



Australian National Contact Point
for the OECD Guidelines for Multinational Enterprises

Initial Assessment

This complaint was submitted by Publish What You Pay Australia (PWYP) and is pursued by PWYP, the Myanmar Alliance for Transparency and Accountability (MATA) and the Bawdwin Labour Union against Myanmar Metals Limited (now Mallee Resources Limited)

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EXECUTIVE SUMMARY

1. On 14 September 2021, the Australian National Contact Point (**AusNCP**) received a complaint from Publish What You Pay Australia (**PWYP** or the **notifier**), against Myanmar Metals Limited (now Mallee Resources Limited, **MYL**, or the **enterprise**). The complaint is brought by PWYP with, and on behalf of, Myanmar Alliance for Transparency and Accountability (**MATA**) and the Bawdwin Labour Union (collectively, the **Complainants**).
2. At the time the complaint was initiated, MYL had announced an intention to divest from a joint venture to develop the Bawdwin mine in Myanmar (Bawdwin Joint Venture, **BJV**).
3. The Complainants allege that MYL's proposed divestment from the BJV did not comply with the OECD Guidelines for Multinational Enterprises (the OECD Guidelines) and if divestment occurred, it would constitute irresponsible disengagement.
4. The position of MYL is that the company has not irresponsibly disengaged from the BJV. MYL states that neither it nor BJV were the owners of the mining concession and neither held the permits necessary to act directly in Myanmar prior to the military coup in February 2021. MYL also states that the strategy proposed by PWYP – for MYL to retain its interest in the BJV and to use its influence to delay or stop future Bawdwin mine development – was impossible in light of the military coup.
5. The AusNCP liaised with both parties during the Initial Assessment process to share and clarify relevant information. The AusNCP shared the information the notifier provided with the enterprise. A response was provided by the enterprise, a copy of which was shared with the notifier. The AusNCP is satisfied that the information provided by both parties was sufficient to undertake the initial assessment.
6. The AusNCP has considered the six admissibility criteria as part of the Initial Assessment process and determined to accept this complaint and offer 'good offices'. The following observations were made during the assessment.
 - 6.1. The complaint provided sufficient material addressing the OECD Guidelines' six admissibility criteria for Initial Assessment.
 - 6.2. While concerns were raised by MYL as to whether the complaint is brought in good faith, the AusNCP considers that the Complainants have a legitimate interest in the issues raised by the complaint.
 - 6.3. The main issues raised by the complaint are whether appropriate human rights due diligence was undertaken and acted upon in

relation to the divestment by MYL from the BJV, and whether there was transparent disclosure of the decision to divest.

- 6.4. The parties differ as to the form and extent of due diligence and other actions MYL could, and should, have taken prior to divestment from BJV.
 - 6.5. The AusNCP proposes offering good offices to contribute to resolution of these differences. The process would involve consideration of what constitutes appropriate human rights due diligence and disclosure in a conflict-affected area in order to achieve responsible disengagement consistent with the OECD Guidelines, and the legal and procedural frameworks to which they refer. Consideration of appropriate due diligence and disclosure would take into account factors such as the enterprise's size, sector, operational context, ownership and structure, the presence or absence of causal nexus, issues of linkage and the extent of leverage the enterprise had and may have.
7. The AusNCP notes that this outcome is not a determination on the merits of the claims presented, nor is it an assessment of whether the enterprise's actions are consistent with the OECD Guidelines.
 8. This statement is available on the AusNCP website at www.ausncp.gov.au.

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COMPLAINT

Parties

9. On 14 September 2021, PWYP submitted a complaint to the AusNCP with, and on behalf of, 245 Myanmar-based CSOs.
10. Following communications with the Independent Examiner, it was clarified that the complaint is pursued by PWYP, MATA (whose membership consists of 244 CSOs) and the Bawdwin Labour Union.
11. PWYP is a civil society coalition of 30 anti-corruption, human rights, environmental and faith-based organisations advocating for greater transparency and accountability of the mining, gas and oil sectors. PWYP is a member of the global PWYP movement.
12. MATA is a network of 244 civil society organisations (CSOs) from all of Myanmar's 14 states and regions. MATA supports members to collaboratively examine economic, political and social reform issues and to advocate for transparency and accountability of governance in Myanmar, with a focus on extractive industries. The identities of the 244 CSOs have been kept confidential due to concerns for the rights of members of these groups in light of the military coup.
13. The Bawdwin Labour Union represents workers in and around the Bawdwin mine.
14. MYL is a single project company. At the time of the initiation of the complaint, MYL's project interest was in the BJV regarding the Bawdwin mine in Myanmar. MYL does not dispute the following characterisation, other than to note that "the contractual interest did not extend to any legal right to access, operate, manage or control the Bawdwin mine, did not imply ownership or title and it remained subject to conditions":¹

