



# The Australian OECD National Contact Point: How it can be reformed

Kristen Zornada

## About this report series

This report is part of a series produced by the Non-Judicial Human Rights Redress Mechanisms Project, which draws on the findings of five years of research. The findings are based on over 587 interviews, with 1,100 individuals, across the countries and case studies covered by the research. Non-judicial redress mechanisms are mandated to receive complaints and mediate grievances, but are not empowered to produce legally-binding adjudications. The focus of the project is on analysing the effectiveness of these mechanisms in responding to alleged human rights violations associated with transnational business activity. The series presents lessons and recommendations regarding ways that:

- non-judicial mechanisms can provide redress and justice to vulnerable communities and workers;
- non-government organisations and worker representatives can more effectively utilise the mechanisms to provide support for and represent vulnerable communities and
- workers; and
- redress mechanisms can contribute to long-term and sustainable respect and remedy of human rights by businesses throughout their operations, supply chains and other business relationships.

The Non-Judicial Human Rights Redress Mechanisms Project is an academic research collaboration between the University of Melbourne, the University of Newcastle, RMIT University, Deakin University and the University of Essex. The project was funded by the Australian Research Council with support provided by a number of non-government organisations, including CORE Coalition UK, HomeWorkers Worldwide, Oxfam Australia and ActionAid Australia. Principal researchers on the team include Dr Samantha Balaton-Chrimes, Dr Tim Connor, Dr Annie Delaney, Prof Fiona Haines, Dr Kate Macdonald, Dr Shelley Marshall, May Miller-Dawkins and Sarah Rennie. The project was coordinated by Dr Kate Macdonald and Dr Shelley Marshall. The reports represent independent scholarly contributions to the relevant debates. The views expressed are those of the authors and not necessarily those of the organisations that provided support.

This report is authored by Kristen Zornada, LLM (Harvard), LLB (Hons) (Bond), with guidance and comment from Dr Shelley Marshall. The author is particularly grateful for comments from Oxfam Australia and the Human Rights Law Centre on early drafts. The author is also grateful to the personnel at the Australian National Contact Point for the spirit of openness with which they met with the research team and corresponded on numerous occasions about the content of this report. Correspondence concerning this report should be directed to Dr Shelley Marshall at [shelley.marshall@rmit.edu.au](mailto:shelley.marshall@rmit.edu.au).



©2017 Kristen Zornada. This report is published under an unported Creative Commons Attribution Non-commercial Share Alike (CC-BY-NC-SA) licence, details of which can be found at <https://creativecommons.org/licenses/by-nc-sa/3.0/>

- ✉ [info@corporateaccountabilityresearch.net](mailto:info@corporateaccountabilityresearch.net)
- 🐦 [https://twitter.com/caresearch\\_au](https://twitter.com/caresearch_au)
- 🌐 [corporateaccountabilityresearch.net](http://corporateaccountabilityresearch.net)
- 🌐 [corporateaccountabilitynetwork.net](http://corporateaccountabilitynetwork.net)

## Acronyms

ACF	Australian Conservation Foundation
ANCP	Australian National Contact Point
ANZ	Australia and New Zealand Banking Group
BCM	Bayswater Contracting and Mining Group
BIS	Department for Business, Innovation and Skills (UK)
CEDHA	Centre for Human Rights and Development
CFMEU	Construction, Forestry, Mining and Energy Union
Cth	Commonwealth of Australia
DFID	Department for International Development (UK)
DRC	Democratic Republic of the Congo
EC	Equitable Cambodia
FENAME	National Federation of Mining and Energy (Mali)
GSL	Global Services Limited
IDI	Inclusive Development International
MIRPC	Manus Island Regional Processing Centre
MNE	Multinational enterprise
MRC	Mineral Commodities (Australian mining company)
NCP	National Contact Point
OECD	Organization for Economic Cooperation and Development
RAID	Rights and Accountability in Development
RH	Rimbunan Hijau (Malaysian forestry company)
UK NCP	United Kingdom National Contact Point
UN	United Nations

# Table of Contents

About this report series	02
Acronyms	03
<b>1. Executive Summary</b>	<b>05</b>
How it operates	06
1.1 Key Findings	07
1.2 Recommendations for reform	10
<b>2. Introduction</b>	<b>16</b>
<b>3. Methodology</b>	<b>18</b>
<b>4. Background</b>	<b>19</b>
4.1 Role of NCPs in providing remedy business-related human rights and other abuses	19
4.2 Impact of the 2011 Review of the Guidelines	22
<b>5. Analysis of complaints submitted</b>	<b>23</b>
5.1 Trends in complaints	23
5.2 Categorisation of complaints by industry and issue	28
5.3 Categorisation of complaints by harm caused	29
<b>6. Complaints submitted and complainants' objectives</b>	<b>33</b>
6.1 Complaints by industry	33
6.2 Objectives of complainants	34
<b>7. Problems with complaint handling and processes and procedures</b>	<b>40</b>
7.1 Employing admissibility criteria not included in the Guidelines	40
7.2 Unclear processes	45
7.3 Lack of transparency	49
7.4 Lack of consequences or remedy	51
7.5 Lack of support for the ANCP and outreach by the ANCP	54
<b>8. Australia and UK: A Comparison</b>	<b>59</b>
<b>9. Annex 1: Rejected cases</b>	<b>72</b>
<b>10. Annex 2: Fully accepted cases</b>	<b>73</b>
<b>11. Annex 3: Partially accepted Cases</b>	<b>73</b>
<b>12. Annex 4: Cases filed with both ANCP and another NCP but dealt with by the latter</b>	<b>74</b>
<b>13. Annex 5: Pending cases</b>	<b>75</b>



Cover photo: A worker at the Phnom Penh Sugar plantation. Equitable Cambodia and Inclusive Development International filed a complaint with the ANCP in 2014 regarding ANZ's financial involvement with Phnom Penh Sugar Company, who are alleged to have forced villagers from their land, including with the use of a private army, to make way for the sugar plantation. As at the date of this report, the complaint remains unresolved by the ANCP.

*Photo credit: Thomas Christofletti 2013 and Inclusive Development International.*



# 1 Executive Summary

The Australian National Contact Point (ANCP) is a non-judicial human rights mechanism. Because the mechanism is non-legal, it provides freedom to act in a way which promotes human rights due diligence amongst Australian business and address breaches using novel problem solving and mediation techniques. The ANCP is charged with implementing the OECD Guidelines for Multinational Enterprises (**Guidelines**). These are perhaps the best developed standards and procedures internationally for providing guidance to business about how to do the least harm possible and act with integrity. The ANCP presents an easy way for the Australian Government to promote sound human rights practices amongst Australian business. There are clear models for best practice developed by other NCPs across OECD countries. The ANCP already exists – there is no need to create an entirely new institution – it simply needs improvement.

The ANCP is particularly important because it is the only avenue for redress for many communities and individuals affected by Australian business outside our national borders. Australia does not have a legal framework that specifically regulates the human rights obligations of Australian corporations overseas.<sup>1</sup> Communities and individuals who live in jurisdictions with weak legal systems or those plagued by bias and corruption face great barriers to accessing justice in their own countries against companies domiciled in Australia. The ANCP is a transnational human rights mechanism that allows grievances to be addressed in accordance with international human rights norms. Given its central role in the Australian human rights landscape, it is vital that it offers effective redress.

Based on a thorough analysis of all the complaints the ANCP has considered, this report finds that the ANCP is presently failing to follow the Guidelines. This means that the Australian Government is missing an important opportunity availed to by its membership of the OECD to promote good human rights practices amongst business and remedy problems when they occur. This report makes 23 recommendations which the ANCP could implement to improve its practices. They are not big changes, but they would make a world of difference to communities who are negatively impacted by the actions of Australian business.

None of the reforms recommended will make the desired difference unless the ANCP is adequately resourced and sufficiently independent. This requires dedicated staff with the necessary expertise to apply the Guidelines and navigate often complex disputes. It is unfair to expect

---

<sup>1</sup> Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination*, Australia, 77th sess, UN Doc CERD/C/AUS/CO/15-17 (13 September 2010) [13]. It has implemented anti-corruption laws that impact the operation of Australian companies that interact with foreign governments abroad: *Criminal Code Act 1995* (Cth) s 70.2, which implements the requirement in the OECD Anti-Bribery Convention to make it an offence to bribe a foreign public official. However, unlike other implementing countries like the UK and the US, Australia has had no successful prosecutions under its anti-bribery of foreign public officials laws: see Cindy Davids and Grant Schubert, 'The Global Architecture of Foreign Bribery Control: Applying the OECD Bribery Convention' in Adam Graycar and Russell G Smith (eds), *Handbook of Global Research and Practice in Corruption* (Edward Elgar, 2011) 319, 326, 328, 337; see also OECD, *Progress Report 2015: Assessing Enforcement of the OECD Convention on Combatting Foreign Bribery* (2015) 15.

staff without the necessary expertise and resources to address disputes which have occurred in other countries, with complex and long histories, involving some of Australia's largest companies. Likewise, it is unfair to expect staff located within government without sufficient authority or independence to address cases involving government, placing them in conflict with their primary duty to government.



Colombian Luz Angela protests the Cerrejón coal mine operated by BHP. In a complaint made to the ANCP by affected communities, BHP were alleged to have destroyed the township of Tabaco and forcibly expelled its population, as well as seeking to drive out the population of five other communities, to ensure the ongoing viability of the mine. After investigating and allowing the parties time to conclude other pre-existing negotiations, the ANCP closed the complaint against the wishes of the complainant, considering that it could serve no further useful function. *Source: Red Pepper*

## How it operates

The ANCP is a non-judicial mechanism within the system created by the OECD for implementing its Guidelines. The Guidelines set out principles for good business practice in areas like human rights, environment, information disclosure, employment and industrial relations, combating bribery and consumer interests. Any person with an interest in the matter can submit a complaint, also known as a specific instance, about alleged breaches of the Guidelines by a multinational enterprise registered in or operating in an adhering country. In handling complaints, National Contact Points are required to follow the OECD's implementation procedures of the Guidelines, which aside from setting out procedure, sets out the core expectations that NCPs will operate with visibility, accessibility, transparency and accountability.

When it receives a complaint, the NCP makes an initial assessment of whether or not to accept the complaint, and if accepted, offers its good offices and to facilitate mediation between the parties to resolve the dispute. If mediation fails or is refused, the NCP may make a de-

termination as to whether or not there has been a breach of the Guidelines. NCPs are tasked with promoting compliance with the Guidelines, through the specific instance complaint mechanism and outreach activities.

The ANCP, based in the Department of the Treasury, has received 15 complaints since 2005, including four since 2011, which coincided with both the change in government domestically and the introduction of revised Guidelines which included a new human rights chapter. This review of the functioning and structure of the ANCP considers the statements published by the ANCP on the outcome of the specific instance process for the 15 complaints it has received, as well as other documents relevant to procedure like the ANCP Process for handling complaints that arise under the OECD Guidelines on Multinational Enterprises (**ANCP Process for handling complaints**).

The evidence reported herein shows that the ANCP suffers from major deficiencies in the way in which it handles complaints and the way in which it is structured. The ANCP regularly rejects claims for reasons falling 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 utilisation as a non-judicial mechanism by civil society and communities impacted by the activities of Australian business overseas.



Paul Pavol protests the involvement of ANZ Bank with operations by Malaysian logging company, Rimbunan Hijau, to clear land in his native Papua New Guinea, outside the Rainforest Summit in Sydney. A complaint made to the ANCP about ANZ's financial support for the logging operations was rejected by the ANCP on the basis that it was not satisfied there was an "investment nexus" between ANZ and the logging operations.

Source: [actnowpng.org](http://actnowpng.org)

The main findings and conclusions of this report, recommendations for remedying the issues identified and examples of best practice are summarised in this Executive Summary.

## 1.1 Key Findings

### Refusal to consider claims due to failure to follow Guidelines

The ANCP rejects nearly a third of all complaints made to it. It transfers another third of all complaints to NCPs in other countries. Most claims that are rejected at the initial assessment stage are for reasons that fall outside the admissibility criteria for complaints. A complaint can only be refused on initial assessment if there is "insufficient evidence of *any breach* of the Guidelines to warrant further examination or the complaint is frivolous, vexatious or falls outside the Guidelines".<sup>2</sup> This report shows that the ANCP is not considering "any breach".

Even in cases that proceed beyond initial assessment, the ANCP has closed complaints or extricated itself from the complaint resolution process where a party, usually the company the subject of complaint, has shown itself unwilling to engage in mediation or discussions. The report shows that the ANCP is yet to make a determination on whether a company has breached the Guidelines.

For complaints that are transferred to another NCP, there appears to be very little follow-up or assistance provided by the ANCP to the home NCP, despite the Procedural Guidance contemplating an approach of inter-NCP coordination and cooperation.

<sup>2</sup> Australian National Contact Point, *Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises* (2011) <<http://www.ausncp.gov.au/content/Content.aspx?doc=anpc/complaints.htm>> (emphasis added).

The ANCP's approach to complaint handling reflects a misinterpretation of the Guidelines. In addition, the failure of the ANCP to engage with the specific instance process to its conclusion, may have caused a chilling effect on the taking up of the specific instance process in Australia. The ANCP is not fulfilling its mandate to be accessible and to carry out its activities in a manner compatible with the Guidelines.

### **Lack of clear guidance concerning the complaint handling process**

The ANCP has adopted and claims to be committed to adhering to the ANCP Process for handling complaints, published on its website as part of its commitment to transparency and accessibility.

However, the role of the ANCP is not clearly defined throughout the ANCP Process for handling complaints. There is no clear guidance about how submitted complaints will be handled. These gaps likely contribute to the high rejection rate and comparatively low utilisation of the specific instance process in Australia.

### **Lack of transparency**

Fundamental to the NCP mandate is transparency. The ANCP claims to be committed to ensuring transparency in its activities. However, it does not appear to be upholding this commitment in practice. It is not transparent with the parties about the process once a specific instance is being investigated. For instance, it does not inform a claimant about the response of a company which would allow the claimant to formulate a response. Further, the outcome of the various stages of the complaint handling process are not published until after the final stage has concluded. The lack of a consistent format for published statements often results in statements that fail to address all the matters required to be addressed.

This means that, first, parties are engaging with the process without the necessary information about the other party's position or evidence submitted to know how to respond or proceed. Second, there is no transparency about the principles the ANCP has taken into account, or has omitted to take into account, in making its decision, and how it has arrived at its decision. This makes it difficult for prospective complainants to determine what information is relevant to include in any complaint they may decide to submit. It also makes it difficult to assess their prospects of having their complaints accepted, which may also be responsible for the relatively low take-up rate of the specific instance process in Australia.

### **Lack of outreach**

The ANCP conducts very little outreach work to promote knowledge of the mechanism or access to it and has no formal budget to do so. Given the barriers to accessing redress mechanisms reported in the series of which this report is a part, this is particularly concerning. There is no way for communities to know how to seek redress through the ANCP when affected by relevant business behaviour.



## Lack of independence

There are characteristics of the ANCP structure which reduce the mechanism's claim to impartiality and independence. It is troubling that the ANCP is based in the Foreign Investment and Trade Division of the Treasury. Given the role of this division is to provide advice to the Foreign Investment Review Board, and therefore its focus on foreign investment in Australia, this may give rise to a conflict of interest concerning its role in investigating complaints against companies who invest in Australia.

Further, this report finds that the ANCP has rejected complaints implicating companies contracted to carry out controversial government policies, without transparent rationale. If the ANCP refuses to consider complaints involving government policy, this sets a worrying precedent of impunity for companies contracted to undertake government work that may involve human rights abuses. It is not the intention of the Guidelines that complaints concerning government contractors should be rejected on the basis that they involve comment on government policy alone.

## Lack of independent oversight

The ANCP's Oversight Committee lacks the external-to-government members necessary to provide independence. This raises serious questions as to how it can fulfil its role to provide advice, oversee and conduct reviews of the ANCP's activities. There is no evidence that the Oversight Committee has reviewed the ANCP's decisions or overturned a decision of the NCP on review. The ANCP's Review Procedure suggests that reviews will be undertaken by a Review Panel comprising three members of the Oversight Committee. The failure of the Oversight Committee to fulfil the functions of its role envisaged in its Terms of Reference results in a lack of proper scrutiny and revision of decisions in the event that errors have been made. It also contributes to a lack of pressure on the ANCP to improve its functioning.

## More resources urgently needed

While this report focuses on the complaint handling function of the ANCP, namely through its practices and procedures, it is clear that the ability of the ANCP to function effectively is tied to the resources made available to fulfil its remit. It is understood that there has never been a dedicated budget assigned to the ANCP beyond the general funding provided to the Treasury Department's Foreign Investment Division within which it is housed.<sup>3</sup>

The failings referred to in this report do not necessarily reflect the performance, diligence or capability of individual members who carry out the duties of the ANCP. The ANCP currently comprises one senior public servant with only part-time commitment to carrying out the role of ANCP. This raises questions as to whether it is fair for the Australian Government to expect that one person working part-time can conduct adequate outreach to communities negatively affected by Australian business activities *and* consider complaints that, for example, raise complicated human rights issues, bring parties that are often geographically dispersed and sometimes antagonistic towards each other together for mediation, or issue statements as to whether a breach of the Guidelines has occurred, and follow up, in a timely and effective manner. The

---

<sup>3</sup> Meeting with the Australian National Contact Point (Canberra, 22 May 2017).

Australian Government has a responsibility to ensure that the ANCP is appropriately resourced in order to achieve quality outcomes within acceptable timeframes. The government has a responsibility to ensure that Australian businesses, and businesses operating in Australia, adhere to the Guidelines. Adequately funding the ANCP is one part of meeting this commitment.

## 1.2 Recommendations for reform

The categories that appear below are ordered by priority for implementation, based on a root cause analysis conducted to identify the issues underlying the underperformance of the ANCP. The key drivers identified are: insufficient independence, non-compliance with processes, including a failure to correctly apply the admissibility criteria under the Guidelines, lack of transparency, and failure to provide remedy. Other flaws with the ANCP flow from these core problems.

This report recommends that in order to increase its effectiveness, the ANCP should prioritise defining its procedures and better adhering with the Guidelines concerning processes. The next priority is improving its transparency and ensuring that remedies are provided. A final priority is providing greater support and outreach to potential complainants and those who have already made complaints.

### Properly resource and improve the independence and expertise of the ANCP

- 1 The ANCP should **be re-designed as a cross-departmental body within government** in order to increase its independence and draw on a wider range of expertise. This will entail moving the ANCP out of the exclusive ambit of Treasury, and require appropriate resources in the form of funding and staff. This may also help to promote a ‘whole of government’ approach to Business and Human Rights.

### Best practice

The French NCP has a tripartite structure that is composed of representatives from several ministries, trade unions and an employer’s federation, coordinated by the Director-General of Treasury.<sup>4</sup>

The Dutch NCP is independent and consists of four independent members and four advisory members from the government departments most relevant to business and human rights. The secretariat of the NCP is housed in the Ministry of Foreign Affairs. The Dutch government allocated significant funding (€900 000 over three years) plus two full-time staff to its NCP, in addition to those staff who have responsibilities to the NCP as part of their other duties.<sup>5</sup>

---

<sup>4</sup> Le ministère de l’Économie et des Finances, *Point de contact national* (2017) <<http://www.tresor.economie.gouv.fr/pcn>>.

<sup>5</sup> OECD Watch, *Model National Contact Point* (2007) 8 <[http://www.oecdwatch.org/publications-en/Publication\\_2223](http://www.oecdwatch.org/publications-en/Publication_2223)>.

- 2 **Permanent, external-to-government members should be appointed to the Oversight Committee in an open, transparent process.** The Oversight Committee should meet at least biannually or more often as required. The Oversight Committee should be made up of dedicated trade union, civil society, business and independent representative in addition to representatives from relevant departments permanently appointed to the Oversight Committee. This could be augmented by a roster of suitably qualified and experienced independent experts in areas covered by the Guidelines, especially those typically cited in complaints considered by the ANCP, like human rights and the environment, who will be available be called upon on an *ad hoc* basis throughout the specific instance process, as required. When the ANCP is unable to determine or resolve matters relevant to the admissibility of a complaint, it should consult these independent experts, and/or other NCPs with relevant experience.

## Best practice

The work of the UK NCP is overseen by a steering board which includes representatives of government departments and external members. The four external members currently appointed include representatives of business, trade unions and non-governmental organisations.<sup>6</sup>

- 3 Serious cases of maladministration by the ANCP should be **subject to review**.

## Improve the process for handing complaints, particularly those that impact admissibility

- 4 **Assess complaints based on whether they raise a bona fide issue that is relevant to the Guidelines** and warrant further examination. In doing so, the ANCP should take into account only the matters included in the OECD Procedural Guidance and Commentary on the Implementation Procedures. Decision makers should not take into account other matters, like for example, whether the parties are willing to mediate, whether the complaint involves government policy, or whether there are parallel proceedings. These matters may require sensitivity in the way the complaint is handled, and impact later processes, but they should not impact admissibility.
- 5 In complaints raising issues that are subject to parallel proceedings, the ANCP should **address in its statement on the complaint its view on whether or not serious prejudice would be occasioned to one of the parties to the parallel proceedings** if the specific instance process were to continue, in accordance with its own guidance on parallel proceed-

<sup>6</sup> UK Government, *UK National Contact Point for the Organisation for Economic Co-operation and Development Guidelines* (2017) <<https://www.gov.uk/government/groups/uk-national-contact-point-for-the-organisation-for-economic-co-operation-and-development-guidelines>>.

ings. When determining whether or not a party is likely to be seriously prejudiced in parallel proceedings if the NCP complaint process continues, the ANCP should consult the Oversight Committee.

