

# Final Statement

Complaint submitted by

Publish What You Pay Australia in its own name and on behalf  
of the Myanmar Alliance for Transparency and Accountability  
and the Bawdwin Labour Union

against

Mallee Resources Limited

2 August 2023

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## Executive summary

1. On 14 September 2021, the Australian National Contact Point for Responsible Business Conduct (AusNCP) received a complaint from Publish What You Pay Australia (PWYP, or the notifier) on behalf of 245 civil society organisations (CSOs), against Myanmar Metals Limited which is now known as Mallee Resources Limited (MYL, or the enterprise).<sup>1</sup>
2. At the time the complaint was initiated, the enterprise had announced an intention to divest from a joint venture to develop the Bawdwin silver, lead and zinc mine in Myanmar (Bawdwin Joint Venture, BJV).
3. The notifier alleged that MYL's proposed divestment from the BJV did not comply with the OECD Guidelines for Multinational Enterprises (OECD Guidelines)<sup>2</sup> and if divestment occurred, it would constitute irresponsible disengagement. The notifier alleged that MYL had not conducted human rights due diligence and meaningfully engaged with stakeholders regarding the divestment, had not taken steps to prevent or mitigate adverse human rights impacts that it alleged could arise from divestment, and had not met the disclosure expectations under the OECD Guidelines in communicating with civil society and local stakeholders. Further details of the complaint are contained in Annex B.
4. The position of MYL was that it had not irresponsibly disengaged from the BJV, that it had sold its interest to an existing partner in the BJV following the military coup, and MYL considered its former business partner a socially responsible entity. MYL also stated 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. The enterprise alleged that the complaint had been brought by PWYP in bad faith. Further details of MYL's response are contained in Annex C.
5. The Independent Examiner undertook an initial assessment of the complaint against the criteria set out in the AusNCP procedures, engaged with the parties and determined to accept the complaint. During this process, the notifier clarified that the complaint was pursued by PWYP, the Myanmar Alliance for Transparency and Accountability (MATA) - whose membership consists of 244 CSOs - and the Bawdwin Labour Union. On 29 August 2022, the AusNCP published an Initial Assessment accepting the complaint and offered its good offices to the parties. Further detail regarding the initial assessment process is contained in paragraphs 43 – 51.
6. On 21 September 2022, the enterprise declined to participate in good offices.
7. As MYL was unwilling to engage in good offices, the Independent Examiner conducted a further examination of the allegations in the complaint, as set out in this Final Statement. Details regarding the examination process are contained in paragraphs 68 – 72.4 below.
8. As a result of the further examination, the Independent Examiner made the findings referred to in paragraphs 129 – 130 below. In summary, these are:

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<sup>1</sup> Publish What You Pay Australia (PWYP), Complaint to the Australian National Contact Point (AusNCP) under the Specific Instance Procedure of the OECD Guidelines for Multinational Enterprises, submitted 14 September 2021 (complaint).

<sup>2</sup> Organisation for Economic Cooperation and Development (OECD) (2011), *OECD Guidelines for Multinational Enterprises*, OECD Publishing. <http://dx.doi.org/10.1787/9789264115415-en> (OECD Guidelines).

- 8.1. It is likely that the enterprise intended to operate responsibly in Myanmar. However, its ability to do so was compromised by not having a human rights policy and not undertaking human rights due diligence prior to and during its investment in Myanmar, which would have been expected under the OECD Guidelines.
  - 8.2. The notifier's complaint that the enterprise did not conduct any, or any adequate, human rights due diligence in respect of its divestment from the BJV in Myanmar is valid.
  - 8.3. It was MYL's responsibility to respect human rights and to have adequate policies and processes in place. However, the enterprise was not assisted in knowing and fulfilling the Australian Government's expectations of business enterprises under the OECD Guidelines by the publications and promotional activities of agencies such as Austrade, which were promoting investment in Myanmar in the period 2017 to 2021. These Australian Government agencies' publications and promotional activities made insufficient reference to the importance of undertaking human rights due diligence prior to and during business activities in Myanmar. They also often provided little guidance to Australian enterprises on how to access resources to assist them to implement socially responsible business conduct.
  - 8.4. The enterprise did not seek to prevent or mitigate potential adverse human rights impacts that it may have caused, contributed to or been directly linked with after the sale of its interest in the BJV. This was a corollary of not undertaking human rights due diligence to inform the enterprise of the potential adverse human rights impacts of the sale of its interest. The notifier alleged such impacts could include an increase in armed conflict in the region surrounding the Bawdwin mine, harms to local people and communities associated with armed conflict, and financing and legitimisation of the illegal military junta. However, there was insufficient evidence available during the Independent Examiner's examination of the complaint to establish that there have been such adverse human rights impacts and the Independent Examiner declines to make a determination in that regard.
  - 8.5. The notifier's complaint as regards the failure of the enterprise to meaningfully engage with stakeholders in advance of and in the process of its divestment is valid.
  - 8.6. The enterprise had also not disclosed material information on matters including structural and business links between the enterprise and certain entities, and the risks of armed conflict.
  - 8.7. The enterprise did not fail to comply with the OECD Guidelines by withholding copies of agreements in relation to the Bawdwin mine between the enterprise's Myanmar partner, Win Myint Mo Industries Co Ltd (WMM) and the Myanmar mining authority, Mining Enterprise 1 (ME1).
9. As a result of the matters referred to above, the Independent Examiner determined that while not all aspects of the complaint were upheld, the enterprise had not undertaken human rights due diligence or engaged meaningfully with stakeholders in respect of its decision to divest from the BJV, contrary to the OECD Guidelines. The enterprise's disclosures in respect of activities, structure, ownership and governance, as well as the enterprise's risk management and relationships also did not meet the expectations set out in the OECD Guidelines.
10. The Independent Examiner makes recommendations in order to improve observance of the OECD Guidelines in future. Those recommendations are that:

- 10.1. The enterprise develop and implement a human rights policy consistent with the OECD Guidelines and the United Nations Guiding Principles on Business and Human Rights (UNGPs). The policy should include a commitment to undertaking adequate human rights due diligence in existing and future mining projects. Implementation of the policy should include training for the enterprise's senior and operational personnel about human rights due diligence in the context of mining, including stakeholder engagement.
  - 10.2. The enterprise consult with civil society organisations as to alleged human rights impacts that may have arisen since its divestment.
  - 10.3. The enterprise use any leverage or influence it retains in respect of its former partners to encourage them to:
    - 10.3.1. undertake human rights due diligence and address and remediate any adverse impacts that may have occurred; and
    - 10.3.2. allow a copy of finalised contracts between WMM and ME1 to be shared with the notifier, MATA and the Bawdwin Labour Union.
  - 10.4. To ensure consistency and policy coherence across the whole of government, the Independent Examiner recommends that the AusNCP liaise with government agencies and departments that assist Australian enterprises overseas, including Austrade, with a view to ensuring that the expectation of the Australian Government as to responsible business conduct is adequately reflected in Austrade materials and activities. Such efforts should seek to ensure that government departments and agencies consistently set out expectations and provide guidance on enterprises having human rights policies and conducting human rights due diligence, particularly in the context of high-risk and conflict areas.
11. The AusNCP will follow up on these recommendations in 12 months.
12. This statement has been prepared with reference to the 2011 version of the OECD Guidelines and the 2022 version of the AusNCP complaint procedures. A copy of this statement is available on the AusNCP website at [www.ausncp.gov.au](http://www.ausncp.gov.au).

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# Parties and process

## Parties

13. The complaint was submitted to the AusNCP by PWYP with and on behalf of 245 Myanmar-based civil society organisations. Following communications with the Independent Examiner, it was clarified that the complaint was pursued by PWYP, MATA (whose membership consists of 244 civil society organisations) and the Bawdwin Labour Union.
14. 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.
15. MATA is a network of 244 civil society organisations 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 civil society organisations have been kept confidential due to concerns for the safety and rights of members of these groups in light of the military coup.
16. The Bawdwin Labour Union represents workers in and around the Bawdwin mine.
17. The enterprise is a Perth-headquartered explorer and mine developer previously listed on the Australian Securities Exchange (ASX). It is a single project company. At the time of the initiation of the complaint, the enterprise's interest was in the Bawdwin mine in Myanmar. As at the date of this report, the enterprise's interest is in the Avebury Nickel Mine in Tasmania.<sup>3</sup>

## Background

18. The Bawdwin mine is a polymetallic mine located in northern Shan State in Myanmar. It is located in mountainous terrain, approximately 11 km west of the town of Namtu.<sup>4</sup>
19. Originally operated in the 15<sup>th</sup> century, the Bawdwin mine was a significant source of the world's lead and silver.
20. Since 1962, Myanmar has been ruled mostly by military regimes and has experienced internal conflict and lengthy periods of international isolation. In 1962, the Burma Corporation, which ran the Bawdwin mine, was nationalised.<sup>5</sup>

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<sup>3</sup> Mallee Resources (MYL), *Avebury Nickel Mine*, <https://malleeresources.com.au/avebury-nickel-mine/> (accessed 25 January 2023).

<sup>4</sup> Coffey and Valentis, *Bawdwin Project Scoping Report*, April 2020, p xix (Scoping Report).

<sup>5</sup> Kyaw Lin Htoon, "Fluctuating fortunes at the Bawdwin mine", *Frontier Myanmar*, 31 January 2018, [Fluctuating fortunes...~https://www.frontiermyanmar.net/en/fluctuating-fortunes-at-the-bawdwin-mine/](https://www.frontiermyanmar.net/en/fluctuating-fortunes-at-the-bawdwin-mine/).

21. By 2009, the Bawdwin mine ceased being operational.<sup>6</sup> A Burmese company, WMM, entered into a Production Sharing Contract with state-enterprise, ME1, which is also the responsible mining authority in Myanmar.<sup>7</sup> The Production Sharing Contract remained valid until 2024.<sup>8</sup>
22. In 2015, for the first time in 55 years, Myanmar held credible national elections. Eighty per cent of available seats were won by the National League for Democracy, which assumed power.
23. Between 2016 and 2018, mass atrocities were committed against the Rohingya in Rakhine State.<sup>9</sup>
24. In 2017, MYL entered into an Option Agreement with WMM as owner, and another Myanmar-based entity EAP Global Co Ltd (EAP), under which MYL could acquire an interest of up to 51% in an incorporated joint venture to develop the Bawdwin mine.<sup>10</sup>
25. On 22 May 2018, the enterprise announced to the ASX that it had issued formal notice to WMM that it would exercise the Bawdwin Option for a fee of US\$20 million with partner group, EAP.<sup>11</sup> On 24 August 2018, the BJV Services Company Limited (BJV) was incorporated.<sup>12</sup>
26. In November 2018, MYL reported that it was the 51% owner and manager of the Bawdwin project.<sup>13</sup> The 51% share was held by the enterprise's wholly owned Myanmar-based subsidiary, Bright Mountain Resources Myanmar Limited.
27. Between 2018 and 2020, "BJV, and accordingly MYL, were able to represent ... WMM in the undertaking of feasibility and related studies",<sup>14</sup> including an environmental and social impact assessment (ESIA).
28. In 2020, the National League for Democracy again won the majority of seats in national elections.
29. On 1 February 2021, the Myanmar military rejected the election result and seized power. Aung San Suu Kyi and other National League for Democracy members were detained and a state of emergency declared.<sup>15</sup>
30. The enterprise informed the AusNCP that on "1 February 2021, MYL's directors convened a Crisis Management Task Force, charged with assessing all of the Company's' immediate obligations to the relevant Australian regulatory bodies including the ASX, the Company's shareholders, its Myanmar partners and Myanmar stakeholders".<sup>16</sup>

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<sup>6</sup> Scoping Report, above n 4, p xxiii.

<sup>7</sup> Attachment to email from MYL to AusNCP, 10 May 2022 (MYL Response).

<sup>8</sup> Ibid.

<sup>9</sup> Australian Department of Foreign Affairs and Trade (DFAT), *DFAT Country Information Report Myanmar*, 11 November 2022 (2022 DFAT Myanmar report), p 8. It is noted that DFAT country information reports are prepared by DFAT for protection visa status determination purposes only, provide DFAT's best judgement and assessment at time of writing and are distinct from Australian Government policy with respect to the countries in question.

<sup>10</sup> MYL Response, above n 7.

<sup>11</sup> MYL, ASX Announcement: *MYL Gives Formal Notice to Exercise Bawdwin Option*, 22 May 2018, <https://www.asx.com.au/asxpdf/20180522/pdf/43v6dssw5c4vgl.pdf> (accessed 25 January 2023).

<sup>12</sup> MYL Response, above n 7.

<sup>13</sup> MYL Chairman's address, *2018 Annual General Meeting*, 21 November 2018.

<sup>14</sup> MYL Response, above n 7.

<sup>15</sup> 2022 DFAT Myanmar report, above n 9, p 8.

<sup>16</sup> MYL Response, above n 7.



31. The enterprise's crisis management task force "determined that it was not feasible for MYL to continue with Bawdwin mine development studies/assessments or to continue to negotiate and agree terms for a new PSA [production sharing agreement] with Government Ministries under military junta control."<sup>17</sup>
32. On 19 March 2021, nine Australian non-governmental organisations including PWYP wrote to the enterprise requesting a meeting. The letter raised that continuing with the Bawdwin Joint Venture would require engaging and cooperating with the military junta in an area that is "already rife with conflict" and that such engagement with the military "would hinder the development of democracy, human rights and justice". The signatories called on the enterprise to suspend preparatory works for the Bawdwin mine and rule out any future in-kind or financial payments to the military controlled governments and their business entities.
33. On 16 June 2021, the enterprise announced to the ASX that it had received a non-binding, conditional proposal from Yintai Gold Co Ltd to acquire all of the ordinary shares on issue in the enterprise.<sup>18</sup>
34. On 17 August 2021, MYL announced to the ASX that it had entered into binding agreements to dispose of the enterprise's entire interest in the Bawdwin Project to its local BJV partner, WMM.<sup>19</sup>
35. On 17 August 2021, PWYP wrote a letter to MYL expressing its concern that the future sale of the enterprise'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".<sup>20</sup> The letter also referred to a report by PWYP and MATA in which they "detailed significant integrity and human rights issues concerning the project and set out recommendations to ensure good governance".<sup>21</sup> The letter concluded with an invitation to discuss the issues in more detail with PWYP, who offered to connect the enterprise with National Unity Government representatives and Myanmar civil society to discuss the situation.
36. On 30 August 2021, PWYP again wrote to the enterprise. As at the time of filing a complaint with the AusNCP, no response had been received from the enterprise.
37. The National League for Democracy and ethnic party representatives formed a government-in-hiding known as the National Unity Government (NUG). In September 2021, the NUG announced an armed revolutionary struggle against the military regime, which has continued since, along with renewed fighting between the military and various ethnic armed organisations.<sup>22</sup>
38. On 14 September 2021, PWYP filed a complaint with the AusNCP, accompanied by:
  - 38.1. A copy of the letter sent 17 August 2021, from PWYP to the enterprise referred to in paragraph 35 above.

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<sup>17</sup> Ibid.

<sup>18</sup> MYL, ASX Announcement: *MYL Receives Non-binding Conditional Proposal to Acquire All Shares in MYL*, (16 June 2021), <https://www.asx.com.au/asxpdf/20210616/pdf/44xf1s66vxzwh.pdf> (accessed 25 January 2023).

