



Law Council
OF AUSTRALIA

Improving specific instance procedures

Australian National Contact Point, Treasury

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful to its Business and Human Rights Committee for its assistance in the preparation of this submission.

Executive Summary

1. The Law Council is grateful for the opportunity to comment on the Australian National Contact Point's (**AusNCP**) discussion paper, *Improving Specific Instance Procedures (Discussion Paper)*.
2. The Law Council welcomed the 2017 Independent Review of the AusNCP (**Review**).¹ In its submission to the Review, the Law Council recommended that the *ANCP Process for handling specific instances* document (**Procedures**) be revised, noting that 'at points it is confusing'.² Consistent with this recommendation, the Law Council generally supports current efforts to improve specific instance procedures, including in the ways proposed by the Independent Reviewer in her report following the Review.³
3. However, the Law Council considers that simply rewriting the Procedures will not resolve the deficiencies in the AusNCP's functionality identified by the Review.⁴ For example, some of the measures proposed by the Discussion Paper, such including indicative timeframes and a follow-up process in a rewritten procedural guidance document, are already in the current Procedures.⁵ Nonetheless, the AusNCP has consistently struggled to meet its own timeframes,⁶ nor does it appear to have ever utilised its follow-up processes.⁷
4. The Law Council agrees with the Independent Reviewer's assessment that 'without a baseline level of human and financial resources, many of the NCP's deficiencies will go unaddressed'⁸ and emphasises that 'it is crucial that both a dedicated budget and staff are provided'.⁹ To this end, the Law Council notes that the Organization for Economic Cooperation and Development's (**OECD**) Council decision on the Guidelines imposes a legally binding obligation on the Australian Government to make available human and financial resources to its NCP so that it can effectively fulfil its responsibilities.¹⁰
5. This submission responds to the questions set out in the Discussion Paper and makes recommendations concerning additional matters that arise from the Discussion Paper. These recommendations are aimed at assisting the AusNCP to operate in accordance with the core criteria for National Contact Points (**NCPs**), being visibility, accessibility,

¹ Alex Newton, *Independent Review: Australian National Contact Point under the OECD Guidelines for Multinational Enterprises* (2017) 6, recommendation 3 <<https://cdn.tspace.gov.au/uploads/sites/112/2018/02/Final-Report.pdf>>.

² Law Council of Australia, *Submission to ANCP 2017 Review* (25 July 2017) 18 [43] <<https://www.lawcouncil.asn.au/resources/submissions/australian-national-contact-point-2017-review->>>

³ Alex Newton, *Independent Review: Australian National Contact Point under the OECD Guidelines for Multinational Enterprises* (2017) 45-46 <<https://cdn.tspace.gov.au/uploads/sites/112/2018/02/Final-Report.pdf>>

⁴ *Ibid* 6, recommendation 3.

⁵ AusNCP, *AusNCP Procedures for dealing with Specific Instances brought forward under the OECD Guidelines for Multinational Enterprises* (2018) [10]-[12] (timetable) and [56]-[57] (follow up to final statements) <<https://ausncp.gov.au/specific-instances/complaints-procedures/>>.

⁶ Kristen Zornada, *The Australian National Contact Point: How it can be reformed* (2017) 26-28 <<http://apo.org.au/system/files/100061/apo-nid100061-405446.pdf>>.

⁷ *Ibid* 51-52.

⁸ Alex Newton, *Independent Review: Australian National Contact Point under the OECD Guidelines for Multinational Enterprises* (2017) 30 <<https://cdn.tspace.gov.au/uploads/sites/112/2018/02/Final-Report.pdf>>

⁹ *Ibid* 31.

¹⁰ See OECD Council Decision, *Decision of the Council on the OECD Guidelines for Multinational Enterprises*, C(2000)96/FINAL (27 June 2000) I [4]. While the Guidelines themselves are not binding, the OECD Council Decision on the Guidelines is legally binding on Australia as an OECD member country.

transparency and accountability,¹¹ and to deal with specific instances in a manner that is impartial, predictable, equitable, and consistent with the OECD Guidelines for Multinational Enterprises (**Guidelines**).¹² These recommendations are:

