



Law Council
OF AUSTRALIA

Australian National Contact Point 2017 Review

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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 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, 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 for the assistance of its Business and Human Rights Committee in the preparation of this submission.

Executive Summary

1. The Law Council welcomes the opportunity to make a submission to the 2017 review of the Australian National Contact Point (**ANCP**). The Law Council was pleased to be invited to attend the consultation session on 12 July 2017 at ASIC in Sydney (**consultation session**) to discuss civil society perspectives on the ANCP.
2. This submission specifically responds to the relevant online consultation questions proposed by the reviewer, while taking into account the review's terms of reference.¹ Due to the short timeframe for the preparation of this submission, the Law Council has been unable to seek comment and input from its Constituent Bodies, Sections and Committees, other than its Business and Human Rights Committee.
3. As a member of the Organisation for Economic Cooperation and Development (**OECD**), Australia is committed to implementing the OECD Guidelines for Multinational Enterprises (**Guidelines**), which includes establishing a national contact point (**NCP**) to receive complaints ('specific instances') against Australian companies and Australian companies operating abroad.² While Australia has a strong legal framework that governs the activities of companies operating domestically, it does not have a legal framework that specifically regulates the human rights obligations of Australian corporations abroad. In theory, individuals and communities adversely impacted by the activities of Australian corporations abroad should be able to approach their domestic authorities with their complaints. However, in countries where the rule of law is weak, it may be impossible to seek justice, due to government corruption, state-backed violence against marginalised communities, a lack of appropriate legal avenues, and long wait times to access courts and tribunals.
4. Therefore, the Law Council considers that having an effective ANCP 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, particularly those operating in non-OECD countries without their own NCP. More broadly, the Law Council considers that reforming the ANCP is an essential part of Australia aligning its strategy on business on human rights with international efforts.
5. Internationally, there has been a shift away from simply ensuring companies comply with national law towards companies meeting international legal standards and expectations of responsible business conduct, like the Guidelines, and United Nations Guiding Principles on business and human rights (**UNGPs**). The UNGPs are global standards for responsible business, that enshrine the three 'pillars' of the state duty to protect human rights, the company responsibility to respect human rights, and greater access to remedy for victims of human rights abuses. The Australian Government has committed to a consultation process regarding a national action plan to implement the UNGPs in Australia for many years, which the Law Council has supported.³ The importance of the need to implement the UNGPs in Australia as part of a robust

¹ Australian National Contact Point, 'Review of the Australian National Contact Point (ANCP) Terms of Reference' (2017) *Australian Government*
<http://www.ausncp.gov.au/content/Content.aspx?doc=review/2017_tor.htm>.

² Organization for Economic Cooperation and Development (OECD), *Guidelines for Multinational Enterprises 2011 Edition* (2011) I [11].

³ Australian Human Rights Commission, *Joint Civil Society Statement on Implementing the UNGPs in Australia* (August 2016)

<<https://www.humanrights.gov.au/sites/default/files/Implementing%20UNGPs%20in%20Australia%20-%20Joint%20Civil%20Society%20Statement.pdf>>.

corporate accountability strategy have also arisen in the context of the current inquiry into establishing a Modern Slavery Act in Australia.⁴

6. The Law Council considers that efforts to implement the UNGPs in Australia would benefit from a strengthened ANCP and vice versa. This is because the UNGPs and Guidelines are complementary as the UNGPs were imported into the Guidelines in 2011 through the addition of a new Chapter IV on human rights.⁵ The UNGPs do not create their own compliance mechanism, but stress the need for 'state-based non-judicial grievance mechanisms' as part of the state duty to protect human rights. Therefore, the NCPs have the potential to add value to UNGPs, as they can provide a compliance mechanism for adherence to the standards set out in UNGPs, at least insofar as they are integrated into Chapter IV of the Guidelines.
7. The Law Council welcomes this review of the ANCP, having previously supported calls from civil society for its reform. Several NCPs which are now considered to highly effective by their peers – such as the Norwegian NCP, Danish NCP and UK NCP – similarly underwent review and significant restructures to enable them to operate as effectively as they do now. The Law Council considers action should be taken to reform the ANCP ahead of its peer review scheduled for 2019. This would ensure that the peer review process can assess the effectiveness of an improved and strengthened ANCP and provide constructive recommendations, rather than reflecting and repeating existing views as to its ineffectiveness.
8. Given its role as a peak professional organisation, the Law Council has never been directly involved in the ANCP process as a complainant or business, but has engaged with the Guidelines especially through its Business and Human Rights Committee.⁶ The Law Council has provided submissions to government inquiries on issues relevant to the Guidelines, most recently in its submission to the parliamentary inquiry on Establishing a Modern Slavery Act in Australia. The Law Council's submission to that inquiry recommended strengthening the ANCP as part of any overarching government strategy to address modern slavery in Australia.⁷
9. The Law Council considers that this review presents an important opportunity for Australian Government to implement meaningful changes to the ANCP that increase its effectiveness and strengthens Australia's commitment to corporate accountability. To that end, Law Council recommends that:
 - The ANCP be reformed to account for the best-practice features of better performing NCPs, including incorporating:
 - sufficient financial and human resources;
 - independence from government but with government oversight;
 - formal involvement of stakeholders, including business, civil society and unions;
 - employment of professional mediators;
 - a promotional strategy that includes outreach domestically and abroad;

⁴ Evidence to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, Sydney, 23 June 2017, 12-13 (Professor Paul Redmond AM), 34 (Nicolette Boele, Responsible Investment Association Australia), 35 (Dr Stuart Palmer, Australian Ethical Investment), 48, 51 (Alice Cope, UN Global Compact Network Australia), 49, 51 (Dr Leeora Black, Australian Centre for Ethical Investment), 50 (Andrew Ian Robert, Sustainable Business Australia).

⁵ Organization for Economic Cooperation and Development (OECD), *Guidelines for Multinational Enterprises 2011 Edition* (2011) 31 [36].

⁶ This responds to one of the online consultation questions regarding the extent to which the organisation making the submission has been involved with the ANCP process and/or engaged with the OECD Guidelines.

