



Australian National Contact Point  
for the OECD Guidelines for Multinational Enterprises

# Initial Assessment

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Complaint by Global Legal Action Network (GLAN) against  
Anglo American Plc, BHP Group Ltd and Glencore  
International

Published 10 January 2022

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# CONTENTS

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<b>EXECUTIVE SUMMARY</b> .....	<b>4</b>
<b>COMPLAINT: PARTIES AND POSITIONS</b> .....	<b>5</b>
<b>ASSESSMENT OF COMPLAINT</b> .....	<b>5</b>
<i>Preliminary issues</i> .....	6
<i>Criterion 1: Party’s identities and interests</i> .....	7
<i>Criterion 2: Is the issue material and substantiated?</i> .....	8
<i>Criterion 3: Link between the enterprise’s activities and the issue</i> .....	9
<i>Criterion 4: Applicable law and procedures</i> .....	9
<i>Criterion 5: Treatment of similar issues in domestic or international proceedings</i> .....	11
<i>Criterion 6: The purposes and effectiveness of the OECD Guidelines</i> .....	12
<i>Conclusions and observations</i> .....	12
<b>ANNEXURES</b> .....	<b>14</b>
<i>Overview of the AusNCP and its role</i> .....	14
<i>Schedule of events</i> .....	16
<i>Endnotes</i> .....	17

## EXECUTIVE SUMMARY

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1. In January 2021, the Australian National Contact Point (**AusNCP**) received a complaint from the Global Legal Action Network (**GLAN**) concerning the Cerrejón mine in Colombia. The complaint was lodged against three multinational enterprises invested in the mine: Anglo American plc (**Anglo American**), BHP Group Limited (**BHP**), and Glencore International AG (**Glencore**). GLAN asserted these companies have not met the standards expected of them under the OECD Guidelines for Multinational Enterprises<sup>1</sup> (**Guidelines**).
2. The Independent Examiner assessed the complaint, in relation to BHP, and engaged with the parties and other National Contact Points from February to December 2021.
3. After considering the six admissibility criteria required by the Initial Assessment process, the Independent Examiner considers the Complaint should proceed to 'good offices'. Given the complexity of issues and number of parties involved, further coordination and agreement between the parties and NCPs will be required to facilitate any conciliation. This is explained in the following statement, summarised below.
  - 3.1 GLAN's complaint provided sufficient material addressing the Guidelines' six admissibility criteria for Initial Assessment.
  - 3.2 While the impacts allegedly occurred in Colombia, GLAN indicated the issues it seeks to address are questions of the Guidelines' compliance by the companies in Australia, Switzerland and the United Kingdom.
  - 3.3 After the complaint was made, the companies announced that Glencore would be acquiring the interests of Anglo American and BHP in the Cerrejón operation.
  - 3.4 The AusNCP proposes that good offices should: (a) concern the Guidelines' compliance in Australia, Switzerland or the United Kingdom, by the companies, including expectations for enterprises to address 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', and (b) be facilitated by the Swiss NCP, including all parties.
4. The AusNCP notes that this outcome is not an assessment of whether BHP's actions are inconsistent with the Guidelines.
5. This statement is available on the AusNCP website at [www.ausncp.gov.au](http://www.ausncp.gov.au).

## COMPLAINT: PARTIES AND POSITIONS

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6. On 19 January 2021 the AusNCP received a complaint from GLAN, about the Cerrejón mine in Colombia, concerning the actions of Anglo American, BHP and Glencore (**Complaint**). GLAN describes these companies as 'the consortium which owns the mine', and says 'it has caused adverse human rights and environmental impacts; has failed to carry out adequate due diligence; and has failed to disclose material information about the impacts of its operations', contrary to the Guidelines.
7. BHP (along with the other multinational enterprises involved) was provided with a copy of the Complaint. BHP's response alleged 'each of the current Shareholders only has an indirect, one-third shareholding in Cerrejón, [and] none of the current Shareholders is able to exercise management or control over Cerrejón's activities'. BHP says 'As a result of BHP's oversight and its participation in Cerrejón's governance structures, BHP believes that Cerrejón management has taken, and is continuing to take, suitable steps to prevent and mitigate the impact of its operations'. BHP's responses included representations from the Cerrejón company.

