

13 June 2018

Ms Victoria Anderson  
Australian National Contact Point  
The Treasury  
Canberra

SENT VIA EMAIL: [ancp@treasury.gov.au](mailto:ancp@treasury.gov.au)

Dear Ms Anderson

**Re: Response to AusNCP consultation paper: Improving specific instance procedures**

I write to provide feedback to the consultation paper on behalf of the ACTU, whose affiliated unions represent workers in diverse industries. These workers participate in supply chains of Australian companies that extend to other countries. As we work to ensure that workers and communities in Australia are protected against labour and other human rights abuses, we also work to ensure that workers and communities overseas have their rights protected.

The ANCP is currently the primary mechanism outside of the courts through which communities and workers whose rights have been infringed by Australian companies operating abroad can raise grievances and seek redress. Unfortunately, as highlighted by the conclusions of the 2017 Independent Review of the ANCP, it has thus far not had a good record of doing so.

The ACTU welcomes the opportunity to submit to the consultation on improving the way such grievances are handled by the ANCP.

As raised in our 2017 ANCP Review submission we wanted to see more clear guidance from the ANCP about the process and criteria used to make their them easier and more transparent.

Hence we are happy that the ANCP decided to proceed with a review of its procedures to ensure these necessary changes are not delayed while the Government considers the recommendations of the 2017 Review.

However, doing this on its own will not address the more significant problems with the way the ANCP deals with the complaints. In order for the ANCP to function properly, the structural and resourcing problems identified by the 2017 Review need to be addressed.

**The initial assessment stage**

We believe the ANCP is currently misapplying the initial assessment criteria and setting an unreasonably high threshold for the acceptance of complaints. This is the main reason unions, civil society organisations and complainants are unhappy with the process.

Therefore we welcome the ANCP's proposals to shift the bulk of the substantive examination of complaints into the later stages of the process, with the initial assessment ensuring the complaint meets the basic requirements of raising an issue covered by the Guidelines, falling appropriately within the ANCPs jurisdiction etc. This accords with other countries' NCPs, and will encourage more meaningful outcomes.

But we do not agree that this process of simplification should occur through amendment of the initial assessment criteria in the way proposed by the consultation paper however.

As the 2017 Review recommended, the ANCPs processes and guidance should be based on those set by the OECD. The criteria set out in the ANCP's current procedures already differ in certain respects from those set out in paragraph 25 of the Commentary to the Guidelines which already causes confusion among both stakeholders and decision makers as to which set of criteria should be applied.

We believe the ANCP would do better to change the initial assessment criteria to resemble the text set out in the Commentary to the Guidelines. This clarifies that the overriding test should simply be whether the issue "*merits further examination*" and is "*bona fide and relevant to the implementation of the Guidelines*".

Paragraph 25 states that:

*"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 NCP will take into account:*

- *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.*

For the sake of clarity, it would also be helpful for the ANCP to add some additional commentary as to how the criteria will be interpreted and weighted at this stage of proceedings, including the fact that the initial assessment stage of plausibility is not meant to be an in-depth investigation of whether the complaint can be proven. In addition, the NCP should not decide whether to proceed with the complaint if there are other international or national processes in progress regarding the same issue.

We believe these changes would ensure greater coherence between the objectives and criteria as set out in the Guidelines and Commentary and how the ANCP applies these criteria in practice, as recommended by the 2017 Review.

Overall, the ANCP must ensure that the initial assessment criteria is applied according to the Guidelines' principles of promoting compliance and facilitating accessibility without pre-judging whether the matter can be solved by mediation.

If complaints are rejected simply because one of the parties does not want to engage in mediation, the ANCP is in fact encouraging companies to ignore the process and the Guidelines. Instead the ANCP should assist in promoting appropriate standards of business conduct by making recommendations for changes in required.

In addition, the ACTU does not believe that incomplete complaints should be rejected, instead the NCP should advise the complainant of the omission and explain what additional information is needed. In the spirit of promoting transparency we also believe that the initial assessments should be published and made available to the public.

### **The “good offices” stage**

The ACTU supports the ANCP’s proposal to meet with each of the parties to discuss the process at the beginning and explore the possibility of direct dialogue or mediation with each of the parties, as well as discuss time-frames 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.

In accordance with the ANCP’s obligation to ensure transparency, minutes of the initial planning meetings should be shared with the other party (as is done by the UK NCP) and where one of the parties does not wish to take up the ANCP’s offer of “good offices”, this should be communicated to the other party and the matter quickly processed to the conclusion stage.

