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Submission to the Review of the Australian National Contact  
Point

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July 2017

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## Human Rights Law Centre

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## Contents

<b>1. EXECUTIVE SUMMARY</b>	<b>1</b>
<b>2. THE ROLE OF THE ANCP AS A REDRESS MECHANISM</b>	<b>2</b>
2.1 Australia's obligation to promote observance of the OECD Guidelines	2
2.2 The ANCP's role with respect to corporate human rights abuses abroad	4
<b>3. IS THE ANCP CURRENTLY AN EFFECTIVE REDRESS MECHANISM?</b>	<b>5</b>
3.1 The ANCP's poor record in resolving disputes	5
3.2 The HRLC/RAID's complaint against G4S	6
<b>4. RECOMMENDATIONS FOR REFORM</b>	<b>10</b>
4.1 Moving the Location of the ANCP	11
4.2 Strengthening Independent Oversight	12
4.3 Improving Procedural Transparency and Guidance	13
4.4 Improving Outreach and Support	15

# 1. Executive Summary

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The Human Rights Law Centre (HRLC) welcomes the opportunity to submit to the consultation on the Australian OECD National Contact Point (ANCP). The HRLC seeks to ensure that Australian companies operating overseas are held accountable for the human rights impacts of their operations and that the Australian Government protects against corporate human rights abuses in accordance with its obligations under international and domestic law.

The ANCP is currently the primary non-judicial mechanism through which communities and workers whose rights have been infringed by Australian companies operating abroad can seek redress. Ideally, the ANCP's role should be to promote corporate good behaviour in accordance with the Guidelines and to try to help resolve disputes between complainants and companies in an objective and constructive manner.

Unfortunately, as this submission sets out, the ANCP has a poor record in performing these functions. It conducts little outreach, its processes are opaque and slow-moving, it frequently fails to follow important aspects of the Guidelines and it evidences a concerning lack of objectivity and due process in the way it handles complaints, with few meaningful outcomes. This Review provides an important opportunity to consider how the ANCP can be strengthened and turned into an effective redress mechanism.

## **Recommendations:**

**The HRLC believes that the following reforms are critical to the ANCP's effective operation:**

- **Greater transparency and accountability;**
- **Greater independence;**
- **Greater adherence to the Guidelines in processing complaints;**
- **Better outreach and support;**
- **Better resourcing**
- **The promotion of meaningful outcomes**

**To promote these objectives, we recommend the following structural and procedural reforms:**

1. **The ANCP should be moved out of Treasury to an area with greater independence, subject-matter and dispute resolution expertise and which is better placed to promote public visibility of its role, such as the Australian Human Rights Commission;**
2. **Assuming the ANCP remains within government, a mechanism should be developed for independent advice to be sought where a complaint raises a potential conflict of interest, to ensure that the ANCP can fulfil its obligations with independence and integrity;**
3. **Independent oversight should be strengthened through the appointment of external stakeholder representatives from civil society, unions and business onto the Oversight Committee in a fair and transparent process;**

4. A separate roster of independent subject-matter experts should be appointed to advise the ANCP as required in the areas covered by the Guidelines;
5. The ANCP should develop and publish more detailed guidance regarding its processes and criteria for decision-making in order to:
  - a. Ensure consistency with the Procedural Guidance to the Guidelines;
  - b. Promote greater transparency and accountability within the complaints process and in final decision-making;
  - c. Encourage meaningful outcomes, including determinations if a company is found in breach of the Guidelines, along with recommendations for remediation or improvement when a company refuse to engage in mediation or a mediated agreement cannot be reached.
6. The ANCP should be properly resourced to actively promote its function through outreach at home and abroad and should develop a clear strategy for doing so;
7. The ANCP should be properly resourced to provide a fair and effective dispute resolution service that actively seeks to address resource imbalances between the parties.

## 2. The role of the ANCP as a mechanism for redress

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### 2.1 Australia's obligation to promote observance of the OECD Guidelines

The OECD Guidelines for Multinational Enterprises ("the Guidelines") are recommendations addressed by governments to multinational enterprises, which set out principles and standards of good practice, consistent with applicable laws and internationally recognized standards. Their aim is to "*strengthen the basis of mutual confidence between enterprises and the societies in which they operate, improve the foreign investment climate and enhance the contribution to sustainable development made by multinational enterprises*".<sup>1</sup>

Under the Guidelines, Australia has obligations to ensure that it is "*encouraging the widest possible observance of the Guidelines*"<sup>2</sup> by multinational enterprises, including but not limited to respect for the internationally recognized human rights of those affected by their activities.