- (a) the AusNCP should adopt its proposed planning stage of good offices, which should always include a pre-mediation meeting with the parties, and where necessary, a stakeholder assessment, as outlined in the NCP Mediation Manual prepared by the Consensus Building Institute (**Mediation Manual**);
- (b) any changes to the confidentiality procedures should be the subject of public consultation, and should strive to promote transparency, for example as in paragraph 51 of the current AusNCP Procedures;
- (c) if complainants do not include all of the information required for the AusNCP to deem the complaint 'valid', the AusNCP should contact the complainant, with a translation in their language, where possible and necessary, and provide complainants with the opportunity to rectify their complaint, rather than simply rejecting it. Complainants that lack representation in Australia should be referred to relevant civil society organisations in Australia for assistance;
- (d) the new AusNCP Procedures should refer to, or replicate, paragraph 25 of the Commentary to the Procedural Guidance for NCPs, which requires the AusNCP to determine whether a specific instance is *bona fide* and raises issues relevant to the Guidelines. If paragraph 25 is adopted into the new AusNCP Procedures and followed in practice, then there is no need to include a 'check that the complaint should be handled by the AusNCP';
- (e) the Proposed Initial Assessment Criteria should not be adopted, as they risk introducing considerations not contemplated by the Guidelines to the initial assessment stage. Rather, the Proposed Initial Assessment Criteria and other relevant interpretive guidance could instead be included as commentary to the new AusNCP Procedures;
- (f) initial assessments should be published. If mediation fails or is refused, a determination on whether there has been a breach of the Guidelines should be included in the final statement, and final submissions should be shared with all the parties;
- (g) follow-up procedures are welcomed and a timeframe of 12 months, or another timeframe as agreed between the parties, is appropriate;
- (h) a review mechanism is essential to promote transparency and accountability. An appropriate form would be to expand the Oversight Committee to include representatives from business, civil society and unions, as well as experts in areas that are relevant to the Guidelines, for example human rights, employment standards or environmental standards, similar to the UK NCP;
- (i) proposed timeframes for making an initial assessment, conducting the good offices stage and final assessment are appropriate, as they are largely consistent with those envisaged by the Guidelines, but must be supported with adequate resourcing to ensure they can be met; and

¹¹ See OECD, *Guidelines for Multinational Enterprises 2011 Edition* (2011), Commentary on the Procedural Guidance for NCPs [22].

¹² *Ibid.*

- (j) the specific instance tracking tool is valuable to promote transparency, but in order to be useful, it should include more information, such as the identity of the parties involved and a brief description of the nature of the complaint, including the chapter/s of the Guidelines alleged to have been breached. Initial assessments, final statements and any follow-up reports should also be uploaded to the tracking tool.

Responses to questions in Discussion Paper

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

6. The offering of 'good offices' by the AusNCP, that is, lending its credibility and assistance to parties to specific instances in resolving their dispute, is an essential, if not central, function of an NCP under the Guidelines.¹³ An NCP that has an effective good offices stage is therefore likely to be an effective NCP. The Law Council considers that the proposed planning stage will strengthen the good offices stage and improve the predictability of the process for the parties involved. Forward plans should be agreed to by all parties.
7. The Law Council agrees with the statement in the Discussion Paper that 'the revised procedures should set clearer expectations for both the notifier and the enterprise of the process and timing of good offices when a complaint is accepted'.¹⁴ The Law Council considers that reform of conflicting confidentiality procedures identified in the Discussion Paper should be the subject of public consultation, given the potential for sensitive information to arise from both the company and complainant perspectives.
8. At the same time, the AusNCP should strive to resolve the conflicting confidentiality procedures in a way that promotes transparency,¹⁵ such as in paragraph 51 of the current AusNCP Procedure.¹⁶

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

Measures to promote the equitable treatment of complainants

9. There may be a power disparity between complainants, who are often members of communities in vulnerable situations, and who may not speak English, and respondents, which are multinational enterprises.¹⁷ As such, the Law Council is concerned by statements in the Discussion Paper that only 'valid' complaints will be accepted.¹⁸ If the AusNCP receives complaints that do not contain all of the information required to be deemed 'valid', the AusNCP should contact the complainants and provide them the opportunity to rectify the complaint, including a translation in the complainants' language where necessary and possible, rather than rejecting it as invalid. Appropriate resources should be supplied to the AusNCP to enable it to undertake this task.

¹³ Ibid, Procedural Guidance, C [2].

¹⁴ The Treasury, Australian National Contact Point for the OECD Guidelines for Multinational Enterprises, *Improving Specific Instances procedures* (22 May 2018) 7.

¹⁵ Consensus Building Institute, *NCP Mediation Manual* (July 2012) 51

<<http://accessfacility.org/sites/default/files/CBI%20-%20NCP%20Mediation%20Manual.pdf>>.

¹⁶ AusNCP, *AusNCP Procedures for dealing with Specific Instances brought forward under the OECD Guidelines for Multinational Enterprises* (2018) [51] <<https://ausncp.gov.au/specific-instances/complaints-procedures/>>.

¹⁷ See for example Alex Newton, *Independent Review: Australian National Contact Point under the OECD Guidelines for Multinational Enterprises* (2017) 29 <<https://cdn.tspace.gov.au/uploads/sites/112/2018/02/Final-Report.pdf>>.

¹⁸ The Treasury, Australian National Contact Point for the OECD Guidelines for Multinational Enterprises, *Improving Specific Instances procedures* (22 May 2018) 5-6.

