



Submission to ANCP Consultation: Improving Specific Instance
Procedures

June 2018

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Human Rights Law Centre

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Contents

1. EXECUTIVE SUMMARY AND RECOMMENDATIONS	1
2. PROPOSED CHANGES TO INITIAL ASSESSMENT STAGE	5
3. PROPOSED CHANGES TO "GOOD OFFICES" STAGE	7
4. PROPOSED CHANGES TO EXAMINATION AND CONCLUSION STAGE	8
5. CHANGES TO PROMOTE FOLLOW-UP	9
6. CHANGES TO REVIEW MECHANISM	10
7. SPECIFIC INSTANCE TRACKING TOOL	11

1. Executive Summary

The Human Rights Law Centre (**HRLC**) seeks to ensure that Australian companies operating overseas are held accountable for the human rights impacts of their operations and that the Australian Government protects against corporate human rights abuses in accordance with its obligations under international and domestic law.

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 (**2017 Review**), it has a poor record in performing this function.

We therefore welcome the opportunity to submit to the consultation on improving the way such grievances are handled by the ANCP. This submission is supplementary to the more detailed submission the HRLC made to the 2017 Review.

One of our recommendations to the 2017 Review was that the ANCP should develop and publish more detailed guidance regarding its processes and criteria in order to ensure greater consistency with the Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises (**OECD Commentary**), promote greater transparency and accountability within the complaints process and encourage meaningful outcomes.

We therefore support the ANCP's decision to proceed with a review of its procedures to ensure these necessary changes are not delayed while the structural changes proposed by the 2017 Review are considered by Treasury. Some aspects of the lack of clarity in the guidance, or inconsistency between the ANCP's procedures and the Guidelines have undoubtedly contributed in certain respects to the ANCP's poor past record of handling complaints submitted to it.

We would stress, however, that 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. In our experience, 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.

Recommendations:

The HRLC recommends the following changes to the ANCP's procedures to promote a more accessible, transparent and effective complaints process:

- 1. The substantive examination of complaints should be shifted, as suggested in the consultation paper, from the initial assessment phase into the later stages of the complaints process to ensure more complaints are advanced quickly to mediation and to promote meaningful outcomes;**
- 2. The initial assessment criteria should be amended to directly reflect the test and criteria set out in paras 25 & 26 of the OECD Commentary and additional commentary added**

(as suggested below) to ensure these criteria are interpreted according to the overarching objectives of promoting observance of the Guidelines and accessibility of the ANCP.

3. In line with the objective of simplifying the initial assessment phase, the timeframe for conducting initial assessments should be shortened to 6 weeks.
4. Where the ANCP receives complaints which contain insufficient information for the matter to be properly processed, the ANCP should contact complainants to inform them of the additional information it requires to process the complaint, rather than complaints being automatically declared invalid.
5. An early planning stage should be added once a complaint is accepted, as suggested in the consultation paper, and information from planning meetings shared between the parties to promote transparency.
6. Any changes with respect to how confidential information is addressed within the complaints process should preserve the core requirement of the transparent exchange of information between the parties wherever possible. Stakeholders should be consulted about the specific changes the ANCP proposes to make to the procedures in this regard.
7. Within the constraints of its existing resources, the ANCP should 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) funding for complainants without resources to travel to attend mediations.
8. As suggested by the consultation paper, parties to a complaint should have the opportunity to provide any final submissions after the “good offices” stage and to provide comments on the ANCP’s draft final statement prior to publication. As with other submissions made during the complaints process, these submissions should be shared between the parties to promote equitable and transparent decision-making.
9. Paragraphs 52 and 53 of the current procedures should be amended (changing the word “may” in each of these paragraphs to “will”) to ensure that where the ANCP has not been able to achieve a mediated resolution, it issues a final statement which comments on whether or not an enterprise’s actions or practices are in breach of the Guidelines, the reasons for these findings and, where appropriate, recommendations for remedial action.