The main vehicle through which it does this is the ANCP. Governments adhering to the Guidelines are legally required to establish National Contact Points (NCPs) to "*promote the Guidelines and act as a forum for discussion of all matters relating to the Guidelines*" as well as participating in appropriate review and consultation procedures to address issues concerning interpretation of the Guidelines. Of

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<sup>1</sup> Organisation for Economic Cooperation and Development (OECD), *OECD Guidelines for Multinational Enterprises*, May 2011, available online <[http://www.ausncp.gov.au/content/publications/reports/OECD\\_guidelines/OECD\\_guidelines.pdf](http://www.ausncp.gov.au/content/publications/reports/OECD_guidelines/OECD_guidelines.pdf)> accessed 19 July 2017, 7. ('OECD Guidelines').

<sup>2</sup> *Ibid*, 10.

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particular relevance, NCPs must “*operate in accordance with the core criteria of visibility, accessibility, transparency and accountability*”.<sup>3</sup>

The ANCP also plays an important role in helping to fulfil Australia’s obligations under the United Nations Guiding Principles on Business and Human Rights (UNGPs) to promote effective mechanisms for redress and remedy for business-related human rights abuses which occur within its jurisdiction.<sup>4</sup>

UNGP 25 states that:

*“As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction, those affected have access to effective remedy”* [our emphasis].

UNGP 27 likewise states that:

*“States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse”* [our emphasis].

Given that Australia co-sponsored the resolution endorsing the UNGPs in 2011 and has recently appointed a multi-stakeholder group to advise it on how best to implement them, it is timely to consider how the ANCP function fits within these broader obligations and a whole-of-government strategy on business and human rights.

## **2.2 The ANCP’s role with respect to corporate human rights abuses abroad**

While the OECD Guidelines cover a wide range of subject areas, the ANCP plays a particularly vital role as a redress mechanism for human rights, labour and environmental abuses by Australian multinational enterprises operating overseas, often in the developing world.

Other than the ANCP, Australia has very few non-judicial mechanisms aimed at providing redress for communities harmed by the operations of Australian companies overseas. The Australian export credit agency, Efic, launched a complaints mechanism in 2012, but this is limited to individuals or groups likely to be affected by Efic’s activities or a project that has received support from Efic.<sup>5</sup>

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<sup>3</sup> These core criteria are outlined in the Decision on the OECD Guidelines for Multinational Enterprises (C(2000)96/FINAL (as amended 25 May 2011: see C/MIN(2011)11/FINAL), which, unlike the Guidelines themselves, is legally binding on member states by force of Article 5 of the Convention on the Organisation for Economic Cooperation and Development, subject to Articles 6(2) and 6(3). Accessible at <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=233&Lang=en&Book=False>

<sup>4</sup> United Nations High Commission on Human Rights, *Guiding Principles on Business and Human Rights*.

<sup>5</sup> Kristen Zornada, ‘The Australian OECD National Contact Point: How it can be reformed’ (2017) *Non-Judicial Redress Mechanisms* 20, 21.

Specific instance complaints to the ANCP to date have largely related to human rights or labour rights breaches associated with Australian companies operating abroad, including serious assaults in Australia's offshore detention centres,<sup>6</sup> land grabs in Colombia,<sup>7</sup> the financing of illegal logging operations in Papua New Guinea,<sup>8</sup> the unlawful dismissal of employees from their jobs in Sri Lanka<sup>9</sup> and damage to communities' land and resources caused by mining activities in several other countries.<sup>10</sup>

Communities, workers and individuals harmed by the operations of an Australian company in circumstances like these often have no other means of raising grievances or seeking remedy. They frequently live in weak governance zones, or those plagued by bias or corruption, where the courts cannot be relied upon to deliver justice or simply cannot be accessed because there is no form of legal aid funding.

Bringing a case against a company within the Australian court system is likewise rarely an option due to costs and legal and procedural hurdles involved with such actions. And while some Australian companies have established their own internal grievance mechanisms, the quality of these are variable and in many cases, communities do not trust them to deliver appropriate redress.

### 3. Is the ANCP currently an effective redress mechanism?

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#### 3.1 The ANCP's poor record in resolving disputes

In the limited number of cases where it has functioned effectively, the ANCP has played an important part in creating an independent, neutral space for resolving disputes between communities and companies in a practical and constructive way without the need for costly and time-consuming litigation.

