



**Australian Government**

**The Treasury**

Australian National Contact Point  
for the OECD Guidelines for Multinational Enterprises

# Final Statement

This Specific Instance was submitted by Australian Women Without Borders against Mercer PR for its conduct in relation to activity in Nauru.

Published 9 July 2019

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# EXECUTIVE SUMMARY

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1. On 27 October 2016, the Australian National Contact Point (AusNCP) received a complaint from Australian Women Without Borders (AWWB) against Mercer PR.
2. The complaint alleged that Mercer PR had breached the Human Rights chapter of the OECD Guidelines for Multinational Enterprises (OECD Guidelines) through public relations work it performed for the Government of the Republic of Nauru. The allegation was triggered by Mercer PR's distribution of the personal information of an alleged sexual assault victim.
3. In February 2018, the AusNCP formally accepted the matter and offered its good offices. The AusNCP held separate meetings with each party to discuss the matter. A joint, facilitated discussion was originally agreed but did not go ahead as Mercer PR later withdrew its agreement to participate.
4. This complaint provided an opportunity for the notifier to formally raise their concerns with Mercer PR. The AusNCP is disappointed that Mercer PR withdrew its support for a joint meeting with the notifier, removing the opportunity for a direct discussion between the parties.
5. It is apparent that the distribution of Najma's personal information has had a significant impact on her. The AusNCP would like to acknowledge Najma's courage and strength in sharing her experience with the AusNCP.
6. While Mercer PR is a very small enterprise, it is important that it meets the standards Government expects of all Australian enterprises operating overseas, including the OECD Guidelines. In concluding this case, the AusNCP recommends that Mercer PR's executive undertake human rights training. The AusNCP will undertake follow-up on this recommendation in six (6) months.
7. This statement is available on the AusNCP website at [www.ausncp.gov.au](http://www.ausncp.gov.au).

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# COMPLAINT

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## Parties

8. The complaint was submitted by the National Justice Project for Australian Women Without Borders (AWWB) (notifier) on behalf of the affected individual (referred to as Najma). AWWB is a non-government organisation which advocates on behalf of women on Nauru.
9. Mercer PR (respondent) is the trading name of a private company, Loan Oak Investments Pty Ltd, incorporated in Australia. Mercer PR provides public relations services, specialising in media engagement and issues management, to a variety of companies, organisations and industry groups.

## Other parties and National Contact Points

10. During the complaint process, the AusNCP sought advice from the OECD Secretariat, French NCP and United Kingdom NCP.
11. The AusNCP also contracted an independent mediator to facilitate a discussion between the parties. However, the discussion did not proceed following Mercer PR's decision not to participate.

## Complaint

12. On 27 October 2016, AWWB submitted a complaint to the AusNCP alleging that Mercer PR had not observed the OECD Guidelines when conducting public relations work on behalf of the Government of the Republic of Nauru.
13. The complaint alleged that Mercer PR breached the human rights chapter of the OECD Guidelines by distributing personal information concerning an alleged sexual assault complainant – Najma. This occurred through the email dissemination of a statement to media outlets with an attached copy of a Nauruan police document that contained Najma's actual name and medical details.

## Outcomes sought

14. In its original submission, the notifier was seeking that Mercer PR:
  - issue a formal apology to Najma expressing recognition of the harm caused and genuine contrition;
  - introduce internal policies to ensure that future business activity is consistent with the OECD Guidelines and international human rights law;

- conduct human rights training for its staff members; and
- pay an amount of compensation to Najma as redress, including to cover associated legal costs.