⁷ See Law Council of Australia, Submission No 60 to Parliamentary Joint Committee on Foreign Affairs, Defence and Trade, *Establishing a Modern Slavery Act in Australia* (28 April 2017) 34.

- clear and transparent process for handling complaints; and
 - investigatory efforts at the specific instance stage.
- Any reform to the ANCP should ensure that it can operate in a way that is legitimate, accessible, predictable, equitable, transparent, rights-compatible and a source of continuous learning, in accordance with UNGP 31.
 - The ANCP be re-housed in the Australian Human Rights Commission, or alternately, the Commonwealth Ombudsman.
 - The Oversight Committee should be retained, but expanded to include non-governmental representatives, drawn from business, civil society and unions.
 - The ANCP should develop a specific promotional strategy to promote the Guidelines and its role with relevant stakeholders. As part of that strategy, the ANCP should:
 - maintain an active website which the ANCP regularly updates;
 - 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;
 - produce publications such as a brochure detailing the procedure for filing complaints, disseminated to stakeholders, and an annual report published on the ANCP website; and
 - distribute promotional materials to business and other stakeholders abroad through the networks of its foreign embassies.
 - To support complainants and multinational enterprises with the specific instance process, the ANCP should:
 - adhere to the three month timeframe for making initial determinations;
 - review and clarify the ANCP Process for handling specific instance complaints;
 - be more transparent in communications between the parties;
 - make initial determinations in a manner consistent with the Guidelines;
 - publish initial determinations on its website;
 - improve efforts to engage with complainants and prospective complainants abroad.

In your view, what makes a NCP successful?

10. The Law Council considers that a successful NCP is one that fulfils its mandate under the Guidelines, and that improves access to remedy for persons adversely-affected by the activities of business. The specific attributes of NCPs and non-judicial grievance mechanisms most likely to achieve these objectives are discussed below.

Fulfilling its mandate under the Guidelines

11. According to the OECD, a NCP's role is to 'further the effectiveness of the Guidelines' and operates 'in accordance with the core criteria of visibility, accessibility, transparency and accountability'.⁸ The Guidelines are not prescriptive as to how a NCP should be constituted to fulfil these objectives. In 2007, following a survey of NCPs, OECD Watch identified areas of agreement between NCPs regarding best practice on structure, oversight, promotion and outreach, and procedures for handling specific instances.⁹
12. In addition to their day-to-day activities in investigating and mediating complaints, as part of the broader OECD framework, NCPs report yearly to the OECD Investment Committee on their activities, partake in a yearly meeting at the OECD, and an optional peer review process. From these processes emerges a picture of which NCPs are better performing than others. The Law Council notes that the following features are generally common across better performing NCPs:
 - Sufficient financial and human resources to handle the case load and promotional activities of the NCP, including a dedicated staff,¹⁰ and budget;¹¹
 - Independence from government but with government oversight;¹²
 - Involvement of stakeholders, through membership drawn from business, civil society and unions;¹³

⁸ Organization for Economic Cooperation and Development (OECD), *Guidelines for Multinational Enterprises 2011 Edition* (2011) 71 (Procedural Guidance) I, 79 (commentary to these core criteria).

⁹ See OECD Watch, *Model National Contact Point* (2007) <https://www.oecdwatch.org/publications-en/Publication_2223>. While providing a useful overview, it should be noted that this study was conducted before the human rights chapter was inserted into the Guidelines in 2011.

¹⁰ The Danish NCP and Norwegian NCP both three full-time staff to support their workload: see, OECD, *Denmark NCP Voluntary Peer Review Report* (2011) 7 <<https://mneguidelines.oecd.org/Denmark-NCP-Peer-Review-2015.pdf>> and OECD,

¹¹ The Danish NCP has a yearly budget of 3 million Danish Krone (approximately AUD\$595 000 at the date of this submission): OECD, *Denmark NCP Voluntary Peer Review Report* (2011) 7 <<https://mneguidelines.oecd.org/Denmark-NCP-Peer-Review-2015.pdf>>. The Dutch NCP has a budget of €900 000 (approximately AUD\$1.3 million, based on exchange rates at the date of this submission), which has permitted it to undertake field visits where necessary to investigate complaints: OECD, *Dutch National Contact Point: Aspirations and Expectations Met? Report of the NCP Peer Review Team* (2010) 13 <<https://www.oecdguidelines.nl/ncp/documents/report/2014/12/16/final-report-peer-review-nl-ncp>>.

¹² Norwegian NCP is an independent body of experts, with a Secretariat in the Ministry of Foreign Affairs: OECD, *Norway National Contact Point Peer Review Process: Final report of the Peer review delegation* (2014) 6 <<http://www.responsiblebusiness.no/files/2014/02/Peer-review-report-NCP-Norway.pdf>>. The Danish NCP, known as the Mediation and Complaints Handling Institution for Responsible Business Conduct, was created in its current form under a Danish act of Parliament in 2012. The legislation establishing the Danish NCP created it as an independent body, housed within the Danish Business Authority: OECD, *Denmark NCP Voluntary Peer Review Report* (2011) 7 <<https://mneguidelines.oecd.org/Denmark-NCP-Peer-Review-2015.pdf>>.

