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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
INVESTMENT COMMITTEE

Cancels & replaces the same document of 29 October 2018

Response by the Investment Committee to the Substantiated Submission by OECD Watch regarding the Australian National Contact Point

On 27 November 2017, the Chairs of the Investment Committee and the Working Party on Responsible Business Conduct received a substantiated submission from OECD Watch regarding the Australian National Contact Point, under Paragraph II. 2. b) of the Procedural Guidance of the Decision of the Council on the OECD Guidelines for Multinational Enterprises [C(2000)96/FINAL].

This document is the response of the Investment Committee to the submission.
It was prepared in line with the procedure for handling substantiated submission is set out in the document "Addressing issues relating to the functioning and performance of NCPs" [DAF/INV/RBC(2015)1].

This cancel and replace clarifies that this is the final response of the Investment Committee and thus removes references to the document as a "draft" response.

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I. INTRODUCTION

1. Paragraph II.2 b) of the Procedural Guidance of the Decision of the Council on the OECD Guidelines for Multinational Enterprises [C(2000)96/FINAL] (the Procedural Guidance), provides that "The [Investment] Committee will, with a view to enhancing the effectiveness of the Guidelines to fostering functional equivalence of the NCPs:[…] consider a substantiated submission by an adhering country, an advisory body, or OECD Watch on whether an NCP is fulfilling its responsibilities with regard to its handling of specific instances." On 27 November 2017, the Chairs of the Investment Committee and the Working Party on Responsible Business Conduct received a substantiated submission from OECD Watch (OECD Watch submission) regarding the Australian National Contact Point (ANCP). This document contains the response by the Investment Committee to the OECD Watch submission.

2. The response is structured as follows: Section II provides a summary of the procedure developed in DAF/INV/RBC(2015)1; Section III provides a summary of the specific instance submitted by the Human Rights Law Centre (HRLC, an Australian NGO) and Rights and Accountability in Development (RAID, a UK NGO) against security firm G4S Australia Pty Ltd (G4S) in 2014 (the specific instance); Section IV outlines the OECD Watch written submission; Section V outlines the ANCP's written response to the OECD Watch submission; Section VI includes the key findings and recommendations from the Investment Committee, and Section VII includes a summary of these findings and recommendations. The procedure for considering substantiated submissions is provided in Annex I. The OECD Watch written submission is provided in Annex II. The written response to the OECD Watch submission from the ANCP is provided in Annex III.

II. PROCEDURE

3. This response has been prepared in line with the procedure set out in paragraph II.2 b) of the Procedural Guidance, and further developed in DAF/INV/RBC(2015)1 "Addressing issues relating to the functioning and performance of NCPs" (See Annex I).

4. In line with this procedure, the Chair of the Investment Committee sent a letter to Investment Committee delegates informing them of the submission and requesting the Secretariat to prepare a response, in consultation with the Bureau of the WPRBC, seeking the views of OECD Watch and the ANCP (as well as other NCPs and stakeholders, where appropriate).

5. A draft response was discussed by the WPRBC on 7 March 2018 and comments were provided in writing following the discussion up to 28 March 2018. The draft was revised on the basis of comments from delegates of the WPRBC and shared with delegates on 3 July 2018 with an invitation to provide any additional comments by 23 July 2018. This document was further revised on the basis of additional comments provided by the ANCP. No other delegate submitted additional comments.

III. SPECIFIC INSTANCE

6. On 23 September 2014 a specific instance was submitted to the ANCP which raised issues around the role of G4S, a private security company with respect to matters at the Manus Island Regional Processing Centre (MIRPC) in Papua New Guinea.

7. The ANCP did not accept the specific instance for further examination and published a final statement on 10 June 2015.

8. On 2 July 2015, HRLC and RAID submitted a request for review of the handling of the specific instance under a voluntary review process established by the ANCP.[1] In early 2016, the ANCP issued a Response to the Specific Instance Appeal (hereinafter ANCP appeal response) noting that following a review it had decided to uphold the original decision.[2]

IV. OECD WATCH WRITTEN SUBMISSION

9. In its submission**,** OECD Watch requests the Investment Committee: "to review how the Australian National Contact Point (ANCP) handled the [specific instance]."[3]

10. In particular, OECD Watch requests the Investment Committee to:

1. "Find that the ANCP has not fulfilled its responsibilities with regard to its handling of this specific instance, particularly in relation to operating in an accessible and impartial manner;
2. Provide recommendations to the Australian government on how to improve the ANCP's handling of specific instances;
3. Request that the ANCP reconsider this specific instance, taking into account the recommendations; and
4. Provide additional guidance to all NCPs in relation to the application of the initial assessment criteria set out in Paragraph 25 of the Procedural Guidance and how these should be interpreted in order to meet the core criteria of accessibility."

11. In its submission OECD Watch states "ANCP's handling of [the] complaint demonstrates a failure to conduct itself in an accessible, equitable and impartial manner in accordance with its responsibilities." It further states that "the ANCP's failure to handle this specific instance, and others,[4] in accordance with its responsibilities has led to a loss

[1] At the time of the specific instance the ANCP had a review process for specific instances it had handled. According to the ANCP website, accessed 29 January 2018 "[t]he review process is intended to identify if there were any procedural errors in the [ANCP] decision-making process and, if so, ensure they are corrected where possible." ANCP Procedures, Version 1.0, para 12 https://cdn.tspace.gov.au/uploads/sites/112/2018/08/2001-2018_AusNCP_Procedures_version_.pdf

The ANCP published revised specific instance procedures in July 2018. The revised procedures also note that "the review is strictly procedural; the reviewer will not examine the substance of any AusNCP decision." ANCP Specific Instance Procedures, para 7.7 (2018), https://cdn.tspace.gov.au/uploads/sites/112/2018/07/2018-AusNCP-Procedures-version-2.0-July-2018.pdf

[2] 2016 ANCP Response to G4S Specific Instance Appeal ('2016 ANCP appeal response')

[3] OECD Watch (2017), Substantiated Submission to the OECD Investment Committee concerning the Australian National Contact Point's handling of the HRLC & RAID vs G4S Australia Pty Ltd specific instance. (hereinafter "OECD Watch submission")

[4] OECD Watch references three other specific instances which it believes were not appropriately handled by the ANCP. These are Serco group Plc and Professor Ben Saul (2015); XSTRATA and CFMEU (2010); and Australian Mining Enterprises and Amadiba Crisis Committee (2013). The ANCP's handling of these specific instances is not considered in this response.

of confidence in the ANCP among both civil society organizations and individuals impacted by the activities of Australian multinational enterprises."[5] These claims are based on the following arguments from OECD Watch:

1. Accessibility

12. OECD Watch states that:

1. The ANCP "incorrectly applied [admissibility] criteria other than the six set out in the commentary to the [P]rocedural [G]uidance";
    - The ANCP's "response to complaints which raise issues which touch on matters of state policy are particularly concerning, since the ANCP appears to be unable to provide an impartial assessment of these types of complaints and conflates the obligations of the state with those of the company." (see also below).
2. "The ANCP failed […] to apply the guidance set out in the Commentary [on the Procedural Guidance] with respect to how NCPs should deal with parallel proceedings ";
3. "The ANCP's appeal statement, issued in response to the complainants' appeal to its Oversight Committee, also disregarded the initial assessment criteria. Instead, it skipped directly to the substance of the complaint[…]."

2. Impartiality

13. OECD Watch states that:

a In not accepting specific instances on the basis that company activities are consistent with government policy the ANCP "incorrectly conflated the state duty to protect human rights with the corporate responsibility to respect human rights under the Guidelines. Companies are not exempt from the application of the Guidelines on the basis that their activities are consistent with domestic law and policy";

b The ANCP failed to act impartially through i) relying on statements made by G4S in the ANCP appeal response "without making any attempt to independently evaluate the veracity or reasonableness of the assertions made" ; and ii) the fact that "the appeal statement is completely silent on the role of G4S's local and expat security guards in the violence [with respect to the 16-18 February incident]";

c "Throughout the assessment process the ANCP refused to pass on any of its correspondence with G4S, or the company's response to the complaint stating that the company had requested that the information be kept confidential. This was despite the HRLC and RAID's repeated requests and offer to keep documents confidential. No assessment was provided by the ANCP as to whether the information submitted by G4S could be considered sensitive business information."

3. Transparency and Predictability

14. OECD Watch states that:

a "The ANCP took 9 months to complete its initial assessment of the G4S complaint - 3 times longer than the indicated time-frame suggested in the Guidelines and in

[5] Idem. at 3

the ANCP's procedural guide for dealing with complaints," and "no reasons for the delay were provided until more than 6 months had passed and the HRLC and RAID had written multiple times seeking updates as to its progress."