## **Mercer PR response**

- 15.** Mercer PR's initial response to the notifier's submission stated it was at all material times acting as an agent for the Nauruan Government and the information distributed to media outlets was done at the Government's direction. Evidence was provided to support this.
- 16.** Mercer PR stated that the distribution of the information was limited to those it considered were already aware of Najma's identity.
- 17.** Mercer PR noted it was a very small enterprise with only four employees and indicated the international scope of its business operations was limited, with all operations conducted by employees within Australia.
- 18.** Mercer PR stated it was not previously aware of the OECD Guidelines or other international instruments referred to in the notifier's submission prior to receiving the complaint. Mercer PR also noted that an apology had not previously been sought.
- 19.** Mercer PR noted at no point did it act with the intention of causing harm to Najma and stated where the harm outlined in the notifier's complaint had been caused by the events in question, it was sincerely sorry for Najma. Mercer PR has not, however, apologised for its own actions.
- 20.** Mercer PR acknowledged its actions as outlined in the complaint may have constituted a breach of Najma's privacy and caused the individual distress.
- 21.** Mercer PR acknowledged it now understood the OECD Guidelines and accepted its responsibility to ensure its future business practices were consistent with the OECD Guidelines and international human rights law.
- 22.** Mercer PR stated it had introduced a policy to ensure where there was a potential adverse human rights impact in the future, it would obtain legal advice before proceeding.
- 23.** Mercer PR noted it had ceased the distribution of press releases for the Republic of Nauru.

## RELEVANT OECD GUIDELINES

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24. The complaint submitted by the notifier alleged that Mercer PR breached the human rights chapter of the OECD Guidelines.

### *Chapter IV Human Rights*

*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:*

- 1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights 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.*
- 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.*
- 4. Have a policy commitment to respect human rights.*
- 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.*

## INITIAL ASSESSMENT

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- 25.** The AusNCP considered the material provided by both parties and sought advice from the OECD Secretariat, United Kingdom and French NCPs in making its initial assessment of the case.
- 26.** The right to privacy is set out in Article 12 of the Universal Declaration of Human Rights as follows:
- *No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.*

This statement is similarly repeated in Article 17 of the International Covenant on Civil and Political Rights. From the notifier's submission, the AusNCP considered it plausible that the distribution of Najma's personal information to numerous journalists could be considered an arbitrary interference with her privacy, even though it was not made available to a broader public through inclusion in articles authored by these journalists. It was also plausible that it could be considered an attack upon her honour and reputation. As such, the privacy concerns raised fall under the recommendations to enterprises set out in the human rights chapter of the OECD Guidelines.

- 27.** While Mercer PR is based in Australia, in this matter its client, and thus its operational reach, was overseas. As Mercer PR also maintains several international contact numbers it is apparent that it – either previously, currently, or potentially in the future – may have further overseas clients that cause its operations to extend outside Australia.
- 28.** Noting the above, the AusNCP considered the complaint was bona fide and relevant to the implementation of the OECD Guidelines. The AusNCP therefore accepted the submission and offered its good offices.

## GOOD OFFICES

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- 29.** The AusNCP started the good offices process by meeting with each party separately to discuss the issue raised and options to proceed.

## Notifier meeting

30. In its meeting with the AusNCP, the notifier<sup>1</sup> provided further information on the sequence of events, the effect on Najma and the outcomes sought. The notifier considered that the distribution of personal information went beyond any potential public interest and speculated that it was intended to publicly embarrass Najma in order to stop other women coming forward with similar allegations.
31. The notifier considered that Mercer PR, as a professional public relations firm, would or should have had a keen understanding that any information provided to journalists would at a minimum quickly spread through their news organisations, even if the information was not subsequently published. As such, even if those people who originally received the information were already aware of Najma's identity and the events affecting her, it was foreseeable that the confirmation of this information would lead to it being spread further.
32. The notifier noted Najma would not have voluntarily shared her status as a rape victim. The notifier described how the release of personal information led to Najma being identified as a victim to her community and family. There were also significant enquiries from the media as they sought to locate Najma and publicise her experience. The notifier explained that the events had had a detrimental effect on Najma's mental health, to the extent that she required counselling.
33. The notifier was eager for a solution and noted their disappointment with the apology provided in Mercer PR's written response, which appeared qualified and insincere. The notifier reiterated the original outcomes they were seeking from Mercer through the process. They also noted the lack of legal avenues available in Nauru and that access to potential legal options may be limited by the restrictions around entering Nauru.