- 6 The ANCP should **adhere to its own timeframes for timely consideration of claims.**
- 7 The ANCP Process for handling complaints should be amended to make it **compulsory for the ANCP to consider the complaint** and issue a determination on whether there has been a breach of the Guidelines **in cases where mediation has been refused or has failed.** This could be achieved by changing the existing language of “may examine ... and issue a determination” to “will examine ... and issue a determination”, similar to the UK NCP Process.
- 8 The ANCP should seek to **overcome the barriers that affected communities experience in relation to collecting and presenting evidence** in a number of ways, such as by:
  - a. requesting evidence from interested parties in the host country;
  - b. conducting investigations in the host country;
  - c. coordinating with relevant government and non-government agencies in the host country; and
  - d. communicating determinations to stakeholders in the complaint beyond just those named in the complaint.

## Best practice

Six NCPs conduct fact-finding in the countries in which the complaints occurred including the German, Dutch, Canadian and Norwegian NCPs.<sup>7</sup>

- 9 The ANCP should actively **participate in the NCP Peer Review process** scheduled for July-December 2018 in order to take advantage of opportunities for learning and improvement.

## Increase transparency

- 10 **Details should be provided on the ANCP website on how to submit a complaint, including by email and by post.** The ANCP Process should be updated to reflect the logical order of steps for addressing complaints, including the confidentiality arrangements that apply at each stage, similar to the UK NCP Process. This information should be provided in the languages of the primary countries in which Australian businesses operate.

---

<sup>7</sup> Trade Union Cases, *National Contact Point Comparison* (2017)  
<<http://www.tuacoecdmneguidelines.org/NCPcomparisonAll.asp>>.



## Best practice

The UK NCP has developed a manual that provides clear procedural guidance.<sup>8</sup>

The Brazilian NCP's web site describes the information to be included when submitting a case/specific instance. It also provides links to a legal document setting out detailed procedures, in both Portuguese and English.<sup>9</sup>

- 11 The ANCP should make explicit whether or not the complaint has been accepted or rejected by issuing an initial assessment. The ANCP **should adopt a standard template for its initial determinations and its final statements.**
- 12 At the conclusion of the initial assessment stage for all complaints it considers, the ANCP should **prepare and publish initial assessment statements.** The ANCP Process for handling complaints should be amended to clarify that this is required for all complaints considered by the ANCP in which it is the only or lead NCP.

## Best practice

The UK NCP and Dutch NCP both publish initial assessments to their website as soon as they have concluded the initial assessment stage, after sending drafts of the statement to the parties for comment. The UK and Dutch NCP procedural guidance documents reflect this commitment.<sup>10</sup>

- 13 **Final statements should be published in a timely manner.**

## Ensure fairness and effectiveness

Delivering outcomes that promote company behaviour consistent with Guidelines in a way that improves conditions for impacted communities requires users and potential users of the specific instance process to have confidence that the process is fair and effective. Specific recommendations for ensuring fairness and effectiveness are as follows:

<sup>8</sup> See United Kingdom National Contact Point, *UK National Contact Point Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises* (January 2014) <[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)>.

<sup>9</sup> Brazilian National Contact Point, *Resolution PCN no 1/2012* (2012) <<http://www.pcn.fazenda.gov.br/assuntos/english/files/resolution-no-01.pdf>>.

<sup>10</sup> United Kingdom National Contact Point, *UK National Contact Point Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises*, above n 8 [3.8.2] – [3.8.3]; (Dutch) Ministry of Foreign Affairs, *Specific instance procedure - Dutch National Contact Point OECD Guidelines for MNEs* (2016); see also OECD Watch, *Model National Contact Point* (2007) 15 <[http://www.oecdwatch.org/publications-en/Publication\\_2223](http://www.oecdwatch.org/publications-en/Publication_2223)>.

- 14 The ANCP should **hold introductory meetings with the parties following the lodgement of a complaint** in order to gather any additional information required for the initial assessment, rather than after the initial assessment stage.
- 15 In cases where the parties agree to mediate, the ANCP should **consider employing professional mediators** in order to achieve better outcomes and relieve itself from the workload of preparing for and running mediation.
- 16 The ANCP should be **thorough in its investigation and assessment** of both domestic and foreign domiciled complaints for which it acts as lead NCP.
- 17 The ANCP is encouraged **not to be deterred from reaching a conclusion based on the evidence before it regarding compliance with the Guidelines** despite any non-cooperation from a party to a complaint.

## Best practice

In *Survival International vs Vedanta*, a specific instance complaint before the UK NCP, the company Vedanta refused to attend mediation and claimed that the UK NCP should not have jurisdiction over the matter. The UK NCP nonetheless issued a Final Statement and Follow Up Statement which addressed the facts the evidence provided by the complainant and other experts.

- 18 Where companies have agreed to implement changes and publish follow-up reports on its website, the ANCP should **utilise its follow-up procedure** to check on their progress.
- 19 The ANCP Process should be amended to require the ANCP to draw conclusions on the extent to which a remedy has been achieved, where appropriate.
- 20 The ANCP should implement a range of remedies available to it through its position within government.

## Best practice

Some NCPs are increasing their effectiveness by implementing novel remedies. In *Canada Tibet Committee vs China Gold International Resources* (2013) the Canadian NCP imposed sanctions on the breaching company, withdrawing its Trade Commissioner Services and other overseas Canadian advocacy support.<sup>11</sup>

<sup>11</sup> Canadian National Contact Point, *Final Statement on the Request for Review regarding the Operations of China Gold International Resources Corp. Ltd., at the Copper Polymetallic Mine at the Gyama Valley, Tibet Autonomous Region* (2015) <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/npc-pcn/statement-gyama-valley.aspx?lang=eng>>.

- 21 The ANCP should prepare and publish **annual reporting of its activities to the OECD Investment Committee**, ensuring that its answers are a thorough, specific and accurate reflection of its activities throughout that year.

## Improve outreach and support

The ANCP should recognise that, as part of a broader international system, it should provide support to its peers and stakeholders. This is necessary to achieve the common goal of delivering outcomes that promote company behaviour consistent with Guidelines in a way that improves conditions for impacted communities. Specific recommendations on ways to achieve this support are as follows:

- 22 A protocol for **follow-up and offering assistance should be developed for cases which have been transferred to foreign NCPs**.
- 23 The ANCP should **conduct far more outreach activities**, for example, holding workshops and trainings on the Guidelines and the specific instance process for other government departments, business communities, civil society, and any other relevant stakeholders, as well as having active and meaningful involvement in the NCP peer-review process. It should also hold an annual consultation with stakeholders as well as more regular meetings with key stakeholders. Australian Embassies and trade missions should help promote the Guidelines.

## Best practice

The Dutch NCP is part of a body called CSR Netherlands which engages with businesses, employers unions, sector associations, financial associations, media, NGOs and OECD Watch to promote the Guidelines. This involves holding workshops and presentations at conferences and other meetings. The NCP makes a strategy each year for communication and promotion. The website also has toolkits for companies to assess whether their behaviour is in line with the Guidelines.<sup>12</sup>

The Norwegian NCP actively engages with NGOs in Norway through stakeholder meetings, such as KOMpakt, and through the government's consultative forum on CSR. The NCP's website is in multiple languages. The website also has tools for companies to assess their behaviour in reference to the Guidelines, and to ascertain whether they are operating in conflict zones. The Norwegian NCP also gives presentations at business conferences and schools.<sup>13</sup>

<sup>12</sup> Ministry of Foreign Affairs, *National Contact point OECD Guidelines* <<http://www.oesorichtlijnen.nl/en>>.

<sup>13</sup> Norwegian Ministry of Foreign Affairs, *Corporate social responsibility in a global economy* (June 2011), 3 <[http://www.regjeringen.no/pages/2203320/PDFS/STM200820090010000EN\\_PDFS.pdf](http://www.regjeringen.no/pages/2203320/PDFS/STM200820090010000EN_PDFS.pdf)>.

## 2 Introduction

Business behaviour can enhance or diminish the lives of the communities and individuals with which it interacts. The private sector contributes new livelihoods, ideas, technologies and products to peoples' lives. However, business can also harm the human rights of populations through their practices including through dispossession and forced resettlement, exploitation of workers, environmental damage and harm to peoples' health. When harms of these types occur, it is crucial that people have access to redress and remedy. National Contact Points are mechanisms established under the Guidelines to provide such remedy. This report examines the operation of the ANCP and its success in providing remedy to harmed communities.

This report is part of a series based on the findings of a five-year Australian Research Council Linkage Project analysing the effectiveness of non-judicial redress mechanisms in responding to human rights violations within transnational business supply chains. A key objective of the project is to develop recommendations as to how non-judicial forms of redress can better support communities adversely impacted by business operations to access justice and have their human rights respected. These recommendations are primarily aimed at those who participate in these mechanisms, including businesses, affected communities and civil society organisations.

A focus on how people can find redress for business-related human rights abuses has been amplified by the third pillar of the United Nations Guiding Principles on Business and Human Rights. The principles on access to remedy promote the role of a range of mechanisms in ensuring remedy, ranging from company based or operational grievance mechanisms, through to the State responsibility to ensure access to judicial and non-judicial processes. During his mandate as the Special Representative of the Secretary-General to the United Nations on the issue of human rights and transnational corporations and other business enterprises Professor Ruggie developed a framework for remedy. In his 2008 report, "Protect, Respect and Remedy: A Framework for Business and Human Rights," Professor Ruggie outlined the role that the NCPs could potentially play within the context of his framework. However, he noted that "with a few exceptions, experience suggests that in practice [the NCPs] have too often failed to meet this potential".<sup>14</sup>

The people whose rights are most frequently injured are often already marginalised, socially, economically or politically. Access to remedy for these abuses is made difficult or almost impossible by failures of domestic legal systems, limited options in terms of redress mechanisms, starting imbalances of power between corporations and local communities, and distance – geographic, cultural, bureaucratic, political and economic – from decision-makers and redress mechanisms that do exist far away from the site of the harm. NCPs provide one way that those who have suffered harm due to the actions of business can access remedy. NCPs were designed as a relatively cheap way for communities, workers and individuals to access remedy, free from confusing procedural rules and precedent.

---

<sup>14</sup> John Ruggie, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, UN Doc A/ HRC/8/5 (June 2008) [98].



The ANCP is a Principal Adviser in the Foreign Investment Division of the Treasury,<sup>15</sup> supported by two public servants in the same division, all of whom have a range of other responsibilities.<sup>16</sup> According to the ANCP website, “the ANCP draws on expertise from other government agencies through an informal inter-governmental network”,<sup>17</sup> and its activities are overseen by an Oversight Committee.<sup>18</sup>

The ANCP has received 15 complaints since 2005, and only five since the introduction of the 2011 Guidelines. This is a small number of complaints compared with NCPs in other countries.<sup>19</sup> In just over 10 years, only one complaint received by the ANCP has resulted in a mutually-accepted mediated outcome, with the balance of complaints being rejected or transferred to another NCP. The ANCP has never issued a determination on whether or not a company complained of has breached the Guidelines. This review seeks to examine the reasons for the lack of utilisation of the ANCP specific instance process mechanism by potential complainants, as well as the lack of meaningful outcomes achieved.

This report examines the ANCP’s handling of the complaints it has received since 2005, and the structures and processes employed to handle these complaints. The report first looks the numbers and trends in complaints that have been submitted to the ANCP. Given that the ANCP has received relatively few complaints, it should be borne in mind when considering the findings and conclusions of this report that it is based on a relatively small sample size. While it is nonetheless useful to review how well the ANCP has been performing its function in handling the complaints that have been submitted, care should be taken in extrapolating any patterns or trends from this data. Where this is relevant to conclusions drawn in this section of the report, it is noted.

The report then presents an analysis of the key issues that emerge from a review of the ANCP complaint handling process, including a review of published statements on complaints, and the structure and processes in place to facilitate the complaint handling process. This analysis forms the basis of the recommendations. Part 8 provides a detailed comparison of the ANCP with the UK NCP. The UK NCP was chosen for the comparison because it is considered one of the highest-performing NCPs internationally and the processes adopted by the ANCP were based on the UK NCP. It is a similar jurisdiction in many respects to Australia’s in the sense that its legal and institutional environment is similar. The Annexes to this report provides a breakdown of all complaints filed and their status.

---

<sup>15</sup> Australian National Contact Point, *The Australian National Contact Point* (2011) <<http://www.ausncp.gov.au/content/Content.aspx?doc=ancp/contactpoint.htm>>.

<sup>16</sup> Meeting with Australian National Contact Point (Canberra, 22 May 2017).

<sup>17</sup> Australian National Contact Point, *The Australian National Contact Point*, above n 15.

<sup>18</sup> Australian National Contact Point, *Terms of Reference and Explanation of the Role of the ANCP Oversight Committee* (2011) <<http://www.ausncp.gov.au/content/Content.aspx?doc=ancp/oversight.htm>>.

<sup>19</sup> By comparison, the UK and New Zealand NCPs received 14 and 6 complaints respectively in the January 2013–June 2014 period: see OECD Watch, *Assessment of NCP Performance in the 2013–2014 Implementation Cycle: OECD Watch Submission to the 2014 Annual Meeting of the National Contact Points* (June 2014) 9 <[http://www.oecdwatch.org/publications-en/Publication\\_4090/@download/fullfile/OECD 20Watch 20submission 20to 20the 202014 20Annual 20Meeting 20of 20the 20NCP.pdf](http://www.oecdwatch.org/publications-en/Publication_4090/@download/fullfile/OECD%20Watch%20submission%20to%20the%202014%20Annual%20Meeting%20of%20the%20NCP.pdf)>.

### 3 Methodology

This study on the ANCP reviews the structure, processes and practice of the ANCP. In particular, it focuses on how the ANCP has handled the 15 complaints it has received.<sup>20</sup> The study is based on a review of all documents sourced from the ANCP's website, and the case databases available from the OECD,<sup>21</sup> and OECD Watch. These documents include:

- statements published by the ANCP on its website regarding each complaint submitted that has been finalised;
- entries for the Australian NCP on the OECD NCP specific instance database and OECD Watch case database, which were matched up with the statements on the ANCP website, where possible, in order to determine party names and outcomes for cases that were transferred to another country's NCP;
- ANCP Process for handling complaints (**ANCP Process**), as well as the document upon which the ANCP Process was based, the UK NCP Process for handling complaints under the OECD Guidelines for Multinational Enterprises (**UK NCP Process**);
- all other documents and pages published on the ANCP website, including but not limited to annual reports, minutes of meetings, and guidance notes; and
- press releases and media articles from complainants that submitted complaints to the ANCP.

The key issues identified following this analysis were then consolidated into groups of like factors. A common theme was identified for each group, and these in turn became the chapter headings for this report, with the key issues forming the subheadings. Secondary sources, including reports by OECD Watch and Amnesty International were drawn upon to assist with naming the issues that emerged from the analysis of the ANCP, and to aid in consistency with identifying issues that emerge internationally.

Prior to publication, a draft copy of this report was provided to the ANCP for comment. The author, Dr Shelley Marshall and Keren Adams of the Human Rights Law Centre, who provided advice in the preparation of this report, met with the ANCP in Canberra in May 2017 to discuss the report and its findings. Further information about the operation of the ANCP was gathered from that meeting. Where that information is not otherwise publically available, the meeting is noted as the source of the information.

---

<sup>20</sup> This figure is based on the specific instance complaints currently publically available on the OECD NCP specific instance database, OECD Watch case database, and ANCP website (discussed further below). Because there is no consistent method of reporting, the figure may not reflect the number of specific instance complaints received by the ANCP to date.

<sup>21</sup> OECD, *OECD Guidelines for Multinational Enterprises Database of Specific Instances – Australia* (2017) <<http://mneguidelines.oecd.org/database/>>. The ANCP advised the author that the OECD NCP database is more reliable than the OECD Watch database, as although the ANCP website is out of date, the ANCP endeavour to officially advise the OECD of all specific instances received. However, for whatever reasons, that does that seem to be the case, with the official OECD NCP database entries for Australia seeming to return only eight of thirteen unique instance complaints apparently filed with the Australian NCP. Therefore, the OECD Watch database has been used to complement the detail provided by the official OECD NCP database.

## 4 Background

The Guidelines provide a non-judicial mechanism for addressing the conduct of multinational companies in the form of the specific instance process operated by the respective NCP of an adhering country.

The specific instance process permits any interested person to submit a complaint about the activities of a multinational enterprise relevant to the Guidelines to the NCP of the country in which the company is registered or is operating. The NCP then considers whether or not to accept the complaint, and if so, offers its “good offices” and/or mediation in an effort to bring the parties together to resolve the dispute. If this is unsuccessful the NCP may examine the complaint and issue a determination as to whether or not there has been a breach of the Guidelines.

### 4.1 Role of NCPs in providing remedy business-related human rights and other abuses

Generally speaking, as the specific instance process is a non-judicial and voluntary mechanism, NCPs do not have any powers of enforcement, cannot impose penalties on companies or award compensation to victims of violations.<sup>22</sup> However, this does not mean that NCPs cannot play an important role in promoting respect for and compliance with the Guidelines, through achieving mediated outcomes, the impact of issuing determinations of breaches of Guidelines, and other creative ways of addressing companies that do not comply with the Guidelines.<sup>23</sup>

OECD Watch has suggested that a full remedy requires three components — cessation of the violation, reparation of harm that has occurred, and adoption of measures to prevent future violations. OECD Watch also found in its review of 15 years of NCP cases and their contribution to improve access to remedy for victims of corporate misconduct that “remedy remains rare” and NCP outcomes that achieve full remedy are the exception, rather than the norm.<sup>24</sup>

---

<sup>22</sup> See Amnesty International, *Obstacle Course: How the UK's National Contact Point Handles Human Rights Complaints under the OECD Guidelines for Multinational Enterprises* (2016) 12 <[https://www.amnesty.org.uk/sites/default/files/uk\\_ncp\\_complaints\\_handling\\_full\\_report\\_lores\\_0.pdf](https://www.amnesty.org.uk/sites/default/files/uk_ncp_complaints_handling_full_report_lores_0.pdf)>.

<sup>23</sup> For example, the Canadian NCP imposed sanctions on a company that refused to participate in the mediation process: see OECD Watch, *Remedy Remains Rare: An Analysis of 15 Years of NCP Cases and Their Contribution to Improve Access to Remedy for Victims of Corporate Misconduct* (2015) 46 <[http://www.oecdwatch.org/publications-en/Publication\\_4201](http://www.oecdwatch.org/publications-en/Publication_4201)>.

<sup>24</sup> OECD Watch, *Remedy Remains Rare: An Analysis of 15 Years of NCP Cases and Their Contribution to Improve Access to Remedy for Victims of Corporate Misconduct* ('Remedy Remains Rare Report') (2015) 17 <[http://www.oecdwatch.org/publications-en/Publication\\_4201](http://www.oecdwatch.org/publications-en/Publication_4201)>.



Workers striking at the BHP-operated Cerrejón mine, Colombia. The banner bears a quote credited to Leon Trotsky, “whoever kneels before a fait accompli is incapable of facing the future” (author translation).  
Source: [londonminingnetwork.org](http://londonminingnetwork.org)

## Recommended remedies

OECD Watch identifies four results of complaint procedures which could contribute to positive changes that may amount to an effective remedy:

- A statement (either by the NCP or company) acknowledging wrongdoing;
- An improvement in corporate policy and/or due diligence procedure;
- Directly improved conditions for victims of corporate abuses; and
- Compensation for harms.<sup>25</sup>

The UN Guiding Principles on Business and Human Rights and the UN Working Group on Human Rights and Transnational Corporations make it clear that a non-judicial grievance mechanism ‘should be able to “counteract or make good” any human rights harms that have occurred.’<sup>26</sup>

<sup>25</sup> Ibid, 11-18.

<sup>26</sup> Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises (2014) UN Doc A/HRC/26/25, 9 [23].



#### 4.1.1 Role of the ANCP in the Australian framework for remedy for business-related human rights and other abuses

Australia has typically been slow to address human rights abuses linked to Australian business operating overseas or companies operating in Australia.<sup>27</sup> Australia does not have a legal framework that specifically regulates the human rights obligations of Australian corporations overseas,<sup>28</sup> although it has implemented anti-corruption laws that impact the operation of Australian companies that interact with foreign governments abroad,<sup>29</sup> and human rights abuses often coincide with the presence of corruption.

In 2016, Australia announced its intention to undertake a national consultation on the implementation of the United Nations Guiding Principles for Business and Human Rights (UNGPs) over 2016-17.<sup>30</sup> This followed calls from Australian civil society for the government to develop a National Action Plan for implementing the UNGPs.<sup>31</sup>

Under Australian law, companies can be found guilty for offences in the criminal code, and Australia takes a broad approach to corporate fault based on an examination of corporate culture.<sup>32</sup> Australian law does provide some potential for legal remedy for certain actions of companies overseas, including some international crimes such as slavery, genocide, torture, and crimes against humanity.

Other than the ANCP, Australia has few non-judicial mechanisms that might provide redress to those harmed by Australian companies operating abroad. For example, the Australian export credit agency, Efic, launched a complaints mechanism in 2012, which accepts complaints from any individual or group affected or likely to be affected by Efic's activities, or a project that has received support from Efic.<sup>33</sup>

---

<sup>27</sup> For more on remedy for business-related human rights abuses in Australia, see May Miller-Dawkins, Shelley Marshall and Kate Macdonald, *Transnational Business-Related Human Rights Abuses in Australia* (2016) <<http://corporateaccountabilityresearch.net/njm-report-iii-redress-in-australia>>.

<sup>28</sup> Committee on the Elimination of Racial Discrimination, above n 1.

