



Australian Government
The Treasury



OECD
GUIDELINES
FOR MULTINATIONAL
ENTERPRISES

Australian National Contact Point
OECD Guidelines for Multinational Enterprises

Appeal Statement

This appeal was submitted by the Human Rights Law Centre (HRLC) and Rights and Accountability in Development (RAID) following the ANCP's statement of 10 June 2015 in relation to a specific instance involving G4S Australia Pty Ltd.

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ANCP Appeal Statement

1. On 23 September 2014 the Australian National Contact Point (ANCP) and United Kingdom National Contact Point received a request to consider a specific instance. The complaint, made by the Human Rights Law Centre (HRLC) and Rights and Accountability in Development (RAID), alleges that G4S Australia Pty Ltd (G4S) in its capacity as the company contracted by the Government of the Commonwealth of Australia to oversee management and security at the Manus Regional Processing Centre (MRPC) failed to comply with the general principles and human rights sections of the OECD Guidelines for Multinational Enterprises (the Guidelines).
2. Given the allegations related to the operations of the Australian company, rather than its UK parent company, the ANCP has handled this complaint. Following an initial assessment process, the ANCP did not accept the matter as a specific instance complaint under the Guidelines as outlined in a statement published on 10 June 2015.
3. On 2 July 2015, the HRLC and RAID appealed the ANCP's decision. They stated that 'the ANCP's initial assessment misconceives and misapplies the OECD Guidelines'. The appeal letter requests that the ANCP:
 - reconsiders the specific instance complaint on the exclusive basis of the six criteria specified in the OECD procedural guidance; and
 - adheres 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 available to both parties, including the ANCP's correspondence with G4S.
4. Under the ANCP leadership at the time, G4S was notified of the appeal and the ANCP prepared a draft statement providing further explanation for the decision. The ANCP review procedures usually only deal with procedural errors and require the review to be conducted by the Oversight Committee. The then ANCP decided further consideration was warranted and prepared a further statement. This was provided to HRLC and RAID in early 2016 and is included at Appendix A.
5. The ANCP acknowledges that at the time it was conducted, this appeal was not handled in line with published procedural guidance. The Treasury is committed to improving the performance of the ANCP function. The 2017 independent review of the ANCP has been an important mechanism to assess the effectiveness of the ANCP's structure and procedures, and will provide a further basis for considering improvements going forward.
6. With the publication of this statement, the ANCP considers the appeal to be formally completed.

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Institutional arrangements

7. The Australian Government is committed to promoting the use of the OECD Guidelines and implementing them effectively and consistently. Through business cooperation and support, the Guidelines can positively influence business conduct and ultimately economic, environmental and social progress.
8. The OECD Guidelines are not legally binding. They are recommendations on responsible business conduct addressed by governments, including Australia, to multinational enterprises. Importantly, while the OECD Guidelines have been endorsed within the OECD international forum, they are not a substitute for, nor do they override, Australian or international law. They represent standards of behaviour that supplement Australian law and therefore do not create conflicting requirements.
9. Companies operating in Australia and Australian companies operating overseas are expected to act in accordance with the principles set out in the OECD Guidelines and to perform to — at minimum — the standards they recommend.
10. The OECD Guidelines can be seen as:
 - a useful aid to business in developing their own code of conduct (they are not aimed at replacing or preventing companies from developing their own codes);
 - complementary to other business, national and international initiatives on corporate responsibility, including domestic and international law in specific areas such as human rights and bribery; and
 - providing an informal structure for resolving issues that may arise in relation to implementation of the OECD Guidelines in Specific Instances.