V. AUSTRALIAN TREASURY DEPARTMENT WRITTEN RESPONSE TO THE SUBMISSION

15. Following OECD Watch's submission, the Australian Treasury Department[6] provided a letter of response. The complete written response is available in Annex III. In its response to the OECD Watch submission the Australian Treasury Department recognises NCPs' duty to "operate in accordance with the core criteria (visibility, accessibility, transparency and accountability) and handle specific instances impartially, predictably, and equitably and [in a manner compatible with the principles and standards of the Guidelines]."

16. Specifically it notes:

- "We reject any assertion of actual partiality on the part of the [ANCP] in the handling of this specific instance. The Guidelines allow NCPs not to accept specific instances – and a decision not to accept should not imply partial or unequal treatment or a lack of accessibility."
- "OECD Watch has specifically raised the [ANCP's] decision not to share documentation from G4S as an example of inequitable treatment. The [ANCP] considered this information to be sensitive and acted in line with its published procedures by not sharing it when G4S did not provide consent."
- "While we refute OECD Watch's fundamental assertions, we concede that the handling of this case was not in line with best practice – the [ANCP] did not meet the expected timeframes or conduct the subsequent appeal in adherence with our published appeal procedure."

17. Furthermore the Australian Treasury Department notes that:

- "Cases that are linked to state policy can nevertheless be problematic for NCPs, so we would support further consideration of their handling by the NCP Network, and subsequently the development of formal guidance from the OECD."
- "Last year [the Australian Treasury Department] initiated an independent review […] the first self-generated review process of any NCP. […and] is now considering the review's recommendation in conjunction with other Australian Government agencies."

VI. FINDINGS AND RECOMMENDATIONS

18. The findings and recommendations below are provided in line with the Guidelines and the Procedural Guidance.

[6] The ANCP secretariat is located in the Australian Treasury Department and the ANCP role is performed by an Adviser based in the Foreign Investment Division of the Australian Treasury Department.

19. These findings and recommendations are related to the ANCP's handling of the G4S specific instance from September 2014 to February 2016 and are not intended as general commentary on the current practices of the ANCP.

20. Since the conclusion of this specific instance, the Australian Treasury Department initiated an independent review of the functioning of the ANCP and has subsequently made changes, including issuing revised rules of procedure and improvements to its website. These changes responded to some of the problems associated with the handling of this specific instance.

1. In the context of handling the specific instance the ANCP, in certain respects, did not act transparently or predictably with respect to indicative timelines and in not following its review process procedures

Timelines

21. The ANCP completed its initial assessment of HRLC and RAID's complaint in 9 months. The ANCP has indicated that during this time it did not communicate with HRLC and RAID to explain reasons behind the delays, or to provide an indication of when the initial assessment may be completed.[7]

22. The Commentary on the Procedural Guidance provides indicative timelines for the handling of specific instances noting that "NCPs should seek to conclude an initial assessment within three months, although additional time might be needed in order to collect information necessary for an informed decision."[8] As such, timelines are indicative and additional time may be necessary at the initial assessment stage.

23. The ANCP has also noted that delays in completing the initial assessment were due in part to a lack of human resources and capacity at the time and that some time was needed to designate a lead NCP for the specific instance as it was also submitted to the UK NCP.[9] The ANCP has also noted that human resource constraints impacted more broadly the handling of this specific instance and the review procedure.[10]

24. The Decision of the Council on the OECD Guidelines for Multinational Enterprises (Council Decision) states that "Adhering countries shall make available human and financial resources to their National Contact Points so that they can effectively fulfil their responsibilities, taking into account internal budget priorities." Since the specific instance was concluded, increased resources have been allocated to the ANCP. The ANCP currently comprises two dedicated staff and three senior officers who devote a proportion of their time to the activities of the ANCP.

Recommendation:

25. *The Investment Committee acknowledges that delays in a process can be legitimate and the efforts of an NCP should not be disregarded simply because of an extended process. However, in order to promote predictability and transparency, the Investment Committee*

[7] Consultation between ANCP and OECD Secretariat on 23 January 2018.

[8] Commentary on the Procedural Guidance, para 40.

[9] Consultation between ANCP and OECD Secretariat on 23 January 2018.

[10] Id.

recommends that the ANCP communicate and explain reasons for delays to parties to a specific instance, when they occur.

Review Process Procedures

26. On 2 July 2015, HRLC and RAID submitted a request for review of the handling of the specific instance under the ANCPs' review process. The request for review asked that the ANCP "reconsider the specific instance complaint against G4S on the exclusive basis of the six criteria specified in the OECD [Commentary on the] procedural guidance;" and 2) "adhere to the timelines set out in the OECD's procedural guidance and ensure that information provided to the ANCP and relied on to formulate the initial assessment be available to both parties."[11]

27. The procedure followed by the ANCP in the review process departed from the *Review Procedure* published on the ANCP's website at the time.

28. The *Review Procedure* at the time stated that the review process will be handled by the Oversight Committee. [12] However in fact the ANCP itself led the review process with respect to the specific instance. In this respect the ANCP reviewed its own decision and drafted the ANCP's appeal response. The ANCP has noted that the Oversight Committee was informed of the request for review by RAID and HRLC and consulted with respect to the response but that the ANCP played the leading role in the review.[13]

29. The *Review Procedure* at the time stated that the review is limited to analysis of procedural issues,[14] though the ANCP appeal response did not comment on procedural

[11] HRLC and RAID (2 July, 2015) Request for Review of the specific instance complaint- G4S Australia Pty Ltd

[12] The ANCPs' review procedures at the time stated that "[T]he quorum for a Review Panel is three and will comprise members of the Oversight Committee." It also stated that "[a]ny Oversight Committee member who has been actively involved in the decision-making process for the complaint will not be entitled to participate as a member of the review panel." Review Procedure - Specific Instance Complaints, para 28, ANCP website, accessed 23 January 2018 https://cdn.tspace.gov.au/uploads/sites/112/2018/08/2001-2018_AusNCP_Procedures_version_.pdf

Under the revised procedures this provision has been amended and now provides: "The request for review will be referred to a senior executive within the Australian Treasury of at least one level higher than the [ANCP] and who was not involved in the handling of the original case. This person will be known as the reviewer." ANCP Specific Instance Procedures, para 7.4 (2018), available at https://cdn.tspace.gov.au/uploads/sites/112/2018/07/2018-AusNCP-Procedures-version-2.0-July-2018.pdf

[13] Consultation between ANCP and OECD Secretariat on 23 January 2018.

[14] The Review Procedure in place at the time stated that "the review process is intended to identify if there were any procedural errors in the ANCP decision-making process and, if so, ensure they are corrected where possible" and that "the review can only deal with procedural errors, and will not examine the substance of any ANCP decision." Review Procedure - Specific Instance Complaints, para 12, 15.

The revised procedure also provides that "As the review is strictly procedural, the reviewer will not examine the substance of any [ANCP] decision and will not replace the [ANCP] decision with their own decision." ANCP Specific Instance Procedures, para 7.7 (2018)

issues raised by HRLC and RAID in their request for review. Instead the response includes an assessment of the initial allegations raised in the original complaint filed by HRLC and RAID concerning G4S. Moreover, the ANCP appeal response was not made publicly available until October 2017, approximately a year after it was originally issued to the parties.[15]

30. Finally, the ANCP has indicated that due to the Oversight Committee's advisory involvement with specific instances and inconsistent tenure of Committee members, it would not normally be well positioned to undertake such a review.[16]

31. Neither the ANCP nor members of the Oversight Committee contacted the HRLC and RAID at any time between 2 July 2015 and early 2016, during which time the review process concerning the specific instance was ongoing, to inform them of what the procedure for appeal would entail or to explain that it would depart from the *Review Procedure* publicised on the ANCP website.

32. Review or appeal procedures are not required under the Procedural Guidance of the Guidelines. However, where an NCP chooses to have them they should ensure that a review or an appeal is handled in a manner that is consistent with the guiding principles for specific instances set out in the Procedural Guidance (in a manner that is impartial, predictable, equitable and compatible with the principles and standards of the Guidelines).

Recommendation:

33. *The Investment Committee recommends that the ANCP, if choosing to have a review procedure, respect its own published rules of procedures for such a process. Where the ANCP departs from its rules of procedure, the ANCP should communicate with parties and explain the reason for the departure.*

2. In the context of handling the specific instance certain actions of the ANCP contributed towards a perception of a lack of impartiality and accessibility

34. The following section sets out certain actions taken by the ANCP which cumulatively contributed to a perception of a lack of impartiality and accessibility in the context of handling the specific instance.

