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The Australian National Contact Point
c/- Foreign Investment Division
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CANBERRA ACT 2600

Submitted online via the 2017 Review - Consultation website¹

Dear Ms Newton,

Submission on Australia's OECD National Contact Point

Australian Lawyers for Human Rights (**ALHR**) thanks you for the opportunity to make this submission to the Independent Review of Australia's OECD National Contact Point (**ANCP**).

ALHR was established in 1993 and is a national network of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

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¹ Australian Government, '2017 Review-Consultation,' *AUSNCP*, <http://www.ausncp.gov.au/content/Content.aspx?doc=review/consultation.htm>

² Australian Government, '2017 Review,' *AUSNCP*,

1. Background

1.1. The 2017 Independent Review² poses a range of Consultation Questions about the ANCP, being:

- *In your view, what makes a National Contact Point (NCP) successful?*
- *Are there any aspects of the Australian NCP's (ANCP) current structure or location you consider problematic?*
- *In the future, what administrative structure do you think will work best for the ANCP? 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 mechanisms for redress).*
- *How can the ANCP engage most effectively with non-government organisations, including business, unions, industry groups, academia and civil society?*
- *To what extent has your organisation engaged with the OECD Guidelines for Multinational Enterprises or the ANCP?*
- *What support should the ANCP provide to complainants and MNEs when handling complaints under the OECD Guidelines?*
- *Do you have any other views for the ANCP Review to consider?*

1.2. This Submission responds to the Consultation Questions with reference to the Terms of Reference for the Independent Review (Annexure 1) relating to:

- the effectiveness of the current ANCP structure the ANCP's role in the context of alternative mechanism(s) for redress;
- the role of the ANCP Oversight Committee;
- how the ANCP should engage with non-government organisations such as business, unions, industry groups, academia and civil society; and
- how the ANCP compares with NCP structures in other OECD countries, including resourcing and international best-practice.

1.3. This Submission also:

- outlines ALHR's recommendations for reform to the ANCP to allow it to effectively fulfil its mandate under the OECD Guidelines on Multinational Enterprises (**Guidelines**) and align with international best practice and the UN Guiding Principles on Business and Human Rights 2011 (**UNGPs**);³ and
- references and builds upon the recommendations regarding reform to the ANCP in the August 2016 Joint Civil Society Statement on Implementing the UN Guiding Principles on Business and Human Rights endorsed by ALHR and other NGOs.⁴

² Australian Government, '2017 Review,' *AUSNCP*,

<http://www.ausncp.gov.au/content/Content.aspx?doc=review/consultation.htm> accessed 1 July 2017

³ UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' UN Doc HR/PUB/11/04 and A/HRC/17/31 (United Nations, 2011) http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf The UN Human Rights Council endorsed the UNGPs in resolution 17/4 of 16 June 2011.

⁴ Australian Human Rights Commission, 'Implementing the UN Guiding Principles on Business and Human Rights in Australia: Joint Civil Society Statement' (August 2016), 19-20 <https://alhr.org.au/wp/wp-content/uploads/2016/08/Implementing-UNGPs-in-Australia-Joint-Civil-Society-Statement1.pdf>

2. The Australian OECD National Contact Point

- 2.1. The ANCP is one of the most important mechanisms available in Australia for challenging breaches of human rights perpetrated by Multinational Enterprises (MNEs) operating in Australia and Australian MNEs operating overseas.
- 2.2. The ANCP is established under the Guidelines. The Guidelines contain ‘voluntary principles and standards for responsible business conduct,’ which signatory States ‘make a binding commitment to implement’.⁵ Under the Guidelines signatory governments must establish a National Contact Point (NCP)⁶ to further the effectiveness of the Guidelines by:
- helping resolve complaints about breaches of the Guidelines by MNEs; and
 - promoting the Guidelines.⁷
- 2.3. Complaints about breaches of the Guidelines by MNEs can be made to the NCP of the country where the violation occurred, or where the MNE is headquartered.⁸ Only 12 complaints about breaches of the Guidelines have been brought to the ANCP since 2001.⁹ Of these, four were rejected as inadmissible, three were resolved through mediation, three were transferred to other NCPs, one is pending and one was closed unresolved due to the Australian MNE’s refusal to engage in mediation.¹⁰ At least five of the complaints have alleged breaches of human rights by Australian MNEs.¹¹ In contrast, the British, American and Dutch NCPs have handled 45, 43 and 28 complaints respectively since 2001.¹²

3. Response to Consultation Questions

3.1. In your view, what makes a National Contact Point (NCP) successful?

- 3.1.1. A successful NCP is one that actively promotes the Guidelines to the extent that the Guidelines, the ANCP and its complaints process are well known to civil society, worker and business stakeholders, both in and outside Australia (see 3.4.1 to 3.4.5). It will also have an accessible complaints handling process (including for vulnerable complainants), which is transparent, impartial, quick and effective at resolving complaints about breaches of the Guidelines (see 3.4.6 to 3.4.9 and 3.6.1 to 3.6.8).
- 3.1.2. A successful NCP is a well-resourced, sufficiently-funded body that is independent of government, and in particular, is free from influence from government agencies and government officials involved with the promotion of business and trade (see 3.2.1 to 3.2.3 and 3.3.1 to 3.3.4). It will also have a separate Oversight Committee. Both the NCP and its Oversight Committee

⁵ Guidelines, Part I, Preface, Paragraph 1, 13

⁶ OECD, *The OECD Guidelines for Multinational Enterprises* (2011 update), 18.

⁷ OECD Council, Amendment of the Decision of the Council on the OECD Guidelines for Multinational Enterprises, Section I, at [1], in OECD, *The OECD Guidelines for Multinational Enterprises* (OECD Publishing: 2011 version), 68.

⁹ Australian Government, ‘Publications and Events’ AUSNCP, <http://www.ausncp.gov.au/content/Content.aspx?doc=publications.htm> accessed 16 July 2017; OECD, *Implementing the OECD Guidelines for Multinational Enterprises: The National Contact Points from 2000 to 2015* (2016), <http://mneguidelines.oecd.org/OECD-report-15-years-National-Contact-Points.pdf>

⁹ Australian Government, ‘Publications and Events’ AUSNCP, <http://www.ausncp.gov.au/content/Content.aspx?doc=publications.htm> accessed 16 July 2017; OECD, *Implementing the OECD Guidelines for Multinational Enterprises: The National Contact Points from 2000 to 2015* (2016), <http://mneguidelines.oecd.org/OECD-report-15-years-National-Contact-Points.pdf>

¹⁰ Australian Government, ‘Publications,’ AUSNCP, <http://www.ausncp.gov.au/content/Content.aspx?doc=publications.htm>.

