

Towards effective non-judicial remedy in Australia: principles for reform

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1. Introduction

ActionAid Australia and Jubilee Australia are calling for improved access to timely and effective remedy for communities subject to human rights abuses at the hands of Australian businesses operating overseas. This brief sets out principles of effective non-judicial remedy, analyses whether currently available mechanisms are fit for purpose against these principles, and makes recommendations to policy-makers.

Thousands of Australian businesses operate or source goods from overseas each year. The Australian government is both directly and indirectly involved in funding the overseas activities of Australian businesses through mechanisms such as the Export Finance and Insurance Corporation (Efic), and its Official Development Assistance program (which includes programs delivered by the Asian Development Bank and the International Finance Corporation).¹ The Australian Government also procures goods sourced from overseas. Some of these Australian businesses, particularly those in the mining and garment sectors, have been associated with human rights abuses overseas.

The United Nations Guiding Principles on Business and Human Rights (UNGPs) were unanimously endorsed by the UN Human Rights Council in 2011, and the Australian Government was a co-sponsor to the resolution. The UNGPs are a guide to implementing the UN ‘protect, respect and remedy’ framework which outlines the state duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the state duty to provide greater access by victims to effective remedy, both judicial and non-judicial.²

When human rights abuses occur, it is critical that those affected have access to effective remedy that is timely and appropriate to the abuse suffered.³ Australia’s principal non-judicial mechanism for assessing cases of human rights abuses by Australian businesses operating overseas is the Australian National Contact Point (NCP) under the OECD’s Guidelines for Multinational Enterprises. An independent review of the Australian NCP, commissioned by Treasury in 2017, found it to be severely lacking.⁴ This paper aims to provide policy-makers with a path forward on reform of non-judicial remedy in Australia.

2. The need for more effective remedy for victims of human rights violations

There is substantial evidence linking human rights abuses to Australian companies operating overseas, especially in low income countries.

The extractive industries pose a high risk to human rights, particularly in communities affected directly by mining, oil and gas operations.⁵ Since the beginning of 2004, more than 380 people have

¹ Shelley Marshall and Kate MacDonald, 2011, ACFID Presentation: *Redress mechanisms governing the human rights practices of transnational business*, <https://static1.squarespace.com/static/57e140116a4963b5a1ad9780/t/57e69da3be6594ead494d8a4/1474731429743/ACFID-PRESENTATION-for-website.pdf>

² Office of the High Commissioner of Human Rights, 2011, *Guiding principles on business and human rights: implementing the United Nations “protect, respect and remedy” framework*, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

³ May Miller-Dawkins, Kate Macdonald and Shelley Marshall, 2016, *Beyond Effectiveness Criteria: The possibilities and limits of Transnational Non-Judicial Redress Mechanisms*, <http://corporateaccountabilityresearch.net/njm-report-i-beyond-the-uns-effectiveness-criteria>

⁴ Alex Newton, 2017, *Independent Review: Australian National Contact Point under the OECD Guidelines for Multinational Enterprises*, <https://cdn.tspace.gov.au/uploads/sites/112/2018/02/Final-Report.pdf>

⁵ ActionAid Australia, 2017, *Fuelling Injustice: Women’s rights and Australian coal mining in Africa*, <http://www.actionaid.org/australia/fuelling-injustice>

died in mining accidents or in off-site skirmishes connected to publicly-listed Australian mining companies in 13 countries across Africa.⁶ Australian mining companies have been accused of negligence, unfair dismissal, violence and environmental law-breaking across Africa, and elsewhere around the world.⁷ Mining can negatively affect communities' access to land, their livelihoods, food security, and their health and safety, and women often bear the brunt of these impacts.⁸