<sup>19</sup> MYL, ASX Announcement: *MYL Enters into Binding Agreements for Divestment of Bawdwin Interest*, (17 August 2021), <https://www.asx.com.au/asxpdf/20210817/pdf/44zd4fq82llybj.pdf> (accessed 25 January 2023).

<sup>20</sup> Letter from PWYP to MYL, 17 August 2021.

<sup>21</sup> PWYP and Myanmar Alliance for Transparency and Accountability, *Extracting the Truth Behind the Bawdwin Mine*, 2021, <https://www.pwyp.org.au/publications/extracting-the-truth-behind-the-bawdwin-mine>, accessed 16 February 2023.

<sup>22</sup> 2022 DFAT Myanmar report, above n 9, p 8.

- 38.2. A copy of the PWYP/MATA report dated February 2021 referred to in the 17 August 2021 letter to the enterprise (referred to in paragraph 35 above).
- 38.3. A copy of a longer unpublished (as at 14 September 2021) version of the report by PWYP/MATA on the Bawdwin Mine project.
- 38.4. A copy of the letter from nine Australian non-governmental organisations to the enterprise referred to in paragraph 32 above.

## Circumstances in which this final statement is made

39. This final statement is made in the context of the enterprise refusing the offer to enter into good offices.
40. The Implementation Procedures of the OECD Guidelines contain Procedural Guidance for National Contact Points (NCPs). The Procedural Guidance relevantly provides that when a party is unwilling to participate in the procedures, a statement should be made publicly available, which should at a minimum describe the issues raised, the reasons why the NCP decided that the issues raised merit further examination and the procedures the NCP initiated in assisting the parties. The statement should also include any recommendations on the implementation of the OECD Guidelines as appropriate.<sup>23</sup>
41. The AusNCP procedures provide that if an offer of good offices is refused, the complaint will return to the Independent Examiner for examination.<sup>24</sup> The Independent Examiner will review the information received and gathered and consider whether further consultation with other parties (which may include other government agencies or overseas missions) is required to bring the matter to a close, and will then prepare a final statement.<sup>25</sup> Where the complaint was accepted but the enterprise failed to engage in the complaint process, the AusNCP procedures direct the Independent Examiner to include in the final statement their analysis of the issues and where possible include a statement as to whether the enterprise's actions were consistent with the OECD Guidelines.<sup>26</sup> The AusNCP procedures also state that the final statement will include recommendations to the enterprise or other relevant bodies where appropriate.<sup>27</sup>
42. Consistent with the Implementation Procedures of the OECD Guidelines and the AusNCP procedures, this final statement is made after the Independent Examiner conducted an examination of the complaint. It contains a statement as to whether MYL's actions were consistent with the OECD Guidelines and recommendations (see paragraphs 129 – 130 below).

## AusNCP proceedings

43. A detailed chronology of the AusNCP proceedings is at Annex A. Key dates are set out below.

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<sup>23</sup> OECD Guidelines, above n 2 Part II, Procedural Guidance Part I(C), part (3(c)).

<sup>24</sup> Australian National Contact Point (AusNCP), *Complaint Procedures*, AusNCP, Australian Government, 2022, 5.8, <https://ausncp.gov.au/index.php/complaints/ausncp-procedures> (AusNCP procedures).

<sup>25</sup> Ibid, 5.10 and 5.11.

<sup>26</sup> Ibid, 6.2.2, see also 6.1.

<sup>27</sup> Ibid, 6.3, see also 6.1.

## Initial assessment

43. Following receipt of the complaint, consistent with the AusNCP procedures for handling complaints,<sup>28</sup> the AusNCP commenced an initial assessment as to whether the matters raised in the complaint merited further examination under the OECD Guidelines.
44. The AusNCP forwarded the complaint to the enterprise on 15 September 2021 with an invitation to provide a response.
45. On 23 September 2021, the enterprise responded objecting to the appointment of the relevant Independent Examiner, citing concerns regarding impartiality.
46. The AusNCP Secretariat, with the input of the AusNCP Governance and Advisory Board, determined to appoint an alternative Independent Examiner and did so on 10 December 2021.
47. Following her appointment, the Independent Examiner engaged in video calls and written correspondence with the enterprise and PWYP.
48. On 10 May 2022, the enterprise provided the Independent Examiner with a written response to the complaint in a form that they were willing to share with the notifier.
49. Between February and June 2022, the Independent Examiner also sought more details about the authority of the notifier to bring the complaint on behalf of 245 civil society organisations. As a result, it was clarified that the complaint was brought by PWYP, MATA (whose membership included 244 civil society organisations) and Bawdwin Labour Union. Each of PWYP, MATA and the Bawdwin Labour Union identified authorised representatives to take forward the complaint in the event that good offices were entered into.
50. The Independent Examiner considered the material provided by the parties in accordance with the AusNCP complaint procedures to determine whether the complaint was raised in good faith and was relevant to the implementation of the Guidelines. In so doing, the Independent Examiner took into account the six admissibility criteria outlined in the OECD Procedural Guidance, namely:
  - 50.1. The identity of the party concerned and its interest in the matter.
  - 50.2. Whether the issue is material and substantiated.
  - 50.3. Whether there seems to be a link between the enterprise's activities and the issue raised in the complaint.
  - 50.4. The relevance of applicable law and procedures, including court rulings.
  - 50.5. How similar issues have been, or are being, treated in other domestic or international proceedings.
  - 50.1. Whether the consideration of the complaint would contribute to the purposes and effectiveness of the OECD Guidelines.

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<sup>28</sup> AusNCP Procedures, above n 24.

51. On 29 August 2022, the AusNCP published an Initial Assessment accepting the complaint and offered its good offices to the parties to the complaint.<sup>29</sup>

## Good offices

52. On 9 September 2022, the enterprise indicated an intention not to engage in good offices.

53. On 17 September 2022 and in a subsequent meeting, the Independent Examiner engaged with the enterprise so as to address any concerns and encourage the enterprise to enter into good offices.

54. On 19 September 2022, PWYP, MATA and the Bawdwin Labour Union accepted the offer of good offices.

55. On 21 September 2022, the enterprise confirmed in correspondence that it declined the offer of good offices.

## Further examination

56. On 26 October 2022, PWYP, MATA and the Bawdwin Labour Union were informed that in light of the enterprise declining good offices, the complaint would proceed to a final statement.

57. On 28 October 2022, the enterprise was informed the complaint would proceed to a final statement and that the AusNCP's offer of good offices remained open to the parties during the drafting of the final statement.

58. On 12 January 2023 and 18 January 2023, the parties were invited to provide additional materials for consideration by the Independent Examiner in the conduct of her examination and preparation of the final statement, including specifically documents that would substantiate statements made in each party's submissions.

59. The parties were provided until 6 February 2023 to respond, which they each did.

60. The parties were also offered an opportunity to respond to each other's 6 February 2023 materials. This offer was not taken up by either party.

61. In addition to reviewing the parties' materials, the Independent Examiner gathered documentation from publicly available resources, consistent with the AusNCP procedures.<sup>30</sup> See further at paragraph 72 below.

## Application of the OECD Guidelines

62. As stated in the Initial Assessment, the paragraphs of the OECD Guidelines set out below are of relevance to the complaint.

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<sup>29</sup> Australian National Contact Point, *Initial Assessment, Complaint submitted by Publish What You Pay Australia (PWYP) and is pursued by PWYP, Myanmar Alliance for Transparency and Accountability and the Bawdwin Labour Union against Myanmar Metals (now Mallee Resources Limited)*, Australian Government, 2022, <https://ausncp.gov.au/complaints/complaint-27>.

<sup>30</sup> AusNCP procedures, above n 24, 6.2.

## 62.1. 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 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**.*

## 62.2. 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.*

62.3. 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.*

63. In addition, the Initial Assessment made reference to the following texts, which are of relevance to determining the conduct expected of the enterprise in order to comply with the OECD Guidelines:

63.1. OECD Due Diligence Guidance for Responsible Business Conduct, which states in the context of responsible disengagement:<sup>31</sup>

*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.*

63.2. OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector;<sup>32</sup>

63.3. *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas;*<sup>33</sup> and

63.4. United Nations (UN) Framework for Business and Human Rights “Protect, Respect and Remedy” and the UNGPs.<sup>34</sup>

<sup>31</sup> OECD, *OECD Due Diligence Guidance for Responsible Business Conduct*, (2018), <https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm>.

<sup>32</sup> OECD, *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*, (2017), <http://dx.doi.org/10.1787/9789264252462-en>.

<sup>33</sup> OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition*, (2016), <http://dx.doi.org/10.1787/9789264252479-en>.

<sup>34</sup> 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).

64. It is noted that since publication of the Initial Assessment, the World Bank Group’s Compliance Advisor Ombudsman has published a paper on “Responsible Exit”,<sup>35</sup> which contains useful content of relevance to the matters addressed in this final statement.

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<sup>35</sup> Compliance Advisor Ombudsmen (CAO), *Responsible Exit: Discussion and Practice in Development Finance Institutions and Beyond*, (2023), <https://www.cao-ombudsman.org/ResponsibleExit>, accessed 16 February 2023.

# Discussion

## The complaint and the enterprise's response

65. Details of matters raised in the notifier's complaint and by the enterprise in its substantive written response are contained in Annexes B and C respectively.
66. In summary, the notifier alleged that the enterprise had failed to act in accordance with the principles and standards in the OECD Guidelines in its proposed "disengagement" (or divestment) from the Bawdwin mine, by failing to:<sup>36</sup>
- 66.1. conduct adequate human rights due diligence in relation to the divestment;
  - 66.2. seek to prevent or mitigate adverse human rights impacts that may arise after the sale of its interest in the BJV; and
  - 66.3. be transparent in relation to its decision to disengage from the BJV.
67. The position of the enterprise was that it had not irresponsibly "disengaged" from the BJV. Its view was that it was unrealistic for the enterprise to have consulted with each stakeholder group in the dynamic circumstances with which it contended in the aftermath of the military coup. The enterprise contended that no-one in the Bawdwin or local community was made worse-off from the enterprise's activities in Myanmar during 2017 to 2021, or its withdrawal from Myanmar. It stated that it had complied with its disclosure obligations as a listed entity subject to the rules of the ASX and the *Corporations Act 2001* (Cth). The enterprise also alleged that PWYP brought the complaint in bad faith.<sup>37</sup>

## Further examination

68. After good offices were declined by the enterprise, the parties were invited to provide a written response to each other's material and to provide any documents supporting their statements which they wished the Independent Examiner to take into account in conducting the examination.
69. By email on 6 February 2023, the enterprise declined to provide documentation supporting various statements made in its substantive response (see Annex C) on the basis that since its divestment, documents of the BJV are not MYL's to provide and MYL does not have authority to provide them. The response made reference to the content of an ESIA and Bawdwin Project Feasibility Study Report, copies of which were not provided and which the enterprise stated it did not have authorisation to provide to the notifier. No information was given as to any efforts taken to obtain such authorisation. Other than a copy of a presentation by MYL to the Myanmar Applied Earth Sciences Association in December 2019, the Independent Examiner was not provided by MYL with information or documents that were published and therefore not subject to confidentiality restrictions – such as copies of corporate policies. The enterprise expressed that:

*[H]ad there been genuine goodwill on behalf of the Complainants to resolve these allegations Mallee in a mutually constructive forum without the need for Mallee to breach its confidentiality obligations*

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<sup>36</sup> Complaint, above n 1.

<sup>37</sup> MYL Response, above n 7.



*by being asked to deliver copies of voluminous documents that it cannot provide then mutually beneficial discussions may have lead [sic] to a far better understanding of Mallee's processes, principles and the reasons that its actions did not result in a [sic] irresponsible withdrawal from Myanmar.*

The Independent Examiner notes that this statement was made in circumstances where the request for supporting documentation had been made only after the enterprise had declined the offer of good offices by the AusNCP.

70. On 6 February 2023, the notifier, PWYP responded by letter to the enterprise's substantive response (see Appendix C), and included copies of documents relied upon by the notifier. The letter included the following in response to the matters raised by the enterprise:

70.1. PWYP emphasised that the complaint related specifically to whether the enterprise complied with the OECD Guidelines in its disengagement following the 2021 coup. While noting that due diligence on WMM was relevant to the disengagement, PWYP identified that much of MYL's substantive response referred to community consultations, due diligence and the ESIA undertaken prior to the coup rather than to due diligence relating to the enterprise's disengagement. PWYP also referred to the decision by the enterprise not to participate in good offices.

70.2. PWYP rejected the enterprise's claim that PWYP had acted in bad faith in not attending a consultation meeting in 2020 organised by those conducting the BJV's ESIA. PWYP claims an entity undertaking the ESIA, Valentis, had a conflict of interest and PWYP declined to participate on the advice of representatives of MATA. PWYP alleged the financial relationship between Valentis and MYL raised a conflict of interest at the time of the ESIA and was not disclosed in the enterprise's scoping report. PWYP also stated that it held concerns regarding alleged connections between Valentis and the military. PWYP stated that it and its partners opted to engage directly with MYL and BJV after the coup and made several approaches to the enterprise.

70.3. PWYP disputed MYL's allegation that PWYP had not sufficiently researched its assertion that MYL had not disclosed the fighting in Shan State in disclosures to the ASX. PWYP supplied the AusNCP with multiple investor presentations published by MYL.<sup>38</sup> These were relied on by PWYP in support of its contention that disclosures throughout MYL's time in Myanmar were to the effect that the country was a lucrative and profitable market while issues of conflict and serious human rights issues in the Shan State and the area surrounding the mine were not mentioned or minimised.

70.4. In response to the enterprise's assertion that communities in Shan State are not worse off from the enterprise's withdrawal from the BJV and Myanmar, the PWYP asserted that workers from BJV lost their jobs after the enterprise's departure, others had their wages reduced and there had been no dialogue with local communities or CSOs since the divestment.

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<sup>38</sup> MYL, *Chairman's AGM Presentation*, 23 October 2017; MYL, *Equity Raising Presentation June 2018* (2018); MYL, *Investor presentation*, (2018), <https://malleeresources.com.au/investors/>. It is noted, however, that one of these presentations, the *Equity Raising Presentation June 2018*, did make reference to conflict within Myanmar and to the possibility that civil and political unrest might 'affect the viability and profitability of the Company'. See further at paragraphs [117]ff.