10. To further promote an approach to specific instance complaints which is equitable,¹⁹ the Law Council recommends that complainants that lack representation in Australia should be referred to relevant Australian civil society organisations for assistance.²⁰ Representation is also more likely to facilitate the submission of valid complaints and the provision of information in a timely manner. This will reduce the burden on the AusNCP to undertake additional work required in seeking to contact parties that are based abroad, and increase the prospect of the AusNCP adhering to its own timeframes.

Professional mediators should be employed to mediate specific instances

11. Beyond the Discussion Paper, the Law Council understands that the AusNCP anticipates that its resourcing levels should be able to accommodate the employment of professional mediators to mediate specific instances in future.²¹

12. The Law Council welcomes this development as it previously recommended the employment of professional mediators in its submission to the Review,²² being best practice for NCPs.²³ The Law Council considers that employing professional mediators will increase the prospect of successful mediations, which will in turn decrease the workload and reduce the financial burden on the AusNCP to investigate specific instances if mediation fails.

13. The Mediation Manual states mediators must be neutral and credible, as well as having professional mediation skills, substantive knowledge of issues in the dispute, language and cultural competencies, and an understanding of good mediation practice standards.²⁴ The Law Council considers that only qualified and experienced mediators are likely to possess these attributes. The Law Council would be happy to engage with the AusNCP to identify qualified mediators within the legal profession, and in any case, opportunities for training mediators on business and human rights specifically.²⁵

¹⁹ OECD, *Guidelines for Multinational Enterprises 2011 Edition* (2011), Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, [22].

²⁰ Based on complaints that have previously been submitted to the AusNCP, this may include organisations that undertake legal work, such as the Human Rights Law Centre; benevolent societies, such as the Brotherhood of St Laurence; or trade unions, such as the Construction, Forestry, Mining and Energy Union; depending on which chapters of the Guidelines are relevant to the complaint.

²¹ AusNCP stakeholder consultation session on *Improving specific instances procedures*, Treasury, Melbourne, 4 June 2018.

²² Law Council of Australia, *Submission to ANCP 2017 Review* (25 July 2017) 9 [12]

<<https://www.lawcouncil.asn.au/resources/submissions/australian-national-contact-point-2017-review->>.

²³ The UK NCP and the Netherlands NCP employ professional mediators: see, respectively, Amnesty international, *Obstacle Course: How the UK's National Contact Point Handles Human Rights Complaints under the OECD Guidelines for Multinational Enterprises* (2016) 10

<https://www.amnesty.org.uk/files/uk_ncp_complaints_handling_full_report_lores_0.pdf> and OECD, *Dutch National Contact Point: Aspirations and Expectations Met? Report of the NCP Peer Review Team* (2010) 52 <<https://www.oecdguidelines.nl/ncp/documents/report/2014/12/16/final-report-peer-review-nl-ncp->>.

²⁴ Consensus Building Institute, *NCP Mediation Manual* (July 2012) 43=45

<<http://accessfacility.org/sites/default/files/CBI%20-%20NCP%20Mediation%20Manual.pdf>>.

²⁵ The Law Council recently rolled out the International Bar Association's training on business and human rights, developed by two Australian academics, to members of the legal profession. It included access to a suite of online materials developed especially for the course, and a half-day face-to-face session. The role of the Australian National Contact Point was covered in the training.

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?

14. The Law Council agrees that shifting the majority of the AusNCP's examination responsibilities to after the good offices stage will ameliorate delays caused at the initial assessment stage, which is intended to function only as a triage process to determine if the issues merit further examination.²⁶
15. However, these responsibilities cannot be abdicated entirely. The Law Council considers that the AusNCP should always conduct a pre-mediation meeting, and discharge the seven essential pre-mediation meeting responsibilities set out in the Mediation Manual.²⁷ Where necessary, this should be followed by a stakeholder assessment.²⁸ This process will inform the good offices stage and assist the AusNCP in meeting its examination responsibilities under the Guidelines.²⁹
16. Beyond shifting examination responsibilities to after the good offices stage, this part of the Discussion Paper also raises other issues relevant to the initial assessment stage, on which the Law Council has commented on below.

The Procedures should set out the determination NCPs are required to make at initial assessment as per the Guidelines

17. The Discussion Paper states that the application of the current initial assessment criteria has resulted in a prolonged initial assessment stage, and sets out Proposed Initial Assessment Criteria intended to clarify and simplify this stage of the process. While the Law Council supports efforts to reduce delays at initial assessment stage, the Law Council does not support the adoption of the Proposed Initial Assessment Criteria as a means to achieve this. From the Law Council's perspective, it appears the difficulty is not with the initial assessment criteria, but with the way in which they have been adapted from the Guidelines into the current AusNCP Procedure.
18. The Commentary on the Procedural Guidance for NCPs states what is required from NCPs at the initial assessment stage:

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. whether there seems to be a link between the enterprise's activities and the issue raised in the specific instance.*

²⁶ OECD, *Guidelines for Multinational Enterprises 2011 Edition* (2011) Procedural Guidance, C [72]; Commentary on the Procedural Guidance for NCPs [25].