Human rights abuses have also been well documented in the garment sector. In 2016, Australian garment industry turnover was \$27 billion, with 91% of our garments made in Asia.⁹ The garment industry has also been subject to intense scrutiny since the collapse of the Rana Plaza factory outside Dhaka, Bangladesh in April 2013, which killed more than 1,100 people.¹⁰ A number of Australian companies source materials from Bangladeshi factories.¹¹ Women make up 80% of garment sector workers, and as such are particularly susceptible to these labour rights abuses, which are compounded for through pregnancy-related discrimination and sexual harassment.¹² Baptist World Aid Australia evaluates Australian fashion companies and brands each year against a criteria covering worker conditions and human rights concerns, and grades companies from A+ to F. In 2018 only one in ten Australian apparel companies achieved A+ or A grades.¹³

As party to both the OECD Guidelines on Multinational Enterprises and the United Nations (UN) Guiding Principles on Business and Human Rights, the Australian Government must ensure that victims of human rights abuses, such as those described above, have access to effective remedy.¹⁴ Effective remedy for human rights violations is considered to have three components: cessation of the violation; reparation of harm that has occurred, such as compensation or an apology, and; adoption of measures to prevent future violations.¹⁵ It is also important to ensure that the barriers to accessing remedy mechanisms (such as literacy, language, cost, physical location and fear of reprisal) and the power relations that exist between states, companies and communities (especially women), are identified and addressed.

Women, in particular, face multiple forms of discrimination and experience additional barriers in seeking access to effective remedy for business-related human rights abuses due to discriminatory laws, gender roles, economic marginalisation, social stigma, power imbalances, religious values and cultural norms. In July 2018, the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) Committee recommended that the Australian Government “establish a specialized mechanism to investigate violations of women’s human rights by corporations which are based or

⁶ International Consortium of Investigative Journalists, 2015, *Fatal Extraction: Australian mining’s damaging push into Africa*, <https://www.icij.org/investigations/fatal-extraction/>

⁷ International Consortium of Investigative Journalists, 2015, *Fatal Extraction: Australian mining’s damaging push into Africa*, <https://www.icij.org/investigations/fatal-extraction/>; Jubilee Australia, 2014, *Voices of Bougainville: Nikana Kangsi, Nikana Dong (Our Land, Our Future)*, <https://www.jubileeaustralia.org/LiteratureRetrieve.aspx?ID=139150>

⁸ ActionAid Australia, 2018, *Women’s Vision for Reform: An Agenda for Corporate Accountability in Australia’s Mining Sector*.

⁹ Oxfam Australia, 2017, *What she makes: power and poverty in the fashion industry*, https://whatshemakes.oxfam.org.au/wp-content/uploads/2017/10/Living-Wage-Media-Report_WEB.pdf

¹⁰ Human Rights Watch, 2017, *Transparency in the Apparel Industry*, <https://www.hrw.org/world-report/2018/essay/transparency-in-apparel-industry>

¹¹ Carolyn Webb, Sydney Morning Herald, 22 April 2018, 'Shameful' clothing brands failing Bangladeshi workers, say activists, <https://www.smh.com.au/national/shameful-clothing-brands-failing-bangladeshi-workers-say-activists-20180422-p4zb1r.html>

¹² Human Rights Watch, 2015, *Work faster or get out: labour rights abuses in Cambodia’s garment industry*, <https://www.hrw.org/report/2015/03/11/work-faster-or-get-out/labor-rights-abuses-cambodias-garment-industry>

¹³ Baptist World Aid Australia, 2018, *2018 Ethical Fashion Report*, <https://baptistworldaid.org.au/resources/2018-ethical-fashion-report/>

¹⁴ OECD, 2011, *OECD Guidelines on Multinational Enterprises*, <http://www.oecd.org/daf/inv/mne/48004323.pdf>; UN Office of the High Commissioner of Human Rights 2011, *Guiding Principles on Business and Human Rights*, https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

¹⁵ OECD Watch, 2015, *Remedy Remains Rare*, https://www.oecdwatch.org/publications-en/Publication_4201

registered within the State party or receive subsidies from it, bring perpetrators to justice and expeditiously ensure compensation and rehabilitation for women victims.”¹⁶

3. Principles for an effective mechanism for delivering non-judicial remedy

Non-judicial remedy mechanisms are not a replacement for functional judicial processes, but are an important complementary means for addressing human rights abuses in cases where judicial redress may not be possible or practical. The following principles for non-judicial remedy have been based on comparative studies of the most effective mechanisms internationally,¹⁷ and have been endorsed by ActionAid Australia, Australian Lawyers for Human Rights, the Human Rights Law Centre, Jubilee Australia, and Oxfam Australia.