- 70.5. Regarding the assertion by the enterprise that it could not engage in consultation with local communities regarding its divestment as it had no representatives in Myanmar who would in any event be forbidden from travelling to Shan State, PWYP contended that this ignored the widespread use of online platforms for meetings with remote communities in Myanmar. PWYP also identified that the enterprise had not sought to engage with Australian CSOs or the NUG.
71. An offer by the Independent Examiner to each party to provide a response to the other's 6 February 2023 materials (outlined in paragraphs 69 and 70 above) was not taken up by either party.
72. In addition to a careful review of the materials supplied by the parties, the Independent Examiner obtained materials from the sources identified in the bibliography at Annex D and listed in the footnotes throughout this statement. These include materials regarding the following issues:
- 72.1. The corporate structure of WMM and allegations in the complaint that WMM was connected with Asia World Corporation and Steven Law, which had been subject to United States (US) sanctions<sup>39</sup>
- 72.2. The history of Myanmar and information available between 2017 and 2021 regarding risks of conflict and human rights risks in Myanmar<sup>40</sup>
- 72.3. The enterprise's disclosures to the ASX,<sup>41</sup> its presentations and reports,<sup>42</sup> and the enterprise's policies<sup>43</sup>

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<sup>39</sup> Directorate of Investment and Company Administration (DICA), 'Myanmar Companies Online,' <https://www.myco.dica.gov.mm>; National Infrastructure Holdings Company (NIHC) (30 October 2020) 'Mining: Introducing Win Mynt Mo Company Limited,' current version: <http://www.nihcmm.com/mining>, archived copy: <https://web.archive.org/web/20201030194008/http://www.nihcmm.com/mining>; NIHC, (30 October 2020) 'Our Management,' current version: <http://www.nihcmm.com/our-management>, archived copy: <https://web.archive.org/web/20201030191325/http://www.nihcmm.com/our-management>; United States Department of Treasury (US Treasury), 'Treasury Sanctions Additional Financial Operatives of the Burmese Regime', 25 February 2010, <https://home.treasury.gov/news/press-releases/hp837> (last accessed 20 February 2023); US Treasury, 'Treasury Amends Burmese Sanctions Regulations, Identifies Blocked Companies Owned By Designated Persons, And Delists Several Burmese State-Owned Entities', 17 May 2016, <https://home.treasury.gov/news/press-releases/jl0458> (last accessed, 20 February 2023); US Treasury, 'Treasury Implements Termination of Burma Sanctions Program', 7 October 2016, <https://home.treasury.gov/news/press-releases/jl0569> (last accessed 20 February 2023).

<sup>40</sup> United Nations General Assembly (UNGA) Human Rights Council Fortieth Session, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, 2 May 2019, A/HRC/40/68; UNGA Human Rights Council Forty-Third Session, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar: Report of the United Nations High Commissioner for Human Rights (UNHCHR)*, 11 November 2020, A/HRC/43/18; 2022 DFAT Myanmar report, above n 9; DFAT, *DFAT Country Information Report Myanmar*, 18 April 2019 (2019 DFAT Myanmar Report); DFAT, *DFAT Country Information Report Myanmar*, 10 January 2017 (2017 DFAT Myanmar Report).

<sup>41</sup> MYL, 'ASX Announcements,' <https://malleeresources.com.au/investors/asx-announcements/>.

<sup>42</sup> MYL, 'Presentations,' *Presentations – Mall...~*<https://malleeresources.com.au/investors/presentations/>; MYL, 'Reports,' MYL, <https://malleeresources.com.au/investors/financial-reports/>

<sup>43</sup> MYL, 'Corporate Governance,' MYL, <https://malleeresources.com.au/about-us/corporate-governance/>.

- 72.4. The human rights principles and expectations of entities with which the enterprise expressed a commitment or intention to align itself.<sup>44</sup>

## Observations and discussion

### Human rights policy

73. The OECD Guidelines are clear that adhering governments expect enterprises to “have a policy commitment to respect human rights”.<sup>45</sup> Governments expect such a policy to:<sup>46</sup>
- 73.1. be approved at the most senior level of the enterprise
  - 73.2. be informed by relevant internal and/or external expertise
  - 73.1. stipulate the enterprise’s human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services
  - 73.2. be publicly available and communicated internally and externally to all personnel, business partners and other relevant parties
  - 73.3. be reflected in operational policies and procedures necessary to embed it throughout the enterprise.
74. From the outset, the enterprise published a commitment to operating in a manner respectful of the environment and with an intention to maximise the social, environmental and economic returns for the local community.<sup>47</sup> Such commitments are to be lauded. Mining operations can and do have very significant impacts on the environment and on local and regional communities in which they are located. They can also have significant effects at the national and international level. Acknowledging the potential for these effects and working to avoid negative impacts while maximising positive benefits are critical.
75. While general commitments to good corporate behaviour are to be welcomed, they do not replace the need for a policy commitment to respecting human rights and a means of implementing and enforcing that policy. An enterprise that respects human rights is more likely to be effective in minimising adverse impacts of its activities. For example, an enterprise that recognises that rights holders have a right to be involved in determining their own economic, social and cultural development is less likely to develop implement corporate social and environmental initiatives that fail to address their intended objectives and have unintended negative consequences on rights holders.
76. Prior to and during MYL’s engagement in Myanmar, it had no human rights policy. The enterprise asserted in its substantive response (see Annex C) that the absence of a published human rights policy did not mean that it did not have an understanding and awareness of its responsibilities with respect to human rights. However, the very responsibilities of which the enterprise stated it was aware include the

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<sup>44</sup> ‘The Equator Principles,’ <https://equator-principles.com>; the International Council on Mining and Metals Mining (ICMM) Mining Principles: <https://www.icmm.com/en-gb/our-principles>.

<sup>45</sup> OECD Guidelines, above n 2, Ch IV, Human Rights Chapter, 4.

<sup>46</sup> OECD Guidelines, above n 2, Commentary on Human Rights Chapter, 44. These same criteria are contained in the UNGPs, above n 34, principle 16.

<sup>47</sup> See for example, MYL, *Annual Financial Report for the year ended 30 June 2017*, Directors’ Report, p 4.

responsibility on every enterprise to have a publicly available human rights policy, as articulated in the OECD Guidelines and the UNGPs.<sup>48</sup>

77. Having a human rights policy is an essential step in an enterprise embedding respect for human rights into its operations and throughout the enterprise. It is foundational to ensuring that those within the enterprise and those with which it engages understand that the enterprise will expect its employees, contractors, partners and others to respect human rights. In addition to being a tool for embedding respect for human rights into operations and throughout the enterprise, having a public human rights policy is a useful means of communicating to stakeholders that the enterprise is serious about its commitment. As stated in the commentary to the UNGPs:<sup>49</sup>

*... enterprises need to know and show that they respect human rights. They cannot do so unless they have certain policies and processes in place.*

Whether an enterprise is small, medium or large, the development, integration and publication of a human rights policy is fundamental to responsible business conduct.

78. The enterprise informed the AusNCP that it had worked closely with its partner organisations in Myanmar and had developed various policies with reference to international guidelines. However, no copies of any such policies were provided to the AusNCP despite a request to do so. There is therefore no evidence that either the enterprise or the BJV had a human rights policy.

79. The Independent Examiner notes that as at the time of writing this final statement, while the enterprise has stand-alone policies on risk management, anti-bribery and other matters the enterprise has still not developed a human rights policy. The enterprise claims on its website that it has aligned its environmental, social and governance principles with the International Council on Mining and Metals (ICMM) Mining Principles. Alignment with Principle 3 of the ICMM Principles on Human Rights requires compliance with various performance expectations, the first of which is:<sup>50</sup>

*Support the UN Guiding Principles on Business and Human Rights by developing a policy commitment to respect human rights, undertaking human rights due diligence and providing for, or cooperating in processes to enable the remediation of adverse human rights impacts that members have caused or contributed to.*

80. The Independent Examiner is encouraged that, since 13 July 2022, there has been a reference to respecting human rights in the enterprise's publicly available corporate governance plan.<sup>51</sup> However the policy commitment is limited and does not address the matters referred to in paragraph 73 above. The Independent Examiner recommends that the enterprise develop and implement a human rights policy consistent with the OECD Guidelines and the UNGPs. Such a policy should be more than a bare statement of a commitment to respect human rights. It should address the matters referred to in paragraph 73 above. It is recommended that, consistent with the UNGPs, the policy commit the enterprise to respecting all internationally recognised human rights, which at a minimum include those set out in the International Bill of Human Rights and the principles concerning fundamental rights set out in the

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<sup>48</sup> OECD Guidelines, above n 2, Commentary on Ch IV, Human Rights Chapter, 44; UNGPs, above n 34, principle 16.

<sup>49</sup> UNGPs, above n 34, principle 15 commentary.

<sup>50</sup> ICMM, ICMM Mining Principles, above n 44.

<sup>51</sup> MYL, Corporate Governance Plan, approved by the Board on 13 July 2022, p 78, <https://malleeresources.com.au/wp-content/uploads/2022/08/Corporate-Governance-Plan-MYL-FINAL3009398.1.pdf> (accessed 2 March 2023).

International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.<sup>52</sup> It should include details of how such a policy will be acted upon, including by way of: undertaking human rights due diligence to identify, prevent, mitigate and account for its human rights risks and impacts; developing a grievance mechanism; and providing for or cooperating in remediation of adverse human rights impacts where the enterprise identifies that it has caused or contributed to adverse human rights impacts. If the enterprise does not have sufficient in-house capacity to develop such a policy, it should seek external assistance and utilise publicly available guidance on how to develop a human rights policy.<sup>53</sup>

## Human rights due diligence

81. The OECD Guidelines state that enterprises are expected to conduct risk-based due diligence (Ch II, para 10), including specifically human rights due diligence (Ch IV, para 5). The purpose of such due diligence is for enterprises to proactively identify, prevent and mitigate actual and potential adverse impacts on human rights and other matters covered by the OECD Guidelines.
82. Human rights due diligence is not to be conflated with corporate due diligence, which enterprises commonly undertake to assess the *risks to the enterprise* of a corporate transaction. Although it can be incorporated into broader enterprise risk management processes, human rights due diligence requires an informed assessment of the *risks to human rights-holders* posed by an enterprise’s acts and omissions including as they relate to the enterprise’s business relationships.<sup>54</sup>
83. As outlined by the United Nations Working Group on Business and Human Rights, human rights due diligence consists of:<sup>55</sup>
  - 83.1. identifying and assessing actual or potential adverse human rights impacts
  - 83.2. integrating findings from impact assessments across relevant company processes
  - 83.3. tracking the effectiveness of measures and processes to know if they are working
  - 83.4. communicating on how impacts are being addressed and showing stakeholders – in particular affected stakeholders – that there are adequate policies and processes in place.
84. Importantly, an effective human rights due diligence process is iterative such that information gleaned throughout is reflected in policies and practices so as to improve outcomes. A human rights impact assessment or other forms of assessing human rights impacts, whether or not they form part of an ESIA,

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<sup>52</sup> UNGPs, above n 34, principle 12.

<sup>53</sup> See, for example, United Nations Global Compact, *A Guide for Business: How to Develop a Human Rights Policy*, [https://www.unglobalcompact.org/docs/issues\\_doc/human\\_rights/Resources/HR\\_Policy\\_Guide.pdf](https://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/HR_Policy_Guide.pdf).

<sup>54</sup> OECD Guidelines, above n 2, Commentary on Human Rights Chapter, 45. See similarly, OECD Guidelines, above n 2, Commentary on General Policies Chapter, 14.

<sup>55</sup> United Nations Working Group on Business and Human Rights, *Corporate human rights due diligence – identifying and leveraging emerging practices*, <https://www.ohchr.org/en/special-procedures/wg-business/corporate-human-rights-due-diligence-identifying-and-leveraging-emerging-practices> (accessed 2 March 2023).

may be just one part of the due diligence process. It is important that human rights due diligence takes into account significant changes in circumstances and is an “on-going, proactive and reactive process”.<sup>56</sup>

85. An issue for consideration is whether the OECD Guidelines impose an expectation that enterprises will conduct due diligence in respect of a decision to divest. MYL’s relationship with the BJV was detailed in contractual relations with partners in the joint venture, with the shared objective of an operational mine. In those circumstances, the decision by MYL to discharge its interest in the BJV was akin to an operational or any other business decision to which the OECD Guidelines apply. The notifier asserted and the Independent Examiner agrees, that a decision to disengage from a business relationship is a decision like any other for which enterprises should conduct human rights due diligence to identify, prevent and mitigate adverse impacts resulting from the business decision. Further, even if MYL’s relationship with the BJV were to be characterised as that of an investor/investee relationship, the recommendations of the OECD Guidelines would apply as they apply across all sectors, including the financial sector and commercial investment enterprises.<sup>57</sup>
86. The OECD Guidelines refer to disengagement as a last resort in efforts by an enterprise to exercise leverage over a third-party entity to respect human rights.<sup>58</sup> This was not the context in which MYL divested. That is, MYL was not divesting as part of an escalation of measures so as to achieve an improved human rights outcome.<sup>59</sup> Rather, MYL was reacting to a radical change in the governance and security of the country. Nevertheless, in both the circumstances contemplated in the OECD Guidelines on disengagement as an exercise of leverage, as well as in the context of a business decision to extricate a company from a business venture in difficult circumstances, the expectation under the OECD Guidelines is that some measure of due diligence should be carried out so as to “take into account potential social and economic adverse impacts related to the decision to disengage”.<sup>60</sup>
87. 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”.<sup>61</sup> These matters warrant further consideration.
88. In the context of the complaint, factors weighing against MYL having to undertake a complex due diligence process include that:
  - 88.1. The enterprise is a small corporate entity, consisting of a single project. It does not have the resources of a major corporation.
  - 88.2. The enterprise had an interest in a non-operating mine, the impacts of divestment from which would likely be less than in respect of an operating mine.

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<sup>56</sup> OECD *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, above n 33, p 13.

<sup>57</sup> See OECD, (2017), *Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises*, <https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf>.

<sup>58</sup> OECD Guidelines, above n 2, commentary on Chapter II General Policies, 22.

<sup>59</sup> OECD (2018), *OECD Due Diligence Guidance for Responsible Business Conduct*, above n 31, pp 31-31, 80.

<sup>60</sup> OECD Guidelines, above n 2.

<sup>61</sup> OECD Guidelines, above n 2, Ch IV, 5.

- 88.3. In light of the state of emergency created by the coup, it was necessary for the enterprise to make decisions quickly.
89. However, factors that need to be taken into account when considering the nature of the human rights due diligence include:
- 89.1. The sector in which the enterprise was engaged – being the mining sector, which is widely known to be a high-risk sector.
- 89.2. The context in which the divestment would take place, including the high-risk and conflict prone context of Myanmar particularly in Shan State, and the reinstatement of military rule.
- 89.3. The severity of potential human rights abuses that may arise in connection with the enterprise’s conduct or its business relationships, particularly in light of the ongoing occurrence of such abuses involving the military in Shan State.
90. It is well documented that mining operations have significant potential to adversely affect human rights, which has led to the development of specific standards and guidance for business respect for human rights in the mining industry.<sup>62</sup> In particular, there is substantial guidance for conducting human rights due diligence in relation to mining operations in high-risk or conflict prone areas.<sup>63</sup> High-risk areas include contexts of “political instability or repression, institutional weakness, insecurity, collapse of civil infrastructure and widespread violence”.<sup>64</sup> In these contexts, human rights due diligence should be enhanced or heightened.<sup>65</sup>
91. Even prior to MYL’s investment in BJV and while there was democratic rule, Myanmar met the definition of a high-risk zone and there was ongoing conflict in the country, including in the state in which the Bawdwin mine is located. The Independent Examiner obtained and reviewed current and historical Country Information Reports on Myanmar published by the Australian Department of Foreign Affairs and

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<sup>62</sup> Examples include: The United Nations’ Principles for Responsible Investment provide investors with guidance tools to promote human rights in the extractive industry: United Nations, ‘The United Nations’ Principles for Responsible Investment’, Principles of Responsible Investment, <https://www.unpri.org/social-issues/human-rights-and-the-extractives-industry/3425.article>; the Australian Human Rights Commission, (2014) *Australian mining and resource sector and human rights*, <https://humanrights.gov.au/our-work/employers/australian-mining-and-resource-sector-and-human-rights>; ICMM, ICMM Mining Principles, above n 44; the Voluntary Principles on Security and Human Rights: ‘Voluntary Principles on Security and Human Rights’ (2000), <https://www.voluntaryprinciples.org>; and Extractive Industries Transparency Initiative: <https://eiti.org>.