²⁷ Consensus Building Institute, *NCP Mediation Manual* (July 2012) 28-32

<<http://accessfacility.org/sites/default/files/CBI%20-%20NCP%20Mediation%20Manual.pdf>>

²⁸ For the circumstances in which it may be necessary to conduct a stakeholder assessment, see *ibid* 31 [4]. On conducting a stakeholder assessment, see *ibid*, 33-40.

²⁹ See OECD, *Guidelines for Multinational Enterprises 2011 Edition* (2011) Procedural Guidance, I C [2]; Commentary on the Procedural Guidance for NCPs [29].

- *the relevance of applicable law and procedures, including court rulings.*
- *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.*³⁰

19. However, the requirement for the AusNCP to determine whether the issue is *bona fide* and relevant to the implementation of the Guidelines is absent from the current AusNCP Procedure, which instead states:

In making its initial assessment of a Specific Instance, the AusNCP will consider the stated grounds of the complaint and the information it has received about the complaint, in order to decide:

- *whether it falls within one or more of the Guidelines;*
- *whether the issue raised is material and substantiated; and*
- *whether there are any other factors which should be taken into account such as, but not limited to:*
 - *the relevance of applicable law and procedures, including court rulings;*
 - *how similar issues have been, or are being, treated in other domestic or international Specific Instances;*

*whether consideration of the Specific Instance would contribute to the purposes and effectiveness of the Guidelines.*³¹

20. The Guidelines make clear that the only determination the AusNCP is required to make at the initial assessment stage is whether the specific instance is *bona fide* and discloses an issue relevant to the Guidelines, and the factors it then sets out are to be taken into account in the context of making that determination. However, the current AusNCP Procedures omit the context to the factors. It also requires AusNCP to make a decision on factors that the Guidelines only require the AusNCP to take into account. If the AusNCP is investigating each of these factors, and making a determination as to whether or not they are satisfied in each specific instance, it is understandable why significant delays are being experienced.

21. Therefore, the Law Council recommends that the new AusNCP Procedures should refer directly to paragraph 25 of the Commentary to the Procedural Guidance for NCPs, to avoid repetition and ensure accuracy and consistency. Staff tasked with making initial assessments should then refer both to the Commentary to the Procedural Guidance and the AusNCP Procedure. If the AusNCP intends for the new Procedures to be a standalone document, then paragraph 25 of the Commentary to the Procedural Guidance for NCPs should be adopted verbatim into the new AusNCP Procedure.

³⁰ Ibid, Procedural Guidance, C [72]; Commentary on the Procedural Guidance for NCPs [25].

³¹ AusNCP, *AusNCP Procedures for dealing with Specific Instances brought forward under the OECD Guidelines for Multinational Enterprises* (2018) [20] (paragraph numbering omitted) <<https://ausncp.gov.au/specific-instances/complaints-procedures>>.

22. Including the requirement to determine whether the complaint is *bona fide* and discloses an issue relevant to the Guidelines correctly frames the initial assessment criteria, not as individual requirements each to be satisfied, but questions to consider for the purposes of filtering out complaints are not *bona fide* and relevant to the implementation to the Guidelines. It follows that if a specific instance is *bona fide* and relevant to the implementation of the Guidelines, then it should be accepted by the AusNCP. This also functions as the 'check that the complaint should be handled by the AusNCP'.³² There is no need for the creation of an additional step for this 'check' to occur, as contemplated the Discussion Paper, and it would be inventing a step not required by the Guidelines.

Proposed initial assessment criteria should not be adopted but included as commentary

23. Similarly, the Law Council does not support the introduction of the Proposed Initial Assessment criteria, as they do not reflect assessment criteria set out in the Guidelines. As noted above, the Law Council considers that the appropriate approach is to refer to or reproduce paragraph 25 of the Guidelines in the new AusNCP Procedure. The Law Council considers it essential the initial assessment criteria reflect those set out in the Guidelines for two reasons.

24. First, because the Guidelines state that NCPs will operate in accordance with core criteria to further the objective of 'functional equivalence'.³³ The Law Council understands the notion of 'functional equivalence' as an aspiration that all NCPs will function in a comparable way, in pursuit of common objectives, but with the flexibility in structure required by their different national contexts.³⁴ The Law Council's view is that the AusNCP introducing the proposed initial assessment criteria would erode this functional equivalence that is central to the NCP system. Given the cross-jurisdictional business operations of multinational enterprises, complaints are often submitted to multiple NCPs,³⁵ and adoption of the AusNCP's proposed initial assessment criteria may lead to the same complaint being treated differently by the AusNCP than by other relevant NCPs.