¹¹ Australian Government, ‘Publications,’ AUSNCP, <http://www.ausncp.gov.au/content/Content.aspx?doc=publications.htm>

¹² OECD, *Implementing the OECD Guidelines for Multinational Enterprises: The National Contact Points from 2000 to 2015* (2016), 41 <http://mneguidelines.oecd.org/OECD-report-15-years-National-Contact-Points.pdf>

should be underpinned by multi-stakeholder representation from government, business, unions, NGOs and experts on issues relevant to the Guidelines, including human rights (see 3.2.4 to 3.2.7 and 3.3.4).

- 3.1.3. A successful NCP will be resourced to resolve complaints through mediation in the first instance, or if mediation fails or an MNE fails to engage in mediation, through publishing detailed Final Statements with thoroughly investigated determinations about whether there has been a breach of the Guidelines by the MNE (see 3.6.1 to 3.6.6). Further, a successful NCP's determination about a breach of the Guidelines would result in follow up mechanisms across government to ensure that there are consequences for the MNE (see 3.6.9 to 3.6.10).
- 3.1.4. In ALHR's view the ANCP does not currently meet the above description. However, if the ANCP receives sufficient government support in terms of its structure, funding and powers so as to meet the requirements for NCPs under the Guidelines, it could easily become a successful NCP.

Requirements for effective NCPs under the Guidelines

- 3.1.5. Since 2011¹³ the Guidelines have required that NCPs' complaint handling should be impartial, predictable, equitable and compatible with the principles and standards of the Guidelines.¹⁴ NCPs are required under the Guidelines to operate in a manner that is visible, accessible, transparent and accountable.¹⁵

UNGP (Pillar III) requirements relevant to NCPs

- 3.1.6. Australia has also recently committed to the implementation of the UNGPs,¹⁶ which expressly underpin the 2011 expansion of the human rights obligations in the Guidelines.¹⁷ The UNGPs provide that companies have a duty to respect human rights (Pillar I) and States have a duty to protect human rights (Pillar II). Importantly, Pillar III of the UNGPs also requires states to ensure access to effective remedies for human rights violations, through judicial and non-judicial grievance mechanisms (**NJGM**).
- 3.1.7. The UN has recognised NCPs as an important non-judicial NJGM.¹⁸ The success of the ANCP should therefore also be judged against the seven

¹³ OECD, *2011 Update of the OECD Guidelines for Multinational Enterprises: Comparative table of changes made to the 2000 text*, (OECD:2011), 87, 99

¹⁴ Guidelines, Procedural Guidance, Chapter I National Contact Points, Part C, Implementation and Specific Instance, 72

¹⁵ Guidelines, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, Chapter I Commentary on the Procedural Guidance for NCPs, Paragraph 9, 78 ; Guidelines, Procedural Guidance, Chapter I National Contact Points, 71

¹⁶ See Australia's statement to the UN Human Rights Council at the adoption of the Report of the UPR Working Group on 17 March 2016 <https://www.ag.gov.au/RightsAndProtections/HumanRights/United-Nations-Human-Rights-Reporting/Documents/UPR-Adoption-Statement.pdf> access at <https://www.ag.gov.au/RightsAndProtections/HumanRights/United-Nations-Human-Rights-Reporting/Pages/Australias-Universal-Periodic-Review.aspx>

¹⁷ OECD, *The OECD Guidelines for Multinational Enterprises* (2011 update), Chapter IV Human Rights, Commentary on Human Rights, 31; Trade Union Advisory Council (TUAC), *The OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context - Trade Union Guide*, (TUAC: 2012), p.4 <<http://www.tuacoecdmneguidelines.org/Docs/TradeUnionGuide.pdf>>

¹⁸ UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' UN Doc HR/PUB/11/04 and A/HRC/17/31, Part III Access to Remedy, Principle 25, 28 (United Nations, 2011)

http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf The UN Human Rights Council endorsed the UNGPs in resolution 17/4 of 16 June 2011; Bernadette Maheandiran, 'Calling for Clarity: How Uncertainty Undermines the Legitimacy of the Dispute Resolution System Under the OECD Guidelines for Multinational Enterprises,' (2015)(20) *Harvard Negotiation Law Review* 205, 206 and 2010-11. See

'effectiveness criteria' in the UNGPs that act as benchmarks against which all NJGMs should be 'designed, revised or assessed'.¹⁹ The criteria require that all NJGMs are *legitimate, accessible, predictable, equitable, transparent, rights compatible* and a source of *continuous learning*.²⁰

3.2. Are there any aspects of the Australian NCP's (ANCP's) current structure or location you consider problematic?

Lack of independence from government agency involved in the promotion of business and trade

- 3.2.1. The Guidelines²¹ allow flexibility to signatory governments to structure their NCPs in a manner that suits local circumstances. However, the Guidelines require that all NCPs must operate impartially, predictably and equitably when handling complaints²² and that 'NCP leadership should be such that it retains the confidence of social partners and other stakeholders'.²³
- 3.2.2. The current structure of the ANCP does not lend itself to impartial handling of complaints. Commentators including Professor John Ruggie (author of the UNGPs), have pointed to the potential conflict of interest that arises where NCPs are located solely within government agencies, especially agencies relating to the promotion of business and trade.²⁴ The ANCP is located solely within such an agency. Since early 2017 the ANCP has been the Principal Adviser at the Foreign Investment Division of the Treasury.²⁵ The previous ANCP was the General Manager of the Foreign Investment and Trade Policy Division of Treasury,²⁶ who was also simultaneously an Executive Member of the Federal Foreign Investment Review Board (between 2014-2016).²⁷ The ANCP's structure and current location gives rise to the perception of a potential

¹⁹ Principle 31, UNGPs

²⁰ Principle 31, UNGPs

²¹ OECD, *The OECD Guidelines for Multinational Enterprises* (OECD Publishing: 2011 version), Procedural Guidance, Section I(A), 71.

²² OECD, *The OECD Guidelines for Multinational Enterprises* (OECD Publishing: 2011 version), Procedural Guidance, Section I(C), 72 and Commentary on the Implementation Procedures, 81 at [22]. These principles are based on the criteria for an effective grievance mechanism set out in the United Nations Guiding Principles on Business and Human Rights, 2011, Principle 31, 33.

