

Human
Rights
Law
Centre

25 October 2023

Secretariat
The Australian National Contact Point
c/- Market Conduct and Digital Division
The Treasury
Langton Crescent
Canberra ACT 2000

Dear AusNCP Secretariat

We write regarding the revised draft Australian National Contact Point for Responsible Business Conduct (**AusNCP**) complaint procedures (**Procedures**) released by the Australian Treasury on 25 September 2023, which have been revised to reflect the 2023 updates to the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (**OECD Guidelines**).

We welcome many of the proposed revisions to the Procedures, particularly those that are aimed at improving the accessibility of the document for parties to complaints. However, there are also some features of the draft Procedures which we consider limit the AusNCP's capability to be an effective non-judicial grievance mechanism framed by the core effectiveness criteria set out in the OECD Guidelines and UN Guiding Principles on Business and Human Rights (**UNGPs**).

We have set out a number of recommendations below which aim to address these shortcomings and ensure better clarity, accessibility, and effectiveness of the Procedures. We have also recommended that the following additional provisions be added to the Procedures:

- An additional investigative stage within the examination phase which gives independent examiners a clearer remit to thoroughly investigate complaints and ascertain whether or not companies have complied with the international standards of conduct set by the Guidelines;
- Explicit provision for independent examiners to make recommendations that sanctions (including the withdrawal of trade support and/or exclusion from public procurement processes) be applied to companies that have breached the Guidelines or failed to engage in good faith;

We note that revisions to the Procedures are only one area of reform needed to make the AusNCP a more effective grievance mechanism. Other reforms that are needed include:

- Additional resourcing to improve the visibility of the AusNCP, facilitate the investigation of complaints and to support complainants to participate more fully in the process;
- Greater powers for the independent examiners to perform their function, including to compel evidence, inspect documents and recommend sanctions; and
- A more coherent approach across government, such that determinations made by the AusNCP about a company's compliance with the Guidelines are factored into government decision-making on procurement and trade support.

1. Are the revised procedures well-designed to bring parties together to resolve complaints? If not, what changes could be made?

The Procedures include some important updates that would enhance the ability of parties to resolve complaints, such as more explicit standards around the good faith obligation, protections for notifiers that may face reprisals as a result of pursuing a complaint, and greater references to potential dispute resolution models which may form part of ‘good offices’. However, further improvements could be made in order for the Procedures to incentivise the participation of enterprises in ‘good offices’, and improve the ability of unrepresented notifiers to engage throughout the AusNCP process.

In order to inform these recommendations, we reviewed all complaints lodged with the AusNCP since the AusNCP was significantly reformed in 2018-2019. Of the 13 complaints received since that time, four complaints resulted in the parties engaging in ‘good offices’,¹ three complaints resulted in the enterprise refusing an offer of ‘good offices’,² and four complaints were withdrawn.³

While it is promising to observe an overall increase in complaints received, the fact that less than half of these complaints have progressed to the ‘good offices’ stage demonstrates that the AusNCP still requires reforms in order to promote greater accessibility. In particular, there is a need for greater incentives to ensure Enterprises engage in the AusNCP process, and increased support for unrepresented notifiers who wish to make a complaint.

Recommendation 1: The Procedures’ ‘Examination’ section should limit the enterprise’s capacity to provide submissions if they refuse to engage in ‘good offices’.

There should be stronger ramifications, beyond public scrutiny alone, to encourage enterprises to engage in ‘good offices’ so that parties can come together to resolve complaints. We consider that this would likely encourage more enterprises to engage constructively with the AusNCP.

If an enterprise refuses to engage in ‘good offices’, the enterprise’s submissions should be limited to providing additional information as requested by the independent examiner pursuant to provision [19]. Otherwise, the ability to make further submissions and provide materials to support the enterprise’s case should be contingent upon participation in the ‘good offices’ phase. This recommendation could be implemented by amending provision [46] of the Procedures which notes that an independent examiner will give the parties an opportunity to provide submissions to inform the examination of the complaint.⁴

¹ AusNCP complaint 20, Friends of the Earth et al. v ANZ Banking Group; AusNCP complaint 21, Human Rights Law Centre et al. v Rio Tinto; AusNCP complaint 23, Global Legal Action Network v BHP Group Ltd et al.; AusNCP complaint 28, Andrew and Robert Starkey v Saab Australia and Saab Group Sweden.