MYL is a Perth-headquartered explorer and mine developer listed on the ASX [Australian Stock Exchange]. MYL held a 51% contractual interest in the BJV, which is comprised of MYL through its wholly owned Myanmar based subsidiary, BMRML [Bright Mountain Resources Myanmar Limited] and two Myanmar-registered companies, WMM [Win Myint Mo Industries Co Ltd] and EAP [EAP Global Co Ltd].

¹ Attachment to email from MYL to AusNCP, 10 May 2022 (**MYL Response**), 15.

Complaint

15. On 1 February 2021, a military coup took place in Myanmar.
16. On 17 August 2021, MYL announced an intention to divest its interest in the BJV to Win Myint Mo Industries Co Ltd (WMM).
17. On 17 and 30 August 2021, PWYP wrote to MYL expressing its concern that the future sale of MYL's stake in the BJV "without adequate human rights due diligence and transparency risks further enriching the corrupt military regime and could contribute greater human rights violations and conflict around the mine".² PWYP urged MYL to conduct human rights due diligence prior to any divestment from the BJV and offered to connect MYL with Myanmar civil society.
18. On 14 September 2021, PWYP submitted a complaint to the AusNCP in which it alleges that MYL has failed to act in accordance with the principles and standards in the OECD Guidelines in its proposed divestment from the Bawdwin mine. Specifically, the Complainants allege that MYL has failed in three key respects to:
 - 18.1. conduct appropriate risk-based human rights due diligence in relation to the divestment and has failed to meaningfully engage with stakeholders;
 - 18.2. seek to prevent or mitigate adverse human rights impacts that may arise after the sale of its interest in the BJV; and
 - 18.3. be transparent in relation to its decision to disengage from the BJV.
19. PWYP alleges that if MYL had conducted human rights due diligence, it "should have led to the conclusion that the sale could result in severe human rights impacts for local people and communities living near to the Bawdwin mine and risks that under WMM, the mine could be developed and generate revenue for the illegitimate military junta, which is committing ongoing, grave human rights violations".³

Outcomes sought

20. The outcomes sought in the initial complaint were revised following MYL's 30 November 2021 announcement of the sale of its interests in the Bawdwin project.
21. During the Initial Assessment period, the notifier advised the AusNCP that the Complainants seek the following revised outcomes from the AusNCP process.

² Letter from PWYP to MYL dated 17 August 2021.

³ Publish What You Pay Australia, Complaint to the Australian National Contact Point under the Specific Instance Procedure of the OECD Guidelines for Multinational Enterprises, submitted 14 September 2021 (**Complaint**), 7.

- 21.1. For MYL to provide evidence of their comprehensive risk-based human rights due diligence, including to seek to prevent or mitigate adverse human rights impacts to which it may be contributing, in relation to the divestment from the BJV.
- 21.2. For MYL to meaningfully engage with key stakeholders in relation to the sale, particularly communities close to the Bawdwin mine and Myanmar-based CSOs representing the interests of local people, workers and communities.
- 21.3. MYL to share any plans from the project owners – WMM and EAP – in how they will prevent or mitigate the anticipated adverse human rights impacts of the sale.
- 21.4. For MYL to be more transparent with key stakeholders, particularly CSOs and labour unions representing local people, workers and communities near the Bawdwin mine, in relation to the sale.
- 21.5. For MYL to disclose the proposed Production Sharing Agreement, or any draft terms thereof, between WMM and Mining Enterprise Number 1 (ME-1) for the Bawdwin mine.
- 21.6. Generally, for MYL to act in accordance with its obligations under the OECD Guidelines in relation to responsible disengagement including discussions with respected stakeholders around the sale, and steps to mitigate any adverse human rights, including labour rights, impacts from taking place.