¹³ The Danish NCP is comprised of five members: a chairperson, an expert member, and three members appointed from recommendations of the Confederation of Danish Industry, Confederation of Trade Unions, and the Danish 92 Group (a network of NGOs): OECD, *Denmark NCP Voluntary Peer Review Report* (2011) 7 <<https://mneguidelines.oecd.org/Denmark-NCP-Peer-Review-2015.pdf>>. The Dutch NCP consists of four independent members and four advisory members from the government departments most relevant to business and human rights: OECD, *Dutch National Contact Point: Aspirations and Expectations Met? Report*

- Employment of professional mediators should complaints proceed to mediation;¹⁴
- A promotional strategy that includes outreach to stakeholders both domestically and abroad;¹⁵
- Clear and transparent process for handling complaints;¹⁶
- Investigatory efforts at the specific instance stage that includes involvement of the complainant and the multinational enterprise, and any necessary fact-finding by the NCP;¹⁷
- Issuance of a determination as to whether there has been a breach of the Guidelines if a multinational enterprise refuses to participate in the mediation process.¹⁸

13. The Law Council recommends that any restructure or reform of the ANCP should include these best-practice features.¹⁹

Improving access to remedy as part of the international ‘protect, respect and remedy’ framework on business and human rights

14. Beyond best practice for NCPs, and adopting a broader view, it should be recognised that NCPs and the OECD Guidelines exist within an international framework for business and human rights, as noted in the background section above. That framework forms the basis of the UNGPs, which set out a requirement for states to create effective and appropriate non-judicial grievance mechanisms, and then provides guidance on what constitutes an ‘effective’ state-based non-judicial grievance mechanism. As a NCP is a state-based non-judicial grievance mechanism, it is instructive to refer to the UNGPs

of the NCP Peer Review Team (2010) 8

<<https://www.oecdguidelines.nl/ncp/documents/report/2014/12/16/final-report-peer-review-nl-ncp>>

¹⁴ 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>>. The UK NCP also has a Steering Board, which includes four external-to-government members drawn from civil society, business and academia, to provide independent oversight and expertise on matters raised in complaints: see UK Government, *UK National Contact Point for the Organisation for Economic Co-operation and Development Guidelines* (2017) <<https://www.gov.uk/government/groups/uk-national-contact-point-for-the-organisation-for-economic-co-operation-and-development-guidelines>>.

¹⁵ The Danish NCP has an active website which is regularly updated, it regularly participates in speaking engagements hosted by business, government and stakeholder organisations, has significant publications, and has sought to raise its visibility abroad, in international contexts in which Danish businesses operate, by distributing materials through foreign embassies: OECD, *Denmark NCP Voluntary Peer Review Report* (2011) 17 <<https://mneguidelines.oecd.org/Denmark-NCP-Peer-Review-2015.pdf>>.

¹⁶ The Danish NCP and Norwegian NCP were commended in their peer reviews for their clear procedural guidance: see, respectively, OECD, *Denmark NCP Voluntary Peer Review Report* (2011) 11 <<https://mneguidelines.oecd.org/Denmark-NCP-Peer-Review-2015.pdf>> and OECD, *Norway National Contact Point Peer Review Process: Final report of the Peer review delegation* (2014) 6 <<http://www.responsiblebusiness.no/files/2014/02/Peer-review-report-NCP-Norway.pdf>>.

¹⁷ The Norwegian NCP, for example, engages third-parties for neutral fact finding missions regarding the complaints it receives: OECD, *Norway National Contact Point Peer Review Process: Final report of the Peer review delegation* (2014) 26-27 <<http://www.responsiblebusiness.no/files/2014/02/Peer-review-report-NCP-Norway.pdf>>

¹⁸ See Commentary to the Procedural Guidance, Organization for Economic Cooperation and Development (OECD), *Guidelines for Multinational Enterprises 2011 Edition* (2011) 85 [35].

¹⁹ As part of the requirement to operate with ‘accountability’, the Commentary to the Procedural Guidance for NCPs explains that this includes encouraging best practice between NCPs: *ibid* 79.

to determine what features make it 'effective' to 'protect, respect and remedy' business-related human rights abuses:

Legitimate: enabling trust from stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;

Accessible: being known to all stakeholder groups for whose use they are intended and providing adequate assistance for those who may face particular barriers to access;

Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;

Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;

Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;

Rights-compatible: ensuring that outcomes and remedies accord with internationally recognised human rights; and

Source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms.²⁰

15. The Law Council considers that a successful NCP should therefore satisfy the criteria for an effective State-based non-judicial mechanism as set out in Guideline 31 of the UNGPs above. Further, it should also be noted that the activities of a NCP, as a non-judicial grievance mechanism, are relevant to the third pillar of the 'protect, respect and remedy' framework – namely, remedy. Therefore, a successful NCP is a NCP that improves access to remedy for victims of business-related human rights abuses. However, as OECD Watch identified in its report, *Remedy Remains Rare: An analysis of 15 years of NCP cases and their contribution to improve access to remedy for victims of corporate misconduct*, generally NCPs worldwide appear to be failing in achieving this broader objective of achieving remedy for victims.²¹
16. Nonetheless, some NCPs have been more successful than others in achieving remedy. OECD Watch have noted some outcomes that have provided some remedy for the complainants. A 2012 specific instance complaint made to the Dutch NCP alleging labour rights abuses in the operations of a Dutch agricultural company led to concrete improvements to working conditions in the company's operations in Argentina.²² A 2013 specific instance complaint made to the UK NCP about a UK company's oil exploration activities inside a UNESCO World Heritage Site led to the company committing not to undertake any further oil exploration within the site unless UNESCO and the relevant

²⁰ John Ruggie, UN Secretary-General's Special Representative for Business and Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, HR/PUB/11/04, 33-34 (Guiding Principle 31).

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

²² See OECD Watch, *CEDHA et al. vs Nidera* (24 June 2011) <https://www.oecdwatch.org/cases/Case_220>.

government agreed that their activities were not incompatible with the site's World Heritage status.²³ It is unlikely coincidental that remedy was facilitated by NCPs that are considered 'best practice', as noted in the section above on high performing NCPs.

Recommendations

- **The ANCP be reformed to account for the best-practice features of better performing NCPs, including incorporating:**
 - **Sufficient financial and human resources;**
 - **Independence from government but with government oversight;**
 - **Formal involvement of stakeholders, including business, civil society and unions;**
 - **Employment of professional mediators;**
 - **A promotional strategy that includes outreach domestically and abroad;**
 - **Clear and transparent process for handling complaints;**
 - **Investigatory efforts at the specific instance stage; and**
 - **Issuance of a determination as to whether there has been a breach of the Guidelines if a multinational enterprise refuses to participate in the mediation process.**
- **Any reform to the ANCP should ensure that it can operate in a way that is legitimate, accessible, predictable, equitable, transparent, rights-compatible and a source of continuous learning, in accordance with UNGP 31.**

Are there any aspects of the ANCP's current structure or location you consider problematic?