The 2006 specific instance complaint brought against GSL<sup>11</sup> in relation to the long-term detention of children and other abuses in Australian detention centres is one example of a complaint that was, by all accounts, handled well. There, the ANCP dealt with the complaint efficiently and established a transparent process for bringing the parties together. After a mediation, a list of outcomes was agreed which included GSL making commitments to establishing human rights standards in its future government contracts, improving training for its staff, making future audits available for external

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<sup>6</sup> *Human Rights Law Centre and RAID vs. G4S* (2014–15).

<sup>7</sup> *Colombian Communities vs. Xstrata* (2007–2009).

<sup>8</sup> *ACF et al vs. ANZ Bank; Green Party of New Zealand vs. ANZ Bank* (2006).

<sup>9</sup> *Rubber production in Sri Lanka* lodged 20 November 2013 (still pending).

<sup>10</sup> See *Amadiba Crisis Committee vs. MRC Ltd.* (2013); *National Federation of Mining and Energy (FENAME) of Mali vs. Bayswater Contracting and Mining Group (BCM)* (2015–2016); *CFMEU vs. Xstrata* (2010–11); *Mining in Chile* (2012).

<sup>11</sup> *Human Rights Council of Australia et al vs Global Solutions* (2006).

scrutiny and improving some of the conditions within the centres, such as ensuring phone access for detainees.<sup>12</sup>

In many cases however, and particularly in recent years, the ANCP has clearly not discharged its obligations effectively or in accordance with the Guidelines.

A recent academic report by Kristen Zornada<sup>13</sup> ('the Zornada report') reviewed all 15 complaints handled by the ANCP since 2005 and compared its operation to that of other NCPs internationally. It concluded that:

*"The Australian NCP suffers from major deficiencies in the way it handles complaints and the way it is structured. The ANCP regularly rejects claims based on reasons which fall outside the OECD Procedural Guidance for NCPs. The ANCP has never issued a single determination of a breach of the Guidelines. These deficiencies have rendered it ineffective and possibly contribute to its lack of utilization as a non-judicial mechanism by civil society and communities impacted by the activities of Australian businesses overseas".*<sup>14</sup>

In particular, the report noted that the ANCP:

- Frequently fails to follow its own guidelines in making decisions, particularly at the preliminary stage;
- Lacks clear guidance concerning the complaints handling process;
- Lacks transparency in relation to the way it processes complaints;
- Conducts very little outreach work to promote knowledge of the mechanism;
- Lacks independence, as a result of its position within Treasury and the fact that it has no external-to-government representation;
- Is significantly under-resourced in comparison with NCPs elsewhere.

### 3.2 The HRLC/RAID's Complaint against G4S

#### 3.2.1 The Complaint

The findings of the Zornada report echo the HRLC's experience in dealing with the ANCP in the context of the specific instance complaint brought by the HRLC and the UK NGO Rights & Action in Development (RAID) against G4S for breaches associated with its running of the Manus Island Detention Centre in 2014 (the G4S complaint).<sup>15</sup>

In summary, the complaint was brought in the aftermath of the violence at the Detention Centre in February 2014, in which Iranian asylum seeker Reza Berati was killed, and 77 other asylum seekers were injured, some seriously.<sup>16</sup> The violence followed a series of independent reports by organisations

<sup>12</sup> Tim Hall, 'OECD NCP Australia – Human Rights Council of Australia et al vs. Global Solutions' (2013) Access online, viewed 19 July 2017 <<http://www.accessfacility.org/oecd-ncp-australia-human-rights-council-australia-et-al-vs-global-solutions>>.

<sup>13</sup> Kristen Zornada, 'The Australian OECD National Contact Point: How it can be reformed' (2017) *Non-Judicial Redress Mechanisms* 20.

<sup>14</sup> Zornada, 'The Australian OECD National Contact Point', above n 13, 7.

<sup>15</sup> Human Rights Law Centre and RAID, *Complaint Concerning G4S Australia Pty Ltd* (2014), [https://www.oecdwatch.org/cases/Case\\_342/1334/at\\_download/file](https://www.oecdwatch.org/cases/Case_342/1334/at_download/file).

