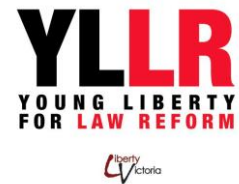


Briefing paper for the UN Special Rapporteur on the situation of human rights defenders: Human Rights Defenders in Australia's National Action Plan on Business and Human Rights



1. Summary and Background

Human Rights Defenders ('Defenders') working on business and human rights issues in Australia and in relation to Australian companies overseas face a unique set of challenges.

Australia's current political and legislative climate at times acts to encourage business activity at the cost of protecting Defenders. This comes in such forms as anti-protest laws in some states and threats to strip tax concessions from environmental organisations.ⁱ For example, anti-protest laws, such as that of Tasmania and Western Australia, aim to constrain protests around mining, forestry sites and workplaces and favour business interests at the cost of the right to freedom of assembly.ⁱⁱ Australia also has limited constitutional and legislative protections for human rights. This leaves Defenders vulnerable to the disproportionate economic power and influence of business. The case studies included in this briefing paper show how companies have interfered with the rights of Defenders.

Defenders working in the area of business and human rights need the full support of the Australian government. They need to be protected both in Australia and abroad, given that one third of Australia's top 2000 companies operate overseas.ⁱⁱⁱ

The development of a National Action Plan on Business and Human Rights (NAP) would be an important opportunity for the government to consult with Defenders. The NAP itself should also ensure that the rights of Defenders working on business and human rights are properly protected and promoted by government and business. This is best practice, as established by International Service for Human Rights and the International Corporate Accountability Roundtable in their joint report - '*Consult, Respect, Protect: Including human rights defenders in National Action Plans on Business and Human Rights*'.

The Special Rapporteur ought to encourage the Australian Government to ensure the protection of and consultation with Defenders in the development of the NAP.

2. Issues affecting Defenders working on business and human rights in Australia

Defenders in Australia face various issues when advocating for human rights that are adversely affected by business. These include:

- *Freedom of speech:* In the absence of a Bill of Rights or strong legal protections for free speech, some Defenders have been subject to legal proceedings that aim to silence them. **Case study 1** shows how a business managed to prevent and delay the screening of a documentary film that showed how the business unlawfully removed a community from its land. This demonstrates not only that it is possible for Defenders to be silenced in the Courts, but that it actually has happened.
- *Lack of transparency:* When engaging in community consultations, companies can take advantage of their position of power to prevent communities from working as Defenders. **Case study 2** shows how a company purposefully tried to mislead and divide an Indigenous community whilst negotiating mining royalties. This case exemplifies the unequal relationship between mining companies and the traditional owners of the land.
- *Lack of accountability in offshore activity:* Australian companies operating overseas are at times associated with activity that endangers the rights and even the

lives of local communities and Defenders. **Case study 3** shows how Australian companies overseas can inflame or foster tension in local conflicts in which the communities have no effective legal redress. The NAP should ensure adequate measures to mediate the relationship between Australian businesses and Defenders overseas.

3. Opportunity presented by the NAP process

It is encouraging that Australia is finally taking steps towards a NAP. At this time there is momentum building to develop a NAP. The government is currently conducting national consultations on the implementation of the UN Guiding Principles on Business and Human Rights.

Through the NAP process, the government has a unique opportunity to foster and actively shape a human rights-supportive culture within the business sector. This is possible and has, to a certain extent, been achieved in the United Kingdom (UK), where Defenders were included in the NAP.

4. Recommendations

We recommend that the Special Rapporteur make comments that:

- a. Support the case for the protection of Defenders in the NAP.**
- b. Encourage the government to engage with Defenders in an open and inclusive consultation process.**
- c. Encourage the government to urge businesses to take an active part in all aspects of the NAP process and foster a human rights culture that supports the work of Defenders.**
- d. Support the inclusion in the NAP of clear extraterritorial obligations for Australian companies operating overseas.^{iv}**
- e. Encourage the government to create effective redress options in law that can be available to Defenders, including by broadening standing rules.^v**
- f. Encourage the government to look to the ISHR/ICAR report ‘Consult, Respect, Protect: Including human rights defenders in National Action Plans on Business and Human Rights’ as a guide for best practice when including Defenders in the NAP process.**
- g. Remind the government that a Bill of Rights is the ideal protection mechanism for human rights.**

5. Case studies

1. Freedom of speech: *The Opposition*

Powerful and wealthy companies are using legal processes and strategic lawsuits against public participation (‘SLAPP suits’) to curtail the freedom of speech of Defenders working on business and human rights issues.

As part of *The Opposition* documentary, director Hollie Fifer filmed human rights abuses carried out by the Papua New Guinea police against protestors from the Paga Hill community

in Port Moresby, who were opposing the development of their settlement by Australian-run company the Paga Hill Development Company ('PHDC').

When Dame Carol Kidu, a former advocate for the community who had appeared in *The Opposition*, began working for the PHDC, she and her new employer attempted to prevent the film being released. Dame Kidu revoked her consent to the use of all footage featuring or facilitated by her, including important footage of human rights abuses. She also issued legal proceedings, which were funded by the PHDC, against Fifer.

Dame Kidu obtained a temporary injunction that forced Fifer to show an edited version of the film at its world premiere at the Hot Docs festival in Canada on 28 April 2016. Following the screening, three PHDC executives contacted the production company claiming to have been defamed, and threatening to sue if screenings did not cease.