17. The Law Council considers that there are several aspects of the ANCP's current structure or location that inhibit its ability to achieve its mandate under the Guidelines, particularly when these are compared with the 'best practice' features of better performing NCPs worldwide.
18. The ANCP currently consists of a Senior Executive in the Foreign Investment Division in Treasury, with part-time responsibility for carrying out her role, in addition to her other duties as a Senior Executive within the Division. From time to time, this Senior Executive can draw upon other Treasury staff in the Foreign Investment Division to support the administration of the ANCP role, though this arrangement does not appear to be formalised and it is understood the ANCP has never been assigned a dedicated staff. The ANCP also has an Oversight Committee made up of representatives from other government departments and agencies. It is also understood that the ANCP has never been assigned a dedicated budget beyond the budget generally allocated to the Foreign Investment Division. This raises questions as to whether the ANCP has sufficient resources to handle its workload of specific instance complaints.
19. The ANCP's location in the Foreign Investment Division of Treasury is problematic for several reasons. First, the primary role of a NCP upon accepting a specific instance complaint is to provide good offices, bring the parties to the table, and facilitate mediation between them to resolve the dispute the centre of the complaint. This is not

²³ See OECD Watch, *WWF vs* <https://www.oecdwatch.org/cases/Case_307>.

a competency that has traditionally been associated with Treasury. While many NCPs in government departments around the world face similar challenges, better performing NCPs employ professional mediators to mediate complaints between the parties.²⁴ However, despite an admitted lack of in-house mediation skills, the ANCP does not employ professional mediators, seemingly even upon request of the parties, as reported at the consultation session. This is likely impacted by the lack of resources allocated to the ANCP, and the fact that many complaints do not reach the mediation stage, being rejected at the initial determination stage.

20. Second, it should be noted that the Foreign Investment Division in which the ANCP is housed is tasked with encouraging and facilitating foreign investment in Australia, including by multinational enterprises, while the ANCP investigates complaints against multinational enterprises.²⁵ The Law Council considers that the regulatory function of promoting responsible business conduct, as well as investigating and mediating grievances about breach of the Guidelines sits uncomfortably with the function of promoting inbound investment into Australia, and in particular, the crucial and demanding function of servicing the Foreign Investment Board. While these functions of the Foreign Investment Division may not be antithetical to the work of the ANCP, they are neither sympathetic nor cognate, and call for the exercise of distinct skills sets and regulatory outlook and expertise.
21. The ANCP's location may also present the appearance that it favours business, rather than making specific instance determinations in an impartial manner. Contributing to this perception may be that the ANCP has consistently refused to issue findings on whether or not a company has breached the Guidelines if the company refuses mediation. If a company refuses to mediate, the ANCP simply closes the complaint. At the consultation session, representatives of the ANCP explained that this is because 'our role is not to decide whether or not there has been a breach [of the Guidelines] because we're non-judicial'. While it is true that the ANCP's primary function is to facilitate mediation, the ANCP's own processes specifically state that it may issue findings as to whether a breach of the Guidelines has occurred if the company refuses mediation. As noted above, the UK NCP, upon whom the ANCP's processes are based, does exactly that. Therefore, the ANCP's failure to do so, coupled with its location in the Foreign Investment Division, may present the appearance that it is not impartial.
22. The ANCP has an Oversight Committee, which is based on the UK NCP's Steering Board. However, while the UK NCP's Steering Board has four external-to-government members, the ANCP's Oversight Committee is comprised exclusively of government representatives.²⁶ The lack of external-to-government membership of the Oversight Committee is problematic as it removes the element of independent and impartial oversight. Further, while the UK NCP's Steering Board is transparent in its operations, fundamental to promoting confidence in its role as an oversight body, minutes of the ANCP's Oversight Committee are not published.²⁷ Aside from assurances by Treasury

²⁴ For example, the Norway NCP: see OECD, *Norway National Contact Point Peer Review Process: Final report of the Peer review delegation* (2014) 6 <<http://www.responsiblebusiness.no/files/2014/02/Peer-review-report-NCP-Norway.pdf>>; and the UK NCP: see 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>.

²⁵ See Foreign Investment Review Board, 'About us' (2017) *Australian Government* <<http://firb.gov.au/about/>>.

²⁶ Australian National Contact Point, *Terms of Reference and Explanation of the Role of the ANCP Oversight Committee* (2017) <<http://www.ausncp.gov.au/content/Content.aspx?doc=ancp/oversight.htm>>.

²⁷ A copy of the minutes from the first meeting of the ANCP's Oversight Committee once appeared online, but have since been removed: see Kristen Zornada, 'The Australian National Contact Point: How it can be reformed' (2017) *Corporate Accountability Project* 22 (see note 36)

staff that the Oversight Committee meets regularly, there is no external indication that it does so and there is no transparency regarding its activities and deliberations.

In future, what administrative structure do you think will work best for the ANCP?²⁸

23. The Law Council notes that, in constituting their NCPs, OECD Member States:

[c]an use different forms of organisation [a]n NCP can consist of senior representatives from one or more Ministries, may be a senior government official or a government office headed by a senior official, be an interagency group, or one that contains independent experts. Representatives of the business community, worker organisations and other non-governmental organisations may also be included.²⁹

24. In addition, NCPs should 'be composed and organised... [to] enable the NCP to operate in an impartial manner while maintaining an adequate level of accountability to the adhering government'.³⁰ That is, NCPs should be independent enough to make decisions impartially, but not so independent that they are not accountable to government. Also, that NCPs are State-based mechanisms has value in terms of compelling cooperation by companies the subject of complaint given the otherwise optional nature of its processes.³¹

25. The Law Council concurs with comments made by participants at the consultation session that there is no single government department that is ideal nor has all of the relevant expertise to house the ANCP. In addition, based on the comments at the consultation session, it seems that no government department is particularly willing to accept responsibility for the ANCP. Further, placing an NCP in a single government department is a model that compared with international best practice is out-dated and well-established as inhibiting effectiveness. Several NCPs that are now high performing were originally homed exclusively in a single government department, until they were restructured to be more effective. Therefore, the Law Council would not support simply relocating the ANCP to another, single government department.