Information sharing

35. The ANCP has noted that, during the initial assessment phase, it did not share documentation provided by G4S with HRLC and RAID because it considered this

[15] The Review Procedure in place at the time provided that "The final recommendation approved by the Oversight Committee will normally be published promptly on the ANCP website, unless the Oversight Committee considers there is a good reason to withhold or delay publication or only publish a summary." Id. Para 36. The revised review procedures provide that "[t]he reviewer will prepare a public statement detailing the request for review, the review process undertaken and their assessment, including any recommendations, for publication on the [ANCP]website." ANCP Specific Instance Procedures, para 7.9 (2018)

[16] Consultation between ANCP and OECD Secretariat in January 2018. In the revised specific instance procedures of the ANCP this is partially addressed as the review will be undertaken by a senior executive within the Australian Treasury. See footnote 12.

information to be sensitive and G4S did not consent to share it.[17] In this respect the ANCP acted in line with its procedures in place at the time which noted that "[i]nformation which is sent to the ANCP will be treated confidentially by the ANCP. The information provided by each party may be shared with any other party to the complaint during the process of assessment, but only with the consent of the party which provided the information. If any such information is provided, it will be on condition that it is kept confidential for the period of assessment."[18] They also provided 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 (whether during the course of a meeting or in writing) will be copied to all parties."[19]

36. The Commentary on the Procedural Guidance notes that "[i]n order to facilitate resolution of the issues raised, [NCPs should] take appropriate steps to protect sensitive business and other information and the interests of other stakeholders involved in the specific instance."[20] As such the Procedural Guidance recognises that sensitive business information can be protected, redacted or anonymised as needed in the context of a specific instance proceeding. However, an NCP should be aware that if one party perceives that an NCP has made decisions on the basis of information withheld from one party, that party may have concerns about the impartiality of the process.

Recommendation:

37. *In order to avoid creating a perception of a lack of impartiality, the Investment Committee recommends that when information is withheld from one party and/or when withheld information is used as the basis of a decision of the ANCP, the ANCP should notify the relevant party and explain why the information was withheld (i.e. why it is sensitive).[21] It also recommends sharing information between the parties to the extent possible, for example through redacting, summarising, or anonymising sensitive information as necessary.*

[17] See Australian Treasury Department Response to OECD Watch Substantiated Submission, 21 February 2018 (Annex III)

[18] ANCP Procedures, Version 1.0, para 17. The ANCPs revised rules of procedure note that "[i]nformation provided by any party to a case will only be shared with the other party to the case with the consent of the party that provided the information. If a party does not agree to share information, the AusNCP will assess whether this is reasonable in the circumstances and where possible, work with the relevant party to excise any sensitive information that may otherwise limit the sharing of the information." See ANCP Specific Instance Procedures, para 9.2 (2018).

[19] ANCP Procedures, Version 1.0, para 16

[20] OECD Guidelines (2011) Procedural Guidance, para. 4

[21] This issue has already been addressed to some extent by the revised rules of procedure of the ANCP which provide that "[i]nformation that cannot be shared between the parties may not be able to form part of the [ANCP's] consideration of the case." See ANCP Specific Instance Procedures, para 9.2 (2018).

Initial Assessment

38. The ANCP did not accept the specific instance for further examination and published a final statement on 10 June 2015. The reasons for not accepting the specific instance were as follows:

a) "[t]he ANCP considers that aspects of the complaint could be interpreted as commentary on government policy. However, G4S as service provider is not accountable for government policy and other mechanisms exist for review and scrutiny of policy. The ANCP is not the most appropriate vehicle for resolution of such matters. It is not the role of the ANCP to issue commentary, whether intended or otherwise, on government policies or law."

b) "further review of G4S conduct at the MRPC would be unlikely to add further value to already extensive reviews" and "there is unlikely to be any new information that can be brought to light on its operation of the MRPC";

c) "there have been various legal proceedings in relation to incidents at the MIRPC, some of which [were] ongoing" and "it is clearly not appropriate for the ANCP to intervene in any way in due legal processes, either domestic or international."[22]

39. The Commentary on the Procedural Guidance provides that "[i]n making an initial assessment of whether the issue raised merits further examination, the NCP will need to determine whether the issue is *bona fide* and relevant to the implementation of the *Guidelines*. In this context, the NCP will take into account:

a) the identity of the party concerned and its interest in the matter.

b) whether the issue is material and substantiated.

c) whether there seems to be a link between the enterprise's activities and the issue raised in the specific instance.

d) the relevance of applicable law and procedures, including court rulings.

e) how similar issues have been, or are being, treated in other domestic or international proceedings.

f) whether the consideration of the specific issue would contribute to the purposes and effectiveness of the *Guidelines*."[23]

40. Some of the admissibility criteria included in the Commentary on the Procedural Guidance are intentionally broad. For example, whether consideration of a specific issue would contribute to the purposes and effectiveness of the *Guidelines* may call for a wide range of issues to be considered, including the scope of the Guidelines and whether the issues raised have already been resolved. As such, by taking into account in their initial assessment whether the issues raised fall under the scope of the Guidelines and whether accepting the complaint would add value the ANCP did not go beyond the six admissibility criteria included in the Commentary on the Procedural Guidance.

[22] ANCP, Statement by the Australian National Contact Point Specific Instance – G4S Australia Pty Ltd, 10 June 2015, https://cdn.tspace.gov.au/uploads/sites/112/2018/02/G4S_aus.pdf

[23] OECD Guidelines (2011), Commentary on the Procedural Guidance, para. 25

Commentary on government policy

41. The ANCP has noted that NCPs made up of government employees, as is the case of the ANCP, may find it challenging to comment on issues which might intersect with the policy positions of their government.[24] The issue raised in the specific instance vis-a-vis government policy and the role of an NCP is a common challenge for NCPs globally. As the Guidelines cover the conduct of enterprises, an issue raised that *solely* addresses government policy or conduct falls outside the scope of the Guidelines. However, as the Guidelines' Human Rights chapter notes: "States have the duty to protect human rights. Enterprises should… [r]espect human rights."[25] The recommendations of the Guidelines, as well as enterprises' responsibility to respect human rights, represent expectations of enterprises which are distinct and separate from government duties. Furthermore, the commentary on the Human Rights chapter notes "[a] State's failure either to enforce relevant domestic laws, or to implement international human rights obligations or the fact that it may act contrary to such laws or international obligations does not diminish the expectation that enterprises respect human rights."[26]

42. It is important that NCPs carefully distinguish the enterprise responsibility to respect human rights and the due diligence requirements that accompany that, from the broader State duty to protect human rights. The role of NCP is to address the former but not to address the latter.

Recommendation:

43. *Under this process it is not the role of the Investment Committee to evaluate whether the ANCP adequately distinguished the corporate responsibility to respect human rights from the state duty to protect human rights with regard to its decision not to accept the specific instance for further examination.*

44. *However, in order to ensure that this distinction is respected and to avoid perceptions of a lack of impartiality, the Investment Committee recommends that, where relevant, the ANCP should strive to clearly articulate how it distinguishes issues of corporate responsibility from issues of state duty in its public statement(s).*

Parallel proceedings

45. In its final statement, the ANCP states that "[there] have been various legal proceedings in relation to incidents at the MIRPC, some of which are ongoing […]"[27]

46. The ANCP concluded that "It is clearly not appropriate for the ANCP to intervene in any way in due legal processes, either domestic or international."[28]

47. The Commentary on the Procedural Guidance provides:

[24] Consultation between ANCP and OECD Secretariat on 23 January 2018.

[25] OECD Guidelines (2011), Chapter IV, para 1

[26] Id. para 38.

[27] ANCP, Statement by the Australian National Contact Point Specific Instance – G4S Australia Pty Ltd, 10 June 2015

[28] Id.

"When assessing the significance for the specific instance procedure of other domestic or international proceedings addressing similar issues in parallel, NCPs should not decide that issues do not merit further consideration solely because parallel proceedings have been conducted, are under way or are available to the parties concerned. NCPs should evaluate whether an offer of good offices could make a positive contribution to the resolution of the issues raised and would not create serious prejudice for either of the parties involved in these other proceedings or cause a contempt of court situation."[29]

Recommendation:

48. *Under this process it is not the role of the Investment Committee to evaluate the ANCP's assessment that an offer of good offices would represent an intervention in due process with respect to other ongoing proceedings. However the Investment Committee recommends that, in order to avoid creating a perception of a lack of accessibility, whenever the ANCP decides that accepting a specific instance would not further the Guidelines and/or could cause serious prejudice to ongoing proceedings, the ANCP should strive to clearly articulate the reasons for such a position in its public statement(s).*[30]

Reliance on statement of G4S in ANCP appeal response

49. The ANCP appeal response makes reference to statements or documents by G4S to support conclusions in several parts of the document.

50. For example, it notes that "G4S' publicly available Human Rights Policy states that 'G4S is committed to fulfilling its responsibilities on human rights in all of its companies around the world by applying the United Nations Guiding Principles on Business and Human Rights (2011) across all of our businesses.' The ANCP is satisfied that G4S is committed to its Human Rights Policy and has attempted to maintain basic human rights standards at the MIRPC within the scope of its own control."