<sup>63</sup> For example, OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, above n 33; OECD, *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*, above n 32.

<sup>64</sup> *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, above n 33, p 13.

<sup>65</sup> United Nations General Assembly (UNGA), *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, 13.

Trade (DFAT),<sup>66</sup> reports by the United Nations Special Rapporteur on the situation of human rights in Myanmar,<sup>67</sup> and reports on Myanmar by the Office for the High Commissioner of Human Rights.<sup>68</sup>

91.1. These materials revealed the very active conflict in Shan State in which the Bawdwin mine is located, prior to and throughout the period the enterprise held an interest in the Bawdwin mine. The materials also documented the violation of human rights by various entities including the Burmese military and ethnic armed organisations. For example, publicly available and credible sources documented grave breaches of human rights in Shan State, including rape by military and security officials,<sup>69</sup> killings and disappearances in conflict affected areas with specific reference to Shan State,<sup>70</sup> and the use of torture by the military against people suspected to be associated with armed ethnic groups in Shan State.<sup>71</sup> DFAT reported that “[s]everal credible sources in Myanmar told DFAT that military personnel are able to act with impunity, particularly in conflict-affected areas” and “in conflict-affected parts of the country such as northern Shan State ... there are credible reports that the military has failed to act to protect civilians in conflict zones”.<sup>72</sup>

91.2. These materials referred to the link between the documented conflict and the exploitation of natural resources. DFAT identified that the fighting in Kachin and Shan States “is influenced by the control of natural resources [which] ... are abundant in the region and are controlled by various interests, including the Tatmadaw and its associates, EAOs and militias”.<sup>73</sup> Similarly, the UN High Commissioner for Human Rights reported, “The conflicts in Myanmar have also been driven by economic interests as the military and some ethnic armed groups and militias have been competing for control of land and natural resources”.<sup>74</sup>

91.3. The materials also documented that Myanmar’s legal system was weak and had limited capacity to provide State protection.<sup>75</sup> Even during democratic rule, the Tatmadaw retained significant powers in the parliament (*Hluttaw*) including “the right to invoke extraordinary powers, including the ability to suspend civil liberties and abrogate parliamentary authority”.<sup>76</sup> In 2017, “parts of the country remain[ed] affected by ongoing conflict, and there are some areas where the government does not exercise control”.<sup>77</sup> These ongoing conflicts were occurring in Shan State, in which the Bawdwin mine is located.

92. It would be expected that an Australian enterprise intending to invest in and/or operate a mine would engage in human rights due diligence before and during such investment. Moreover, in the circumstances extant in Myanmar in the years prior to the coup, as referred to above, it would be

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<sup>66</sup> DFAT Country Information Reports are prepared for the sole purpose of protection visa determinations.

<sup>67</sup> UNGA, Human Rights Council Fortieth Session, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, 2 May 2019, A/HRC/40/68.

<sup>68</sup> UNGA Human Rights Council Forty-Third Session, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar: Report of the United Nations High Commissioner for Human Rights*, 11 November 2020, A/HRC/43/18.

<sup>69</sup> 2017 DFAT Myanmar Report, above n 40, p 21.

<sup>70</sup> *Ibid*, p 24.

<sup>71</sup> *Ibid*, p 25.

<sup>72</sup> *Ibid*, p 27.

<sup>73</sup> 2019 DFAT Myanmar Report above n 40, p 19.

<sup>74</sup> Report of the UNHCHR, 11 November 2020, above n 40, 13.

<sup>75</sup> 2017 DFAT Myanmar Report above n 40, 28.

<sup>76</sup> *Ibid*, 7.

<sup>77</sup> 2017 DFAT Myanmar Report above n 40, p 9.



expected that such due diligence would be enhanced or heightened. It would also be expected that a mining company already invested in Myanmar at the time of the coup would undertake human rights due diligence in respect of its decision to divest. An enterprise complying with the OECD Guidelines before and during its investment would have been well placed to build on its pre-existing due diligence and update it with information necessary to assess the potential human rights impacts of divestment.

93. The complaint did not allege a failure by the enterprise to undertake adequate human rights due diligence prior to the decision by the enterprise to invest in the Bawdwin mine. However, as human rights due diligence is an ongoing and iterative process it is relevant to consider whether it had been undertaken at any stage. The Independent Examiner considers it likely that if human rights due diligence had been undertaken before MYL's decision to invest in Myanmar and continued throughout its engagement with BJV, the enterprise would have been better placed to respond in a manner consistent with the OECD Guidelines after the military coup occurred. It is also likely that the enterprise would have had systems in place to readily assess and address the potential human rights risks of divestment, and be in a position to communicate those matters when stakeholders raised the issue with them.
94. The enterprise states that it conducted due diligence including on its partners and officers in the BJV project.<sup>78</sup> 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".<sup>79</sup> While it appears that the enterprise conducted due diligence on its prospective partners in the joint venture prior to acquiring its interest in the BJV, the enterprise does not suggest that such assessments focused upon risks to human rights (ie. human rights due diligence) rather than risks to the enterprise (ie. traditional corporate due diligence). As such, while the enterprise's due diligence included checking whether its proposed partners were presently on a sanctions list, the enterprise does not appear to have inquired into whether the partners' prior conduct or its business relationships posed a potential risk to human rights. The notifier complained that WMM had evolved out of Asia World, a conglomerate that had been sanctioned by the US along with one of its directors, Steven Law, by reason of their association with the former military junta and engagement in illicit activities. These were not matters of which the enterprise appeared to be aware.
95. The Independent Examiner reviewed the website of National Infrastructure Holdings Company Limited (NIHCL), which identified WMM and the Bawdwin Mine as part of its mining services.<sup>80</sup> The NIHCL website stated that two of its founders, U Maung Kyay and U Than Myint, both served as directors of Asia World for 20 years, including from 1994 – 2014.<sup>81</sup> The Independent Examiner also obtained information from the Myanmar Directorate of Investment and Company Administration, which operates Myanmar Companies Online,<sup>82</sup> a service similar to the Australian Securities and Investment Commission's company search facilities. Information was obtained regarding the directors of NIHCL, Asia World Company Limited, and WMM. The information confirmed that U Maung Kyay and U Than Myint were directors of both WMM and NIHCL, and that Steven Law (aka Htun Myint Naing) remains a director of Asia World Company Limited.

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<sup>78</sup> MYL Response, above n 7.

<sup>79</sup> Ibid.

<sup>80</sup> NIHC, Mining: Introducing Win Mynt Mo Company Limited, above n 39; NIHC, Our Management, above n 39.

<sup>81</sup> NIHC, Our Management, above n 39.

<sup>82</sup> DICA, Myanmar Companies Online, above n 39.

96. Relating to the allegation in the complaint that Asia World Corporation and Steven Law were entities and individuals sanctioned for their support for the prior military regime and were involved in drug trafficking, the Independent Examiner obtained materials from the official website of the US Department of the Treasury. These materials confirmed that on or about 25 February 2010, “two key financial operatives of the Burmese regime – Steven Law (Tun Myint Naing) and his father, Lo Hsing Han – as well as Steven Law’s wife, Cecilia Ng, and various companies,” including “the major Burmese conglomerate Asia World Co. Ltd. and its subsidiaries” were designated on the sanctions list.<sup>83</sup> The US Department of Treasury concluded that in addition to supporting the Burmese military government, these individuals and entities were engaged in illicit activities, including heroin trafficking. On 17 May 2016, following free elections in Myanmar, the US Department of Treasury’s Office of Foreign Assets Control amended the Burmese Sanctions Regulations and updated the designated nationals and blocked persons list so as to facilitate trade with Burma.<sup>84</sup> Notably, however, it retained on the sanctions list the six companies that were owned 50 percent or more by Steven Law or Asia World Co Ltd. On 7 October 2016, by Executive Order, the Burma sanctions program was terminated.<sup>85</sup> It is noted that although Asia World and Steven Law had been sanctioned by the US Government, WMM was not among the designated entities.
97. Assessing the human rights risks of divestment would have required an understanding of the human rights record of the entity to which divestment would occur. Without the information referred to above, any assessment of the human rights risks of divesting to WMM would not have been complete. The information provided to the Independent Examiner suggests that instead of undertaking such an assessment, the enterprise relied upon its previous corporate due diligence and the personal relationships it had built with the individual representatives of WMM. While personal knowledge of individuals in an enterprise would inform the process, anecdotal assessment is not a replacement for human rights due diligence. Had the enterprise been aware of the historic connections between WMM, Asia World and Steven Law and their sanctioning for heroin trafficking and links to the former military regime, red flags ought to have been raised as to potential human rights risks of divesting to WMM in the context of a revived military regime.
98. The notifier contended that the enterprise conducted inadequate human rights due diligence in respect of its divestment from the Bawdwin mine project, including by failing to meaningfully engage with stakeholders. In its responses, the enterprise relied very heavily on the ESIA conducted in the period prior to the coup to demonstrate it had acted responsibly. Although the enterprise stated that the ESIA referred to various international standards,<sup>86</sup> it is not evident from the responses of the enterprise that the ESIA included an assessment of potential human rights impacts and no copy was provided. An ESIA would not be adequate to address the human rights implications of a decision to disengage if it did not assess the potential human rights risks associated with MYL disengaging from the BJV and/or an increase in militarisation and/or a return to military rule. The Independent Examiner has not been provided with information to suggest the ESIA included assessment of potential adverse risks to human rights of these matters. Further, even if the ESIA did include a human rights assessment, that assessment would only inform the “identifying” phase of due diligence referred to in paragraph 83.1 above, but would not constitute due diligence if it did not result in the other aspects referred to in 83 above including communication with stakeholders. Specifically, if a human rights impact assessment had been conducted

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<sup>83</sup> US Treasury, Treasury Sanctions Additional Financial Operatives of the Burmese Regime, above n 41.

<sup>84</sup> US Treasury, Treasury Amends Burmese Sanctions Regulations, above n 41.

<sup>85</sup> US Treasury, Treasury Implements Termination of Burma Sanctions Program, above n 41.

<sup>86</sup> See n 127127 below for details of the standards referred.

(even if incomplete), it ought to have been possible for the enterprise to respond to the notifier when they enquired as to what due diligence had been undertaken.

99. The enterprise contends that it formed a Crisis Management Team which did consider the impacts on stakeholders when it took the decision to divest from the BJV following the coup (see 30 – 31 above). A key consideration is whether this constituted human rights due diligence in relation to the decision to divest. In circumstances where the enterprise had no human rights policy, no prior human rights due diligence and no apparent internal resource of human rights expertise, it is to be anticipated that assessing the potential human rights impacts of divestment would likely have required external advice. No information was provided as to what, if any, external human rights expert advice was sought in order for the Crisis Management Team to undertake its assessment. It is therefore unlikely that the deliberations of the Crisis Management Team constituted adequate human rights diligence, particularly in the absence of prior human rights due diligence.

100. On the basis of the above, the Independent Examiner has determined that the enterprise did not undertake adequate human rights due diligence in respect of the potential human rights impacts that may arise in relation to its decision to divest from the BJV mine.

101. It is the responsibility of businesses to respect human rights in line with the expectations of the OECD Guidelines, which includes having adequate policies and processes in place, including in relation to conducting human rights due diligence, to fulfil that responsibility. Many enterprises develop their policies and processes with the assistance of other business organisations and guidance from civil society. The State also plays an essential role. States have a duty to protect human rights from adverse impact by third parties and as part of this duty should provide effective guidance to business enterprises on how to respect human rights throughout their operations, including by undertaking human rights due diligence.<sup>87</sup> The actions that States take in fulfilling this duty can have extraterritorial effect. As noted in the commentary to the UNGPs:<sup>88</sup>

*There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses.*

Various Australian Government departments and agencies are engaged in supporting or facilitating business activities to which the OECD Guidelines apply. Those with roles assisting Australian businesses

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<sup>87</sup> UNGPs, above n 34, 1 and 3(c).

<sup>88</sup> UNGPs, above n 34, discussion in commentary about principle 2.

in their investments and operations overseas include the Australian Trade and Investment Commission (Austrade),<sup>89</sup> DFAT,<sup>90</sup> and Export Finance Australia.<sup>91</sup>

102. The enterprise informed the AusNCP that as part of its decision to divest, it consulted with the Australian Embassy in Yangon. The Australian Embassy in Yangon informed the AusNCP that this consultation was with Austrade. The Independent Examiner does not have information as to whether the enterprise was advised to undertake a human rights assessment of its proposed divestment. The Independent Examiner observes, however, that during the period in which the enterprise invested in Myanmar, Austrade promoted Myanmar as a country with significant business opportunities for Australian companies, specifically including for mining.<sup>92</sup> Importantly, Austrade included on its website on a page headed “Myanmar – Business Risks”, the following:<sup>93</sup>

*Australian companies operating in Myanmar ... should consider implementing the guidance set out in such corporate responsibility frameworks as the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises. The UN Guiding Principles set a global standard for preventing and addressing the risk of adverse human rights impacts linked to business activity. They outline the responsibilities of companies to respect, protect and remedy the human rights of individuals and communities impacted by their operations. The Australian Government strongly supports the Guiding Principles and encourages companies to engage with and implement them.*

While such a statement on the Austrade website is an important signal to Australian enterprises of government expectations, the same webpage refers to due diligence without identifying the need for enterprises to undertake human rights due diligence. Similarly, at least one publication by Austrade and DFAT on the business opportunities of investment in Myanmar in 2017 made no reference to the human

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<sup>89</sup> Since its inception in 1985-86, Austrade has assisted Australian exporters and since 2008, has had responsibility for the promotion and attraction of productive foreign direct investment into Australia: Austrade, 2018-19 Annual Report, pp 4-5. The mission of Austrade in 2017-18 included ‘promoting Australian capabilities, making connections through an extensive global network of contacts, leveraging the ‘badge of government’ offshore, working collaboratively with partner organisations, and providing quality advice and services to exporters, education institutions and investors’: Austrade, (24 October 2018) ‘Annual Report 2017 – 2018,’ Austrade, <https://www.austrade.gov.au/news/publications?dfaction=search&dfdesc=annual%20report>.

<sup>90</sup> DFAT’s role includes ‘working with business to share information on developments in overseas markets that present commercial opportunities and risks’ and ‘supporting ... business to build the resilience of Australia’s supply chains’, and DFAT’s staff at ‘overseas posts build productive relationships and networks ... [that] enable us to advise Australian ... businesses on key political, economic, commercial, regulatory, and strategic developments’: DFAT, ‘Australia’s Economic and Commercial Diplomacy,’ <https://www.dfat.gov.au/trade/for-australian-business/economic-and-commercial-diplomacy> (accessed 28 March 2023).

<sup>91</sup> Export Finance Australia is the Australian Government’s export credit agency, which plays an important role in financing Australian exports and interests, including overseas infrastructure development: [Export Finance Australia, ‘Supporting Australian Business,’ https://www.exportfinance.gov.au/how-we-can-help/](https://www.exportfinance.gov.au/how-we-can-help/).

