



Australian Government
The Treasury



**Australian National Contact Point
OECD Guidelines for Multinational Enterprises**

Final Statement

This Specific Instance was submitted by Professor Ben Saul of the University of Sydney, on behalf of refugees detained in Australia, against SERCO Group Pty Ltd – a United Kingdom-based multinational enterprise operating under contract by the Australian Government.

Published 10 August 2017

Disclaimer

The information contained within this document is intended to inform the reader of the general processes and undertakings arising from a Specific Instance complaint raised with the Australian National Contact Point for the OECD Guidelines for Multinational Enterprises. It is made available on the understanding that the Australian Treasury, as a result of providing this information, is not engaged in providing professional or legal advice, nor does it accept any responsibility for the accuracy or completeness of any material contained herein.

Readers should exercise their own judgement with respect to interpretation. This material includes the views of third parties, which do not necessarily reflect the views of the Commonwealth, or indicate its commitment to a particular course of action. Links to other websites and listings of other people or organisations are included for convenience and do not constitute endorsement of those sites, products or services. The Commonwealth Government respects the privacy of personal and commercially sensitive information provided by parties, as per the requirements of the Privacy Act 1988 and the Freedom of Information Act 1982.

Executive Summary

1. On 14 January 2015, Professor Ben Saul of the University of Sydney submitted a Specific Instance to the Australian National Contact Point (ANCP) alleging non-observance of the Human Rights Chapter of the OECD Guidelines for Multinational Enterprises (the OECD Guidelines) by SERCO Group plc (Serco) in its operations in Australia. Professor Saul submitted this Specific Instance on behalf of 54 asylum seekers, recognised as refugees by the Australian Government but detained on the basis of a decision by the Minister for Immigration and Border Protection to not grant a visa*.

**The Australian Security and Intelligence Organisation (ASIO), if requested by the Department of Immigration and Border Protection (DIBP), provides advice about the suitability, on national security grounds, of an individual to be granted a visa. Detention, or otherwise, of individuals after that advice is received is a matter for the Minister for Immigration and Border Protection.*

2. The ANCP does not accept this Specific Instance. While the issues raised could be both material and substantive, further consideration is unlikely to contribute to the purposes and effectiveness of the OECD Guidelines.
3. This position was supported by the ANCP Oversight Committee.

Victoria Anderson
Australian National Contact Point¹
OECD Guidelines for Multinational Enterprises

c/- Foreign Investment Division
Australian Treasury
Email: ancp@treasury.gov.au

¹The ANCP position was transferred from Mr Robert Donelly to Ms Victoria Anderson in early 2017.

Institutional arrangements

4. 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.
5. 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.
6. 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.
7. 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

8. 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.
9. 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.
10. 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 collegiately 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.
11. Ms Victoria Anderson, in her capacity as Australian National Contact Point, is the current chair of the Oversight Committee. 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.

Specific Instance

Parties

12. **Professor Ben Saul** (complainant) is a Barrister and a Professor of International Law at the University of Sydney's Sydney Centre for International Law, located in Sydney, Australia.
13. **SERCO Group plc** (respondent) is a British company (the Australian subsidiary is Serco Immigration Services) that was contracted by the Australian Government Department of Immigration and Border Protection (DIPB) to provide immigration detention services in Australia.

Other parties and NCPs

14. While the Australian NCP has managed all aspects of this Specific Instance, the United Kingdom NCP has been sent relevant information as a courtesy.

Complaint

15. In his Specific Instance, Professor Saul calls on the ANCP to consider Serco's business conduct in relation to the Human Rights Chapter of the OECD Guidelines, with due consideration to their participation in activities in relation to which adverse findings were made against the Australian Government by the United Nations Human Rights Committee (UNHRC) in 2013. Professor Saul wrote:

"In August 2013, the United Nations Human Rights Committee (HRC) issued two decisions concerning these refugees ('Views') under the individual complaints procedure of the Optional Protocol to the International Covenant on Civil and Political Rights (1966) (ICCPR). That procedure is legally binding on Australia and the Australian Government made extensive legal submissions to the UN in that proceeding.

In its decisions ... the UN Human Rights Committee found that Australia's treatment of this group of refugees involved:

- (1) *Unlawful arbitrary detention in violation of Article 9(1) of the ICCPR;*
- (2) *A failure to provide effective judicial remedies in violation of Article 9(4); and*
- (3) *Cruel, inhuman or degrading treatment in detention contrary to Article 7."*

and

"...under the OECD Guidelines Serco should not participate in detention that is contrary to human rights even if it may be lawful under Australian domestic law. "

16. Professor Saul sought the following outcomes:

"Serco should: (a) immediately seek to vary its contract with the Department of Immigration to exclude the detention of these refugees (or others in similar position in future); or (b) failing that, negotiate an ad hoc agreement with the Department to exclude the detention of these refugees; or (c) failing that, unilaterally release the refugees and default on its contract in respect of their detention. In addition, Serco should compensate each refugee (a) proportionate to the duration and severity of their detention and (b) apportioning its joint responsibility viz-a-viz the Australian Government, and in accordance with prevailing legal standards on the quantum of compensation for illegal detention.