## Mercer PR meeting

34. Mercer PR provided context for the events in a meeting with the AusNCP. The situation on Nauru was described as challenging, due to a strong focus on stopping offshore processing by advocates for refugees. As such, Mercer PR stated that anyone involved with Nauru was being targeted and that the media was used to create negative perceptions of Nauru, including through the frequent publication of assault allegations. Mercer PR's role was to manage public relations issues for the Nauruan Government.
35. Mercer PR explained that the Nauruan police were questioning the veracity of some assault reports, including that of Najma. Mercer PR was asked to publish the media release and medical records to counteract media reporting. Prior to

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<sup>1</sup> Comments from the notifier at this meeting include comments made by Najma, a support person, a representative from AWWB and representatives from the National Justice Project.

the media release being sent, legal advice was sought from the Nauruan Government, through which Mercer PR cleared its release.

36. Mercer PR noted its release of the information had caused its employees to be targeted, including through journalists and refugee advocates lobbying Mercer PR's other clients.
37. Mercer PR acknowledged that it had learned a valuable lesson from the experience and would not repeat its actions. It was noted Mercer PR no longer delivered media releases for the Nauruan Government. Mercer PR confirmed it now knew to stop and seek advice in similar circumstances.
38. The AusNCP encouraged Mercer PR to be involved in a mediated or facilitated discussion with the notifier as a pathway to move forward and for both sides to resolve the issue. Mercer PR had some reservations but agreed to consider involvement in a joint discussion.

## Joint meeting

39. After both parties provided agreement, the AusNCP made arrangements for a facilitated discussion between the parties. However, Mercer PR subsequently withdrew its agreement to participate, resulting in the cancellation of the joint meeting.

## CONCLUSION

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### Process

40. Following the conclusion of the good offices process, the AusNCP sought any additional written submissions from the parties. Mercer PR provided further comments, which the AusNCP considered in addition to previous communications with both parties when preparing this statement.
41. Both parties were provided a draft version of this statement for comment. The AusNCP made amendments to this draft statement prior to publication, following receipt of comments from both parties.

### AusNCP view

42. This complaint has provided an opportunity for the notifier to formally raise their concerns with Mercer PR. It is unfortunate that Mercer PR withdrew its support for a joint meeting with the notifier, removing the opportunity for a direct discussion between the parties.
43. The increased role of small and medium-sized enterprises on the international stage was acknowledged in the 2011 update to the OECD Guidelines. While

Mercer PR is a very small enterprise, it is important that it recognises the expectations and impact of its operations overseas.

44. The AusNCP considers that Mercer PR's association with the release of sensitive personal information in this instance is inconsistent with the human rights chapter of the OECD Guidelines.
45. The notifier sought a formal apology that recognised the harms that occurred, and direct compensation to Najma as redress. It also sought the introduction of internal policies to ensure Mercer PR's activities going forward are consistent with the OECD Guidelines and international human rights law, and that the company arranges for its staff members to undertake human rights training.
46. Mercer PR stated it was not previously aware of the OECD Guidelines and re-emphasised that it was not its intention to cause harm to any individual. It called for acknowledgement of its previously unblemished reputation and good prior work for its clients. Mercer PR also rejected the AusNCP's assessment that its limited international operations should classify the company as a multinational enterprise. Mercer PR said the notifier's intention to seek financial compensation for Najma was a factor in its decision not to participate in the planned discussion. Mercer PR emphasised its understanding that its media release was not the only channel through which Najma's personal details had become known.
47. However, as a result of this process, Mercer PR appears to understand the importance of ensuring that its actions avoid potential adverse human rights impacts. In this regard, the AusNCP notes Mercer PR has stated it now has a policy to ensure that where there is potential for its actions to lead to an adverse human rights impact it would obtain legal advice before proceeding.
48. The AusNCP recognises the process of dealing with a complaint and the resulting potential for reputational impacts can be confronting for companies. The AusNCP acknowledges that there were other factors contributing to the harm experienced by Najma, beyond Mercer PR's actions.
49. In relation to the notifier's request for payment of an amount of compensation, the AusNCP notes that as a non-judicial mechanism, its role does not ordinarily extend to making specific recommendations about financial compensation.
50. Mercer PR and the notifier both initially had legal representation but Mercer PR later acted alone. The AusNCP notes that despite being a non-judicial mechanism, the use of legal counsel is common. Indeed, without legal assistance matters affecting individuals, such as this one, may not otherwise reach the AusNCP. However, an imbalance where only one party has access to legal counsel can create an environment that supports disengagement from the process.
51. The AusNCP encourages parties to view good offices as a chance for open and constructive dialogue. When this occurs, parties have the opportunity to genuinely understand alternate perspectives.