Enterprise response

22. MYL was provided with a copy of the Complaint on 15 September 2021.
23. MYL submitted a response on 18 February 2022, and an amended response on 10 May 2022.
24. The position of MYL is that the company has not irresponsibly disengaged from the BJV. MYL alleges that PWYP has brought the complaint in bad faith.⁴ MYL contends that “PWYP’s complaint is ill-considered and without merit, particularly with respect to PWYP’s contention that MYL has failed to act in accordance with the principles and standards in the OECD Guidelines in the three key respects outlined above”.⁵
25. In support of its position, MYL refers to:⁶
 - 25.1. MYL’s and BJV’s approach to community consultation in the context of the preparation of an environmental and social impact assessment (**ESIA**).

⁴ MYL Response 5, 12, 16, 34, 38.

⁵ MYL Response, 6.

⁶ MYL Response, 38 – 41.

- 25.2. MYL and its partners in the BJV joint development of policies and strategies “designed to deliver enhanced outcomes for local and regional communities and stakeholder groups”. MYL also states that “there is no evidence that any community or stakeholder groups are worse off following MYL’s withdrawal from Myanmar”.
- 25.3. MYL’s provision of disclosure to the ASX. MYL states that its “over-arching corporate responsibility is to provide timely, accurate and full public disclosure to its shareholders in compliance with the regulatory responsibilities imposed by the ASX and Australian Corporations Law”.
26. MYL’s position is that “it was unrealistic for MYL to individually consult with each stakeholder group and PAP [project affected person] ... particularly as the divestment planning and actions were dynamic, MYL had no representatives in Myanmar and even if it did, MYL representatives were forbidden to travel to Shan State due to Covid-19 restrictions”.⁷
27. MYL states that neither it nor the BJV held title to the Bawdwin mine or the mining concession. The mining concession was held by WMM. Further, neither MYL nor BJV had been issued a Foreign Investment Permit prior to the military coup in February 2021. Accordingly, neither MYL nor BJV had any “right to enter or conduct activities and provide guidance in relation to the mining concession except at the invitation of and with the permission of WMM”.⁸
28. MYL’s position is that the strategy proposed by PWYP – to retain its interest in the BJV and to use its influence to delay or stop future Bawdwin mine development – was impossible in light of the military coup.⁹

Relevant OECD Guidelines

29. The Complainants allege that MYL breached certain paragraphs of the OECD Guidelines, specifically:
- 29.1. Chapter II (General Policies), paragraphs 10 and 14.
 - 29.2. Chapter III (Disclosure), paragraphs 1 and 2(f).
 - 29.3. Chapter IV (Human Rights), paragraphs 1, 2, 4 and 5.
30. The Independent Examiner considers the following paragraphs of the OECD Guidelines are of relevance to the complaint:
- 30.1. Chapter II (General Policies)
 - Enterprises should: ...*
 - 10. Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to*

⁷ MYL Response, 41.

⁸ *Ibid.*

⁹ MYL Response, 5.

identify, prevent and mitigate actual and potential adverse impacts [...] and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation.

...

- 12. Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship.*
- 13. In addition to addressing adverse impacts in relation to matters covered by the Guidelines, encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of responsible business conduct compatible with the Guidelines.*
- 14. Engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities.*

30.2. Chapter III (Disclosure)

- 1. Enterprises should ensure that timely and accurate information is disclosed on all material matters regarding their activities, structure, financial situation, performance, ownership and governance. This information should be disclosed for the enterprise as a whole, and, where appropriate, along business lines or geographic areas. Disclosure policies of enterprises should be tailored to the nature, size and location of the enterprise, with due regard taken of costs, business confidentiality and other competitive concerns.*
- 2. Disclosure policies of enterprises should include, but not be limited to, material information on:*
 - ...
 - f) foreseeable risk factors;*
 - g) issues regarding workers and other stakeholders;*
 - h) governance structures and policies, in particular, the content of any corporate governance code or policy and its implementation process.*
- 3. Enterprises are encouraged to communicate additional information that could include:*
 - (a) value statements or statements of business conduct intended for public disclosure including, depending on its relevance for the enterprise's activities, information on the enterprise's policies relating to matters covered by the Guidelines;*