26. In terms of a preferable administrative structure, the Law Council notes that independence, while maintaining an appropriate link to government, and involvement of stakeholders, appear to be common success factors of better performing NCPs. Any restructure of the ANCP should focus on creating an appropriate degree of independence and formally integrating stakeholder perspectives into its functionality. In addition to structure, careful consideration should be given to the core functions of the ANCP, being mediation of disputes in the first instance, and making findings as to whether or not a breach of the Guidelines has occurred should mediation fail or be refused.

<https://static1.squarespace.com/static/57e140116a4963b5a1ad9780/t/59412132414fb5787b361657/1497440634574/NJM20_ANCP.pdf>.

²⁸ The online consultation question included the instruction, 'please include in your response: your vision for how it would work, the relative advantages and disadvantages for all stakeholders under your preferred model, including the ANCP's ability to handle specific instances (complaints) and promote the Guidelines; and any comparative models proven to be effective (e.g. other NCPs or non-judicial mechanism for redress)'.

²⁹ Organization for Economic Cooperation and Development (OECD), *Guidelines for Multinational Enterprises 2011 Edition* (2011) 71 (Procedural Guidance) IA [2].

³⁰ *Ibid* IA [1].

³¹ See OECD Watch, *Model National Contact Point* (2007) 8 <https://www.oecdwatch.org/publications-en/Publication_2223>.

27. Taking into account these considerations, the Law Council recommends that that the ANCP be re-housed in either the Australian Human Rights Commission (**AHRC**), or should the AHRC not be considered appropriate, the Commonwealth Ombudsman. The Law Council notes the view expressed at the consultation session that the AHRC would be willing to accommodate the ANCP and eager to see its success.
28. The Law Council considers that the AHRC has many advantages as an alternative home for the ANCP. First, as a statutory body, it is independent from but still accountable to government. Secondly, the AHRC has decades of experience with mediation and conciliation, with participants in its processes expressing a high degree of satisfaction with how their complaints were handled.³² Thirdly, given the worldwide trends towards complaints largely raising human rights issues under Chapter IV,³³ the AHRC can draw upon its specialised knowledge in human rights to address these complaints, likely to form the bulk of its work. Fourthly, the AHRC is well known, which would likely enhance visibility of the ANCP, and given the high take-up of its conciliation processes, is likely to be more accessible as a mechanism than the Treasury department.³⁴ Finally, the Law Council notes that the Commentary to the UNGPs indicates that, insofar as State-based non-judicial grievance mechanisms are concerned, 'national human rights institutions have a particularly important role to play'.³⁵
29. The Oversight Committee should be retained, but should be expanded to include representatives from business, civil society and unions, as well as experts in areas outside of human rights that are relevant to the Guidelines, for example employment standards or environmental standards. The experience of the Danish NCP and Norwegian NCP has shown that increasing stakeholder participation in the NCP process increases perceptions of legitimacy of the NCP. Further, adding external membership to the Oversight Committee would create a layer of independent and impartial oversight over the ANCP's operations. In addition, it would allow the ANCP to consult subject matter experts on issues other than those relevant to the human rights chapter.
30. The Law Council also notes that for some stakeholders there may be some disadvantages with the AHRC as an alternate home for the ANCP. First, while Chapter IV on human rights has formed the basis of the bulk of complaints worldwide, there are other chapters of the Guidelines not strictly relevant to human rights that are not necessarily areas in which the AHRC may have in-house competencies. However, adding additional members to the Oversight Committee, who are experts in fields relevant to the Guidelines other than human rights, and who can be consulted as appropriate, may ameliorate this issue. Secondly, housing the ANCP within a human rights commission may contribute to a perception that the ANCP favours civil society rather than business. However, ensuring that there are representatives from business on the Oversight Committee will ensure that business stakeholders retain oversight over the ANCP. Thirdly, given the AHRC is a statutory body, bringing the ANCP within the

³² In 2015-2016, there was a 94% degree of satisfaction with the AHRC's complaint process: see Australian Human Rights Commission, Submission No 13 to the Parliamentary Joint Committee on Human Rights, *Freedom of Speech in Australia* (9 December 2016) 37-38.

³³ Based on statistics presented during presentation by ANCP representatives at the consultation session; but see also Kristen Zornada, 'The Australian National Contact Point: How it can be reformed' (2017) *Corporate Accountability Project 22* <https://static1.squarespace.com/static/57e140116a4963b5a1ad9780/t/59412132414fb5787b361657/1497440634574/NJM20_ANCP.pdf>.

³⁴ For a summary of how the AHRC is accessible, transparent and accountable, see Australian Human Rights Commission, Submission No 13 to the Parliamentary Joint Committee on Human Rights, *Freedom of Speech in Australia* (9 December 2016) 57-60.

³⁵ John Ruggie, UN Secretary-General's Special Representative for Business and Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, HR/PUB/11/04, 33-34 (Guiding Principle 31).

mandate of AHRC would likely require legislative amendment, a time-consuming process without a guaranteed outcome. However, as noted above, the Danish NCP, one of the better performing NCPs worldwide, is established by act of parliament.

31. An alternative home for the ANCP other than the AHRC could be the Commonwealth Ombudsman. The Commonwealth Ombudsman could be advantageous as it is independent from, but accountable to government, already has in-house expertise in the investigation of complaints and the preparation of (non-binding) findings. Further, the reputation of the Ombudsman offices in Australia is generally one of impartiality, and it could not be inferred that the Commonwealth Ombudsman would favour either business or civil society. However, there are some disadvantages of placing the ANCP in the Commonwealth Ombudsman. First, like the AHRC, it would likely require legislative amendment to bring the ANCP within the ambit of the Commonwealth Ombudsman. Secondly, the Commonwealth Ombudsman does not have the in-house mediation and conciliation experience and expertise that the AHRC has. Thirdly, the Commonwealth Ombudsman would not have the human rights or other relevant content expertise.
32. The Law Council considers that, regardless of where the ANCP is ultimately located, the relevant entity needs to be resourced appropriately, with a dedicated staff and a dedicated budget, in order to carry out its work.