²³ Guidelines, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, Chapter I Commentary on the Procedural Guidance for NCPs, Institutional Arrangements, Paragraph 10, 80; OECD, *2011 Update of the OECD Guidelines for Multinational Enterprises: Comparative table of changes made to the 2000 text*, (OECD:2011), 85

²⁴ UN Human Rights Council, 'Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprise, UN Doc A/HRC/8/5 (7 April 2008), [98 -99] ,

<http://www2.ohchr.org/english/bodies/hrcouncil/docs/8session/A-HRC-8-5.doc>; D Blackburn and KD Ewing *Submission by International Centre for Trade Union Rights to the UK Joint Committee on Human Rights – Business and Human Rights: Labour Standards and British Multinationals*, (2009)

<<http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/5/5we53.htm#note378>>; J. Oldenziel et al, *Calling for Corporate Accountability*, (OECD Watch, 2013), 33 <http://www.oecdwatch.org/publications-en/Publication_3962>; Bernadette Maheandiran, 'Calling for Clarity: How Uncertainty Undermines the Legitimacy of the Dispute Resolution System Under the OECD Guidelines for Multinational Enterprises,' (2015)(20) *Harvard Negotiation Law Review* 205, 218; International Corporate Accountability Round Table, *The First Annual International Corporate Accountability Roundtable Meeting: Building a Movement for Corporate Accountability*, Washington DC 8-9 September 2011, 17

<<http://icar.ngo/wp-content/uploads/2013/02/First-Annual-ICAR-Meeting-Report.pdf>>; 'Assessment of the Australian NCP' by Monash University, The University of Melbourne and Deakin University's Non-Judicial Human Rights Mechanism Research project, 21 April 2014, Annex 3 to OECD Watch, *Assessment of the NCP Performance in the 2013-2014 Implementation Cycle: OECD Watch Submission to the 2014 Annual Meeting of the National Contact Points*, (June 2014), 38 http://www.oecdwatch.org/publications-en/Publication_4090/

²⁵ <http://www.ausncp.gov.au/content/Content.aspx?doc=ancp/contactpoint.htm> accessed 1 July 2017

²⁶ (Robert Donnelly) ANCP, 'Final Statement – Specific Instance complaint against Ansell', *AUSNCP* (2017) (Executive Summary) <http://www.ausncp.gov.au/content/Content.aspx?doc=publications.htm>

²⁷ Australian Government, 'Foreign Investment Review Board Annual Report 2015-2016' (2017) <https://cdn.tspace.gov.au/uploads/sites/79/2017/04/1516-FIRB-Annual-Report.pdf>

conflict of interest in favour of business interests,²⁸ and does not reflect international best practice (discussed below).

Lack of resourcing

- 3.2.3. The ANCP has one only part-time staff member, while the majority of other NCPs have multiple full-time and/or part time staff.²⁹ The ANCP also has significantly less funding than 'model' NCPs such as those in the UK, Norway and the Netherlands.³⁰ The ANCP website notes that the ANCP 'draws on expertise from other government agencies through an informal inter-governmental network.'³¹ There is no evidence publicly available to suggest that the ANCP and its Oversight Committee (discussed below) is supported by staff with expertise to deal with complaints about the human rights-related obligations, which were added to the Guidelines in 2011.³²

Oversight Committee

- 3.2.4. The ANCP purportedly complies with OECD best practice to the extent it has an oversight committee.³³ However, it is difficult to give holistic feedback on the structure and operations of the NCP, given the lack of information available about the activities of the Oversight Committee. The ANCP's Oversight Committee is said to provide guidance to the ANCP on the Guidelines, and reviews procedural (but not substantive) issues arising from complaints.³⁴ Unfortunately the individual who holds the office of ANCP is also the Chair of the Oversight Committee, which raises concerns about the ability of the Oversight Committee to properly provide impartial guidance or conduct effective reviews of the ANCP's activities.
- 3.2.5. The ANCP website advises that the Oversight Committee is made up of representatives from the departments of Foreign Affairs and Trade, Industry, Employment, Immigration and Border Protection and Attorney-General along with representatives from the Export Finance and Insurance Corporation and AusTrade.³⁵ The ANCP website also notes that other departments, as well as internal or external experts, may participate in the oversight committee meetings on an ad hoc basis, when issues of interest arise.³⁶ The Oversight

²⁸ Oxfam Australia, *Strengthening the Australian National Contact Point for the OECD Guidelines for Multinational Enterprises*, (2010), 1

²⁹ OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2016* (2017), 39 <http://www.oecd.org/daf/inv/mne/2016-Annual-Report-MNE-Guidelines-EN.pdf>

³⁰ 'Assessment of the Australian NCP' by Monash University, The University of Melbourne and Deakin University's Non-Judicial Human Rights Mechanism Research project, 21 April 2014, Annex 3 to OECD Watch, *Assessment of the NCP Performance in the 2013-2014 Implementation Cycle: OECD Watch Submission to the 2014 Annual Meeting of the National Contact Points*, (June 2014), 36 http://www.oecdwatch.org/publications-en/Publication_4090/; see also Oxfam Australia, *Strengthening the Australian National Contact Point for the OECD Guidelines for Multinational Enterprises*, <http://www.aph.gov.au/DocumentStore.ashx?id=f464992a-cb1c-4c40-90ab-e513d312d21b>.

³¹ Australian Government, 'The Australian National Contact Point,' *AUSNCP* <http://www.ausncp.gov.au/content/Content.aspx?doc=ancp/contactpoint.htm> accessed 1 July 2017

³² Based on similar criticism by Amnesty of UK NCP: Amnesty International and CORE, *The UK NCP and Alleged Human Rights Abuses by British Companies: A Factsheet*, <http://corporate-responsibility.org/wp-content/uploads/2016/04/NCP-infographic.pdf> and Amnesty International UK, *Obstacle Course: How the UK's National Contact Point handles human rights complaints under the OECD Guidelines for Multinational Enterprises* (February 2016) www.amnesty.org.uk/sites/default/files/uk_ncp_complaints_handling_full_report_lores_0.pdf.

³³ OECD, *The OECD Guidelines for Multinational Enterprises* (OECD Publishing: 2011 version), Commentary on the Implementation Procedures, 80 at [11]; OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2014*, (2014), 21-22 <http://www.oecd.org/daf/inv/mne/MNE-Annual-Report-2014-NCP-Activities.pdf>;

³⁴ Australian Government, 'Terms of Reference and Explanation of the Role of the ANCP Oversight Committee', *AUSNCP*, <<http://www.ausncp.gov.au/content/Content.aspx?doc=ancp/oversight.htm>> accessed 1 July 2017

³⁵ Australian Government, 'Terms of Reference and Explanation of the Role of the ANCP Oversight Committee', *AUSNCP*, <<http://www.ausncp.gov.au/content/Content.aspx?doc=ancp/oversight.htm>>

³⁶ Australian Government, 'Terms of Reference and Explanation of the Role of the ANCP Oversight Committee', *AUSNCP*, <<http://www.ausncp.gov.au/content/Content.aspx?doc=ancp/oversight.htm>>

Committee does not have any non-government stakeholders other than by ad hoc invitation, in contrast for example to the UK NCP's Steering Committee on which it was expressly modelled.³⁷

- 3.2.6. The Terms of Reference of the Oversight Committee available on the ANCP website note that the committee meets bi-annually and says that, subject to confidentiality issues in relation to complaints: *'(i)n all other respects the Oversight Committee will aim to operate in an open and transparent manner. In the interests of transparency, details of serving members on the Oversight Committee will be provided on the ANCP website. Except when confidential matters are concerned ... minutes of Oversight Committee meetings will also appear on the ANCP website.'*³⁸
- 3.2.7. The Oversight Committee had its first meeting on 22 November 2012 establishing the committee (the minutes of which have been removed from the ANCP website at some point after May 2016). As far as we are aware, to date the Oversight Committee has not published any other meeting minutes or summaries of oversight or guidance provided to the ANCP, nor details regarding its serving members.³⁹ It therefore appears that the Oversight Committee is not meeting its own transparency standards.