- b) *policies and other codes of conduct to which the enterprise subscribes, their date of adoption and the countries and entities to which such statements apply;*
- c) *its performance in relation to these statements and codes;*
- d) *information on internal audit, risk management and legal compliance systems;*
- e) *information on relationships with workers and other stakeholders.*

30.3. Chapter IV (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.*

INITIAL ASSESSMENT

31. Consistent with the OECD's procedural guidance for handling complaints to NCPs and the AusNCP Complaint Procedures¹⁰, the AusNCP commenced an initial assessment as to whether the matters raised warranted further consideration under the OECD Guidelines. The AusNCP forwarded the complaint to MYL on 15 September 2021 with an invitation to provide a response.
32. On 16 September, Independent Examiner Mr John Southalan disclosed to both parties previous and ongoing interests in the extractives sector and Myanmar.
33. On 23 September, MYL responded to the AusNCP objecting to the appointment of the Independent Examiner in light of the 16 September disclosure.
34. The AusNCP Secretariat, with the input of the AusNCP Governance and Advisory Board, determined to appoint an alternative Independent Examiner, Ms Shanta Martin, on 10 December 2021.
35. Following her appointment, the Independent Examiner engaged in video calls and correspondence with MYL and PWYP.
36. On 17 February 2022, MYL provided the Independent Examiner with a written response to the complaint. Following further consultation with MYL, a copy of the response was provided to PWYP on 10 May 2022.
37. PWYP provided further information to the Independent Examiner on 18 February 2022, 11 and 28 March 2022 and 6 April 2022. In May 2022, the Independent Examiner engaged directly with members of MATA and the Bawdwin Labour Union.
38. The AusNCP considered the complaint and material provided by the parties in accordance with the AusNCP Complaint Procedures and the principles set out in the OECD Procedural Guidance and Commentary, to determine whether the complaint was raised in good faith and relevant to the implementation of the Guidelines.

Assessment criteria

39. The OECD's procedural guidance instructs NCPs conducting Initial Assessments to take into account six admissibility criteria:
 - 39.1 the identity of the party concerned and its interest in the matter;
 - 39.2 whether the issue was material and substantiated;

¹⁰Australian National Contact Point Complaint Procedures (2019), available at <http://www.ausncp.gov.au/complaints/ausncp-procedures>.

- 39.3 whether there seemed to be a link between the enterprise's activities and the issue raised in the complaint;
 - 39.4 the relevance of applicable laws and procedures, including court rulings;
 - 39.5 how similar issues have been, or are being, treated in other domestic or international proceedings; and
 - 39.6 whether consideration of the complaint would contribute to the purposes and effectiveness of the Guidelines.
40. These admissibility criteria are sometimes 'interrelated and necessitate examination as a whole'. The initial assessment should be undertaken in a manner which promotes accessibility, predictability, transparency, impartiality, and compatibility with the OECD Guidelines.

Criterion 1: Parties' identities and interests

41. The complaint states that the notifier brings the complaint for and on behalf of 245 Myanmar-based CSOs. While anonymity was requested for the 245 Myanmar-based CSOs due to human rights and security concerns following the military coup, their identities were disclosed to the AusNCP.
42. AusNCP procedures state that where a notifier brings the complaint on behalf of others, they should be able to demonstrate their authority to do so.
43. In the process of confirming PWYP's authority to bring the complaint, it became clear that communicating safely and securely with all 245 CSOs based in Myanmar would not be possible. However, MATA as the umbrella organisation of 244 CSOs, and the Bawdwin Labour Union are able to engage in secure communications with the AusNCP. Accordingly, the complaint is pursued by PWYP, MATA and Bawdwin Labour Union.
44. MATA is a national network whose purpose is to support members to collaboratively examine economic, political and social reform issues and to advocate for transparency and accountability of governance in Myanmar, with a focus on extractive industries. The seven objectives of MATA listed below outline their and their members' interest in the complaint:¹¹
- 44.1. Full transparency, responsibility and accountability in natural resource governance;
 - 44.2. Increase CSO's participation in nation building and the overall legal reform process;
 - 44.3. Improve public participation in decision making process of natural resources governance, especially the revenue and resource governance in national and sub-national level;
 - 44.4. Promotion of human resources and environmental protection;

¹¹ Email from PWYP to AusNCP dated 11 March 2022.