51. The ANCP appeal response also notes that "[t]he actions G4S stated it took show that attempts to prevent impacts were made […] The ANCP notes that through actively participating in and complying with the findings of the various reviews that have been conducted into the events of 16 to 18 February 2014, G4S has sought to address and remediate any adverse impacts that occurred, irrespective of who was responsible for such impacts." The various reviews referenced are the Senate Inquiry report into the Incident at the Manus Island Detention Centre from 16 February to 18 February 2014 (dated 11 December 2014)[31] and a Report by Robert Cornall AO to the Secretary of the

[29] OECD Guidelines (2011), Commentary on the Procedural Guidance, para 26

[30] The revised specific instance procedures of the ANCP do not reference parallel proceeding but note that "Where the case was rejected, the final statement will also include an explanation of how the submission was assessed…" See ANCP Specific Instance Procedures, para 5.3(2018).

[31] The Senate inquiry report includes an analysis of the role of the contractor (G4S), subcontractor and service provider's involvement and response with regard to incidents at the MIRPC. Senate Inquiry report into the Incident at the Manus Island Detention Centre from 16 February to 18 February 2014 (11 December 2014)
https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Manus_Island/Report

Department of Immigration and Border Protection, dated 23 May, 2014.[32] However neither of these reviews resulted in recommendations targeted at G4S and neither review resulted in remediation at MIRPC by G4S for adverse impacts associated with the 16-18 February 2014 events.

Recommendation:

52. *Under this process is not the role of the Investment Committee to evaluate the ANCP's conclusions with regard to the ANCP appeal response. However the Investment Committee recommends that in order to avoid creating a perception of a lack of impartiality, the ANCP should ensure that if conclusions of fact are made in a specific instance statement, they should be based (and appear to be based) on more than the assertions of one party.*

VII. SUMMARY OF FINDINGS AND RECOMMENDATIONS

53. The Investment Committee finds that in the handling of the specific instance:

1. In certain respects, the ANCP did not act transparently or predictably with respect to indicative timelines and in not following its review process procedures; and
2. Certain actions of the ANCP contributed towards a perception of a lack of impartiality and accessibility.

54. To promote transparency and predictability the Investment Committee recommends that:

a) The ANCP communicate and explain reasons for delays to parties to a specific instance, when they occur.

b) The ANCP, if choosing to have a review procedure, respect its own published rules of procedures for such a process. Where the ANCP departs from its rules of procedure, the ANCP should communicate with parties and explain the reason for the departure.

55. To build trust with parties and avoid perceptions of lack of impartiality and accessibility Investment Committee recommends that:

a) when information is withheld from one party and/or when withheld information is used as the basis of a decision of the ANCP, the ANCP should notify the relevant party and explain why the information was withheld (i.e. why it is sensitive). It also recommends sharing information between the parties to the extent possible, for example through redacting, summarising, or anonymising sensitive information as necessary.

[32] The Cornall review investigates the conditions leading up to incidents at the MIRPC and provides an overview of G4S's responsibilities with respect to the security and day-to-day management of the MIRPC .Report by Robert Cornall AO to the Secretary of the Department of Immigration and Border Protection (23 May, 2014) https://www.homeaffairs.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/review-robert-cornall.pdf

b) where relevant, the ANCP should strive to clearly articulate how it distinguishes issues of corporate responsibility from issues of state duty in its public statement(s).

c) whenever the ANCP decides that accepting a specific instance would not further the Guidelines and/or could cause serious prejudice to ongoing proceedings, the ANCP should strive to clearly articulate the reasons for such a position in its public statement(s)

d) the ANCP should ensure that if conclusions of fact are made in a specific instance statement, they should be based (and appear to be based) on more than the assertions of one party.

ANNEX I: PROCEDURE FOR CONSIDERING SUBSTANTIATED SUBMISSIONS

The Procedural Guidance provides that: "The [Investment] Committee will, with a view to enhancing the effectiveness of the Guidelines and to fostering the functional equivalence of NCPs: […] b) consider a substantiated submission by an adhering country, an advisory body or OECD Watch on whether an NCP is fulfilling its responsibilities with regard to its handling of specific instances."[33]

The Decision of the Council on the OECD Guidelines for Multinational Enterprises (Council Decision) provides that "[t]he [Investment] Committee shall not reach conclusions on the conduct of individual enterprises."[34] In addition the Commentary on the Procedural Guidance provides that "[t]he non-binding nature of the Guidelines precludes the [Investment] Committee from acting as a judicial or quasi-judicial body. Nor should the findings and statements made by the NCP (other than interpretations of the Guidelines) be questioned by a referral to the Committee."[35]

The procedure for considering substantiated submissions on whether an NCP is fulfilling its responsibilities with regard to its handling of specific instances is as follows[36]:

- Where the Investment Committee receives a submission under section II.2b) or c) of the Procedural Guidance, it will request the [Working Party on Responsible Business Conduct] WPRBC to provide a draft response.
- The draft response will be prepared by the Secretariat, in consultation with the Bureau of the Working Party.
- The Secretariat and the Bureau will seek the views of the country or stakeholder which made the submission, and those of the relevant NCP. The Secretariat will also hold consultations with other NCPs and stakeholders, where appropriate.
- The draft response will be submitted to the Investment Committee. The Investment Committee will adopt a final response, and will, as necessary, make recommendations to improve the functioning of the NCP in question. The Committee may wish to discuss the issue with stakeholders before adopting a final response. As specified in Section II.4 of the Procedural Guidance, the Committee will not reach conclusions on the conduct of individual enterprises.
- The response from the Investment Committee will be transmitted to the country or stakeholder that made the submission and the Investment Committee delegate of the country of the NCP concerned, as well as to the WPRBC and the Annual Meeting of NCPs.
- The response of the Investment Committee will contain a summary with key findings and recommendations, which will be included in the Annual Report to the Council. The full response of the Investment Committee will be declassified.

In line with this procedure, this response has been prepared by the Secretariat, following an initial consultation with the WPRBC bureau. The Secretariat sought the views of OECD

[33] OECD Guidelines for Multinational Enterprises (2011), Procedural Guidance paragraph II.2 b)

[34] Decision of the Council on the OECD Guidelines for Multinational Enterprises II.4 and Commentary on the Procedural Guidance, para 44

[35] Id. Commentary on the Procedural Guidance, para 44

[36] "Addressing issues relating to the functioning and performance of NCPs" [DAF/INV/RBC(2015)1]

Watch, HRLC and RAID during a call organised on 22 January 2018 and call organized with OECD Watch and the WPRBC bureau on 3 April 2018. The Secretariat also sought the views of the ANCP during a call organised on 23 January 2018 and through an in-person meeting with the WPRBC bureau on 6 March 2018. The ANCP was also invited to provide a written response to the submission from OECD Watch regarding the conduct of the ANCP.

A first draft of this document [DAF/INV/RBC(2018)9] was discussed by the WPRBC on 7 March 2018 and comments were provided in writing following the discussion up to 28 March 2018. On this basis, a revised draft **[**DAF/INV/RBC(2018)9/REV1] was circulated by written procedure to the WPRBC on 3 July 2018. Delegates were invited to provide any additional comments by 23 July 2018. The current document has been revised to take into account additional comments provided by Australia.

This document was shared for approval and discussed during the 25 October 2018 meeting of the Investment Committee.

ANNEX II: OECD WATCH SUBSTANTIATED SUBMISSION

OECD Watch

Substantiated Submission to the OECD Investment Committee concerning the Australian National Contact Point's handling of the HRLC & RAID vs G4S Australia Pty Ltd specific instance

This is an attachment to the letter dated 27 November 2017 from OECD Watch to the Chair of the OECD Investment Committee and the Chair of the Working Party on Responsible Business Conduct. It provides further information and substantiation regarding the Australian National Contact Point's handling of specific instances, including the HRLC & RAID vs G4S Australia Pty Ltd compliant.

The content of the submission is as follows:

- Part 1 describes the specific instance;
- Part 2 provides information about the ANCP's handling of this specific instance;
- Part 3 explains how the ANCP was not fulfilling its procedural responsibilities in the implementation of the Guidelines in this specific instance;
- Part 4 describes other cases in which the ANCP has rejected complaints during the initial assessment stage that contribute to its inaccessibility. This part refers to a recent study of the ANCP that corroborates many of the same concerns set out in this submission;
- Part 5 describes the ANCP's responsibilities under the Guidelines which are the basis for this submission; and
- Part 6 concludes with the actions that OECD Watch would like to see from the Investment Committee with respect to this submission.

1. The HRLC & RAID vs G4S Australia Pty Ltd Complaint

The HRLC & RAID vs G4S Australia Pty Ltd specific instance (G4S Compliant) was jointly filed with the Australian and UK NCPs on 23 September 2014 by the Human Rights Law Centre (HRLC) (an Australian NGO) and Rights and Accountability in Development (RAID) (a UK NGO).[1] The NCPs subsequently determined that the Australian National Contact Point (ANCP) would consider the complaint.