<sup>92</sup> For example, Austrade (18 April 2017), *Export Markets, Business Risks – Myanmar*, Austrade, archived version available at: [Doing business - Bus...~https://web.archive.org/web/20170330150244/http://www.austrade.gov.au/Australian/Export/Export-markets/Countries/Myanmar/Doing-business/Business-risks](https://web.archive.org/web/20170330150244/http://www.austrade.gov.au/Australian/Export/Export-markets/Countries/Myanmar/Doing-business/Business-risks) (accessed 13 March 2023). In April 2017, Austrade also organised with the Australia-Myanmar Chamber of Commerce a Myanmar mission to highlight mining, oil and gas opportunities: Austrade (28 April 2017), *Myanmar Mission to highlight mining, oil and gas opportunities*, Austrade, archived version available at: <https://web.archive.org/web/20170731041444/https://www.austrade.gov.au/news/latest-from-austrade/2017/myanmar-mission-to-highlight-mining-oil-and-gas-opportunities>.

<sup>93</sup> Ibid, Austrade, *Export Markets, Business Risks – Myanmar*.

rights risks of such investment and the importance of conducting human rights due diligence.<sup>94</sup> These Australian Government promotions also often provided little guidance to Australian enterprises on how to access resources to assist them to implement socially responsible business conduct.<sup>95</sup>

103. In order to successfully promote compliance with the OECD Guidelines, consistency and policy coherence across the whole of government is essential.<sup>96</sup> The Independent Examiner recommends that the AusNCP liaise with Australian Government agencies and departments that assist Australian businesses overseas, including Austrade, with a view to ensuring that Australian Government expectations as to responsible business conduct are adequately reflected in government materials and activities. These include the expectation under the OECD Guidelines that Australian businesses will respect human rights including in their activities abroad, have a human rights policy and conduct adequate human rights due diligence, particularly in the context of high-risk and conflict areas.

## Preventing and mitigating adverse human rights impacts

104. The alleged potential impacts identified by the notifier are detailed in paragraph 137 and 143 below and included, for example, an increase in armed conflict in the region surrounding the Bawdwin mine, harms to local people and communities associated with armed conflict, and financing and legitimisation of the illegal military junta. There was no allegation that the enterprise would have encouraged or instigated the potential adverse impacts. There was no evidence presented to the Independent Examiner that if the impacts were realised, they would have been caused or contributed to by the enterprise's decision to divest, though such a situation is plausible. The Independent Examiner observes, however, that many of the allegations of potential adverse human rights impacts identified by the notifier would only be realised if, after divestment, various steps were taken by other entities. Accordingly, the alleged potential impacts, if realised, may only have been linked to the decision to divest.

105. The Independent Examiner considers the notifier's expectation that the enterprise should present "a barrier to development of the mine"<sup>97</sup> by not divesting was not a reasonable expectation arising under the OECD Guidelines. It is significant in this context that if the enterprise had retained its interest while discontinuing development of the mine as the notifier proposed, it would not necessarily have prevented

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<sup>94</sup> For example, Australian Government publication 'ASEAN Now', (November 2017), available at <https://www.dfat.gov.au/sites/default/files/asean-now-insights-for-australian-business.pdf> (accessed 13 March 2023).

<sup>95</sup> The above-referenced publications, including the 'Export markets, Business Risks – Myanmar' (above n 92) contained no link to resources on the OECD Guidelines or conducting human rights due diligence, despite these publications being aimed at assisting businesses with the most relevant resources. Similarly, an Austrade webpage on *Resources to Myanmar – Trends and Opportunities* contained no such links. An archived version is available at: <https://web.archive.org/web/20170418101137/http://www.austrade.gov.au/Australian/Export/Export-markets/Countries/Myanmar/Industries/resources>. It is noted, however, that towards the lower half of a separate Austrade webpage headed 'Export Markets – Myanmar, Market Profile' (30 March 2017) a discrete box headed 'Business Risks' referred to the OECD Guidelines as voluntary principles and standards for responsible business behaviour of which multinational enterprises 'should be aware' and hyperlinked to the AusNCP's website. An archived copy available at <https://web.archive.org/web/20170330150203/https://www.austrade.gov.au/australian/export/export-markets/countries/myanmar/market-profile>.

<sup>96</sup> OECD Council, *Recommendation on the Role of Government in Promoting Responsible Business Conduct*, OECD/LEGAL/0486; <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0486>. See also *OECD, Declaration on Promoting and Enabling Responsible Business Conduct in the Global Economy*, OECD/LEGAL/0489.

<sup>97</sup> Complaint, above n 1.

development of the mine. The enterprise submitted that the result would have been that the enterprise would have been in default of its obligations and lost its investment.<sup>98</sup> This would have enabled WMM to proceed with development of the mine under its existing product sharing contract if it so chose. Accordingly, it is not clear that the enterprise's decision as to whether or not to divest would have changed the result. Whether or not the enterprise chose to divest, the development of the mine and the risks of potential human rights impacts arising from an operating mine remained. It is also relevant to consider whether the enterprise could have sustained a situation where it remained invested but did not develop the mine. The enterprise is a small entity that had a financial interest in one project. It was not in a position to withstand the financial repercussions of remaining invested but undertaking no steps towards development of the mine. Further, in light of the military coup, continuing to remain involved in the project presented its own human rights risks. Thus, the Independent Examiner does not find that the course proposed by the notifier would have mitigated or avoided the potential human rights impacts the notifiers identified.

106. Although the decision to divest may not have materially affected the likelihood of the mine being developed, the *manner* in which divestment took place and specifically, to whom and on what terms, could have. The Compliance Advisor Ombudsman of the International Finance Corporation and Multilateral Investment Guarantee Agency has identified a number of high-profile cases where exits by investors have resulted in reported social, environmental, and human rights impacts or conflicts that have resulted in harm to people in the project area, and noted that having a pre-exit human rights assessment is a common practice in responsible exit.<sup>99</sup> No assessment of the potential for adverse human rights impacts if the enterprise divested to one entity instead of another appears to have been undertaken by the enterprise. Human rights due diligence in relation to the divestment decision would have assessed these matters in order to identify, prevent and mitigate potential adverse human rights impacts of divesting to one entity instead of another.

107. If the entity to which the enterprise divested subsequently engaged in conduct that caused adverse human rights impacts, those adverse impacts could be directly linked to the enterprise even if they were not caused or contributed to by the enterprise. Where adverse human rights impacts are not contributed to by an enterprise but only directly linked to it by its business relationships, the expectation is that the enterprise will seek ways to prevent or mitigate those adverse impacts.<sup>100</sup> The enterprise may also choose to take a role in remediation.

108. The enterprise 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".<sup>101</sup> While a lack of adverse impact by happenstance may be positive, it does not alleviate an enterprise from the responsibility to have undertaken human rights due diligence. The purpose of such due diligence is to proactively avoid adverse human rights impacts rather than hope for the best.

109. The notifier disputes that there have not been adverse impacts. However, there is insufficient corroborating evidence to substantiate the claim. If any adverse impacts have occurred, there may not be a causal nexus between those impacts and the enterprise's decision to disinvest. On the basis of the

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<sup>98</sup> MYL Response, above n 7.

<sup>99</sup> CAO, Responsible Exit: Discussion and Practice in Development Finance Institutions and Beyond, above n, pp iii, vi and 13.

<sup>100</sup> OECD Guidelines, above n 2, Ch IV Human Rights Chapter, 3.

<sup>101</sup> MYL Response, above n 7.

presently available information, the Independent Examiner declines to make a determination that adverse impacts have occurred and if they have, whether those impacts were caused, contributed to or directly linked to the enterprise's decision to divest or the manner of that divestment.

110. The Independent Examiner notes that despite its divestment, the enterprise may have had and may still have capacity to exercise some leverage over its former partners. In its response, the enterprise stated that "WMM has continued to engage with MYL by seeking advice and guidance from MYL on a range of matters, including the understanding and potential implementation of modern, safe mining practices and methodologies for the benefit of WMM employees and local/regional communities and stakeholders".<sup>102</sup> In its 2021 Annual Report, the enterprise also reported that "MYL will provide two of its professional staff to WMM for 6 months on a full-time consulting basis and has also offered our assistance and advice as required".<sup>103</sup>

111. The Independent Examiner recommends that the enterprise consult with CSOs as to alleged human rights impacts that may have arisen since its divestment and seek to exercise its leverage to encourage the BJV to undertake its own human rights due diligence so as to identify and, if relevant, remediate such impacts. If any adverse human rights impacts are identified as being contributed to or caused by MYL, it should participate in remedying those impacts. Such conduct by MYL would be consistent with the expectations by adherent governments under the OECD Guidelines, including as set out in Chapter II paragraph 13, which states that enterprises should "encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of responsible business conduct compatible with the Guidelines". Although WMM and BJV are no longer partners of MYL, the continuing relationship as noted by the enterprise gives rise to a similar expectation and provides the opportunity to encourage these entities to engage in responsible business conduct.

## Disclosure and engagement

112. The notifier alleged that the enterprise had not met the disclosure and stakeholder engagement expectations set out in the OECD Guidelines. In particular the notifier alleged in the complaint and materials attached to it, that the enterprise had not disclosed:

- 112.1. alleged links between the enterprise and Asia World
- 112.2. risks associated with the Bawdwin mine being in a conflict zone
- 112.3. information about undertaking and/or communicating about its human rights due diligence
- 112.4. the business relationship between an entity undertaking the ESIA and the enterprise
- 112.5. the enterprise's planned divestment prior to it taking place

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<sup>102</sup> MYL Response, above n 7.

<sup>103</sup> MYL (2021) Annual Report for the Year Ended 30 June 2021, above n 50; MYL, Investor Presentation at Annual General Meeting, *Unlocking the value from one of Asia's best under-developed multi-commodity assets Investor Presentation*, 23 October 2017; MYL, *Unlocking the value of one of Asia's best under-developed multi-commodity assets: Investor Presentation, Updated*, January 2018; MYL, *Mines and Money Presentation Hong Kong, 'Awakening the Tiger'*, 5 April 2018.

112.6. agreements between WMM and ME1 in relation to the Bawdwin mine.

The relevant disclosures include but are not limited to those made in relation to the decision to divest.

113. The notifier’s complaint about disclosure and engagement with stakeholders overlaps with, but also raises distinct issues to, those discussed above regarding human rights due diligence. The overlap with due diligence is brought about by the nature of the conduct that is expected of enterprises undertaking human rights due diligence. The OECD Guidelines state that adhering governments expect that as part of the due diligence process enterprises will “account for” how actual and potential adverse human rights impacts will be addressed.<sup>104</sup> Similarly, paragraph 45 of the Commentary to the Human Rights Chapter of the OECD Guidelines expresses that, “The process [of human rights due diligence] entails ... tracking responses as well as communicating how impacts are addressed”. OECD guidance for the extractive sector specifically emphasises the importance of meaningful stakeholder engagement as a critical part of human rights due diligence.<sup>105</sup> That guidance reflects paragraph 14 of Chapter II of the OECD Guidelines, which stipulates that enterprises should “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”.

114. Separately and additionally to the communication and engagement expectations embedded in human rights due diligence, Chapter III of the OECD Guidelines sets out the expectations on enterprises as to disclosure. Of particular relevance to the complaint, paragraphs 1 and 3 of Chapter III emphasise the expectation to disclose matters regarding activities, structure, ownership and governance, as well as the enterprise’s risk management and relationships.

115. MYL denied any connection with Asia World. However, as referred to above (at [95]), the Independent Examiner found that there was material substantiating the allegation that the corporate structure of BJV was linked with Asia World. WMM, one of MYL’s partners in the BJV, was led by directors with strong connections to Asia World. Two of the directors of WMM had been directors of Asia World for over 20 years, including during a period in which Asia World had been subject to US sanctions for supporting the Burmese military regime and engaging in illicit activities, including heroin trafficking. MYL’s continued denial of that connection is not consistent with the expectations imposed by the OECD Guidelines. Further, as discussed above, the sanctioning of Asia World, its subsidiaries and officers for links with heroin trafficking and a close relationship with the former military regime are matters which would reasonably be expected to be the subject of human rights due diligence.

116. As regards disclosure of conflict in Shan State, in which the mine is located, the enterprise stated that it had made numerous disclosures including narrative on this subject to the ASX over time. The enterprise did not provide the AusNCP with any specific references or copies of such disclosure. The AusNCP undertook a review of all ASX disclosures made by the enterprise in the period from 2017 to the date of the coup on 1 February 2021, for mention of ongoing conflict in Shan State, presence of the military near the mine, risk of military coup, bribery/corruption risks or risks to human rights. The result of the search was that it found very few documents detailing these issues and none that addressed all of these matters. The 17 November 2017 prospectus contained a generic reference to risks associated with operating in a foreign country including “economic, social or political instability or change” and a generic

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<sup>104</sup> OECD Guidelines, above n 2, Ch II General Policies Chapter, 10.

<sup>105</sup> *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*, above n 32.



force majeure risk including civil disorder.<sup>106</sup> The document contained no reference to the presence of the military in Bawdwin or the historic and ongoing fighting in Shan State in which the mine is located. Multiple investor presentations also contained no reference to these matters.<sup>107</sup>

117. On 5 June 2018, an equity raising investor presentation for the first time referred to specific risks associated with Myanmar’s continuing violence and conflict, deep within the document under the sub-heading, “Sovereign Risks”. It stated:

*Myanmar is continuing to experience civil unrest, politically motivated violence and conflict between ethnic groups and military forces. Such political instability and ongoing religious conflicts can fundamentally impact foreign business operations in Myanmar. Although the unrest and conflict are not presently located within the area of the Company’s operations, the possibility of continued or an increase in civil and political unrest remains a constant threat which may affect the viability and profitability of the Company.*<sup>108</sup>

118. Those risks were repeated in a revised prospectus issued on 14 June 2018.<sup>109</sup> There was also reference to Myanmar having experienced unrest between ethnic groups and military forces, including in Shan State, on page 33 of an ASX announcement on probable reserves on 6 May 2019.<sup>110</sup> However, other presentations and disclosures did not aver to these risks,<sup>111</sup> and even stated that “sovereign risk aspects in Myanmar [are] well-managed”.<sup>112</sup>

119. Similarly, three disclosures in July to October 2019 made oblique reference to conflict in Shan State by way of referring to peace process negotiations between the military and armed groups.<sup>113</sup> However, in the latter two disclosures, the enterprise also stated, “No problems in relation to security exists at or have ever been encountered at either Bawdwin or Namtu”. These assurances are contradicted by information subsequently reported in the scoping report published in 2020, which stated that such conflict had taken place in Namtu in December 2017.<sup>114</sup>

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<sup>106</sup> MYL, *Prospectus*, 17 November 2017, [https://asx.api.markitdigital.com/asx-research/1.0/file/2995-01923022-3A482675?access\\_token=a](https://asx.api.markitdigital.com/asx-research/1.0/file/2995-01923022-3A482675?access_token=a) (accessed 10 March 2023). A similar generic description of risk was contained in a Notice of General Meeting/Proxy Form dated 4 May 2018, [https://asx.api.markitdigital.com/asx-research/1.0/file/2995-01978836-3A492855?access\\_token=a](https://asx.api.markitdigital.com/asx-research/1.0/file/2995-01978836-3A492855?access_token=a) (accessed 4 April 2023).

<sup>107</sup> MYL, *Chairman’s AGM Presentation*, above n 105; MYL, *Unlocking the value of one of Asia’s best under-developed multi-commodity assets: Investor Presentation, Updated*, January 2018; MYL, *Mines and Money Presentation Hong Kong, “Awakening the Tiger”*, 5 April 2018.