## ASSESSMENT OF COMPLAINT

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8. When an NCP receives a complaint under the Guidelines, the NCP should conduct an 'initial assessment'.<sup>2</sup> This is to determine whether the issues are 'bona fide' (in other words real or authentic) and relevant to the implementation of the Guidelines (in other words within their scope of coverage).<sup>3</sup> The AusNCP has procedures, mirroring the Guidelines, which specify that in deciding whether to accept a complaint, six admissibility criteria are assessed:
  - 8.1 the identity of the party [who submitted the complaint] concerned and its interest in the matter;
  - 8.2 whether the issue is material and substantiated;
  - 8.3 whether there seems to be a link between the enterprise's activities and the issue raised in the complaint;
  - 8.4 the relevance of applicable law and procedures, including court rulings;
  - 8.5 how similar issues have been, or are being, treated in other domestic or international proceedings; and
  - 8.6 whether the consideration of the complaint would contribute to the purposes and effectiveness of the Guidelines.<sup>4</sup>
9. The AusNCP procedures also state that the initial assessment '...determine whether a complaint should be accepted, transferred to another NCP, or rejected', and also acknowledges that 'In some circumstances, it may be appropriate for the AusNCP to work with another NCP throughout the handling

of a case.' The initial assessment included consideration of transfer and significant coordination activities with other NCPs, which is explained below.

10. The six admissibility criteria are 'interrelated and necessitate examination as a whole'.<sup>5</sup> An Initial Assessment should be undertaken in a manner which promotes accessibility, predictability, transparency, impartiality, and compatibility with the Guidelines.<sup>6</sup> In accordance with those concepts, this Initial Assessment statement includes some extracts of parties' submissions where relevant. The AusNCP emphasises, however, this does not indicate a view on the accuracy of any parties' statement, merely its relevance. An Initial Assessment is not a fact-finding exercise,<sup>7</sup> but determining whether the Complaint should proceed to good offices by reference to the six criteria.

## Preliminary issues

11. The Complaint was also submitted to the NCPs of Switzerland (Glencore's headquarters) and the United Kingdom (Anglo American's headquarters). GLAN contends the 'multinational enterprise' against which the Complaint is made, and which must observe the Guidelines, is every company involved. GLAN asserted, in response to questions by the NCPs:

Our complaint relates to breaches of the Guidelines by an enterprise which is comprised of the parent companies and their subsidiaries (i.e. Carbones del Cerrejón Limited, Cerrejón Zona Norte S.A, Anglo American plc, BHP Group Limited, BHP Group Plc, Glencore Plc, and CMC-Coal Marketing DAC). ...These entities are so linked that they coordinate the operations in various ways. They are therefore an enterprise.<sup>8</sup>

BHP disagreed with GLAN's position regarding these companies and their relationship, with BHP stating:

Cerrejón is not a subsidiary of BHP, is not under the control of BHP and is not subject to BHP policies and procedures. Each of BHP, Anglo American and Glencore are separately managed and controlled enterprises, with their own separate policies, procedures and governance frameworks, and none of these companies has any control over the activities which are separately conducted by any other group. For completeness, Cerrejón also clearly does not have any control over the activities of BHP. For these reasons, BHP does not accept the Complainant's characterisation of Cerrejón and the Shareholders as a single MNE: the features of a MNE described in paragraph 4 of Chapter I of the Guidelines are not present in this case.<sup>9</sup>

12. There *are* relations and arrangements between these various entities. But, for a complaint to be considered by the AusNCP, there must be relevant connections with Australia. In this case, that is the BHP Group. GLAN did not identify any other connections with Australia. Accordingly, the 'admissibility criteria' for the Initial Assessment are considered in relation to BHP.
13. The Initial Assessment regarding BHP was extended due to the engagement with the parties and complex NCP coordination activities, particularly in the

preliminary stages where the AusNCP led several discussions and drafting activities with four other NCPs. The Complaint was submitted at the same time as GLAN made two similar complaints to the Irish NCP about two Irish entities: CMC Coal Marketing Company and the Electricity Supply Board. All complaints concern the same alleged activities and impacts in Colombia.