<sup>16</sup> Latika Bourke, 'Manus Island riot: Independent report by Robert Cornall details deadly detention centre violence' *ABC News* online (26 May 2014) <http://www.abc.net.au/news/2014-05-26/scott-morrison-releases-review-into-manus-island-riot/5478170>.



like UNHCR criticizing conditions at the Centre as breaching basic human rights standards and raising concerns about the potential for violence.<sup>17</sup>

These incidents subsequently formed part of the subject of a major class action in the Australian courts (one of very few that has seen any form of remedy for victims of human rights abuses overseas) that led to 1,902 asylum seekers receiving an unprecedented settlement of \$70 million in 2017.<sup>18</sup> Two people, including a G4S employee, were subsequently convicted by a PNG Court of the assaults that killed Reza Berati.<sup>19</sup> The PNG High Court likewise found that the prolonged, arbitrary detention of asylum seekers at the Centre breached human rights principles set out in the PNG Constitution.<sup>20</sup>

It is against the seriousness of this particular complaint and the subsequent, more effective remedies that were pursued elsewhere that the ANCPs handling of the specific instance complaint should be judged.

The complaint alleged breaches of the Guidelines relating to G4S' complicity in an unlawful detention regime, its failure to maintain basic human rights standards at the Centre, its failure to protect detainees from violence, including violence perpetrated by its own employees and its failure to conduct adequate risk-based due diligence or mitigate adverse impacts in its running of the Centre. It was accompanied by detailed evidence, including witness statements from G4S' own former employees and a copy of its contract with the Australian government, which clearly outlined the company's legal responsibilities with respect to the running of the Centre.

As G4S was no longer running the Centre by the time the complaint was made, the remedies sought included:

- Commitments with respect to a human rights framework for any future contracts G4S might enter into;
- The payment of compensation to those detainees injured by G4S guards and to the family of Reza Berati;
- Information as to the outcomes of internal investigations and disciplinary actions taken against staff involved in the violence; and
- Commitments with respect to better training, including human rights training, for its employees and sub-contractors.

### 3.2.2 *The ANCP's failure to follow due process in its handling of the Complaint*

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<sup>17</sup> Robert Cornall, Report to the Secretary, Department of Immigration and Border Protection: Review into the Events of 16-18 February 2014 at the Manus Regional Processing Centre (23 May 2014) 8. See also; UNHCR Regional Representation, Canberra, *UNHCR Monitoring visit to Manus Island, Papua New Guinea 23 to 25 October 2013* (26 November 2013); Amnesty International, Submission No 22 to Senate Legal and Constitutional Affairs References Committee, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014*, 9 May 2014.

<sup>18</sup> The Guardian, 'Government to pay \$70m damages to 1,905 Manus detainees in class action' *Guardian* online (14 June 2017) <<https://www.theguardian.com/australia-news/2017/jun/14/government-to-pay-damages-to-manus-island-detainees-in-class-action>>.

<sup>19</sup> Eric Tlozek, 'Reza Barati death: Two men jailed over 2014 murder of asylum seeker at Manus Island detention centre' *ABC News* online (19 April 2016) <<http://www.abc.net.au/news/2016-04-19/reza-barati-death-two-men-sentenced-to-10-years-over-murder/7338928>>.

<sup>20</sup> Eric Tlozek and Stephanie Anderson, 'PNG's Supreme Court rules detention of asylum seekers on Manus Island is illegal' *ABC News* online (27 April 2016) <<http://www.abc.net.au/news/2016-04-26/png-court-rules-asylum-seeker-detention-manus-island-illegal/7360078>>.

The ANCP's own complaints procedure as set out on its website suggested the complaint would be dealt with as follows:

- The ANCP would aim to make an Initial Assessment as to whether to accept the complaint within three months (para 10);
- Where this timetable could not be observed, such as for reasons beyond the ANCP's control, the parties would be notified and reasons explained, and the ANCP would set a revised timetable (para 11);
- Unless a good case was made for information to be withheld from a party, all information received by the ANCP from the parties would be copied to all the parties. Where there was particularly sensitive information, the preferred approach would be to agree conditions of confidentiality to attached to that information (para 16).<sup>21</sup>

These procedures were not followed.

The ANCP took 9 months to consider whether to accept the complaint as one which warranted further investigation, three times longer than time-frames suggested in the guidance on its website. No reasons or revised timetable were provided until more than 6 months had passed and we had written multiple times seeking updates as to progress.

The ANCP did not pass on any of its correspondence with G4S, or the company's response to the complaint, despite the HRLC and RAID's offer to give undertakings as to confidentiality. Indeed the ANCP would initially not even share information about when it had had correspondence with G4S or even whether the company had provided a response. Eventually, when pressed, the ANCP acknowledged that G4S had provided information to it but said it could not share any information about it because the company had requested that it be kept confidential.