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

- 3.3.1. The ANCP is classed as a mono-partite NCP, that is, an NCP that is housed within a single government agency. However, other NCPs are more independent from government and include representatives from business, labour and civil society. Some NCPs are tripartite, that is, they have representatives from a number of government departments, and business and labour representatives (for example, NCPs in Belgium, France, Latvia and Sweden).⁴⁰ Other NCPs are quadripartite, that is, they also include representatives from NGOs (e.g. Finland and Czech Republic).⁴¹ Finally, a range of NCPs, which are often considered the best practice NCPs, are structured as agencies independent of government, and are made up of independent experts, but rely on a Government agency for secretariat support (e.g. Denmark, Norway and the Netherlands).⁴²

³⁷ Australian Government, 'Australian National Contact Point for the OECD Guidelines for Multinational Enterprises – OVERSIGHT COMMITTEE – Minutes 22 November 2012' *AUSNCP*, (2012) http://www.ausncp.gov.au/content/Content.aspx?doc=publications/oversight/20121122_minutes.htm accessed May 2016; UK Department for Business, Innovation and Skills, *UK National Contact Point procedures for dealing with complaints brought under the OECD Guidelines for Multinational Enterprises: Latest update 27th November 2013* (January 2014), 4 at [1.1.2] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270577/bis-14-518-procedural-guidance.pdf; Bernadette Maheandiran, 'Calling for Clarity: How Uncertainty Undermines the Legitimacy of the Dispute Resolution System Under the OECD Guidelines for Multinational Enterprises,' (2015)(20) *Harvard Negotiation Law Review* 205, 217;

³⁸ Australian Government, 'Terms of Reference and Explanation of the Role of the ANCP Oversight Committee', *AUSNCP*, <http://www.ausncp.gov.au/content/Content.aspx?doc=ancp/oversight.htm>; see also ANCP, 'Final Statement – Specific Instance complaint against Ansell', *AUSNCP* (2017), 1 <http://www.ausncp.gov.au/content/Content.aspx?doc=publications.htm>

³⁹ 'Assessment of the Australian NCP' by Monash University, The University of Melbourne and Deakin University's Non-Judicial Human Rights Mechanism Research project, 21 April 2014, Annex 3 to OECD Watch, *Assessment of the NCP Performance in the 2013-2014 Implementation Cycle: OECD Watch Submission to the 2014 Annual Meeting of the National Contact Points*, (June 2014), 36 http://www.oecdwatch.org/publications-en/Publication_4090/.

⁴⁰ OECD, Annual Report on the OECD Guidelines for Multinational Enterprises 2015 (2016), <http://mneguidelines.oecd.org/2015-Annual-Report-MNE-Guidelines-EN.pdf>, 39

⁴¹ OECD, Annual Report on the OECD Guidelines for Multinational Enterprises 2015 (2016), <http://mneguidelines.oecd.org/2015-Annual-Report-MNE-Guidelines-EN.pdf>, 40

⁴² OECD, Annual Report on the OECD Guidelines for Multinational Enterprises 2015 (2016), <http://mneguidelines.oecd.org/2015-Annual-Report-MNE-Guidelines-EN.pdf>, 40

- 3.3.2. Where NCPs are tripartite (that is, have representatives from government, business and unions) they tend to be more effective.⁴³ They are also more legitimate in the eyes NCP stakeholders.⁴⁴ In a review of NCPs, OECD Watch found that: *'(77%) [of] cases OECD Watch considers to have some element of remedy-related outcome were produced by NCPs that are comprised of independent expert bodies, have a balanced tripartite structure, or have a multi-stakeholder oversight body as part of their governance structure ... These findings suggest that it is worthwhile to promote more independent and impartial structures among all NCPs.'*⁴⁵
- 3.3.3. In 2014 Norway's NCP was subject to OECD Peer Review, following a move to a more independent structure in 2011 comprising 'a four-person Expert Panel and a two person full-time Secretariat employed by the Ministry of Foreign Affairs.'⁴⁶ The Peer Review Report noted: *'the NCP's status as an 'arms-length entity' ... seems to have been fundamental to building the credibility of the Norway NCP with key stakeholders,'*⁴⁷ and later: *'(i)t's not realistic to have people promote Norwegian trade in the morning and handle complaints after lunch.'*⁴⁸ Structuring the ANCP to be independent from government, and in particular from agencies tasked with dealing with trade and business, addresses both the risk of actual bias, and just as importantly, the perception of bias in its handling of complaints.
- 3.3.4. ALHR recommends that in future the ANCP should:
- be restructured to be independent of government, or at minimum be independent of government agencies and government officials involved with the promotion of business and trade;
 - be underpinned by tripartism and include qualified specialists with experience relevant to the Guidelines, including in human rights;
 - have an independent Oversight Committee, also underpinned by a tripartite representation with an advisory function and oversight of appeals on procedural issues; and
 - be adequately staffed and resourced.

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

Promotion of the Guidelines

- 3.4.1. Promotion of the Guidelines to business, worker organisations and NGOs is one of the primary functions of NCPs.⁴⁹ Under the Guidelines, all NCPs must

⁴³ D Blackburn and KD Ewing *Submission by International Centre for Trade Union Rights to the UK Joint Committee on Human Rights – Business and Human Rights: Labour Standards and British Multinationals*, (2009) <<http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/5/5we53.htm#note378>>referring to the findings of the OECD's Trade Union Advisory Committee.

⁴⁴ OECD Watch, *A '4 x10' Plan for Why and How to Unlock the Potential of the OECD Guidelines: A briefing for policymakers* (June 2016), 2; Trade Union Advisory Council (TUAC), *15-Point Plan for National Contact Points, TUAC Fact Sheet* (2015), 1

⁴⁵ Caitlin Daniel, Joseph Wilde-Ramsing, Kris Genovese, Virginia Sandjojo, 'Remedy Remains Rare: An analysis of 15 years of NCP cases and their contribution to improve access to remedy for victims of corporate misconduct' (OECD Watch: June 2015), 34-45

⁴⁶ OECD, *Norway National Contact Point Peer Review Process: Final Report of the Peer Review Delegation*, 2014, 6

⁴⁷ OECD, *Norway National Contact Point Peer Review Process: Final Report of the Peer Review Delegation*, 2014, 19

⁴⁸ OECD, *Norway National Contact Point Peer Review Process: Final Report of the Peer Review Delegation*, 2014, 34