<sup>108</sup> MYL, *Equity Raising Investor Presentation*, 5 June 2018 at page 32.

<sup>109</sup> MYL, *Prospectus*, 14 June 2018, [https://asx.api.markitdigital.com/asx-research/1.0/file/2995-01990390-3A495011?access\\_token=a](https://asx.api.markitdigital.com/asx-research/1.0/file/2995-01990390-3A495011?access_token=a) (accessed 14 March 2023).

<sup>110</sup> MYL, *Outstanding Bawdwin PFS Results and Maiden Reserve Declared*, 6 May 2019, [https://asx.api.markitdigital.com/asx-research/1.0/file/2995-02102906-6A929761?access\\_token=a](https://asx.api.markitdigital.com/asx-research/1.0/file/2995-02102906-6A929761?access_token=a) (accessed 4 April 2023).

<sup>111</sup> MYL, *Investor Presentation – July 2018*; MYL, *Annual General Meeting, Chairman’s Address*, 21 November 2018; MYL, *Mines and Money London – November 2018*.

<sup>112</sup> MYL, *Investor Presentation – October 2018*

<sup>113</sup> MYL, *June 2019 Quarterly Activities Report*, 19 July 2019, 9; MYL, *Bawdwin Project Update*, 2 August 2019, 3-4; MYL, *September 2019 Quarterly Activities Report*, 29 October 2019, 6.

<sup>114</sup> Scoping Report, above n 4, p 14. It is not known what, if any, inquiries MYL made to seek to inform itself of these issues prior to making positive statements that ‘No problems in relation to security exists at or have ever been encountered at either Bawdwin or Namtu’ prior to the release of the Scoping Report. It is noteworthy that one of the key outcomes of human rights due diligence – had it been undertaken - would have been an awareness of the existing human rights vulnerabilities in the area in which the BJV was to operate.

*[G]roups predominately fight for autonomy, resources and territory. Despite the NCA [Nationwide Ceasefire Agreement initiated in 2015], the groups continue to instigate skirmishes between each other and Myanmar Government forces. In December 2017, the SSA [Shan State Army] and TNLA [Ta'and National Liberation Army] **clashed in Namtu Township (Mine Yin Village Tract)**...*

***Members of both the TNLA and the SSA live in the villages surrounding Bawdwin. Infantry Battalion No. 66 of the Myanmar Government military is also deployed near Bawdwin and Namtu.***

*(emph added)*

The facts that there had been fighting in the Namtu township in 2017, that members of armed groups lived in the villages surrounding Bawdwin, that a military battalion was deployed near Bawdwin, and that armed conflict is often associated with fighting for resources, had not previously been disclosed by MYL in its ASX disclosures or investor presentations. To the contrary, the 2019 disclosures appear to have been intended to assure investors that any fighting and risks of conflict were distant from the mine.

120. The active conflict in Shan State in the period before the coup, including specifically in the towns closest to the mine, and the military presence near the mine, would likely be considered “material” issues for the purposes of the OECD Guidelines.<sup>115</sup> This is particularly so given the history of military rule in Myanmar and human rights abuses by the military. Not only could conflict lead to disruption of the Bawdwin mine project, it could also result in grave human rights abuses. There is also the risk that human rights abuses could potentially be linked to the enterprise, giving rise to potential costs of remediation, and presenting reputational and financial risks for the enterprise and ultimately, financial risks for its shareholders. Except as noted above, most of the enterprise’s disclosures were largely silent as to these risks and instead highlighted the potential boon to be gained by investing in Myanmar. It was not until after the coup that the enterprise’s disclosures contained more consistent mention of the occurrence and risks of conflict.<sup>116</sup>

121. On the basis of the reviewed documentation, the Independent Examiner considers that the disclosures prior to the coup in relation to ongoing and potential conflict, and the risks associated with such conflict including to human rights, in Shan State and specifically near the Bawdwin mine did not meet the disclosure requirements of the OECD Guidelines Chapter III.

122. The lack of human rights due diligence undertaken by MYL resulted in it also not being able to comply with the OECD Guidelines in respect of the expectations to meaningfully engage with stakeholders, account for how it would address adverse impacts that might arise and to disclose its risk management procedures. The failure to have undertaken due diligence at an early stage likely hampered the ability of the enterprise to be in a position to communicate with stakeholders at the time that it was considering divesting from the BJV. The enterprise stated that it was unrealistic for MYL to “individually consult” with each stakeholder group and project affected person or to “consult directly” with the stakeholder groups PWYP asserts it should have. That response deliberately obfuscates the expectation that enterprises should seek to engage meaningfully with stakeholders. In the context of a military coup, it would be

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<sup>115</sup> OECD Guidelines, above n 2, Commentary on Chapter III Disclosure, 30: ‘Material information can be defined as information whose omission or misstatement could influence the economic decisions taken by users of information’.

<sup>116</sup> See for example, MYL, *Corporate Update*, 24 February 2021; MYL, *Bawdwin Technical Update – Mining Optimisation*, 20 April 2021, Appendix A; MYL, *March 2021 Quarterly Activities Report*, 30 April 2021; MYL, *June 2021 Quarterly Activities Report*, 21 July 2021,; [https://malleeresources.com.au/investors/asx-announcements/?\\_year=2021&\\_page=1](https://malleeresources.com.au/investors/asx-announcements/?_year=2021&_page=1) (accessed 4 April 2023).

reasonable for an enterprise to seek to consult with the international and national organisations to which local stakeholders were known to be linked. It is not uncommon for local level stakeholders to be in communication with national and international civil society organisations due to existing networks and the ubiquity of mobile telephone and internet services. The enterprise had previously identified during its ESIA that Oxfam and PWYP were among those international organisations. The enterprise was also contacted by international civil society organisations but did not engage with them. The Independent Examiner is not persuaded that during the events that led to the enterprise deciding to divest there was not any means by which it could have engaged with any civil society representatives to seek to better understand the potential effects of its proposed divestment and to communicate its intentions. It is likely that such communications could have enabled the enterprise to speak directly to local stakeholders through video or phone conference. It is noted, for example, that the Independent Examiner was able to have a video conference with local stakeholders, facilitated by the notifier. The enterprise made no reference to seeking the assistance or input of any civil society representatives at the time the decision to disinvest was made. Similarly, although the enterprise made reference to the use of “independent experts to provide guidance in dealing with local/regional community groups and wider stakeholders in Myanmar”, this appears to have been limited to the conduct of the ESIA. There is no evidence to suggest that advice was sought from independent experts as to the impacts of divestment on local communities and stakeholders before the decision was made.

123. MYL’s response to the complaint relied heavily on the ESIA process that had commenced in about 2020.<sup>117</sup> In representations made to the AusNCP, the enterprise stated that the entities that conducted the ESIA, Valentis and Coffey, were “independent environmental consultants ... engaged by BJV to conduct independent community consultation to support the preparation of a detailed ESIA on behalf of BJV”. It asserted that the ESIA process was designed to be carried out in an open and transparent manner by the BJV.<sup>118</sup> The enterprise’s statements to the AusNCP that Valentis was an independent consultant did not fully reflect the business connections between MYL and the Valentis group. The Independent Examiner reviewed ASX disclosures published by the enterprise from 2019 regarding a proposed acquisition by MYL of a Valentis subsidiary. Those documents identify a proposal to acquire a controlling interest in a subsidiary of Valentis prior to the commencement of the ESIA, in return for which MYL would acquire from Valentis service contracts worth at least US\$500,000.<sup>119</sup> The disclosures also state that Valentis was MYL’s key geological, drilling and logistics consultant at Bawdwin. These existing and proposed relationships between MYL and the Valentis group, the realisation of which depended upon MYL’s continuing involvement in Myanmar, created an interest by Valentis in the continued development of the Bawdwin mine. The Valentis group’s interest in the continued development of the mine created an actual and/or perceived conflict with its ability to independently assess the mine project. In the

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<sup>117</sup> For example, the enterprise relied on the ESIA consultation with civil society groups when responding to the alleged failure to consult with civil society in its divestment. It also asserted that the approach to the ESIA community consultation and the guidelines adopted in it were relevant to demonstrating MYL’s regard for human rights: MYL Response, above n 7.

<sup>118</sup> Ibid.

<sup>119</sup> In 2019, MYL had commenced a process of obtaining a controlling interest in a subsidiary of the Valentis group. The investment structure involved a commitment by MYL to spend a minimum of US\$500,000 on exploration expenditure, 75% of which would be spent on services provided by the Valentis group. Valentis was said to be ‘MYL’s key geological, drilling and logistics consultant at Bawdwin and is the current majority shareholder of [the entity MYL was seeking to acquire a controlling interest in]’: MYL, ASX Announcement: *Strategic Option Secured Over Gold Exploration Projects* 7 November 2019, p 9, [https://asx.api.markitdigital.com/asx-research/1.0/file/2924-02170123-6A954029?access\\_token=a](https://asx.api.markitdigital.com/asx-research/1.0/file/2924-02170123-6A954029?access_token=a). See also MYL, (2021), Annual Report for the Year Ended 30 June 2021, above n 50, p 7. available at <https://www.asx.com.au/asxpdf/20210923/pdf/450tg6n5vq3tsy.pdf>.

circumstances, the Independent Examiner considers the representations by the enterprise that the ESIA was undertaken by independent consultants did not accurately reflect the interest that Valentis had in the development of the mine. A 326-page scoping report prepared by Coffey-Valentis for the Bawdwin Project, described by the enterprise as an important document in an ASX announcement,<sup>120</sup> was sent by BJV to the Ministry of Natural Resources and Environmental Conservation of Myanmar on 30 June 2020, but made no mention of Valentis' interest.<sup>121</sup> Omissions in ASX announcements of the relationship between Valentis and MYL and the failure to clarify the relationship when engaging with the AusNCP constitute conduct contrary to the OECD Guidelines.

124. As regards the allegation that the enterprise did not adequately disclose its planned divestment to local stakeholders, the enterprise stated:<sup>122</sup>

*Whilst recognising that the OECD Guidelines provide noble intent with respect to public disclosure, including disclosure on material matters and activities to community/stakeholder groups, MYL's directors['] key responsibility is to make public disclosure in compliance with its Australian regulatory obligations, including provision for complete and continuous disclosure on material decisions and actions undertaken by the Company.*

The Independent Examiner considers the enterprise's response constructs a false dichotomy between disclosure obligations under Australian law and the OECD Guidelines. The OECD Guidelines in no way suggest that disclosure to local stakeholders should come at the expense of, or prior to, disclosure to the market. Accordingly, compliance with the OECD Guidelines is unlikely to have conflicted with disclosure obligations imposed by the ASX and the Corporations Act. At the same time, it may not be sufficient to rely only on compliance with disclosure obligations under Australian law in order to comply with the OECD Guidelines.

125. Under the OECD Guidelines:<sup>123</sup>

*Enterprises are encouraged to provide easy and economical access to published information and to consider making use of information technologies to meet this goal. Information that is made available to users in home markets should also be available to all interested users. Enterprises may take special steps to make information available to communities that do not have access to printed media (for example, poorer communities that are directly affected by the enterprise's activities).*

None of the ASX disclosure statements made by the enterprise following the coup and which informed the market of the enterprise's divestment plans were translated into Burmese. In circumstances where local stakeholders may not read or write English, and/or have knowledge of the availability of these materials, the ASX disclosures could not be considered sufficient for informing local stakeholders. The enterprise also did not take steps to communicate with civil society organisations with partners or networks in Myanmar so as to discuss information beyond the ASX disclosures, such as what effect, if any, the enterprise anticipated the divestment would have for local stakeholders and why that was the case.

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<sup>120</sup> MYL, ASX Announcement: *Bawdwin Project Update* (15 September 2020), [https://asx.api.markitdigital.com/asx-research/1.0/file/2924-02280949-6A995889?access\\_token=a](https://asx.api.markitdigital.com/asx-research/1.0/file/2924-02280949-6A995889?access_token=a).

<sup>121</sup> Scoping Report, above n 4.

<sup>122</sup> MYL Response, above n 7.

<sup>123</sup> OECD Guidelines, above n 2, Commentary on Chapter III Disclosure, 35.

126. The notifier submitted that the enterprise ought to have disclosed agreements between WMM and ME1 in relation to the Bawdwin mine, including the proposed Production Sharing Agreement or any draft terms. In relation to the finalised agreement that had been entered into by WMM and ME1 in 2009, prior to the coup, Myanmar was an implementing country of the Extractive Industries Transparency Initiative (EITI), which has promoted contract transparency since at least 2013. Since 2019, the EITI Standard requires implementing countries to disclose all contracts and licenses that are granted or amended from 1 January 2021. As an EITI implementing country, Myanmar was not required to disclose the 2009 agreement between WMM and ME1. This does not mean that the enterprise could not be expected to encourage its project partner and ME1 to publicise the agreement consistent with the OECD Guidelines. Contrary to the submissions of the enterprise, it is not unreasonable to assert that MYL could seek to influence either of WMM or ME1,<sup>124</sup> and indeed the OECD Guidelines expect that in appropriate circumstances enterprises exercise their influence or leverage to achieve an outcome consistent with the Guidelines.<sup>125</sup> It is noted, however, that the OECD Guidelines do not expressly impose this expectation in the context of disclosure.

127. In relation to the draft agreement with ME1 being negotiated by BJV to replace the 2009 agreement, the enterprise noted that prior to the military coup, it had secured agreement for the final agreement to be publicly disclosed once signed.<sup>126</sup> However, as at the date of the military coup, the agreement was yet to be agreed and had not been reviewed and endorsed by relevant government bodies. In circumstances where the agreement was still at a relatively early stage and has no binding effect, particularly in the circumstances of a change in regime, the Independent Examiner does not consider the OECD Guidelines imposed on the enterprise an expectation of disclosure in respect of the draft terms.

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<sup>124</sup> MYL Response, above n 7.

<sup>125</sup> See for example, OECD Guidelines, above n 2, Commentary on Chapter II General Policies, 19-20.

<sup>126</sup> MYL Response, above n 7.

# Conclusions and recommendations

## Determination

128. In all the circumstances discussed above, the Independent Examiner finds:

- 128.1. It is likely that the enterprise intended to operate responsibly in Myanmar, but its ability to do so was compromised by not having a human rights policy or undertaking enhanced due diligence prior to and during its investment in Myanmar. The enterprise had no human rights policy and continues to have no policy compliant with the OECD Guidelines and the UNGPs. The enterprise ought to have conducted enhanced human rights due diligence prior to and during its investment in Myanmar, in circumstances where it proposed operating a mine in Myanmar, a country that is high-risk and conflict prone, particularly in Shan State where the mine is located, the well-documented grave human rights abuses that were occurring in the area including as a result of fighting over natural resources, and the gravity of human rights abuses that could be caused, contributed to or directly linked to the BJV mine. By not having a human rights policy and failing to conduct adequate human rights due diligence, the enterprise was not compliant with the OECD Guidelines.
- 128.2. The notifier's complaint is valid that the enterprise did not conduct any adequate human rights due diligence in respect of its divestment from the BJV in Myanmar. While the enterprise referred to conducting an ESIA that made reference to international standards, there is no evidence that it would have amounted to a robust examination of human rights risks. In any event, an impact assessment would not in and of itself constitute adequate human rights due diligence. The Independent Examiner finds that the enterprise did not assess the human rights impacts of MYL's divestment from the BJV to WMM.
- 128.3. The enterprise was not assisted in knowing and fulfilling the expectations of the Australian Government under the OECD Guidelines by the lack of sufficient reference and guidance in Australian Government publications and promotional activities, including those of Austrade.
- 128.4. The enterprise had not conducted human rights due diligence and had not sufficiently informed itself of the potential adverse impacts that could arise from the fact or manner of its divestment. In those circumstances, the enterprise did not seek to prevent or mitigate potential adverse human rights impacts that it may have caused, contributed to or be directly linked to as a result of the sale of its interest in the BJV.
- 128.5. There is insufficient evidence before the AusNCP to establish that there have been adverse human rights impacts as a result of the enterprise's divestment from the BJV. The Independent Examiner notes that the enterprise retained a connection with its former BJV partners through which it could encourage its former partners to undertake human rights due diligence and address any adverse impacts that may have occurred.
- 128.6. The Independent Examiner finds the notifier's complaint is upheld as regards the failure of the enterprise to meaningfully engage with stakeholders in advance of and in the process of its divestment. In particular, the enterprise did not seek to engage with local stakeholders whether through civil society organisations or otherwise. ASX disclosures in English could not be

considered sufficient for informing local stakeholders for whom such disclosures would be inaccessible.