Powers to investigate

- a mandate to proactively investigate both individual cases of abuse and systemic problems which may give rise to those abuses
- clear processes for gathering and verifying evidence
- the ability to compel witnesses and company documents where appropriate

Powers to recommend effective remedy

- the ability to recommend a range of appropriate remedies including compensation, an apology, cessation of particular activities, mitigation measures and corporate policy changes
- a mandate to refer criminal wrongdoing to relevant law enforcement bodies

Leverage

- the ability to generate buy-in and changes in corporate behaviour, such as through sector initiatives focused on human rights-compliant practice and the United Nations Guiding Principles on Business and Human Rights, and recommending sanctions such as the withdrawal of government contracts or trade support for companies that fail to engage or comply with remedy recommendations

Independence

- independent from government and corporate interests

Resources

- well-qualified staff with appropriate subject-matter expertise and training in dispute-resolution
- appropriate financial resources for undertaking investigations

Accessibility

- a mandate to identify and address specific barriers that women and other marginalised groups face accessing remedy, including those of language, distance, resources and power imbalances

¹⁶ CEDAW Committee, 2018, *Concluding observations on the eighth periodic report of Australia*, https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fAUS%2fCO%2f8&Lang=en

¹⁷ May Miller-Dawkins, Kate Macdonald and Shelley Marshall, 2016, *Beyond Effectiveness Criteria: The possibilities and limits of Transnational Non-Judicial Redress Mechanisms*, <http://corporateaccountabilityresearch.net/njm-report-i-beyond-the-uns-effectiveness-criteria>; Global Affairs Canada, 2018, *Government of Canada brings leadership to responsible business conduct abroad*, <https://www.canada.ca/en/global-affairs/news/2018/01/the-government-ofcanadabringingleadershiptoresponsiblebusinesscond.html>

Accountability and transparency

- a strong, independent oversight mechanism
- requirements to provide regular and timely feedback to all parties regarding the steps of an investigation and to monitor and follow up on public recommendations for remedy
- requirements to report publicly on a regular basis (e.g. to Parliament)

4. Pathways for reform

Australia's principal non-judicial mechanism for assessing cases of human rights abuses by Australian business operating overseas is the Australian National Contact Point (NCP) under the OECD's Guidelines for Multinational Enterprises.

The current Australian NCP model has been shown to be insufficient and is clearly not meeting the principles outlined above. In 2017, the Australian NCP was ranked by the OECD as one of the worst performing NCPs among OECD nations.¹⁸ When assessed against key criteria the Australian NCP was found to not provide effective remedy, and to have a poor record of resolving disputes.¹⁹ Furthermore, access to the Australian NCP is restricted by language, physical location, costs and fear of reprisal, and the review found that the Australian NCP did not have the requisite mechanisms or policies in place to overcome these barriers.²⁰ A formal response from the Government to this review is expected in late 2018.

As noted by the 2017 Review of the Australian NCP, the most effective NCPs internationally are those which are well-resourced, have an independent structure, proactively investigate complaints and effectively engage with all stakeholders.²¹ The Norwegian NCP, for example, was established as an independent, expert four-member panel where one member is nominated from each of the trade union confederation, the business federation, and a forum of non-governmental organisations (NGOs) on behalf of civil society. The fourth member, and chair, is appointed by the Ministry of Foreign Affairs.²² The Norwegian NCP has an annual budget of NOK\$4 million (AUD\$675,530 equivalent) and three full-time staff forming the secretariat.²³