- 44.5. Improved CSOs participation in collaboration with key stakeholders to fight against the corruption;
 - 44.6. Capacity building and empowerment of civil society organizations and the communities for public participation in natural resource management; and
 - 44.7. Promotion of broad communication and cooperation mechanism and access to information.
45. Both PWYP and MATA have an interest in transparency and accountability in the extractive industries. The conduct of human rights due diligence and disclosure of information are central to transparency and corporate responsibility and/or accountability. These are matters raised by the complaint.
46. The Bawdwin Labour Union was previously engaged with the BJV through representing workers involved in the project. Its interest in the matter are the human rights of workers including the relocation of workers and their families, redundancies and other entitlements. The potential impact of divestment on these matters is identified as an issue of concern in the complaint.
47. While MYL raised concerns that PWYP initiated the complaint without significant prior consultation, there has been no substantiation of the suggestion that PWYP has brought the complaint in bad faith.
48. The AusNCP considers that the Complainants have a legitimate interest in the issues raised in the complaint.

Criterion 2: Is the issue material and substantiated?

49. The AusNCP interprets “material and substantiated” to mean that the issues are plausible and related to the application of the OECD Guidelines, and that there is a plausible link between the enterprise’s activities and the issues raised.¹²
50. The issues raised by the complaint relate to whether or not MYL conducted human rights due diligence prior to formulating and/or acting on a decision to divest from the BJV, the level of engagement MYL had with stakeholders, actions taken by MYL to prevent or mitigate potential adverse human rights impacts from sale of its interest in BJV and the level of transparency MYL had in relation to the sale.
51. These issues relate to the OECD Guidelines Chapters referred to in paragraph 30 above. The OECD Guidelines urge enterprises to conduct risk-based due diligence, including specifically human rights due diligence. The purpose of such due diligence is to identify, prevent and mitigate actual

¹² *Australian National Contact Point Complaint Procedures (2019)*, Article 4.11, available at <http://www.ausncp.gov.au/complaints/ausncp-procedures>.

and potential adverse impacts on human rights and other matters covered by the Guidelines.

52. MYL states that it conducted due diligence including on its partners and officers in the BJV project.¹³ It also states that “MYL has rigorous corporate procedures and processes in place that ensure that internal due diligence assessments, inclusive of advice sought from external experts where necessary, are made on all material decisions and actions undertaken by the Company”.¹⁴ MYL contends that it “is confident that no-one in the Bawdwin or local community was made “worse-off” from MYL’s activities in Myanmar during 2017 to 2021, or has been made “worse-off” from its withdrawal from Myanmar”.¹⁵
53. The complaint provides plausible information and material regarding the bases for the Complainants’ concerns that human rights due diligence – as distinct from due diligence regarding business risks - was not conducted and communicated. It is noted, however, that it is neither necessary nor appropriate for the AusNCP to undertake fact-finding or a thorough assessment of the issues raised on their merits during the Initial Assessment stage of the process.¹⁶
54. After consideration of both the complaint and MYL’s response, the AusNCP considers the issues raised are material and substantiated.

Criterion 3: Link between the enterprise’s activities and the issue

55. The issues raised by the complaint are framed by reference to MYL’s activities; specifically, MYL’s conduct of - or alleged failure to conduct - human rights due diligence, the form of engagement by MYL with stakeholders and questions about MYL’s transparency regarding the divestment.
56. MYL’s response refers to its limited capacity to engage directly with stakeholders in Myanmar and the disclosures provided to the ASX.
57. Although the parties have different understandings of the conduct that may be sufficient to comply with the OECD Guidelines, the AusNCP considers that there is a link between the activities of the enterprise and the issues raised. The AusNCP notes that no determination has been made as to whether the OECD Guidelines have been observed.

¹³ MYL Response, 14 and 16.

¹⁴ MYL Response, 17.

¹⁵ MYL Response, 12.

¹⁶ OECD, *Guide For National Contacts Points on the Initial Assessment of Specific Instances*, (2019), (**OECD Initial Assessments Guide**), 7, available at <https://mneguidelines.oecd.org/Guide-for-National-Contact-Points-on-the-Initial-Assessment-of-Specific-Instances.pdf>.