25. Second, only the matters included in the Guidelines and Commentary to the Procedural Guidance for NCPs should be taken into account in making an initial assessment.³⁶ For example, the underlined language of 'is the issue plausible?' and 'is there a clear and relevant link between the enterprises activities',³⁷ is not used in the Guidelines. Adoption of these criteria therefore risks introducing additional matters into the initial assessment that may lead to exclusion of specific instance complaints that may otherwise be *bona fide* and relevant to the Guidelines. As noted in Independent Reviewer's report, the AusNCP has on several occasions rejected complaints for reasons falling outside the Guidelines and its own procedures.³⁸

³² The Treasury, Australian National Contact Point for the OECD Guidelines for Multinational Enterprises, *Improving Specific Instances procedures* (22 May 2018) 5.

³³ OECD, *Guidelines for Multinational Enterprises 2011 Edition* (2011) Procedural Guidance, I.

³⁴ OECD, *About the OECD Guidelines for Multinational Enterprises* (2017)

<<http://mneguidelines.oecd.org/about>>.

³⁵ Consensus Building Institute, *NCP Mediation Manual* (July 2012) 31-32

<<http://accessfacility.org/sites/default/files/CBI%20-%20NCP%20Mediation%20Manual.pdf>>.

³⁶ OECD Watch, *Remedy Remains Rare* (2015) 27 <https://www.oecdwatch.org/publications-en/Publication_4201>.

³⁷ The Treasury, Australian National Contact Point for the OECD Guidelines for Multinational Enterprises, *Improving Specific Instances procedures* (22 May 2018) 6.

³⁸ These reasons include: that accepting the complaint would require comment on government policy; that the parties are unwilling to mediate; that the company has complied with domestic law so is also assumed to have

26. Nonetheless, it is noted that investigating specific instances to determine if they meet the ‘material and substantiated’ standard has caused difficulties and delays to the AusNCP and NCPs worldwide.³⁹ In the Law Council’s view, any extraneous material that may assist the AusNCP interpret the initial assessment criteria (e.g.: guidance issued by the OECD Investment Committee, reports by OECD Watch, peer reviews, etc.) should instead be incorporated into commentary to the AusNCP guidance, rather than amending the criteria themselves.
27. For example, the Law Council notes that Dr. Roel Nieuwenkamp, Chair of the OECD Working Party for Responsible Business Conduct, has stated that the ‘material and substantiated’ standard was intended to prevent frivolous complaints without setting an unreasonable threshold for offering good offices.⁴⁰ Further, the Mediation Manual suggests that only three of the criteria are needed to determine if a complaint is *bona fide* and raises issues relevant to the Guidelines.⁴¹ This is the type of information that could be incorporated into a commentary document to assist AusNCP staff tasked with making an initial assessment of a specific instance.

Initial assessments should be published

28. It is unclear from the flowchart on the progress of a specific instance on the AusNCP website, and the Discussion Paper, whether the AusNCP intends to publish its initial assessment determinations. The current AusNCP Procedures indicate that it should do so upon acceptance of a specific instance,⁴² yet it has never published an initial assessment.⁴³
29. The Law Council considers that, unless there are compelling reasons not to do so, the AusNCP should generally publish its initial assessments, as it promotes transparency. Publication of initial assessments is standard practice of the UK NCP, and it has enjoyed positive outcomes.⁴⁴ For example, after the UK NCP published its initial assessment that a complaint made about Formula One’s labour practices leading up to the Bahrain Grand Prix merited ‘further examination’, Formula One adopted its first-ever human rights policy.⁴⁵

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

complied with the Guidelines; or the mere fact there are parallel proceedings on foot without assessment of any risk to those proceedings: see Alex Newton, *Independent Review: Australian National Contact Point under the OECD Guidelines for Multinational Enterprises* (2017) 22, 28 <<https://cdn.tspace.gov.au/uploads/sites/112/2018/02/Final-Report.pdf>>.

³⁹ OECD Watch, *Remedy Remains Rare* (2015) 27 <https://www.oecdwatch.org/publications-en/Publication_4201>.

⁴⁰ *Ibid.*

⁴¹ Consensus Building Institute, *NCP Mediation Manual* (July 2012) 22 [1.2] <<http://accessfacility.org/sites/default/files/CBI%20-%20NCP%20Mediation%20Manual.pdf>>.

⁴² AusNCP, *AusNCP Procedures for dealing with Specific Instances brought forward under the OECD Guidelines for Multinational Enterprises* (2018) [30]-[32] <<https://ausncp.gov.au/specific-instances/complaints-procedures/>>.

⁴³ Alex Newton, *Independent Review: Australian National Contact Point under the OECD Guidelines for Multinational Enterprises* (2017) 23 <<https://cdn.tspace.gov.au/uploads/sites/112/2018/02/Final-Report.pdf>>.

⁴⁴ *Ibid.*

⁴⁵ See OECD Watch, *Remedy Remains Rare: An analysis of 15 years of NCP cases and their contribution to improve access to remedy for victims of corporate misconduct* (2015) 17 <https://www.oecdwatch.org/publications-en/Publication_4201>.

