

5 July 2021



Mr Nicolas Hachez
Manager
National Contact Points Coordination and AusNCP Peer Review 2021
OECD Centre for Responsible Business Conduct
2, rue André Pascal
75016 PARIS FRANCE

By email: Secretariat@ausncp.gov.au

Dear Mr Hachez

Australian National Contact Point Peer Review 2021

Thank you for the opportunity to provide a submission to the 2021 Peer Review Stakeholder Survey issued by the Australian National Contact Point (**AusNCP**) for the Organisation for Economic Co-operation and Development (**OECD**) Guidelines for Multinational Enterprises (**the Guidelines**).¹

The Law Council of Australia (**Law Council**) is grateful for the assistance of its Business and Human Rights Committee, and the Law Society of New South Wales, in the preparation of this submission.

As you know, the Guidelines are recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They represent a global framework for responsible business conduct covering all areas of business responsibility including disclosure, human rights, employment and industrial relations, environment, anti-corruption, competition and taxation.

As a member of the OECD, Australia is committed to implementing the Guidelines, recognising that companies operating in Australia and Australian companies operating overseas are expected to act in accordance with the principles set out in the Guidelines and to perform to the standards they endorse. Australia has established a national contact point to receive complaints in this context.

The Law Council recognises that having an effective AusNCP is critical as it represents the only non-judicial, low-cost mechanism that allows individuals and communities to seek redress for harm caused by Australian companies operating abroad.

A key function of the AusNCP is to enhance the effectiveness of the Guidelines by undertaking promotional activities. While the Law Council welcomes recent efforts by the AusNCP to undertake outreach activities,² it highlights for consideration the limited

¹ OECD, *Guidelines for Multinational Enterprises 2011 Edition* (2011).

² See eg, Australian National Contact Point, *National Contact Point Reporting Questionnaire 2020 Annex 1* (Annual report, March 2021) <https://ausncp.gov.au/sites/default/files/inline-files/annual_outlook_march2021.pdf>.

understanding of the Guidelines and the role of the AusNCP amongst key stakeholders. This includes the legal profession and government (other than officials directly involved in the AusNCP's work). Opportunities to enhance the visibility of the Guidelines, and their implementation by the AusNCP, are explored further below.

At the same time, the Law Council recognises growing interest in the role of the AusNCP to deal with emerging challenges leading to disputes, such as climate change. For example, one recent complaint of note was filed by bushfire survivors alleging that the Australian and New Zealand Banking Group Ltd had not adhered to the Guidelines regarding due diligence, disclosure, environment, and consumer interests.³ Looking ahead, this issue may be likely to increase the number and visibility of complaints, as well as the AusNCP's ability to contribute to the resolution of issues.

The Law Council confines its comments to select survey questions on which it considers it can most usefully respond.

3. In particular, what are your views on the communication tools or avenues being used by the NCP (website, brochures, leaflets, participation in public events, etc.)?

The Law Council has previously recommended that the AusNCP develop a specific promotional strategy to promote the Guidelines and its role with relevant stakeholders. It recommended that as part of such a strategy, the AusNCP adopt measures including the following:

- speak at and attend events organised by business, civil society and other stakeholder organisations, including the National Dialogue on Business and Human Rights, and UN Global Compact Forum, as well as organising its own events for these audiences;
- maintain an active website which it regularly updates; and
- distribute promotional materials to business and other stakeholders abroad through the networks of its foreign embassies.⁴

The Law Council notes that following the 2017 AusNCP Independent Review (**Independent Review**), Treasury announced a commitment to improving outreach and promotion.⁵ With reference to the most recent Reporting Questionnaire,⁶ the Law Council welcomes the activities since undertaken by the AusNCP to promote the Guidelines. This includes a range of presentations and training on the Guidelines and the role of the AusNCP.

At the same time, the AusNCP's promotional plan and information on upcoming events promoting the Guidelines are not available on the AusNCP's website and the Law Council would welcome improvements in this regard. In the Law Council's view, there remains

³ *Friends of the Earth Australia & Ors v Australia and New Zealand Banking Group* (Complaint to the Australian National Contact Point, 30 January 2020). This complaint alleges breach of provisions of the OECD Guidelines with respect to Ch II (General policies); Chapter III (Disclosure); Chapter VI (Environment); and Chapter VIII (Consumer Interests).

⁴ Law Council, *Australian National Contact Point 2017 Review*, Submission to Independent Reviewer (25 July 2017) 7.

⁵ The Treasury, 'Treasury Response to the 2017 AusNCP Independent Review' (November 2018).