Recommendations

- **ANCP be re-housed in the Australian Human Rights Commission, or alternately, the Commonwealth Ombudsman.**
- **The Oversight Committee should be retained, but expanded to include non-governmental representatives, drawn from business, civil society and unions.**
- **Regardless of where the ANCP is re-housed, the relevant entity should be assigned a dedicated staff and dedicated budget.**

How can the ANCP engage most effectively with non-government organisation, including business, unions, industry groups, academia and civil society?

33. The Law Council notes that a key function of NCPs is 'to further the effectiveness of the Guidelines by undertaking promotional activities'.³⁶ However, Treasury representatives at the consultation session confirmed that ANCP promotional and outreach activities have been limited, due to resourcing and other constraints. In line with its role to promote the Guidelines, the Law Council recommends that the ANCP should develop a specific promotional strategy to promote the Guidelines and its role with relevant stakeholders.
34. Currently, as noted by participants at the consultation forum, 'the only people who know about the ANCP are people whose job it is to know about the ANCP', a clear failing by the ANCP to be 'visible'.³⁷ These remarks are similar to those expressed by stakeholders in relation to a former iteration of the Danish NCP located exclusively in a government

³⁶ Organization for Economic Cooperation and Development (OECD), *Guidelines for Multinational Enterprises 2011 Edition* (2011) 71 (Procedural Guidance) I.

³⁷ Ibid.

department, who called it 'the best kept secret in Denmark'.³⁸ Since then, the Danish NCP improved its visibility by adopting a number of measures which the Law Council also recommends the also ANCP adopt, namely:

- maintaining an active website which it regularly updates;
- speaking at events organised by business, civil society and other stakeholder organisations, as well as organising its own events for these audiences;
- producing publications such as a brochure detailing the procedure for filing complaints, disseminated to stakeholders, and an annual report published on its website; and
- distributing promotional materials to business and other stakeholders abroad through the networks of its foreign embassies.

35. Further, the Law Council recommends that the ANCP include information on its website on how to lodge a complaint with the ANCP, or a mechanism for doing so. It should also be updated to contain a complete record of all specific instance complaints that the ANCP has considered, minutes of its Oversight Committee, and reports to the OECD Investment Committee since 2011. Remedying these issues would improve both the transparency and accessibility of the ANCP.

36. The Law Council also recommends that the ANCP should be more actively involved at speaking at relevant events organised by business, civil society and other stakeholder sessions. To that end, the Law Council agrees with recommendations from participants at the consultation sessions about outreach activities that may be effective, including having representatives speak at the national dialogue on business and human rights and other events held by representative organisations like the UN Global Compact, 'road shows' around the country to present to relevant stakeholders about the Guidelines and the ANCP process, and disseminating information to Australian Embassies in non-OECD countries about the ability for individuals and communities impacted by the activities of Australian businesses to lodge complaints with the ANCP. Outreach efforts previously undertaken by the ANCP, including regular consultation with stakeholders from business, civil society, academia and other government departments, should be resumed. The Law Council considers that there is value in structured promotions of the Guidelines and communications with relevant parties of interest including with respect to international developments within the OECD.

37. The Law Council also agrees with comments at the stakeholder forum that a quality product – namely, an effective ANCP – supports promotion of the mechanism through reputation and word-of-mouth.

38. The Law Council notes that consultations with stakeholders worldwide as part of the NCP peer review process has revealed a desire for guidance on implementation of the Guidelines in practice, beyond just awareness-raising activities. While it has been noted that might not be appropriate for the ANCP to advise specific companies on how to implement the Guidelines, there are opportunities to facilitate discussions with business around this issue, to complement other civil society initiatives in this regard. The Law Council, for example, is currently developing a curriculum and training in conjunction with the International Bar Association, which will train lawyers that advise business, on business and human rights issues, including the operation of the Guidelines.

39. More generally, the Law Council considers that the establishment of a national action plan to implement the UNGPs in Australia would be conducive to creating and

³⁸ OECD, *Denmark NCP Voluntary Peer Review Report* (2011) 17 <<https://mneguidelines.oecd.org/Denmark-NCP-Peer-Review-2015.pdf>>.

formalising a strategy for meaningful engagement between the ANCP and business, unions, industry groups, academia and civil society. In this respect, the Law Council notes the National Action Plan to Combat Human Trafficking and Slavery, and how it has facilitated effective forums like the National Roundtable on Human Trafficking and Slavery, bringing together external-to-government experts from across relevant sectors to discuss, and where necessary, make recommendations to improve, the Australian government response. The Law Council considers that the creation and implementation of a strategy for engagement between the ANCP and external stakeholders would benefit from the support of a national action plan and a whole-of-government response to the issue of increasing access to remedy for persons impacted by the activities of Australian business.

Recommendations

- **Develop a specific promotional strategy to promote the Guidelines and its role with relevant stakeholders.**
- **As part of that strategy, the ANCP should:**
 - **maintain an active website which the ANCP regularly updates;**
 - **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;**
 - **produce publications such as a brochure detailing the procedure for filing complaints, disseminated to stakeholders, and an annual report published on the ANCP website; and**
 - **distribute promotional materials to business and other stakeholders abroad through the networks of its foreign embassies.**

What support should the ANCP provide to complainants and MNEs when handling complaints under the OECD Guidelines?

40. As a peak professional body, the Law Council has never been directly involved with the ANCP's complaints process as a party and therefore cannot specifically comment on the support parties would appreciate based on its experiences.
41. Nonetheless, the Law Council reiterates the need for NCPs to handle specific instance complaints in a manner that is impartial, predictable, equitable and compatible with the OECD Guidelines.³⁹ Given the perceptions about the lack of basic functionality of the ANCP expressed at the consultation forum, the Law Council considers that the best support the ANCP could give parties at this stage is to operate in accordance with these key principles. To that end, the Law Council considers that several improvements that could be made to the ANCP's handling of complaints which would improve its functionality and stakeholder satisfaction with its process.