<sup>29</sup> See for example, *Criminal Code Act 1995* (Cth) s 70.2, which implements the requirement in the OECD Anti-Bribery Convention to make it an offence to bribe a foreign public official. However, unlike other implementing countries like the UK and the US, Australia has had no successful prosecutions under its anti-bribery of foreign public officials laws: see Cindy Davids and Grant Schubert, 'The Global Architecture of Foreign Bribery Control: Applying the OECD Bribery Convention' in Adam Graycar and Russell G Smith (eds), *Handbook of Global Research and Practice in Corruption* (Edward Elgar, 2011) 319, 326, 328, 337; see also OECD, *Progress Report 2015: Assessing Enforcement of the OECD Convention on Combatting Foreign Bribery* (2015) 15.

<sup>30</sup> Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia, Addendum, Advance Version*, UN Doc A/HRC/31/14/Add.1 (29 February 2016) [63].

<sup>31</sup> These calls include a letter from a coalition of NGOs and a policy paper: see Human Rights Law Centre, *Letter dated 27 January 2016 from Australian Lawyers for Human Rights; Castan Centre for Human Rights Law; Human Rights Law Centre; Jesuit Social Services; Jubilee Australia Plan International Australia; Mineral Policy Institute; Oxfam Australia; Save the Children Australia; The Australasian Centre for Corporate Responsibility; The Australia Institute; UNICEF Australia; Uniting Church of Australia; and World Vision Australia* <<http://hrlc.org.au/wp-content/uploads/2016/01/NAP-civil-society-letter.pdf>> and Australian Lawyers for Human Rights, *Policy Paper on an Australian National Action Plan (NAP) to implement the UN Guiding Principles on Business and Human Rights (UNGPs)* (Policy Paper, 16 February 2016) <<http://alhr.org.au/wp/wp-content/uploads/2016/03/NAP-Policy-Paper.pdf>>.

<sup>32</sup> Jennifer Zerk, 'Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies' (2013) *Office of the United Nations High Commissioner for Human Rights* 33–4.

<sup>33</sup> See Efic, *Our Approach to Complaints* (2012) <<https://www.efic.gov.au/about-efic/our-organisation/complaints-mechanism>>.

## 4.2 Impact of the 2011 Review of the Guidelines

The ANCP was reformed following the 2011 review of the Guidelines. This section outlines the changes made in response to the review.

### 4.2.1 Creation of the Oversight Committee

In 2012 the ANCP Oversight Committee was established as a direct response to the 2011 review of the Guidelines. The individual who currently constitutes the ANCP is the chair of the Oversight Committee,<sup>34</sup> which also includes representatives from various government departments: the Department of Foreign Affairs and Trade, the Department of Industry, the Export Finance and Insurance Corporation, the Department of Employment, and the Australian Trade Commission. There is capacity for representatives from other departments to participate in Oversight Committee meetings when issues of particular relevance arise.<sup>35</sup>

The main function of the Oversight Committee is to assist the ANCP when complaints are made and there are contentious issues to be considered, and members are expected to meet biannually. The only meeting of which there is a record on the ANCP website is the initial meeting of November 2012.<sup>36</sup> However, the ANCP has indicated that the Oversight Committee has in fact been meeting regularly, though a decision was taken not to publish the minutes of those meetings as they may contain “sensitive” information.<sup>37</sup>

### 4.2.2 Complaints could allege breaches by Australian multinationals and multinationals operating in Australia of the human rights chapter

The introduction of the chapter on human rights in 2011 gave the ANCP the capacity to examine complaints alleging breaches of human rights by Australian companies and companies operating in Australia. Australian multinational companies, including mining companies and financial institutions, operate around the world in situations that raise human rights concerns. Multinational companies are also contracted to do work in Australia in carrying out government policies that have proved controversial locally. Unlike other NCPs like the UK NCP, the introduction of the human rights chapter has not seen a significant spike in claims filed with the ANCP, either because of a lack of awareness, trust in the process, will, or resources by potential complainants. Since the 2011 Guidelines came into effect, three complaints have been submitted with the ANCP alleging breaches of the human rights chapter. Two complaints have been rejected; one complaint is still pending.

---

<sup>34</sup> Currently the ANCP is a Principal Adviser in the Foreign Investment and Trade Policy Division within the Treasury: see Australian National Contact Point, *The Australian National Contact Point* <<http://www.ausncp.gov.au/content/Content.aspx?doc=ancp/contactpoint.htm>>, above n 15.

<sup>35</sup> *ibid.*

<sup>36</sup> Australian National Contact Point, *AusNCP — Publications* (7 October 2016) <<http://www.ausncp.gov.au/content/Content.aspx?doc=publications.htm>>.

<sup>37</sup> Meeting with the Australian National Contact Point (Canberra, 22 May 2017).

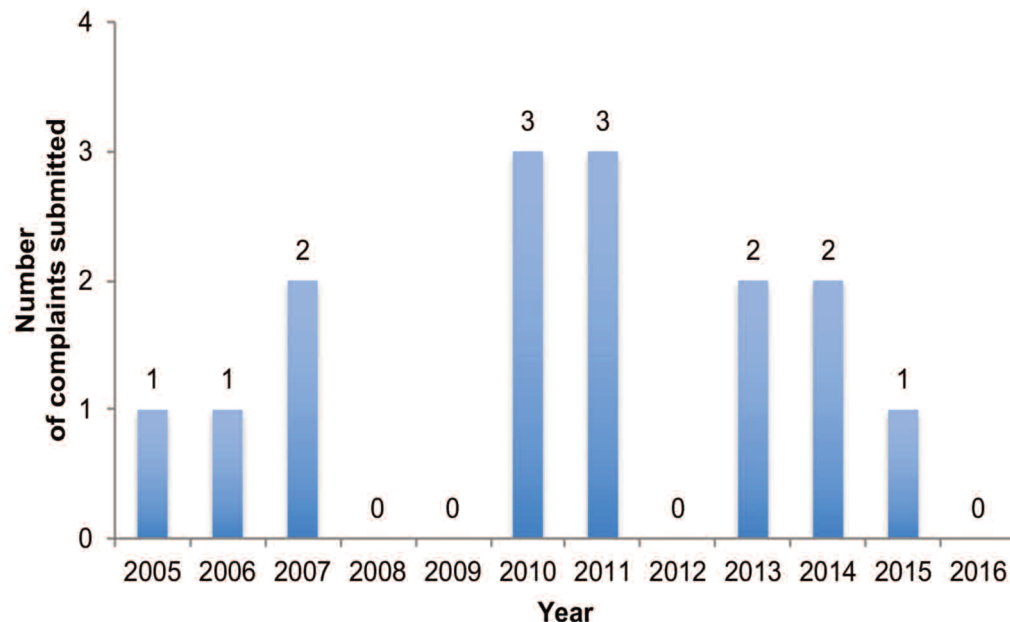
## 5 Analysis of complaints submitted

### 5.1 Trends in complaints

#### 5.1.1 Overview since 2005

Since 2005, 15 complaints have been submitted to the ANCP.<sup>38</sup> As illustrated in Figure 1, the number of cases peaked between 2010 and 2011, with three complaints submitted each year.

Figure 1: Number of complaints submitted each year



#### 5.1.2 Status of complaints

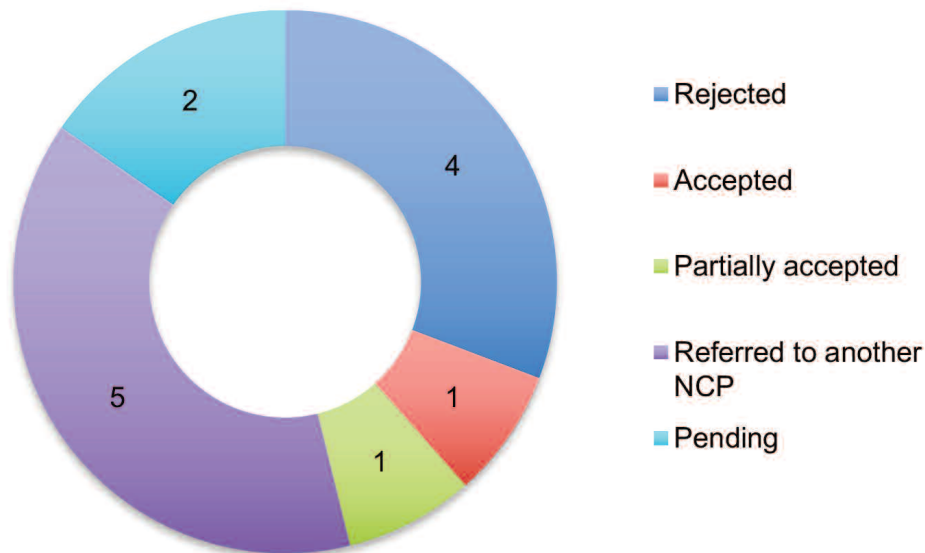
As at the date of this report, based on publically available information, 15 complaints have been filed with the ANCP, 13 of those unique. That is, while two complaints were filed against ANZ Bank financing a logging company in Papua New Guinea, they were addressed by the ANCP as one complaint. Likewise, while two complaints were filed against BHP Billiton and Xstrata respectively regarding the Cerrejón mine, these were addressed together by the ANCP as one

<sup>38</sup> This figure is based on a combined total from the OECD NCP database, the ANCP website, and OECD Watch. This figure includes a complaint submitted in relation to *Rubber production in Sri Lanka* (listed on the OECD NCP database), and a complaint submitted by Equitable Cambodia and Inclusive Development International (listed on the OECD Watch case database), neither of which are listed on the ANCP website but are mentioned as currently being considered by the ANCP on the respective databases on which they appear.

complaint. Therefore, for the analysis in this section, they will only be counted once each. Complaints have been sorted into four categories,<sup>39</sup> namely:

- **Accepted** — complaints that have been fully accepted following initial assessment;
- **Partially accepted** — complaints that have been accepted in part following initial assessment;
- **Referred to another NCP** — complaints relating to activities outside of Australia that have been referred to the local NCP to act as lead NCP;
- **Rejected** — complaints that have been rejected following initial assessment; and
- **Pending** — complaints that have been filed in which no initial assessment or final statement has yet been issued.

Figure 2: Status of complaints submitted to the ANCP

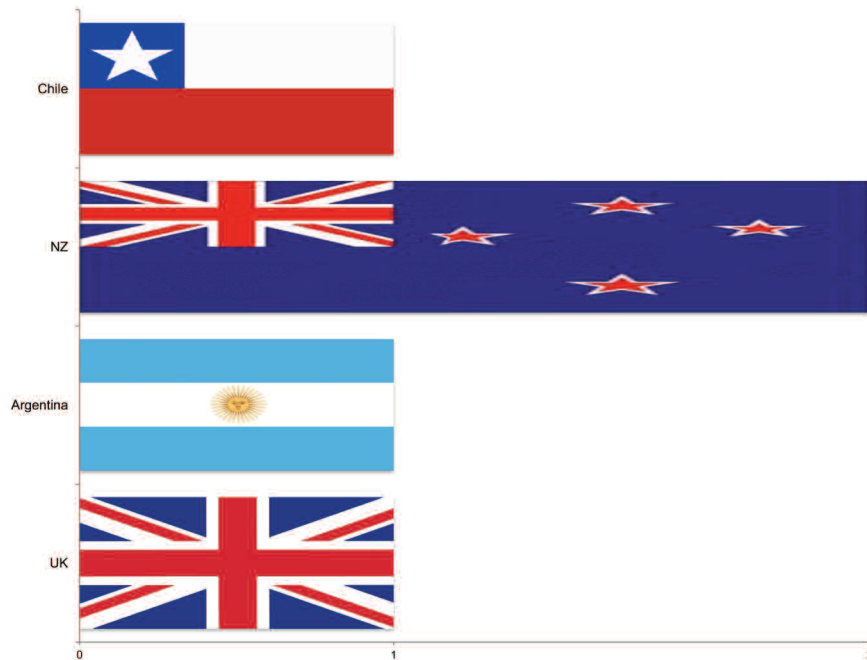


As shown in Figure 2 above, the ANCP is not involved with most complaints beyond the initial investigation stage, with 9 out of 13 complaints either referred to another NCP (five complaints) or rejected after initial assessment (four complaints). As complaints may be filed either with the NCP of the country in which the company operates, or with the NCP of the country in which the company is registered, complainants often submit the same complaint to both NCPs, or to a series of NCPs in the case of consortiums of companies or joint ventures. Where this is the case, the OECD Procedural Guidance provides for coordination between NCPs, which includes the NCPs deciding which NCP will take the lead. Figure 3 shows the NCPs to which the ANCP has referred complaints and in which the foreign NCP has agreed to accept the case as lead NCP.

<sup>39</sup> Categories have been adopted from Amnesty International, above n 22, 17.



Figure 3: Other NCPs to which the ANCP has referred complaints, by amount of complaints referred



### 5.1.3 Timeframe of assessment, examination and mediation, conclusion

NCPs are required to assess, conduct mediation, or make a determination as to whether there has been a breach of the Guidelines, and conclude complaints within one year. The ANCP Process sets out that the ANCP has committed to complete each of these key stages within the following time frames:

- Stage 1 — from receipt of complaint to Initial Assessment – three months;
- Stage 2 — from acceptance of a case to conclusion of mediation or examination – six months; and
- Stage 3 — drafting and publication of Final Statement – three months.<sup>40</sup>

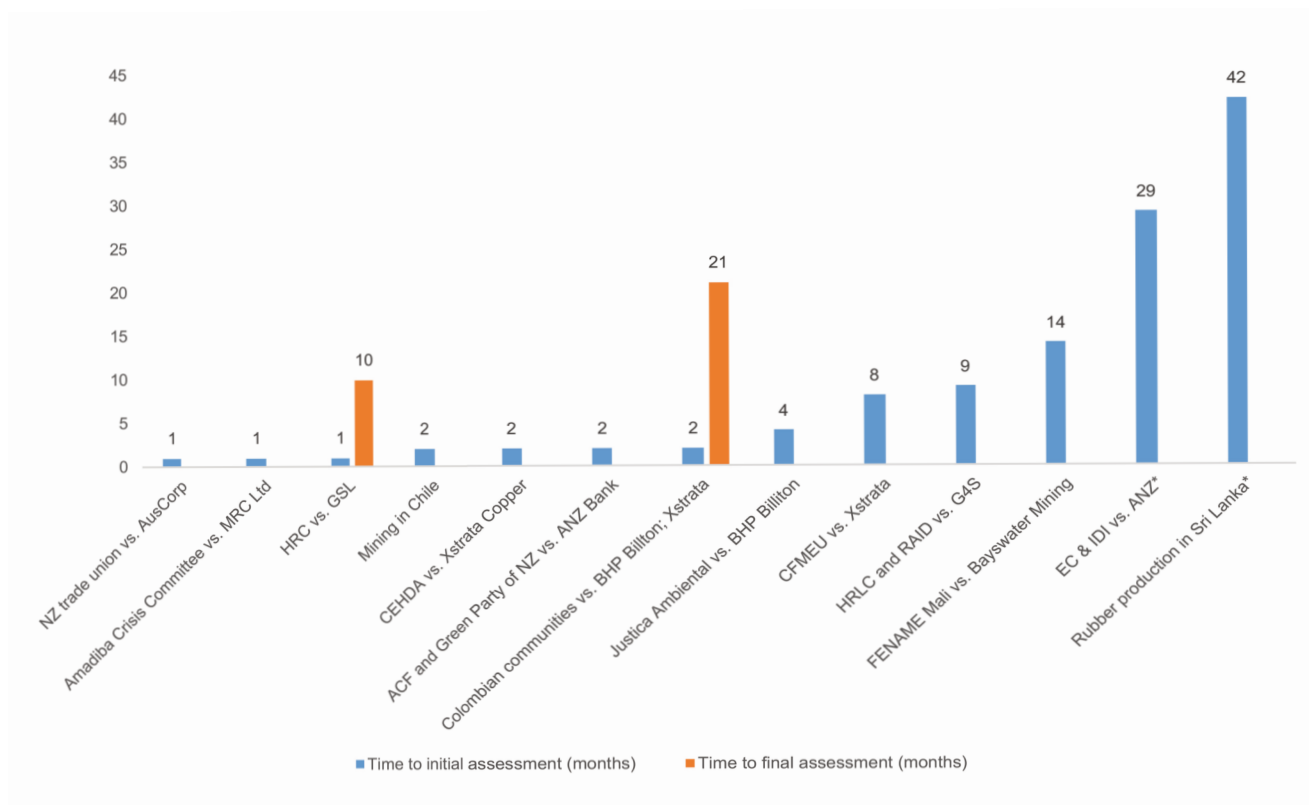
Despite the ANCP committing to complete each stage within its respective timeframe, the ANCP Process states that flexibility may be required to account for delays occasioned by circumstances beyond its control, but that this will be explained to the parties who will then be informed of a revised timetable.<sup>41</sup>

<sup>40</sup> Australian National Contact Point, *Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises*, above n 2, [9]–[10].

<sup>41</sup> Ibid [11].

Figure 4: Time taken by the ANCP for dealing with complaints, in months, as at end of May 2017<sup>42</sup>

\*Pending initial assessment



An analysis of the above data and the corresponding statements issued by the ANCP reveals the following:

- Prior to 2011, the ANCP largely managed to adhere to its timeframe of three months for stage one — initial assessment: prior to 2011, the ANCP typically took two months to make an initial assessment.<sup>43</sup> However, since 2011, which also coincides with the change of government, the ANCP has not adhered to its own timeframes. The ANCP's own processes state that it should make an initial assessment within three months. Astoundingly, two complaints have been pending, without update on the ANCP website, for over three and a half years (*Rubber production in Sri Lanka*, lodged 20 November 2013) and two and a half years (*EC and IDI vs. ANZ*, lodged 6 October 2014). In *FENAME Mali*

<sup>42</sup> The chart at Figure 4 reflects the time taken to complete the initial assessment stage, not the time taken to publish a statement on the initial assessment, as the ANCP does not appear to prepare nor publish statements on initial assessments. Therefore, the timeframe for the initial assessment stage has been taken to be: for rejected complaints — the time between the date filed and the date of the ANCP's statement on the complaint; for accepted or partially accepted complaints — the time between the date filed and the date at which the ANCP claims to have accepted the case as recorded in its final statement on the complaint; for transferred complaints — the time between the date filed and the date at which the ANCP transferred the case, or where that is unavailable, the date at which the home NCP agreed to accept the complaint, as recorded in its final statement on the complaint.

<sup>43</sup> To reflect the typical amount of time the ANCP takes to make an initial assessment, the median time taken has been used here instead of the average time taken. Due to the small amount of complaints handled by the ANCP, and therefore the resulting small data set, the "average" complaint handling time is too strongly influenced by a small number of outlying values to provide an accurate reflection of the typical amount of time taken by the ANCP to make an initial assessment.

*vs. Bayswater Mining* (lodged 9 October 2015), the ANCP took over a year to make an initial determination (published December 2016). No reason was cited by the ANCP for the delay. The delay is particularly extraordinary given the complaint was ultimately dismissed because the entity the subject of the complaint was not found to be registered in Australia, which could be determined relatively quickly with a standard online company search. The ANCP also took more than double the amount of time to make an initial determination in *CFMEU vs. Xstrata*, and triple the amount of time in *Human Rights Law Centre and RAID vs. G4S*.

- *It is difficult to assess adherence with the time frame for stage two because of the failure to publish updates and statements:* as the ANCP only seems to publish statements once its involvement in the complaint has ceased, for complaints that proceed to the mediation stage it is not always easy to demarcate when the initial assessment stage ends and the mediation process begins, and therefore whether or not the ANCP has adhered to its timeframes. For example, in *CFMEU vs. Xstrata*, it is difficult to tell whether the ANCP accepted the case and then closed it for its inability to have the parties agree to mediate, or rejected it (see section 7.2.5).
- *Complaints that proceed to mediation far exceed the recommended timeframe for resolving complaints:* the two complaints that were handled by ANCP as lead NCP through to the mediation stage, *Human Rights Council of Australia vs. GSL* and *Colombian communities vs. BHP Billiton — Cerrejón Coal*, far exceeded the six month timeframe prescribed in the guidelines. These cases are discussed in more detail below.

### **CASE STUDY 1: Delay mutually agreed to achieve quality outcome in *Human Rights Council of Australia vs. GSL***

A complaint against GSL, contracted by the Australian Government to implement practical arrangements for immigration detention, was partially accepted by the ANCP. Both parties agreed to mediation, and the parties reached mutually agreed outcomes regarding changes GSL would make to its procedures and policies.

In its evaluation of the GSL specific instance complaint, the ANCP notes in relation to the approximately 10 months it took to resolve the complaint that, “although the time taken to complete the specific instance substantially exceeded the ... period set out in the ANCP’s operational guidelines, the parties and the ANCP agree that the extra time was needed to obtain a quality outcome” and that “many factors including resources available to the parties and the ANCP, and the complexity of the issues will obviously influence the duration of a specific instance”.<sup>44</sup> Nonetheless, the complainant gave feedback that “ANCP adhered to the timeframes established ... any delays were clearly articulated and explained to all parties”, and the case is recognised by OECD Watch as a best practice example of the specific instance process.<sup>45</sup>

<sup>44</sup> Australian National Contact Point, *ANCP’s Evaluation of the GSL Specific Instance Process* (13 October 2006) 2 [7] <[http://www.ausncp.gov.au/content/publications/reports/general/GSL\\_Evaluation.pdf](http://www.ausncp.gov.au/content/publications/reports/general/GSL_Evaluation.pdf)>.

<sup>45</sup> Ibid 5.