Criterion 4: Applicable law and procedures

58. The complaint alleges, among other things, that MYL failed to make sufficient disclosures to local communities regarding the proposed divestment from BJV. MYL states that it was, and is, subject to Australian law, including the disclosure obligations required by ASX listing rules. MYL also refers to the limits imposed under Myanmar law as to its ability to engage directly in Myanmar in the absence of a Foreign Investment Permit.
59. The OECD Guidelines “extend beyond the law in many cases”.¹⁷ Where there is a conflict between domestic laws and regulations and the principles and standards of the Guidelines, “enterprises should seek ways to honour such principles and standards to the fullest extent which does not place them in violation of domestic law”.¹⁸ For the purposes of the Initial Assessment, it is unnecessary for the AusNCP to determine whether MYL has upheld this principle. The issue may be considered in the context of ‘good offices’.
60. In addition to the Guidelines, the complaint makes reference to the OECD Due Diligence Guidance for Responsible Business Conduct (Guidance for RBC). In the context of responsible disengagement, the complaint notes that the Guidance for RBC states:
- In these situations enterprises should also consider and address the potential adverse impacts of a decision to disengage. If an enterprise determines that disengagement is the most appropriate action, there are a range of actions that it may take to ensure that its process for disengagement is responsible.*¹⁹
61. The following also provide guidance on enterprise responsibilities under the OECD Guidelines, with particular relevance to the mining sector and operations in conflict-affected and high risk areas:
- 61.1. OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector;²⁰ and
 - 61.2. OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.²¹
62. The OECD Guidelines draw from and reflect the United Nations (UN) Framework for Business and Human Rights ‘Protect, Respect and Remedy’ and are in line with the UN Guiding Principles on Business and Human Rights

¹⁷ OECD, OECD Guidelines for Multinational Enterprises (2011, (OECD Guidelines), Ch I (Concepts and Principles), para. 2.

¹⁸ *Ibid.*

¹⁹ OECD, OECD Due Diligence Guidance for Responsible Business Conduct, (2018).

²⁰ OECD, OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, (2017) available at <http://dx.doi.org/10.1787/9789264252462-en>.

²¹ OECD, OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition, (2016) available at <http://dx.doi.org/10.1787/9789264252479-en>.

(UNGPs).²² The UNGPs identify that the corporate responsibility to respect human rights extends to circumstances in which a company may not have directly caused or contributed to adverse human rights impacts; business enterprises have a responsibility to seek to prevent or mitigate adverse human rights impacts to which they are directly linked, even if they have not contributed to those impacts (UNGP 13). Identifying the differing means by which a company may be associated with an adverse human rights impact is related to the expectations on enterprises to conduct human rights due diligence. Guiding Principle 17 identifies that:

In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:

(a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;

(b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;

(c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.

63. The UNGPs also reflect that the scale and complexity of the means through which enterprises meet their responsibility to respect human rights may vary according to factors such as size, sector, operational context, ownership and structure (UNGPs 14, 17). Further, the action a company may take to prevent or mitigate an adverse human rights impact may vary depending on whether the enterprise is involved solely because the impact is directly linked to it, and by the extent of its leverage in addressing the adverse impact (UNGP 19). The OECD Guidelines specify that the human rights due diligence that enterprises are expected to carry out is that which is "appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts".²³
64. The UN Working Group on the issue of human rights and transnational corporations and other business enterprises has also published a report

²² United Nations, *Guiding principles on business and human rights: Implementing the United Nations "Protect, Respect and Remedy" framework*, (2011), (A/HRC/17/31), Annexure (UNGPs).

²³ OECD Guidelines, Ch IV, para 5.

regarding due diligence in conflict-affected regions, which recommends heightened due diligence in situations of heightened risk.²⁴

65. The parties differ in their views as to the form and extent of human rights due diligence and other actions MYL could and should have taken prior to divesting from BJV. These matters would benefit from attention in the context of 'good offices' with consideration of the enterprise's size, sector, operational context, ownership and structure, the presence or absence of causal nexus, issues of direct linkage and the extent of leverage.