- 128.7. The Independent Examiner also finds that disclosures by the enterprise were not compliant with the OECD Guidelines in that they failed to disclose material information.
  - 128.8. The Independent Examiner does not find that the enterprise failed to comply with the OECD Guidelines by not disclosing copies of agreements between WMM and ME1 in relation to the Bawdwin mine. However, encouraging WMM to disclose any finalised agreements with the Myanmar government would be conduct consistent with the OECD Guidelines.
129. As a result of the above, the Independent Examiner finds that the enterprise's actions were not compliant with the OECD Guidelines in that MYL did not undertake human rights due diligence and engage meaningfully with stakeholders in respect of its divestment from the BJV in Myanmar, which conduct would be expected under the OECD Guidelines. The enterprise's disclosures in respect of activities, structure, ownership and governance, as well as the enterprise's risk management and relationships also did not meet the expectations of the OECD Guidelines.

## Recommendations

130. The Independent Examiner recommends that:
- 130.1. The enterprise develop and implement a human rights policy consistent with the OECD Guidelines and the UNGPs. The policy should include a commitment to undertaking adequate human rights due diligence in existing and future mining projects. Implementation of the policy should include training for the enterprise's senior and operational personnel about human rights due diligence in the context of mining, including stakeholder engagement.
  - 130.2. The enterprise consult with civil society organisations as to alleged human rights impacts that may have arisen since its divestment.
  - 130.3. The enterprise use any leverage or influence it retains in respect of its former partners to encourage them to:
    - 130.3.1. undertake human rights due diligence and address and remediate any adverse impacts that may have occurred; and
    - 130.3.2. allow a copy of finalised contracts between WMM and ME1 to be shared with the notifier, MATA and the Bawdwin Labour Union.
131. To ensure consistency and policy coherence across the whole of government, the Independent Examiner recommends that the AusNCP liaise with government agencies and departments that assist Australian enterprises overseas, including Austrade, with a view to ensuring that the expectation of the Australian Government as to responsible business conduct is adequately reflected in Austrade materials and activities. Such efforts should seek to ensure that government departments and agencies consistently set out expectations and provide guidance on enterprises having human rights policies and conducting human rights due diligence, particularly in the context of high-risk and conflict areas.
132. The AusNCP will follow up on these recommendations in 12 months.

# Annexes

## Annex A: Schedule of events

Submission	Date
<ul style="list-style-type: none"><li>Complaint submitted to the AusNCP by Publish What You Pay Australia (PWYP, the notifier) on behalf of the Myanmar Alliance for Transparency and Accountability (MATA) and the Bawdwin Labour Union (BLU) against Myanmar Metals Limited (now Mallee Resources Limited, the enterprise)</li></ul>	14 September 2021
<ul style="list-style-type: none"><li>AusNCP acknowledged complaint received and sought further information from the notifier</li></ul>	14 September 2021
<ul style="list-style-type: none"><li>Enterprise and the AusNCP Governance and Advisory Board (AusNCP Board) provided with a copy of the complaint</li></ul>	15 September 2021
<ul style="list-style-type: none"><li>OECD notified of the complaint</li></ul>	16 September 2021
<ul style="list-style-type: none"><li>Enterprise raised concerns with AusNCP Secretariat about a potential conflict of interest for the Independent Examiner allocated to the complaint</li></ul>	22 September 2021
<ul style="list-style-type: none"><li>AusNCP Board convened to discuss potential conflict of interest</li></ul>	22 October 2021
<ul style="list-style-type: none"><li>AusNCP Secretariat conducted a procurement process and conflicts checks to appoint an alternate Independent Examiner to the complaint</li></ul>	2 November – 9 December 2021
<ul style="list-style-type: none"><li>Independent Examiner Shanta Martin appointed and allocated to the complaint</li></ul>	10 December 2021
Initial Assessment	
<ul style="list-style-type: none"><li>Independent Examiner invited the notifier to provide a submission to inform the initial assessment by 4 February 2022</li></ul>	22 December 2021
<ul style="list-style-type: none"><li>Independent Examiner invited the enterprise to provide a formal response to the complaint to inform the initial assessment by 4 February 2022</li></ul>	22 December 2021
<ul style="list-style-type: none"><li>Enterprise raised concerns with the AusNCP Secretariat regarding allocation of the complaint to Independent Examiner and AusNCP's complaint process</li></ul>	22 December 2021
<ul style="list-style-type: none"><li>AusNCP Senior Executive Officer spoke with the enterprise by phone to clarify processes for Independent Examiner allocation and complaint handling</li></ul>	20 January 2022



- Enterprise requested an extension of time to submit its formal response to the complaint until 18 February 2022. 20 January 2022
- Independent Examiner spoke with the enterprise by videoconference to clarify complaint process 21 January 2022
- Independent Examiner granted an extension to both parties to provide submissions by 18 February 31 January 2022
- AusNCP received submission from the enterprise 17 February 2022
- AusNCP received submission from the notifier 18 February 2022
- Independent Examiner spoke with the notifier to clarify the identities and interests of the parties 7 March 2022
- Notifier provided the AusNCP with further information regarding the identities and interests of the parties 11 March 2022 and 28 March 2022
- Independent Examiner engaged with the enterprise on confidentiality undertakings, and which aspects of the enterprise's submission could be shared with the notifier and referred to in the initial assessment 22 March - 10 May 2022
- AusNCP Secretariat undertook procurement and conflicts checks to contract a Burmese-English interpreter 19 April – 29 April 2022
- Independent Examiner received confirmation that PWYP's representative agreed to the confidentiality undertakings required prior to receiving a copy of the enterprise's submission to the AusNCP 29 April 2022
- Independent Examiner provided PWYP's representative a copy of the enterprise's submission to the AusNCP 10 May 2022
- Independent Examiner met with the notifier via videoconference to clarify the identity and interests of the parties (with Burmese-English interpreter) 13 May 2022
- PWYP advised the AusNCP that MATA and BLU would also be formal notifier for the complaint 17 May 2022
- MATA provided written confirmation of individuals authorised to represent the network 27 May 2022
- Draft initial assessment provided to AusNCP Board for comment by 15 June 31 May 2022

- AusNCP Secretariat undertook procurement and conflicts checks to contract Burmese-English translators to translate of documents that informed the initial assessment 8 June - 21 June 2022
- Draft initial assessment provided to parties for comment by 19 July 28 June 2022
- Embargoed initial assessment sent to AusNCP Board and parties 18 August 2022
- Initial assessment published on [www.ausncp.gov.au](http://www.ausncp.gov.au) and reported to the OECD 29 August 2022
- Independent Examiner received confirmation, via PWYP, that MATA and BLU representatives had agreed to the confidentiality undertakings required prior to receiving a copy of the enterprise's submission to the AusNCP 26 September 2022
- Independent Examiner provided a copy of the enterprise's submission to the AusNCP to MATA and BLU representatives, via PWYP 26 September 2022

## Good Offices

- Enterprise indicated they would decline mediation under the AusNCP offer of good offices 9 September 2022
- Independent Examiner engaged with the enterprise regarding methods other than mediation under the good offices of the AusNCP and setting out the process if good offices is not accepted 17 September 2022
- Notifier indicated they accepted AusNCP offer of good offices 19 September 2022
- Independent Examiner spoke with the enterprise by videoconference to clarify what a good offices process would entail. Enterprise undertook to consider the AusNCP's offer further 20 September 2022
- Enterprise confirmed that after further consideration, it would decline the AusNCP's offer of good offices 21 September 2022
- Independent Examiner drafted a letter to the notifier advising of enterprise decision to decline good offices and inviting notifier to respond to points made by the enterprise during the initial assessment 6 October 2022
- AusNCP Secretariat commissioned a Burmese translation of the Independent Examiners letter to the notifier 11 October 2022
- Independent Examiner sent a letter to the notifier, in English and Burmese, advising of enterprise decision to decline good offices and inviting notifier to respond to points made by the enterprise during the initial assessment 26 October 2022

- Independent Examiner formally acknowledged enterprise’s decision to decline good offices 28 October 2022

## Final Statement

- AusNCP Secretariat made a request of PWYP to provide copies of specific documents referenced in the original complaint to inform the Independent Examiner’s examination 12 January 2023
- Notifier provided a response to AusNCP’s 12 January request 16 January 2023
- AusNCP Secretariat requested the notifier provide a response to the points made by the enterprise during the initial assessment 17 January 2023
- AusNCP Secretariat requested the enterprise provide specific documents referenced in their submission during the initial assessment 18 January 2023
- Enterprise provided a response to AusNCP’s 18 January request for documents 6 February 2023
- Notifier provided a response to AusNCP’s 17 January request 6 February 2023
- Parties provided an opportunity to respond to each other’s further responses (none received) 8 February 2023
- Draft final statement provided to the AusNCP Board for comment by 28 April 5 April 2023
- Draft final statement provided to the parties for comment by 26 June 2 June 2023
- Parties' comments received by the AusNCP 15 June 2023
- Embargoed final statement sent to the AusNCP Board and parties 24 July 2023
- Final statement published on [www.ausncp.gov.au](http://www.ausncp.gov.au) and reported to the OECD. 2 August 2023

## Annex B: Details of the complaint

133. On 14 September 2021, PWYP submitted a complaint to the AusNCP on behalf of 245 civil society organisations against Myanmar Metals Limited, now known as Mallee Resources Limited (MYL, or the enterprise).
134. The notifier alleged that the enterprise had failed to act in accordance with the principles and standards in the OECD Guidelines in its proposed divestment from the Bawdwin mine. Specifically, they alleged that the enterprise had failed to:
- 134.1. conduct appropriate risk-based human rights due diligence in relation to the divestment;
  - 134.2. seek to prevent or mitigate adverse human rights impacts that may arise after the sale of its interest in the BJV; and
  - 134.3. be transparent in relation to its decision to disengage from the BJV.
135. PWYP stated that while they appreciated the logistical challenges associated with doing due diligence on the enterprise's divestment from the Bawdwin mine, "these challenges do not release MYL from its responsibility to do so, in accordance with the OECD Guidelines". PWYP alleged that if the enterprise had conducted human rights due diligence on the transaction, 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".
136. The complaint alleged that the enterprise had not engaged with any of the notifying 245 civil society organisations in relation to the proposed sale, despite several of them having previously communicated with the enterprise. The complaint alleged many of these civil society organisations engage with communities close to the mine and are relevant stakeholders. PWYP also alleged that it had tried and failed to engage with the enterprise in relation to its divestment. The complaint raised that the enterprise had failed to provide meaningful opportunities for stakeholders' views to be taken into consideration in relation to the divestment decision. It also stated that the enterprise should "disclose information about any agreements between WMM and ME1 in relation to the Bawdwin mine, including the proposed Production Sharing Agreement or any draft terms".
137. As regards the alleged adverse human rights impacts from divestment, the complaint identified:
- 137.1. "The risk that the mine, if developed under the current regime in Myanmar, could generate revenue for the military junta, thereby contributing to ongoing and severe human rights violations in the country."
  - 137.2. "[P]otential impacts include an increase in armed conflict in the region surrounding the Bawdwin mine, harms to local people and communities associated with armed conflict, and financing and legitimisation of the illegal military junta."
  - 137.3. "[P]otential negative impacts of the proposed sale to WMM. WMM does not have a track record of responsible business nor a public human rights policy. It is highly unlikely that WMM would follow the OECD Guidelines." The complaint identified a number of allegations against WMM as being "a company formerly with ties to the illegal drug trade and to the previous military

regime in Myanmar”. It noted that sanctions had previously been in place against a related business entity of WMM, Asia World Co Ltd, when WMM took control of the Bawdwin mine in 2010.

137.4. It was alleged that WMM did not have the personnel to responsibly manage the mine. The complaint alleged that this meant that WMM would either manage the project in an irresponsible manner that would impact the rights of workers and local residents, or transfer management to a third party, which would likely not be a responsible business if it took up management during the military regime’s control.

137.5. The complaint also identified concerns of forced displacement of local communities, particularly under WMM. The complaint stated there were “real concerns that local residents will not have the opportunity to give their consent in relation to resettlement and that communities will be forcibly removed if or when the development of the mine proceeds.”

138. The complaint proposed that to mitigate or prevent the above-referenced potential impacts of divestment to WMM:

138.1. “MYL should withhold from the sale until it receives written confirmation from WMM and EAP of the plans they will implement to prevent or mitigate the anticipated human rights impacts”.

138.1. “MYL should cancel the proposed sale to WMM and only sell to an entity that is assessed as responsible under the OECD Guidelines”.

139. Documentation provided by the notifier to the AusNCP in support of the complaint included:

139.1. copies of correspondence;

139.2. references to materials available online as footnoted in the complaint and the reports referred to at paragraphs 38.2 and 38.3 above; and

139.3. copies of public statements made by the enterprise.

## Annex C: Details of the enterprise's response

140. The enterprise was provided with a copy of the complaint on 15 September 2021.
141. The enterprise submitted a response on 18 February 2022, and an amended response on 10 May 2022, which was shared with the notifier, MATA and the Bawdwin Labour Union.
142. The position of the enterprise was that it had not irresponsibly disengaged from the BJV.
143. The enterprise alleged that PWYP brought the complaint in bad faith. The enterprise contended that “PWYP’s complaint is ill-considered and without merit, particularly with respect to PWYP’s contention that the enterprise has failed to act in accordance with the principles and standards in the OECD Guidelines in the three key respects outlined above”. It stated that the complaint is “motivated by publicity rather than genuine outcomes and MYL believes that that the complaint by PWYP on behalf of its 245 Myanmar-based CSOs is not genuine and originated from a bad faith position.”
144. The enterprise’s position was 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”.
145. The enterprise stated 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”.
146. The enterprise’s position was 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.
147. The enterprise also noted that it “did not just withdraw because operating in Myanmar became uncomfortable, the political and legal landscape was irrevocably damaged following the military coup... the state of emergency was more reflective of a state of anarchy where it was unclear who is rightly in charge, which laws applied and to whom, in a newly unpredictable country where foreigners were not safe and shooting became commonplace in the major cities as well as in the regions. This is not an environment where community meetings could be convened by MYL for the purpose of discussing disengagement with stakeholders, as suggested by PWYP.”
148. The enterprise stated that in making the decision that it was not feasible for MYL to continue with Bawdwin mine development studies/assessments or to continue to negotiate and agree terms for a new PSA with Government Ministries under military junta control, it sought independent guidance and advice. The enterprise stated:

*The Company acted prudently, it sought external advice where necessary and where possible to ensure that the transaction was lawful and equitable. With increasing violence and political uncertainty in Myanmar, the decision to divest MYL’s interests in Myanmar and seek to recover as much of its investment in BJV as possible was determined to be the only mechanism available to the Company to remain viable and solvent.*

149. The enterprise's response to the complaint emphasised that prior to the military coup the enterprise had intended to bring improved mining and operational standards to Myanmar, which it described variously as "first-world" standards and "best practice".