52. It is apparent that the distribution of Najma's personal information has had a significant impact on her. The AusNCP would like to acknowledge Najma's courage and strength in sharing her experience with the AusNCP.

## Recommendations

53. The AusNCP agrees with the notifier that a genuine apology noting the impact of its activities on Najma would underpin the goodwill and spirit of resolving the complaint. We also encourage Mercer PR to consider all options to provide appropriate remedy to Najma to address the adverse impacts of its activities on her.
54. The AusNCP recommends that Mercer PR's executive undertake human rights training in order to more readily assess the recommendations of the OECD Guidelines and incorporate them into internal operational guidelines and decision making processes. The AusNCP considers that this recommendation aligns with Mercer PR's focus on crisis matters, as these are often born of or have human rights implications.
55. The AusNCP will follow up on these recommendations in six (6) months.

# SCHEDULE OF EVENTS

Specific Instance	Date
• Complaint submitted by the notifier	27 Oct 2016
• Complaint acknowledged by the AusNCP	21 Nov 2016
Initial Assessment	Date
• AusNCP provided a copy of the complaint to Mercer PR for response	1 Jun 2017
• Mercer PR response received	11 Aug 2017
• Mercer PR response provided to the notifier for further comment	12 Sep 2017
• Notifier comments received	27 Sep 2017
• AusNCP consulted on its draft initial assessment decision with the AusNCP Oversight Committee, the OECD Secretariat, the UK NCP and the French NCP	Dec 2017
• AusNCP formally accepted case and offered its good offices. Notifier comments of 27 September provided to Mercer PR	14 Feb 2018
Good Offices	Date
• AusNCP met with the notifier	20 Mar 2018
• AusNCP met with Mercer PR	17 Apr 2018
• Mercer PR withdrew agreement to participate in a facilitated discussion	21 Nov 2018
• AusNCP emailed the notifier noting end of good offices	26 Nov 2018
Final Statement	Date
• AusNCP invited both parties to provide further comments	4 Jan 2019
• Mercer PR provided further comments	6 Jan 2019
• First draft of Final Statement provided to Oversight Committee for comment.	18 Feb 2019
• Oversight Committee comments received	28 Feb 2019
• First draft of Final Statement provided to parties for comment	19 Mar 2019
• Notifier provided a response to draft Final Statement	15 Apr 2019
• Mercer PR provided a response to draft Final Statement	31 May 2019
• AusNCP published the Final Statement on its website	9 July 2019

\* Prior to May 2017 another Treasury official held the role of AusNCP.

# INSTITUTIONAL ARRANGEMENTS

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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 OECD Guidelines can positively influence business conduct and ultimately economic, environmental and social progress.

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.

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.

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

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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.

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.
  - i. This case was handled primarily before the establishment in 2019 of the **new AusNCP Governance and Advisory Board** (the Board), which includes non-government members as well as representatives from key government agencies. From April 2019, all new cases will be managed by an Independent Examiner, who will be supported by the Board.
  - ii. Prior to the Board's establishment, the AusNCP's implementation of the OECD Guidelines was monitored by an Oversight Committee, which provided advice on complaints and broader international issues. Members of the Committee met biannually and out of session as required, to support the AusNCP in promoting a sustainable approach to business conduct and support trust between multinational enterprises and the communities in which they operate. This work is being carried forward by the new Board, chaired by Ms Victoria Anderson, in her capacity as the Australian National Contact Point.