Governance

11. Countries adhering to the OECD Guidelines have flexibility in organising their National Contact Points (NCPs) and in seeking the active support of social partners, including the business community, worker organisations, other non-governmental organisations, and other interested parties.
12. Accordingly, the OECD Guidelines stipulate that NCPs:
 - a. will be composed and organised such that they provide an effective basis for dealing with the broad range of issues covered by the OECD Guidelines and enable the NCP to operate in an impartial manner while maintaining an adequate level of accountability to the adhering government;
 - b. can use different forms of organisation to meet this objective. A NCP can consist of senior representatives from one or more ministries, may be a senior government official or a government office headed by a senior official, be an interagency group, or one that contains independent experts. Representatives of the business community, worker organisations and other non-governmental organisations may also be included; and
 - c. will develop and maintain relations with representatives of the business community, worker organisations and other interested parties that are able to contribute to the effective functioning of the OECD Guidelines.
13. An Oversight Committee oversees the ANCP in its implementation of the OECD Guidelines, including advising on Specific Instances and broader international issues. Members of the Committee meet formally biannually and out of session as required, working collegially to support the ANCP in promoting a sustainable approach to business conduct and engender mutual confidence between multinational enterprises and the communities in which they operate.
14. Ms Victoria Anderson, in her capacity as Australian National Contact Point, is the current chair of the Oversight Committee. The ANCP position was transferred from Mr Robert Donnelly to Ms Victoria Anderson in early 2017. Officials from the Australian Treasury provide secretariat services to the Committee. Members of the Committee include representatives from the Department of Foreign Affairs and Trade; Attorney-General's Department; the Department of Immigration and Border Protection; the Department of Industry, Innovation and Science; the Department of Employment; Export Finance and Insurance Corporation; and the Australian Trade Commission (Austrade). Other departments, including the Department of the Prime Minister and Cabinet, may participate in Committee meetings on an ad-hoc basis when issues of relevance arise. The Oversight Committee may call upon further experts where appropriate.

Appendix A – 2016 ANCP Response to G4S Specific Instance Appeal

[Please note that in order to prepare Appendix A for publishing, amendments of a minor nature, such as formatting and typography, have been made to a version provided to the complainant in 2016. Footnote 1 has also been added to reflect a decision made by the Papua New Guinea (PNG) Supreme Court in April 2016.]

Appeal of the ANCP decision regarding a Specific Instance against G4S

On 2 July 2015, the Human Rights Law Centre (HRLC) and Rights and Accountability in Development (RAID) appealed the Australian National Contact Point's (ANCP) final assessment (decision) of 10 June 2015 to reject the Specific Instance submitted on behalf of transferees detained at the Manus Island Regional Processing Centre (MIRPC).

The ANCP has reviewed the decision issued in relation to this case and has decided to uphold the original decision.

Allegations made by HRLC and RAID

HRLC and RAID allege that G4S Australia Pty Ltd (G4S) breached the following OECD Guidelines for Multinational Enterprises (the Guidelines):

General Principles (Chapter II)

A: Enterprises should:

2. Respect the internationally recognised human rights of those affected by their activities.
3. Promote awareness of and compliance by workers employed by multinational enterprises with respect to company policies through appropriate dissemination of these policies, including through training programmes.
10. Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation.
11. Avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur.
12. Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship.

Human Rights (Chapter IV)

States have the duty to protect human rights. Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations:

2. Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.
3. Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.
5. Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.
6. Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.

HRLC and RAID allege that G4S has violated these provisions of the Guidelines through:

- its complicity with the Australian and PNG Governments' arbitrary and indefinite detention of asylum seekers at the MIRPC and violations of their procedural rights; and/or
- its failure to maintain basic human rights standards during the period it was responsible for the MIRPC's management; and/or
- its 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; and/or
- its failure to conduct adequate risk-based due diligence and prevent or mitigate adverse impacts directly linked to its operations.

The Ruling of the ANCP

Upon review, the ANCP has upheld its decision not to accept the Specific Instance Complaint made by HRLC and RAID against G4S. The ANCP took the following points into account when considering whether the complainants' concerns merited further consideration:

With regards to the first allegation made by HRLC and RAID:

- its complicity with the Australian and PNG Governments' arbitrary and indefinite detention of asylum seekers at the MIRPC and violations of their procedural rights; ...