² AusNCP complaint 22, Mr John Podgorelec et al v ElectraNet Pty Ltd.; AusNCP complaint 27, Publish What You Pay et al v Mallee Resources Ltd; AusNCP complaint 29, Project Sepik et al v PanAust Ltd.

³ AusNCP complaint 23, Global Legal Action Network v BHP Group Ltd et al.; AusNCP complaint 25, Parella Law v Australian multinational enterprise; AusNCP complaint 26, Justicia y Reparacion v Australian-based enterprise operating in Chile; AusNCP complaint 32, SAVEducation Pty Ltd v India-based enterprise.

⁴ AusNCP complaint procedures – for public consultation, [46].

Additionally, provision [40.2] of the Procedures should be expanded to specify that the AusNCP will note on their website when an enterprise has refused to engage in ‘good offices’, and there should be a clear requirement for independent examiners to note this in their final statement.⁵

Enterprises who are subject to AusNCP complaints often have greater resources to respond to complaints and can engage in inhibiting conduct such as raising counter allegations against often vulnerable notifiers who rely on limited resources when making complaints. By engaging in this conduct, we consider it arguable that this constitutes a lack of engagement in the proceedings with a view to finding a Guidelines-compatible solution,⁶ and limits the parties’ ability to come together to resolve a complaint.

For example, in Complaint 29 (Project Sepik et al. v PanAust Ltd), the independent examiner noted that the enterprise declined to engage in ‘good offices’, and the voluntary nature of this phase.⁷ However, it is clear that the enterprise still put substantial evidence to support its position before the independent examiner. While the independent examiner noted that by the enterprise declining to engage in this phase, this reduces the weight of the enterprise’s subsequent arguments including that it had been denied procedural fairness,⁸ and that the notifier had not acted in good faith,⁹ it is apparent that the enterprise was not incentivised enough to participate in the dispute resolution process through the AusNCP.

Recommendation 2: The Procedures should set out that an independent examiner will refer an unsupported notifier (i.e., a notifier without representation) to a relevant third party, or the Governance and Advisory Board to source an appropriate third party to assist with the drafting of their complaint if required.

We note that provision [18.1] of the Procedures allows the Secretariat to work with notifiers to provide additional material that would be required for the initial assessment to proceed.¹⁰ However, relevant third parties such as civil society organisations or pro bono legal representatives may be more appropriately placed than the Secretariat to provide assistance to unsupported notifiers and assist them with framing their complaint with respect to the OECD Guidelines.

In Complaint 24 (Port Hedland Community Progress Association v BHP), the Port Hedland Community Progress Association lodged an AusNCP complaint regarding the operations and corresponding dust emissions of mining company BHP.¹¹ However, the independent examiner determined not to accept the complaint as the notifier’s main aims were not within its scope and the notifiers did not provide a clear explanation of the issues it wished to resolve with respect to the OECD Guidelines.¹² Although the Association’s main aims were a review of BHP’s licence under Western Australian law, and to obtain fair compensation under a government scheme, it is evident that the Association sought for the AusNCP to make findings using the OECD Guidelines with respect to BHP’s environmental management system.¹³

⁵ Ibid, [40.2].

⁶ Ibid, definition ‘good faith’.

⁷ AusNCP complaint 29, Project Sepik et al v PanAust Ltd, [34].

⁸ Ibid, [48].

⁹ Ibid, [47].

¹⁰ AusNCP complaint procedures – for public consultation, [18.1].

¹¹ AusNCP complaint 25, Port Hedland Community Progress Association v BHP, [1].

¹² Ibid, [3].

¹³ Ibid, [12.2].

We consider this complaint demonstrates that some notifiers may find difficulties in using the OECD Guidelines and the AusNCP process despite assistance from the Secretariat. Provision [18.1] of the Procedures is limited in promoting the accessibility of the AusNCP process as it is confined to the assistance of seeking additional material rather than support more generally. Nonetheless, as demonstrated by Complaint 24, notifiers may require further ongoing assistance in order to effectively engage in the AusNCP process.

We acknowledge that provision [5] of the Procedures already sets out that the AusNCP may seek to connect the notifier to a relevant third party for assistance in forming their complaint.¹⁴ Even so, this referral process remains unutilised in practice. Since Complaint 24 was lodged, there have been eight further complaints accepted by the AusNCP which have all been supported by civil society organisations or pro bono legal representation. The stark contrast between the outcome of these complaints and Complaint 24 demonstrates the benefit of a supported complaint.