## CASE STUDY 2: Delay due to awaiting external review of BHP Billiton's operations in Colombian Communities vs. BHP Billiton — Cerrejón Coal

The ANCP accepted this complaint in September 2007, and shortly thereafter the companies provided information to the ANCP that they had commissioned an independent review on their activities. As some of the activities under review fell within the scope of the complaint, it was agreed that the complaint would be suspended pending the outcome of the independent review, which was expected early 2008. The report of the findings of the independent review was released in February 2008, therefore occasioning a delay of around four months to the ANCP specific instance process. However, it appears that suspending the complaint pending the outcome of the review was not detrimental to the process, as the company undertook to implement the recommendations from the report, which addressed many issues the subject of complaint.<sup>46</sup>



## 5.2 Categorisation of complaints by industry and issue

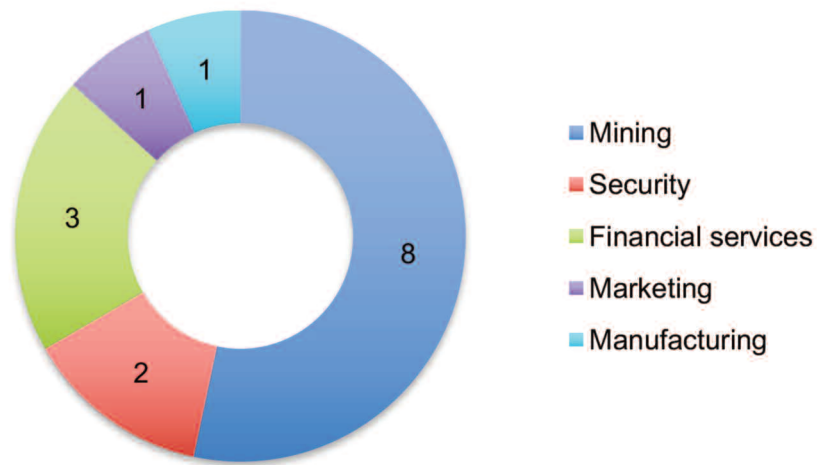
This section considers the 15 complaints that have been submitted to the ANCP.<sup>47</sup> As shown in Figure 5 below, five industries, mining, security, financial services, marketing, and agriculture are represented in complaints submitted to the ANCP. The majority of complaints submitted relate to mining companies. In those mining complaints, two companies, Xstrata and BHP Billiton, are the subjects of half of those complaints. Both financial services complaints relate to ANZ Bank, and both security complaints relate to companies contracted to manage offshore immigration detention centres on behalf of the Australian Government.

<sup>46</sup> Australian National Contact Point, Final Statement by the Australian National Contact Point: BHP – Cerrejón Coal Specific Instance (12 June 2009) [11], [13]–[15] <[http://www.ausncp.gov.au/content/publications/reports/general/Final\\_Statement\\_BHP\\_Billiton\\_Cerrejon\\_Coal.pdf](http://www.ausncp.gov.au/content/publications/reports/general/Final_Statement_BHP_Billiton_Cerrejon_Coal.pdf)>.

<sup>47</sup> In this section each complaint is counted separately, rather than addressed together as in the section above.



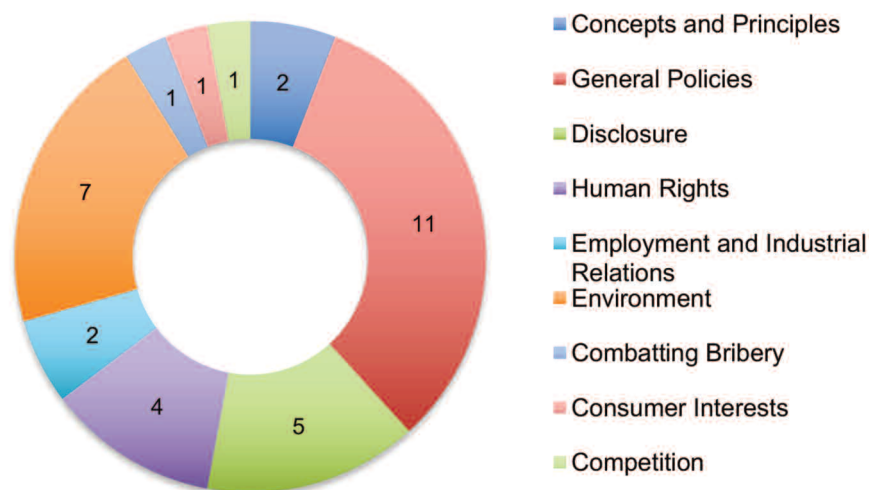
Figure 5: Industries the subject of complaints



### 5.3 Categorisation of complaints by harm caused

Figure 6 shows that the majority of complaints submitted allege breaches of the General Policies chapter, -followed by the Environment chapter, and Disclosure and Human Rights chapters respectively. It should be noted that while the data underlying Figure 6 reflects complaints received since 2005, the Human Rights chapter was not introduced until the 2011 OECD Guidelines. The majority of complaints submitted to the ANCP were submitted before the introduction of the 2011 Guidelines. Not all complaints submitted to the ANCP are represented in Figure 6 below due to the failure of the ANCP to identify in some statements which chapters the complainant alleged were breached.

Figure 6: Guidelines chapters relevant to breaches of the Guidelines alleged in complaints<sup>48</sup>



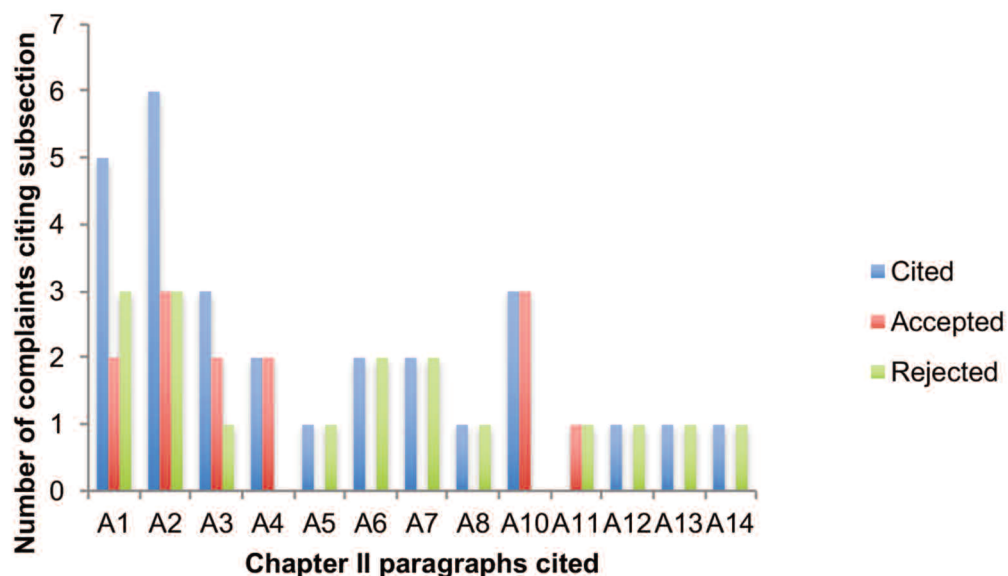
<sup>48</sup> Due to ANCP statements not consistently citing sections of the Guidelines alleged to have been breached, data on Guidelines chapters cited in complaints is taken from the OECD Watch case database, except for *CFMEU vs. Xstrata*, which was taken from the ANCP statement which included these details, as well as *AusCorp* and *Rubber production in Sri Lanka*, which were both excluded from consideration as no details could be found about the breaches of the Guidelines alleged in those complaints on the ANCP website, the OECD NCP specific instance database or OECD Watch case database.

## FINDING 1: Shift in most commonly alleged breaches cited in complaints since introduction of 2011 Guidelines from “Environment” to “Human Rights”

Since 2005 but prior to the introduction of the 2011 Guidelines, Environment was the chapter of the Guidelines most commonly cited in complaints, and remains the most commonly cited chapter overall as most complaints were submitted to the ANCP during this timeframe.<sup>49</sup> However, Human Rights is the chapter of the Guidelines most commonly cited in complaints submitted since the introduction of the 2011 Guidelines, being cited in all four complaints submitted since that time.<sup>50</sup> Contrastingly, Environment was cited by only one of those four complaints.<sup>51</sup>

As seen in Figure 6 above, the most cited sections of the Guidelines are from Chapter II “General Policies”. Chapter II is divided in two parts, with Part A focused on policies and practices companies should adopt to ensure compliance with relevant law and standards in the companies in which they operate, and Part B focused on outreach efforts and community engagement that companies should undertake. The paragraphs in Part B are most commonly cited, as show in Figure 7 below.

Figure 7: Alleged breaches of General Policies chapter<sup>52</sup>



<sup>49</sup> See Colombian Communities vs. Xstrata, Colombian Communities vs. BHP Billiton, Human Rights Council of Australia vs. GSL, ACF vs. ANZ, Green Party of New Zealand vs. ANZ, CFMEU vs. Xstrata, CEDHA vs. Xstrata, Justiça Ambiental vs. BHP Billiton, AusCorp.

<sup>50</sup> See Australian Human Rights Law Centre and RAID vs. G4S, Amadiba vs. MRC, a complaint concerning mining in Chile, EC and IDI vs. ANZ.

<sup>51</sup> See Amadiba vs. MRC.

<sup>52</sup> Due to ANCP statements not consistently citing sections of the Guidelines alleged to have been breached, data on Guidelines chapters cited in complaints is taken from the OECD Watch case database, except for *CFMEU vs. Xstrata*, which was taken from the ANCP statement which included these details, as well as *AusCorp* and *Rubber production in Sri Lanka*, which were both excluded from consideration as no details could be found about the breaches of the Guidelines alleged in those complaints on the ANCP website, the OECD NCP specific instance database or OECD Watch case database.

As shown in Figure 7 above, in complaints that have been accepted by the ANCP, the paragraphs most commonly cited are A1, A2, A3, A4, A10, and A11. However, given the small number of complaints considered by the ANCP, and that for each section cited, almost as many complaints have been rejected as have been accepted, this data does not appear to evidence any meaningful pattern about the types of complaints the ANCP is more likely to accept based on breach alleged.

## **Chapter II: General Policies paragraphs most commonly cited in the accepted complaints handled or led by the ANCP**

Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard:

### **A. Enterprises should:**

- 1 Contribute to economic, environmental and social progress with a view to achieving sustainable development.
- 2 Respect the internationally recognised human rights of those affected by their activities.
- 3 Encourage local capacity building through close co-operation with the local community, including business interests, as well as developing the enterprise's activities in domestic and foreign markets, consistent with the need for sound commercial practice.
- 4 Encourage human capital formation, in particular by creating employment opportunities and facilitating training opportunities for employees.
- 10 Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation.
- 11 Avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur.
- 12 Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship.
- 13 In addition to addressing adverse impacts in relation to matters covered by the Guidelines, encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of responsible business conduct compatible with the Guidelines.

By way of comparison, the paragraphs cited by complaints rejected by the ANCP and that were not cited in complaints accepted by the ANCP were A5, A6, A7, and A8.

## Chapter II: General Policies paragraphs most commonly cited in the 4 rejected complaints handled by the ANCP

- 5 Refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to human rights, environmental, health, safety, labour, taxation, financial incentives, or other issues.
- 6 Support and uphold good corporate governance principles and develop and apply good corporate governance practices, including throughout enterprise groups.
- 7 Develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate.
- 8 Promote awareness of and compliance by workers employed by multinational enterprises with respect to company policies through appropriate dissemination of these policies, including through training programmes.



Workers on a site operated by BCM International. A complaint was made to the ANCP about BCM's allegedly unfair dismissal of workers on a site in Mali. The ANCP took over a year to respond, ultimately rejecting the complaint because it couldn't find any evidence that BCM was registered in Australia.  
*Source: bcmgh.com*



## 6 Complaints submitted and complainants' objectives

### 6.1 Complaints by industry

An analysis of the complaints by industry does not seem to reveal any patterns about acceptance and rejection rate.

Figure 8: Industry and case status



#### KEY FINDING 2: ANCP has rejected complaints regarding the security industry and financial services industry

While Figure 8 is accurate in its depiction of complaint status by industry, our methodology has impacted the finding. The two cases rejected in financial services and the two cases accepted in mining relate to the same company and facts in each industry respectively, but have been counted twice as they are separate complaints.

<sup>53</sup> Figure 8 includes the three complaints brought by unions regarding labour practices at their respective companies. It includes *EC & IDI vs ANZ Bank* and *Rubber production in Sri Lanka*, even though it is unclear whether or not these complaints have been accepted or not, though it has been assumed based on the information available.

Further, our study was hampered by the lack of information published by the ANCP. While Figure 8 shows one complaint accepted in the financial services industry, this is unconfirmed as no information is available from the ANCP on this complaint. Information is available on this case solely from OECD Watch.

In the partially accepted case involving security, *Human Rights Council of Australia vs. GSL*, the complainants' extensive complaints about human rights abuses were rejected in favour of the few regarding the policies and procedures of the company.

We are concerned that decisions concerning cases in the security and financial services industry appear to be influenced by the lack of independence from government of the ANCP and the application of too high an evidentiary threshold to the question of “investment nexus”.

## 6.2 Objectives of complainants

As voluntary and non-judicial mechanisms, NCPs are limited in what they can achieve compared with, for example, a domestic court. OECD Watch identifies four results of complaint procedures that may amount to an effective remedy, namely:

- a statement (either by the NCP or the company) acknowledging wrongdoing;
- an improvement in corporate policy and/or due diligence procedure;
- directly improved conditions for victims of corporate abuses; and
- compensation for harms.<sup>54</sup>

An analysis of the complaints submitted to the ANCP show that complainants generally seek remedies like the above to address the breaches of the Guidelines alleged.

### 6.2.1 Complaints involving a company-government nexus: Complainants' Objectives

There have been two complaints submitted to the ANCP involving a company-government nexus and have exclusively comprised complaints against companies contracted to oversee and manage immigration detention of asylum seekers. Many of the objectives are similar, including that the companies make contracts with the Australian Government consistent with the requirements of international human rights law and that companies refuse to detain persons in violation of international human rights law. Listed below is a summary of the objectives sought in those complaints.

---

<sup>54</sup> Remedy Remains Rare Report, above n 23, 10, 11, 18.

### KEY FINDING 3: Objectives in complaints against security companies

The complaints against security companies have sought that the specific instance process encourage or require companies to:

- seek assurances from the Australian Government that it has complied with the requirements of international human rights law;
- seek advice from human rights oversight bodies and civil society;
- seek commitments regarding a human rights framework for all future contracts;
- commit to payment of financial compensation for asylum seekers killed or injured under the supervision of the company, in accordance with the company's own policies;
- report on outcomes of any internal investigations and disciplinary actions;
- disclose key documents regarding company processes and procedures; and
- commit to human rights training of its employees and subcontracts.

The table below compares the objectives sought in *Human Rights Council of Australia vs. GSL* with those sought in *Human Rights Law Centre vs. G4S*.

**Table 1: Summary of complainants in security cases submitted to the ANCP**

Partially accepted <i>Human Rights Council of Australia vs. Global Services Limited</i> (2006)	Rejected <i>Human Rights Law Centre and RAID vs. G4S</i> (2015)
<ul style="list-style-type: none"> <li>• That Global Services Limited (GSL) should <b>seek assurances</b> from Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) that it has complied with the requirements of <i>Convention on the Rights of the Child</i>, and if this has not been met, GSL should refuse detention, and <b>it should be a term of the contract</b> that GSL is not required to detain a child if the requirements are not met;</li> <li>• GSL should <b>seek assurances</b> that a person is not an "indefinite detainee", and if they are, they should refuse to detain them, and <b>it should be a term of the contract</b> that they are not required to detain an indefinite detainee;</li> <li>• GSL <b>should refuse to detain</b> or continue to detain: <ul style="list-style-type: none"> <li>◦ any person for lengthy and unreasonable periods unless a Court has reviewed the detention and determined that it is appropriate, necessary and not arbitrary; and</li> <li>◦ unless assured by DIMIA there is continuing appropriate justification;</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• <b>Commitments with respect to a human rights framework for any future contracts</b> it may enter into with respect to the MIRPC or any other Australian immigration detention facilities including by: <ul style="list-style-type: none"> <li>◦ <b>refusing to detain people</b> for prolonged periods unless that detention has been determined by a court to be appropriate, necessary and not arbitrary in light of the person's personal circumstances;</li> <li>◦ <b>refusing to mandatorily detain asylum seekers</b> under the age of 18; and</li> <li>◦ ensuring that where it is responsible for the provision of health, housing, education and recreation for detainees, those <b>services meet international human rights standards</b>.</li> </ul> </li> <li>• Commitments with respect to the <b>payment of financial compensation</b> to detainees injured by G4S guards and to the family of Reza Barati, in fulfilment of the company's commitment under its own human rights policies to "deliver appropriate and effective remedy" where it fails to prevent abuses.</li> <li>• <b>Information on the outcomes of any internal</b></li> </ul>

<ul style="list-style-type: none"> <li>• <u>GSL should seek the advice of Human Rights and Equal Opportunity Commission to determine what actions they should take to be in compliance with international human rights law (IHRL);</u></li> <li>• <u>GSL should ensure its acts are consistent with relevant international law (UN statements and international instruments);</u></li> <li>• If a UN body finds a person's detention breaches a convention, GSL must refuse to continue to detain that person;</li> <li>• GSL should include a clause in the contract with DIMIA regarding not being required to do any act contrary to IHRL;</li> <li>• <u>Provision of health, housing, education and recreation should meet IHRL standards;</u></li> <li>• <u>If DIMIA refuses to make any of the above assurances or include any of the above clauses in contracts with GSL, GSL should refuse to provide services.</u><sup>56</sup></li> </ul>	<p>investigations and disciplinary actions taken against staff involved in the violence.</p> <ul style="list-style-type: none"> <li>• Disclosure of key documents which the company has not provided to the Senate Inquiry, such as its complete training package for personnel engaged at the MIRPC, its contracts with its subcontractors and its actual records with respect to the February violence,</li> <li>• <u>Commitments with respect to future human rights training of its employees and subcontractors.</u><sup>57</sup></li> </ul>
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

As noted in Table 1, the complaint in *Human Rights Council of Australia vs. Global Services Limited* was partially accepted, while the complaint in *Australian Human Rights Law Centre and RAID vs. G4S* was rejected. The underlined objectives in the column summarising the objectives in *Human Rights Council of Australia vs. Global Services Limited* show the types of issues admitted — namely, those relevant to the company policies, rather than alleged human rights abuses occasioned from carrying out services contracted by the Australian government. In *Australian Human Rights Law Centre and RAID vs. G4S*, although there was a similar objective regarding training of personnel to be consistent with international human rights (also underlined), in rejecting the complaint the ANCP noted while the conduct of staff is relevant to the OECD Guidelines, two independent reviews had already taken place that had reviewed the conduct of G4S staff, and included recommendations regarding conditions and training of staff, so a further review would be unlikely to add value.<sup>57</sup>

<sup>55</sup> See Human Rights Council of Australia, *Submission to the Australian National Contact Point for the OECD Guidelines for Multinational Enterprises Concerning Global Solutions Limited (Australia) Pty Ltd* (2005) 16–18 <<http://www.hrca.org.au/wp-content/uploads/2009/03/original-ngo-complaint3.pdf>>.

<sup>56</sup> Human Rights Law Centre and RAID, *Complaint Concerning G4S Australia Pty Ltd* (2004) <[http://hrlc.org.au/wp-content/uploads/2014/09/HRLC\\_RAID\\_Complaints\\_OECD\\_Guidelines\\_specific\\_instance\\_G4S\\_Sep2014.pdf](http://hrlc.org.au/wp-content/uploads/2014/09/HRLC_RAID_Complaints_OECD_Guidelines_specific_instance_G4S_Sep2014.pdf)>.

<sup>57</sup> Australian National Contact Point, *Specific Instance Complaint against G4S Australia Pty Ltd* (2015) 3 <[http://www.ausncp.gov.au/content/Content.aspx?doc=publications/reports/general/G4S\\_Aus.htm](http://www.ausncp.gov.au/content/Content.aspx?doc=publications/reports/general/G4S_Aus.htm)>.



## 6.2.2 Common issues in mining: Complainants' objectives

Five complaints have been submitted to the ANCP regarding alleged breaches of the Guidelines by Australian mining companies. Despite their different contexts and geographic locations, the many of the objectives are common, as shown below.

### KEY FINDING 4: Objectives in complaints against mining companies

In mining cases, complainants' objectives tend to seek that the specific instance process will encourage companies to:

- Make appropriate arrangements to address the impact of mining operations local communities, especially indigenous communities: *Colombian communities vs. Xstrata*; *Colombian communities vs. BHP Billiton*; *Amadiba Crisis Committee vs. MRC*; and *Justiça Ambiental vs. BHP Billiton*;
- Cease destructive activities: *CEDHA vs. Xstrata Copper*;
- Make commitments to protect the environment as far as feasibly possible: *CEDHA vs. Xstrata Copper*; *Justiça Ambiental vs. BHP Billiton*;
- Repair any past damage resulting from operations, either to the environment or local communities: *CEDHA vs. Xstrata Copper*; *Colombian Communities vs. Xstrata*; *Colombian Communities vs. BHP Billiton*;
- Avoid future abuses: *CEDHA vs. Xstrata Copper*; *Justiça Ambiental vs. BHP Billiton*; and
- Engage with civil society on mining issues that affect local communities, especially indigenous communities, and the environment: *CEDHA vs. Xstrata Copper*.

Table 2 considers the objectives of two complaints concerning mining operations detrimentally impacting indigenous and local communities, one of which was accepted, and the other which was rejected.

