

ALERT: Ferrovial's exposure to human rights risks through proposed Broadspectrum takeover





No Business in Abuse (NBI) is an independent, non-profit, non-government initiative bringing together a cross-section of Australian society including faith-based groups, unions, lawyers and human rights campaigners. NBI seeks to end the complicity of corporate entities in human rights abuses perpetuated within Australia's immigration system.



GetUp is an independent movement of more than a million people working to build a progressive Australia and bring participation back into our democracy. We campaign on human rights, democratic participation, economic fairness and environmental sustainability.



The Human Rights Law Centre protects and promotes human rights in Australia and beyond through a strategic mix of legal action, evidence-based advocacy, research and capacity building.

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SUMMARY

This alert is to inform investors, financiers, clients and partners of Spanish listed company **Ferrovial S.A.** [FER:SA] of the risks and implications of its takeover bid for Australian listed company **Broadspectrum Limited, formerly Transfield Services Limited** [ASX:BRS], launched on 7 December 2015.

Broadspectrum is the Australian Government's lead contractor in the operation of its offshore detention centres (ODCs) in Nauru and Papua New Guinea. Broadspectrum derives the majority of its current EBITDA from these contracts.¹

Australia's system of immediate, arbitrary and indefinite detention of asylum seekers in harsh conditions on remote Pacific Islands has been decisively and repeatedly condemned by expert human rights bodies and the international community.

Broadspectrum's activities in providing services central to maintaining a system that violates human rights standards constitutes a breach of the corporate responsibility to respect human rights contained in the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.

In the event that Ferrovial's bid is successful, Ferrovial will be exposed to the substantial legal, reputational and financial risks associated with complicity in gross historical and ongoing human rights abuses. These risks will flow to companies with which Ferrovial has business relationships.

THE OFFSHORE DETENTION CENTRES

Under Australia's Migration Act, asylum seekers arriving by boat are subject to mandatory, indefinite and non-reviewable detention.² The possibility of release by a court is expressly excluded.³ Asylum seekers arriving after 19 July 2013 are subject to mandatory removal to centres on Nauru or Manus Island, Papua New Guinea.⁴ The only exception to these mandatory detention and removal provisions is at the personal, non-compellable and non-reviewable discretion of the Immigration Minister. This system is without parallel in the world.

Australia is the only country in the world with a policy that imposes mandatory and indefinite detention of asylum seekers on arrival.

As of 30 April 2015, the average amount of time asylum seekers have been detained in the Nauru ODC was 402 days.⁵ The Australian Government has not released figures for the length of detention in the Manus ODC. The asylum seekers subject to this regime include unaccompanied children, pregnant women, the elderly and victims of torture.

The UN Human Rights Committee has repeatedly found Australia's practice of mandatory indefinite detention to be arbitrary and in violation of international law.⁶

Australia's offshore detention centres have also been criticised by the UN High Commissioner for Human Rights,⁷ the Committee Against Torture,⁸ the UN Special Rapporteur on Torture,⁹ the Australian Human Rights Commission,¹⁰ the Human Rights Law Centre (Melbourne, Australia),¹¹ Amnesty International¹² and Human Rights Watch¹³, among others. In Australia's recent review before the Human Rights Council, the Australian Government received at least 60 recommendations criticising Australia's policies on asylum seekers and refugees.¹⁴

On Broadspectrum's own figures, sexual assault and major incidents of self-harm occur with unacceptable regularity in the Nauru ODC.¹⁵ In 2014, the Medical Journal of Australia published a report stating that the vast majority of Australian paediatricians believe mandatory detention of asylum seeker children constitutes child abuse,¹⁶ a position since supported by the Australian Medical Association (AMA).¹⁷ The AMA has also called for a moratorium on any child being transferred to Nauru after doctors at Brisbane's Lady Cilento Children's Hospital refused to discharge a one year old asylum seeker child to Nauru.¹⁸

Even the Secretary of the Department of Immigration and Border Protection has conceded the weight of evidence of harm inflicted on asylum seekers in the ODCs, stating in 2014, "... there is a reasonably solid literature base which we're not contesting at all which associates a length of detention with a whole range of adverse health conditions."¹⁹

BROADSPECTRUM'S COMPLICITY IN HUMAN RIGHTS ABUSES

Asylum seekers, including children, are exposed to cruel, inhuman and degrading treatment and conditions.