14. GLAN recommended a lead NCP should manage the Complaint, however did not suggest which one would be most suitable. BHP also indicated its preference for one lead NCP, and suggested the Colombian NCP. Given the complaints to the Irish NCP concerned the same issues in Colombia, the AusNCP conferred with the NCPs of Colombia, Ireland, Switzerland and the United Kingdom. The NCP of Colombia indicated they would not act as lead NCP in relation to the Complaints. The Irish NCP explained it would proceed to deal with the two complaints it received from GLAN.
15. The AusNCP drafted preliminary enquiries of the parties, to seek further information/clarification about the issues and help in identifying a lead NCP. These enquiries were agreed with the NCPs of Switzerland and the United Kingdom, and sent to the parties. Both parties were later provided with the other's responses (in confidence).
16. The three NCPs receiving this Complaint (Australia, Switzerland and the UK) also sought the assistance of the Chair of the OECD Working Party on Responsible Business Conduct in arriving at agreement, in accordance with Guidelines.
17. In the absence of any agreement about a lead NCP, the three NCPs commenced their separate Initial Assessments of their own headquartered enterprise, including the AusNCP Initial Assessment of the Complaint regarding BHP. These three NCPs continued to liaise during their conduct of Initial Assessments, to ensure consistency while each making their independent decision under their relevant procedure.
18. On 28 June 2021, it was announced that, subject to regulatory approvals being granted, Glencore would be acquiring BHP and Anglo American's share in the Cerrejón operations. BHP's statement explained that its interest was to be divested to Glencore 'for US\$294 million cash consideration'.<sup>10</sup> GLAN indicated this did not change its Complaint, stating 'GLAN's view is that the ... companies' responsibilities for past harms are not affected by this share transfer'.<sup>11</sup>

## **Criterion 1: Party's identities and interests**

19. The first admissibility criteria is 'the identity of the party concerned and its interest in the matter'. The parties submitting a complaint 'should have some interest in the matters they raise in their submissions'.<sup>12</sup>
20. GLAN explained the Complaint was 'supported by Christian Aid, the Centro de Investigación y Educación Popular (CINEP), the Colectivo de Abogados 'José Alvear Restrepo' (CAJAR), the Interamerican Association for Environmental Defense (AIDA), Arbeitsgruppe Schweiz Kolumbien (ask!), and ABColombia'.

21. GLAN is a non-profit organisation based in UK and Ireland, which describes its rationale as 'pursuing innovative legal actions across boundaries, challenge states and other powerful actors involved with human rights violations'.<sup>13</sup> In response to inquiries about authority to act on behalf of parties in Colombia, GLAN provided the AusNCP with further information (which was also provided, on a confidential basis, to BHP as part of each party's responses being shared with the other). GLAN explained various consultations with communities in Colombia, and engagement with partner organisations. There is no need for these consultations or parties to be identified in this public statement. However, it is sufficient to note there were meetings with communities in Colombia in 2020 and 2021, and that GLAN has stated the 'leaders of communities affected by these impacts were involved in the submission of the complaint and will be involved in the [sic 'any'] good offices phase as well'.<sup>14</sup>
22. During the exchanges (about the Initial Assessment) between the NCPs and the parties, questions arose about the status of the six 'supporting' organisations (see para 20 above).
  - 22.1 GLAN explained the central involvement of those organisations, in informing and progressing the Complaint. GLAN also requested, and documented the basis why, the Complaint should be amended to formally include those organisations as Notifiers. The AusNCP understands why those organisations ought be involved in any good offices.
  - 22.2 BHP explained there are also other stakeholders, and it stated: 'the remedies sought by Complainant do not take into account the interests of the large numbers of community members who are employed by the mine and whose families benefit from the operation of the mine'. The question of any remediation or change to operations would need to take into account the potential impacts on others. However that does not negate the interests of the parties who have raised this Complaint.

## **Criterion 2: Is the issue material and substantiated?**

23. The second admissibility criteria, 'whether the issue is material and substantiated', assesses whether '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'.<sup>15</sup> The materiality of issues is assessed against the recommendations and standards of the OECD Guidelines, not in relation to domestic law.<sup>16</sup> There is no need, at the Initial Assessment stage, for a complaint to provide formal evidence of a causal link between the enterprise and the issues.<sup>17</sup>
24. The question of the effect of mining on communities in Colombia is certainly material to expectations in the Guidelines. GLAN's Complaint has provided material and identified concerns, and BHP has responded to those. The parties have different understandings and perceptions of various events, but the issues raised in the Complaint are sufficiently material and substantiated for the purposes of Initial Assessment.