Criterion 5: Treatment of similar issues in domestic or international proceedings

66. Neither party to the complaint identified any parallel proceedings past or present that are considering, or will consider, MYL and/or the Bawdwin mine. It is noted that the existence of such proceedings would not necessarily preclude the AusNCP determining that the complaint merits further consideration. The Commentary on the Procedural Guidance provides that, "[w]hen assessing the significance for the specific instance procedure of the other domestic or international proceedings addressing similar issues in parallel, NCPs should not decide that issues do not merit further consideration solely because parallel proceedings have been conducted, are under way or are available to the parties concerned."²⁵
67. Nevertheless, identification of similar issues that have been or are being considered in other domestic or international proceedings assists in ensuring relevant comparative experiences are known. This promotes consistency, avoids duplication, and prevents prejudicing parties who may be engaged in other proceedings.
68. The Complainants note that a specific instance has been filed by the Committee Seeking Justice for Alethankyaw (CSJA) against Telenor ASA (Telenor) to the Norwegian NCP.²⁶ CSJA alleges that Telenor has acted inconsistently with the OECD Guidelines among other things when it comes to human rights due diligence at operations in Myanmar (Chapter IV in the Guidelines). The Norwegian NCP found the issues raised in the complaint merit further consideration, and has decided to proceed with the complaint.²⁷ While the CSJA complaint relates to due diligence within the

²⁴ Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, *Business, human rights and conflict-affected regions: towards heightened action*, 21 July 2020, A/75/212.

²⁵ OECD Guidelines, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises (2011), para 26.

²⁶ Complaint, 13.

²⁷ National Contact Point for Responsible Business Conduct Norway, *Initial Assessment: Committee Seeking Justice For Alethankyaw (CSJA) vs. Telenor Group* (28 Oct 2020), (CSJA Telenor IA) available at https://files.nettsteder.regjeringen.no/wpuploads01/blogs.dir/263/files/2020/10/CSJA-Telenor_Initial-Assessment_EN.pdf.

Myanmar context, the complaint “primarily concerns an incident where an inactive telecommunications tower owned and operated by Irrawaddy Green Towers, a tower infrastructure vendor to Telenor Myanmar, allegedly was used by the military as a vantage point to kill and drive out unarmed civilians”²⁸. Given the very distinct subject matter of the complaint, the alleged occurrence of gross human rights violations and the timing of the alleged events, the outcome of the complaint by CSJA is likely to raise significantly different issues to those raised by the Complainants against MYL before the AusNCP.

69. The Complainants also refer to a complaint against Telenor filed with the Norwegian NCP by the Centre for Research on Multinational Corporations (SOMO) on behalf of 474 anonymous Myanmar-based CSOs. The SOMO complaint contends that Telenor has failed to observe the recommendations of the OECD Guidelines with respect to risk-based due diligence, stakeholder engagement and disclosure in Telenor’s disengagement from Myanmar. The Norwegian NCP has determined that the issues raised in the submission merit further consideration and will offer its good offices to the parties.²⁹
70. MYL notes that “Telenor had MIC [Myanmar Investment Commission] approval for its activities, legal title to its in-country assets, numerous employees and other direct and indirect stakeholders and had been operating a revenue generating and taxpaying commercial business in Myanmar for some years prior”.³⁰
71. There are significant differences between the complaint made by SOMO to the Norwegian NCP and the complaint made by the notifiers to the AusNCP, particularly as to the nature, size and form of operation of the relevant enterprises. There are, however, some aspects of the SOMO complaint against Telenor that are similar to the notifiers’ complaint against MYL. Both specific instances involve the handling of a complaint from a large number of CSOs from Myanmar with respect to risk-based human rights due diligence, stakeholder engagement and disclosure in an enterprise’s disengagement or divestment from Myanmar. As the complaint was initially said to be on behalf of 245 CSOs, the AusNCP considered there may also be advantages to the Norwegian NCP and AusNCP liaising on issues of procedure and general approach. The AusNCP has undertaken some engagement with the Norwegian NCP in this regard. Nevertheless, the AusNCP considers the outcomes of the SOMO complaint against Telenor are likely to be distinct to that complaint and do not impact the complaint notified to the AusNCP.

²⁸ CSJA Telenor IA, p 1.