- 10. Paragraph 56 of the current procedures should be amended to ensure regular follow-up of any recommendations made by the ANCP after 12 months, unless a different time-frame is agreed by the parties and ANCP.**
- 11. The existing review process to the Oversight Committee should be retained until a new and more effective oversight mechanism is implemented as part of the response to the 2017 Review. Treasury should ensure that this Oversight Committee is appropriately structured and has involvement by sufficiently senior decision-makers from other government departments to undertake its stated function and the ANCP should recuse itself from involvement in reviewing its own decisions.**
- 12. The Specific Instance Tracker should be updated to include the names of the parties and nature of the complaint with respect to complaints already closed. With respect to open complaints, once a complaint is accepted for consideration, the ANCP's Initial Assessment should be included on the Tracker.**

The HRLC urges Treasury to take immediate steps to implement the recommendations of the 2017 Review to strengthen and restore trust and confidence in the ANCP.

2. Proposed changes to initial assessment stage

The HRLC 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 stage/substantive examination stages.

As we set out in the substantiated submission to the OECD Investment Committee submitted with OECD Watch in November 2017, we believe the ANCP is currently misapplying the initial assessment criteria and setting an unreasonably high threshold for the acceptance of complaints. This is leading not only to unnecessary delays in the process, but also and more concerning, to the rejection of well-founded complaints without a sufficient examination of the issues or attempts to bring the parties together for discussions. This has undermined the ANCPs accessibility as a grievance mechanism and has led to a loss of confidence in the mechanism by civil society organisations, unions and prospective complainants.

We therefore agree with 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 playing more of a "triage" role to ensure the complaint meets the basic requirements of raising an issue covered by the Guidelines, falling appropriately within the ANCPs jurisdiction etc. This accords with what we understand to be common practice among other leading NCPs such as the UK NCP, and is much more likely to encourage more meaningful outcomes.

We do not believe it is desirable, however, for this process of simplification to occur through amendment of the initial assessment criteria in the way proposed by the consultation paper however.

As far as possible, we believe ANCPs processes and guidance should be based on those set by the OECD with respect to how specific instance complaints should be handled. This was also the recommendation of the 2017 Review.¹

The criteria set out in the ANCP's current procedures already differ in certain respects from those set out in para 25 of the Commentary to the Guidelines. If the ANCP's criteria are amended to further diverge from these criteria, this creates the potential for additional confusion among both stakeholders and decision makers as to which set of criteria should be applied.

Rather, we believe it would be preferable for the ANCP to amend its initial assessment criteria to more closely mirror the text set out in the Commentary to the Guidelines, which provide (para 25) 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:

¹ Recommendation 3 of the 2017 Review states that the ANCP "should develop and implement revised operating procedures based directly on the Guidelines and Procedural Guidance". Newton, A. *Independent Review: Australian National Contact Point under the OECD Guidelines for Multinational Enterprises* (2017). Available online at <<https://cdn.tspace.gov.au/uploads/sites/112/2018/02/Final-Report.pdf>>, accessed 4 June 2018.

- *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.*

We believe that adding the first part of this test to the ANCP's procedures, which 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" will help frame how the criteria should be applied.

For the avoidance of doubt, it would also be helpful for the ANCP to add some additional commentary as to how the criteria will be interpreted and weighed at this stage of proceedings, as follows:

The NCP will give particular weight at this stage to whether the complaint raises an issue related to the application of the Guidelines, whether there is a clear link to the enterprise's activities and whether acceptance of the specific instance will contribute to the purposes and effectiveness of the Guidelines. While the NCP will consider whether the specific instance is well-substantiated enough to be plausible, the initial assessment stage is not intended to be an in-depth examination with the aim of establishing whether the allegations are "proven", and acceptance of the complaint for further examination does not mean the NCP has concluded that the Guidelines have been breached, merely that the matter warrants further examination.

Given the problems that have previously arisen with respect to the way the ANCP has dealt with cases involving parallel proceedings, including in the HRLC's complaint against G4S, we also recommend that the text from para 26 of the Commentary to the Guidelines with respect to parallel proceedings also be directly incorporated into the ANCP's procedures with respect to initial assessments, as follows:

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.

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.