Furthermore, the Governance and Advisory Board (**the Board**) includes four representatives from across civil society and trade unions who could be called upon for advice as they are well placed to assist in the referral of notifiers to a relevant third party for representation.¹⁵

2. Do the proposed revised AusNCP complaint procedures strike the right balance between transparency and accessibility (i.e., are they detailed enough while also being easy to read)?

As set out in the UNGPs, in order for the AusNCP to be transparent and accessible as a non-judicial grievance mechanism, it must provide adequate assistance for those who may face particular barriers to access and provide sufficient information about the mechanism's performance to build confidence in its effectiveness.¹⁶ Broadly, we recognise that information regarding AusNCP remains somewhat inaccessible and there is limited awareness raising beyond key stakeholders. We make the following recommendations for the Procedures to increase the overall transparency and accessibility of the AusNCP.

Recommendation 3: The Procedures should use consistent and accessible language.

Despite the Procedures indicating the AusNCP's support for culturally and linguistically diverse individuals, as well as First Nations peoples, individuals with disabilities, and people who are disadvantaged or vulnerable,¹⁷ we recommend the Procedures should increase the accessibility of the AusNCP through consistent and accessible language, including the use of plain English.

We note that the Procedures take positive steps by limiting unnecessarily technical language in some areas, such as providing limited references to an AusNCP complaint as a 'specific instance', except for provision [28.4] where it directly borrows from the language of the OECD Guidelines.¹⁸

¹⁴ AusNCP complaint procedures – for public consultation, [5].

¹⁵ See: [Governance and Advisory Board | AusNCP](#).

¹⁶ United Nations High Commission on Human Rights, *Guiding Principles on Business and Human Rights*, Principle 31.

¹⁷ AusNCP complaint procedures – for public consultation, [2].

¹⁸ OECD (2023), *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*, OECD Publishing, Paris, (OECD Guidelines), paragraph 33 'Commentaries on the Implementation Procedures'.

However, there remains a continued use of the term ‘good offices’ throughout the Procedures to describe the dispute resolution phase of the process, which is unhelpful and confusing for anyone unfamiliar with the AusNCP process.¹⁹ Although the use of ‘good offices’ is consistent with the OECD Guidelines, we consider a more familiar term to lay people reading the Procedures, such as ‘dispute resolution’, provides greater accessibility and translates the OECD Guidelines’ requirements into its practical application.

Furthermore, we recommend that the ‘glossary’ be placed towards the front of the Procedures to ensure that those who read the Procedures are exposed to unfamiliar terms prior to engaging in the AusNCP process.

Recommendation 4: The Procedures should ensure that the notifier’s complaint, with the notifier’s consent, be published on the AusNCP website.

In order to promote an enhanced understanding of specific AusNCP complaints, we recommend that the notifier’s initial complaint be published on the AusNCP website to help facilitate the AusNCP’s exposure to the wider public. Otherwise, interested stakeholders who review AusNCP statements are only privy to aspects of the initial complaint or submissions that the independent examiner chooses to mention in their statements.

Often alongside lodging their AusNCP complaint, civil society organisations will publish their initial complaint online. Having these complaints available on the AusNCP website will assist with the accessibility of the mechanism. It also provides greater transparency of the AusNCP process as it will encourage interested stakeholders to be aware of when there may be any aspects of a notifier’s complaint which is poorly translated into the findings of the independent examiner.

We note that the notifier’s consent would be required, particularly if the notifier has concerns regarding confidentiality, security or safety, or if the publication of the complaint would reveal sensitive information or the identity of individuals who have not consented to this being made public.

Recommendation 5: Provisions [10.1] and [40.1] of the Procedures (specifying that the complaint process will effectively be ended by the independent examiner if the notifier does not agree to continue with ‘good offices or is found not to be acting in good faith) should be removed.

We consider that the approach reflected in provisions [10.1], and in particular [40.1] of the Procedures (being that an independent examiner effectively dismisses a complaint upon determining that the notifier is not acting in good faith or where the notifier refuses to continue with ‘good offices’) are unnecessarily punitive and should be removed from the Procedures.

We note that in past complaints, for example, enterprises have often claimed notifiers are acting in bad faith where they have undertaken media advocacy around a complaint or sought to raise the impacts of the company’s activities through other forums outside the AusNCP process. While these should not be seen as an example of bad faith, there are real risks that provision [10.1] of the Procedures will be used by enterprises to try to have complaints against them dismissed.