⁴⁹ OECD, *The OECD Guidelines for Multinational Enterprises* (OECD Publishing: 2011 version), OECD Council, Amendment of the Decision of the Council on the OECD Guidelines for Multinational Enterprises, Section I , 68 at [1] and Procedural Guidance, Section 1(B), 72 and Commentary on Implementation Procedures, 80 at [13-16]; OCED, *Annual*

be visible, accessible, transparent and accountable in their operations⁵⁰ However, the Guidelines and the ANCP do not have a high profile in Australia and are not well promoted.⁵¹

- 3.4.2. The 2016 Annual Report on the OECD Guidelines for Multinational Enterprises (**OECD Annual Report**) noted that Australia did not organise or co-organise any events to promote the Guidelines,⁵² while a total of 113 promotional events were hosted by other NCPs in 2016.⁵³ The 2016 OECD Annual Report also indicated that, unlike the vast majority of other NCPs, the ANCP does not have a budget for organising the promotion of events, attending events organised by other NCPs or attending events organised by other stakeholders.⁵⁴
- 3.4.3. In 2014, OCED Watch rated the ANCP's visibility as 'very poor.'⁵⁵ The 2013 and 2014 OECD Annual Reports indicate that the ANCP had not organised promotional activities during 2013 and 2014,⁵⁶ though the ANCP did at least participate in a range of activities organised by other stakeholders.⁵⁷
- 3.4.4. The ANCP website suggests that consultations are held with MNEs, business, NGOs and government departments annually on matters relating to the Guidelines.⁵⁸ However, stakeholders have suggested such consultations may no longer be occurring.⁵⁹ In contrast, other NCPs regularly host information sessions and workshops on the Guidelines and consultations with trade unions, business and civil society.⁶⁰ They also engage in promotional activities organised by other stakeholders.
- 3.4.5. ALHR submits that similar activities should be regularly organised and hosted or co-hosted by the ANCP in Australia and overseas (in conjunction with Australian embassies), with a view to promoting the Guidelines to business, unions, industry groups, academic and civil society. The ANCP should also consider:

Report on the OECD Guidelines for Multinational Enterprises 2014, (2014), 16, <http://www.oecd.org/daf/inv/mne/MNE-Annual-Report-2014-NCP-Activities.pdf>.

⁵⁰ OECD, *The OECD Guidelines for Multinational Enterprises* (OECD Publishing: 2011 version), Procedural Guidance, Section I, 71 and Commentary on the Implementation Procedures, 79.

⁵¹ 'Assessment of the Australian NCP' by Monash University, The University of Melbourne and Deakin University's Non-Judicial Human Rights Mechanism Research project, 21 April 2014, Annex 3 to OECD Watch, *Assessment of the NCP Performance in the 2013-2014 Implementation Cycle: OCED Watch Submission to the 2014 Annual Meeting of the National Contact Points*, (June 2014), 37 http://www.oecdwatch.org/publications-en/Publication_4090/

⁵² OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2016* (2017), 106 <http://www.oecd.org/daf/inv/mne/2016-Annual-Report-MNE-Guidelines-EN.pdf>

⁵³ OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2016* (2017), 41 <http://www.oecd.org/daf/inv/mne/2016-Annual-Report-MNE-Guidelines-EN.pdf>

⁵⁴ OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2016* (2017), 41-42 <http://www.oecd.org/daf/inv/mne/2016-Annual-Report-MNE-Guidelines-EN.pdf>

⁵⁵ OECD Watch, *Assessment of the NCP Performance in the 2013-2014 Implementation Cycle: OCED Watch Submission to the 2014 Annual Meeting of the National Contact Points*, (June 2014), 11 <

http://www.oecdwatch.org/publications-en/Publication_4090/at_download/fullfile; >; see also Oxfam Australia, *Strengthening the Australian National Contact Point for the OECD Guidelines for Multinational Enterprises*,

<http://www.aph.gov.au/DocumentStore.ashx?id=f464992a-cb1c-4c40-90ab-e513d312d21b>.

⁵⁶ OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2014*, (2014), 61 and 62,

<http://www.oecd.org/daf/inv/mne/MNE-Annual-Report-2014-NCP-Activities.pdf>; OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2013*, (2013), 54 and 58 <http://www.oecd.org/daf/inv/mne/MNE-Annual-Report-2013-NCP-Activities.pdf>

⁵⁸ <http://www.ausncp.gov.au/content/Content.aspx?doc=ancp/contactpoint.htm>

⁵⁹ ⁵⁹ 'Assessment of the Australian NCP' by Monash University, The University of Melbourne and Deakin University's Non-Judicial Human Rights Mechanism Research project, 21 April 2014, Annex 3 to OECD Watch, *Assessment of the NCP Performance in the 2013-2014 Implementation Cycle: OCED Watch Submission to the 2014 Annual Meeting of the National Contact Points*, (June 2014), 37 http://www.oecdwatch.org/publications-en/Publication_4090/

⁶⁰ OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2014*, (2014), 61-63 <http://www.oecd.org/daf/inv/mne/MNE-Annual-Report-2014-NCP-Activities.pdf>; These types of events reflect those suggested in the OECD, *The OECD Guidelines for Multinational Enterprises* (OECD Publishing: 2011 version), Commentary on the Implementation Procedures, 79.

- regularly attending events held by stakeholders with a view to raising awareness of the NCP and the Guidelines; and
- working with NCPs in other countries with a view to promoting the Guidelines in Australia and elsewhere.

ANCP Website

- 3.4.6. The ANCP has a website that explains the Guidelines and the procedure for bringing a complaint (also known as a ‘specific instance’).⁶¹ Given the intended reach of the Guidelines, Australian embassies and consulates should have information available for visitors and local MNEs about the ANCP. Similarly Australian embassy and consulate websites should all have a short explanation of the role of the ANCP and a link to the ANCP website. This will allow the ANCP and its functions to be visible and accessible to both Australian MNEs and MNEs operating in Australia, as well as potential complainants in Australia and overseas. The ANCP should also ensure that the ANCP website is translated for all major languages and the languages of countries where Australian MNEs are most active.
- 3.4.7. The ANCP’s website should also be reviewed to ensure it provides clearer guidance to prospective complainants about how to make a complaint. It should also have information for MNEs about what human rights are, and how they might be able to identify if they are in breach of the human rights chapter of the Guidelines.

