

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.

There 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 Australia and Anor*, before the Supreme Court of Victoria relating to the alleged injury of a MRPC transferee.
- A class action, *Kamasae 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 MRPC;
- G4S was not ultimately responsible for operational standards at the MRPC, 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";

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 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.