The complaint concerned alleged breaches of the OECD Guidelines for Multinational Enterprises (Guidelines) by security firm G4S Australia Pty Ltd in relation to the conditions and alleged abuse of detainees at the Manus Island Regional Processing Centre (MIRPC), a remote facility in Papua New Guinea where asylum seekers are currently detained under Australian law and policy. The complaint was brought in the aftermath of an outbreak of violence at the MIRPC in February 2014, in which Iranian asylum seeker Reza Berati was killed, and 77 other asylum seekers were injured.[2] The incident followed a series of independent reports by organisations like the UNHCR criticizing conditions at the Centre as breaching basic human rights standards and raising concerns about the potential for violence.[3]

[1] The complaint is available at: http://hrlc.org.au/wp-content/uploads/2014/09/HRLC_RAID_Complaints_OECD_Guidelines_specific_instance_G4S_Sep2014.pdf.
[2] Latika Bourke, 'Manus Island riot: Independent report by Robert Cornall details deadly detention centre violence' *ABC News* online (26 May 2014) http://www.abc.net.au/news/2014-05-26/scott-morrison-releases-review-into-manus-island-riot/5478170.
[3] Robert Cornall, Report to the Secretary, Department of Immigration and Border Protection: Review into the Events of 16-18 February 2014 at the Manus Regional Processing Centre (23 May 2014) 8. See also; UNHCR Regional Representation, Canberra, *UNHCR Monitoring visit to Manus Island, Papua New Guinea 23 to 25 October 2013* (26 November 2013); Amnesty International, Submission No 22 to Senate Legal and Constitutional Affairs References Committee, *Incident at the Manus Island Detention Centre from 16 February to 18 February 2014*, 9 May 2014.

The G4S Complaint alleged breaches of the Guidelines relating to G4S's complicity in an unlawful detention regime, its failure to maintain basic human rights standards at the MIRPC, its failure to protect detainees from violence (including violence perpetrated by its own employees) and its failure to conduct adequate risk-based due diligence or mitigate adverse impacts in its running of the MIRPC.

As G4S was no longer running the MIRPC by the time the G4S Complaint was made, the remedies sought included:

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

It is noteworthy that subsequent to the G4S Complaint being filed:

- An Australian Senate Inquiry was initiated which concluded, among other things, that a significant number of G4S staff were involved in violent assaults on detainees at the MIRPC and recommended criminal prosecutions of these staff, together with better training by the new security provider which had taken over from G4S;
- Two people, including a G4S employee, were subsequently convicted by a PNG Court of the assaults that killed Reza Berati (several expat G4S guards fled the country and were never prosecuted);[4]
- The PNG High Court found in April 2017 that the prolonged, arbitrary detention of asylum seekers at the Centre breached fundamental human rights principles set out in the PNG Constitution;[5] and
- A civil class action was brought in Australia against the Australian government, G4S and other contractors for unlawful imprisonment and other abuses at the MIRPC which ultimately resulted in a settlement of $70 million compensation being paid to asylum seekers in June 2017, though without an admission of liability.[6]

As these subsequent proceedings were primarily focused on the responsibilities of the Australian and PNG governments, they did not focus in detail on G4S's human rights responsibilities and, with the exception of the payment of compensation to detainees injured in the violence, did not provide the remedies which were sought under the specific instance complaint. Their conclusions highlight, however, the serious and substantiated nature of the complaint against G4S.

[4] Eric Tlozek, 'Reza Barati death: Two men jailed over 2014 murder of asylum seeker at Manus Island detention centre' *ABC News* online (19 April 2016) <http://www.abc.net.au/news/2016-04-19/reza-barati-death-two-men-sentenced-to-10-years-over-murder/7338928>.
[5] Eric Tlozek and Stephanie Anderson, 'PNG's Supreme Court rules detention of asylum seekers on Manus Island is illegal' *ABC News* online (27 April 2016) < http://www.abc.net.au/news/2016-04-26/png-court-rules-asylum-seeker-detention-manus-island-illegal/7360078>.
[6] The Guardian, 'Government to pay $70m damages to 1,905 Manus detainees in class action' *Guardian* online (14 June 2017) <https://www.theguardian.com/australia-news/2017/jun/14/government-to-pay-damages-to-manus-island-detainees-in-class-action>.

2. The ANCP's Handling of the Complaint

The ANCP took 9 months to complete its initial assessment of the G4S Complaint - 3 times longer than the indicated time-frame suggested in the Guidelines and in the ANCP's procedural guide for dealing with complaints. No reasons for the delay were provided until more than 6 months had passed and the HRLC and RAID had written multiple times seeking updates as to its progress.

Throughout its assessment, the ANCP refused to pass on any of its correspondence with G4S, or the company's response to the complaint, stating that the company had requested that the information be kept confidential. This was despite the HRLC and RAID's repeated requests and offer to keep documents confidential. No assessment was provided by the ANCP as to whether the information submitted by G4S could be considered sensitive business information.

On 10 June 2015, the ANCP decided not to accept the case for further examination.[7] The relevant sections of the ANCP's statement are set out below:

> *At this time the ANCP is not able to accept the matter as a specific instance complaint under the Guidelines. In reaching this conclusion, the ANCP considered the three aspects to the complainant's submission:*
>
> - *The role of G4S in giving effect to Government policy.*
> - *The conduct of G4S staff in delivering on the contract with the Government.*
> - *Legal liability for events at the MRPC.*
>
> *1. The role of G4S in giving effect to Government policy.*
>
> *The ANCP considers that aspects of the complaint could be interpreted as commentary on government policy. However, G4S as service provider is not accountable for government policy and other mechanisms exist for review and scrutiny of policy. The ANCP is not the most appropriate vehicle for resolution of such matters. It is not the role of the ANCP to issue commentary, whether intended or otherwise, on government policies or law.*
>
> *2. The conduct of G4S staff in delivering on the contract with the Government.*
>
> *The conduct of G4S staff is relevant to the OECD guidelines. In this regard, the ANCP notes the reviews that have already taken place in respect of the MRPC, which have reviewed the conduct of G4S staff:*
>
> *Two independent reviews and subsequent reports by Robert Cornall AO to the Secretary of the Department of Immigration and Border Protection. Amongst the recommendations of the Review into the Events of 16-18 February 2014 at the Manus Regional Processing Centre are those relating to conditions and training of staff. These reports are available on the Department of Immigration and Border Protection website.*
>
> *A Senate Inquiry into the Incident at the Manus Island Detention Centre from 16 February to 18 February 2014. The Inquiry released its report on 11 December 2014 which contained a number of recommendations, including one relating to ensuring the adequacy of training for staff at the MRPC. View report: Incident at the Manus Island Detention Centre from 16 February to 18 February 2014*
>
> *The ANCP is of the view that a further review of G4S conduct at the MRPC would be unlikely to add further value to these already extensive reviews. As G4S has not operated the facility*

[7] Australian National Contact Point, *Statement by the Australian National Contact Point Specific instance – G4S Australia Pty Ltd* (10 June 2015), available at: http://www.ausncp.gov.au/content/Content.aspx?doc=publications/reports/general/G4S_Aus.htm

since March 2014, there is unlikely to be any new information that can be brought to light on its operation of the MRPC.

3. Legal liability for events at the Manus Regional Processing Centre.

The have been various legal proceedings in relation to incidents at the MRPC, some of which are ongoing including:

- *A civil proceeding, RN v Commonwealth of Commonwealth of Australia and Anor, before the Supreme Court of Victoria relating to the alleged injury of a MRPC transferee.*
- *A class action, Kamasaee v Commonwealth & Ors, to be considered in the Supreme Court of Victoria.*
- *Legal proceedings within PNG, including cases with the PNG Supreme Court.*

It is clearly not appropriate for the ANCP to intervene in any way in due legal processes, either domestic or international.

On 2 July 2015, the HRLC and RAID wrote to the ANCP's Oversight Committee to request that it review the ANCP's decision on the basis that the ANCP's initial assessment misunderstood and misapplied the Guidelines. Specifically, the appeal submitted that:

- The ANCP had incorrectly applied criteria other than the six set out in the commentary to the procedural guidance;
- It was inconsistent with the Guidelines to find G4S exempt from scrutiny on the basis that their activities were consistent with government policy;
- It was incorrect to state that no new information would be revealed through the resolution of the specific instance, and no other processes had addressed G4S's responsibilities under the Guidelines or how the company might remedy any breaches to avoid future breaches/harms; and
- The ANCP had failed to follow the Commentary with respect to parallel proceedings or explain why consideration of the specific instance might prejudice those proceedings.

