific Instance complaints should be handled. The Procedural Guidance directs NCPs to determine whether a complaint raises a ‘bona fide’ issue, and to consider whether the issue is “material and substantiated”. The ANCP should clarify that it understands this to mean that the issue is related to the OECD Guidelines (material) and that the standard for substantiation that the ANCP will apply to allegations of misconduct is ‘plausibility’ - as proposed in the consultation paper.

Consistency with the Procedural Guidance is vital to ensuring functional equivalence among the NCP’s. A consistent set of minimum criteria (as per the Procedural Guidance) is required.

- the identity of the party concerned and its interest in the matter;
- whether the issue is material and substantiated;



- the relevance of applicable law and procedures;
- how similar issues have been, or are being, treated in other domestic or international proceedings;
- whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines.

At the Initial Assessment stage, the key question is does the issue “merit further examination”, is it “bona fide and relevant to the implementation of the Guidelines”.

TIA would not support the inclusion of ‘is there a clear and relevant link between the enterprise activities and the issues raised’, at the Initial Assessment stage. This will potentially raise again the ‘investment nexus’ debate that was resolved in the 2011 update to the Guidelines. This ANCP should clarify it is a ‘plausible link’ rather than a ‘clear and relevant link’ as is proposed. This will ensure Initial Assessments are based on a ‘plausible link’ rather than the potential barriers and delays that could arise if criteria were based on ‘clear’ (or proven) link between the company and the issue.

The Commentary to the Guidelines with respect to Parallel Proceedings should be directly incorporated into the ANCP’s procedures with respect to Initial Assessments. As suggested by the Human Rights Legal Centre, to include:

The NCP will not decide that issues do not merit further consideration solely because international or domestic parallel proceedings have been conducted or are underway or available to the parties concerned. The NCP will evaluate whether an offer of good offices could make a positive contribution to the resolution of the issues raised and would not create serious prejudice for either of the parties involved in these other proceedings or create a contempt of court situation. In making such an evaluation, the NCP may take into account practice among other NCPs and, where appropriate, consult with the institutions in which the parallel proceeding is being or could be conducted.

In cases where one party refuses to participate, and the case meets the bona fide, material and substantiated test, the ANCP should proceed to the examination/conclusion stage.

The new Specific Instance Flowchart provided in the consultation paper, suggests that incomplete submissions will be declared invalid and rejected. TIA holds the view that the ANCP should contact the complainant explaining that they have provided incomplete information and alerting them to the additional information needed for the complaint to be considered. This will assist in meeting the OECD objective of promoting accessibility.

Establishing an appropriate balance between transparency and confidentiality is critical. Transparency is prioritised under the Guidelines, and without any public scrutiny into a case, companies have little incentive to engage. With this in mind, TIA recommends the ANCP make public the initial assessment decision to proceed, or not, to the examination stage.

Proposed changes to “good offices” stage

TIA welcomes the ANCP’s proposal to establish an early planning stage during which it will meet with both parties to discuss the specific instance process and seek to understand the parties’ needs (e.g. translation), objectives, and goals for mediation. The proposed planning stage can also address timeframes and confidentiality. This will contribute to a more transparent, predictable process which is more likely to engage both parties and lead to positive mediated outcomes.

As part of this early planning stage, we encourage the ANCP not to reject complaints that appear, at first submission, not to fulfil the admissibility criteria under the Guidelines, but rather to discuss such concerns with complainants to help them understand and address any shortcomings in their submissions.



The consultation paper indicates that the ANCP is currently preparing revised procedures with respect to the “good offices” stage, including with respect to how confidentiality is dealt with at this stage of the process.

The balance between transparency and confidential information is at the heart of ensuring impartiality and equitability. While an NCP may accept confidential documents from parties and engage in confidential discussions, no material that is not shared with both parties should ever be used to form the decision in a case. Complainants must be able to respond and address factual inaccuracies.

It is essential to the credibility and fairness of the process that Specific Instance complaints are dealt with as transparently as possible. The current ANCP procedural principle “*unless a good case is made for information to be withheld, all the information and evidence received by the ANCP may be shared with the parties*”, should be preserved and upheld in practice. The revised procedures should ensure that the basic principle of transparency within the process is preserved and promoted. This issue is of particular importance to both business and civil society stakeholders, and we recommend that the ANCP consults with stakeholders on the specific changes it intends to make in this area.

If the ANCP is to become a genuinely accessible and equitable mechanism, the ANCP must be properly resourced to offer “good offices” to recognise and address the significant barriers complainants face in being able to attend or participate in dialogue or mediation with companies. This is particularly true of overseas complainants, many of whom face significant cultural, linguistic and resource barriers to accessing the Specific Instance process, and particularly the “good offices” stage of proceedings.

While acknowledging the constraints of existing ANCP resources, we support the Human Rights Law Centre recommendation that the ANCP should also implement the following changes to promote a more equitable and accessible framework for dialogue:

- (a) the provision of translation services for non-English speaking complainants;
- (b) referral of complainants who lack representation in Australia to relevant civil society organisations or trade unions for assistance;
- (c) engagement of professional mediators to resolve disputes;
- (d) travel support for complainants without resources to be able to attend mediations.