The failure to share, even in broad terms, G4S' response to the Complaint had obvious implications for due process and the ANCP's ability to make a fair and objective assessment of the Complaint. Without knowing what information the Company was submitting to the ANCP, the HRLC and RAID had no way to provide any response to it, or seek to correct any inaccuracies in the information provided.

The failure to share information, even about when the ANCP had had correspondence with the Company, also meant it was impossible to know whether the delays in processing the complaint were being caused by the company, or the ANCP itself.

### 3.3.3 *The ANCP's failure to follow the Guidelines in its decision-making*

The purpose of the initial assessment phase is supposed to be to determine whether a complaint merits further examination and whether it raises a "*bona fide issue that is relevant to the implementation of the Guidelines*". The Procedural Guidance to the Guidelines provide a list of six specific criteria NCPs should take into account when conducting initial assessments, including whether there appears to be a link between the enterprises activities and the issue raised, the party's

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<sup>21</sup> AusNCP, *Procedures for Dealing with Complaints Brought under the OECD Guidelines for Multinational Enterprises*, viewed 19 July 2017, <<http://www.ausncp.gov.au/content/Content.aspx?doc=ancp/complaints.htm>>.

interest in the matter, whether there is evidence submitted in support of the claim and how similar issues have been dealt with in other domestic and international proceedings.<sup>22</sup>

While noting these six criteria in its response, the ANCP ultimately released an Initial Assessment decision rejecting the complaint based on unrelated grounds. It found that:

1. It was not the role of the ANCP to issue commentary on government policies or law;
2. No new information was likely to be able to be revealed through accepting the complaint since G4S was no longer running the Centre;
3. There were parallel proceedings underway and it was not the role of the ANCP to intervene in legal due process.<sup>23</sup>

The first of these points raises serious concerns about whether there is a fundamental conflict between the ANCP's current position within Government and its ability to perform its obligations under the Guidelines. Corporate responsibility for upholding the Guidelines exists independently of government policy and companies are not exempt from the application of the Guidelines on the basis that their activities are consistent with domestic law or policy. Indeed the Guidelines state that where there is a conflict between a particular state's law and the Guidelines enterprises should find ways to honour the principles "*to the fullest extent that does not place them in violation of domestic law*".<sup>24</sup> The role of the ANCP should likewise be to advise companies on whether their activities are in compliance with the Guidelines, irrespective of Government policy and practice.

The second reason was untrue, since the Complaint had specifically requested disclosure of information not previously disclosed in the Government's inquiry into the incident. The remedies sought by the Complaint were also premised on the fact that G4S was no longer operating the Centre.

The final point directly contravened the Procedural Guidance to the Guidelines with respect to parallel proceedings, which specifically state that:

*"NCPs should not decide issues do not merit further consideration solely because parallel proceedings have been conducted, are underway or available. NCPs should evaluate whether an offer of good offices could make a positive contribution to the resolution of the issues raised and would not create serious prejudice for either of the parties involved in the other proceedings or cause a contempt of court situation".<sup>25</sup>*

The ANCP's rejection was upheld following a request for reconsideration to the Oversight Committee on similar grounds. The Oversight Committee further concluded that the Complaint should be rejected because:

- G4S was not ultimately responsible for conditions in the Centre, which were the responsibility of the PNG government;
- G4S had no responsibility over the actions of the PNG mobile squad (no comment was made regarding its responsibility over the actions of its own employees); and

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<sup>22</sup> OECD Guidelines, above n. 4, 82-83.

<sup>23</sup> See, Australian National Contact Point, *Statement by the Australian National Contact Point: Specific Instance – G4S Australia Pty Ltd* (10 June 2015) <[http://www.ausncp.gov.au/content/publications/reports/general/G4s\\_aus.pdf](http://www.ausncp.gov.au/content/publications/reports/general/G4s_aus.pdf)>.

<sup>24</sup> OECD Guidelines, 17.

<sup>25</sup> Ibid, 83.

- G4S was not in breach of its due diligence obligations because it had an obligation under its contract to ensure 50% of its staff were local.<sup>26</sup>

The failure of the Oversight Committee to follow or correctly apply the Initial Assessment criteria is particularly concerning. Their grounds for rejecting the complaint suggests that they were, in effect, skipping over the initial assessment stage altogether and jumping straight to a substantive decision. This was done, however, without taking any of the steps that the ANCP would normally have been required to follow in investigating the matter, such as attempting to bring the parties together or addressing any of the substantial evidence presented in support of the Complaint.