The HRLC and RAID requested that the ANCP reconsider its initial assessment on the exclusive basis of the six criteria specified in the OECD Procedural Guidance, adhere to the timelines set out in the OECD Procedural Guidance and ensure that any information provided to the ANCP and relied on to prepare initial assessments be made available to both parties, including the ANCP's correspondence with G4S.[8]

After a further delay of seven months, the ANCP, not the Oversight Committee, sent a response to the HRLC and RAID on 11 February 2016, upholding the ANCP's original decision not to accept the complaint. A copy of the ANCP's full decision can be found in the attached materials. In summary, however, the ANCP concluded that the rejection of the complaint should be upheld because:

- It was not the role of the ANCP to comment on the indefinite detention of asylum seekers at the MIRPC;
- G4S was not ultimately responsible for operational standards at the MIRPC, which was the responsibility of the PNG government;

[8] The letter from the HRLC and RAID of 2 July 2015 is available here: http://hrlc.org.au/wp-content/uploads/2015/07/HRLC-RAID-letter-to-ANCP-2-7-15.pdf

- G4S had limited ability to influence the safety and security of detainees given control of the facility was the responsibility of PNG;
- In relation to the incidents of February 2014, G4S had no authority over the PNG police mobile squads and no means or authority to prevent their actions; and
- G4S was not in breach of its due diligence obligations because it had an obligation under its contract to ensure 50% of its staff were local Manus staff and the conflict between capacity-building and the risk of a lack of experienced staff was ultimately imposed upon G4S by government.

The ANCP's Appeal Statement was ultimately published on 27 October 2017.

3. The ANCP's Performance and Areas of Non-Compliance

OECD Watch considers that the ANCP's handling of the G4S Complaint demonstrates multiple failures to fulfil its obligations under the Guidelines by handling specific instances in a manner that is impartial and equitable, and generally operating in line with the core criteria of accessibility. The two primary areas of concern are first, the failure of the ANCP to ensure accessibility and correctly apply the initial assessment criteria and second, the failure of the ANCP to operate in an impartially.

i) Failure to ensure accessibility and correctly apply the initial assessment criteria

Paragraph 25 of the Procedural Guidance lists six criteria which NCPs "will take into account" when determining whether a specific instance meets this test, namely:

- 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.

The language of the provision does not indicate that these criteria are merely suggestive, or that an NCP may determine whether a complaint should proceed based on other, unrelated criteria. However, that is precisely what happened in this specific instance.

Moreover, as discussed further below, the reasons cited by the ANCP for rejecting the specific instance ignored other important provisions of the Procedural Guidance and Commentary. The ANCP failed, for instance, to apply the guidance set out in the Commentary with respect to how NCPs should deal with parallel proceedings. With emphasis from OECD Watch, Paragraph 26 of the Commentary states that:

> When assessing the significance for the specific instance procedure of other domestic or international proceedings addressing similar issues in parallel, NCPs **should not decide that issues do not merit further consideration solely because parallel proceedings have been conducted, are under way or are available to the parties concerned.** NCPs should evaluate whether an offer of good offices could make a positive contribution to the resolution of the issues raised and would not **create serious prejudice for either of the parties involved in these other proceedings**

> **or cause a contempt of court situation**. In making such an evaluation, NCPs could take into account practice among other NCPs and, where appropriate, consult with the institutions in which the parallel proceeding is being, or could be conducted. Parties should also assist NCPs in their consideration of these matters by providing relevant information on the parallel proceedings. (Commentary, Paragraph 26)

The ANCP's finding that the complaint should be rejected on the basis of ongoing civil proceedings in Australia and PNG clearly disregarded this guidance.

The ANCP's appeal statement, issued in response to the complainants' appeal to its Oversight Committee, also disregarded the initial assessment criteria. Instead, it skipped directly to the substance of the complaint, issuing a statement which purportedly exonerated G4S of any misconduct, but without having undertaken any of the steps that would have been required had it properly accepted the specific instance, such as offering its good offices for mediation, facilitating an exchange of information between the parties or thoroughly examining the evidence.

The result was a process that was inequitable and which denied the complainants access to the NCP process in a specific instance which raised serious allegations and which, in our view, clearly fell within the ANCP's jurisdiction. In OECD Watch's view, the criteria set by the ANCP not only misapplied the Procedural Guidance, but set an unreasonably high threshold for acceptance of the complaint, contravening the ANCP's responsibility to operate in an accessible manner.

ii) Failure to operate impartially

The ANCP's process for handling the complaint and reasons given for rejecting it also raise serious concerns about the ANCP's ability to operate impartially. As noted above, one of the reasons ultimately given by the ANCP for rejecting the complaint was that:

> aspects of the complaint could be interpreted as commentary on government policy. However, G4S as service provider is not accountable for government policy and other mechanisms exist for review and scrutiny of policy…It is not the role of the ANCP to issue commentary, whether intended or otherwise on government policies or law.

In addition to applying another additional admissibility criteria not contemplated in the Procedural Guidance, the ANCP's reasoning incorrectly conflates the state duty to protect human rights with the corporate responsibility to respect human rights under the Guidelines. Companies are not exempt from the application of the Guidelines on the basis that their activities are consistent with domestic law and policy. Rather, the 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*" (Section 1, paragraph 2). For an NCP to fulfil its functions fairly and impartially, it must be able to address specific instances which raise potential breaches of the Guidelines objectively, irrespective of whether the company is engaged by the state or acting under state law or policy.[9]

OECD Watch is particularly concerned, however, about the degree of bias demonstrated by the ANCP's appeal statement. Having refused to accept the complaint, which would have required in-depth engagement with the parties and thorough examination of the evidence,

[9] In any event, we note that the lawfulness of the MIRPC was at the time of this complaint under challenge and was subsequently found to be unlawful.

the ANCP nonetheless went on to issue a statement which purported to exonerate G4S in relation to every allegation. Large parts of the statement simply quote directly from the company's response, without making any attempt to independently evaluate the veracity or reasonableness of the assertions made. For example, addressing the allegation that G4S failed to mitigate adverse impacts in its running of the MIRPC, such as by attempting to negotiate a cap on the number of detainees it accepted under its contract or removing staff members from the MIRPC who had already participated in violence against detainees, the ANCP states that:

> *In its response to the ANCP, G4S states that it "made numerous security and other recommendations to the Australian Government during the contract so as to enhance safety and security, but G4S had no capacity to influence decisions taken by the Australian Government on infrastructure enhancements." "Potential impacts are to be addressed through prevention or mitigation, while actual impacts are to be addressed through remediation." The actions G4S stated it took show that attempts to prevent impacts were made.*

It is clear from this statement that the ANCP made no attempt to request any evidence from G4S demonstrating its requests to the Australian government or evaluate whether these requests were sufficient or reasonable mitigation measures. It simply accepted G4S's response as satisfactory. Given this response was never shared with the HRLC or RAID for comment or correction during the assessment process, the ANCP's blanket acceptance of the company's position in its conclusions are particularly problematic. By failing to operate impartially, the ability to handle the specific instance in an equitable manner was also compromised.

The partiality of the ANCP's response is most evident in its treatment of the allegations regarding the assaults perpetrated by G4S employees against the asylum seekers in February 2014 and their role in Reza Berati's death. The appeal statement is completely silent on the role of G4S's local and expat security guards in the violence and instead simply comments (largely irrelevantly) on the actions of the PNG police:

> *With regard to the third allegation made by HRLC and RAID:*
> *[G4S's] manifest failures to ensure the safety and security of those in its care, including from its own personnel, resulting in the death of one detainee and serious injuries to many others;*
>
> *In the view of the ANCP, control of the facility is the responsibility of the PNG Government. G4S was responsible for maintaining a secure environment and responding to security incidents in the facility within the confines of the infrastructure available....*
>
> *With regard to the incidents of 16, 17 and 18 February 2014, the Cornall Review noted G4S had no authority over the police mobile squad and had expressed concern about the potential for the use of firearms by the police mobile squad, the actions taken by the police to breach the perimeter fence and enter Mike Compound on the night of 17 February were unexpected and unforeseeable, and G4S had no means or authority to prevent the police instigating such actions. Given that the control of the facility rests with the PNG Government, the PNG police had the authority to enter the facility without the consent of G4S.*

This conclusion stands in stark contrast with the findings of the Australian Senate Inquiry, which concluded in relation to G4S's role in the violence that:

> *It is undeniable that a significant number of local service provider staff, as well as a small minority of expat staff, were involved in the violence against transferees. During the disturbance on 16 February, PNG national G4S staff, along with other local residents, used*

> *excessive force to bring transferees who had egressed from Oscar compound back into the centre, and then continued to assault transferees inside the centre. On the night of 17 February, G4S reported that some of its local security staff involved in the IRT broke ranks and entered the affray. Many other witness accounts provided to the committee alleged that service provider staff were responsible for some of the injuries incurred by asylum seekers, including allegations that service provider staff were among Mr Barati's attackers.*[10]

Given that these findings were handed down in December 2014, a full year before the ANCP issued its 2016 appeal statement and that a G4S employee was already at this stage on trial for Berati's murder, the ANCP's purported exoneration of G4S for breaches of the Guidelines relating to its role in the violence is particularly concerning.