Most importantly, however, the ANCP should 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, rather than adopting an overly-rigid or formalistic approach. The ANCP has, for example, rejected several previous complaints on the basis that they would "not contribute to

the purposes and effectiveness of the Guidelines” where, it appears, the ANCP has judged that the matter would not be capable of resolution through mediation.²

This approach, in our view, directly contradicts the aim of promoting observance of the Guidelines – if complaints are rejected simply because one of the parties is unlikely to engage in mediation, the ANCP is in fact creating an incentive for companies to ignore the process and the Guidelines. In cases like these, the ANCP should instead proceed to the examination/conclusion stage and consider whether it can instead assist in promoting appropriate standards of business conduct either through issuing a determination with respect to the company’s conduct based on the information provided to it and/or making authoritative recommendations for changes in practices or policies.

We also note that under the new specific instance flowchart provided in the consultation paper, incomplete submissions will be declared invalid and rejected. Given that some complainants, particularly those based overseas, will be unfamiliar with the complaints process and exactly what information the ANCP requires, where an incomplete submission is received, we believe that the ANCP should, in accordance with the objective of promoting accessibility, respond to the complainant explaining that they have provided incomplete information and alerting them to the additional information needed for the complaint to be considered. We understand that the ANCP has recently been taking this approach to enquiries, which we welcome, but it would be helpful if this could be stated clearly in the procedures.

It is unclear from the consultation paper whether the ANCP proposes under the new process to continue to issue an initial assessment statement where a complaint is accepted. In our view, it is important for the transparency of the process that it does so and this should ideally be published on the specific instance tracker. Currently, on the new specific instance tracker, no information is provided in relation to open complaints or the names of the parties involved. This issue is discussed further below.

3. Proposed changes to “good offices” stage

The HRLC also welcomes the ANCP’s proposal to establish an early planning stage in which it meets with each of the parties to discuss the process, explores the willingness of each of the parties to engage in a direct dialogue or mediation and seeks to understand the parties’ objectives (if these are unclear from the complaint), as well as discussing time-frames and confidentiality and any particular needs the parties may have in order to facilitate a fruitful dialogue (eg. translation services). We believe 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, unless a good case is made otherwise, be shared with the other party (as is done by the UK NCP). Where one of the parties does not wish to take up the ANCP’s offer of “good offices”,

² See eg. SI 12 *Professor Ben Saul v Serco*.

this should be communicated to the other party together with the reasons, and the matter then swiftly advanced to the final examination/conclusion stage.

We note from the consultation paper 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. We believe it is essential to the credibility and fairness of the process that specific instance 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 preserved and upheld in practice.

Previously, it has been the case in relation to at least some specific instance complaints, such as the one the HRLC submitted against G4S, that companies have been able to request that all information with respect to a complaint, including the company’s response to the allegations are withheld from the complainant. This undermines the ANCPs ability to deal with a complaint impartially and equitably, since without sharing this information, at least in summary form, it is impossible for the complainant to respond or offer factual corrections to the information submitted by the company. While it certainly may be appropriate for parties to be required to give confidentiality undertakings with respect to matters discussed or information exchanged in a mediation context (and indeed this is already provided for in the existing ANCP procedures at paragraph 45), or for certain information, such as employees’ names, to be redacted to protect individual privacy, the revised procedures should ensure that the basic principle of transparency within the process is preserved.

Given this issue is one of particular importance to both business and civil society stakeholders, we recommend that the ANCP consults with stakeholders on the specific changes it intends to make in this area.

With respect to the accessibility of the “good offices” stage, as noted in our submission to the 2017 Review, if it is to become a genuinely accessible and equitable mechanism, 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 resource barriers to accessing the specific instance process, and particularly the “good offices” stage of proceedings.

Within the constraints of its existing resources, we recommend that 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.

4. Proposed changes to examination and conclusion stage

As stated above, we welcome 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. Ideally, the process of "examination" and collection of evidence by the ANCP should be an iterative process which occurs through the discussions and exchange of information during the good offices stage, as well as in the final conclusion stage, if resolution cannot be reached.

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.