ANCP annual reports to the OECD

- 3.4.8. The Guidelines provide that NCPs should be accountable and their activities transparent to ensure NCPs have the confidence of the public.⁶² The Guidelines require that NCPs report annually to the OECD Investment Committee on their activities.⁶³ The OECD has stated that it is best practice to publish such reports online.⁶⁴ It is clear that the ANCP has submitted annual reports on its activities to the OECD Investment Committee⁶⁵ (**ANCP Reports**). However by late 2016, the ANCP had not published any of the annual ANCP Reports on the ANCP website since 2012.⁶⁶
- 3.4.9. In late December 2016, following a Freedom of Information (**FOI**) request for access to the missing ANCP Reports, the 2013, 2014 and 2015 reports were placed on the ANCP’s website.⁶⁷ They have since been removed, along with all of the other past annual ANCP Reports. The annual ANCP Reports to the OECD should be published for transparency and to assist stakeholders to

⁶¹ Australian Government, ‘The OECD Guidelines for Multinational Enterprises’, *AUSNCP*, <<http://www.ausncp.gov.au/content/content.aspx?doc=home.htm>>;

⁶² OECD, *The OECD Guidelines for Multinational Enterprises* (OECD Publishing: 2011 version), Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, Chapter I Commentary on the Procedural Guidance for NCPs, Paragraph 9 Transparency, 79

⁶³ Guidelines, Procedural Guidance, Chapter I National Contact Points, Part D Reporting, Paragraph 1,74

⁶⁴ OECD, *The OECD’s Annual Report on the OECD Guidelines for Multinational Enterprises 2014 – Responsible Business Conduct by Sector*, (OECD: 2014), 27

⁶⁵ <http://mneguidelines.oecd.org/2015-Annual-Report-MNE-Guidelines-EN.pdf>, Annex III, 129

⁶⁶ Australian Government, ‘Publication and Events’ *AUSNCP*,

<http://www.ausncp.gov.au/content/Content.aspx?doc=publications.htm>; See also: OECD, *The OECD’s Annual Report on the OECD Guidelines for Multinational Enterprises 2014 – Responsible Business Conduct by Sector*, (OECD: 2014), 27

⁶⁷ Email titled ‘Freedom of Information request - FOI No. 1981’ dated 22 December 2016 to Lauren Zanetti from (foi@treasury.gov.au) FOI Team, Parliamentary and Legal Services Unit, Financial and Parliamentary Division, The Treasury. The email states: ‘The Australian National Contact Point’s (ANCP) annual reports to the OECD for 2012-13, 2013-14 and 2014-15 are now available on the AusNCP website, available at: <http://ausncp.gov.au/content/Content.aspx?doc=publications.htm>. A report for 2016 is yet to be finalised.’

understand the ANCP complaint process, and should be replaced on the ANCP website.

3.5. To what extent has your organisation engaged with the OECD Guidelines for Multinational Enterprises or the ANCP?

3.5.1. ALHR has not directly engaged with the ANCP however we have considerable interest in and familiarity with the Guidelines.

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

Address power imbalances between parties

3.6.1. The Guidelines require that NCPs deal with complaints impartially and equitably⁶⁸ There is frequently a power imbalance between MNEs and complainants. Complainants may face a wide range of barriers to accessing the NCP including lack of access to technical, technological and financial resources, language differences, literacy issues, physical distance from the NCP and concerns about reprisal.⁶⁹ Handling complaints in an equitable manner is explained in the Commentary to the Guidelines to mean that parties are able to 'engage in the process on fair and equitable terms.'⁷⁰

In order to deal equitably with complaints, ANCP should consider measures undertaken by the Norwegian and Dutch NCPs such as:

- providing advisory services to prospective complainants;⁷¹
- providing translation services,⁷² and consultants to vulnerable complainants;⁷³ and
- mediating complaints in the complainant's location to ensure travel is not a barrier to access.⁷⁴

Comment on whether Guidelines were breached in the ANCP's Final Statement if mediation fails

3.6.2. The Guidelines are unclear about what the NCP should do if a complaint has been accepted by the ANCP, but NCP-facilitated mediation of the complaint fails or an MNE fails to engage in the NCP complaints process.⁷⁵ If mediation

⁶⁸ Guidelines, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, Chapter I Commentary on the Procedural Guidance for NCPs, Guiding Principles for Specific Instances, Paragraph 22, 82

⁶⁹ Principle 31, Commentary (b), UNGPs

⁷⁰ Guidelines, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, Chapter I Commentary on the Procedural Guidance for NCPs, Guiding Principles for Specific Instances, Paragraph 22, 82

⁷¹ Véronique Van Der Plancke, Valérie Van Goethem, Geneviève Paul, Elin Wrzoncki, Marion Cadier, *Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms (3rd Edition)*, (FIDH: May 2016), 408

⁷² Roberta Pinamonti and Peter Nestor, *Grievance Mechanisms in the Dutch Hard Coal Supply Chain: An assessment of the effectiveness of three grievance mechanisms against the UN Guiding Principles on Business and Human Rights*, (BSR: 2014), 20

⁷³ Véronique Van Der Plancke, Valérie Van Goethem, Geneviève Paul, Elin Wrzoncki, Marion Cadier, *Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms (3rd Edition)*, (FIDH: May 2016), 408 referencing

OeCDWatch,NorwegianSupportCommitteeforWesternSaharavSjovik,http://oecdwatch.org/cases/Case_247

⁷⁴ Caitlin Daniel, Joseph Wilde-Ramsing, Kris Genovese, Virginia Sandjojo, 'Remedy Remains Rare: An analysis of 15 years of NCP cases and their contribution to improve access to remedy for victims of corporate misconduct' (OECD Watch: June 2015), 22-23

⁷⁵ Ochoa Sanchez, 'The roles and Powers of the OECD National Contact Points,' (2014) 84 *Nordic Journal of International Law* 89, 97; Guidelines, Procedural Guidance, Section 1, Part C, para 3 c

fails other NCPs (e.g. UK, Netherlands, Norwegian and Brazilian NCPs) investigate the complaint and make a public determination in the Final Statement about the MNE's compliance with the Guidelines.⁷⁶ In contrast, if mediation fails, the ANCP will close the complaint despite it being unresolved.⁷⁷ For example, in 2011 a complaint to the ANCP was closed unresolved and without a comment about whether there had been a breach of the Guidelines, when the Australian MNE refused to engage in mediation.⁷⁸

- 3.6.3. The ANCP website now provides that if mediation fails the ANCP will examine the complaint further, collect further information and evidence and 'may make a statement as to whether the Guidelines have been breached.'⁷⁹ However this has not happened in practice to date.⁸⁰ In fact, that ANCP has expressed a conflicting view in the past, noting in a 2011 Final Statement that its '*role is limited to using its good offices to bring the parties together to explore resolution of issues at hand, possibly through mediation*' and further that '*the Guidelines ... do not allow for any arbitral or judgmental role by the [ANCP]*'.⁸¹
- 3.6.4. The ANCP's past failure to date to make a determination about whether there has been a breach of the Guidelines where mediation fails, exacerbates the power imbalance between parties to complaints. Without the possibility that the ANCP may make an independent determination of an MNE's compliance with the Guidelines, the complaints process is weak.⁸² The ANCP's approach gives MNEs a perverse incentive to refuse to engage in mediation, and means that only those complaints amenable to mediated resolution are dealt with to the point of resolution by the ANCP.⁸³
- 3.6.5. An adverse NCP finding against an MNE (and its attendant reputational risk) has been recognised as a deterrent to breaching the Guidelines and a form of remedy for complainants.⁸⁴ For example, the Norwegian NCP's OECD Peer Review noted that MNEs said that avoiding a compliance determination motivated their involvement in the NCP mediation process.⁸⁵ OECD Watch's