Table 2: Objectives of mining industry complaints as submitted

Accepted complaint <i>Colombian Communities vs. Xstrata</i> ; <i>BHP</i> (2007–09)	Rejected complaint <i>Amadiba Crisis Committee vs. MRC Ltd</i> (2013)
<ul style="list-style-type: none"> <li>• Implementation of a consultation process with the communities, including by ensuring: <ul style="list-style-type: none"> <li>◦ positions of equal power in the process, transparency;</li> <li>◦ appropriate process to ensure remedy of past abuses and to ensure the lack of future abuses;</li> <li>◦ written guarantees of the future</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• <b>Request that the Australian NCP accepts this case</b> and notifies MRC that the Amadiba residents regard MRC's conduct to be in complete violation of the OECD Guidelines, and that <i>the only outcome that the Amadiba community is willing to consider is that MRC withdraws its mining rights application</i>;</li> </ul>

<p>security of the <i>pueblos</i> and action to end the strangulation;</p> <ul style="list-style-type: none"> <li>◦ guarantees regarding health and water quality, including medical care;</li> <li>◦ protection and improvement of the infrastructure to ensure the viability of commerce, trade, etc.;</li> <li>◦ agreements about access;</li> <li>◦ preference.</li> </ul> <ul style="list-style-type: none"> <li>• <b>Resolve problems arising from the destruction of Tabaco [village]:</b> <ul style="list-style-type: none"> <li>◦ contribute to implementing a Supreme Court judgment, namely by clearly financial resources to purchase a resettlement property;</li> <li>◦ assist with relocation;</li> <li>◦ pay appropriate compensation and reopen negotiation with those parties paid inadequate negotiation;</li> <li>◦ compensate those who suffered physical violence or loss of property by theft or other cause;</li> </ul> </li> <li>• <b>Take action to ensure special needs of the Wayuu and Afro-Colombians, including:</b> <ul style="list-style-type: none"> <li>◦ collective ownership;</li> <li>◦ access to company land, ancestral remains, and other cultural needs; and</li> <li>◦ the matters referred to in common with other communities above.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Read and assess the detailed record of documentation and views the video material provided and <b>accept this case as a specific instance;</b></li> <li>• <b>Undertake a fact-finding visit to South Africa</b> to meet with impacted communities, including the ACC as a legitimate local community representative body;</li> <li>• <b><u>Make an assessment of the complaints against MRC</u></b>, its subsidiaries and its South African business partners <b>as to whether the evidence contained therein substantiates the ACC’s assertion that</b>, despite an espoused commitment to international principles and standards of good practice, the burden of evidence shows <b>that the company and its partners are in breach of the OECD Guidelines</b> and will continue to be so for as long as they continue to conduct themselves in the manner that this complaint describes;</li> <li>• <b><u>Directly engage MRC Directors</u></b> that affords the ACC the opportunity to confront MRC Directors and staff with the complaints as outlined in this documentation;</li> <li>• Make public, including advising to the Australian Securities Exchange, <b>the outcome of the specific instance</b>, including the details of the complaint, your assessment of the case and breaches, and MRC’s response.</li> </ul>
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

A key reason for the ANCP’s decision to reject the complaint in *Amadiba Crisis Committee vs. MRC* was because of unwillingness of the local community represented by the complaint to engage in mediation. The community wanted withdrawal of the mining permit. Refusal to mediate is anticipated by the Guidelines. The requests by the complainant for engagement with MRC and a determination on whether or not MRC has breached the Guidelines (underlined in Table 2 above), are consistent with the ANCP’s mandate to provide “good offices” and make a determination when

mediation is refused. The complainants also requested that the ANCP make a field visit to South Africa,<sup>58</sup> though there is no provision or budget for fact-finding field trips in the ANCP Process.<sup>59</sup> It may be something necessary for the ANCP to consider in future when making initial assessments regarding Australian multinational companies operating abroad, especially when in rejecting the complaint ANCP has relied upon claims that it admitted it has been unable to verify.<sup>60</sup>



Anti-mining protest, South Africa.

Source: grundup.org.za

<sup>58</sup> See OECD Watch, *Amadiba Crisis Committee vs. MRC Ltd. Final Case Letter* (1 February 2013) 7 <[http://www.oecd-watch.org/cases/Case\\_288](http://www.oecd-watch.org/cases/Case_288)>.

<sup>59</sup> Cf United Kingdom National Contact Point, *UK National Contact Point Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprise*, above n 6, [4.6.6].

<sup>60</sup> Australian National Contact Point, *Specific Instance – Australian Multinational Mining Company* (2014) [8.2] <[http://www.ausncp.gov.au/content/publications/reports/general/SouthAfrica\\_Mining.pdf](http://www.ausncp.gov.au/content/publications/reports/general/SouthAfrica_Mining.pdf)>.

## 7 Problems with complaint handling and processes and procedures

### 7.1 Employing admissibility criteria not included in the Guidelines

When determining whether or not to accept a specific instance complaint, a NCP is to determine whether the complaint merits further examination and whether it raises a *bona fide* issue that is relevant to the implementation of the Guidelines. A complaint can only be refused on initial assessment if there is “insufficient evidence of *any breach* of the Guidelines to warrant further examination or the complaint is frivolous, vexatious or falls outside the Guidelines”.<sup>61</sup>

The OECD Commentary to the Procedural Guidelines, published on the ANCP website, sets out the follow six criteria that NCPs should take into account in the initial assessment:

- the identity of the party concerned and its interest in the matter;
- whether the issue is material and substantiated;
- whether there seems to be a link between the enterprise’s activities and the issue raised in the specific instance;
- the relevance of applicable law and procedures, including court rulings;
- how similar issues have been, or are being, treated in other domestic or international proceedings; and
- whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines.<sup>62</sup>

OECD Watch has found that NCPs have commonly taken into account factors additional to those mandated.<sup>63</sup> The box below identifies the additional admissibility criteria that appear to have been used by the ANCP.

#### KEY FINDING 1: Admissibility criteria used by the ANCP at initial assessment stage falls outside the Guidelines

The ANCP has issued five statements rejecting or rejecting in part complaints following initial assessment. None of those statements include any discussion by the ANCP as to whether or not the complaint meets the threshold for admissibility, namely that the complaint raises issues that merit further consideration under the Guidelines. Instead, the ANCP’s stated reasons for rejecting the complaints were that:

<sup>61</sup> Australian National Contact Point, *Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises*, above n 2, [28].

<sup>62</sup> See Australian National Contact Point, *Commentary on the Implementation Procedures of the OECD Guidelines For Multinational Enterprises* (2011) <[http://www.ausncp.gov.au/content/Content.aspx?doc=oeed\\_guidelines/procedures\\_commentary.htm#assessment](http://www.ausncp.gov.au/content/Content.aspx?doc=oeed_guidelines/procedures_commentary.htm#assessment)>.

<sup>63</sup> Remedy Remains Rare Report, above n 25, 27.



- Consideration of the complaint may require comment on government policy: *Australian Human Rights Law Centre and RAID vs. G4S*; *Human Rights Council of Australia vs. GSL* (see section 7.1.1);
- A party was unwilling to enter into mediation: *Amadiba Crisis Committee vs. MRC Ltd*; *CFMEU vs. Xstrata* (see 7.1.2);
- There were parallel legal proceedings: *Australian Human Rights Centre and RAID vs. G4S*; *Amadiba Crisis Committee vs. MRC Ltd*; *CFMEU vs. Xstrata* (see section 7.1.3); and
- The ANCP was unable to verify claims or resolve competing accounts: *ACF vs. ANZ*; *Green Party of New Zealand vs. ANZ*; *Amadiba Crisis Committee vs. MRC Ltd* (see sections 7.1.2 and 7.1.4); *FENAME of Mali vs. Bayswater Contracting and Mining Group*.

### 7.1.1 Consideration of the complaint may require comment on government policy

#### CASE STUDY 3: *Australian Human Rights Centre and RAID vs. G4S*

**Key facts:** The complaint alleged misconduct by G4S in its capacity as the company contracted by the Australian Government to oversee immigration detention at the Manus Island Regional Processing Centre, including in respect of an incident in which one asylum seeker died and others were injured.

**ANCP Decision:** The ANCP explained in its reasons for rejecting the complaint that the company is “not accountable for government policy”, that other mechanisms exist for review and scrutiny of policy, and that it is “not the role of the ANCP to issue commentary, whether intended or otherwise, on government policies or law”.<sup>64</sup>

In rejecting *Australian Human Rights Centre and RAID vs. G4S*, the ANCP appears to have misunderstood the role of the Guidelines in promoting responsible behaviour for multinational enterprises and its own function. At the initial assessment stage, all the ANCP is required to determine is whether a complaint merits further examination and whether it raises a bona fide issue relevant to the implementation of the guidelines. While compliance with relevant national law



A 2014 flyer from the Refugee Rights Action Network brings attention to the death of asylum seeker Reza Barati, who was killed by security force personnel at MIRPC. A complaint was lodged against G4S, provider of security services at MIRPC, with the ANCP. The ANCP rejected the complaint on grounds including that it considered it inappropriate to comment on government policy, and that there were other proceedings on foot so there was no need for further review.

Source: Rran

<sup>64</sup> 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)>.



may be a factor contributing to whether or not a company meets the standards set out in the Guidelines, it is not determinative. Therefore, that G4S may have been acting lawfully and pursuant to government policy may be relevant to, but is not determinative of, whether or not a company has breached the Guidelines. As the Australian Human Rights Centre explained in its letter to the ANCP following rejection of its complaint against G4S:

Corporate responsibility for upholding the OECD Guidelines exists independently of government policy and companies are not exempt from the application of the OECD Guidelines on the basis that their activities are consistent with domestic law. The OECD Guidelines state that where there is a conflict between a state's law and the Guidelines, enterprises should find ways to honour the principles of the Guidelines 'to the fullest extent which does not place them in violation of domestic law.'

The role of the ANCP is to advise companies as to whether their activities are in compliance with the Guidelines, regardless of Government policy and practice.<sup>65</sup>

Indeed, what the complainants sought from the ANCP process was largely to obtain commitments from G4S that it would carry out its services in accordance with internationally recognised human rights standards and take action consistent with its own corporate social responsibility policies and its obligations under its contract with the Australian Government.<sup>66</sup> These could reasonably be seen to contribute to the purpose and effectiveness of the Guidelines but were not mentioned nor apparently considered by the ANCP in rejecting the complaint. Given these objectives, and aside from its irrelevance to the question of whether the complaint is admissible, it is difficult to deduce on what basis the ANCP considered that consideration of the complaint would require inappropriate comment on or review of government policy.

The ANCP took a similar approach in handling the complaint against GSL. The ANCP rejected parts of the complaint that it considered pertained to the legality of the Australian Government policy, though it accepted parts of the complaint that related to the company's operating policies and procedures.<sup>67</sup> While that complaint process ultimately produced a favourable mediated outcome for both parties, limiting the complaint in this way had the effect of ignoring the actual human rights abuses alleged to have been committed by the company, by focusing on the company's practices and procedures.<sup>68</sup> It is unclear also why the complaint against G4S was rejected entirely, whereas the aspects of the complaint against GSL relevant to the practices and procedures of the company were considered.

It is troubling that the ANCP appears to reject cases involving companies contracted to carry out controversial government policies, as it may give rise to a perception of bias and contribute to a lack of accountability under the Guidelines for companies carrying out government work,

---

<sup>65</sup> Australian Human Rights Law Centre and RAID, *Letter to Australian NCP Regarding Specific Instance Complaint — G4S Australia Pty Ltd* (2 July 2015) 2 <<http://hrlc.org.au/wp-content/uploads/2015/07/HRLC-RAID-letter-to-ANCP-2-7-15.pdf>>.

<sup>66</sup> Australian Human Rights Law Centre and RAID, above n 56.

<sup>67</sup> Australian National Contact Point, *Statement by the Australian National Contact Point: GSL Australia Specific Instance* (6 April 2006) 5 <[http://www.ausncp.gov.au/content/publications/reports/general/GSL\\_Statement.pdf](http://www.ausncp.gov.au/content/publications/reports/general/GSL_Statement.pdf)>.

<sup>68</sup> Amnesty International has observed a similar tendency of the UK NCP to reject parts of complaints alleging actual human rights abuses, the ending of which would seem to be one of the underlying purposes of the Guidelines, while accepting for further examination parts of complaints related to general policies and practices of companies regarding human rights: see Amnesty International, above n 22, 4.

undermining the necessary impartiality of the ANCP. It is vital that in cases involving government policy that the ANCP preserves its independence and should take into account only the specific criteria for determining whether or not it should accept the complaint. Should the ANCP be unsure of how to do so, it should seek external advice, either from experts or an independent Oversight Committee as appropriate.

Further, it is troubling that the ANCP is based in the Foreign Investment and Trade Division of the Treasury. Given the role of this division is to provide advice to the Foreign Investment Review Board, and is therefore focused on foreign investment in Australia, there may be a conflict of interest concerning its role in investigating complaints against companies who invest in Australia. While it is noted that the Foreign Investment and Trade Division has responsibility for implementing Australia's OECD commitments, at least sharing responsibility for the ANCP role with another department, such as the Department of Attorney-General or another relevant department, would bolster independence and decrease any perception of partiality or undue influence.<sup>69</sup>

### 7.1.2 A party was unwilling to enter into mediation

#### CASE STUDY 4: *Amadiba Crisis Committee vs. MRC Ltd*

**Key facts:** *Amadiba Crisis Committee vs. MRC Ltd* involved a community organisation alleging violations of the Guidelines by an Australian mining company on the Eastern Cape of South Africa. The ANCP claimed that when it spoke with representatives of the complainant during the initial assessment process, the complainant indicated that the local community “are not interested in any mediation process that carries with it even the remotest possibility of accommodation between the mining company and local residents”.<sup>70</sup>

**ANCP decision:** The ANCP rejected the specific instance, and claimed its decision was based on the fact that “the focus of the ANCP process is to facilitate mediation between parties, [and] the complainant has clearly stated that the local community is not interested in mediation”.<sup>71</sup>



Sikhosiphi Rhadebe, shown here speaking to crowds, was a South African anti-mining activist opposed to a mine owned by Perth-based Mineral Commodities Limited (MRC). In 2016, he was murdered in his house by killers posing as police. MRC denies any connection with the murder. In 2013, the ANCP rejected a complaint into MRC's mine brought by the Amadiba Crisis Committee, of which Rhadebe was chairman.

Source: *The Guardian*

<sup>69</sup> OECD Watch has found that multipartite NCPs, composed of representatives from one or more government ministries as well as representatives from business associations, trade unions and/or NGOs should, in theory, “be less prone to bias because they involve input from multiple stakeholder groups with different interests, and are therefore less likely to be influenced by any one party”: report above, n 23.

<sup>70</sup> OECD Watch, *Amadiba Crisis Committee vs. MRC – Complaint* (1 February 2013) 7 <[http://www.oecdwatch.org/cases/Case\\_288](http://www.oecdwatch.org/cases/Case_288)>.

<sup>71</sup> Australian National Contact Point, *Specific Instance – Australian Multinational Mining Company*, above n 58, [8].

While the focus of the ANCP Process may be to facilitate mediation between the parties, willingness of a party to mediate is not relevant to the admissibility of a complaint at the initial assessment stage. If the ANCP had accepted this complaint, and the complainant maintained its position on refusing mediation, the ANCP would then have to consider issuing a determination on whether or not the company had breached the Guidelines. Indeed, this was one of the remedies sought by the complainants.<sup>72</sup> By rejecting the complaint at the initial assessment stage, it allowed the ANCP to avoid having to issue the determination (see section 7.4.1).

### 7.1.3 There were parallel legal proceedings

#### CASE STUDY 5: *Human Rights Law Centre and RAID vs. G4S*

**Key facts:** In *Human Rights Law Centre and RAID vs. G4S*, there were parallel legal proceedings on the subject of the complaint submitted, namely an incident in which an asylum seeker was killed and many others injured while detained at a detention centre operated by G4S.

**The ANCP's decision:** In its reasons for rejecting the complaint, the ANCP noted the parallel proceedings, and stated only that, “*it is clearly not appropriate for the ANCP to intervene in any way in due legal processes, either domestic or international*”, despite its processes to the contrary.<sup>73</sup>

As is clear from the six criteria outlined above that NCPs should take into account when deciding whether to accept a claim, the existence of parallel proceedings is not relevant to admissibility. In fact, the ANCP has published a paper to provide guidance on how it intends to handle the issue of parallel legal proceedings within the OECD Guidelines complaint process,<sup>74</sup> which relevantly provides that:

The fact that parallel proceedings exist will not of itself cause a suspension of its process and/or its determination of any dispute; [and]

The ANCP will suspend a complaint only where it is satisfied that it is necessary in order to avoid *serious prejudice* to a party to parallel proceedings and is appropriate in all the circumstances.<sup>75</sup>

In any case, the ANCP did not follow its own guidance as it failed to form a view on whether investigating the complaint would cause “serious prejudice” to a party to the parallel proceedings.<sup>76</sup> The guidance provides that a complaint may be *suspended* where the ANCP is satisfied that is necessary to avoid serious prejudice,<sup>77</sup> not that it can be rejected, as admissibility requires assessment of other criteria.

<sup>72</sup> OECD Watch, *Amadiba Crisis Committee vs. MRC – Complaint*, above n 71.

<sup>73</sup> Australian National Contact Point, *Statement by the Australian National Contact Point: Specific Instance – G4S Australia Pty Ltd*, above n 6, 4.

<sup>74</sup> Australian National Contact Point, *Approach of the Australian National Contact Point to Specific Instances in which there are parallel proceedings* (2011) <<http://www.ausncp.gov.au/content/Content.aspx?doc=anpcp/parallel.htm>>.

<sup>75</sup> Ibid [3.1]–[3.2] (emphasis added).

<sup>76</sup> Ibid [13].

<sup>77</sup> Ibid [11].

Given the parallel proceedings in question involved the government, the failure of the ANCP to follow its own clearly defined guidance raises troubling questions about its independence.<sup>78</sup> Whether or not any party to a parallel proceeding is likely to be seriously prejudiced by the complaint process is a matter that would lend itself to external advice, such as from the Oversight Committee. However, given the Oversight Committee is not independent either (see section 7.5.1 above), this would not necessarily address concerns in a case involving government policy.

#### 7.1.4 The ANCP was unable to verify claims or resolve competing accounts

##### CASE STUDY 6: *ACF vs. ANZ; Green Party of New Zealand vs. ANZ*

**Key facts:** ACF and the Green Party of New Zealand both lodged complaints against ANZ on account of its financial links with a Malaysian-owned forestry company, Rimbunan Hijau (RH), which was responsible for logging in Papua New Guinea. For the claim to be admissible, there had to be an “investment nexus” between ANZ and RH. An indicator of whether or not there was an investment nexus was the degree to which ANZ could influence the operations of RH. The ANZ indicated that its capacity to influence RH was limited as it did not participate in any decision making process of RH. The complainants argued that it could given ANZ’s reputation and established market position as potential levers that could be use to effect a change in RH’s policies.

**ANCP finding:** The ANCP stated that it was “unable to ascertain the degree to which ANZ has the capacity to influence RH’s logging decisions in PNG” and therefore rejected the case.

In the above case study, that the ANCP was unable to resolve the key issue in determining whether or not the case was admissible is a failing. It indicates that the ANCP needed to have undertaken further investigation at the initial assessment stage. One method of doing this may have been to consult the Oversight Committee, or external experts or other NCPs that have dealt with similar cases, given that the OECD guidance and principles around establishing an investment nexus and similar concepts in investment law are developing rapidly and an expert opinion or the experience of another NCP may have assisted in resolving the conflict. Further, if responsibility for the ANCP was shared with a department more likely to have appropriate resources for investigation of quasi-legal complaints and expertise on legal matters, like the Department of Attorney General, the ANCP investigative process may be more successful.

## 7.2 Unclear processes

This section focuses on the lack of clarity in the ANCP Process.

<sup>78</sup> See Dr Shelley Marshall, *OECD National Contact Points Better Navigating Conflict to Provide Remedy to Vulnerable Communities* (2016) 21–23 < <https://business-humanrights.org/my/node/148064> >.



### 7.2.1 No information on practical steps for submitting a complaint

While the ANCP Process sets out the steps the ANCP will follow when dealing with a complaint under the Guidelines, there is no information available on the ANCP website on how to submit a complaint to the ANCP as a practical matter, only general contact details. Given the Guidelines require that NCPs be accessible, a requirement to which the ANCP maintains that it is committed to upholding,<sup>79</sup> the practical steps for submitting a complaint to the ANCP should be made clear on its website and in the ANCP Process.

### 7.2.2 Unclear how confidentiality applies throughout process

The Guidelines require that NCPs be transparent, but this must be balanced with confidentiality in handling complaints when appropriate. However, it is unclear how the requirement for transparency interacts with confidentiality at different stages of the process. For example, the ANCP Process provides both that “unless a good case is made to the ANCP for information to be withheld from a party, all the information received by the ANCP from the parties or any other person or organisation ... will be copied to all parties,” and “the information provided by each party may be shared with any other party in the complaint, *but only with the consent of the party which provided the information*”.<sup>80</sup>

While the first provision seems to imply a transparent process in which information will be proactively shared with all parties, the latter implies a process in which information remains confidential unless consent is given for its disclosure. This makes it difficult for parties to determine whether information they provide or receive should be confidential or can be disclosed. Sharing confidential information or an unwillingness to disclose information may impact the trust and confidence between the parties necessary for constructive mediation later in the complaint resolution process.<sup>81</sup>

#### CASE STUDY 7: CFMEU vs. Xstrata

**Key facts:** The Construction, Forestry, Mining and Energy Union (CFMEU) brought a complaint against Xstrata for breaches of the Guidelines related to trade union activities. The CFMEU publicly announced lodging the complaints on a number of websites and in the Australian media. The CFMEU was willing to engage in mediation but Xstrata was not, largely because of issues relating to confidentiality with the CFMEU and a perceived lack of good faith and goodwill shown by the CFMEU. The CFMEU gave a guarantee of confidentiality of all future discussions, but Xstrata refused mediation.<sup>82</sup>

**ANCP Decision:** Unable to bring the parties together, the ANCP closed the complaint.

<sup>79</sup> Australian National Contact Point, *Implementation and Promotion* (2011) <<http://www.ausncp.gov.au/content/Content.aspx?doc=ancp/implementation.htm>>.

