

6 August 2018

Ms Victoria Anderson
The Australian National Contact Point
c/- Foreign Investment Division
The Treasury
Langton Crescent
Canberra ACT 2600

By Email: Victoria.Anderson@treasury.gov.au

Dear Ms Anderson

Re: Revised Specific Instance Procedures

We write in regard to the new specific instance procedures released by the Australian Treasury on 18 July 2018.

We appreciate the efforts of the Australian NPC (AusNCP) to try to make its complaint handling procedures more accessible, accountable, and transparent, and we are pleased to see that several of civil society's key recommendations have been adopted into the text. However, we are concerned that other key recommendations have not been addressed, and indeed that several of the amendments may regress from provisions in the previous complaint-handling procedures.

Positive elements in the AusNCP's new specific instance procedures

Several of the changes adopted in the new specific instance procedures should enable the AusNCP to process complaints more quickly and ensure greater number of complaints are advanced to the good offices stage. We view these changes as evidence of a new commitment by the AusNCP to seek more meaningful outcomes in cases submitted to it, and we appreciate the impact the changes may have on improving the accessibility of the NCP. Of note:

- The broadened view on interpreting the definition of an Australian multinational enterprise should enable more cases to be heard against companies with an Australian connection (2.4);
- Increased guidance to help complainants flesh out an incomplete submission should enable more complainants to understand and meet the eligibility requirements (3.2);

- The clarified interpretation of the OECD Guidelines’ “material and substantiated” admissibility criteria, as accommodating complaints showing a plausible issue and a plausible link to an enterprise, should enable more valid complaints to be heard (3.8); and
- The explicit assertions that information not shared between both parties cannot inform the AusNCP’s consideration of a case, and that the AusNCP will work with a party seeking confidentiality to maximize the portions of documents that may be shared, should enable a more open and impartial assessment of the facts in each case (9.2).

Shortcomings in the AusNCP’s new specific instance procedures

We regret, however, that the AusNCP has not adopted several of civil society’s recommendations that we believe are critical to enabling meaningful resolution of specific instance cases. In particular:

- The lack of mandatory commitment by the NCP to issue determinations of compliance for companies that refuse to participate meaningfully in the complaint process removes a critical incentive for companies to engage, and thus fails to correct the power imbalance between companies and communities pursuing a specific instance complaint (5.4). OECD research shows that NCPs are increasingly issuing determinations. The AusNCP has missed an opportunity to set an example by requiring determinations in set circumstances;
- The lack of commitment by the NCP to recommend consequences for companies that refuse to engage meaningfully in the specific instance process or fail to implement the NCP’s recommendations after a case’s conclusion similarly removes an incentive for companies to engage and to respect the government’s recommendations on responsible business conduct;
- While it includes some positive elements mentioned above, the section on confidentiality appears to regress from a strong commitment in the AusNCP’s original procedures, that the AusNCP would operate according to a general principle of information-sharing between parties. The procedures should have established (from the section title onward) a transparency policy setting a baseline presumption of transparency with limited, delineated exceptions to protect confidentiality;
- The time limit of just 10 days for parties to appeal a specific instance decision, and the limitation from substantive to mere procedural appeals, is unduly restrictive, and again appear as a regression from the original appeal provisions;
- The new procedures set no clear purpose for the Oversight Committee, which now seems to have no substantive role in either appeals or oversight;
- The procedures do not address how the AusNCP will handle cases subject to parallel proceedings or ensure that cases will not be rejected on this basis, a critical issue of concern raised in OECD Watch’s recent substantiated submission against the AusNCP;
- The procedures do not address requested improvements to the specific instance tracker; and
- The procedures do not explain safety protocols or procedures for complainants fearing reprisals for filing a specific instance.

These shortcomings will, in our view, continue to inhibit the accessibility, transparency and accountability of the AusNCP and limit its ability to function as an effective redress mechanism. We would strongly urge the AusNCP to consider further amendments to the procedural guidance to ensure these issues are addressed.

We also re-iterate our call for Treasury to implement the other recommendations of the 2017 Independent Review of the AusNCP as a matter of urgent priority. Changes to the AusNCP’s

procedures will only improve its effectiveness if the more fundamental structural and resourcing issues identified by the Review are also addressed.

We would welcome your response to the points we highlight in this paper and the opportunity to discuss these issues with you further.

Yours sincerely,

Human Rights Law Centre
OECD Watch
Transparency International Australia
Oxfam Australia
Australian Council of Trade Unions
CFMMEU Mining and Energy
Australian Lawyers for Human Rights
Jubilee Australia
Professor Fiona Haines, University of Melbourne
Adjunct Professor Holly Cullen, University of Western Australia
Associate Professor Justine Nolan, University of New South Wales
Adjunct Associate Professor John Southalan, University of Western Australia
Dr Annie Delaney, RMIT University
Dr Shelley Marshall, RMIT University
Ms Ingrid Landau, Monash University

Cc: Mr John Lonsdale, Deputy Secretary, Markets Group, Department of Treasury
Cc: Chair, OECD Working Party on Responsible Business Conduct