Provision [40.1] of the Procedures is even more problematic. There may be good reasons why a notifier does not wish to engage in or to continue with the ‘good offices’ process, including fears of reprisal, or a sense that discussions with the enterprise (either prior to lodging the AusNCP complaint or through

¹⁹ AusNCP complaint procedures – for public consultation, [35]–[43].

the ‘good offices’ process itself) are not leading to changes in their position or activities. In either of these cases, there would still be real value in the independent examiner investigating the complaint and issuing a determination as to whether the enterprise has acted consistently with the Guidelines, rather than simply preparing a final statement summarising the process followed to date.

3. Are the revised AusNCP complaint procedures equitable and impartial? Do they provide procedural fairness to the parties?

The Procedures should go further to ensure that the AusNCP’s process enables trust from those who are intended to use it. We encourage the AusNCP to include the additional following revisions to the Procedures so that the independent examiners may make accurate findings of fact, and so that the parties can engage on fair terms.

Recommendation 6: The Procedures’ ‘examination’ phase should include an explicit investigations component if further information is required beyond that provided by the parties. The Procedures should give a clear remit to the independent examiners to thoroughly investigate complaints, including in exceptional cases undertaking field visits where the independent examiner deems this necessary.

The Procedures’ ‘examination’ phase does not currently empower the independent examiner to investigate aspects of a complaint beyond the information it receives from the parties and ad-hoc advice from other stakeholders.²⁰ We consider that provision [48] of the Procedures should be expanded to give the independent examiner a more explicit remit to thoroughly investigate complaints to ensure that all relevant information is before them. This should include the ability to undertake desktop research, seek further information from relevant third parties and, in exceptional cases, engage in field visits²¹

We note that several NCPs already include provisions like this in their Procedures. The UK NCP Procedures, for instance, states that:

4.6.2 *The objective of the examination is for the NCP to investigate the complaint in order to assess whether the complaint is justified.*

4.6.3 *At the outset of the investigation the NCP will identify the steps it intends to take in order to proceed with the investigation and will notify both parties in writing. The NCP will inform both parties in writing of any amendments it considers necessary to these steps. If, as a result of the investigation, the NCP decides that additional steps are required in order to complete the investigation, it will notify both parties of the additional steps it intends to take.*

...

4.6.6 *In exceptional cases the NCP may consider it necessary to undertake a field visit. The NCP will seek to agree terms of reference for the field visit with both parties in advance*

²⁰ Ibid, [46]–[48].

²¹ Ibid, [48].

*of the visit. The NCP will share a report of the visit with both parties for their comment.*²²

The Dutch NCP Procedures likewise provides the following investigative phase:

3b. Further examination following the rejection of good offices or failure of dialogue

*If the NCP's good offices are rejected or the dialogue fails, the NCP will, in principle, undertake further examination to determine whether the enterprise concerned failed to observe the OECD Guidelines on the grounds put forward in the notification. This can entail asking the parties to provide additional information, consulting external parties or independent experts, carrying out or commissioning research on location and/or requesting information from other parties involved in the notification. The outcome is then shared with the parties by means of the final statement. If the NCP decides not to examine the case further, it will inform the parties and explain why.*²³

The Canadian Ombudsman for Responsible Enterprise (**CORE**), an ancillary body to the Canadian NCP with respect to human rights abuses, additionally empowers the Ombud to undertake an 'ombud-initiated review' without the need for a notifier's complaint:

10. Review initiated by the CORE

10.1 The Ombud may initiate a review of an alleged human rights abuse within their mandate and will do so based on published criteria that guide the choice of human rights issues for Ombud-initiated reviews.

10.2 When the Ombud decides to initiate a review, they will prepare a Notice of Ombud-initiated Review and provide the appropriate Minister(s) and any Canadian company, individual, organization or community named in the Notice, with a copy of the Notice at least ten (10) working days before posting the Notice on the CORE website.

10.3 The Notice of Ombud-initiated Review will contain sufficient information regarding each of the admissibility criteria at section 5.6 of these Procedures.

10.4 At the outset of an Ombud-initiated review, Terms of Reference will be prepared including describing the scope of the review. The Terms of Reference will be published on the CORE's website.

10.5 The Ombud will decide how to conduct the Ombud-initiated review and will communicate information regarding the conduct of the review, as appropriate.