⁷⁶ Bernadette Maheandiran, 'Calling for Clarity: How Uncertainty Undermines the Legitimacy of the Dispute Resolution System Under the OECD Guidelines for Multinational Enterprises,' (2015)(20) *Harvard Negotiation Law Review* 205, 223; Ochoa Sanchez, 'The roles and Powers of the OECD National Contact Points,' (2014) 84 *Nordic Journal of International Law* 89, 104 -107; Trade Union Advisory Council (TUAC), *The OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context - Trade Union Guide*, (TUAC: 2012), 44

⁷⁷ See AusNCP, Final Statement on CFMEU complaint regarding Xstrata Coal Pty Ltd (28 June 2011) http://www.ausncp.gov.au/content/publications/reports/general/Xstrata_Summary.pdf; Assessment of the Australian NCP' by Monash University, The University of Melbourne and Deakin University's Non-Judicial Human Rights Mechanism Research project, 21 April 2014, Annex 3 to OECD Watch, *Assessment of the NCP Performance in the 2013-2014 Implementation Cycle: OCED Watch Submission to the 2014 Annual Meeting of the National Contact Points*, (June 2014), 38 http://www.oecdwatch.org/publications-en/Publication_4090/; Ochoa Sanchez, 'The roles and Powers of the OECD National Contact Points,' (2014) 84 *Nordic Journal of International Law* 89

⁷⁸ See AusNCP Final Statement on CFMEU complaint regarding Xstrata Coal Pty Ltd (28 June 2011) http://www.ausncp.gov.au/content/publications/reports/general/Xstrata_Summary.pdf;

⁷⁹ Australian Government, 'Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises,' *AUSNCP (2017)* <http://www.ausncp.gov.au/content/Content.aspx?doc=anpc/complaints.htm> accessed 16 July 2017

⁸⁰ Macdonald, Kate, Marshall, Shelley, Miller-Dawkins, May and Zornada, Kristen, *Redress for Transnational Business-Related Human Rights Abuses in Australia*, Corporate Accountability Research, (2016), 29

⁸¹ AUSNCP, Summary CFMEU complaint about Xstrata Coal Pty Ltd (8 June 2011)

⁸² Trade Union Advisory Council (TUAC), *The OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context - Trade Union Guide*, (TUAC: 2012), 44
<<http://www.tuacoecdmneguidelines.org/Docs/TradeUnionGuide.pdf>>

⁸³ OCED Watch, *Assessment of the NCP Performance in the 2013-2014 Implementation Cycle: OCED Watch Submission to the 2014 Annual Meeting of the National Contact Points*, (June 2014), 19-20
http://www.oecdwatch.org/publications-en/Publication_4090/

⁸⁴ Ochoa Sanchez, 'The roles and Powers of the OECD National Contact Points,' (2014) 84 *Nordic Journal of International Law* 89, 116.

⁸⁵ See also, Caitlin Daniel, Joseph Wilde-Ramsing, Kris Genovese, Virginia Sandjojo, 'Remedy Remains Rare: An analysis of 15 years of NCP cases and their contribution to improve access to remedy for victims of corporate misconduct' (OECD Watch: June 2015), 44 referencing (at footnote 86) Interview with Astrid Gade Nielsen, Head of Communications, Arla Foods (11 May 2015); interview with Aukje Berden, Group CSR Manager, Nidera (18 May 2015);

research has found that 77% of complaints to NCPs resulting in a form of remedy 'were produced by NCPs that have demonstrated that they will make determinations of non-compliance with the Guidelines if mediation fails.'⁸⁶

- 3.6.6. The ANCP's failure to make a determination about whether there has been a breach of the Guidelines where mediation fails or an MNE refuses to engage in the complaint process, diminishes the effectiveness of the Guidelines⁸⁷ and does not reflect Australia's commitment under the UNGPs to facilitate both accountability and access to non-judicial remedy, for corporate human rights violations. Where mediation of a complaint fails or an MNE fails to engage in the ANCP complaints handling process, the ANCP should be resourced to investigate the complaint and publish a determination on whether the MNE has breached the Guidelines in the ANCP's Final Statement on the complaint.

Timeliness

- 3.6.7. The ANCP has frequently failed to meet the one year time frame on the ANCP website for handling complaints, sometimes by a number of years. ALHR acknowledges that some complaints are complex and mediation of a complaint or consideration of a Final Statement may properly require more time than suggested by the ANCP on its website. However, timely processing of complaints to the ANCP provides certainty for both complainants and MNEs and exerts pressure on the parties to come to a mediated resolution. Certainty about the ANCP's timeframes for processing complaints and conformity with those timeframes, allows complainants to consider pursuing other avenues for remedy. Adequately resourcing the ANCP would facilitate greater timeliness in the ANCP's processes.

Transparency, accountability and accessibility

- 3.6.8. NCPs are required under the Guidelines to operate in a manner that is transparent, accountable and accessible.⁸⁸ Increased transparency about the ANCP's complaint process would assist both complainants and MNEs during the complaint process. Greater transparency and guidance regarding the ANCP's processes would assist prospective complainants, who often have limited resources, to decide whether to make a complaint to the ANCP. In particular the ANCP website should provide:

- an explanation regarding how the ANCP decides when an MNE is an 'Australian MNE' with the relevant criteria informed by NCP best practice and the intent of the Guidelines and the UNGPs;
- increased guidance around what types of information will be considered 'confidential' and how such information will be dealt with by the ANCP, within the complaint process;
- detailed Final Statements, with reasons for the outcome of the complaint.

OECD Watch, A '4 x10' Plan for Why and How to Unlock the Potential of the OECD Guidelines: A briefing for policymakers (June 2016), 3 referencing Norwegian Peer Review Final Report, 2012, 26.

⁸⁶ Caitlin Daniel, Joseph Wilde-Ramsing, Kris Genovese, Virginia Sandjojo, 'Remedy Remains Rare: An analysis of 15 years of NCP cases and their contribution to improve access to remedy for victims of corporate misconduct' (OECD Watch: June 2015), 44

⁸⁷ Ochoa Sanchez, 'The roles and Powers of the OECD National Contact Points,' (2014) 84 *Nordic Journal of International Law* 89, 107-116.

⁸⁸ Guidelines, Commentary on the Implementation Procedures of the OCED Guidelines for Multinational Enterprises, Chapter I Commentary on the Procedural Guidance for NCPs, Paragraph 9, 78 ; Guidelines, Procedural Guidance, Chapter I National Contact Points, 71

Policy coherence through multi-agency follow-up mechanisms

- 3.6.9. The 2011 Revision of the Guidelines requires that NCPs make relevant agencies aware of their reports and statements in order to foster 'policy coherence'.⁸⁹ It is unclear to what extent this is occurring. The 2015 OECD Annual Report suggests that Australia is taking NCP statements into consideration when export finance applications are considered.⁹⁰ However, best practice in terms of policy coherence is demonstrated rather by the UK and Netherlands' governments' indications that they will link MNEs' refusal to engage in NCP complaint processes or negative compliance determinations on human rights, to the withdrawal of export credit finance.⁹¹ For example, the Canadian NCP withdrew Canadian government support (through Trade Commissioner services) from a Canadian MNE that failed to engage in the NCP complaint process.⁹²
- 3.6.10. ALHR submits that the ANCP should facilitate similar 'follow up' mechanisms by relevant government agencies where an MNE fails to engage in a complaints process or is the subject of an NCP determination that it has breached the Guidelines.