It is not the role of the ANCP to comment on the indefinite detention of asylum seekers at the MIRPC. The detention of asylum seekers at the MIRPC is legal under Australian and Papua New Guinea (PNG) law.¹

The OECD Guidelines Concepts and Principles (Chapter I) clearly state:

Obeying domestic laws is the first obligation of enterprises. The Guidelines are not a substitute for nor should they be considered to override domestic law and regulation. While the Guidelines extend beyond the law in many cases, they should not and are not intended to place an enterprise in situations where it faces conflicting requirements. However, in countries where domestic laws and regulations conflict with the principles and standards of the Guidelines, enterprises should seek ways to honour such principles and standards to the fullest extent which does not place them in violation of domestic law.

With regard to the second allegation made by HRLC and RAID:

- its failure to maintain basic human rights standards at the during the period it was responsible for the MIRPC's management; ...

The ANCP is of the view that given G4S was not ultimately responsible for the MIRPC facility, it had limited ability to influence the operation of the facility. The facility is maintained and controlled by the PNG Government and the operational standards for the facility ultimately rest with that Government.

G4S publically available Human Rights Policy² 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.

With regard to the third allegation made by HRLC and RAID:

- its 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; and/or

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. The ability of G4S to influence the safety and security of detainees was limited to incidents within the facility. The limit to G4S's control is illustrated by the "numerous security and other recommendations (made) 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."

¹ The ANCP notes that on 26 April 2016, after the preparation of this statement, Papua New Guinea's Supreme Court found the detention of persons found to be in need of international protection was unconstitutional in PNG.

² <http://www.au.g4s.com/media/1580/g4s-human-rights-policy.pdf>

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.³ 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.

With regard to the fourth allegation made by HRLC and RAID:

- its failure to conduct adequate risk-based due diligence and prevent or mitigate adverse impacts directly linked to its operations.

The Cornall Review noted “the contractual requirement for G4S to employ at least 50% local Manus staff, preferably through local business entities, in an environment where mitigating the infrastructure limitation required experienced staff.”⁴ This is consistent with the General Policies (A5) “The Guidelines also acknowledge and encourage the contribution that MNEs can make to local capacity building as a result of their activities in local communities. Similarly, the recommendation on human capital formation is an explicit and forward-looking recognition of the contribution to individual human development that MNEs can offer their employees, and encompasses not only hiring practices, but training and other employee development as well. Human capital formation also incorporates the notion of non-discrimination in hiring practices as well as promotion practices, life-long learning and other on-the-job training.”⁵ The conflict between capacity building of Manus Islanders and the risk of a lack of experienced staff was ultimately imposed upon G4S by Government.

Commentary on the General Policies (A2) states that “enterprises are encouraged to co-operate with governments in the development and implementation of policies and laws. Considering the views of other stakeholders in society, which includes the local community as well as business interests, can enrich this process.”⁶ The G4S submission to the Cornall Review indicates that G4S attempted to engage governments on policies and laws but it did not have the authority to make changes to the facility without the approval of the Australian and PNG Governments.

As noted above, the Cornall Review found “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”.⁷

³ <http://www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/review-robort-cornall.pdf>

⁴ <http://www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/review-robort-cornall.pdf>

⁵ <http://www.oecd.org/daf/inv/mne/48004323.pdf>

⁶ <http://www.oecd.org/daf/inv/mne/48004323.pdf>

⁷ <http://www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/review-robort-cornall.pdf>

Commentary on the Guidelines (A14) notes “...due diligence can help enterprises avoid the risk of such adverse impacts. For the purposes of this recommendation, 'contributing to' an adverse impact should be interpreted as a substantial contribution, meaning an activity that causes, facilitates or incentivises another entity to cause an adverse impact and does not include minor or trivial contributions...”⁸ The maintenance of the infrastructure of the facility was the responsibility of the PNG Government and by identifying the risks associated with housing detainees in what was described as a “low security, temporary centre”⁹ and informing both the Australian and PNG Government’s, G4S certainly engaged in due diligence and attempted to mitigate these risks. 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.

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 ANCP further notes that as the company is no longer contracted to run the MIRPC it does not have the ability to further remediate any impacts that may have occurred.

⁸ <http://www.oecd.org/daf/inv/mne/48004323.pdf>

⁹ <http://www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/review-robert-cornall.pdf>