If mediation fails, a determination on whether there has been a breach of the Guidelines should be included in the final statement

30. The Law Council considers that the most important change to procedures for the conclusion stage is, where enterprises refuse to enter into mediation or mediation fails, the AusNCP should make a finding in its final statement as to whether it appears the conduct complained of has or has not breached the Guidelines.
31. It must be reiterated that participation in the specific instance process is entirely voluntary. In some cases, it may be appropriate for enterprises to defer or suspend involvement in the specific instance process, where it is undergoing relevant reforms to address matters the subject of complaint,⁴⁶ or where it is necessary to avoid 'serious prejudice' to a party to parallel proceedings.⁴⁷
32. However, exceptional circumstances aside, the Law Council considers it in the best interests of promotion of the Guidelines that enterprises are incentivised to participate in voluntary mediation. As it currently stands, the AusNCP Procedures create no incentive for enterprises to engage in mediation, and the AusNCP has does not have the power to compel them to so. The value of issuing a statement as to whether or not a company has breached the Guidelines, or a 'compliance determination' is supported by the evidence, as noted in the 2015 OECD Watch report *Remedy Remains Rare*:

*Corporations that were party to NCP complaints have also indicated that they decided to participate in the mediation process in part to avoid a compliance determination. Further, 27 of the 35 cases (77%) that OECD Watch identified as having resulted in a remedy-related outcome were produced by NCPs that have demonstrated that they will make determinations of non-compliance with the Guidelines if mediation fails.*⁴⁸

33. The Law Council considers it to be consistent with the AusNCP's role as a non-judicial mechanism to issue a statement on whether or not the conduct complained of appears to be in breach of the Guidelines. Unlike a judicial mechanism, the AusNCP has no power to enforce penalties or sanctions on enterprises if it finds they have breached the Guidelines. Rather, the determination would function as an advisory opinion, which is entirely appropriate for the expert body tasked with interpreting the Guidelines in Australia to issue.
34. All that would be required to make this change is to change the word 'may' to 'will' in paragraphs 52 and 53 of the current AusNCP Procedure, so that it reads as follows:

52. The AusNCP will then review all the information it has gathered, and will make a statement as to whether the Guidelines have been breached.

⁴⁶ For example, in the BHP Billiton and Cerrejón Coal specific instance, the complaint was suspended pending the outcome of an independent social review Cerrejón Coal had commissioned to provide an independent assessment of its social engagement: see AusNCP, *Statement by the Australian National Contact Point: BHP-Billiton – Cerrejón Coal specific instance* (12 June 2009) [11]-[12] <https://cdn.tspace.gov.au/uploads/sites/112/2018/02/Final_Statement_BHP_Billiton_Cerrejon_Coal.pdf>.

⁴⁷ See AusNCP, *Parallel Proceedings* (2018) [3] <<https://ausncp.gov.au/specific-instances/parallel-proceedings/>>.

⁴⁸ OECD Watch, *Remedy Remains Rare* (2015) 44 <https://www.oecdwatch.org/publications-en/Publication_4201>.

53. The AusNCP's Final Statement will include the following...⁴⁹

Final submissions should be made available to all parties

35. The Law Council agrees that parties to a complaint should have the opportunity to provide any final submissions after the good offices stage and provide comments on the draft final statement prior to publication. Consistent with the transparency for which NCPs must strive for in carrying out its specific instance procedures, any final submissions should be shared with all parties.
36. Otherwise, there is a real risk that basing final determinations on confidential information not shared with the other party or parties to the dispute can impact the perceived impartiality of the NCP.⁵⁰ For example, in a case concerning the Xayaburi hydroelectric dam on the Mekong River, the Finnish NCP based its final statement largely on confidential information received from the company, which had been withheld from the complainants.⁵¹ The decision generated wide criticism and damaged the credibility of the Finnish NCP.⁵²

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

37. The Law Council considers that follow-up processes will improve the transparency of the AusNCP. For example, despite the 'success' of the *Brotherhood of St Laurence & Others and GSL* complaint, which concluded over 10 years ago, it is unclear whether GSL ever implemented the changes to its company policies that it proposed to undertake.⁵³
38. In the Law Council's view, the purpose of follow-up processes should be to determine whether the AusNCP's recommendations have been meaningfully implemented and, where relevant, have resulted in change in the conduct the subject of the specific instance complaint. Without being prescriptive, at a minimum, the AusNCP should require the relevant enterprise to prepare a progress report, which should be filed with the AusNCP, notified to all parties, and posted on the specific instance tracking tool online. Meaningful follow-up may require going beyond a company report, for example, where resources permit, interviews with affected communities and individuals, or site visits, to determine if recommendations have been implemented and there has been any change in terms of the conduct the subject of the specific instance complaint.⁵⁴
39. The AusNCP should also contemplate how to address situations in which an enterprise does not provide a progress report, to encourage compliance and

⁴⁹ AusNCP, *AusNCP Procedures for dealing with Specific Instances brought forward under the OECD Guidelines for Multinational Enterprises* (2018) [52]-[53] <<https://ausncp.gov.au/specific-instances/complaints-procedures/>>.