### **Criterion 3: Link between the enterprise's activities and the issue**

25. The third criteria to be examined is 'whether there seems to be a link between the enterprise's activities and the issue raised in the complaint'.
26. It is necessary to examine the Complaint's detail more closely to understand what are the 'issues raised'. The majority, and detail, of the Complaint is about events in Colombia. GLAN explained its position, in response to inquiry from the NCPs:
- We [GLAN] consider the 'impacts', which have indeed occurred in Colombia, to be distinct from the 'issues' at hand in this case. ...[T]hese words are not synonymous ... [W]hile the violations have occurred in Colombia, the issues we would like the NCP to address arise in Australia, Switzerland, and the UK.<sup>18</sup>
27. The Guidelines contain expectations of enterprises which are linked, even if not directly involved, in particular activities.<sup>19</sup> GLAN explained that the communities do not know the full extent of legal arrangements between the Colombian operations and the international investors (including BHP). GLAN characterised the essence of the Complaint against BHP (and Anglo American and Glencore) as about what it described as those companies' alleged:
- failure to adopt a responsible closure plan for the mine;  
... role in approving major expansion decisions; and  
... failure to enforce minimum enterprise-wide standards on environmental and human rights impacts.<sup>20</sup>
28. BHP maintained that there is no relevant link because of the corporate structure between the companies (the parties' submissions on this were extracted above at para 11).
29. For the purposes of the Initial Assessment, there is a link between BHP and the issue of Guidelines' expectation of investors. Given GLAN's clarification ('the issues we would like the NCP to address arise in Australia, Switzerland, and the UK'), it has indicated the focus of the Complaint is the activities of BHP (along with Anglo American and Glencore) in their 'home' countries.

### **Criterion 4: Applicable law and procedures**

30. 'The relevance of applicable law and procedures, including court rulings' is the fourth of the admissibility criteria.
31. The Guidelines' due-diligence expectations are not limited to only those matters within a company's direct legal control. The *UN Guiding Principles on Business and Human Rights*,<sup>21</sup> which inform the OECD Guidelines, explain the 'responsibility to respect human rights' covers a company's own activities *but also* requires the company to 'prevent or mitigate adverse human rights impacts

that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts'.<sup>22</sup> This is reflected in the Guidelines' expectation of companies.

If the enterprise identifies a risk of contributing to an adverse impact, then it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impacts to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of the entity that causes the harm.<sup>23</sup>

[W]here an enterprise has not contributed to an adverse human rights impact, but that impact is nevertheless directly linked to its operations, products or services by its business relationship with another entity. ... Meeting the expectation ... would entail an enterprise ... to use its leverage to influence the entity causing the adverse human rights impact to prevent or mitigate that impact. 'Business relationships' include relationships with business partners, entities in its supply chain, and any other non-State or State entity directly linked to its business operations, products or services. Among the factors that will enter into the determination of the appropriate action in such situations are the enterprise's leverage over the entity concerned, how crucial the relationship is to the enterprise, [and] the severity of the impact...<sup>24</sup>

32. The Guidelines' expectations of multinational enterprises in this instance – where there are potential impacts on Indigenous parties - include the *UN Declaration on the Rights of Indigenous People* (as that is incorporated through the *UN Guiding Principles*).<sup>25</sup> The operation or application of the Guidelines is informed by the OECD's *Guidances on Responsible Business Conduct (2018)*<sup>26</sup> and *Meaningful Stakeholder Engagement in the Extractive Sector (2017)*.
33. GLAN assert 'The very existence of the human rights and environmental impacts detailed in our complaint necessarily means that the parent companies [which it identifies as Anglo American, BHP and Glencore] have failed in their obligations'.<sup>27</sup> This is not correct. Just because impacts occur in a project does not necessarily mean every enterprise connected to that project has breached the Guidelines. BHP and Cerrejón reject allegations of the mine having adverse impacts on human rights and the environment. These differing positions of the parties are not to be resolved in Initial Assessment. BHP has also indicated various actions it has taken – alone and also in association with Anglo American and Glencore - which 'seek to influence Cerrejón to operate in accordance with best industry practices and international standards, including the OECD Guidelines'.<sup>28</sup>
34. It is apparent a key question will be the extent of Guidelines' expectations for companies around 'contributing', 'linked' and 'leverage', and what action BHP (and Anglo American and Glencore) have taken in this regard. The parties have very different positions on this, which could be a useful area for attention in 'good offices'.