150. The enterprise stated in respect of human rights that it:

150.1. "understands its duty in respect of responsible social behaviour, including human rights obligations";

150.2. "has an understanding and commitment to human rights";

150.3. "has a small team of professionals who are all acutely aware of their obligations to the Company's regulators, shareholders and its corporate/social governance responsibilities with respect to operating in Australia and/or overseas"; and

150.4. "is well aware of its corporate responsibilities and it engaged independent experts to provide guidance in dealing with local/regional community groups and wider stakeholders in Myanmar".

151. The enterprise acknowledged that it "had not publicly released a human rights policy" but asserted that "in no way diminishes the Company's understanding and awareness of its responsibilities with respect to human rights". The enterprise stated that it "chose to not arrive in Myanmar with 'boiler-plate' mission statements and policies, rather it chose to develop these policies armed with knowledge of the Myanmar Centre for Responsible Business expectations/guidelines and UN expectations/guidelines and to develop its policies and procedures in-country by direct engagement with relevant stakeholder groups, as evidenced by BJVs development of its own company policy on Community Relations."

152. The enterprise stated that the development of policies "occurred by way of local and regional engagement 'on the ground' with community and stakeholder groups by BJV representatives and by independent expert groups engaged by BJV to action community/stakeholder engagement and Q&A sessions to assist with the development of meaningful environmental management and social engagement policies". The enterprise claimed that it had collaborated with WMM "for several years with the joint development of mine development policies, strategies and outcomes designed to benefit all shareholders and stakeholders, including local and regional stakeholder groups."

153. It stated that various international standards and guidelines referred to in the BJV's Environmental and Social Impact Assessment (ESIA) and Pre-Feasibility Study were "used to develop policy in the ESIA".<sup>127</sup> The enterprise referred to undertaking studies and developing its environmental management plan in accordance with standards imposed by the Equator Principles.<sup>128</sup>

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<sup>127</sup> These standards were listed by MYL as the World Bank Environmental and Social Framework (2018), Equator Principles III (EPFI 2020), IFC Performance Standards on Environmental and Sustainability (IFC 2012), IFC Stakeholder engagement good practice handbook from 2007 for companies doing business in emerging markets, World Bank Guidelines on Environmental Health and Safety from 2007 including specifically for mining, an IFC handbook from 2002 for preparing resettlement action plans, unspecified International Labour Organisations standards, ISO 14000, unspecified leading best practice guidelines and unspecified ICMM materials.

<sup>128</sup> The enterprise stated it was planning to have an 'Environmental Management Plan delivered to Equator Principles'. The enterprise stated it was required to undertake 'financing studies in accordance with the Equator Principles' to earn its interest in BJV and that BJV had a 'commitment to develop social and environmental management policies and Environmental Management Plans consistent with Equator Principles'. The enterprise

154. The enterprise stated that undertaking these studies was required in order for it to obtain a foreign investment permit from the Myanmar Investment Commission. It stated that the foreign investment permit was required in order for ownership of the mine to transfer to BJV, which the enterprise states meant transfer of ownership “by extension to MYL as BJV shareholder”. The enterprise stated that the foreign investment permit and transfer of ownership to BJV and the enterprise were necessary for it to “acquire the right to directly access the mine and engage with the community, workforce, regulator and other government agencies”.

155. In response to the concerns expressed by the notifier that WMM would not abide by the OECD Guidelines or other standards of responsible business conduct, the enterprise claimed:

*MYL believes that WMM and its partner EAP will be good and proper operators of the Bawdwin project if they proceed with future mine development. MYL has observed their business practices since entering Myanmar in 2017 and they have shown themselves to be business people of great integrity.*

The enterprise alleged that WMM had demonstrated it would operate responsibly by reference to its retention of a 1000-person payroll for 10 years longer than was required under the Production Sharing Contract, which required WMM to retain the workforce for only two years. MYL described this as a “charitable act recognising the lack of any other employment for those people in the local region.” The enterprise stated that it “has no knowledge of any actions or decisions made by WMM or EAP which indicate that any of [BJV’s social responsibility and environmental] policies and procedures will be abandoned if the parties elect to proceed with the future development of the Bawdwin mine”. The enterprise considered the complaint belittled “MYL’s Myanmar partners [as] inept and/or corrupt and therefore cannot be trusted to stay on track to deliver Bawdwin outcomes ... unless MYL as Australians shepherd or supervise them down the development pathway.”

156. The enterprise dismissed as “speculative” the notifier’s concern that WMM may transfer management to a third party that would likely not be a responsible business if it took up management during the military regime’s control. It also stated that “WMM has continued to engage with MYL by seeking advice and guidance from MYL on a range of matters, including the understanding and potential implementation of modern, safe mining practices and methodologies for the benefit of WMM employees and local/regional communities and stakeholders”.

157. As regards the concerns raised by the notifier as to the historical connection between WMM and the illegal drug trade and to the previous military regime in Myanmar, as well as to sanctions imposed on Asia World Co Ltd, the enterprise stated that:

*MYL’s direct experience of working with the directors, officials and employees of WMM is that they are good and proper business people with great integrity. MYL has completed two rounds of independent due diligence on its partners (WMM and EAP) and their officers and the analysis confirmed that neither of the partner companies or their directors are subject to any international sanctions.*

158. The enterprise emphasised that in its experience, “the BJV partners ... are worldly, well-educated, sophisticated, ethical, caring and capable people [and] PWYP’s complaint is fallacious.” The enterprise

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stated, ‘MYL’s plan and intention was to secure offshore funding consistent with the Equator Principles’ and that the BJV’s ESIA and Pre-Feasibility Study referred to various international standards and guidelines, which were ‘used to develop policy in the ESIA’.



asserted that the notifier “only [have] distant knowledge of and [have] never met the principals and officers of WMM or EAP, because if [they] had met them [they] would not doubt [*sic*] have been impressed by their professionalism and integrity”.

159. Regarding disclosures in Australia:

159.1. The enterprise stated 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”.

159.2. Specifically responding to the allegation that MYL had a strong link to Asia World Co which had not been disclosed publicly in Australia, the enterprise stated, “This statement is untrue and not based on fact. MYL has no link to AWC, it has carried out two rounds of due diligence on its partners and officers which confirm ownership/director holdings in WMM and there is therefore no disclosure to be made on this matter.”

159.3. Responding to the allegation that no disclosures related to fighting in Shan State had been made on the ASX, the enterprise stated, “This is false and further evidences that PWYP ... did not conduct adequate due diligence before making this complaint. Numerous disclosures including narrative on this subject have been made to the ASX over time.”

160. In response to the allegations that MYL had not undertaken or disclosed adequate human rights due diligence prior to any divestment from the BJV and that if it had it should have concluded the sale could result in severe human rights impacts, the enterprise stated:

160.1. that the allegation was “untrue”, “not supported by facts” and that “MYL’s due diligence work clearly did not lead to that conclusion”; and

160.2. that it is “confident that its due diligence on the social and human rights impacts for local people and communities following its withdrawal from Myanmar would result in ‘no harm’ and the Company is confident that its actions and behaviour with respect to its withdrawal have been appropriate.”

161. The enterprise responded to the allegation that due diligence had not been undertaken in relation to the divestment by referring to due diligence it undertook on WMM. It stated it was “impressed with WMM’s previous history of being a responsible employer and its record of working on the basis of ‘no-one will be worse off’ in communities that were affected by infrastructure development or in the instance of dry-port development, re-location to superior accommodation and enhanced community/social outcomes.”

162. In response to the allegation that the enterprise should have disclosed the actions it undertook if it had conducted due diligence on the transaction, the enterprise responded that it had “at all times abided by ASX and ASIC disclosure rules and regulations” and referred to the impact that divestment would have on its shareholders and its regulatory compliance. It stated that it 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.”

163. Regarding the allegation that in relation to its divestment the enterprise had not consulted nor engaged with any of the 245 Myanmar- based CSOs on whose behalf the complaint was filed, nor the National Unity Government of the Republic of the Union of Myanmar (NUG), the enterprise responded that it did not know who the CSOs are (the identities of 244 of which have been kept confidential on the basis of security concerns). It noted, however, that as part of the ESIA the BJV did consult with a range of civil society groups, so it seemed likely that they would have been consulted at that stage. The enterprise also emphasised that PWYP had been invited to participate in the ESIA conducted by BJV’s “independent environmental management consultants Valentis and Coffey” who “were engaged by BJV to conduct independent community consultation”, but PWYP declined. The enterprise stated that it did not consult with the NUG, which “is not the recognized government in Myanmar, it is not recognized by the Australian Government as the official government in Myanmar and MYL’s withdrawal from Myanmar cannot be guided by narrative from unofficial government representatives in exile”.

164. In response to outcomes sought by the notifier,<sup>129</sup> the enterprise stated as follows:

164.1. Outcome sought: Enterprise 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.

Response: MYL engaged in limited activities in Myanmar, which were carried out by BJV, and MYL is confident that its actions will not contribute to adverse human rights impacts as a result of its withdrawal.

164.2. Outcomes sought:

164.2.1. For the enterprise 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.

164.2.2. 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.

Response: MYL sold its beneficial interest in the BJV to an existing shareholder. MYL is a small company with limited financial and human resources. It had no ability to access the site and surrounding communities and therefore was not able to consult directly with the many stakeholder groups that PWYP asserts it should have. It further stated that full consultation with the large number of Bawdwin region stakeholder groups was not possible and unrealistic.

164.3. Outcome sought: 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.

Response: MYL has disengaged from BJV, however, there is no vacuum left or inability for the Complainants to continue to engage with BJV. BJV exists as before but without Mallee as shareholder and the key shareholder, WMM, holds an existing Production Sharing Agreement with ME1. WMM holds the title to the Bawdwin tenement and project. It is unreasonable and

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<sup>129</sup> 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. MYL declined an invitation by the AusNCP to update or change any aspect of its Response to address the updated outcomes.

inappropriate for the Complainants to seek project information from MYL or for MYL to speak or act on behalf of BJV as it has no authority from BJV to do this. The correct conduit is for the Complainants to seek information from WMM and/or BJV.

- 164.4. Outcome sought: For MYL to disclose the proposed Production Sharing Agreement, or any draft terms thereof, between WMM and Mining Enterprise Number 1 (ME1) for the Bawdwin mine.

Response: The enterprise asserted that “it is not reasonable to assert that MYL could influence either of WMM or ME1 to disclose detailed information about their confidential agreements, if contrary to their internal policies, nor is it reasonable to assert that could MYL influence either party as to who they share information about those agreements with.”

- 164.5. Outcome sought: 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.

Response: The enterprise disputed that WMM is not a responsible entity to which MYL should disengage, relied on its own due diligence and record working with WMM and emphasised the interest of MYL’s shareholders to recover some of their investment in Myanmar.

165. In support of its position, the enterprise quoted excerpts from the ESIA and referred to the existence of various policies the enterprise had developed with BJV. However, when asked by the Independent Examiner for copies of the ESIA, or any policies or documents on which it wished to rely in support of the above referenced statements regarding its commitment to human rights or undertaking human rights due diligence, the enterprise declined, citing confidentiality.<sup>130</sup> The enterprise made available a copy of a public statement made by the enterprise in late 2019 in Yangon at the Myanmar Applied Earth Sciences conference.<sup>131</sup>

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<sup>130</sup> In response to a request by the Independent Examiner for a copy of the ESIA on which the enterprise relied, the enterprise advised that, ‘As part of the sale process [of MYL’s interest in the BJV], all Bawdwin documentation and information pertinent to the Bawdwin project assessment was sold to the BJV partners by Mallee. The project information is owned by and is confidential to the BJV partners. Mallee does not have authority to disclose the information to the Complainants’. In response to a request by the Independent Examiner for a copy of any policies, procedures, strategies, commitments, outcomes, and guidelines MYL developed with the Bawdwin Joint Venture on which the enterprise relied, the enterprise advised that these were ‘clearly demonstrated in the ESIA and Pre-Feasibility Studies, [which] documents are exclusively owned by BJV and Mallee does not have authorisation to provide copies to the Complainants’.

<sup>131</sup> Copy supplied by the enterprise to the AusNCP on 6 February 2023.

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## Annex E: Institutional arrangements

166. The Australian Government is committed to promoting the use of the OECD Guidelines for Multinational Enterprises (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.

167. The OECD Guidelines are recommendations on responsible business conduct addressed by governments, including Australia, to multinational enterprises. They provide voluntary principles and standards for responsible business conduct consistent with applicable laws and internationally recognised standards. 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 the standards they recommend. In countries where domestic laws and regulations conflict with the principles and standards of the OECD 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.

168. Importantly, while Australia is an adhering country to the OECD Guidelines and 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 legal requirements.

169. 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. For example, the human rights chapter in the OECD Guidelines as well as other key concepts align with the [United Nations Guiding Principles on Business and Human Rights](#).
- Providing an informal structure for resolving issues that may arise in relation to implementation of the OECD Guidelines in complaints.



## Annex F: Governance

170. Governments adhering to the OECD Guidelines have flexibility in organising their National Contact Points for Responsible Business Conduct (NCPs). NCPs are expected to meet core effectiveness criteria, by operating in a manner that is visible, accessible, transparent, accountable, impartial and equitable, predictable, and compatible with the OECD Guidelines. NCPs are also expected to seek the active support of social partners, other stakeholders and relevant government agencies.

171. Accordingly, the OECD Guidelines stipulate that:

- NCPs will be composed, organised and sufficiently resourced to provide an effective basis for dealing with the broad range of issues covered by the OECD Guidelines, have access to expertise on all relevant aspects of the NCP mandate, and operate in an impartial manner and maintain an adequate level of accountability to the adhering government.
- NCPs can use different forms of organisation to meet the effectiveness criteria and maintain stakeholder confidence.
- Governments are encouraged to include representatives of the business community, worker organisations, civil society and other non-governmental organisations in advisory or oversight bodies to assist the NCP in its tasks and contribute to the effectiveness of the OECD Guidelines.

172. The [AusNCP Governance and Advisory Board](#) (AusNCP Board) includes representatives from Australian Government agencies, business, civil society and unions. The AusNCP Board provides independent expert advice and assistance to the AusNCP and the Independent Examiners on complaints handling. Board members use their networks, events and publications to promote responsible business conduct standards under the OECD Guidelines and the AusNCP services. The AusNCP Board is consulted on all AusNCP statements.

173. The AusNCP Board helps to ensure that the AusNCP meets the effectiveness criteria of the OECD Guidelines. AusNCP Board Members may be called on to conduct procedural reviews of AusNCP complaints and may be consulted on various operational and administrative matters as needed.

174. From September 2019, all new cases are managed by Independent Examiners, who are supported by the AusNCP Secretariat and the AusNCP Board.