⁵⁰ OECD Watch, *Remedy Remains Rare* (2015) 36 <https://www.oecdwatch.org/publications-en/Publication_4201>.

⁵¹ *Ibid* 35-36.

⁵² *Ibid*.

⁵³ Kristen Zornada, *The Australian National Contact Point: How it can be reformed* (2017) 51-52 [7.43] <<http://apo.org.au/system/files/100061/apo-nid100061-405446.pdf>>.

⁵⁴ For example, in a case handled by the Norwegian NCP, the NCP hosted a meeting with the parties a year after the agreement was signed, but that meeting alone was not enough to uncover the true outcomes of the NCP process for directly affected communities and employees. Only when complainants undertook their own site visit to the company's plants in Chile did they find that there had been little or no change in circumstance for local people: see OECD Watch, *Remedy Remains Rare* (2015) 47 <https://www.oecdwatch.org/publications-en/Publication_4201>.

incentivise enterprises that have sought to do the right thing. The Law Council suggests that, for example, if an enterprise does not file a progress report within 6 months of the 12-month follow-up period, then this should be disclosed on the AusNCP website.

40. The Law Council considers that, generally, 12 months is an appropriate timeframe for follow-up.⁵⁵ However, with the agreement of the parties, the AusNCP may also want to consider other follow-up timeframes, depending on the extent of the action agreed to be undertaken by the company in concluding the specific instance complaint. Some of these efforts may take longer than 12 months for progress to be demonstrated.
41. In addition, the Law Council considers that there should be follow-up of complaints received by the AusNCP concerning Australian multinational enterprises operating abroad which are transferred to another NCP to act as lead NCP. In the past, the AusNCP has transferred complaints regarding the activities of Australian multinational enterprises operating in another country to the NCP in that country with very little follow-up on the outcome.⁵⁶ Ideally, as contemplated by the Procedural Guidance for NCPs,⁵⁷ and the Mediation Manual,⁵⁸ the AusNCP should adopt a collaborative approach and work together with other relevant NCPs on a complaint, noting the cross-jurisdictional nature of multinational business.
42. Finally, noting that the capacity for follow-up previously existed in the AusNCP's procedural guidance documents, and that it was not utilised,⁵⁹ the Law Council reiterates its previous recommendation that functional reform must be supported by appropriate resourcing to the AusNCP to ensure that there is capacity to conduct follow-up.

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

43. The Law Council considers it essential that the AusNCP have a review mechanism to promote accountability. An Oversight Committee, similar to the UK NCP's Steering Board,⁶⁰ could perform this function, but should be expanded to include representatives from business, civil society and unions, as well as experts in areas that are relevant to the Guidelines, for example human rights, employment standards or environmental standards. To ensure that decisions of the Oversight Committee are impartial and credible, the AusNCP neither chair, nor participate as a member of the Oversight Committee. Further, to promote transparency, a report on the results of any review conducted by the Oversight Committee should be made public.

⁵⁵ On the benefit of short timeframes for enterprises that engage with the AusNCP, see Alex Newton, *Independent Review: Australian National Contact Point under the OECD Guidelines for Multinational Enterprises* (2017) 32 <<https://cdn.tspace.gov.au/uploads/sites/112/2018/02/Final-Report.pdf>>.

⁵⁶ Law Council of Australia, *Submission to ANCP 2017 Review* (25 July 2017) [51]

<<https://www.lawcouncil.asn.au/resources/submissions/australian-national-contact-point-2017-review->

⁵⁷ OECD, *Guidelines for Multinational Enterprises 2011 Edition* (2011) Procedural Guidance, C [2(b)].

⁵⁸ Consensus Building Institute, *NCP Mediation Manual* (July 2012) 31-32

<<http://accessfacility.org/sites/default/files/CBI%20-%20NCP%20Mediation%20Manual.pdf>>.

⁵⁹ Kristen Zornada, *The Australian National Contact Point: How it can be reformed* (2017) 51-52 [7.43]

<<http://apo.org.au/system/files/100061/apo-nid100061-405446.pdf>>.

⁶⁰ For a summary of the aspects of the review function of the UK Steering Board that may be appropriate to adopt for the AusNCP's Oversight Committee, see OECD Watch, *Remedy Remains Rare* (2015) 34

<https://www.oecdwatch.org/publications-en/Publication_4201>.

Do stakeholders have any comments on the proposed timeframes?