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

35. The fifth admissibility criteria is 'how similar issues have been, or are being, treated in other domestic or international proceedings'. This assists in ensuring relevant precedents are known, to promote consistency and avoid duplication. The Guidelines commentary indicates that understanding any other 'domestic or international proceedings addressing similar issues' is relevant because the NCP should 'evaluate whether an offer of good offices could make a positive contribution to the resolution of the issues raised'.<sup>29</sup>
36. A previous Guidelines' complaint regarding the Cerrejón mine has been made, and conciliated. This was in 2007, with complaints filed with the AusNCP (concerning BHP-Billiton, now BHP) and the Swiss NCP (concerning Xstrata - since acquired by Glencore). With the agreement of the parties and NCPs, a joint good offices process was facilitated by the AusNCP. The parties to that complaint reached agreement, reported by the AusNCP in 2009.<sup>30</sup>
37. GLAN asserts that Carbones del Cerrejón has failed to comply with binding court orders in Colombia. A complaint under the Guidelines is *not* about compliance nor breach of domestic laws<sup>31</sup> but, instead, meeting the expectations in the Guidelines. Actions which parties take, in following Colombian law, *can* also contribute to meeting the Guidelines. But the Guidelines' complaint process is not an exercise of determining compliance with domestic law. Accordingly, the parties' assertions about consistency or breach of Colombian laws or court orders are not relevant to determining whether the Complaint meets the six admissibility criteria. Nor are these determinative of whether BHP has complied with the OECD Guidelines.
38. The AusNCP understands some of the companies connected with the Cerrejón mine have instituted arbitration claims against the Colombian State, in relation to Cerrejón, under international investment agreements.<sup>32</sup> As with domestic legal proceedings, these do not necessarily preclude a good offices process for a company and complainant about the company's observance of the Guidelines. Neither party has indicated the investment claims against the Colombian State would prejudice (or be prejudiced by) the parties' engagement in good offices on this Complaint.
39. BHP and GLAN indicated various other proceedings have examined (or are examining) aspects of the operations at Cerrejón. These include: Colombian court proceedings and orders, engagement by the United Nations Special Procedures, administrative proceedings in Columbia, and agreements between Cerrejón and community representatives. BHP contended that any NCP process could lead to interference or inconsistent findings with these other procedures.<sup>33</sup> It was, however, not apparent that the issues and parties *in this Complaint* entirely overlap any other extant proceedings or findings. Accordingly, these other proceedings do not preclude all potential 'good offices', but they may inform the scoping and content of any NCP 'good offices' (to avoid duplication

and inconsistencies). As explained below (paragraphs 44-46), the scope of any 'good offices' would be subject to further engagement with the parties.

## **Criterion 6: The purposes and effectiveness of the OECD Guidelines**

40. The final admissibility criteria is 'whether the consideration of the complaint would contribute to the purposes and effectiveness of the OECD Guidelines'. This criteria 'is intentionally broad and can encompass a wide range of issues'.<sup>34</sup> This includes considering 'whether providing good offices through facilitating an exchange between the parties, discussing the issues and expectations of the Guidelines with the enterprises in question, or developing meaningful recommendations with respect to enterprise conduct would support or encourage the resolution of the issues.'<sup>35</sup>
41. This Complaint is against BHP (together with Anglo American and Glencore) arising from alleged impacts in Colombia; and there are closely-related complaints (to the Irish NCP) against two other enterprises. GLAN has confirmed that while the alleged impacts are in Colombia, 'the issues we would like the NCP to address arise in Australia, Switzerland, and the UK'. Even though that focus may not be actions on the ground in Colombia, there needs to be some shared understanding of what has occurred in Colombia, in order for the parties to constructively engage about the application of the Guidelines within their own internal structures and due diligence policies.
42. All parties and NCPs accept a utility in having coordinated processes. It would not contribute to the effectiveness of the Guidelines to have multiple good offices proceedings which may proceed on different understandings of what had occurred in Colombia.

## **Conclusions and observations**

43. In relation to BHP, the Complaint merits further consideration and would be appropriate for 'good offices' within the Guidelines (which can include conciliation, formal mediation or facilitated discussions) with the aim of arriving at a mutually agreed resolution.
44. The Complaint is not seeking to directly address actions in Colombia. GLAN confirmed, during exchanges with the NCPs, that 'the issues we would like the NCP to address arise in Australia, Switzerland, and the UK', meaning the activities of the BHP (along with Anglo American and Glencore) in their 'home' countries. Accordingly, the 'good offices' should solely be about the Guidelines' issues which arise in Australia, Switzerland, or the UK, including application and fulfillment of the Guidelines' expectations for enterprises to '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'.<sup>36</sup> Whether and how that expectation is met, in the

circumstances of this Complaint (and the material already exchanged by the parties) could assist the parties finding a resolution of this Complaint.