²⁹ National Contact Point for Responsible Business Conduct Norway, *Initial Assessment: The Centre for Research on Multinational Corporations (SOMO) on behalf of 474 Myanmar-Based Civil Society Organisations vs. Telenor Asa* (27 Sep 2021), (SOMO Telenor IA) available at https://files.nettsteder.regjeringen.no/wpuploads01/sites/263/2021/09/Initial-Assessment_SOMO-and-474-CSOs-vs.-Telenor_FNL.pdf.

³⁰ MYL Response, 31.

Criterion 6: The purposes and effectiveness of the OECD Guidelines

72. The purposes of the OECD Guidelines include the promotion of positive contributions by enterprises to economic, environmental and social progress worldwide,³¹ and to assist in minimising and resolving difficulties which may arise from enterprise operations.³²

73. The OECD Guidelines state:³³

Governments wish to encourage the widest possible observance of the Guidelines. While it is acknowledged that small and medium sized enterprises may not have the same capacities as larger enterprises, governments adhering to the Guidelines nevertheless encourage them to observe the Guidelines' recommendations to the fullest extent possible.

74. Thus, whether or not the entity against which a complaint is made is a small enterprise does not determine whether an NCP ought to accept the complaint. If acceptance of the complaint and offering of good offices can assist to achieve the above-stated purposes and contribute to the effectiveness of the Guidelines, it ought to be offered.

75. Adhering countries to the OECD Guidelines, including Australia, declared that the effectiveness of the Guidelines is enhanced by NCPs that handle enquiries and contribute to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances in accordance with the procedural guidance.³⁴ Thus, a relevant consideration is whether there is an opportunity to positively contribute to a resolution of issues regarding implementation of the Guidelines.

76. Both parties raise salient points regarding the extent and manner of the application of the Guidelines, specifically in respect of undertaking human rights due diligence and giving disclosure, in the context of MYL's divestment from the BJV. Particular features of the complaint include the fact that MYL is a single-project mining company rather than a large multinational, that the project was in a conflict-affected region, and that the complaint relates to divestment rather than the continued operations of an enterprise. The AusNCP considers that contributing to resolution of the differing views of the parties to the complaint could substantially enhance understanding of the application of the Guidelines by the parties, and also by other enterprises and stakeholders.

³¹ OECD Guidelines, Forward.

³² OECD, *Declaration on International Investment and Multinational Enterprises* (2011), Preamble.

³³ OECD Guidelines, Ch I, para 6.

³⁴ OECD, *Amendment of the Decision of the Council on the OECD Guidelines for Multinational Enterprises* (2011), Ch I para 1.

CONCLUSION

77. Consistent with the AusNCP procedures and the principles set out in the OECD Procedural Guidance and Commentary, the AusNCP considered the complaint and reviewed the material provided by the parties.
78. Having considered the six admissibility criteria of the Initial Assessment process, the AusNCP considers the complaint merits further consideration and would be appropriate for 'good offices' within the OECD Guidelines.
79. Acceptance of the complaint and the offering of good offices is not an assessment of whether MYL's actions are consistent with the OECD Guidelines.

INSTITUTIONAL ARRANGEMENTS

80. 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.
81. The OECD Guidelines 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.
82. 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.
83. 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

84. Countries adhering to the OECD Guidelines have flexibility in organising their NCPs and in seeking the active support of social partners, including the business community, worker organisations, other non-governmental organisations, and other interested parties.
85. Accordingly, the OECD Guidelines stipulate that NCPs:
- i) 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;
 - ii) 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
 - iii) 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.
86. The [AusNCP Governance and Advisory Board](#) (the Board), which includes non-government members as well as representatives from key government agencies, provides advice and assistance to the AusNCP Secretariat in relation to the handling of complaints. The Board was consulted in the development of this statement.
87. The Board helps to ensure that the AusNCP is visible, accessible, transparent and accountable, in accordance with its obligations under the OECD Guidelines for Multinational Enterprises. Members may be called on to conduct procedural reviews of AusNCP complaints and may be consulted on various operational and administrative matters as needed.
88. From September 2019, all new cases are managed by an Independent Examiner, who is supported by the AusNCP Secretariat and the Board. The Australian National Contact Point, held by a Senior Executive official in the Treasury, retains responsibility for current cases submitted prior to September 2019.