Since September 2012, Broadspectrum has been the lead contractor administering the Nauru ODC, and since February 2014 has been the lead contractor for both the Nauru and Manus Island ODCs. Broadspectrum makes decisions about the welfare, movement, communication, behaviour, accommodation, food, clothing, water, security and the general conditions of asylum seekers and refugees in the ODCs. Broadspectrum can make recommendations as to whether the placement of

asylum seekers and refugees is appropriate, whether they are put into solitary 'managed accommodation,' and in certain circumstances to use force or authorise the use of force.²⁰

No Business in Abuse's November 2015 report sets out the basis for Broadspectrum's complicity in gross human rights abuses on a large scale.²¹ Relying only upon the findings of international and domestic expert authorities including Australian Parliamentary committees, the United Nations Special Rapporteur on Torture, the Australian Human Rights Commission and Amnesty International, the report details horrifying abuses and the resultant severe

mental and physical harm inflicted upon asylum seekers and refugees within the ODCs during Broadspectrum's provision of services.

Of additional concern is the lack of independent and public oversight of the ODCs. Public inspections of the ODCs by independent authorities including United Nations experts and the Australian Human Rights Commission have been regularly refused since 2013. Transparency regarding the ODCs has been further hampered by the Australian Border Force Act, a law which came into force in July 2015 and makes it a criminal offence, punishable by two years' imprisonment, for anyone who does work for the Australian Department of Immigration and Border Protection, to disclose information obtained by them while doing that work. These provisions apply to the staff of Broadspectrum and its subcontractors.

RESPONSIBILITY TO RESPECT HUMAN RIGHTS

Broadspectrum's responsibility under the UN Guiding Principles is to respect human rights in its business activities.²² This responsibility exists over and above the requirement of compliance with the laws of PNG, Nauru or Australia.²³

A company need not be the sole cause of an abuse to hold responsibility for it. It can contribute to that abuse through knowingly providing practical assistance that has a substantial effect on the commission of the abuse.²⁴

The Interpretive Guide to the Guiding Principles addresses the situation of complicity in gross human rights abuses as follows:²⁵ **"If enterprises are at risk of being involved in gross human rights abuses, prudence suggests that they should treat this risk in the same manner as the risk of involvement in a serious crime, whether or not it is clear that they would be held legally liable."**

Private contractors working in Australia's ODCs have not and cannot prevent or substantially mitigate the ongoing abuses. One of the previous private contractors, Save the Children Australia, acknowledged this in April 2015 when it stated: "It is the act of prolonged and arbitrary detention that creates the circumstances that give rise to harm. No amount of hard work, collaboration or improvement to process or infrastructure can make up for this fact."²⁶

LIABILITY FOR HISTORICAL VIOLATIONS AND RESPONSIBILITY TO REMEDY

During Broadspectrum's involvement in the offshore detention regime, it is estimated that roughly 2000 people have been exposed to a range of serious human rights abuses including arbitrary, indefinite detention and cruel, inhuman and degrading conditions. Additionally, many asylum seekers detained on Manus Island and Nauru have experienced severe physical and mental harm, which may be actionable in Australian courts. Broadspectrum has indemnified the Australian Government in relation to the illness, injury or death of any person in the offshore detention centres.²⁷ Additionally, under the UN Guiding

Principles, Broadspectrum has a responsibility to ensure that victims of human rights abuses to which it has contributed have an appropriate and effective remedy.

Karami Kamasae v The Commonwealth of Australia & Ors is an ongoing class action brought on behalf of detainees from the Manus Island ODC who suffered injury a result of conduct by the Australian Government, G4S and Transfield (G4S was contracted to provide detention services at the Manus Island ODC before February 2014). The Statement of Claim filed by the plaintiff alleges that the defendants failed to take reasonable care in relation to food and water, accommodation, healthcare and security arrangements at the Manus Island ODC.²⁸ While it is not yet possible to quantify the damages that might be awarded in such a case, the legal fees alone are likely to be substantial.