The Dutch NCP likewise is comprised of eight members, up to five of which are independent members nominated by the government following consultations with relevant business, ministries and civil society. An additional advisory body, the 'NCP Plus', meets every three months and is comprised of external stakeholders from trade unions, NGOs, and business associations. The Dutch NCP has a budget of €900 000 (AUD\$1.45 million equivalent) over three years.²⁴ Importantly, the Danish NCP has powers established by legislation to undertake investigations and to undertake cases of its own initiative.²⁵

The traditional focus of NCPs, however, has generally been on dispute resolution, rather than accountability and the exposure of systemic problems. With a few exceptions, they have tended not to be structured with the strong investigative powers that a commission or ombudsperson might

¹⁸ Alex Newton, 2017, *Independent Review: Australian National Contact Point under the OECD Guidelines for Multinational Enterprises*, <https://cdn.tspace.gov.au/uploads/sites/112/2018/02/Final-Report.pdf>

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ OECD, 2018, *Structures and Procedures of National Contact Points for the OECD Guidelines for Multinational Enterprises*, <https://mneguidelines.oecd.org/Structures-and-procedures-of-NCPs-for-the-OECD-guidelines-for-multinational-enterprises.pdf>

have – for example, to initiate own-motion investigations or compel documents or witnesses. It is also only recently that some NCPs have begun to move towards considering more direct forms of sanction for companies found to have breached the Guidelines, or who have refused to participate in the complaints process, such as by withdrawing government trade support.

These limitations have restricted the ability of even the most well-resourced and independent NCPs to effectively recommend remedy. A 2015 OECD Watch review of all complaints handled by NCPs between 2001 and 2015 found that of 250 cases filed, only 3 resulted in improved conditions for victims of corporate abuses, and none resulted in compensation for victims.²⁶

Thus, while a reformed Australian NCP could provide an effective non-judicial redress mechanism, its mandate, authority and resources would need to be significantly expanded beyond its current mandate, and beyond that of even the most well-regarded NCPs, to ensure it can play this role effectively.

The Canadian government has recently established a corporate grievance mechanism that can be considered leading practice for provision of non-judicial remedy, and provides a valuable example of non-judicial remedy that adheres more closely to the principles outlined above.

The Canadian Ombudsperson for Responsible Enterprise (CORE), established in January 2018, will be an independent, arm's-length non-judicial mechanism with the power and resources to investigate individual and systematic allegations of human rights abuses arising from Canadian companies' activities overseas. The Canadian NCP will continue to fulfil its mandate of dialogue, facilitation or mediation for all sectors for the wider range of issues included in the OECD Guidelines for Multinational Enterprises.²⁷

CORE is expected to function independently of government. While CORE is under the purview of the Minister for Trade, it will have "full discretion to... address allegations of human rights abuses by Canadian companies operating abroad". In addition, its multi-stakeholder advisory board will include civil society to ensure that a range of experience and viewpoints are represented on the board. The intention is also for CORE to report on progress during investigations, and it will be required to report annually to the Canadian Parliament.²⁸

CORE will have the power and budget to undertake collaborative and independent fact-finding and will also be able to compel witnesses and documents. It will focus on investigations, informal resolution of disputes, and on making public recommendations for remedy that could include compensation, an apology, the cessation of particular activities, mitigation measures or corporate policy changes. It will also have the ability to recommend sanctions if companies do not cooperate in the investigation process, including the withdrawal of certain government services such as trade advocacy and future Export Development Canada support.²⁹

CORE is also better resourced than most NCPs, with an initial budget allocation of \$CAD6.8 million (approximately \$AUD7.2 million) over six years, although this is considered the lower end of what is required by civil society organisation Mining Watch Canada.³⁰

²⁶ OECD Watch, 2015, *Remedy Remains Rare*, https://www.oecdwatch.org/publications-en/Publication_4201

²⁷ Global Affairs Canada, 2018, *Responsible business conduct abroad – Questions and answers* <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/faq.aspx?lang=eng> (accessed 21 September 2018)

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ Trish Audette-Longo, Canada's National Observer, 27 February 2018, *Morneau budget proposes new money for human rights watchdog*, <https://www.nationalobserver.com/2018/02/27/news/morneau-budget-proposes-new-money-human->

4. Conclusion and recommendations

The Australian Government has an obligation to improve access to effective non-judicial remedy for rights violations by Australian businesses. It is clear that the current mechanism for providing non-judicial remedy, the Australian NCP, is failing to perform this function adequately.