³⁹ Organization for Economic Cooperation and Development (OECD), *Guidelines for Multinational Enterprises 2011 Edition* (2011) 72 (Procedural Guidance) C.

42. First, the Law Council recommends that the ANCP adhere to its timeframes for making an initial determination, being three months.⁴⁰ While it is acknowledged that substantive parts of the process, for example the mediation stage, may take longer than indicative timeframes provided, the initial determination period should not, as all that is required is an assessment of whether or not the complaint pertains to an Australian company or company operating in Australia, and raises matters relevant to the Guidelines.⁴¹ In the Mali mining case, for example, it took the ANCP one year to determine that the company in question was not registered in Australia.⁴² Delays of this kind are frustrating for the parties to the complaint, as well as delaying access to remedy for the affected individuals or communities. If delays are encountered, the parties should be kept apprised of the delay and any reasons for the delay. Of course, this should be supported by appropriate resourcing to allow the ANCP to meet these timeframes.
43. Second, the Law Council recommends that the ANCP Process for handling specific instance complaints (**ANCP Process**) be reviewed and clarified, as at points it is confusing. For example, it states that after making an initial determination, it will forward the complaint to the company for comment, with the invitation to send the ANCP a response.⁴³ To promote equitable treatment of the parties, this step should come during the initial determination stage, not afterwards. That is, a company should be given the opportunity to learn of the complaint and comment on the complaint prior to the ANCP making a decision on whether or not to accept it. The UK NCP, upon which the ANCP Process is modelled on almost word-for-word, includes this step as occurring prior to, not after, the making of the initial determination.⁴⁴
44. Third, the Law Council recommends that the ANCP be more transparent in its communications between the parties. Participants at the consultation session who had been involved with filing a complaint indicated that they were met with extended periods of silence from the ANCP during the initial determination stage, which made it unclear whether or not the ANCP was investigating the complaint, and whether the silence was due to a lack of company response, or ANCP not attending to the complaint. This may contribute to a lack of confidence in the process and mistrust between the parties. It is essential that the ANCP conduct the initial determination in a spirit that promotes trust between the parties, given that if the complaint is accepted, the parties will need to be brought together for mediation. The mediation process is a voluntary undertaking, and unlikely to be agreed to if the parties distrust each other. The ANCP should acknowledge receipt of complaints and copy communications to both parties where appropriate. The Law Council also supports a suggestion made by the reviewer at the consultation session that an online portal which parties to a complaint can log onto to check its progress be instituted.

⁴⁰ Since 2011, the ANCP has consistently failed to adhere to this timeline: see Kristen Zornada, 'The Australian National Contact Point: How it can be reformed' (2017) *Corporate Accountability Project* 26-27 (in particular, figure 4)

<https://static1.squarespace.com/static/57e140116a4963b5a1ad9780/t/59412132414fb5787b361657/1497440634574/NJM20_ANCP.pdf>.

⁴¹ See Organization for Economic Cooperation and Development (OECD), *Guidelines for Multinational Enterprises 2011 Edition* (2011).

⁴² See Australian National Contact Point, *Specific Instance Complaint against Bayswater Mining and Contracting Group* (8 December 2016)

<http://www.ausncp.gov.au/content/publications/reports/general/BCM_fs.pdf>.

⁴³ See Australian National Contact Point, *Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises* (2017) [32]

<<http://www.ausncp.gov.au/content/Content.aspx?doc=ancp/complaints.htm>>.

⁴⁴ United Kingdom National Contact Point, *UK National Contact Point Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises* (2014) [3.1]

<<https://www.gov.uk/government/publications/uk-national-contact-point-procedures-for-complaints-brought-under-the-oecd-guidelines-for-multinational-enterprises>>.

45. Third, the Law Council recommends that the ANCP should be active at the initial determination stage, and play an investigative role including, in an appropriate case, making fact-finding investigations overseas. In light of the challenges that may be faced in particular by complainants abroad, including operating in a language other than English and power differentials between communities and companies, this proactive role should include investigating the grievance even where it is not fully elaborated. This should especially be the case if the respondent company declines to participate in the mediation process – the complaint should not just be closed, as this is inconsistent with the spirit of the Guidelines to promote corporate accountability.
46. Fourth, the Law Council recommends that the ANCP publish the results of its initial determinations on its website, and amend the ANCP Process to make this requirement clear. Currently, no initial determinations have ever been published. When the ANCP decides to accept a case, only a final determination is published when the case is concluded, which may be years.⁴⁵ In addition, publishing initial determinations may create an incentive for company change regarding the conduct complained of, even ahead of a final determination on the matter.⁴⁶
47. This is detrimental to transparency, as there is often no indication a complaint has even been filed until it is concluded, especially as the ANCP does not appear to be consistently reporting the complaints it receives to the OECD as required. In addition, the lack of publication of the initial determinations makes it difficult to judge whether or not the ANCP is dealing with complaints in a predictable manner. The UK NCP, by comparison, publishes its initial determinations on its website at the point at which it makes the decision on whether to reject or accept the case, with de-identified details if necessary. The ANCP should also ensure it submits all complaints it receives to the OECD for publication on its online repository.
48. Fifth, the Law Council recommends that the ANCP should make initial determinations in a manner that is compatible with the Guidelines. If the complaint raises issues relevant to the Guidelines, and involves an Australian company or company operating in Australia, it should be accepted. However, the ANCP appears to have rejected complaints on extraneous grounds, like that accepting the complaint would require comment on government policy,⁴⁷ that the parties are unwilling to mediate,⁴⁸ it

⁴⁵ See for example the Ansell complaint, which was submitted to the Australian National Contact Point in 2013, and resolved in June 2017, taking three years longer to conclude than the indicative timeline for resolving complaints of one year: see Australian National Contact Point, *Specific instance complaint against Ansell – Final Determination* (June 2017) <http://www.ausncp.gov.au/content/publications/reports/general/Final_Statement-Ansell_and_IndustriALL.pdf>.