As demonstrated by Complaint 29 (Project Sepik et al. v PanAust Ltd), when an enterprise refuses to engage and the independent examiner is left to make findings 'on the papers', they have traditionally been very cautious in making determinations on matters where 'the factual basis on which an AusNCP

²² UKNCP complaint procedures (2019), [4.6]

assets.publishing.service.gov.uk/media/5df1fee440f0b609497ff0ac/uk-ncp-specific-instance-procedures.pdf.

²³ DutchNCP complaint procedures (2021), [3b] [2107 procedure to submit specific instances+-+TG.pdf.>](#).

determination would rest is not objectively established and is contested between the parties'.²⁴ This is understandable. But without the means or authority under the current Procedures to thoroughly investigate the factual basis of complaints, the independent examiners will always be limited to what the parties provide. In the case of enterprises, this provides a perverse incentive for them not to engage in the process or provide information.

We would therefore strongly encourage the AusNCP to consider adopting into the Procedures equivalent provisions to those of the UK and Dutch NCPs to give independent examiners the remit to properly investigate the factual basis of complaints that are before them. We believe this will lead to more accurate, balanced, and well-reasoned decisions and to greater engagement by enterprises in the process.

Ultimately, the AusNCP would benefit from independent examiners having investigative powers akin to other complaints bodies such as the state or Commonwealth Ombudsman or Australian Competition and Consumer Commission (ACCC), including for instance, the power to compel documents or testimonies, to inspect documents or premises and override certain privileges that usually protect disclosure of information. We accept that while changes of this nature are beyond the scope of a procedural review, some strengthening of the independent examiners' investigative capacity, at least akin to that used by other NCPs, can and should be implemented as part of the current procedural reforms.

Recommendation 7: The Procedures should stipulate that an independent examiner is not limited to findings against sections of the OECD Guidelines contained in the complaint so long as the enterprise has an opportunity to respond.

The Procedures should provide for independent examiners to be able to make findings against sections of the OECD Guidelines beyond those contained in the notifier's complaint.

Provision [45] of the Procedures sets out that the objective of the examination phase is for an independent examiner to consider whether the actions of the enterprise raised in a complaint were consistent with the OECD Guidelines, and to identify means by which to improve observance of the OECD Guidelines, where appropriate.²⁵ Although the OECD Guidelines do not preclude an independent examiner from being confined to making findings against the specific complaints raised by the parties, we consider the Procedures should include a sub provision of provision [45] which explicitly empowers independent examiners to make findings not raised in the complaint, if the independent examiner considers it appropriate, so long as the parties have an opportunity to respond to such findings.

In Complaint 29 (Project Sepik et al. v PanAust), the notifier alleged that the enterprise's development 'Sepik Development Project' did not comply with the OECD Guidelines as they had not sufficiently addressed foreseeable environment impacts, not respected human rights in acting inconsistently with free, prior and informed consent (FPIC) requirements, and provided insufficient disclosure of material matters.²⁶

²⁴ AusNCP complaint 29, Project Sepik et al. v PanAust Ltd, [30.2].

²⁵ AusNCP complaint procedures – for public consultation, [45].

²⁶ AusNCP complaint 29, Project Sepik et al v PanAust Ltd, [37].

Although the independent examiner found that most of the enterprise's actions identified in the complaint were not inconsistent with the OECD Guidelines,²⁷ the independent examiner found that the notifiers are stakeholders in the project even if he could not make a finding that FPIC was required.²⁸ The independent examiner proceeded to note that Chapter 2 of the OECD Guidelines sets out the expectations of enterprises with respect to stakeholders, but the notifiers did not specifically assert that the enterprise acted inconsistently with this expectation such that he considered this alongside the complaints raised.²⁹

With respect to the notifier's complaint regarding FPIC, the independent examiner concluded that the notifier's complaint and submissions conflated issues about FPIC and stakeholder engagement.³⁰ Despite the independent examiner determining that it was premature to make factual findings in this respect, the independent examiner did recommend that the enterprise review the totality of its community engagement in relation to the project and future engagement should include the notifiers and the views of local leaders.³¹

We consider that it was open, even applying the existing Procedures, to the independent examiner to make findings regarding the enterprise's stakeholder engagement, despite that issues relating to Chapter 2 of the OECD Guidelines were not raised in the notifier's complaint. Setting this out explicitly in the revised procedures would enhance substantive fairness in the resolution of complaints, as long as enterprises are afforded an opportunity to respond. Note, however, that where an enterprise has not engaged in the AusNCP process it would not be necessary to afford an opportunity for response in such matters.