Generally, we believe the procedures currently set out at paras 47-55 of the ANCP's current procedures with respect to the final examination process and the drafting and publication of the final statement are good and should be preserved.

The one key additional change which should be made to the ANCP Procedures in this area is that to paragraph 52 and 53. Currently, these paragraphs state that the ANCP "may" issue a final statement and set out a list of factors the ANCP "may" include in such a statement. This vague language has led in the past to a lack of rigor and accountability in the ANCP's decision-making and a failure to provide detailed rationales for its final decisions, as well as an absence of any determinations with respect to breaches of the Guidelines.

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, on which the Australian procedures are based.³ This wording is likely, in and of itself, to encourage more companies to attempt to engage in good faith dialogue to try to resolve disputes.

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.

³ UK Department for Business Innovation & Skills, *UK National Contact Point Procedures for Dealing With Complaints Brought Under the OECD Guidelines for Multinational Enterprises*, (Jan 2014). Available online at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/270577/bis-14-518-procedural-guidance.pdf>, accessed 4 June 2018, pp 17-18.

The time-frames set out in the consultation paper with respect to how the various stages of a complaint should be dealt with appear to us to be reasonable and do not differ substantially from the existing procedures. As stated above, we would recommend that the initial assessment phase be shortened slightly from 10 to 6 weeks in line with the objective of simplifying this part of the process. It may be appropriate for the good offices and/or final stage to correspondingly be lengthened by 4 weeks given that the bulk of the work undertaken by the ANCP will now occur at those stages.

5. Changes to promote follow-up

The HRLC supports the proposal in the consultation paper to ensure more regularised follow-up of complaints to ensure compliance with any recommendations made. While paras 56-57 of the existing procedures already provide for follow up by the ANCP, they do not require the ANCP to take this action or specify a time-frame within which this should occur.

We therefore recommend that para 56 of the procedures is 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”.

We recommend that the process for correction of Follow Up statements within para 57 is preserved.

6. Changes to review mechanism

The HRLC 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 above.

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

Particularly given the past poor performance of the ANCP, it is vital that it has a functional review mechanism going forwards to provide oversight of its decision-making. As noted by the 2017 Review:

“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".⁴

The reason given in the consultation paper for abolishing this mechanism, ie. that "the Oversight Mechanism is not currently structured adequately to provide a genuine opportunity for review", in our view, manifestly inadequate. The entire purpose of the 2017 Review was to highlight and remedy such problems. We accept that the ANCP is currently restrained with respect to the implementation of more ambitious structural changes recommended by the Review until Treasury issues its formal response, but we see no reason for it to implement changes which would further undermine the transparency and accountability of the mechanism in the interim.

We would recommend that the existing Oversight and review mechanism be retained until a more effective oversight and review structure is put in place. The ANCP could in the interim partially remedy some of the problems highlighted by the Review by ensuring that the ANCP is not directly involved in reviewing its own decisions and that the Oversight committee is staffed by appropriately senior staff from Treasury and other government departments to enable it to carry out its functions effectively.

7. The Specific Instance Tracking Tool

The HRLC welcomes the changes to its website which the ANCP has made 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.

Unfortunately, at present, insufficient information is included about many of the specific instance complaints within the Tracking Tool for it to serve its intended function. This is particularly true with respect to the three open complaints currently listed on the ANCP's website, which are already at the Good Offices or Conclusion stages. No information is provided with respect to the complainant, company or the nature of the complaint. This is despite the fact that under the ANCPs current procedures, it is supposed to, on acceptance of a complaint for consideration, issue an Initial Assessment setting out the names of the parties, nature of the complaint, process it has 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.⁵

We recommend that to improve the transparency of the SI Tracking Tool, the ANCP publish on the tool, at a minimum, its Initial Assessment and Final Statement. We believe that publishing the names of the parties and nature of the complaint once a complaint has been accepted for examination is best practice as far as operating transparently and also serves an important accountability function, since it allows other stakeholders and the public to see how the ANCP is addressing particular complaints.

⁴ Newton, A, *Independent Review*, above n 1, pp 24-5.

⁵AusNCP, Specific Instance Complaints Procedures, paras 30-32.