45. As noted above, it would likely be counterproductive for multiple good offices to occur in relation to this Complaint. The scope of any 'good offices' will be subject to further engagement with the parties and relevant NCPs, relative to their own IA outcomes and negotiation regarding the nature of the 'good offices' offer proposed. Given the continuity of Glencore (arising from the recent announcement by the companies) there is a central connection with the Swiss NCP. Accordingly, the Independent Examiner proposes there should be one 'good offices' facilitated by the Swiss NCP, but including BHP and Anglo American as well as Glencore. The AusNCP also suggests that parties and NCPs remain in close connection with the Irish NCP, regarding its progress of the complaints it received from GLAN.
46. If the Swiss NCP, BHP and GLAN all agree to that course, the proposed 'good offices' will be conducted by the Swiss NCP. That would entail BHP as one of the parties involved in the 'good offices' facilitated by the Swiss NCP, involving at least Glencore and GLAN. The AusNCP would remain available to assist any requests by the Swiss NCP to facilitate involvement from BHP or other issues relevant to Australia. If the issues are not resolved through those good offices, the Complaint (in relation to BHP) would revert to the AusNCP to proceed to final statement in accordance with the AusNCP Procedures.
47. The AusNCP Procedures state that 'Acceptance or rejection of a complaint is not an assessment of whether the enterprise's actions are consistent with the OECD Guidelines'.<sup>37</sup>
48. A draft of this Initial Assessment was provided, for comment, to the AusNCP's Governance and Advisory Board; the NCPs of Switzerland, the United Kingdom, and Ireland; and then to GLAN and BHP. All comments were considered by the Independent Examiner, in finalising this Initial Assessment, with the decision remaining the responsibility of the Independent Examiner.

John Southalan

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# ANNEXURES

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## Overview of the AusNCP and its role

1. 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.
2. 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.
3. 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.
4. The OECD Guidelines can be seen as:
  - 4.1 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);
  - 4.2 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
  - 4.3 providing an informal structure for resolving issues that may arise in relation to implementation of the OECD Guidelines in complaints.

## Governance

5. 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.
6. Accordingly, the OECD Guidelines stipulate that NCPs:
  - 6.1 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;

- 6.2 can use different forms of organisation to meet this objective. An 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
  - 6.3 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.
7. 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.
  8. 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.
  9. Conflicts of interest are managed through the AusNCP Complaint Procedures and the Governance and Advisory Board Terms of Reference. Before assessing this complaint, the Independent Examiner checked any actual or perceived conflicts of interest with the parties and received no objections.

## Schedule of events

Submission	Date
<ul style="list-style-type: none"> <li>Complaint submitted to and acknowledged by the AusNCP.</li> </ul>	19 January 2021
<ul style="list-style-type: none"> <li>OECD notified, website updated, conflicts of interest registered</li> </ul>	20-21 January 2021
<ul style="list-style-type: none"> <li>BHP notified and invited to respond</li> </ul>	20 January 2021
<b>Preliminary coordination and initial assessment</b>	
<ul style="list-style-type: none"> <li>BHP: responses received</li> </ul>	29 January - 2 February 2021
<ul style="list-style-type: none"> <li>Coordination: NCP group meeting</li> </ul>	29 January 2021
<ul style="list-style-type: none"> <li>Coordination: MNE responses shared (with permission) and draft correspondence to the MNEs finalised</li> </ul>	4 February 2021
<ul style="list-style-type: none"> <li>Coordination: correspondence with the Colombian NCP</li> </ul>	3-9 and 15 February 2021
<ul style="list-style-type: none"> <li>Coordination: NCP group meeting</li> </ul>	11 February 2021
<ul style="list-style-type: none"> <li>BHP: update provided</li> </ul>	16 February 2021
<ul style="list-style-type: none"> <li>Coordination: correspondence from Australia, on behalf of the NCP group, to OECD Working Party Responsible Business Conduct Chair seeking assistance to identify suitable lead NCP</li> </ul>	18 February 2021
<ul style="list-style-type: none"> <li>Coordination: follow up call with the OECD</li> </ul>	15 March 2021
<ul style="list-style-type: none"> <li>Coordination: NCP group meeting, including the OECD</li> </ul>	22 March 2021
<ul style="list-style-type: none"> <li>Coordination: correspondence regarding approach and party correspondence</li> </ul>	25 March – 15 April 2021
<ul style="list-style-type: none"> <li>Coordination: NCP group meeting and correspondence confirming next steps</li> </ul>	19-22 April 2021
<ul style="list-style-type: none"> <li>Governance and Advisory Board: update provided at meeting</li> </ul>	21 April 2021
<ul style="list-style-type: none"> <li>GLAN and BHP: correspondence sent providing an update on the Australian procedure and seeking further information</li> </ul>	26 April 2021
<ul style="list-style-type: none"> <li>Coordination: MNE updates shared and party response deadlines agreed</li> </ul>	4-12 May 2021
<ul style="list-style-type: none"> <li>BHP: correspondence regarding procedures</li> </ul>	30 April – 12 May 2021
<ul style="list-style-type: none"> <li>GLAN: deadline extension granted</li> </ul>	21 May 2021
<ul style="list-style-type: none"> <li>Coordination: NCP correspondence on progress and MNEs</li> </ul>	21 May – 2 June 2021
<ul style="list-style-type: none"> <li>GLAN: response received</li> </ul>	1 June 2021
<ul style="list-style-type: none"> <li>BHP: deadline extension granted</li> </ul>	22 June 2021
<ul style="list-style-type: none"> <li>Coordination: NCP correspondence on progress and MNEs</li> </ul>	24-28 June 2021
<ul style="list-style-type: none"> <li>GLAN and BHP: update provided and further questions posed</li> </ul>	26 June 2021
<ul style="list-style-type: none"> <li>Glencore acquisition announcement</li> </ul>	28 June 2021