The case of *Kidu v Fifer* was decided in Fifer's favour in July 2016. The Court did not find Dame Kidu's story credible, and commented that the legal action appeared to have been motivated by a desire to protect her own reputation and that of the PHDC from their negative portrayal in *The Opposition*.

However, the threat of defamation proceedings still looms, and Fifer is hesitant to screen *The Opposition* again. Implementation of the Guiding Principles will reinforce that businesses are required to respect human rights, and should therefore support rather than hinder the work of Defenders.

2. Transparency: Fortescue Metal Group and the Yindjibarndi Aboriginal Corporation

The dispossession of Indigenous peoples from their traditional lands is a significant issue in Australia, and one that is exacerbated by the lengthy and cumbersome court processes that Indigenous communities must go through to maintain their land claim. The mining industry can complicate this process where the relative disadvantage of Indigenous communities can be exploited to obtain mining permits on Indigenous land.

The Fortescue Metal Group ('FMG') has been engaged in a longstanding conflict around its Solomon Hub mine in Western Australia, which is situated on land officially represented by the Yindjibarndi Aboriginal Corporation ('YAC'). Mining rights over this land are worth more than \$100 billion, and the FMG had offered to compensate the YAC with just \$10 million per year.^{vi} When the YAC refused this offer, the FMG directed significant funding and resources to a split-off faction, the Wirlu-Murra Yindjibarndi Aboriginal Corporation ('WMYAC'), which then entered its own negotiations with the FMG^{vii} and organised a meeting to change its leadership and direction to the benefit of the mining company.

The YAC alleged that the FMG financially influenced the meeting to increase their chances of obtaining mining rights.^{viii} The YAC issued proceedings in the Federal Court of Australia against the FMG, where Justice Rares found that the notice of meeting had been 'calculated to mislead'.^{ix} Control reverted back to the original directors after a special meeting, and the YAC continues to negotiate with the FMG.

The FMG's failure to disclose their funding of the WMYAC threatened the traditional landowners' ability to make fully informed choices and thus impeded their capacity to act as Defenders for their community. Where businesses have an interest in the activities of a community group, they should be required to disclose any resources they have provided to that group so Defenders can properly carry out their work.

3. Extraterritoriality: Mineral Commodities Limited in South Africa

The activities of Australian companies overseas can inflame or create tense local conflicts in which the communities have no effective legal redress. The Australian-based mining company, Mineral Commodities Limited (ASX: MRC), has spent thirteen years trying to establish a sand mine in the Amadiba region on the Eastern Cape of South Africa.

The region has been dogged with violence and intimidation aimed at community leaders opposing the mine. In March 2016 this resulted in vocal anti-mining activist Sikhosiphi 'Bazooka' Radebe being shot and killed in his own home.

Radebe's organisation, the Amadiba Crisis Committee, believes the violence occurring around the mine is connected to a gap between pro-mining and anti-mining factions in the community. These tensions have been exacerbated by a poor consultation process and lack of transparency by MRC in its attempts to establish the mine.

After sixteen years of involvement in this mining project, MRC disinvested its 56 per cent share from the mining project, stating its inability to stop or avoid 'tensions and conflict' as the reason.^x While MRC's disinvestment should be commended, the Guiding Principles must be implemented in Australia to stop such abuses occurring again.

This case study exemplifies the need of the NAP to also apply to the extraterritorial operations of Australian companies.

Endnotes

ⁱ This includes: *The Workplaces (Protection from Protestors) Act 2014* (Tas), the *Criminal Code Amendment (Prevention of lawful activity) Bill 2015* (WA) and for more on environmental organisations see: <<http://www.abc.net.au/7.30/content/2015/s4214478.htm>>.

ⁱⁱ Emily Howie et al, *Safeguarding Democracy* (Human Rights Law Centre, 2016) available at http://hrlc.org.au/wp-content/uploads/2016/02/HRLC_Report_SafeguardingDemocracy_online.pdf 25.

ⁱⁱⁱ Australian Trade Commission *Overseas Investment of Australian Companies: Trade and Investment Note* (2015) p 3.

^{iv} Stand with Amadiba, *Joining Statement on the Assassination of South African Activist* <<https://standwithamadiba.wordpress.com/2016/05/18/joint-statement/>>.

^v Emily Howie et al, *Safeguarding Democracy* (Human Rights Law Centre, 2016) available at <http://hrlc.org.au/wp-content/uploads/2016/02/HRLC_Report_SafeguardingDemocracy_online.pdf> 39.

^{vi} Paul Cleary, 'Pilbara Split by Resource Riches' *The Australian* (14 May 2011) available at <<http://www.theaustralian.com.au/national-affairs/pilbara-split-by-resource-riches/story-fn59niix-1226055581095>>.

^{vii} Wirru-Murra Yindjibarndi Aboriginal Corporation, 'FAQs' <<http://wmyac.com/faq>>.

^{viii} Bronwyn Herbert, 'Fortescue Accused of Rigging Land Rights Deal' *ABC* (24 December 2012) <<http://www.abc.net.au/news/2012-11-20/fmg-accused-of-rigging-meeting/4382826>>.

^{ix} *TJ (on behalf of the Yindjibarndi People) v State of Western Australia* [2015] FCA 818 [97].

^x MRC 'MRC Enters into MOU with Bee Partner to Divest Interest in Xolobeni Mineral Sands Project' available at <<http://mineralcommodities.com/category/news/>>.

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