4. The ANCP's Record of Handling Specific Instances

The ANCP is currently located in the Foreign Investment Division of the Treasury. It has received a total of 16 specific instances since 2005, 14 of those unique (in two instances, two separate complaints were filed against the same company in relation to the same conduct and were subsequently consolidated).[11] Of these, 4 have been referred to other NCPs,[12] 6 have been rejected at the initial assessment stage,[13] 2 have been accepted,[14] 1 has been closed after mediation and a negotiated outcome in parallel proceedings,[15] and 1 is pending.[16] Only one complaint received by the ANCP to date has resulted in a mediated, mutually-accepted outcome.

OECD Watch notes that HRLC & RAID vs G4S Australia Pty Ltd is not the only specific instance in which the ANCP has rejected claims at initial assessment for reasons which, on our view, fall outside the assessment criteria listed in the Guidelines' Procedural Guidance, as well as the ANCP's own complaints procedures. Other examples are as follows:

- *Professor Ben Saul v Serco Group Pty Ltd* (rejected 10 August 2017)[17]
  This complaint also concerned alleged breaches of the human rights chapter of the Guidelines by a UK company contracted by the Australian government to run its immigration detention centres. The complaint was rejected by the ANCP following initial assessment on the basis that:
  - Although the Australian Government acknowledged the United Nations Human Rights Committee had made an adverse finding against the Australian Government in relation to the subject matter of the complaint, the Australian Government "stated it had not acted contrary to domestic law";
  - Serco "was contracted by DIBP to provide immigration detention services on behalf of the Australian Government. A range of complex policy and national security considerations underpin this arrangement";

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[10] Senate Legal and Constitutional Affairs Committee, *Report: Incident at the Manus Island Detention Centre from 16 February to 18 February 2014* (2014). Available at <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Manus_Island/Report/c08>

[11] Kristen Zornada, 'The Australian OECD National Contact Point: How it can be reformed' (2017) *Non-Judicial Redress Mechanisms* 23.

[12] *CEDHA v Xstrata Copper* (2011-14); *Justica Ambiental v BHP Billiton* (2010-11); *Unnames NZ Trade Union v AusCorp* (2009-10); *Mining in Chile* (parties unknown) (2012).

[13] *Professor Ben Saul v SERCO Group* (2015-17); *National Federation of Mining and Energy (FENAME) of Mali v Bayswater Contracting and Mining Group (BCM)* (2015-16); *Human Rights Law Centre and RAID v G4S* (2014-15); *Amadiba Crisis Committee v MRC* (2013); *CFMEU v Xstrata* (2010-11); *ACF et al v ANZ Bank / Green Party of New Zealand v ANZ Bank (2006).*

[14] *Columbian communities v Xstrata / BHP Billiton* (2007-09); *Human Rights Council of Australia v GSL* (2005-06).

[15] *industriALL Global Union v Ansell Limited* (2013 – 17).

[16] *EC and IDI v ANZ Banking Group (2014 –).*

[17] *Professor Ben Saul v Serco Group* (2015-17), available at http://www.ausncp.gov.au/content/publications/reports/general/SERCO_Final_statement.pdf

- Considering these factors, the ANCP "did not believe bringing the parties together would be fruitful or lead to a different outcome. Ultimately, the ANCP's judgment was that the purposes and effectiveness of the Guidelines would not be furthered by proceeding to full assessment".

- *Construction, Forestry, Mining, Energy Union (CFMEU) v XSTRATA* (rejected 8 June 2011)[18]

This complaint concerned alleged breaches of the employment and industrial relations chapter of the Guidelines regarding Xstrata's right to engage in collective bargaining. The complaint was rejected by the ANCP following initial assessment on the basis that:

- XSTRATA refused to enter into face to face mediation with the CFMEU;
- The Guidelines "are voluntary and do not allow for any arbitral or judgmental role by the ANCP";
- The ANCP was "unable to bring the parties together to address the alleged breaches raised by the CFMEU....and therefore unable to fulfill its key role of seeking to resolve possible issues arising through the Guidelines through mediation".

- *Amadiba Crisis Committee v MRC* (rejected 8 March 2013)[19]

This complaint concerned allegations of breaches of various chapters of the Guidelines by an Australian mining company operating in South Africa. The complaint was rejected by the ANCP following initial assessment on the basis that:

- "the ANCP process is to facilitate mediation between parties and the complainant stated it did not wish to engage in mediation";
- the ANCP was unable to verify the assertions made; and the company's application for mineral exploration rights was at the time of the complaint being considered by the relevant local authorities and the local community should be able to participate in the associated consultation process.

The reasons provided for rejecting the complaints above, many of which depart significantly from the criteria the ANCP ought to have considered under the Procedural Guidance, suggests that the ANCP is setting an unreasonably high bar for the proper consideration of complaints brought to it and is not operating in an accessible manner. Its response to complaints which raise issues which touch on matters of state policy are particularly concerning, since the ANCP appears to be unable to provide an impartial assessment of these types of complaints and conflates the obligations of the state with those of the company. Its rejection of complaints on the basis that a company does not wish to engage in mediation or that the ANCP does not judge that mediation would be fruitful is another area of serious concern for OECD Watch, since rejection on this basis is not contemplated in the Procedural Guidance and is likely to simply encourage companies to ignore the OECD Guidelines and the NCP, thereby undermining the effectiveness of the Guidelines.

Furthermore, the ANCP's pattern of operating in an inaccessible and impartial manner has been noted in a recent academic report published by academics at RMIT University in June 2017,[20] which reviewed all complaints handled by the ANCP and compared its operation to that of other NCPs internationally. It concluded that:

> *" The Australian NCP suffers from major deficiencies in the way it handles complaints and the way it is structured. The ANCP regularly rejects claims based on reasons which fall outside the*

[18] *CFMEU v Xstrata* (2010-11), available at <http://www.ausncp.gov.au/content/publications/reports/general/Xstrata_Summary.pdf>
[19] *Amadiba Crisis Committee v MRC* (2013), available at <http://www.ausncp.gov.au/content/Content.aspx?doc=publications/reports/general/SouthAfrica.htm>
[20] Kristen Zornada, 'The Australian OECD National Contact Point: How it can be reformed' (2017) *Non-Judicial Redress Mechanisms* 20.

> *OECD Procedural Guidance for NCPs. The ANCP has never issued a single determination of a breach of the Guidelines. These deficiencies have rendered it ineffective and possibly contribute to its lack of utilization as a non-judicial mechanism by civil society and communities impacted by the activities of Australian businesses overseas".*[21]

In particular, the report noted that the ANCP:

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

In June 2017, the Australian government announced a review of the ANCP. Consultations were held by an independent reviewer in July 2017. The reviewer was due to present her findings and recommendations to Treasury in September 2017, but to date these findings have not been released. It is unclear at this stage whether the review will lead to the changes necessary to restore civil society's confidence in the ANCP.

5. The ANCP's Responsibilities under the Guidelines

Australia has been a member of the OECD since it ratified the Convention on the Organisation for Economic Cooperation and Development on 7 June 1971. On 21 June 1976, adhering governments, including Australia, made a Declaration on International Investment and Multinational Enterprises (Declaration), by which, amongst other things, they jointly recommended to multinational enterprises operating in or from their territories the observance of the Guidelines annexed to the Declaration.[22]

Pursuant to a further Decision of the Council on 27 June 2000, adhering countries are obliged to:

> […] set up National Contact Points to further the effectiveness of the Guidelines by undertaking specified tasks, including contributing to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances, taking account of the attached procedural guidance.[23]

The Procedural Guidance sets out the roles and responsibilities of National Contact Points. These responsibilities are further elaborated in the Commentary on the OECD Guidelines for Multinational Enterprises (Commentary). Some of the relevant guidance that corresponds with this submission includes the following responsibilities (with emphasis from OECD Watch):

> The role and general functioning of the NCP:
>
> The role of National Contact Points is to further the effectiveness of the Guidelines. NCPs will operate in accordance with core criteria of visibility,

[21] Zornada, 'The Australian OECD National Contact Point', above n 13, 7.
[22] C(76)99/FINAL
[23] C(2000)96/FINAL (as amended on 25 May 2011: see C/MIN(2011)11/FINAL

accessibility, transparency and accountability to further the objective of functional equivalence. (Procedural Guidance, Paragraph 1).

Accessibility: Easy access to NCPs is important to their effective functioning. This including facilitating access by business, labour, NGOs, and other members of the public. Electronic communications can also assist in this regard. NCPs would respond to all legitimate requests for information, and also undertake to deal with specific issues raised by parties concerned in an efficient and timely manner.