44. Broadly, the Law Council considers that the proposed timeframe for handling a complaint, being 55 weeks, is appropriate, noting that the Commentary to the Procedural Guidance for NCPs indicates that NCPs should endeavour to conclude specific instance procedures within one year. Although the proposed timeframe exceeds the one-year timeframe by a few weeks, the Law Council considers that it is appropriate for the AusNCP to set a realistic timeframe from the outset to afford certainty to the parties, rather than aim for an ambitious timeframe which the AusNCP is unable to meet. The Law Council also notes the AusNCP's statements that improvements to the procedures as a whole should in time result in cases being concluded in more timely manner.⁶¹
45. The Law Council considers that the proposed timeframe for initial assessment, being 10 weeks, is appropriate, noting that the Commentary to the Procedural Guidance indicates that NCPs should seek to conclude the initial assessment stage within 3 months (being 12 weeks).⁶² The Law Council notes that the proposed timeframe for a final statement, being 15 weeks, is outside the timeframe indicated in the Procedural Guidance for NCPs of three months (being 12 weeks). However, the Law Council considers that, should the additional time be required to produce a high-quality final statement, then it is appropriate.
46. While reform to the indicative timeframes is welcomed, the Law Council notes that the AusNCP has previously had indicative timeframes, to which it did not adhere.⁶³ Therefore, the Law Council reiterates a recommendation it made in its submission to the Review, being that reform of timeframes must be supported by adequate resourcing to enable the staff of the AusNCP to meet these timeframes.⁶⁴ Published timeframes are unhelpful if the AusNCP is practically unable to adhere to them.

Have stakeholders found this specific instance tracking tool valuable?

47. The Law Council considers that the specific instance tracking tool valuable in promoting transparency, pursuant to the core criteria according to which NCPs should operate under the Guidelines. However, in practice, the information provided on the tracking tool is vague so that the matter to which a specific instance pertains cannot be identified, making it of little value to anyone but the parties.
48. By way of comparison, the OECD Watch case database includes an entry for a specific instance titled *EC and IDI vs. Australia and New Zealand Banking Group*, notes that it was filed with the AusNCP in October 2014, identifies that it concerns ANZ's role in displacing and dispossessing Cambodian families, includes a summary of the facts alleged and the paragraphs of the Guidelines alleged to have been

⁶¹ AusNCP, *Improving instance procedures consultation* (2018) 13 <<https://cdn.tspace.gov.au/uploads/sites/112/2018/05/AusNCP-prod-consult-may2018.pdf>>.

⁶² See OECD, *Guidelines for Multinational Enterprises 2011 Edition* (2011) Commentary on the Procedural Guidance for NCPs, [40]-[41].

⁶³ Alex Newton, *Independent Review: Australian National Contact Point under the OECD Guidelines for Multinational Enterprises* (2017) 28 <<https://cdn.tspace.gov.au/uploads/sites/112/2018/02/Final-Report.pdf>>.

⁶⁴ Law Council of Australia, *Submission to ANCP 2017 Review* (25 July 2017) 42 <<https://www.lawcouncil.asn.au/resources/submissions/australian-national-contact-point-2017-review->>>.

breached.⁶⁵ Conversely, the AusNCP specific instance tracking tool describes this matter as ‘SI relating to the financial and insurance industry’, notes it was received October 2014, and that it is in the ‘conclusion’ stage.⁶⁶ No other substantive information is provided.

49. The Law Council considers that further detail about the complaint should be provided. At a minimum, the tracking tool should include the names of the parties and a brief description of the nature of the complaint, including the chapter/s of the Guidelines alleged to have been breached. The initial assessment, final statement and any follow-up reports should also be uploaded to the tracking tool. This would be consistent with promoting meaningful transparency and the principle that information should not be confidential unless there is a good case for to be made for it to be withheld.⁶⁷
50. Of course, as noted in the Mediation Manual,⁶⁸ there may be circumstances where there are good reasons to protect confidentiality and not publish this information. However, these are likely to be exceptional cases, as often the information about the specific instance is available elsewhere online, including the OECD Watch case database,⁶⁹ or the OECD Database of Specific Instances,⁷⁰ which would obviate the need for the AusNCP to protect confidentiality.

⁶⁵ OECD Watch, *EC and IDI vs. Australia and New Zealand Banking Group* (2014) <https://www.oecdwatch.org/cases/Case_343>.

⁶⁶ Case ID 11: AusNCP, *Track an open SI* (2018) <<https://ausncp.gov.au/specific-instances/track-an-open-si>>.

⁶⁷ AusNCP, *AusNCP Procedures for dealing with Specific Instances brought forward under the OECD Guidelines for Multinational Enterprises* (2018) [51] <<https://ausncp.gov.au/specific-instances/complaints-procedures/>>.

⁶⁸ Consensus Building Institute, *NCP Mediation Manual* (July 2012) 12 <<http://accessfacility.org/sites/default/files/CBI%20-%20NCP%20Mediation%20Manual.pdf>>.

⁶⁹ OECD Watch, *Case Database* (2018) <<https://www.oecdwatch.org/cases>>.

⁷⁰ OECD, *Database of specific instances* (2018) <<http://mneguidelines.oecd.org/database>>.