Recommendation 8: The Procedures should require parties to disclose all relevant information as part of the amended good faith requirement.

The updated Procedures place increased importance on the parties engaging in good faith, due to this being further highlighted in the revisions to the OECD Guidelines themselves.³² We consider that the definition of good faith in the updated Procedures should include an obligation on the parties to disclose all relevant information which may assist an independent examiner in their examination of the complaint.

By withholding information relevant to the complaint, parties may limit the independent examiner's ability to make findings, particularly regarding compliance of the enterprise's conduct with the OECD Guidelines and may provide a skewed or partial presentation of the issues in dispute. This goes directly to the heart of engagement in good faith.

The section in the updated Procedures on 'Confidentiality, transparency and conflicts of interest' currently merely reflect the position in the existing Procedures that information provided by any party to a complaint will only be shared with the consent of that party.³³ While we do not recommend that this be changed (provided only information disclosed between the parties in some form can form part

²⁷ Ibid, [3].

²⁸ Ibid, [3.3].

²⁹ Ibid, [53].

³⁰ Ibid, [116].

³¹ Ibid, [120].

³² OECD (2023), *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*, OECD Publishing, Paris, (OECD Guidelines), paragraph 26 to 28 'Commentaries on the Implementation Procedures'.

³³ AusNCP complaint procedures – for public consultation, [84].

of the independent examiner's consideration of the complaint), the AusNCP should incentivise full and frank disclosure of relevant information and documents. Including an obligation of this kind in the good faith definition is one way to do that.

Recommendation 9: The Procedures should set out that an independent examiner will not transfer a complaint before consulting with the Board, the notifier, and the enterprise.

Despite increased guidance in the Procedures with respect to the transfer of complaints to other NCPs, including the explicit inclusion of transfer statements which require an independent examiner to set out their reasons for transferring a complaint,³⁴ the Procedures should provide greater certainty with respect to the procedures of when a complaint is transferred.

We note that Complaint 21 (Global Legal Action Network v BHP Group Ltd et al.) provides insight into the practical frustrations that a party may face with the transfer process. As part of this complaint, the notifiers considered there were ‘a number of barriers which they said had been raised previously and were preventing their participation in the proceedings,’ including the Switzerland NCP’s coordination with the AusNCP and the UK NCP.³⁵

As a starting point, there should be an assumption that notifiers have filed their complaint with a particular NCP on the basis that it is the one best-equipped to help resolve their dispute. Notifiers may also have logistical, safety, or other reasons why they prefer the AusNCP to handle their complaint as opposed to another NCP, even when another NCP might also take the lead or supporting role. Of course, there may be important or necessary reasons why the complaint should be moved to another NCP. However, any decision to transfer a complaint should have appropriate controls around it.

To ensure that notifiers’ preferences and concerns are met, provision [24] of the Procedures should be modified to clarify that the independent examiner must consult the Board and the parties before transferring a complaint to another NCP or seeking to co-manage a complaint with another NCP (as opposed to advising of a transfer after this decision has already been made).

Recommendation 10: The Procedures should provide that members on the Board who are consulted to review statements are able to seek additional information from the independent examiner in order to inform their views.

The Procedures outline processes during initial, final and follow-up assessments where a draft statement will be provided to the Board for review and advice.³⁶ We note that besides the parties and the independent examiner, the Board is the other key body within the complaints process with its members being ‘available to the independent examiners to provide advice throughout the handling of complaints’.³⁷

Given the current limited capacity for independent examiners to investigate complaints, as indicated in Recommendation 8, it is crucial that the Board be empowered to seek additional information from the independent examiners in order to provide holistic advice which strengthens the examiner’s findings within the statements. It should be for the independent examiner to determine whether or not it is

³⁴ Ibid, [33].

³⁵ AusNCP complaint 23, Global Legal Action Network v BHP et al., [21.5].

³⁶ AusNCP complaint procedures – for public consultation, [30.1], [60] & [66].

³⁷ Ibid, definition ‘Governance and Advisory Board’.

reasonable to provide certain requested additional information to the Board to inform their review, having regard to the need for taking into account impartiality and fairness considerations.

Recommendation 11: The Procedures should provide greater certainty regarding party engagement with respect to the 'case follow-up' phase, particularly if an issue remains unresolved or ongoing.