The Institutional Arrangement of the NCP:

Consistent with the objective of functional equivalence and furthering the effectiveness of the Guidelines, adhering countries have flexibility in organizing their NCPs, seeking the active support of social partners, including the business community, worker organisations, other nongovernmental organisations, and other interested parties. (Procedural Guidance, Paragraph 1.a)

NCP leadership should be such that it retains the confidence of social partners and other stakeholders, and fosters the public profile of the Guidelines. (Commentary, Paragraph 10)

The Implementation of Specific Instances:

When issues arise relating to implementation of the Guidelines in specific instances, the NCP is expected to help resolve them. This section of the Procedural Guidance provides guidance to NCPs on how to handle specific instances. (Commentary, Paragraph 20).

The Guiding Principles of Specific Instances:

Consistent with the core criteria for functional equivalence in their activities NCPs should deal with specific instances in a manner that is:

Impartial. NCPs should ensure impartiality in the resolution of specific instances. [...]

Equitable. NCPs should ensure that the parties can engage in the process on fair and equitable terms, for example by providing reasonable access to sources of information relevant to the procedure. (Commentary, Paragraph 22).

The Initial Assessment Phase:

In making an initial assessment of whether the issue raised merits further examination, the NCP will need to determine whether the issue is bona fide and relevant to the implementation of the Guidelines. In this context, the NCP will take into account:

- 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 issues raised in the specific instance.
- the relevance of applicable laws and procedures, including court rulings.
- how similar issues have been, or are being, treated in other domestic or international proceedings,

- whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines. (Commentary, Paragraph 25).

When assessing the significance for the specific instance procedure of other domestic or international proceedings addressing similar issues in parallel, NCPs **should not decide that issues do not merit further consideration solely because parallel proceedings have been conducted, are under way or are available to the parties concerned**. NCPs should evaluate whether an offer of good offices could make a positive contribution to the resolution of the issues raised and would not create serious prejudice for either of the parties involved in these other proceedings or cause a contempt of court situation. In making such an evaluation, NCPs could take into account practice among other NCPs and, where appropriate, consult with the institutions in which the parallel proceeding is being, or could be conducted. Parties should also assist NCPs in their consideration of these matters by providing relevant information on the parallel proceedings. (Commentary, Paragraph 26).

Following its initial assessment, the NCP will respond to the parties concerned. If the NCP decides that the issue does not merit further consideration, it will inform the parties of the reasons for its decisions. (Commentary, Paragraph 27).

The principles set out in the Procedural Guidance and Commentary are largely mirrored in the ANCP's own published complaint handling procedures.

6. Conclusion

In order to restore civil society's confidence in the Australian NCP, it is essential that the ANCP act in a manner that is accessible and impartial, while upholding its responsibilities listed in the Guidelines' Procedural Guidance. For this reason, OECD Watch invites the Committee to:

- Find that the ANCP has not fulfilled its responsibilities with regard to its handling of this specific instance, particularly in relation to operating in an accessible and impartial manner;
- Provide recommendations to the Australian government on how to improve the ANCP's handling of specific instances;
- Request that the ANCP reconsider this specific instance, taking into account the abovementioned recommendations; and
- Provide additional guidance to all NCPs in relation to the application of the intial assessment crtieria set out in Paragraph 25 of the Procedural Guidance and how these should be interpreted in order to meet the core crtieria of accessibility.

ANNEX III: RESPONSE TO OECD WATCH SUBSTANTIATED SUBMISSION

Australian Government
The Treasury

21 February, 2018

Dr. Manfred Schekulin, Chair of the Investment Committee
Dr. Roel Nieuwenkamp, Chair of the Working Party on Responsible Business Conduct
Organisation for Economic Co-operation and Development
Rue André Pascal 2
75775 CEDEX 16
Paris, France

Dear Dr. Schekulin and Dr. Nieuwenkamp

RESPONSE TO OECD WATCH SUBSTANTIATED SUBMISSION

Thank you for the opportunity, conveyed by email on 16 January 2018, to respond to the substantiated submission made by OECD Watch regarding the Australian National Contact Point's (AusNCP) handling of the specific instance submitted by the Human Rights Law Centre and Rights and Accountability in Development against G4S Australia Pty Ltd (G4S).

The Australian Treasury, as host of the AusNCP, is happy to participate and notes the importance of focusing our collective efforts on matters of process, with a view to improving the functioning of the AusNCP. We also note that—as per guidance issued by the OECD's Responsible Business Conduct Unit—the process is not aimed at re-prosecuting the merits of the specific instance or reaching conclusions about the conduct of the enterprise in question.

In considering this substantiated claim, we underline the importance of focusing on the fundamental principles underpinning NCPs—we recognise our duty under the Guidelines to operate within the core criteria (visibility, accessibility, transparency and accountability); and handle specific instances impartially, predictably, equitably and consistently. NCPs were designed to promote good corporate practices through the Guidelines and provide a non-judicial mechanism to consider complaints that merit further consideration. In this case, OECD Watch argues that the AusNCP was not impartial or accessible, and that it ignored or misapplied the NCP criteria resulting in the complainant being denied access to the NCP process. We reject these assertions.

The complainant did, in fact, access the NCP process. It was able to put forward a case and that case was considered. The AusNCP had regard to the guidelines and it formed a judgment that an offer of good offices would not have made a positive contribution to the resolution of the issues raised, especially in light of the extensive public scrutiny already being applied. The operation of, and incidents at, the Manus Regional Processing Centre, including the role and actions of G4S, were considered in two independent reviews by Mr Robert Cornall AO which were provided to Australia's Immigration Department, an Australian Senate inquiry, a Papua New Guinea police investigation and legal action.

The decision to accept a case and offer good offices is necessarily a matter of judgment and the initial assessment criteria are factors to consider when making these decisions. In our view, they need to be applied diligently, but also flexibly, so that the NCP can form the best judgment on the basis of the available information and the circumstances of the case. While the complainant did not agree with the AusNCP's decision to reject this instance, it was an available and justifiable decision under the criteria.

We reject any assertion of actual partiality on the part of the AusNCP in the handling of this specific instance. The Guidelines allow NCPs not to accept specific instances – and a decision not to accept should not imply partial or unequal treatment or a lack of accessibility. OECD Watch has specifically raised the

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AusNCP's decision not to share documentation from G4S as an example of inequitable treatment. The AusNCP considered this information to be sensitive and acted in line with its published procedures by not sharing it when G4S did not provide consent.

We note that Australia is not the only NCP to have handled specific instances that are linked to matters of government policy (for example, through a company contracting with government). The OECD does not require NCPs to be independent from government and indeed, some NCPs draw a large part of their influence with stakeholders as a result of their connection to government. Cases that are linked to state policy can nevertheless be problematic for NCPs, so we would support further consideration of their handling by the NCP Network, and subsequently the development of formal guidance from the OECD.

We note OECD Watch's request that this specific instance be reconsidered, but in light of the AusNCP's earlier consideration of the case and the other significant inquiries and investigations, we believe there would be little value in revisiting it.

While we refute OECD Watch's fundamental assertions, we concede that the handling of this case was not in line with best practice — the AusNCP did not meet the expected timeframes or conduct the subsequent appeal in adherence with our published appeal procedure. We recognise that it is incumbent on the AusNCP to have good procedures and structures in place to ensure its responsibilities are discharged effectively.

More broadly, Treasury recognises that the AusNCP's performance has not always met stakeholder expectations in recent years and is taking a range of steps to improve the function. Last year we initiated an independent review—which we understand is the first self-generated review process of any NCP. The review recommended an independent NCP model to be hosted in another department, as well as significant improvements to the AusNCP's administrative processes and procedures. Our support for and subsequent publication of the review, despite its critical findings, demonstrates our commitment to managing the function in an open and transparent manner and accepting ideas for improvement. We acknowledge the involvement of OECD Watch, the OECD Secretariat and other key stakeholders in the 2017 review and continue to welcome feedback and advice on our operations.

We are now considering the review's recommendations in conjunction with other Australian Government agencies. While this occurs, the AusNCP is working to resolve outstanding specific instances, developing improvements to its procedures (which will be subject to stakeholder consultation), conducting more stakeholder outreach activities, improving its website and ensuring people can more easily track our work and lodge complaints through an online form. In considering potential improvements through this substantiated submission process, we ask that the Committee carefully considers their practical application and interaction with measures already being taken to improve the AusNCP function.

Thank you again for the opportunity to respond to the substantiated submission. Treasury has and will continue to make itself available to the OECD Secretariat to discuss the issues raised in OECD Watch's substantiated claim. We look forward to discussing the issues further through our representative, Mr Roger Brake, at the upcoming meeting of the OECD Working Party on Responsible Business Conduct.

Yours sincerely

John Lonsdale
Deputy Secretary
Markets Group