⁶ See eg, Australian National Contact Point, *National Contact Point Reporting Questionnaire 2020 Annex 1* (Annual report, March 2021) <https://ausncp.gov.au/sites/default/files/inline-files/annual_outlook_march2021.pdf>.

scope to improve promotion of the AusNCP through its communication channels.⁷ As noted below, it recognises that additional budget resources may be needed for this purpose, and has called for these to be provided.⁸

In addition, the AusNCP website does not provide links to organisations within Australia that can assist potential complainants with drafting or submitting a complaint. Certain overseas individuals or entities, such as a non-government organisations (**NGO**) or trade unions, especially in non-English-speaking countries, may not feel able to access the procedure without the support of an Australian or global partner organisation or individual. To address this issue, the Law Council suggests that the website include links to peak organisations in Australia willing to assist in preparing complaints.

The Law Council understands that the Department of Treasury is currently preparing a factsheet on the role of the AusNCP and its procedures which avoids, to the extent possible, OECD specific language. The Law Council welcomes this development. To improve its accessibility, the Law Council suggests that this factsheet should be made available on the AusNCP website and translated in commonly-spoken languages in the Asia-Pacific region, as well as the official languages of the United Nations. It would be happy to assist in promoting this factsheet.

15. On measure, how would you assess the NCP against the four core criteria of visibility, accessibility, transparency and accountability?

Following the 2017 independent review, there have been significant improvements made to the AusNCP's structure and operation. In particular, the appointment of an Independent Examiner and a Governance Advisory Board with representatives from Government and NGOs will assist in the AusNCP's objectives to operate in a manner that is impartial, predictable, equitable and compatible with the principles and standards of the Guidelines.

Further, since the 2017 review, the Law Council recognises that the AusNCP has been more active in its stakeholder engagement and outreach including webinars. However, as discussed above, there remain opportunities to further enhance its visibility and accessibility to stakeholders.

The Law Council notes that the AusNCP's publications webpage only includes material dating from 2017. Given that the AusNCP has been operating in Australia since 2000, it is unclear why previous government documents are not available as these are relevant to the history and development of the AusNCP. To enhance transparency and accountability, the Law Council supports the publication of earlier governance documents on its website, such as board minutes and annual reports to the OECD, to enhance transparency and accountability.

⁷ Ibid 5.

⁸ Law Council, *2021-22 Pre-Budget Submission*, Submission to the Department of Treasury (8 February 2021) 36.

16. On measure, how would you assess the NCP's handling of complaints against the guiding principles of impartiality, predictability, equitability and compatibility with the Guidelines?

In relation to predictability, the Law Council notes the 2017 independent review considered stakeholder concerns that the publication of decisions by the AusNCP, and the format of decisions, was unpredictable and inconsistent.⁹ Stakeholders also observed that decisions were generally focused on procedural aspects of a complaint, rather than substantive reasons for the AusNCP's decision.¹⁰

To address these concerns, the review strongly encouraged the AusNCP:

to provide more substantive explanation and details of the factors weighed in favour (and against) its decisions at different stages in the specific instance process. Further, publishing decisions in a consistent format and as promptly as possible, would greatly improve the function's predictability.¹¹

Following this review, the AusNCP revised its procedural guidance.¹² Amongst other things, the new procedures include indicative timeframes for each stage of the case handling process. The Law Council welcomes these efforts to improve the handling of complaints. In the Law Council's view, this has contributed to the increase in number of complaints coming before the AusNCP.¹³ By improving predictability and consistency of decisions, the AusNCP may also promote observance of the Guidelines by multinational enterprises.

20. Do you have any further comment?

The Law Council reiterates the call in its 2021-22 Pre-Budget Submission for the Australian Government to ensure that ongoing and, if necessary, expanded, funding is made available to the AusNCP.¹⁴ This funding should be sufficient to ensure the AusNCP Secretariat have requisite skills and expertise in thematic areas of the Guidelines that attract the largest number of specific instance complaints, including employment and industrial relations, human rights, and the environment.¹⁵

⁹ Alex Newton, *Independent Review: Australian National Contact Point under the OECD Guidelines for Multinational Enterprises* (2017) 33. 28.

¹⁰ *Ibid.*

¹¹ *Ibid.* 29.

¹² Australian National Contact Point, *Complaints Procedures* (September 2019).

¹³ The AusNCP is currently managing four active complaints. It has managed 22 complaints since it was established in 2001. See <https://ausncp.gov.au/complaints>.

¹⁴ Law Council, *2021-22 Pre-Budget Submission*, Submission to the Department of Treasury (8 February 2021) 36.

¹⁵ Alex Newton, *Independent Review: Australian National Contact Point under the OECD Guidelines for Multinational Enterprises* (2017) 33.

If you would like to discuss this matter further, please do not hesitate to contact me directly on [REDACTED] Alternatively, please contact Ms Sarah Swan, Policy Lawyer, on (02) 6246 3703 or at sarah.swan@lawcouncil.asn.au, if you require further information or clarification.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Jacoba Brasch QC'.

Dr Jacoba Brasch QC
President