<sup>80</sup> Australian National Contact Point, *Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises*, above n 2, [16]–[17] (emphasis added).

<sup>81</sup> See Australian National Contact Point, *Approach of the Australian National Contact Point to Specific Instances in which there Are Parallel Proceedings*, above note n 75 [39.2].

<sup>82</sup> Australian National Contact Point, *Specific Instance Complaint CFMEU – Xstrata Coal Pty Ltd* (8 June 2011) 2–3. <[http://www.ausncp.gov.au/content/publications/reports/general/Xstrata\\_Summary.pdf](http://www.ausncp.gov.au/content/publications/reports/general/Xstrata_Summary.pdf)>.



Xstrata claimed that the publicity that the CFMEU had conducted around the claim reduced its ability to trust the CFMEU,<sup>83</sup> and therefore its willingness to enter into negotiations.<sup>84</sup> It is common for both claimants and respondents to make statements and conduct campaigns related to NCP claims. NCP claims are often only one element of a larger, multi-pronged campaign involving judicial and non-judicial claims. The case may indicate that a clearer process on what is permissible to disclose and what should remain confidential at each step of the process might allay problems of this type in future by setting expectations, and allow the ANCP to point to clear evidence to support decisions to disclose or keep confidential information, or determine if parties are acting in good faith required for a successful mediation.

### 7.2.3 The order of steps the ANCP is required to follow under the Guidelines during the initial assessment stage is not followed

Pursuant to the ANCP Process, the ANCP is required to acknowledge receipt of the complaint within 10 days. It is not clear after that how the ANCP then goes about making an initial assessment, as the steps in the ANCP Process appear jumbled. For example, the ANCP Process contemplates that:

*In making its initial assessment of a Specific Instance... the ANCP will contemplate the stated grounds of the complaint and the information it has received about the complaint...*

[and then]

*Having made an initial assessment the ANCP may forward the complaint to the company... with the invitation to send the ANCP a preliminary response... or transfer the matter to another NCP... or not accept the complaint... (emphasis added).*

Forwarding the complaint to the company for comment is a step that should occur at the initial assessment stage, yet in the ANCP Process it is listed as a step occurring *after* the ANCP has made the initial assessment. It is difficult to see how the ANCP would make an informed initial assessment without seeking comment from the company on the complaint. Further, making a decision not to accept the complaint, or to transfer it to another NCP, are outcomes from an initial assessment, rather than steps that the NCP takes “having made an initial assessment”.

That these steps are jumbled in the ANCP Process is supported by the fact that the UK NCP Process, upon which the ANCP Process is modelled almost word-for-word, lists these steps as occurring as part of the initial assessment, not after.<sup>85</sup> Whether or not the ANCP in fact undertakes these steps as part of the initial assessment in practice does not change the fact that the

---

<sup>83</sup> It should be noted that it appeared the CFMEU and Xstrata appeared to have “bad blood” outside the scope of the complaint as well.

<sup>84</sup> Australian National Contact Point, *Specific Instance Complaint CFMEU – Xstrata Coal Pty Ltd*, above n 80, 2–3.

<sup>85</sup> United Kingdom National Contact Point, *UK National Contact Point Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises*, above n 8, [3.1].

ANCP Process in its current form is confusing for potential or actual complainants and companies seeking guidance on the Initial Assessment stage.

#### 7.2.4 Introductory meetings with parties seem to occur after the initial assessment stage

The ANCP Process provides that if the complaint is accepted it may offer separate meetings to the parties at which it will explain the process and answer any questions. However, it would seem that the appropriate time to meet with the parties to explain the process to them would be during the initial assessment stage, not after the complaint is accepted, as not all complaints may be accepted, and parties nonetheless should be familiarised with the process for investigation during the initial assessment stage, and the review process, should the complaint be rejected.

Further, the ANCP claims that during the meeting with the complainant it will clarify the precise nature of the complaint and in the meeting with the company it will seek a response to the complaint. Again, these seem like investigatory steps that would be necessary in order to make an initial assessment. It is difficult to understand why the ANCP would need to clarify the “precise nature” of the complaint after it has already accepted it. Further, the response of the company is something the ANCP would be better placed to obtain during the initial assessment stage in order to make an informed decision.

#### 7.2.5 Unclear whether complaint rejected, or accepted and suspended

In *CFMEU vs. Xstrata* (case facts described above at section 7.2.2), the Final Statement by the ANCP seems to imply the complaint had been accepted, by referring to how it sought to bring the parties together to mediate the issues raised by the CFMEU, which would be the next step after an initial assessment has been made to accept the complaint. In addition, the reference to the willingness of the ANCP to “re-open” the specific instance if the parties agreed implies that it was already open, that is, accepted.

However, nowhere in the Statement for the complaint did the ANCP determine whether the complaint merits further examination and raises a bona fide issue that is relevant to the implementation of the Guidelines. Therefore, it is unclear if the case had been rejected because of the parties’ failure to enter into mediation (see section 7.1.1), or if it has been accepted and suspended, and if the latter, on what basis. Aside from making it difficult to accurately report on the number of cases rejected and accepted, it may also affect the ability of the parties to review the decision if it is in fact a rejection, as reviews must be lodged within 10 days of being notified of the decision.

## 7.3 Lack of transparency

### 7.3.1 No consistent or professional format for statements

The ANCP publishes its Statements on its website. However, the Statements do not have a consistent format, which means that different information is available for different complaints, and issues addressed in some cases and not others. It is also unclear which Statements are Final Statements and which are Initial Assessments. Where cases are rejected, the published statements might be assumed to be Initial Assessments, as the complaint process terminates at that stage. Where cases are accepted, the ANCP does not publish any form of Initial Assessment, only the Final Statement once the case is resolved.

The ANCP Process sets out what should be covered in an Initial Assessment and a Final Statement.<sup>86</sup> However, ANCP “Initial Assessments” and Final Statements inconsistently address those areas. In addition, compared with some of the statements prepared by leading NCPs like the UK, the statements produced by the ANCP lack a professional format. There does not appear to be a consistent template for statements, and there are inconsistencies across the statements in the use of headings, as well as page numbers, paragraph numbers, and fonts. A consistent template with headings that refer to each of the areas the ANCP is required to address in its initial assessment, or in a final statement, may ameliorate the inconsistencies across the statements. This may also make statements more accessible as they will be clearer to read and transparent as they address each area taken into account by the ANCP in rendering its decision.

### 7.3.2 There is no requirement to keep minutes of meetings with the parties

In order to promote transparency, some NCPs take minutes of any meetings that occur with the parties and share those minutes with all parties. For example, the UK NCP will share information provided to it about a complaint with all parties to the complaint unless a good case is made to it that specific information should not be shared (e.g.: due to legal restrictions).<sup>87</sup> Where information is sensitive, the preferred course is to agree with the parties appropriate conditions of confidentiality.<sup>88</sup> A similar transparency requirement should be inserted into the ANCP Process.

The civil society representative in the *Human Rights Law Centre vs. G4S* complaint explained the problems with the lack of transparency throughout the process in the following terms:

We were unable to find out even basic information from the ANCP about how many times the ANCP had corresponded with G4S, whether G4S had submitted any kind of response to the complaint etc. This meant we were unable to have any insight into

<sup>86</sup> Australian National Contact Point, *Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises*, above n 2, [30], [53].

<sup>87</sup> United Kingdom National Contact Point, *UK National Contact Point Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises*, above n 8, [2.5.1].

<sup>88</sup> See, e.g., *ibid* [3.1.3]; Norwegian National Contact Point, *Procedural Guidelines for Handling Complaints* (1 October 2013) 8 <<http://www.responsiblebusiness.no/files/2013/12/NCP-Norway-Procedural-Guidelines.pdf>>.

whether it was the company or the ANCP itself that was the reason for the lack of progress. This is a major impediment to an effective complaints process. If you can't even find out on a confidential basis what the company has said to defend itself or indeed whether they have submitted to the process at all, representatives have no basis to then be able to properly assess the ANCP's final decision, because there is no indication as to what information the company may have given to the ANCP or withheld.<sup>89</sup>

Despite the ANCP Process providing for meetings with parties during the initial investigation and determination stages of the complaint handling process, there is no requirement for the ANCP to take minutes of these meetings, nor to share them with the other parties. While it may not always be appropriate to share minutes of meetings with a party with the other parties for reasons of confidentiality, it would nonetheless provide an important record-keeping function for the evidence-gathering process when making an Initial Assessment and any determination. It may also assist with any potential reviews challenging the fairness of the process afforded to a party by the ANCP.

### 7.3.3 Does not prepare or publish initial assessments nor is it required by the ANCP Process

While the ANCP Process contemplates the making of an initial assessment, in that it refers to steps taken “*before issuing* an initial assessment” and “*when issuing* the initial assessment” (emphasis added) there does not appear to be an independent requirement for the ANCP to produce and issue an initial assessment. The closest is the section that sets out what should be included in an initial assessment, but the requirement is couched in the optional, for example, “the initial assessment, when issued, *may* include ...”. This appears to be a deliberate choice, as this section is a word for word reproduction of the corresponding UK NCP Process section, except that the word “will” (which appears in the UK NCP Process) has been substituted for “may” in the ANCP Process. This would suggest that the ANCP Process does not require the ANCP to issue Initial Assessments, or at the very least, indicates that it does not have to address all of the areas of consideration when rendering an Initial Assessment.

Further, there is no requirement in the ANCP Process to publish its initial assessment, only to “issue” the assessment, which could be read as a requirement to issue the assessment only to the parties. This does not appear to be consistent with the principle of transparency intended to guide the work of the NCPs. The ANCP has never published a clearly identifiable initial assessment on its website. The statements the ANCP publishes on its website cannot be inferred to be initial assessments as, in the case of complaints that are rejected, statements rarely address the areas that should be addressed in an initial assessment and conflate admissibility with the merits of the case or irrelevant considerations. In the cases of complaints that are accepted, statements are not issued until after the case is concluded, which would indicate they are final statements.

---

<sup>89</sup> Email from Keren Adams to Shelley Marshall, 10 March 2017.

## 7.4 Lack of consequences or remedy

### 7.4.1 No requirement to give clear statement on whether guidelines have been breached

The explanation for why the ANCP may never have issued a determination is that on a close reading of the ANCP Process, it may not actually be required to do so. The section on mediation provides that, “if the parties are unable to agree on mediation or mediation fails, then the ANCP *will* conduct an examination of the case as set out below”, but the section on examination of complaints provides that “the ANCP *may* then review all the information it has gathered, and *may* make a statement as to whether the Guidelines have been breached.”<sup>90</sup> This suggests that the process of examining the complaint and issuing a statement on whether or not the Guidelines have been breached is optional.

While the ANCP Process is modelled on the UK NCP Process, the UK NCP is different here, as it is required to examine the complaint and determine whether there has been a breach of the Guidelines (“the [UK] NCP *will* then review all the information it has gathered and make a decision as to whether the Guidelines have been breached”). That the UK NCP is serious about examining the complaint to determine whether or not there has been a breach is evidenced by the provision in the UK NCP Process that permits field visits (albeit in exceptional cases), which is not mirrored in the ANCP Process.

### 7.4.2 There are no consequences for refusing to enter into mediation

In at least two complaints lodged with the ANCP, the ANCP or other lead NCP was unable to convince the company, which in both cases was Xstrata, to engage with the mediation process. In both complaints, having failed to bring Xstrata to the table, the ANCP closed the complaint. Given that participation in mediation is voluntary, and that refusing to mediate will result in the complaint being closed, there is not much if any incentive for the company to enter into mediation, where it might have to make concessions or costly changes as a result. If a party refuses to mediate, or the mediation fails, the ANCP is to examine the complaint, and make a determination on whether or not the Guidelines have been breached. However, the ANCP has shown an aversion to issuing determinations — it has yet to issue a single one. Without the potential risk that a company might have to face a determination that it breached the Guidelines if it does not enter mediation, there is not much incentive for the company to agree to mediate.

### 7.4.3 No follow-up conducted

The ANCP Process, like the UK NCP Process upon which it is based, provides for the ANCP to follow up on the extent to which a company or companies have implemented any relevant recommendations that arose from any mediation or determination that the company breached the Guidelines. That process envisages following up with the company, seeking a response as

---

<sup>90</sup> Australian National Contact Point, *Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises*, above n 2, [52].



to its progress on implementing the recommendations or agreed changes, and publishing a follow-up statement to its website. However, although this mechanism is included in the ANCP Process, it does not appear to have ever been used. In the *GSL* case, which concluded over 10 years ago, it is unclear whether or not *GSL* ever implemented the changes it agreed to make as a result of the mediation process it participated in as part of the ANCP process.

### CASE STUDY 8: *Colombian Communities vs. Xstrata; BHP Billiton*

**Key facts:** A complaint was submitted to the ANCP against BHP Billiton by Colombian communities impacted by its mining operations. The ANCP, in conjunction with the UK NCP and the Swiss NCP, offered “good offices” to the parties to discuss the complaint. An independent review was already underway to determine the impact of the mining activities on the communities and to make recommendations on what measures needed to be taken, including for example, resettling the population.

**ANCP outcome:** Despite a number of outstanding issues remaining following the review, such as certain communities not yet being resettled, and the urging of the complainants not to close the complaint, the ANCP extricated itself from the process and closed the complaint, finding that “the ANCP fulfilled its primary function in providing a forum for discussion and assisting the parties reach agreement on the issues. The ANCP does not anticipate having an ongoing role”.<sup>91</sup>

Therefore, despite the ANCP Process providing for it, in practice the ANCP seems averse to being involved in any follow-up action. This is unfortunate given that without follow up it is difficult to determine whether a remedy has been achieved, and its effectiveness. In contrast, the UK NCP follows up with companies after one year to determine whether it has implemented proposed changes, and publishes its follow-up statements, with its conclusion on whether or not the remedy has been achieved, on its website. The follow-up procedure in the ANCP Process does not provide for the ANCP to draw its own conclusions on the information provided to it about implementation of recommendations or agreed changes.<sup>92</sup>

#### 7.4.4 Failure to employ professional mediators

Unlike the UK NCP, the ANCP does not employ professional mediators to handle its mediation process in complaints it accepts. This is not compulsory, and the one ANCP complaint that proceeded to mediation ten years ago had the hallmarks of “best practice” according to OECD Watch.<sup>93</sup> However, generally professional mediators are more likely to be able to help parties

<sup>91</sup> Australian National Contact Point, *Final Statement by the Australian National Contact Point: BHP — Cerrejón Coal Specific Instance* (12 June 2009) [29], [34]  
<[http://www.ausncp.gov.au/content/publications/reports/general/Final\\_Statement\\_BHP\\_Billiton\\_Cerrejon\\_Coal.pdf](http://www.ausncp.gov.au/content/publications/reports/general/Final_Statement_BHP_Billiton_Cerrejon_Coal.pdf)>.

<sup>92</sup> See Dr Shelley Marshall, above n 79, 17, 45.

<sup>93</sup> OECD Watch, *Guide to the OECD Guidelines for Multinationals Enterprises' Complaint Procedure* (2006) 29–33  
<[http://www.oecdwatch.org/publications-en/Publication\\_1664](http://www.oecdwatch.org/publications-en/Publication_1664)>.



Villagers from Kampong Speu province protest outside an ANZ branch in Phnom Penh after they lost land due to land grabs by a sugar plantation financed by ANZ. A complaint was made to the ANCP about ANZ's involvement in 2014, the outcome of which remains pending. Source: Phnom Penh Post

navigate complex issues and reach mutual agreement than a non-professional mediator. Given the ANCP sees its major function as being to provide good offices and facilitate mediation, it would seem worthwhile to invest in professional mediators. Of course, this would depend on the government funding the ANCP appropriately to make this a reality.

## CASE STUDY 9: *Human Rights Council of Australia vs. GSL*

### Key facts

This case involved a complaint against the company for its implications with human rights abuses given its involvement with providing services to offshore detention facilities as part of the government's immigration detention policy. The ANCP rejected parts of the complaint that it considered would involve a comment on Australian Government policy, limiting the scope of the complaint to practices and procedures followed by GSL in carrying out the work it was contracted to do for the Australian Government.

### Outcome of the mediation

Both parties agreed to go to mediation on the limited scope of the complaint, and reached a mutually agreed outcome, which included GSL accepting guidance from the complainants on how to make their practices and procedures compliant with international human rights standards. Following resolution of the specific instance, the Australian NCP conducted an evaluation of the process, writing to both parties for comment. The following features were considered by the parties to be critical to the success of the negotiation:

- **Commitment to the process:** The ANCP demonstrated commitment to the process, including by not rejecting the claim outright despite the highly sensitive nature of the case, nor using the ongoing legal proceedings, parliamentary inquiries and public scrutiny as justification for not proceeding, as well as assisting in bringing the Company

to mediation by alleviating initial concerns it had, and appropriate time was allocated for the mediation which was well-planned and permitted robust discussion.

- **Non-adversarial nature:** The ANCP emphasised a non-adversarial process directed at mutual gains by the parties, which was GSL claimed was “a seminal turning point”<sup>94</sup> in its decision to agree to enter into mediation with the complainant. While the complainant agreed the emphasis on a “win-win” process suited this instance, it raised concerns about the utility of such an approach in all cases.
- **Transparency:** The ANCP made clear from the outset that they were seeking a mediation process that provided an opportunity for both parties to reach negotiated outcomes, the process implemented to manage the mediation was transparent, and a draft of the “final statement” was sent to both parties for comment before making it public.

**Equal treatment:** The ANCP invited and actively encouraged both parties to provide additional information and expert advice during the initial determination stage, both parties were given recognition, authority and opportunity to develop materials and respond to issues raised, both parties were allowed to contribute to the agenda for mediation.

**Timeliness:** The ANCP generally adhered to the timeframes established, and any delays were clearly articulated and explained to all parties.

**Follow-up:** The ANCP welcomed the documenting of “agreed outcomes” from the mediation, included the agreed outcomes in the final statement, and disseminated the agreed outcomes to government groups with a relevant interest in the management of Australia’s immigration detention.<sup>95</sup>

## 7.5 Lack of support for the ANCP and outreach by the ANCP

### 7.5.1 The Oversight Committee does not appear to be effective in its intended function of providing independent oversight

The ANCP Oversight Committee is modelled on the UK NCP’s Steering Board,<sup>96</sup> which has been lauded internationally for giving the UK NCP a degree of independence as it has four external-to-government members involved in providing advice and reviews of the UK NCP.<sup>97</sup> By contrast, the ANCP Oversight Committee has no external-to-government members and comprises only representatives from other government departments,<sup>98</sup> which limits the ability of

---

<sup>94</sup> Australian National Contact Point, *ANCP Evaluation of GSL Specific Instance complaint (2006)* 7 <[http://www.ausncp.gov.au/content/publications/reports/general/GSL\\_Evaluation.pdf](http://www.ausncp.gov.au/content/publications/reports/general/GSL_Evaluation.pdf)>

<sup>95</sup> Ibid 5.

<sup>96</sup> Australian National Contact Point, *Oversight Committee Minutes (22 November 2012)* item 2 <[http://www.ausncp.gov.au/content/publications/oversight/20121122\\_minutes.pdf](http://www.ausncp.gov.au/content/publications/oversight/20121122_minutes.pdf)>.

<sup>97</sup> See Remedy Remains Rare Report, above n 22, 33.

<sup>98</sup> As at 2012, representatives from Treasury, Export Finance Insurance Corporation, Austrade, Department of Education, Employment and Workplace Relations, Department of Foreign Affairs and Trade, AusAID (now defunct) and the Department of Resources and Energy: see Australian National Contact Point, *Oversight Committee Minutes*, above n 97.

the Oversight Committee to provide independent oversight to the ANCP.<sup>99</sup> In addition, transparency is limited, with only one set of minutes from a meeting of the Oversight Committee available online. The ANCP have indicated that although the Oversight Committee meets regularly, they have decided not to publish the minutes anymore. To achieve its function of providing independent oversight the Oversight Committee should appoint independent members in an open, transparent process.<sup>100</sup> Further, to effectively provide advice and oversee the effectiveness of the ANCP, the Oversight Committee needs to meet regularly, and have its minutes publicly available.

### CASE STUDY 10: *CEDHA vs. Xstrata*

**Key facts:** CEDHA filed a complaint against Xstrata in Australia, as Xstrata is registered in Australia, regarding its mining activities in Argentina, which it claimed were having a destructive environmental impact on glaciers. For a number of practical reasons, including that the activities in question were occurring in Argentina, the ANCP transferred the complaint to the Argentine NCP, who accepted the complaint.

**Outcome of the complaint:** The process dragged on for years as Argentina changed its glacier laws — twice — which impacted the complaint as it sought in part to have Xstrata commit to complying with Argentine glacier law. In addition, Xstrata did not display any interest in undertaking mediation, and after years of delays and being unable to bring the parties together, the Argentine NCP closed the complaint.