The Procedures currently provide minimal opportunity for parties to engage in the follow-up of a complaint. We recommend that this phase be expanded to allow for parties to make submissions with respect to any unresolved or ongoing issues. The 'case follow-up' phase of the Procedures sets out that 'the Examiner will... request an update from both parties on developments since the completion of the final statement'.³⁸ However, this provides little certainty that an independent examiner will sufficiently engage in any potential issues a party may have following the publication of the final statement.

In Complaint 22 (Mr John Podgorelec et al. v ElectraNet Pty Ltd), the independent examiner noted that the enterprise elected not to engage in the follow-up phase and had not provided sufficient information to demonstrate any steps taken in response to the independent examiner's recommendations made in their final statement.³⁹ Despite the enterprise's lack of engagement with the follow-up phase, the notifiers still submitted that the enterprise failed to act upon any of the recommendations.⁴⁰ This demonstrates that the Procedures provide insufficient certainty to parties as to how a complaint will be resolved if an enterprise refuses to engage in a case follow-up, despite unresolved issues, such that this phase should be further refined.

4. Do you have any general comments on the revised AusNCP complaint procedures?

Recommendation 12: The Procedures should include a requirement that final statements include the results of any examination, sources of information that formed the basis of the decision and findings as to whether or not the enterprise has acted consistently with the Guidelines, an argued rationale for each finding and, where appropriate, make recommendations as to what steps should be taken by the enterprise.

The Procedures do not currently require an independent examiner to provide their views on whether an enterprise has breached the OECD Guidelines but rather lists this as optional.⁴¹ In order to promote the predictability of the AusNCP and incentivise adherence to the Guidelines, we recommend that there should be clearer requirements in the Procedures as to what a final statement should contain, including that the independent examiner must make findings as to whether or not the enterprise has breached the OECD Guidelines and, if this is the case, make recommendations as to the steps they should take to remedy any such breach. In the event that the independent examiner cannot reach such a determination as to whether or not the OECD Guidelines has been breached, they should be required to provide reasons as to why this is the case.

³⁸ Ibid, [64].

³⁹ AusNCP complaint 22, Mr John Podgorelec et al. v ElectraNet Pty Ltd, [1].

⁴⁰ Ibid, [16].

⁴¹ AusNCP complaint procedures – for public consultation, [58].

We recommend that the Procedures model this requirement from the UK NCP Procedures which requires a final statement to include:⁴²

5.1 ...

- *the results of examination (if any), which will include an argued rationale behind each conclusion including a clear statement as to whether or not the company is in breach of the Guidelines; ...*

The information included in final statements also provides useful insight into the reasoning of independent examiners, enabling greater scrutiny of their findings by the general public and the Board. We note that with respect to the final statement, each party will be given an opportunity to respond to any information that may be taken into account by the independent examiner in the formulation of views or recommendations for the final statement.⁴³ We further recommend that all sources of information on which the independent examiner has based their decision be included in their final statement to promote further transparency throughout the process.

Recommendation 13: Where enterprises fail to engage in the AusNCP complaint process in good faith or are found to be in breach of the OECD Guidelines, the Procedures should explicitly set out that the independent examiner may draw their findings to the attention of other relevant government agencies and make recommendations for the withdrawal of government trade support and/or exclusion from public procurement processes.

In order to enhance the AusNCP's predictability (in line with the effectiveness criteria set out in UNGP 31) and more strongly incentivise both engagement by enterprises in the AusNCP process and compliance with any recommendations made by independent examiners, we recommend that the AusNCP's Procedures provide greater clarity on the types of recommendations they may make, including potential sanctions.⁴⁴

Currently, the revised Procedures merely provide that independent examiners may draw any instances of inappropriate conduct to other relevant government agencies through the Secretariat. Given a number of enterprises are failing to engage in the AusNCP process at all, stronger incentives clearly need to be built into the Procedures to help encourage engagement and compliance. We recommend that the AusNCP's Procedures implement a similar model to that of the CORE, which provides:⁴⁵

- 12.7 *If the Ombud considers that a Canadian company has not acted in good faith during a review including a follow-up to a review, the Ombud may make recommendations to the Minister on implementing trade measures including:*

⁴² UKNCP complaint procedures (2019), [5.1]

assets.publishing.service.gov.uk/media/5df1fee440f0b609497ff0ac/uk-ncp-specific-instance-procedures.pdf.