We understand that the ANCP is currently preparing revised procedures with respect to the “good offices” stage, including with respect to how confidentiality is dealt with. It is essential to the credibility and fairness of the process that complaints are dealt with as transparently as possible and that the principle currently set out in paragraph 51 of the ANCPs Procedures (“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”) is maintained and enforced in practice. Not sharing this information undermines the ability of parties to respond and offer corrections which impacts on the “good office” principles and impartiality. As this issue is one of particular importance to business and unions, as well as civil society stakeholders, we recommend that the ANCP consults with stakeholders on the specific changes it intends to make in this area.

With regards to accessibility of the “good offices” stage, the ANCP must be properly resourced in order to address the substantial barriers complainants face in being able to attend or properly participate in dialogue or mediation with companies. This is particularly true of overseas complainants, many of whom face significant cultural, linguistic and financial barriers to accessing the complaints process. While acknowledging the constraints of its existing resources, we recommend that ANCP should also implement changes such as providing translation, finding relevant unions and CSO’s who can assist, engaging professional mediators and financial support for travel.

### **Examination and conclusion stage**

The ACTU welcomes the proposal to move the bulk of the ANCP’s examination from the initial assessment stage to later in the process, which will ensure that more complaints are moved through to good offices and attempted resolution. We also welcome the suggestion for parties to have an opportunity to provide any final submissions after the “good offices” stage, to feed into the ANCP’s final statement, and to provide comments on the draft final statement before it is published.

As with other submissions made by the parties during the process, these submissions should be shared between the parties as well as with the ANCP.

Overall, the procedures currently set out in paragraphs 47-55 of the ANCP's the final examination process and the drafting and publication of the final statement are good and should remain.

However in paragraphs 52 and 53, which state that the ANCP "may" issue a final statement and set out a list of factors the ANCP "may" include in such a statement, such unclear language should be removed. In the past this has led to a lack of accountability in the ANCP's decision-making and a failure to provide detailed reasons for its final decisions.

We recommend that the word "may" in these two paragraphs is 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.<sup>1</sup>

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 to it 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.

### **Promoting follow up**

The ACTU supports the proposal in the consultation paper to ensure more regularised follow-up of complaints to ensure compliance with any recommendations made. While paragraphs 56-57 of the existing procedures already include follow up by the ANCP, they do not oblige the ANCP to do this or specify within which timeframe.

We therefore recommend that paragraph 56 of the procedures is amended to ensure that the ANCP will follow up with the parties regarding any progress on the implementation of the recommendations 12 months after issuing the final statement.

### **Review mechanism**

The ACTU strongly opposes the proposal within the consultation paper to remove the current review mechanism of the Oversight Committee, and to replace it with the follow-up process outlined in the consultation paper.

The follow-up process and review mechanism are entirely different accountability mechanisms. The first is designed to ensure companies are complying with the ANCPs recommendations. The second is designed to ensure the ANCP is properly following and applying its own procedures and making decisions in accordance with the Guidelines.

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<sup>1</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/270577/bis-14-518-procedural-guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/270577/bis-14-518-procedural-guidance.pdf), pp 17-18

Given the poor performance of the ANCP in the past, it is vital that the oversight committee is reviewed and strengthened. The 2017 Review recommends improvements need to be made as even if a review is conducted and shows that procedural errors are made, there are no repercussions.<sup>2</sup>

The reason given in the consultation paper for abolishing this mechanism that “the Oversight Mechanism is not currently structured adequately to provide a genuine opportunity for review”, is totally unacceptable. The entire purpose of the 2017 Review was to highlight and remedy such problems. Whilst we understand that the ANCP is still awaiting the response of the review from Treasury, there is no reason for it to propose changes which would make the transparency and accountability of the mechanism even weaker in the meantime.

### **The Specific Instance Tracking Tool**

The ACTU welcomes the changes to the ANCP website over the past 12 months 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.

However, currently there is insufficient information on the website regarding many complaints within the Tracking Tool for it to be effective. Within the three open complaints currently listed on the ANCP’s website, there is no information regarding the complainant, company or the nature of the complaint. This is despite the fact that under the ANCPs current procedures it is meant to issue an Initial Assessment setting out the names of the parties, nature of the complaint, the process it has followed to date, reasons for accepting or rejecting the complaint and an outline of the next stages in the ANCP’s decision- making.<sup>3</sup>

We recommend that to improve the transparency of the Tracking Tool, the ANCP publish at a minimum, its Initial Assessment and Final Statement and, ideally, also the complaint and any response made by the company.

The ACTU supports the broad intent and proposed measures although there are some concerns. We must reiterate that the proposed measures must not be a substitute for the major reform of the AusNCP recommended by the independent review in 2017.

Yours sincerely



Sally McManus

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

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