The above complaint was closed as the Argentine NCP was unable to convince Xstrata to enter into the mediation process. However, there is no indication that the ANCP followed up with the Argentine NCP to offer support in bringing Xstrata to the table, or even if it did and was refused, that it sought to engage with Xstrata in Australia. While Xstrata is noted as having a “decentralised company structure”, that the company is registered and listed in Australia may have meant the ANCP held more sway with the company. Likewise, in *CFMEU vs. Xstrata*, the ANCP was unable to bring Xstrata to the table, and although it “expressed disappointment” to Xstrata, it is not clear what steps the ANCP took to encourage the company to engage with the mediation process.

<sup>99</sup> Australian National Contact Point, *Terms of Reference and Explanation of the Role of the ANCP Oversight Committee* (2011) <<http://www.ausncp.gov.au/content/Content.aspx?doc=ancp/oversight.htm>>.

<sup>100</sup> See *Remedy Remains Rare Report*, above n 22, 17.





A worker at a rubber plantation in Sri Lanka. A complaint was made to the ANCP in 2013 alleging that an Australian company involved in rubber production in Sri Lanka had breached the employment and industrial law provisions of the Guidelines. The outcome of the complaint remains pending.  
Credit: Gunther Deichmann

### 7.5.2 The ANCP does not appear to take all steps possible to bring companies to the table

From the 13 unique complaints that have been submitted to the ANCP, it has transferred five to another country's NCP (two to New Zealand and one each to Argentina, Chile and the UK). Based on the Final Statements issued by the ANCP in these cases, it is not clear that there has been any follow up with the respective foreign NCP after the case has been transferred, nor that assistance with addressing the complaint is offered, beyond general undertakings to provide assistance if required. While it may be more practical for another country's NCP to have day-to-day carriage of a complaint regarding activities transpiring within its territory, this does not mean that there is no room for inter-NCP coordination, as issues may arise once the claim is accepted that might be more appropriate for the home NCP to address. To that end, if the ANCP is to uphold its commitment to being accountable, it should follow up on the progress and outcome of complaints submitted to it but transferred to foreign NCPs.<sup>101</sup>

In another case, the ANCP rejected a complaint partly because the subject of the complaint was being dealt with by local authorities. However, this alone is not reason to reject a complaint (see section 7.1.3 on parallel proceedings). It appears that knowing the issues would be dealt with in some way by the country where the activities were taking place may have influenced the ANCP's decision to reject the complaint. This is compared with its approach in a case like *CFMEU vs. Xstrata*, which involved locally domiciled parties, one of whom was also unwilling to negotiate, but the ANCP appears to have undertaken far more effort in attempting to bring the parties together before reluctantly closing the case.

<sup>101</sup> Dr Shelley Marshall, above n 79, 37–40.



#### 7.5.4 ANCP annual reporting to the OECD Investment Committee is inconsistent and answers are scant, vague or incorrect

Part of the ANCP's role in effective implementation and promotion of the Guidelines involves reporting annually to the OECD Investment Committee.<sup>102</sup> The OECD Investment Committee provides a common framework for annual reporting by NCPs, essentially a set of standard questions for NCPs to respond to regarding how they have handled complaints and otherwise promoted the Guidelines in that year.

First, it appears that the last time that the ANCP produced an annual report for the Investment Committee was for 2011-2012, suggesting that the Investment Committee has had no formal update on the ANCP's activities for four years. Secondly, assuming that the ANCP does provide these yearly updates, its failure to publish its reports to the Investment Committee on its website evidence a lack of transparency in its operations. Finally, in years when the ANCP has produced an annual report to the Investment Committee, the answers are often scant, vague or incorrect.

##### EXAMPLE 1: 2011–12 Annual Report the OECD Investment Committee

The ANCP gave the following answers to the questions in italics.

*Please fill in, where appropriate ... the following template for each specific instance received, under consideration or concluded in the reporting period.*

(1) Minerals exploration in Argentina; (2) Mining in Chile

...

*Was the specific instance a multi-jurisdictional instance and involved other NCPs? If yes, please specify.*

Both specific instance complaints involved dual Australian and UK listed companies — the UK NCP was kept informed of transfer arrangements.

*If the specific instance takes place among adhering countries, are the home and the host NCPs consulting? Please provide details.*

See above.

*Was a leader NCP identified?*

<sup>102</sup> Australian National Contact Point, *Implementation and Promotion* (2011)  
<<http://www.ausncp.gov.au/content/Content.aspx?doc=ancp/implementation.htm>>.

N/A

*Are all involved NCPs dealing with the same complaint or are there issues that each NCP is handling separately?*

N/A

The ANCP identified above that it had two specific instance complaints regarding activities in Argentina and Chile respectively, and because the complaints involved dual Australian and UK listed companies, the UK NCP was kept informed of transfer arrangements. However, the complaints were transferred to Argentina and Chile, but there is no mention of the Argentine and Chilean NCPs at all, which would seem relevant to the question “are the home and host NCP consulting”. The ANCP replies, “see above”, however the answer “above” refers to its interactions with only the UK NCP, and it remains unclear the extent to which the ANCP was consulting with the Argentine and Chilean NCPs, if at all.

Nor is it clear from the ANCP answer whether “a leader NCP [was] identified” in those complaints as the ANCP responds “N/A”, even though in its final statements for the two complaints that year the ANCP identifies the Argentinian and Chilean NCPs respectively as the lead NCPs. Based on these answers, the OECD Investment Committee gains no insight into the degree of cross-jurisdictional NCP coordination the ANCP had with the Argentine and Chilean NCPs in addressing its complaints that year.

Aside from creating a lack of transparency, the lack of detail makes it difficult for the OECD Investment Committee to identify any issues that arise in complaints involving cross-jurisdictional NCP coordination and address them by providing guidance or clarification if necessary, which impacts all NCPs. In order to address issues that impact NCPs, 12 NCPs have been scheduled to undergo a peer review process by 2018, including Australia.<sup>103</sup> It is critical that Australia participate fully in the peer review process in order to gain the benefit of shared knowledge and best practice between NCPs in order to fulfil its role under the Guidelines.

---

<sup>103</sup> OECD, *OECD Guidelines for Multinational Enterprises: National Contact Points peer reviews* (2016) <<https://mneguidelines.oecd.org/ncpeerreviews.htm>>.

## 8 Australia and UK: A Comparison

In this section the Australian NCP is compared with the UK NCP. This comparison is valuable because the ANCP has based its processes upon those of the UK NCP. The UK NCP is one of the better NCPs internationally, so can also provide a benchmark for good practice.

**Table 1: Comparison of ANCP and UK NCP**

	ANCP	UK NCP
<b>Structure of the NCP</b>	<ul style="list-style-type: none"> <li>The ANCP is a Senior Executive of the Foreign Investment and Trade Policy Division at the Treasury.</li> <li>The ANCP is overseen by the Oversight Committee, which has only government members.</li> <li>The ANCP claims to draw on expertise from other government agencies through an informal intergovernmental network.</li> <li>However, in practice it is not clear the extent to which the ANCP draws on other expertise, as it is not specifically cited in Final Statements.</li> </ul>	<ul style="list-style-type: none"> <li>The Department for Business, Innovation and Skills (BIS) is responsible for maintaining the UK NCP.</li> <li>The UK NCP is overseen by the Steering Board, which has both government and non-government members.</li> <li>The UK NCP is also partly “influenced” by the Department for International Development (DFID) through funding (DFID funds the salaries of the NCP even though staff are employed by BIS) and DFID’s representation on the Steering Board.</li> </ul>
<b>Who assesses complaints?</b>	One individual who currently constitutes the ANCP, supported by two other treasury staff.	Three civil servants who staff the UK NCP.
<b>Funding</b>	Treasury, but the ANCP does not have a dedicated budget.	BIS and DFID.
<b>Complaint resolution process</b>	There are three stages to dealing with complaints brought under the Guidelines: from receipt of complaint to initial assessment, from acceptance of a case by the NCP to conclusion or examination, and from acceptance of a case by the NCP to conclusion of mediation or examination. <sup>104</sup>	Largely identical, but some key differences: <ul style="list-style-type: none"> <li>The UK NCP is to write the complainant within 10 days to confirm how the complaint will be handled,<sup>105</sup> whereas the ANCP is required only to confirm receipt of the complaint within 10 days.<sup>106</sup></li> </ul>

<sup>104</sup> Australian National Contact Point, *Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises*, above n 2.

<sup>105</sup> United Kingdom National Contact Point, *UK National Contact Point Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises*, above n 6, [3.1.1].

<sup>106</sup> Australian National Contact Point, *Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises*, above n 2, [19].

	<p><i>Stage 1: From receipt of complaint to initial assessment</i></p> <p>After receiving a complaint, the ANCP will make an initial assessment of the Specific Instance, and may consult with other NCPs and/or experts, if relevant. The ANCP may:</p> <ul style="list-style-type: none"> <li>• forward the complaint to the MNE named in the Specific Instance, requesting a preliminary response; or</li> <li>• transfer the Specific Instance to another country's NCP if it is more appropriate that the complaint be dealt with by the other country's NCP (e.g.: based on the geography of the activities complained of); or</li> <li>• reject the complaint, advise the complainant appropriately, and publish a statement on its website.</li> </ul> <p><i>Stage 2: From acceptance of the case by the NCP to conclusion of mediation or examination</i></p> <p>If the ANCP decides to accept the Specific Instance, it will offer its "good offices" to bring the parties together with the aim of reaching a mutually agreed resolution, usually by mediation. Participation in any mediation is voluntary, and if the parties agree, they will proceed to mediation. If the parties refuse mediation or mediation fails, the ANCP is to conduct an examination of the case.</p> <p><i>Stage 3: Drafting and publication of the Final Statement</i></p> <ul style="list-style-type: none"> <li>• The ANCP will then draft a Final Statement, which may include any mediated outcomes where the par-</li> </ul>	<ul style="list-style-type: none"> <li>• During the initial assessment period, UK NCP will offer meetings to both the complainant and company to explain the NCP process and answer any questions, and as part of its commitment to transparency, minutes of the meeting will be shared with both parties.<sup>107</sup></li> <li>• Instead, the ANCP makes offering meetings to the complainant and company to explain the process and answer any questions optional, it occurs after the initial assessment stage, and it may use these meetings to start investigating the complaint, including by clarifying the precise nature of the complaint with the complainant, and asking the company for their response to the complaint. There is no mention of taking a minute of these meetings nor sharing what was discussed at each meeting with both parties.<sup>108</sup></li> <li>• The UK NCP is required to produce and publish its initial assessment, whereas this appears optional for the ANCP.<sup>109</sup></li> <li>• Where the mediation is refused by the parties or fails, the UK NCP is required to examine the complaint and determine whether there has been a breach of the Guidelines ("the [UK] NCP will then review all the information it has gathered and make a decision as to whether the Guidelines have been breached"),<sup>110</sup> whereas examining the complaint and determining whether there has been a breach of the Guidelines is only optional for the ANCP ("the ANCP may then review all the information it has gathered, and may make a statement as to</li> </ul>
--	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<sup>107</sup> United Kingdom National Contact Point, *UK National Contact Point Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises*, above n 8, [3.1.3].

<sup>108</sup> Australian National Contact Point, *Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises*, above n 2, [24].

<sup>109</sup> Cf United Kingdom National Contact Point, *UK National Contact Point Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises*, above n 8, [3.8.1]–[3.2.2] and Australian National Contact Point, *Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises*, above n 2, [30].

<sup>110</sup> United Kingdom National Contact Point, *UK National Contact Point Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises*, above n 8, [4.6.8].

	ties have proceeded to mediation, or may include a determination by the ANCP as to whether or not there has been a breach of the Guidelines. The Final Statement will then be sent to the parties for checking, with a deadline of 10 days for comment. After making any necessary factual changes, the Final Statement will be sent to the parties. The parties then have 10 days from the date the Final Statement to apply for review to the Oversight Committee. Once this process has concluded, the Final Statement will be published online.	whether the Guidelines have been may been breached”). <sup>111</sup>
<b>Number of complaints submitted</b>	15 complaints have been submitted to the ANCP. <sup>112</sup>	63 complaints have been submitted to the UK NCP. <sup>113</sup>
<b>Outcome of determinations</b>	The ANCP has never made a determination on whether or not there has been a breach of the Guidelines by a company in any case.	The UK NCP has made a determination on whether or not there has been a breach of the Guidelines in 7 cases: <ul style="list-style-type: none"> <li>• 4 in favour of business (i.e.: no breach of the Guidelines), and of those, 3 were in the defence industry and 1 in mining; and</li> <li>• 3 in favour of the complainants (i.e., company found to have breached the Guidelines), all in mining.</li> </ul>
<b>Indeterminate or mixed outcomes</b>	N/A	<ul style="list-style-type: none"> <li>• Three cases resulted in mixed outcomes for the complainant (e.g., not all of the breaches cited in the complaint may have been considered or determined),</li> </ul>

<sup>111</sup> Australian National Contact Point, *Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises*, above n 2, [52].

<sup>112</sup> The status of those complaints are: rejected — 6; transferred to or led by another country's NCP — 4; accepted or partially accepted — 3; pending — 2: see Final Statements published on Australian National Contact Point, *Publications* (2011) <<http://www.ausncp.gov.au/content/Content.aspx?doc=publications.htm>>; OECD Watch, *EC and IDI vs. Australia New Zealand Banking Group* (2014) <[http://www.oecdwatch.org/cases/Case\\_343](http://www.oecdwatch.org/cases/Case_343)>, which details a complaint said to have been accepted by the ANCP the outcome of which is pending; and OECD NCP, *Rubber production in Sri Lanka* (2013) <<http://mneguidelines.oecd.org/database/instances/au0006.htm>>, which provides some detail on a complaint and states that the ANCP is currently supporting a dialogue between the parties, the outcome of which is pending, though it does not state that the complaint has even been formally accepted.

<sup>113</sup> The majority of complaints submitted to the UK NCP (43 complaints) were submitted after the UK NCP restructuring in 2008. Since 2011, 27 complaints have been submitted, of which 25 allege breaches of the human rights chapter of the Guidelines. See Amnesty International, above n 22, 14, 16.



		<p>involving oil, tobacco, and manufacturing, respectively; and</p> <ul style="list-style-type: none"> <li>• A further four cases in mining saw no action taken, as the NCP claimed they had been dealt with in the UN as they occurred in a conflict zone (see “admissibility” below)</li> </ul>
<b>Admissibility</b>	<p>No cases have been officially deemed inadmissible by the ANCP.</p>	<p>UK NCP has deemed 7 cases inadmissible, comprising:</p> <ul style="list-style-type: none"> <li>• 4 complaints against mining companies operating in the DRC and Zimbabwe, claiming the UN had dealt with the issues and it could not reopen the case;</li> <li>• 1 mining case in Zambia, citing “want of prosecution”; and 2 other cases underwent an initial assessment but were deemed to be inadmissible. No information is available as to the identity of the company.</li> </ul>
<b>Jurisdiction</b>	<ul style="list-style-type: none"> <li>• The ANCP may consider a complaint where the company is registered in Australia, or operating in Australia.</li> <li>• In practice, however, usually where the company is registered in Australia but the complaint relates to activities conducted abroad, the ANCP transfers the specific instance to the relevant country’s NCP to handle.<sup>114</sup></li> </ul>	<ul style="list-style-type: none"> <li>• The UK NCP may consider a complaint where the company is registered in the UK, or operating in UK.</li> </ul>
<b>Industries the subject of complaint</b>	<p>The ANCP has received 15 complaints, 3 of which were complaints by trade unions. The industries the subject of complaint were:</p> <ul style="list-style-type: none"> <li>• Mining — 8 (including two trade union complaints)</li> <li>• Financial services — 3</li> </ul>	<p>Since 2011, the UK NCP has received 27 complaints, 22 of which were handled by the UK NCP as lead NCP.<sup>115</sup> Of those 22, the industries the subject of complaint were:</p> <p>Telecommunications — 9</p> <p>Mining — 6</p>

<sup>114</sup> See *CEDHA vs. Xstrata Copper* (transferred to Argentina), *Justiça Ambiental vs. BHP Billiton* (transferred to UK), *NZ trade union vs. AusCorp* (transferred to New Zealand), and a complaint with unnamed parties transferred to Chile.

<sup>115</sup> Amnesty International, above n 22, 19.

	<ul style="list-style-type: none"> <li>• Security — 2</li> <li>• Marketing – 1 (trade union complaint)</li> <li>• Manufacturing – 1</li> </ul>	Security — 3 Financial institutions — 3 IT — 1 Insurance — 1 Sporting events — 1 Tourism — 1
<b>Standing internationally and changes to functioning over time</b>	<ul style="list-style-type: none"> <li>• The ANCP appears to have fallen behind compared with leading NCPs internationally.</li> <li>• The ANCP's most recent publicly available annual report on its activities is from 2008 (despite it having an active caseload since then), and its most recently publicly available annual report to the OECD Investment Committee is from 2011–12.<sup>116</sup> It is not clear why this is the case.</li> </ul>	<ul style="list-style-type: none"> <li>• The UK NCP is one of the better performing NCPs internationally.<sup>117</sup></li> <li>• The UK NCP underwent extensive structural and procedural reforms in 2008. The new procedures introduced included:               <ul style="list-style-type: none"> <li>◦ an agreed time frame for examination of complaints;</li> <li>◦ the publication of initial assessments and final statements which would make clear if a breach of the Guidelines had occurred;</li> <li>◦ the use of professional mediators; and</li> <li>◦ creation of a Steering Board to oversee the operations of the UK NCP and offer advice on the interpretation of the Guidelines.<sup>118</sup></li> </ul> </li> </ul>
<b>Collection and consideration of evidence</b>	<ul style="list-style-type: none"> <li>• The ANCP procedure for collecting evidence to investigate the complaint, both before and after the initial assessment stage, is largely based on the UK NCP procedure, but the steps are in a different order.<sup>119</sup></li> <li>• <i>At the initial assessment stage:</i> The ANCP will consider the specified grounds of the com-</li> </ul>	<ul style="list-style-type: none"> <li>• <i>At the initial assessment stage:</i> the UK NCP will forward the complaint to the company for comment, may ask the complainant for any information or clarification it considers necessary, then make a draft initial assessment which it will forward to the parties for comment before publication. It may</li> </ul>

<sup>116</sup> Australian National Contact Point, *Publications* (2011) <<http://www.ausncp.gov.au/content/Content.aspx?doc=publications.htm>>.

<sup>117</sup> Amnesty International, above n 22, [11].

<sup>118</sup> Ibid.

<sup>119</sup> It seems that in adapting the UK NCP Procedure, various steps taken to examine and investigate the complaint appear have been confused. The evidence-gathering process that it outlines (e.g., inviting the company to comment, etc.) seems befitting to the initial assessment stage, rather than after the complaint has been accepted (especially given the ANCP rarely accepts complaints). In practice, it may be that the ANCP in fact does take these steps at the initial assessment stage.

	<p>plaint and supporting evidence, and may consult with other national NCPs, and external experts, where relevant.<sup>120</sup> The ANCP Procedure contemplates the issue of an Initial Assessment having reviewed the complaint and supporting evidence, forwarded these to the parties for comment prior to publication, but no Initial Assessments have been published by the ANCP. The ANCP appears to have conflated the Initial Assessments with Final Statements.</p> <ul style="list-style-type: none"> <li>• <i>After making an initial assessment:</i> The ANCP may forward the complaint to the company with invitation to comment. The ANCP may hold meetings with the complainant and the company to begin its analysis of the complaint, including clarifying the precise nature of the complaint, and in the meeting with the company, asking for a response to the complaint. Throughout the complaint handling process, both parties may have the opportunity to submit additional evidence and documentation. If appropriate, the ANCP may seek comment or advice from experts or organisations that may bring particular knowledge and experience that will assist consideration of the complaint. If the ANCP does not accept a specific instance it means there is “insufficient evidence” of any breach of the Guidelines to warrant further examination.<sup>123</sup></li> <li>• <i>After accepting the specific instance:</i> the parties may proceed to mediation, but where media-</li> </ul>	<p>ask the parties for further information at any point, or seek an informed opinion from members of the Steering Board or other experts or members to clarify factual matters.<sup>121</sup> The UK NCP circulates for comment to the parties, and then publishes, its Initial Assessment.</p> <ul style="list-style-type: none"> <li>• The UK NCP has been criticised for requiring too high a level of evidence at the initial assessment stage, which is intended to be a “preliminary sift” to ensure complaints are relevant to the Guidelines and submitted bona fide, and has led to many complaints being rejected on the basis of a lack of substantiation.<sup>122</sup></li> </ul>
--	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<sup>120</sup> Australian National Contact Point, *Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises*, above n 2, [20]–[22].

<sup>121</sup> United Kingdom National Contact Point, *UK National Contact Point Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises*, above n 8, [3.1.1] – [3.2.2]

<sup>122</sup> See Amnesty International, above n 22, 62.

<sup>123</sup> Ibid [23]–[26].

	<p>tion is refused or fails, the ANCP may have to examine the complaint. The examination may involve the ANCP collecting further information from the complainant, the company, or seeking advice from other relevant government departments, Australian diplomatic missions or business associations, NGOs or other agencies, and if appropriate, informed independent opinion. Unlike the UK NCP, there is no provision in the ANCP Procedure for conducting field visits, if necessary.<sup>124</sup></p>	
<b>Standing and access</b>	<ul style="list-style-type: none"> <li>Any “interested party” can file a complaint. The ANCP will consider all complaints it receives provided the complaint and supporting material are filed in English.</li> <li>The ANCP Process states that because the ANCP required “detailed information” complainants should have a “close interest in the case” and “be in a position to supply information about it” as well as having a “clear view of the outcome they wish to achieve”.</li> <li>It is unclear from the ANCP Procedure or website how complaints are to be lodged (e.g., online, by post).</li> </ul>	<ul style="list-style-type: none"> <li>The standing requirements for the UK NCP are the same as for the ANCP.</li> <li>Complaints may be submitted online or by email, and the UK NCP website provides guidance on how to submit a complaint.</li> </ul>
<b>Hearing process</b>	<p>The ANCP process is non-adversarial in nature and therefore the “hearing” process is limited to mediation, or where that fails/is refused, examination of the complaint. The hearing process for each is outlined below.</p> <ul style="list-style-type: none"> <li><i>Where the ANCP conducts the mediation:</i> If the parties agree to mediation, then the media-</li> </ul>	<p>Key differences are that the UK employs professional mediators, and that if mediation fails or is refused, then the UK NCP will examine the complaint and reach a determination as to whether the guidelines have been breached.</p>

<sup>124</sup> Ibid [47]–[52].