Response

17. Serco's view is that the Specific Instance should not be accepted. Details of Serco's response are not reproduced here. Serco requested that the details of their response be retained in confidence by the ANCP due to the commercially sensitive nature of some of the material it contains.

Relevant OECD Guidelines

18. The Specific Instance alleges Serco has failed to act in accordance with ***IV Human Rights Guidelines and associated commentary***, specifically:

... 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:

- 1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse impacts with which they are involved.*
- 2. Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.*

...

- 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.*

Initial assessment

Process

19. Consistent with procedures agreed by the OECD for handling Specific Instances, the ANCP commenced an Initial Assessment as to whether the matters raised warranted further consideration under the OECD Guidelines.
20. As part of its responsibility to interpret the OECD Guidelines, the OECD Investment Committee has indicated that the following issues should be taken into account by a National Contact Point when undertaking an initial assessment.
 - The identity of the party concerned and its interest in the matter.
 - Whether the issue is material and substantiated.
 - Whether there seems to be a link between the enterprise's activities and the issue raised in the Specific Instance.
 - The relevance of applicable law and procedures, including court rulings.
 - How similar issues have been, or are being, treated in other domestic or international proceedings.
 - Whether the consideration of the specific issue would contribute to the purposes and effectiveness of the OECD Guidelines.
21. As the actions of the company involved in this Specific Instance occurred on Australian soil, and the company is a multinational enterprise, the Specific Instance falls within the scope of the OECD Guidelines and the ANCP considered the issues involved. The ANCP consulted both parties during the consideration process.

Schedule of events

Specific Instance		
• Complaint received from Professor Ben Saul and acknowledged by the ANCP.		14 January 2015
• The ANCP wrote to Serco providing background on the ANCP process and a copy of Professor Saul's Complaint.		11 February 2015
Initial Assessment		
• SERCO responded to the Complaint, rejecting the allegations.		30 March 2015
• Then ANCP, Mr Rob Donelly, met with Professor Saul to discuss the case.		26 June 2015
• New ANCP appointed – Ms Victoria Anderson.		April 2017
• Ms Victoria Anderson met with Professor Saul to discuss delays and issues associated with the case.		21 April 2017
• Draft initial assessment provided to ANCP Oversight Committee for comment.		29 May 2017
• Initial assessment, including the ANCP's final position, provided to Professor Saul and Serco for comment.		23 June 2017
• Comments received from parties		July 2017
• Initial assessment published on the ANCP website and provided to the OECD NCP Secretariat.		August 2017

Publications

<http://mneguidelines.oecd.org/database/>

<http://www.ausncp.gov.au/content/Content.aspx?doc=publications.htm>

ANCP Final Statement

22. In considering whether to accept this Specific Instance, the ANCP has considered the views of the parties, publicly available information and the advice of the Oversight Committee—all with reference to its responsibilities under the Guidelines. Although the issues raised could be material and substantive, weight has been given to whether the consideration of the Specific Instance will contribute to the purposes and effectiveness of the OECD Guidelines².
23. The ANCP notes the following.
 - The UN HRC ICCPR made an adverse finding against the Australian Government in respect of the matters examined by the UN Human Rights Committee.
 - The Australian Government, in its Response to the finding acknowledged its obligations under the ICCPR, but reiterated its right to undertake measures, including detention, to uphold Australia's national security.
 - The Australian Government also stated in its Response that it has not acted contrary to domestic law.
24. Serco has been 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.
25. Considering all of the factors outlined above, the ANCP does not believe bringing the parties together in this Specific Instance would be fruitful or lead to a different outcome. Ultimately, the ANCP's judgment is that the purposes and effectiveness of the OECD Guidelines would not be furthered by proceeding to a full assessment of this particular Specific Instance.

A reflection on corporate responsibilities

26. Although the ANCP has decided not to accept this Specific Instance, this determination turned on the circumstances in question. The ANCP notes the desirability of Australian multinational enterprises (MNEs) having in place robust social and environmental policies - including (if relevant) policies in relation to human rights. In developing these policies, Australian MNEs should reflect on possible interactions with local laws and regulations in the countries they operate in, and the consistency of these with other international guidance such as the OECD Guidelines for MNEs³. The OECD Guidelines suggest that MNEs 'should seek ways to honour them to the fullest extent which does not place them in violation of domestic law, consistent with paragraph 2 of the Chapter on Concepts and Principles'.

² OECD (2011), OECD Guidelines for Multinational Enterprises, Commentary on the Procedural Guidance for NCPs, I.25 Initial Assessment, p.83

³ *ibid* p.32