• Coordination: NCP updates exchanged	29 June – 7 July 2021
• BHP: initial response received, indicated another to follow	6 July 2021
• Coordination: NCP correspondence on approach and share BHP response (with permission)	6-9 July 2021
• BHP: correspondence on process and Glencore acquisition	12 July 2021
• GLAN and BHP: separate correspondence updating parties	13 July 2021
• Coordination: meeting and correspondence regarding progress, agree to proceed with separate Initial Assessments	19-22 July 2021
• GLAN: correspondence on process and parallel arbitration proceeding	17-19 July 2021
• GLAN and BHP: separate correspondence updating parties	23 July 2021
• BHP: subsequent response received	6 August 2021
• Coordination: NCP correspondence sharing party responses (with permission)	17 August 2021
• Statement: draft shared with and comments received from the NCP group and Governance and Advisory Board, including proposed approach for good offices	7-28 September 2021
• Coordination: NCP conferral regarding initial assessments	21 September 2021
• Statement: draft provided to parties for comment	29 September 2021
• Submissions from parties on draft Initial Assessment	October – December 2021
• Statement: embargo copy provided to Governance and Advisory Board, NCP group, parties and Irish and Colombian NCPs	5 January 2022
• Statement: published on the AusNCP website and notified to OECD	10 January 2022

## Endnotes

<sup>1</sup> Adhering Governments, *OECD Guidelines for Multinational Enterprises* (2011, OECD Publishing, 25 May 2011) (**Guidelines**)

<sup>2</sup> Under the OECD Guidelines, a complaint is entitled a 'specific instance' but the AusNCP Procedures use the term 'complaint' (Australian National Contact Point *Complaint Procedures* (September 2019) Treasury) and that is how it is termed in this Initial Assessment.

<sup>3</sup> Secretary-General of the OECD, *Guide for National Contacts Points on the Initial Assessment of Specific Instances* (2019, OECD Publishing), 5. (**OECD Initial Assessments Guide**).

<sup>4</sup> *AusNCP Procedures* (above n2), 4.10.

<sup>5</sup> *OECD Initial Assessments Guide* (above n3), 6.

<sup>6</sup> *OECD Initial Assessments Guide* (above n3), 19-20, drawing from *Guidelines* (above n1), ch I C & Commentary [9] & [22]; and Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (2011, United Nations Human Rights Council, 21 March 2011) (**UNGPs**).