⁴³ AusNCP complaint procedures – for public consultation, [53.1].

⁴⁴ United Nations High Commission on Human Rights, *Guiding Principles on Business and Human Rights*, Principle 31.

⁴⁵ Operating Procedures for the Human Rights Responsibility Mechanism of the Canadian Ombudsperson for Responsible Enterprise <[CORE Operating Procedures](#)>.

- 12.7.1 *The withdrawal or denial of trade advocacy support provided to the Canadian company by the Department of Foreign Affairs, Trade and Development (known as “Global Affairs Canada”);*
- 12.7.2 *The refusal by the Department of Foreign Affairs, Trade and Development to provide future trade advocacy support to the Canadian company;*
- 12.7.3 *The refusal by Export Development Canada to provide future financial support to the Canadian company.*

In the Canadian NCP complaint, *Canada Tibet Committee v China Gold International Resources Corp. Ltd*, the Canadian NCP sanctioned the enterprise for its unwillingness to engage in the Canadian NCP process.⁴⁶ The Canadian NCP concluded that the enterprises’ failure to participate in the NCP consultations process will be “taken into consideration in any applications by the Company for enhanced advocacy support from the Trade Commissioner Service and/or Export Development Canada (EDC) financial services, should they be made.”

5. Do you have any comments on specific paragraphs or sections of the revised updated AusNCP complaint procedures?

Recommendation 14: The Procedures should not include the requirement for complaints to demonstrate a link between the issue raised and the enterprise’s presence, conduct or impact in Australia.

With respect to the initial assessment phase, provision [28] of the Procedures sets out the six admissibility criteria which an independent examiner must consider when determining whether an issue raised in a complaint warrants further examination.⁴⁷

Although the OECD Guidelines limit this consideration to these explicit criteria, provision [8] of the Procedures, positioned under the heading ‘submitting a complaint’, sets out additionally that complaints should demonstrate a link between the issue raised and the enterprise’s presence, conduct or impact in Australia and notes that conduct may include acts, omissions, responsibilities, or decisions.⁴⁸

Despite not being included in the admissibility criteria within the Procedures, we consider this requirement undermines the accessibility of the AusNCP and places an unfair burden on notifiers. Frequently, due to the complex and often opaque structures of multinational enterprises, it may be difficult for a notifier, particularly if they are based outside of Australia, to obtain information on exactly how the Australian part of an enterprise is linked to the issues they are experiencing on the ground. They may only know that the company has a presence in Australia. This should not prevent them from bringing a complaint to the AusNCP. Given the small numbers of complaints brought to the AusNCP, which reflect the real difficulties communities have identifying avenues for raising complaints about corporate activities, revisions to the Procedures should not create additional barriers for them to do so. If an enterprise feels that the Australian part of their operations is completely unrelated to the issues raised in the complaint, they can raise this in their response.

⁴⁶ Canadian NCP complaint, *Canada Tibet Committee v China Gold International Resources Corp Ltd* < [Final Statement on the Request for Review regarding the Operations of China Gold International Resources Corp. Ltd., at the Copper Polymetallic Mine at the Gyama Valley, Tibet Autonomous Region](#)>.

⁴⁷ AusNCP complaint procedures – for public consultation, [28].

⁴⁸ *Ibid*, [8].

If it is the Secretariat's intention that this be a relevant aspect as to whether the AusNCP handle a specific complaint, as opposed to another NCP, we recommend that this be positioned in relation to [22] of the Procedures as this should be considered with respect to complaint transfers rather than complaint admissibility.⁴⁹

Recommendation 15: The Procedures' Appendix A should include an 'examination' phase in the complaint process diagram.

We note that in an attempt to simplify the visual representation of the AusNCP complaint process, the Procedures reduced the process to three phases: complaint submission and initial assessment, 'good offices', and final statement. However, this fails to address the examination phase of the AusNCP process and implies that the complaint process is simply about conciliation rather than a process where an independent examiner may make findings about an enterprise's conduct with respect to the OECD Guidelines.

Alongside these procedural considerations, we reiterate the requirement to ensure that the Secretariat is adequately resourced to support independent examiners and encourage widespread awareness raising of the NCP among interested stakeholders.

We welcome your response to the points we highlight in this paper and are available to discuss any questions or concerns you might have.

Yours sincerely,



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⁴⁹ Ibid, [22].