**In short, the ANCP's handling of the G4S Complaint showed a flagrant disregard for the Guidelines and their objective to promote good corporate behaviour, a failure to follow due process and a concerning lack of objectivity in performing their function.**

## 4. Recommendations for Reform

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Based on our experience of the ANCP's poor handling of the G4S complaint, and the Zornada report, which suggests that similar problems have arisen in many other complaints, the HRLC believes that the following changes are crucial to ensuring the ANCP can effectively fulfil its mandate:

1. Greater transparency and accountability;
2. Greater independence;
3. Greater adherence to the Guidelines in processing complaints;
4. Better outreach and support;
5. Better resourcing
6. The promotion of meaningful outcomes.

To promote these objectives, we recommend a number of structural and procedural reforms.

### 4.1 Moving the Location of the ANCP

It is the HRLC's view that the following features are important prerequisites to the ANCP's ability to fulfil its obligations under the Guidelines and provide an effective grievance mechanism:

- a) Independence and an ability to apply the Guidelines objectively;
- b) Appropriate subject-matter expertise or ready access to such expertise;
- c) Experience in grievance-handling and dispute resolution processes;
- d) Appropriate resourcing;
- e) Sufficient weight and authority to bring the parties together;
- f) Relevant networks and stakeholder partnerships to promote the Guidelines.

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<sup>26</sup> The decision of the Oversight Committee was never published on the ANCP's website, another demonstration of the lack of transparency with which the ANCP. It is on file with the HRLC and available on request.

While it is not impossible that these criteria could be met while maintaining the ANCP's current location (assuming the other reforms proposed in this submission were implemented), the ANCP's poor record in discharging its obligations to date suggests that Treasury may not be the most appropriate place for it. A number of other government departments and bodies would have much stronger subject-matter and complaints-handling expertise as well as better networks for promoting the Guidelines.

The HRLC's view is that, provided appropriate additional resourcing is provided, the Australian Human Rights Commission (AHRC) would be the most logical place to house the ANCP, for a number of reasons.

The AHRC has the authority of government but is structurally independent of it, so it is less likely to face conflicts of interest. It already has well-developed complaints handling, investigatory and mediation functions relating to human rights and employment matters (which make up the bulk of NCP complaints internationally and in Australia). Moreover, the organisation has an extremely strong record in resolving complaints to the satisfaction of both parties to disputes.<sup>27</sup>

The AHRC also already plays an important role facilitating dialogue between civil society and business in this area, through the annual Australian Dialogue on Business and Human Rights which it hosts with the UN Global Compact Network Australia, and would therefore be well-placed to conduct the outreach necessary for fulfilment of the ANCP's mandate to promote transparency and outreach.

Finally, the AHRC also already has an important educational role and experience undertaking community outreach to promote its functions and wider understanding about its grievance mechanisms and human rights more generally. Its website and materials are much more accessible than those of most government departments and are available in a wide range of languages.

The Department of Foreign Affairs and Trade would be the next logical choice, particularly given DFAT's current responsibility for the implementation of the Government's responsibilities under the UN Guiding Principles on Business and Human Rights. DFAT would undoubtedly have the appropriate subject matter and legal expertise, as well as strong stakeholder networks it could draw on.

The HRLC does have some concerns, however, as to whether situating the role within DFAT (or another branch of government such as the Attorney-General's Department) would give it sufficient independence. There is some potential for conflicts of interest to arise between DFAT's role in promoting Australian business activity abroad and its ability to objectively assess complaints against Australian businesses operating overseas.

The HRLC would suggest that if the ANCP does continue to be housed within Government, an alternative process be developed to deal with complaints that raise breaches of the Guidelines that also implicate the Australian government or raise potential conflicts of interest. This could entail, for instance, referring the complaint, or those aspects of the complaint that implicate the Government, to an independent reviewer for determination.

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<sup>27</sup>76% of disputes conciliated by the AHRC result in an agreed outcome and 94% of complainants and respondents report being satisfied with their processes, with 73% rating the service "very good" or "excellent". *Annual Report*, 2016, 27. See, also, Gillian Triggs, 'Gillian Triggs: Racial vilification laws protect those who are silenced by hate speech', *The Guardian* online (9 March 2017), <https://www.theguardian.com/australia-news/2017/mar/09/in-defence-of-laws-on-racial-vilification>.

Given the wide range of subject areas covered by the Guidelines, it is unlikely that any one body or department would ever fulfil all the above criteria perfectly. Wherever the ANCP is housed, consideration should therefore be given to how gaps in knowledge or experience can best be filled, for instance through resourcing for the appointment of qualified mediators, the appointment of a panel of subject-matter experts to advise the NCP or external to government representation on the oversight committee as outlined below.