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- <sup>7</sup> OECD *Initial Assessments Guide* (above n3), 7 ('It is not necessary to undertake fact-finding or a thorough assessment of all the issues raised on their merits during this stage of the process as further examination is envisioned in the next stage of the process').
- <sup>8</sup> Letter GLAN to AusNCP, 31 May 2021 (**GLAN Response to NCP questions**), 3.
- <sup>9</sup> Submissions BHP to AusNCP, 5 July 2021, para 4.8-4.9 (**BHP Response to NCP questions**).
- <sup>10</sup> BHP 'BHP announces divestment of Cerrejón interest' (28 June 2021) <https://www.bhp.com/media-and-insights/news-releases/2021/06/bhp-announces-divestment-of-cerrejon-interest/> (accessed 25 Aug 2021).
- <sup>11</sup> GLAN 'Letter to parent co NCPs', 16 July 2021, 7.
- <sup>12</sup> OECD *Initial Assessments Guide* (above n3), 6.
- <sup>13</sup> <https://www.glanlaw.org/about-us> (accessed 25 Aug 2021).
- <sup>14</sup> GLAN *Response to NCP questions* (above n8), 9.
- <sup>15</sup> AusNCP *Complaint Procedures* (above n2), 4.10(b) & 4.11.
- <sup>16</sup> OECD *Initial Assessments Guide* (above n3), 21.
- <sup>17</sup> OECD *Initial Assessments Guide* (above n3), 20.
- <sup>18</sup> GLAN *Response to NCP questions* (above n8), 4.
- <sup>19</sup> 'The Guidelines concern those adverse impacts that are ... [1] caused or [2] contributed to by the enterprise, or [3] are directly linked to their operations, products or services by a business relationship': *Guidelines* (above n1), ch II, Commentary [14].
- <sup>20</sup> GLAN *Response to NCP questions* (above n8), 8.
- <sup>21</sup> UNGPs (above n6).
- <sup>22</sup> UNGPs (above n6), Guiding Principle 13(b), further detailed in Guiding Principles 18 & 19.
- <sup>23</sup> *Guidelines* (above n1), ch II, Commentary [19].
- <sup>24</sup> *Guidelines* (above n1), ch IV, Commentary [43]; see also OECD Council, *Due Diligence Guidance for Responsible Business Conduct* (2018, Organisation for Economic Co-operation & Development, 31 May 2018), p77 & 81 (addressing 'How can an enterprise seek to prevent and mitigate adverse impacts linked to business relationships with whom it does not have a contractual relationship?').
- <sup>25</sup> eg. Norges OECD-kontaktpunkt, *Jijnjevaerie Saami village – Statkraft SCA Vind AB (SSVAB)* (2016, Norwegian National Contact Point for the OECD Guidelines for Multinational Enterprises, 8 February 2016), 15; Nationaal Contactpunt, *Indigenous Federations from Peru et al. vs Pluspetrol Resources Corporation B.V.* (2021, Ministry of Foreign Affairs, 20 April 2021), 6; Independent Examiner, *Final Statement* (2021, Australian National Contact Point, Department of Treasury, 9 June 2021), [28].
- <sup>26</sup> *Responsible Business Guide* (above n24).
- <sup>27</sup> Secretary-General, *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector* (2017, Organisation for Economic Co-Operation and Development, 2 February 2017).
- <sup>28</sup> BHP *Response to NCP questions*, 1.
- <sup>29</sup> *Guidelines* (above n1), Implementation Procedures, Commentary, [26].
- <sup>30</sup> Australian National Contact Point, *Statement on BHP Billiton – Cerrejon Coal Specific Instance* (2009, Department of Treasury, 12 June 2009).
- <sup>31</sup> OECD *Initial Assessments Guide* (above n3), 8. Multiple NCP decisions have emphasised that questions of compliance with domestic law is the function of domestic authorities: eg. Point de contact national français de l'OCDE, *Specific Instance "EDF and EDF Renewables in Mexico"* (2020, Ministère de l'Économie et des Finances, 10 March 2020), 14; *Statkraft SCA Final Statement* (above n25), 7 & 10.
- <sup>32</sup> The website of the World Bank's International Centre for Settlement of Investment Disputes (<https://icsid.worldbank.org/cases/pending>) indicates there are pending claims against Colombia by AngloAmerican (ICSID Case No. ARB/21/31, registered 2 June 2021) and Glencore (ICSID Case No. ARB/21/30, registered 28 May 2021). Further information on the claims (which state 'Anglo American has filed a lawsuit challenging a ban that prevents Colombian coal mining firm Cerrejon from developing its La Puente pit. The latest lawsuit comes after fellow Cerrejon shareholders BHP and Glencore filed separate suits for the

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same reason on 27 April and 1 June, respectively') was reported by Argusmedia on 4 June 2021 ('Anglo American files Cerrejon lawsuit against Colombia' <https://www.argusmedia.com/en/news/2221732-anglo-american-files-cerrejon-lawsuit-against-colombia> ) and also by Bnamericas on 3 June 2021 ('Glencore files new arbitration claims against Colombia' <https://www.bnamericas.com/en/news/glencore-files-new-arbitration-claims-against-colombia> ). All URLs accessed 25 August 2021.

<sup>33</sup> BHP 'Cerrejon OECD Complaint' submissions to the AusNCP, 6 August 2021, 3.2-3.7.

<sup>34</sup> *OECD Initial Assessments Guide* (above n3), 10.

<sup>35</sup> *OECD Initial Assessments Guide* (above n3), 12.

<sup>36</sup> per *Guidelines* (above n1) ch IV, [3] and ch II A, [12]-[14].

<sup>37</sup> *AusNCP Procedures* (above n2), 4.16.