ActionAid Australia and Jubilee Australia therefore recommend that all political parties:

1. Endorse the principles of non-judicial remedy outlined in this paper; and,
2. Work towards improving the effectiveness of non-judicial remedy available to victims of human rights abuse by Australian companies, in line with these principles.

Annex 1: Comparison of the current ANCP, NCP best practice, and CORE against principles of effective non-judicial remedy mechanisms

Principle	Current ANCP	NCP best practice	CORE
Powers to investigate	Does not have the budget to conduct independent investigations, cannot compel witnesses or documents, and cannot enforce compliance with investigations.	The Danish, Dutch and Norwegian NCPs have approximately 3 staff and investigations budgets ranging from AUD\$600,000 to AUD\$1.3 million. No NCPs have power to compel documents as part of investigations, or the ability to compel witnesses or documents.	Will have the power and budget to undertake collaborative and independent fact-finding and will also be able to compel witnesses and documents.
Powers to provide effective remedy	Does not provide effective remedy, and has a poor record of resolving disputes.	Despite NCPs having the power to recommend remedy, no NCPs have the power to enforce remedy, and between 2001 and 2015, of 250 cases filed only 3 resulted in improved conditions for victims of corporate abuses.	Will make public recommendations for remedy that could include compensation, an apology, the cessation of particular activities, mitigation measures or corporate policy changes.
Leverage	No mandate to address long-term sector-wide behavioural change and cannot recommend sanctions for companies that do not engage or comply.	NCPs typically address single instance issues, rather than long-term sector-wide behavioural change. Some NCPs have implemented novel remedies, such as imposing sanctions on a non-compliant company through withdrawal of government trade support (e.g. Canada 2013)	Will be able to address sector-wide behaviour change through its own motion investigations and recommend sanctions such as the withdrawal of government contracts or trade support for companies that do not engage.
Independence	Housed within the Treasury of the Australian Government; ANCP Oversight Committee has no non-governmental members.	There is precedent for NCPs functioning independently from government in Norway, the Netherlands, and Denmark, and further examples of tripartite and interagency structures.	Will have “full discretion to... address allegations of human rights abuses by Canadian companies operating abroad.” Its multi-stakeholder advisory board includes civil society.
Resources	Poorly resourced, with just one part-time dedicated staff member and no dedicated budget.	Some NCPs are better resourced: three full-time staff and an annual budget of between AUD\$600,000 and AUD\$1.3 million would be commensurate with the Danish, Dutch and Norwegian NCPs.	Has an initial budget allocation of CAD\$6.8 million (approximately AUD\$7.2 million) over six years.
Accessibility	Very difficult to access without a lawyer or NGO advocate; lack of ‘plain English’ protocol documents.	Some NCPs have sought to improve their accessibility. The Norwegian and Dutch NCPs have conducted mediation in places which do not necessitate extra travel for complainants and have funded external consultants to address power imbalances between parties. There is scant literature on how effectively NCPs have reduced barriers for specific groups, such as women, in accessing remedy.	As it has not yet been established, the level of accessibility of CORE is not yet clear, and it is yet to be demonstrated that CORE will effectively address the specific barriers that women face in accessing remedy.
Accountability and transparency	A major weakness due to the monopartite structure and lack of regular reporting.	The best NCPs have an independent oversight committee or advisory group with civil society, trade union and industry representation.	CORE will report on progress during investigations, and it will be required to report during investigations and annually to the Canadian Parliament.