**Recommendation 1:**

**The ANCP should be moved out of Treasury to an area with greater subject-matter and dispute resolution expertise and a more accessible public interface, such as the Australian Human Rights Commission.**

**Recommendation 2:**

**Assuming the ANCP remains within government, a mechanism should be developed for independent advice to be sought where a complaint raises a potential conflict of interest, to ensure that the ANCP can fulfil its role with independence and integrity.**

#### **4.2 Strengthening Independent Oversight**

The ANCP Oversight Committee currently has responsibility for considering requests for guidance by the ANCP, overseeing and monitoring the effectiveness of the ANCP, agreeing to changes in its procedures, promoting and raising awareness of the Guidelines and considering requests for review in relation to Specific Instance complaints, as well as considering whether improvements or clarifications of the Guidelines should be brought to the attention of the OECD Investment Committee.

The Oversight Committee currently consists only of representatives from other government departments. By the ANCP's own admission, maintaining consistency in the personnel attending from those Departments at the meetings of the Oversight Committee has been difficult.

The appointment of independent experts representing the views of the key stakeholders (civil society, unions and business) would contribute significantly to the ANCP's ability – and stakeholders' confidence in its ability – to promote and implement the Guidelines. As has been noted in the Zornada report, the UK and French NCPs, as well as a number of others, have introduced structures of this kind and this independent input and expertise has proved highly effective in promoting confidence in the process.<sup>28</sup>

The UK NCP, for instance, has four external members on its Steering Board (a trade union, civil society, business and independent representative), each appointed by their own constituencies with renewable 3-year terms. Each external member is permitted to select one permanent "alternate" in

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<sup>28</sup>Kristen Zornada, 'The Australian OECD National Contact Point: How it can be reformed' (2017) *Non-Judicial Redress Mechanisms* 20, 10.

case they cannot attend a meeting or a conflict of interest arises. This ensures the process runs smoothly and meeting regularity is not disrupted, while maintaining a level of consistency in the knowledge of the complaints and the Guidelines.<sup>29</sup>

The HRLC considers that the ANCP should adopt a similar structural reform to its Oversight Committee to formally incorporate representatives from civil society, trade unions and business through a fair and transparent process that aims to promote trust in the process. Given the length of time necessary to resolve some complaints under the Guidelines, representatives should be appointed for a minimum of 2 years to ensure consistency in complaints handling. The current functions of the Oversight Committee should be maintained and its terms of reference should be made publicly available on its website.

The HRLC further considers that the ANCP would benefit from the establishment of a separate roster of independent subject matter experts to advise the ANCP and the Oversight Committee as required in the areas covered by the Guidelines.<sup>30</sup> The ANCP's website already explains that its Oversight Committee currently "*may wish to call on persons having a knowledge, experience or understanding of particular topics, including external experts, as and when appropriate*".<sup>31</sup> Having a formal register of independent subject matter experts would ensure this happens in a transparent manner and would undoubtedly broaden the pool of expertise the ANCP can draw on.

#### **Recommendation 3:**

**Independent oversight should be strengthened through the appointment of external stakeholder representatives from civil society, unions and business onto the Oversight Committee in a fair and transparent process.**

#### **Recommendation 4:**

**A separate register of independent subject-matter experts should be appointed to advise the ANCP as required in the areas covered by the Guidelines**

### **4.3 Improving Procedural Transparency and Guidance**

<sup>29</sup> See, Department for Business Innovation & Skills, 'UK National Contact Point Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises' (27<sup>th</sup> of November 2013) access online: <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/270577/bis-14-518-procedural-guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270577/bis-14-518-procedural-guidance.pdf)>; Department for International Development, 'Review Procedure for Dealing with Complaints Brought under the OECD Guidelines for Multinational Enterprises to the UK National Contact Point' (14 January 2011) access online: <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31804/11-654-review-procedure-uk-national-contact-point.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31804/11-654-review-procedure-uk-national-contact-point.pdf)>

<sup>30</sup> Zornada, above n 26, 11.

<sup>31</sup> Australian Government, *Terms of Reference and Explanation of the Role of the ANCP Oversight Committee* (2017), AusNCP, <<http://www.ausncp.gov.au/content/Content.aspx?doc=ancp/oversight.htm>>.



The ANCPs current procedural guidance for making a complaint, published on its website, is quite basic and leaves a substantial degree of uncertainty about many aspects of the process, which has undoubtedly contributed to the poor decision-making by the ANCP in some instances. It also currently fails to accord important elements contained in Procedural Guidance to the Guidelines set by the OECD Council.

