

Australian National Contact Point for the OECD Guidelines for Multinational Enterprises

Canberra, 8 June 2011

The Australian National Contact Point (ANCP) for the OECD Guidelines for Multinational Enterprises (Guidelines) promotes the principles of the Guidelines and provides a forum for concerned parties to discuss issues relevant to any specific matter or case which may arise.

On 12 October 2010 the ANCP received a complaint raising a number of concerns regarding the activities of a multinational company, Xstrata Coal Pty Ltd (XSTRATA) from an Australian Trade Union – Construction, Forestry, Mining, Energy Union – Mining and Energy Division (CFMEU). XSTRATA is a wholly owned subsidiary of a multinational corporation Xstrata plc.

Xstrata plc operates a highly decentralised corporation with responsibility and accountability devolved to commodity businesses. Sales and marketing of commodities produced by Xstrata plc globally is undertaken by a separate company which is the largest shareholder in Xstrata plc.

COMPLAINT

The CFMEU's complaint was set out in its notice of 11 October 2010 of a specific instance matter. At **Attachment A** is a schedule of the alleged breaches of the Guidelines by XSTRATA claimed by the CFMEU.

The CFMEU in its specific instance notice contended that these breaches of the Guidelines had come about through 'numerous tactics to weaken or restrict collective bargaining, requiring or promoting individual employment contracts, failure to consult on major workplace restructuring including redundancies, and failure to actively redeploy workers made redundant.'

The CFMEU also contended that Xstrata plc had entered into anti-competitive arrangements with its major shareholder that were disadvantageous to other shareholders including the CFMEU.

In support of its contentions the CFMEU provided specific details of numerous incidents, including via sworn statements.

The CFMEU in its notice of complaint documented that there had been a number of industrial disputes which resulted in formal proceedings under the *Fair Work Act 2009 (Cwth)* (the Australian national industrial relations law). In addition, CFMEU commented that compliance with Australian law did not constitute compliance with the Guidelines and that the Guidelines represent supplementary principles and standards of a non- legal character.

The outcomes sought by the CFMEU were:

1. That XSTRATA remedy the specific breaches of the Guidelines. Where remedy of a past action is not possible, that the company formally commits to no further similar breaches.
2. That XSTRATA commit to working constructively and cooperatively with the CFMEU on matters of mutual concern, and specifically commit to constructive collective bargaining negotiations to reach agreements on wages and working conditions, especially with respect to employment security and the workplace rights of union members.
3. That Xstrata plc cease its anti-competitive practices with respect to exclusive marketing arrangements with its major shareholder. That all marketing contracts be subject to competitive tendering or similar transparent and arms-length commercial arrangements.

At Attachment B is an extract from XSTRATA's response to the notice of specific instance made by the CFMEU.

PROCESS

ANCP met with CFMEU, on 30 November 2010, to discuss the specific instance. The CFMEU further outlined a history of industrial disputation between CFMEU and XSTRATA's subsidiary operating units over a range of issues at particular mining operations in eastern Australia. It was noted that CFMEU had publicly announced its lodging of the complaints made under the Guidelines on a number of websites and in the Australian media. CFMEU undertook that going forward it would treat all discussions on this matter as being confidential. A representative of the Australian Government's Department of Education, Employment and Workplace Relations attended this meeting.

Separately on 30 November 2010, XSTRATA met with ANCP and challenged that there were any breaches of the Guidelines as alleged by CFMEU. A representative of the Australian Government's Department of Education, Employment and Workplace Relations also attended this meeting.

At the time that the complaints were made both parties agreed separately that there were no outstanding industrial issues as these had been resolved, largely through the formal provisions of Australia's industrial relations system, at times following a deal of industrial disputation. The CFMEU asserts that the formal resolution of these disputes within the limits of Australian law does not constitute resolution of these issues which it contends are breaches of the Guidelines.

Both parties agreed that at the enterprise level there was ongoing contact between CFMEU and local enterprise managers of XSTRATA. Some of this interaction was constructive and resulted in positive outcomes. However in some workplaces interaction was fraught with disputation, resulting in legal action to resolve issues. Some of the actions by parties to these disputes and/or their agents appears to have led to a high level of distrust and antipathy between XSTRATA and the CFMEU at the corporate level.

The ANCP outlined its role to both parties. In particular, that the Guidelines are voluntary and do not allow for any arbitral or judgemental role by the ANCP. The ANCP's role is

limited to using its good offices to bring the parties together to explore resolution of issues at hand, possibly through mediation. This process relies on the good will of all parties involved.

CFMEU expressed its willingness to engage in a mediation process. XSTRATA did not see any value in engaging in a mediation process with the CFMEU through the ANCP, however was willing to engage with the CFMEU at the enterprise level.

During the first quarter of 2011 draft copies of this statement were provided to CFMEU and XSTRATA for comment.