3.7. Do you have any other views for the ANCP Review to consider?

- 3.7.1. On the information publicly available, the ANCP has not yet volunteered to assist with peer reviewing other NCPs. ALHR submits that the ANCP should volunteer to assist with an OECD Peer Review of other NCPs with a view to better understanding international NCP best practice.

4. Conclusion

- 4.1. In 2015, G7 leaders⁹³ committed to strengthening mechanisms for providing access to remedies through NCPs, by encouraging OECD promotion of peer reviews and ensuring their own NCPs 'are effective and lead by example'.⁹⁴ This sentiment was echoed in the 8 July 2017 G20 Declaration (to which Australia was a party) which emphasised commitment to the UNGPs and NCPs, and supported access to non-judicial remedy through NCPs in particular.⁹⁵
- 4.2. ALHR calls on the Government to demonstrate leadership and fulfill its obligations under the UNGPs by implementing the following recommendations for reform of the ANCP.

⁸⁹ Guidelines, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, Chapter I Commentary on the Procedural Guidance for NCPs, Conclusion of the Procedures, Paragraph 37, 85; Barbara Linder, Karin Lukas, Astrid Steinkellner, *THE RIGHT TO REMEDY: Extrajudicial Complaint Mechanisms for Resolving Conflicts of Interest between Business Actors and Those Affected by their Operations* (Ludwig Boltzmann Institute of Human Rights:2013), 16

⁹⁰ <http://mneguidelines.oecd.org/2015-Annual-Report-MNE-Guidelines-EN.pdf>, 75

⁹¹ Véronique Van Der Plancke, Valérie Van Goethem, Geneviève Paul, Elin Wrzoncki, Marion Cadier, *Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms (3rd Edition)*, (FIDH: May 2016), 408 – 410; International Corporate Accountability Roundtable (ICAR) and European Coalition for Corporate Justice (ECCJ) *Assessments of Existing National Actions Plans (NAPs) on Business and Human Rights: November 2015 Update*, (ICAR and ECCJ: 2015)

⁹² Caitlin Daniel, Joseph Wilde-Ramsing, Kris Genovese, Virginia Sandjojo, 'Remedy Remains Rare: An analysis of 15 years of NCP cases and their contribution to improve access to remedy for victims of corporate misconduct' (OECD Watch: June 2015), 46

⁹³ Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States.

⁹⁴ G7 Germany, 'Leaders' Declaration: G7 Summit' *G8 Information Centre*, (8 June 2015) <http://www.g8.utoronto.ca/summit/2015/mau/2015-G7-declaration-en.html>

⁹⁵ G20 Leaders' Declaration Shaping an interconnected world Hamburg, (7/8 July 2017), 4-5 <https://www.g20.org/gipfeldokumente/G20-leaders-declaration.pdf>

5. Recommendations

- 5.1. **Recommendation 1:** The ANCP should be restructured to be a more substantive body which is independent of government, or at minimum be independent of government agencies and government officials involved with the promotion of business and trade.
- 5.2. **Recommendation 2:** The ANCP should have tripartite representation and include qualified specialists with experience relevant to the Guidelines, including in human rights.
- 5.3. **Recommendation 3:** The ANCP should have an independent Oversight Committee, also underpinned by a tripartite representation, with an advisory function and oversight of appeals on procedural issues. The ANCP staff should not be part of its Oversight Committee.
- 5.4. **Recommendation 4:** The ANCP and its Oversight Committee should be adequately staffed and resourced.
- 5.5. **Recommendation 5:** The ANCP should significantly increase its promotion of the Guidelines and the complaint process amongst business and non-business stakeholders in Australia and overseas.
- 5.6. **Recommendation 6:** The ANCP should be resourced to assist vulnerable complainants with independent advisory assistance and translation services where appropriate to ensure equitable access to the complaint process.
- 5.7. **Recommendation 7:** If parties fail to resolve a complaint by way of ANCP facilitated mediation or where an MNE refuses to engage in the ANCP's complaint resolution process, the ANCP should investigate complaints and publish a determination in the Final Statement regarding whether the Guidelines have been breached.
- 5.8. **Recommendation 8:** The ANCP should meet its published timeframes for dealing with a complaint.
- 5.9. **Recommendation 9:** The ANCP should increase the transparency of its processes by publishing its Oversight Committee minutes (excluding confidential information) and publishing its annual reports to the OECD on its website.
- 5.10. **Recommendation 10:** The ANCP should increase the transparency and accessibility of its complaints process by ensuring that its website is more user-friendly and by publishing:
 - information regarding the ANCP's criteria for establishing when an MNE should be considered an Australian MNE for the purpose of the Guidelines;
 - more detail regarding how confidential information is dealt with during the complaint process; and
 - detailed reasons in Final Statements.
- 5.11. **Recommendation 11:** The ANCP should facilitate similar 'follow up' mechanisms by relevant government agencies where an MNE fails to engage in a complaints process or is the subject of an NCP determination that it has breached the Guidelines.

5.12. **Recommendation 12:** The ANCP should regularly contribute to peer reviews of other NCPs.

If you would like to discuss any aspect of this submission, please contact Australian Lawyers for Human Rights' Business & Human Rights Subcommittee by email at bhr@alhr.org.au.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Benedict Coyne', with a long, sweeping underline.

Benedict Coyne
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This submission was authored by:

A handwritten signature in black ink, appearing to read 'Lauren Zanetti', written in a cursive style.

Lauren Zanetti
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Annexure 1

Terms of Reference for the Independent Review

Examine the Australian Government's commitments and obligations under the OECD Guidelines for Multinational Enterprises (the Guidelines) and assess how the ANCP function should fit within whole-of-government strategy.

Evaluate the effectiveness of the current ANCP structure, specifically:

- *the ANCP's role in the context of alternative mechanism(s) for redress;*
- *the role of the ANCP Oversight Committee;*
- *how the ANCP should engage with non-government organisations such as business, unions, industry groups, academia and civil society; and*
- *how the ANCP compares with NCP structures in other OECD countries, including resourcing and international best-practice.*

Evaluate the most suitable area of Government to effectively perform the ANCP function, specifically:

- *the ability to successfully promote the Guidelines, including access to relevant networks and stakeholder partnerships; and*
- *the ability to successfully manage the grievance handling process, including ready access to policy expertise and a working understanding of current international and domestic sensitivities that may relate.*