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**Submission to Consultation by Australian National Contact Point on
Improving Specific Instance Procedures**

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1. INTRODUCTION

On 22 May 2018, the Australian National Contact Point (AusNCP) for the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises (MNE Guidelines) issued a consultation document on specific instance procedures. This consultation on procedure followed a more wide-ranging review held in 2017. In the consultation document, the AusNCP acknowledges that other matters, particularly its future structure, are still under consideration but wishes to proceed with improving its internal procedures in the short term. This is a laudable goal. However, it is my view that the issue of procedure will have to be revisited after the broader reform is complete in order to ensure coherence between structure and procedure. Nonetheless, there are issues in the AusNCP's current procedure that can be addressed immediately, including matters of practice. As the consultation document notes, the values associated with the specific instance procedure are visibility, accessibility, transparency and accountability, and the guiding principles for handling specific instances are impartiality, predictability, equitability and compatibility with the principles and standards of the Guidelines. I would also add that although the OECD's sectoral and now general guidance on due diligence for responsible business are addressed to businesses and not governments, the AusNCP should have regard to these documents when dealing with specific instances.

The remainder of this submission follows the consultation questions set out in the 22 May document, but there are some points I raise which are not directly part of the questions. I have placed comments where they seem most appropriate. One point I reiterate in several places is the need for the AusNCP to improve transparency not only for the benefit of parties to specific instances, but also for the legitimacy and credibility of the AusNCP and the MNE Guidelines with the broader public.

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2. RESPONSES TO CONSULTATION QUESTIONS:

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

Yes. This should be accompanied by support for complainants who are lack experience in dealing with legal and quasi-legal procedures, particularly international and transnational procedures. This should include translation services for complainants who are unable to contribute to the procedure in English at a suitable level. If completion of the online form will in future be essential for a specific instance to proceed to initial assessment, the AusNCP should provide support to applicants who have difficulties in completing the form, including those with limited or no access to the internet.

2. Are there any other improvements that could assist the effectiveness of the 'good offices' stage?

The AusNCP should ensure that the initial assessment is limited to criteria in the MNE Guidelines and Procedural Guidance. As is now expected under the MNE Guidelines (see paragraph 32, Commentary on Procedural Guidance), a written statement on rejection at initial assessment should be provided. This supports the values of transparency and accountability.

Many of the concerns expressed about the initial assessments done in the past by the AusNCP relate less to the published procedure than to the actual practice of initial assessments. In part the consultation document addresses this by proposing that much of the examination of complaints be moved to a later stage, which will certainly assist. However, some practices must be eliminated regardless of when they are applied. Much will depend on how the term 'plausible' in the revised procedure is interpreted. If it becomes a substantive test requiring *prima facie* evidence, then there is the risk that rejection at the initial assessment stage will continue to be common. Specific instances should only be rejected for reasons set out in the MNE Guidelines and Procedural Guidance. The consultation paper does not appear to address the issue of parallel proceedings, which has been the basis for rejecting specific instances at initial assessment, and on which NCPs have variable approaches. While parallel proceedings are not mentioned in the proposed revised criteria for initial assessment, the final criterion of contributing to the purposes and effectiveness of the Guidelines is sufficiently broad that the question of parallel proceedings could be raised under that heading. The AusNCP should adopt the approach used by the UK NCP that parallel proceedings will only be a bar to further consideration where there would be 'serious prejudice to a party to parallel proceedings.'¹ Furthermore, the UK NCP applies a principle of severability which allows specific instances to proceed in part even where the test of serious prejudice is met in relation to some proceedings in relation to the subject matter of the complaint.

¹ United Kingdom Department for International Development and Department for Business, Innovation and Skills, Approach of the UK National Contact Point to Specific Instances in Which There Are Parallel Proceedings, 16 September 2009, updated 14 January 2011, URN 11/652, paragraph 3: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31717/11-652-approach-national-contact-point-parallel-proceedings.pdf.

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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?

This will in principle be a good idea, and will reduce the likelihood that meritorious complaints are rejected before they are fully examined. The practice of examination must be thorough and will require the AusNCP to be more proactive than it has been in the past. The imbalance of resources and expertise that often exists between the complainant and the business which is the object of the specific instance must be taken into account. Although the procedure is non-judicial, it is nonetheless implied by the value of accessibility that a complainant be given every possibility to present material supporting the complaint. In some cases, this may require the AusNCP to make investigations itself, as other NCPs have done. The proposal to give the parties an opportunity to make final submissions should improve the quality of the results of specific instances and improve perceptions of legitimacy and fairness.

4. Are further changes needed to improve the procedures for the conclusion stage?

As required by the Procedural Guidance (see paragraph 35 of the Commentary to Procedural Guidance), the AusNCP should provide a reasoned report in its final statements. In accordance with good practice of NCPs, final statements should include findings of actions incompatible with the MNE Guidelines, where the business that is the object of the complaint has not cooperated with the specific instance process and an agreed conclusion to the process between the parties has not been possible. The provision of detailed and substantive final statements are important parts of transparency and accountability to the parties. They are also important for the dissemination of good practice amongst NCPs.

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

A standard follow up is a good idea. Most NCP practice I have seen involves a follow up at 12 months, but I would suggest that the AusNCP retain the possibility of further follow up, particularly where there is inadequate progress in implementing any agreement between the parties. It should also be possible for the parties to agree a different model of follow up as part of their agreement to conclude the specific instance. Although this is probably not feasible within the current AusNCP structure and budget, in the longer term it might be worth considering independent follow up for complex agreements, whether by staff of the AusNCP itself, or contracted out to independent researchers. Follow up statements by the AusNCP should be published.

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

A review function is valuable, although it is less important than improvements in the specific instance handling process itself. Furthermore, reviews are distinct from follow up and fulfil a different function, particularly by reviewing rejections of specific instances at initial assessment. Any review must be done by a body which is fully independent from the initial decision-maker – a sub-committee of a reformed oversight committee would be appropriate if the sub-committee includes no government members, and no member has a conflict of interest with any of the parties (examples would include former employees of either of the parties). If it is likely that structural reform to the AusNCP will not be completed within a reasonably

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foreseeable period, the AusNCP should consider methods of maintaining a review function in the meantime.

7. Do stakeholders have any comments on the proposed timeframes?

I think that it is more important to ensure that timeframes are observed by the AusNCP and the parties than to have any particular time frame. Where timeframes are not met, the AusNCP should publish a brief statement of reasons (waiting for a party to submit information; translation of materials). This would improve visibility, transparency and accountability. Providing reasons to the parties is essential, but I believe that in order to increase general confidence in the specific instance process, reasons for delay should be made public.

8. Have stakeholders found this specific instance tracking tool valuable?

I have not used the tracking tool as yet. However, I would note that the tracking tool is important is making the work of the AusNCP accessible to the public. The consultation paper at several points emphasises the importance of transparency to the parties to a specific instance, which is indeed the case. Transparency in relation to the broader public is also important in terms of the legitimacy of the AusNCP, and in supporting its other role which is promotion of the MNE Guidelines.