



19 July 2017

Ms Alex Newton
Review of the Australian National Contact Point
The Treasury
Langton Crescent
Canberra ACT 2600

Submitted via email: anpc@treasury.gov.au

Dear Ms Newton,

**Review of the Australian National Contact
Joint submission with Australian Council of Trade Unions**

I write in response to the announced Review and its call for submissions. This submission is made jointly with the Australian Council of Trade Unions.

Reform of the Australian National Contact Point for the OECD Guidelines for Multinational Enterprises is long overdue. Australian trade unions have been calling for major reform since at least 2011 (copy of ACTU submission attached). The calls made in the 2011 submission remain valid.

The NCP is:

- Woefully under-resourced for its task with only one part-time staff member and virtually no budget.
- For all intents and purpose virtually invisible – the only people that know it even exists are those employed in companies, NGOs and unions that are charged with being aware of international laws, guidelines and standards that concern human rights including labour practices. The NCP is not promoting the Guideline to companies and the public within Australia, let alone in places where Australian companies are active overseas.
- Unwilling to proceed in cases where companies refuse to participate in the processes provided under the Guidelines. This effectively denies complainants the protection and access to remedy they should be afforded under the Guidelines, and under the UN Guiding Principles on Business and Human Rights to which the Guidelines refer.

The Review's attention is directed to the major report launched recently by Corporate Accountability Research and authored by Kristen Zornada¹. The CFMEU and ACTU are in broad agreement with the findings and recommendations of the report, and in particular note that the best practice examples given in the report provide a multitude of options – that already exist elsewhere – for improving the operations of the NCP.

The CFMEU has had three direct or indirect experiences of engaging with the National Contact Point in making complaints:

- Against Rio Tinto Plc/Ltd in 1998-99
- Against Xstrata Plc (now Glencore) in 2010-11
- Against Ansell Ltd in 2013-17

None of these experiences have been satisfactory, though the indirect case with Ansell where the international union to which the CFMEU is affiliated, IndustriALL, has concluded a settlement with the company, may be described as a moderate success.

In the Rio Tinto case, which the CFMEU made through the ACTU, the NCP issued a letter almost a year after our complaint was lodged - without ever meeting the ACTU - dismissing the case 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. Through the Trade Union Advisory Committee to the OECD, the ACTU sought a clarification from the OECD's Committee on Investment and Multinational Enterprises. The CIME decision (DAFFE/IME(99)35/FINAL) issued 10 December 1999 confirmed that compliance with domestic law does not equate to compliance with the Guidelines, and that Rio Tinto was a multinational enterprise. Despite this decision rebuffing the basis of the NCP's decision, it did not revisit it.

With respect to the Xstrata case, the NCP refused to proceed once the company refused to engage in mediation as provided under the Guidelines. It was entirely within the powers of the NCP to proceed with the case, for which the CFMEU had provided exhaustive documentation. The NCP's final statement named the company and expressed disappointment with Xstrata's refusal to participate in a resolution of the complaint. Despite this, Xstrata released a statement in the UK (10 June 2011) claiming it had complied with the Guidelines. How a company could claim it had complied with the Guidelines when it had pointedly refused to follow the processes provided in the Guidelines defied credulity.

In the Ansell case led by IndustriALL there has been more success. However, with the original complaint being made at the end of 2013, and the substantive result not being achieved until August 2016 (and the final statement in June 2017) it cannot be said to have resolved in a reasonable timeframe.

¹ <https://corporateaccountabilityresearch.net/report-xx-ancp>

There is a question about whether Treasury is the appropriate location for the NCP – especially its location within the Foreign Investment Division where it may be perceived as having a conflict of interest with other functions of the Division.

Other possibilities include the Attorney General, the Dept. of Foreign Affairs and Trade, the Australian Human Rights Commission, or a separate existence as a statutory body.

The CFMEU and the ACTU incline to the view that a location within Attorney General's or as a statutory entity is preferred. We see DFAT as not being well-placed to deal with complaints that involve the conduct of MNEs within Australia (as in the Rio Tinto and Xstrata cases), and the AHRC – while skilled in resolving human rights disputes – as not being well-placed to deal with all the matters covered by the Guidelines.

Regardless of the location of the NCP, the key issues are resourcing and willingness to promote and apply the Guidelines.

The key requirements are:

- Greater transparency and accountability;
- Greater independence;
- Greater adherence to the Guidelines in processing complaints;
- Better outreach and support; and
- Better resourcing.

To promote these objectives, we recommend the following structural and procedural reforms:

1. Consideration should be given to structuring the NCP as a multi-stakeholder body, including as a statutory entity.
2. Where the NCP continues as a government official, independent oversight should be strengthened through the appointment of external stakeholder representatives from civil society, unions and business onto the Oversight Committee in a fair and transparent process.
3. If the NCP remains within a government department, provision should be made for independent advice to be sought where a complaint raises a potential conflict of interest, to ensure that the ANCP can fulfil its obligations with independence and integrity.
4. A separate roster of independent subject-matter experts should be appointed to advise the ANCP as required in the areas covered by the Guidelines.
5. The NCP should be resourced to utilise professional mediators that have expertise in the matters that are the subject of complaint.

6. The NCP should develop and publish more detailed guidance regarding its processes and criteria for decision-making in accordance with the objectives and Procedural Guidance set out in the Guidelines.
7. Further to (6), where the NCP has made an assessment that there is an issue to be addressed, it should proceed with the case notwithstanding the refusal of a company to participate. While mediation of an outcome is preferred, the lack of mediation should not prevent the NCP conducting an investigation, making findings and recommendations, and conducting follow-up on them.
8. When handling complaints, the NCP should issue public statements about receipt of cases, its initial assessment on whether to accept or otherwise dispose of the case, and its final statement - as they occur.
9. The ANCP should be properly resourced to actively promote its function through outreach at home and abroad and should develop a clear strategy for doing so.
10. The ANCP should be properly resourced to provide a fair and effective dispute resolution service that actively seeks to address resource imbalances between the parties.

The CFMEU and ACTU welcome further communication on this matter. For the CFMEU, please contact Peter Colley, National Research Director, on pcolley@cfmeu.com.au, and for the ACTU please contact Andrea Maksimovic, Associate Director of International and Civil Society, on amaksimovic@actu.org.au

Yours sincerely,



Tony Maher
CFMEU National President