Following receipt of comments from the parties on the draft statement the ANCP held telephone discussions with XSTRATA and the CFMEU;

- In conversation with the ANCP on 14 April 2011, XSTRATA reiterated the points it had already made, especially that 16 of its enterprises had negotiated, albeit at times after disputation, enterprise agreements with the CFMEU. XSTRATA maintained its position regarding a mediation process with the CFMEU; largely because of issues relating to confidentiality with the CFMEU, and a perceived lack of good faith and goodwill shown by the CFMEU and continued to see no point in meeting with the CFMEU.
- Separately on 21 April 2011, the CFMEU continued to press for a mediation process with XSTRATA to resolve its specific instance complaints.
 - It was noted that the CFMEU has given a guarantee of confidentiality of all future discussion regarding this matter.
- In its comments on the initial draft statement the CFMEU *inter alia* indicated that the draft statement did not represent adequate application of implementation procedures under the Guidelines and that it would proceed to the OECD Investment Committee for clarification if these deficiencies were not addressed. The ANCP noted this possibility.

In discussing the matter with the both XSTRATA and the CFMEU, the ANCP expressed disappointment with XSTRATA's refusal to enter into face to face discussions with the CFMEU about this matter. The ANCP has been unable to bring the parties together to address the alleged breaches raised by the CFMEU and therefore the ANCP is unable to fulfil its key role of seeking to resolve possible issues arising from the Guidelines through mediation. The ANCP continues to offer its services towards resolving the issues and would consider reopening this specific instance if both parties were to agree.

ATTACHMENT A

CFMEU ALLEGATIONS OF BREACHES OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

- That XSTRATA breached Part IV, 1(a), (2)(a) and 2(c) of the OECD Guidelines: enterprises should, within the framework of applicable law, regulations and prevailing labour relations and employment practices:
 - 1(a) Respect the right of their employees to be represented by trade unions and other bona fide representatives of employees, and engage in constructive negotiations, either individually or through employers' associations, with such representatives with a view to reaching agreements on employment conditions.
 - 2. a) Provide facilities to employee representatives as may be necessary to assist in the development of effective collective agreements.
 - c) Promote consultation and cooperation between employers and employees and their representatives on matters of mutual concern.'
- That XSTRATA breached Part IV, (6) of the OECD Guidelines: 'In considering changes in their operations which would have major effects upon the livelihood of their employees, in particular in the case of the closure of an entity involving collective lay-offs or dismissals, provide reasonable notice of such changes to representatives of their employees, and, where appropriate, to the relevant governmental authorities, and co-operate with the employee representatives and appropriate governmental authorities so as to mitigate to the maximum extent practicable adverse effects. In light of the specific circumstances of each case, it would be appropriate if management were able to give such notice prior to the final decision being taken. Other means may also be employed to provide meaningful cooperation to mitigate the effects of such decisions.'
- That XSTRATA breached Part IV, (8) of the OECD Guidelines: 'Enable authorised representatives of their employees to negotiate on collective bargaining or labour management relations issues and allow parties to consult on matters of mutual concern with representatives of management who are authorised to take decisions on these matters.'
- That Xstrata plc had breached Part IX of the OECD Guidelines
"Enterprises should, within the framework of applicable laws and regulation, conduct their activities in a competitive manner."

ATTACHMENT B

XSTRATA'S RESPONSE TO COMPLAINTS

XSTRATA responded as follows:

1. XSTRATA and Xstrata plc were committed to complying with the laws of the countries within which they operated and supported the OECD Guidelines for Multinational Enterprises.
2. XSTRATA's decentralised operating model was well known to CFMEU. XSTRATA intended to continue the arrangement whereby industrial matters were managed and engaged upon locally to its mining operations. XSTRATA has maintained this position in meetings with CFMEU officials.
3. XSTRATA noted that its operating units have a long history of collective bargaining and agreement making with CFMEU and other trade unions. XSTRATA acknowledged that at times negotiations leading to such agreement making were fraught and had at times led to industrial disputation of varying degree. All such negotiations at the time of the advice from XSTRATA had been resolved either directly or through the appropriate legal mechanisms.
4. XSTRATA also made particular note of vilification of it and its staff, directors and some shareholders in websites established and managed by CFMEU. It is understood that these actions are subject to actions before the Australian authority established to hear complaints of such nature.
5. XSTRATA on behalf of Xstrata Plc noted that in its original prospectus issued in 2002 prior to its listing on the London Stock Exchange the marketing and sales arrangements for its commodities through its principal shareholder were clearly made public and that these arrangements meet the requirements of the UK Listings Authority. XSTRATA advised that all related party transactions between Xstrata plc and its principal shareholder are reported in Xstrata plc's accounts in accord with appropriate reporting principles. XSTRATA rejected that these arrangements were anti competitive within the scope of Part IX of the OECD Guidelines for Multinational enterprises.
6. XSTRATA advised that it did not consider mediation a viable means of addressing CFMEU's complaint given the level of distrust between the parties over a number of issues including maintenance of confidentiality and good faith.