	<p>tion process will be followed. Where the ANCP conducts the mediation (e.g., rather than a third-party mediator selected by the parties), this will include:</p> <ul style="list-style-type: none"> <li>◦ <i>Before the mediation:</i> meeting with the parties to discuss the process and discuss any issues or questions, agreeing the agenda, encouraging the parties to exchange information, trust and confidence;</li> <li>◦ <i>During the mediation:</i> providing each party with the opportunity to explain their views and clarify outstanding issues, and where the mediation is successful, may involve preparing a mediation agreement.<sup>125</sup></li> <li>• <i>Where the parties have appointed a third-party mediator:</i> the ANCP will follow up with the parties every two months for updates on the process.</li> <li>• <i>Where the parties do not agree to mediation or it fails:</i> the ANCP may examine the case (see “collection and consideration of evidence” and “procedure for resolving complaints”), and may make a statement as to whether the Guidelines have been breached.</li> </ul>	
<b>Transparency</b>	<ul style="list-style-type: none"> <li>• The ANCP publishes Final Statements on its website.</li> <li>• Information sent to the ANCP is treated confidentially by the ANCP, but information provided by each party may be shared with any other party to the complaint, with consent of the party providing the information. Information and documents provided to the ANCP</li> </ul>	<ul style="list-style-type: none"> <li>• The UK NCP publishes its initial assessments, final statements and follow-up statements on its website.</li> <li>• The UK NCP has similar confidentiality procedures as the ANCP.</li> <li>• The UK NCP has been criticised by Amnesty International for accepting the word of a company and for not</li> </ul>

<sup>125</sup> Australian National Contact Point, *Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises*, above n 2, [36]–[42].



	may be subject to <i>Freedom of Information Act 1982</i> (Cth) requests, and may be released under that Act.	being willing to or not having the power to review the confidential reports showing that they have carried out due diligence and human rights impact assessments. <sup>126</sup>
<b>Remedy</b>	Any remedy must come through the mediation process. The ANCP has indicated that it considers its role limited to providing good offices and facilitating mediation between the parties rather than playing an active and/or ongoing role in resolving the complaint. <sup>127</sup>	<ul style="list-style-type: none"> <li>• The UK is more proactive in following up on commitments by the parties reached following mediation (see, “follow up”)</li> <li>• The quality of the UK NCP’s mediated outcomes is likely to be related to their employment of professional mediators and the role of the Steering Committee in providing advice on issues such as human rights standards.</li> </ul>
<b>Enforcement</b>	The ANCP does not have any powers of enforcement nor are any provided for within Australian legislation.	The UK NCP does not have any powers of enforcement nor are any provided for within UK legislation.
<b>Review of handing of complaints</b>	<ul style="list-style-type: none"> <li>• <i>What can be reviewed?</i> Reviews are available to correct procedural errors only (e.g., failure to issue a Final Statement in accordance with the timetable, failure to be afforded an opportunity to be heard, failure to be treated fairly by the ANCP).</li> <li>• <i>What is the timeframe for requesting a review?</i> Within 10 days of the ANCP sending the parties the Final Statement in the case. The party requesting the review then has a further 10 days to provide full particulars of why the ANCP decision should be reviewed. The review process should be completed</li> </ul>	The process is essentially the same as the ANCP, as the Australian review process is modelled on the UK process, <sup>128</sup> but handled by the UK NCP’s Steering Committee.

<sup>126</sup> See Amnesty International, above n 22, 60.

<sup>127</sup> In the *Australian Human Rights Law Centre and RAID vs. GSL*, the parties mediated agreement included changes that the company would make to its operating procedures to be consistent with international human rights norms. However, the implementation and follow up on these steps was left to the parties. See also the BHP Billiton — Cerrejón Coal complaint: Australian National Contact Point, *Final Statement by the Australian National Contact Point: BHP — Cerrejón Coal Specific Instance*, above n 92, [29], [34].

<sup>128</sup> See Australian National Contact Point, *Oversight Committee Minutes*, above n 97, items 3 and 4.

	<p>within 75 working days of receipt of a request.</p> <ul style="list-style-type: none"> <li>• <i>Who conducts the review?</i> The Review Panel, which is comprised of the members of the Oversight Committee. The review is conducted on the papers.</li> <li>• <i>What outcomes are available?</i> The Review Panel will make a recommendation to the Oversight Committee. If the Oversight Committee considers there are good grounds for the appeal, they may decide to remit the decision back to the ANCP with instructions on how to rectify the procedural error and/or acknowledge that there were deficiencies in the process in the Specific Instance and make recommendations as to how these errors can be avoided in the future. The Oversight Committee will not substitute the decision of the ANCP with its own decision.</li> </ul>	
<b>Process for follow-up</b>	<ul style="list-style-type: none"> <li>• According to its Procedure, if the ANCP's Final Statement includes recommendations to a company, it may specify a date by which both parties are asked to provide the ANCP with a substantiated update on the company's progress towards implementing the recommendations. The ANCP will then prepare a draft Follow Up Statement reflecting the parties' responses, which it will send to the parties for comment, before publishing the Follow Up Statement on its website.<sup>129</sup></li> <li>• In practice, the ANCP seems averse to being involved in any</li> </ul>	<p>The UK NCP appears to have taken a more active role in utilising the follow-up procedure, publishing on its website follow-up statements in six cases.<sup>130</sup></p>

<sup>129</sup> Australian National Contact Point, *Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises*, above n 2, [56]–[57].

<sup>130</sup> See United Kingdom National Contact Point, *UK National Contact Point Case Statements* (2016) <<https://www.gov.uk/government/collections/uk-national-contact-point-statements#follow-up-statements-and-reviews>>.

	<p>follow-up action, stating in its Final Statement in <i>Colombian Communities vs. Xstrata; BHP Billiton</i> that, “the ANCP fulfilled its primary function in providing a forum for discussion and assisting the parties reach agreement on the issues. The ANCP does not anticipate having an ongoing role”.<sup>131</sup></p>	
<b>Domestic laws that may impact operations of the NCP</b>	<p>Information held by the ANCP may be released under requests made pursuant to the <i>Freedom of Information Act 1982</i> (Cth).</p>	<p>Information held by the UK NCP may be released under requests made pursuant to the <i>Freedom of Information Act 2000</i> (UK) and <i>Environmental Information Regulations 2004</i> (UK).<sup>132</sup></p>
<b>Status and impact of mediated outcomes and determinations</b>	<ul style="list-style-type: none"> <li>• Determinations are not a substitute for nor do they override Australian law, but standards of behaviour supplemental to Australian law. Australia has not made any determinations, but the ANCP enjoyed a positive mediated outcome in <i>Australian Human Rights Law Centre vs. GSL</i>, where the parties agreed on changes to be made to GSL’s practices in procedures to be consistent with international human rights norms.<sup>133</sup> However, there has been no published follow up by the ANCP on the extent to which these changes have actually been made.</li> </ul>	<ul style="list-style-type: none"> <li>• Determinations are not legally binding under UK law.</li> <li>• The UK NCP makes recommendations where it finds a breach of the Guidelines, which it follows up with the company after one year to determine whether or not they have been implemented. From the follow-ups published by the UK NCP, it appears companies generally claim to have implemented the recommendations, but refuse to provide access to “confidential” company documents that might evidence said implementation.<sup>134</sup></li> <li>• In addition, likely by virtue of its employment of professional me-</li> </ul>

<sup>131</sup> Australian National Contact Point, *Final Statement by the Australian National Contact Point: BHP — Cerrejón Coal Specific Instance*, above n 92 [29], [34].

<sup>132</sup> United Kingdom National Contact Point, *UK National Contact Point Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises*, above n 8, 9.

<sup>133</sup> Australian National Contact Point, *ANCP Evaluation of GSL Specific Instance complaint* (2006) <[http://www.aus-ncp.gov.au/content/publications/reports/general/GSL\\_Evaluation.pdf](http://www.aus-ncp.gov.au/content/publications/reports/general/GSL_Evaluation.pdf)>

<sup>134</sup> See for example, United Kingdom National Contact Point, *Follow up Statement after recommendations in complaint from LPHR against G4S* (July 2016) 5–6 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/534307/bis-16-323-uk-ncp-follow-up-complaint-lphr-g4s.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/534307/bis-16-323-uk-ncp-follow-up-complaint-lphr-g4s.pdf)>; Follow up Statement after recommendations in complaint from *Privacy International vs. Gamma International* (2016) 4–5 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/502420/bis-16-127-uk-ncp-follow-up-statement-privacy-international-gamma-international.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/502420/bis-16-127-uk-ncp-follow-up-statement-privacy-international-gamma-international.pdf)>; Follow up to the Final Statement ... *Complaint from the Malaysian Trades Union Congress against British American Tobacco Malaysia Berhad* (2011) 2–3 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31747/11-1072-follow-up-ncp-malaysian-trades-union-congress-bat.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31747/11-1072-follow-up-ncp-malaysian-trades-union-congress-bat.pdf)>.

	<ul style="list-style-type: none"> <li>In its Final Statement in <i>Colombian Communities vs. Xstrata; BHP Billiton</i>, handled in conjunction with other countries' NCPs, in which the parties also came to a mediated agreement, it is unclear the extent to which the mediated outcomes were implemented as no follow-up appears to have been conducted.</li> </ul>	<p>diators and follow-up mechanism, has enjoyed mediated outcomes with a positive impact. For example, in a 2014 case alleging human rights violations in connection with Formula One's Grand Prix races in Bahrain, the mediated agreement facilitated by the UK NCP included the first public commitment by Formula One to respect human rights in all operations and develop a human rights due diligence policy.<sup>135</sup></p>
Notable features	<ul style="list-style-type: none"> <li>Alleged procedural failings can be referred for review to the Oversight Committee, which is based on the UK NCP's Steering Board and procedures.</li> <li>The Oversight Committee comprises representatives from various government departments, and may include independent experts, appointed from time to time by the Committee. Unlike the UK NCP's Steering Board, there are no permanent independent members.</li> <li>The Oversight Committee is to hold meetings biannually or at times the Oversight Committee Chair considers to be appropriate, though in practice it is unclear that they hold these meetings.<sup>136</sup></li> <li>In addition to reviews, the Oversight Committee is responsible for: <ul style="list-style-type: none"> <li>considering issues of general and specific application of the Guidelines;</li> <li>overseeing and monitor the effectiveness of the ANCP, to agree any changes in the ANCP's procedures, and develop-</li> </ul> </li> </ul>	<p>The UK NCP has a number of notable features, including that:</p> <ul style="list-style-type: none"> <li>Professional mediators are used;</li> <li>Final statements include determinations as to whether a breach of the Guidelines has occurred;</li> <li>Alleged procedural failings can be referred for review to the Steering Board; and</li> <li>After one year, the UK NCP invites the parties to a complaint to report on how its recommendations have been implemented, and issues a statement.</li> </ul>

<sup>135</sup> Remedy Remains Rare Report, above n 25, 17.

<sup>136</sup> See Australian National Contact Point, *Australian National Contact Point for the OECD Guidelines on Multinational Enterprises Oversight Committee Minutes*, above n 97.

<sup>137</sup> Australian National Contact Point, *Annual Report to the OECD Investment Committee 2011–2012* (2012) 5 <[http://www.ausncp.gov.au/content/publications/reports/reports\\_to\\_OECD/2011-12\\_Annual\\_Report/ANCP\\_Annual\\_Report\\_to\\_OECD\\_2012.pdf](http://www.ausncp.gov.au/content/publications/reports/reports_to_OECD/2011-12_Annual_Report/ANCP_Annual_Report_to_OECD_2012.pdf)>.

	<ul style="list-style-type: none"> <li>ing further procedures; <ul style="list-style-type: none"> <li>◦ considering issues where clarifications of improvements to the Guidelines are proposed for bringing to the attention of the OECD Investment Committee; and</li> <li>◦ keeping its own Terms of Reference public and under review.</li> </ul> </li> <li>• There is no evidence on the ANCP's website that any complaint has ever been referred for review.</li> </ul>	
<b>Outreach</b>	<ul style="list-style-type: none"> <li>• The ANCP reported to the OECD in 2012 that it engaged in outreach with business, relevant community groups, Australian High Commissions and consulates and business organisations, as well as developing a communication strategy.</li> <li>• However, it is understood the ANCP now conducts limited to no outreach as it has no budget to do so.<sup>137</sup></li> </ul>	<ul style="list-style-type: none"> <li>• The UK NCP holds seminars, conducts outreach visits to other OECD member and non-member countries, and is involved in peer reviewing other countries' NCPs.<sup>138</sup> It is not clear how much time the UK NCP dedicates to outreach, given its heavy caseload.<sup>139</sup></li> </ul>

<sup>138</sup> See for example, United Kingdom National Contact Point Steering Board, *Minutes of Meeting* (25 November 2015) [4.1] – [4.2] <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/509014/UK-NCP-Steering-Board-Minutes-25\\_Nov-2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/509014/UK-NCP-Steering-Board-Minutes-25_Nov-2015.pdf)>.

<sup>139</sup> See Amnesty International, above n 22, 13.



## Annex 1: Rejected cases

Case name	Key issue	Reason rejected
<i>National Federation of Mining and Energy (FENAME) of Mali vs. Bayswater Contracting and Mining Group (BCM) (2015 – 2016)</i>	BCM's dismissal of several hundred workers, including union representatives, without correct approval from the relevant local Government agency in Mali.	Initial investigation determined that BCM is not a registered Australian enterprise and attempts to contact BCM went unanswered. At the time of investigation there did not appear to be any other NCP with operational jurisdiction.
<i>Human Rights Law Centre and RAID vs. G4S (2014–15)</i>	G4S's contribution to human rights abuses of asylum seekers in offshore immigration detention operated on behalf of the Australian government. <sup>140</sup>	Not the role of ANCP to issue commentary on government policies or law, and other mechanisms exist for review and scrutiny of policy. Independent reviews of the conduct of G4S had already been conducted. Legal proceedings regarding matters the subject of complaint were ongoing, and the ANCP considered it was not appropriate to "intervene in any way in due legal processes". <sup>141</sup>
<i>Amadiba Crisis Committee vs. MRC (2013)</i>	Alleged human rights and environmental violations relating to mining on land inhabited by indigenous peoples in South Africa. <sup>142</sup>	Unwillingness of the communities represented by the complainant to enter into mediation, although acknowledged claim could not be verified. Matters the subject of the complaint being investigated by local South African authorities within domestic legal system.
<i>CFMEU vs. Xstrata (2010–11)</i>	Xstrata's alleged breaches of employment and industrial relations and competition practices in its dealings with the Construction, Forestry, Mining and Energy Union	Unwillingness of Xstrata to enter into mediation process with CFMEU.
<i>ACF et al vs. ANZ Bank; Green Party of New Zealand vs. ANZ Bank (2006)</i>	ANZ Bank's financing of a Malaysian multinational company's destructive forestry ("logging") practices in Papua New Guinea. <sup>145</sup>	Unable to determine the extent to which ANZ could influence the Malaysian multinational company's activities and therefore whether the requisite "investment nexus" existed.

<sup>140</sup> See OECD Watch, *Human Rights Law Centre and Raid vs. G4S (2015)* <[http://www.oecdwatch.org/cases/Case\\_342](http://www.oecdwatch.org/cases/Case_342)>.

<sup>141</sup> Australian National Contact Point, *Statement by the Australian National Contact Point Specific Instance – G4S Australia Pty Ltd*, above n 65.

<sup>142</sup> See OECD Watch, *Amadiba Crisis Committee vs. MRC Ltd*, above n 71.

<sup>143</sup> See OECD Watch, *ACF et al. vs. ANZ Bank (2006)* <[http://www.oecdwatch.org/cases/Case\\_107](http://www.oecdwatch.org/cases/Case_107)> and *Green Party of New Zealand vs. ANZ Bank (2008)* <[http://www.oecdwatch.org/cases/Case\\_125](http://www.oecdwatch.org/cases/Case_125)>.

<sup>144</sup> See OECD Watch, *Human Rights Council of Australia vs. GSL (2006)* <[http://www.oecdwatch.org/cases/Case\\_73](http://www.oecdwatch.org/cases/Case_73)>.

<sup>145</sup> OECD Watch, *CEDHA vs. Xstrata (2014)* <[http://www.oecdwatch.org/cases/Case\\_217](http://www.oecdwatch.org/cases/Case_217)>.

## Annex 2: Fully accepted Cases

Case name	Key issue	Resolution
<i>Colombian communities vs. Xstrata; BHP Billiton (2007–09)</i>	Xstrata and BHP Billiton forced evictions at coal mine in Colombia. <sup>146</sup>	<ul style="list-style-type: none"> <li>ANCP met with the parties and learned that BHP had commissioned an independent review of its activities at the mine. The complaint was suspended until the report of the review was released.</li> <li>The report recommended that BHP take action that addressed much of the subject matter of the complaint. BHP confirmed to the ANCP that it undertook to implement the recommendations.</li> <li>Despite protest from the complainants, the ANCP closed the complaint, considering that it had discharged its role and that it was not appropriate for it to have an overseer role regarding implementation of the recommendations of the review.</li> </ul>

## Annex 3: Partially accepted Cases

Case name	Key issue	Aspects of claim rejected and why	Resolution
<i>Human Rights Council of Australia vs. GSL (2005–06)</i>	GSL management of immigration detention centres in Australia, including the failure to remove children from detention following recommendations to do so, and misrepresenting that it is committed to promoting best practice in human rights. <sup>147</sup>	Claims relating to alleged human rights abuses occurring during GSL carrying out Australian Government policy on immigration detention rejected. Scope limited to ensuring GSL's practices and policies consistent with international human rights standards.	The parties reached a mutually accepted mediated outcome that involved changes GSL undertook to make to its policies and procedures to be consistent with international human rights standards.

<sup>146</sup> Australian National Contact Point, *Transfer of Specific Instance Complaint to National Contact Point for Argentina* (2011) <[http://www.ausncp.gov.au/content/publications/reports/general/NCP\\_Argentine.pdf](http://www.ausncp.gov.au/content/publications/reports/general/NCP_Argentine.pdf)>.

<sup>147</sup> OECD Watch, *Justiça Ambiental vs. BHP Billiton* (2010) <[http://www.oecdwatch.org/cases-es/Case\\_189](http://www.oecdwatch.org/cases-es/Case_189)>.

## Annex 4: Cases filed with both ANCP and another NCP but dealt with by the latter

Case name	Key issue	Reasons for transfer	Outcome
<i>CEDHA vs. Xstrata Copper</i> (2011–14)	Xstrata's activities and impact on glaciers in Argentina. <sup>148</sup>	Each of the projects the subject of the complaint was in Argentina. The NGO making the complaint was in Argentina. Key company representatives with day-to-day decision-making responsibilities for the projects based in Argentina. <sup>149</sup>	Complaint closed by Argentine NCP due to unwillingness of Xstrata to engage in mediation process.
<i>Justiça Ambiental vs. BHP Billiton</i> (2010–11)	Concerns regarding BHP's intention to operate an aluminium smelter under a bypass in Mozambique. <sup>150</sup>	Complaint also filed with UK NCP as BHP Billiton dual listed in Australia and the UK. Decided UK NCP would be lead NCP as BHP's alumina group located in the UK.	Complaint was accepted by the UK NCP and has been suspended while the parties engage in external mediation.
<i>Unnamed NZ Trade Union vs. AusCorp</i> (2009–10)	Concerns regarding AusCorp's use of sub-contractors rather than employees to provide services.	Complaint involved a range of New Zealand domestic issues.	NZ NCP rejected the complaint as it considered that the issues raised in the trade union submission did not merit further examination.
<i>Mining in Chile</i> (parties currently unknown) (2012)	Concerns regarding activities of a joint venture mining operation.	The joint venture the subject of complaint was in Chile. Key company representatives with day-to-day decision-making responsibilities for the projects based in Chile. Spanish was the first language of the proponents of the complaint and the key company representatives.	The ANCP not in the best position to assess whether the actions by the company were valid or illegal under Chilean law.

<sup>148</sup> OECD, *Specific instance case database – Australia – Rubber production in Sri Lanka* (2013) <<http://mneguidelines.oecd.org/database/instances/au0006.htm>>.

<sup>149</sup> OECD Watch, *EC & IDI vs. ANZ Bank* (2014) <[https://www.oecdwatch.org/cases/Case\\_343](https://www.oecdwatch.org/cases/Case_343)>.

## 5: Pending Cases

Case name	Key issue
<i>Rubber production in Sri Lanka (2013 – )</i>	Alleged breach of the employment and industrial relations provisions of the Guidelines by an Australian multinational enterprise which manufactures rubber products in Sri Lanka. <sup>152</sup>
<i>EC and IDI vs. ANZ Banking Group (2014 – )</i>	ANZ's role in financing a sugar plantation and refinery that displaced and dispossessed Cambodian families. <sup>153</sup>



corporateaccountabilityresearch.net



©2017



DESIGN BY  
OPF-TECH.NET