Proposed changes to examination and conclusion stage

TIA welcomes the proposal to shift the majority of the ANCP’s examination responsibilities from the Initial Assessment stage to later in the proceedings, to ensure that more matters are moved through to “good offices” and attempted resolution.

We welcome the suggestion for parties to have an opportunity to provide final submissions or supplementary material after the “good offices” stage has commenced. This recognises that during the complaint process, situation that affect the issue may change. Further, it enables parties to contribute to the ANCP’s final statement, and to review the draft final statement before it is published. As with other documentation made by the parties during the process, these submissions should be shared between the parties, as well as with the ANCP, in keeping with transparency principles.

The ANCP’s current procedures (47-55) with respect to the final examination process and the drafting and publication of the final statement are solid and should be preserved.

However, we recommend the vague language “may” issue a final statement, be amended to “will” so that the ANCP is obliged as part of its final statement to issue commentary on whether or not the company has breached the Guidelines. This change is already reflected in the UK NCP’s procedures, on which the Australian procedures are based.



TIA supports the OECD Watch and HRLC view that in circumstances where the ANCP has reviewed a complaint, sought all relevant information, attempted to offer good offices to resolve the matter but has been unable to bring the parties to a resolution, it should be prepared to make a determination based on the information provided as to whether the Guidelines have been breached and, where appropriate, to offer recommendations for changes the company can and should make to ensure that its conduct is brought in line with the Guidelines.

Changes to promote follow-up

TIA supports the proposal in the consultation paper to ensure more regularised (12 month) follow-up and progress reports of complaints to ensure compliance with any recommendations made.

We support the HRLC recommendation that para 56 of the procedures be amended as follows:

“Where the Final Statement includes recommendations to the company, the AusNCP will ask the parties for an update on progress in the implementation of these recommendations 12 months after issuing its Final Statement, unless another time-frame has been agreed by the parties and ANCP and set out in the Final Statement”.

The 12-month time-frame for follow up, and operating timeframes (initial assessment within 3 months, good offices within 6 months and final statement within a further 3 months) as set out in the consultation paper are reasonable and appropriate. This should not, however, inhibit the handling of all complaints in a timely and expedient manner.

Changes to the review mechanism

TIA strongly opposes the ANCP’s proposal to replace the current review mechanism of the Oversight Committee with the proposed follow-up procedures.

The follow-up process and review mechanism (Oversight Committee) serve completely different purposes and accountability. Follow-up monitoring seeks accountability of companies by endeavouring to ensure that companies are complying with the ANCPs recommendations. In contrast, the review mechanism seeks accountability of the ANCP itself by monitoring whether the ANCP is applying its own procedures correctly and making decisions that align with The Guidelines.

TIA holds the view, that the existing review mechanism be strengthened, and supports OECD Watch submission to the 2017 Review that:

“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.”

We note and support the 2017 Review finding:

“Based on the Independent Reviewer’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...outline time frames, policies and procedures for handling specific instances, there appear to



be no repercussions for not following these procedures...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 reconsidered...from a complainant's or respondent's perspective, this is likely to undermine confidence and trust in the validity of the ANCP process".²

The ANCP rationale for discontinuing the Oversight Mechanism (outlined in the consultation paper) - that "the Oversight Mechanism is not currently structured adequately to provide a genuine opportunity for review", is inadequate and no reason to abolish the mechanism altogether. While the ANCP is currently restrained with respect to the implementation of more ambitious structural changes recommended by the 2017 Review until Treasury issues its formal response, this does not necessitate changes to the Oversight Mechanism which would further undermine the transparency and accountability of the mechanism in the interim. Strengthening the legitimacy and composition of the mechanism, rather than removing it altogether with no replacement, would be a better approach.

The Specific Instance Tracking Tool

TIA welcomes changes to the ANCP website to improve transparency in its decision-making. The Specific Instance Tracking Tool has the potential to be an excellent way to promote increased accountability and transparency in ANCP decision-making.

To maximise the potential of this Tracking Tool, TIA recommends the ANCP provide more information and publish on the tool, at a minimum, its Initial Assessment and Final Statement and, details of the complaint and any response made by the company. Currently, no information is provided with respect to the complainant, company or the nature of the complaint. However, the ANCPs current procedures stipulate that the Initial Assessment will identify the parties, the nature of the complaint, process followed to date, reasons for accepting or rejecting the complaint, notice of any parts of the complaint found to be outside the Guidelines and an outline of the next stages in the ANCP's determination.³

CONCLUSION

TIA appreciates the opportunity to participate in the ANCP consultation on Improving the Specific Instance Procedures. We are confident that the recommendations outlined in this submission, and others by civil society, will shape a future ANCP able to effectively promote responsible business conduct and access to remedy.

END

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² <https://cdn.tspace.gov.au/uploads/sites/112/2018/02/Final-Report.pdf>, pp 24-5.

³ <http://ausncp.gov.au/specific-instances/complaints-procedures/>, paras 30-32.