⁴⁶ For example, in 2014, the UK NCP issued an initial determination that a complaint about Formula One and potential human rights abuses in the lead-up to the Bahrain Grand Prix had merit. This caused Formula One to reverse a previously long-held position not to concern itself with human rights issues in countries in where its races are held, and led to the creation of its first ever human rights policy: 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>. This example underlines the importance of transparency in investigations and how the publication of findings, even though non-binding, can be effective in creating public pressure to procure change to company behaviour.

⁴⁷ Australian National Contact Point, *Specific Instance Complaint against G4S Australia Pty Ltd* (2015) 3 [1] <http://www.ausncp.gov.au/content/content.aspx?doc=publications/reports/general/G4s_austr.htm> and *Statement by the Australian National Contact Point on the GSL Australian Specific Instance* (2006) [5] <http://www.ausncp.gov.au/content/publications/reports/general/GSL_Statement.pdf>.

⁴⁸ In two instances, Australian multinational mining companies were unwilling to enter into mediation: Australian National Contact Point, *Statement by the Australian National Contact Point -*

was a matter covered by local law,⁴⁹ or because there are parallel proceedings on foot,⁵⁰ without making any assessment of whether accepting the complaint would cause serious prejudice to the parallel proceedings, as it is required to do by its own processes.⁵¹

49. Rejection of complaints on this bases is not unique to the ANCP and has occurred in NCPs worldwide,⁵² however these issues arise less frequently with NCPs that are better performing. The Law Council considers that the ANCP should engage with these NCPs on how they handle specific instance complaints. The Law Council also considers that adopting a multi-stakeholder model which includes experts on the Guidelines and incorporating a degree of independence will alleviate some of these bases for these decisions.
50. Sixth, the Law Council recommends that the ANCP strengthen its support offered to complainants and prospective complainants based abroad. Consideration should be given to the perspective of a complainant or prospective complainant abroad, particularly one from a non-OECD country and the barriers to their access to the grievance procedure under the Guidelines. When designing support and outreach efforts, including any relevant reform to the ANCP Process, it should be taken into account how feasible it is for complainants and prospective complainants based abroad to participate in the process adopted by the ANCP, what practical access they have to the ANCP, and what support needs to be provided to complainants and prospective complainants for the grievance process to work as intended. To this end, any outreach and promotional efforts, and ANCP processes, should be designed with the objective of improving access to remedy for human abuses, the third pillar of the framework underpinning the UNGPs.
51. Treasury representatives have explained that the difficulty with addressing complaints about Australian companies operating abroad is that their investigations are limited due to a lack of resources for conducting fact finding missions abroad, language barriers, limited understanding of local laws, and other practical difficulties. For complainants based abroad that lodge complaints about the activities of Australian companies in a OECD member state, the ANCP transfers the complaint to the NCP of the relevant country with very little follow up.⁵³ This is despite the fact that the NCP system anticipated that the NCPs would work together on the complaint.⁵⁴ If the ANCP

Specific Instance – Australian Multinational Mining Company (2013) [8]

<<http://www.ausncp.gov.au/content/Content.aspx?doc=publications/reports/general/SouthAfrica.htm>> and Australian National Contact Point, *Specific Instance complaint CFMEU – Xstrata Coal Pty Ltd – Industrial Relations/Employment Practices/Marketing Arrangements* (2011)

<http://www.ausncp.gov.au/content/publications/reports/general/Xstrata_Summary.pdf>.

⁴⁹ See Australian National Contact Point, *Statement by the Australian National Contact Point - Specific Instance – Australian Multinational Mining Company* (2013) [8]

<<http://www.ausncp.gov.au/content/Content.aspx?doc=publications/reports/general/SouthAfrica.htm>>.

⁵⁰ Australian National Contact Point, *Specific Instance Complaint against G4S Australia Pty Ltd* (2015) 4 <http://www.ausncp.gov.au/content/publications/reports/general/G4S_au.pdf>.

⁵¹ Australian National Contact Point, 'Approach of the Australian National Contact Point to Specific Instances in which there are parallel proceedings' (2011) *Australian Government* [3.1]-[3.2] <<http://www.ausncp.gov.au/content/content.aspx?doc=anncp/parallel.htm>>.

⁵² 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) 27-30 <https://www.oecdwatch.org/publications-en/Publication_4201>.

⁵³ See Kristen Zornada, 'The Australian National Contact Point: How it can be reformed' (2017) *Corporate Accountability Project* 56 [7.5.2]

<https://static1.squarespace.com/static/57e140116a4963b5a1ad9780/t/59412132414fb5787b361657/1497440634574/NJM20_ANCP.pdf>.

⁵⁴ Organization for Economic Cooperation and Development (OECD), *Guidelines for Multinational Enterprises 2011 Edition* (2011) 72 (Procedural Guidance) C [2(b)].

transfers a complaint, it should remain engaged with the complaint investigation process, offering support and assistance to the lead NCP if required.

52. The ANCP should not reject complaints regarding activities of Australian companies operating abroad due to an unfamiliarity with the relevant domestic legal system. While the Guidelines promote compliance with local law, they comprise standards of responsible business conduct that do not depend upon local law for their content, and local law does not provide an excuse for non-compliance with the standards in the Guidelines. Examination of a complaint under the Guidelines does not require consideration of local law. Therefore, the ANCP should instead focus its determination on whether or not the complaint raises issues relevant to the Guidelines.
53. Seventh, the Law Council recommends strengthening support for prospective complainants based abroad. The ANCP website is only in English, and Treasury representatives have confirmed that the ANCP does not engage in outreach abroad. The ANCP could improve their international outreach by providing publications and information on how to lodge a complaint through Australian Embassies and High Commissions abroad, as well as include information on how to file a complaint in basic English, and languages used in countries where Australian multinational enterprises operate (especially non-OECD member countries) on its website.

Recommendations

- **To support complainants and multinational enterprises with the specific instance process, the ANCP should:**
 - **adhere to the three month timeframe for making initial determinations;**
 - **review and clarify the ANCP Process for handling specific instance complaints;**
 - **be more transparent in communications between the parties;**
 - **make initial determinations in a manner consistent with the Guidelines;**
 - **publish initial determinations on its website; and**
 - **improve efforts to engage with complainants and prospective complainants abroad, focused on improving access to remedy.**