RISKS ASSOCIATED WITH COMPLICITY IN HUMAN RIGHTS ABUSES

IMPACT OF COMPLICITY IN GROSS HUMAN RIGHTS ABUSES FOR BROADSPECTRUM

Principle 3 of the Australian Securities Exchange (ASX) Corporate Governance Council's Corporate Governance Principles and Recommendations is "Act ethically and honestly."²⁹ The commentary to this section states: "A listed entity's reputation is one of its most valuable assets and, if damaged, can be one of the most difficult to restore. Investors and other stakeholders expect listed entities to act ethically and responsibly. Anything less is likely to destroy value over the longer term."

Institutional investors have divested their holdings, citing Broadspectrum's association with human rights abuses

Since the inception of the No Business in Abuse campaign, reports show that numerous institutional investors in Broadspectrum have divested their holdings, citing Broadspectrum's association with human rights abuses and the lack of transparency for investors.³⁰ MSCI ESG Research has flagged Broadspectrum's involvement in the ODCs as a 'Very Severe

Controversy' and downgraded its IVA rating accordingly.³¹ In its Target's Statement lodged on 21 January 2016, Broadspectrum, by its own admission, attributes "market uncertainty" surrounding the company's contract negotiations with the Department of Border Protection (DIBP) to "activist campaigns".³²

This reputational damage has also spread to entities within Broadspectrum's target client markets. Six Australian local government authorities, including the City of Sydney, are in the process of excluding Broadspectrum, its subcontractors, and any company contracted to Australia's system of immigration detention from any future contractual relations.³³ In addition to 85 current campaigns targeting local government authorities, in 2016, No Business In

Abuse will launch campaigns targeting other key client growth sectors for Broadspectrum, including the health, school cleaning, higher education, welfare and justice sectors. No Business in Abuse has also engaged in confidential meetings with Broadspectrum clients in the resources and industrial sectors. Many of these clients indicate a reluctance to proxy exposure to gross human rights abuses as a result of contractual relationships. Clearly, Broadspectrum's ongoing complicity in gross human rights abuses is a material financial and reputational risk threatening the company's future growth and earnings.

RISK OF COMPLICITY FOR FERROVIAL S.A.

Ferrovial is a signatory to the UN Global Compact, is listed on the Dow Jones Sustainability Index and FTSE4Good and has enacted a strict human rights policy.³⁴ Ferrovial understandably relies upon this reputation in attracting investors, finance and in translating to 'low risk' ratings for contracting with national governments sensitive to corporate reputational concerns (such as the UK and Canadian Governments). This is also a reputation Ferrovial has successfully leveraged to secure charitable partnerships with human rights-based development agencies such as Oxfam.

If Ferrovial's takeover bid for Broadspectrum is successful, Ferrovial will be exposed to Broadspectrum's liability for historic and ongoing human rights abuses occurring at the ODCs. It would face an immediate decision regarding participation in the ongoing tender process for a new five year contract with the DIBP to provide welfare and garrison support services at the ODCs. Should Ferrovial be awarded this contract, it will do so with full, prior knowledge of the practical impossibility of complying with its corporate obligation to respect human rights, and the certainty of its complicity in gross human rights abuses perpetrated against vulnerable asylum seekers and refugees.

A successful takeover bid would also make Ferrovial S.A the target of a global campaign against corporate involvement in Australia's abusive immigration detention regime. In addition to targeting Ferrovial's newly acquired non-detention client base in Australia, the campaign would engage the company's clients and charitable partnerships internationally, and include submissions to various authorities of review and investigation including the complaints procedure of the Norwegian Global Pension Fund, UN human rights bodies and the International Criminal Court.

Any association with the ODCs will expose Ferrovial to significant legal and financial risk and prove deleterious to Ferrovial's current standing as a globally respected leader in corporate social responsibility.

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