As highlighted above, the ANCP's website currently states, for example, that when considering initial assessments of specific instance complaints, the ANCP will consider a number of factors, "including but not limited to" the criteria listed at para 25 to the Procedural Guidance to the Guidelines.<sup>32</sup> The Procedural Guidance to the Guidelines, however, clearly mandates NCPs to take into account six specific criteria only when considering initial assessments. These criteria are not listed permissively as examples of the types of issues the NCP may consider.<sup>33</sup>

The ANCP also currently wrongly states on its Summary Brochure that if an Agreement is reached, no Final Statement is made, which contradicts the ANCP's obligations under the Guidelines' Procedural Guidance.

Another area where more detailed guidance for the ANCP is clearly required to promote transparency is with respect to confidentiality. Confidentiality should not be able to be interpreted, as it was in the G4S complaint, to mean that no information whatever is shared with one of the parties to the complaint. To do so fundamentally undermines basic principles of equity and due process.

Finally, the ANCP's procedural guidance should include a much clearer list of the information that must be set out in the ANCP's Final Statement on the complaint and the types of remedy it may recommend. Currently, the ANCPs website sets out a number of factors it "may" include in its Final Statements, which has led to a lack of rigor and accountability in its decision-making and a failure to provide detailed rationales for its final decisions.

As an accountability mechanism, it is particularly crucial that the ANCP be encouraged to make clear statements as to whether a breach of the Guidelines has occurred and, where appropriate, recommendations for remedy or reparation – and conversely, where it finds no breach, to clearly explain why this is the case. If a company refuses to engage in the mediation process, the ANCP should insofar as it is able to do so, make a determination based on the evidence placed before it. If it simply dismisses complaints due to unwillingness by a company to engage, this incentivises bad behaviour by companies and effectively penalises those trying to do the right thing.

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<sup>32</sup> AusNCP website, see above n 20.

<sup>33</sup> *OECD Guidelines*, above n. 4, 82-83.



**Recommendation 5:**

**The ANCP should develop and publish more detailed guidance regarding its processes and criteria for decision-making in order to:**

- a. Ensure consistency with the Procedural Guidance to the Guidelines;**
- b. Promote greater transparency and accountability within the complaints process and in final decision-making;**
- c. Encourage meaningful outcomes, including determinations if a company is found in breach of the Guidelines, along with recommendations for remediation or improvement when a company refuse to engage in mediation or a mediated agreement cannot be reached.**

#### **4.4 Improving Outreach and Support**

The ANCP currently has almost no public profile and its existence would not be known to most of the Australian public, let alone communities impacted by the activities of Australian companies overseas. It conducts very little active outreach, its website is often out of date and it only publishes information about its processes in English.

The ANCP likewise currently offers very little assistance to complainants to overcome the often substantial barriers they face in trying to access the process (distance, language, lack of resources etc.). This is particularly important in the context of complaints brought on behalf of victims overseas.

If it is to lift its visibility and become a more accessible and equitable mechanism, the ANCP must be properly resourced to undertake these functions properly.

With respect to outreach, this means adequate resourcing for its staff to actively promote the ANCP's work externally, both in Australia and overseas. The latter could be done via Australia's overseas consulates and by ensuring information about the ANCP and its functions are translated into the major languages of the primary countries where Australian companies operate. It could also be done via existing networks like the UN Global Compact and other civil society, business and government networks. It should also hold consultations with stakeholders on a more regular basis.

With respect to accessibility and support, the ANCP must have resourcing to properly support complainants who seek to raise grievances through the NCP process. This means resources in terms of staffing to ensure complaints are dealt with promptly and effectively, as well as funding for additional costs like translators or subsidizing travel where necessary so that complainants can properly participate in the process. In some instances, it may be appropriate for the ANCP to travel to meet with complainants in their home country, so they can satisfy themselves with respect to the evidence presented. At least six other NCPs currently provide funding for their staff to engage in active investigations with respect to complaints brought under the Guidelines.<sup>34</sup>

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<sup>34</sup> See, Zornada, above n. 26, 15.

***Recommendation 6:***

The ANCP should be properly resourced to actively promote its function through outreach at home and abroad and should develop a clear strategy for doing so

***Recommendation 7:***

The ANCP should be properly resourced to provide a fair and effective dispute resolution service that seeks to address resource imbalances between the parties through, for example, providing translators or subsidizing travel to attend mediations or present evidence.