



Australian National Contact Point  
for the OECD Guidelines for Multinational Enterprises

# Final Statement

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Complaint by Port Hedland Community Progress Association  
regarding BHP

Published 1 September 2021

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## EXECUTIVE SUMMARY

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1. In February 2021, the Australian National Contact Point (**AusNCP**) received a complaint (**Complaint**) from the Port Hedland Community Progress Association (**Association**) regarding the operations of BHP, an Australian multinational mining company. The Association stated 'BHP Industrial Emissions [are] causing dangerous health risks to community resulting in Government rezoning the town site unfit for residents', which the Association contended was contrary to the *OECD Guidelines for Multinational Enterprises* (**OECD Guidelines**).
2. The Independent Examiner assessed the Complaint and engaged with the parties from February to June 2021.
3. After considering the six admissibility criteria required by the Initial Assessment process, the Independent Examiner has determined not to accept this Complaint. The AusNCP Procedures note that rejection of a complaint is not an assessment of whether the enterprise's actions meet the OECD Guidelines. The procedures also require the Independent Examiner to issue a public statement explaining how the Complaint was assessed. The assessment against each criteria is contained in the statement, summarised below.
  - 3.1 Good offices through the AusNCP are to facilitate an exchange between parties, discussing the issues and expectations of the OECD Guidelines, to support or encourage the resolution of those issues. The two main aims the Association identified with its Complaint (review BHP's licence under WA law, and obtain 'fair' compensation under a government scheme) are not within the OECD Guidelines' scope. The Association has not provided clear explanations of the OECD Guidelines issues it wishes to resolve with BHP. There are ongoing opportunities and processes available to the Association to engage with BHP and government regarding the Association's concerns.
  - 3.2 Port Hedland has significant dust issues, to which BHP's operations contribute (dust also arises from other industries operating in Port Hedland and environmental factors). Within the framework of the OECD Guidelines, the Association has a legitimate interest in raising the dust issues, which are material and substantiated, and there is a link to BHP's activities. The Association raised concerns about other issues and places, but these are not within the scope of the OECD Guidelines or were not substantiated.
  - 3.3 In relation to dust, there are many measures in place to monitor and manage dust impacts on Port Hedland, which are undertaken by BHP, the broader industry, and government. Many of these measures accord with the expectations of the OECD Guidelines, but two aspects needed further assessment, concerning (1) air-monitoring in Port Hedland, and (2) a voluntary 'buy-back' scheme for residential properties most affected by dust.

- 3.4 There have been issues about the air-monitoring's accuracy and accountability. Monitoring is undertaken by another organisation and responsibility for ambient air quality monitoring will shortly be transferred to the Western Australian (WA) Government.
  - 3.5 The amounts of the buy-back scheme, which are set by the WA Government and funded jointly by government and industry, are not appropriate issues for a good offices' engagement with BHP.
  - 3.6 The OECD Guidelines' requirements regarding due diligence are continuous. Where new information or circumstances arise, indicating an enterprise's operations may involve human rights impacts, these should be carefully examined by the enterprise. The Independent Examiner observed that ongoing efforts to improve public awareness and accountability by all involved will be important to promote community confidence in the management of dust impacts in Port Hedland.
4. The AusNCP notes that this outcome is not an assessment of whether BHP's actions are consistent with the OECD Guidelines.
  5. This statement is available on the AusNCP website at [www.ausncp.gov.au](http://www.ausncp.gov.au).

## COMPLAINT: PARTIES AND POSITIONS

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6. On 1 February 2021, the AusNCP received a complaint from Ms Janette Ford, President of the Association alleging 'BHP Industrial Emissions causing dangerous health risks to community resulting in Government rezoning the town site unfit for residents' (**Complaint**).
7. BHP is one of several companies operating from port facilities in the town of Port Hedland in north-western Australia.<sup>1</sup>
8. From February to June 2021, the AusNCP engaged with the Association and BHP to better understand the Complaint, inviting submissions and material, and giving each party the opportunity to respond. These exchanges are detailed in the Schedule of Events (page 26), including the extensions been given to the Association to provide submissions and material. The assistance to the Association was consistent with the AusNCP Procedures that 'Where a complaint does not contain the information necessary to conduct an initial assessment, the Secretariat will work with the notifier to explain what additional material would be required in order for the initial assessment to proceed'.<sup>2</sup>

## ASSESSMENT OF COMPLAINT

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9. When an NCP receives a complaint under the OECD Guidelines,<sup>3</sup> the NCP should conduct an 'initial assessment'.<sup>4</sup> This is to determine whether the issues are 'bona fide' (in other words real or authentic) and relevant to the implementation of the OECD Guidelines (in other words within their scope of coverage).<sup>5</sup> The AusNCP has procedures, mirroring the OECD Guidelines, which specify that in deciding whether to accept a complaint, six admissibility criteria are assessed:
  - 9.1 the identity of the party [who submitted the complaint] concerned and its interest in the matter
  - 9.2 whether the issue is material and substantiated
  - 9.3 whether there seems to be a link between the enterprise's activities and the issue raised in the complaint
  - 9.4 the relevance of applicable law and procedures, including court rulings
  - 9.5 how similar issues have been, or are being, treated in other domestic or international proceedings
  - 9.6 whether the consideration of the complaint would contribute to the purposes and effectiveness of the OECD Guidelines.<sup>6</sup>
10. The six admissibility criteria are 'interrelated and necessitate examination as a whole'.<sup>7</sup> An initial assessment should be undertaken in a manner which promotes accessibility, predictability, transparency, impartiality, and compatibility with the OECD Guidelines.<sup>8</sup>

## Preliminary issues

11. The basis for any complaint to be examined by an NCP is 'an issue with the implementation of the Guidelines'.<sup>9</sup> The Association's material and allegations have raised many different matters, and it is apparent the Association has concerns about BHP and other industry bodies, as well as with WA Government agencies. The AusNCP endeavoured to gain greater information from the Association, clarifying what 'issue[s] with the implementation of the Guidelines' the Association claims are relevant here. That clarity is necessary for the AusNCP (because it is these 'issues' against which most of the Guidelines' admissibility criteria are assessed), and also BHP (so that it knows what is said to be its deficiencies and can respond accordingly).
12. The matters raised by the Association changed over time, with AusNCP requests for clarification or responses to BHP's submissions resulting in new assertions. In places, the Association's material also posed rhetorical questions or suggested *potential* for impropriety,<sup>10</sup> making it difficult to clarify what Guidelines issue(s) the Association was raising. The following summarises the Association's claims.
  - 12.1 In its initial February submission, the Association summarised its complaint as follows (emphasis added).

What sections of the OECD Guidelines does the submission relate to?: **BHP Industrial Emissions causing dangerous health risks to community resulting in Government rezoning the town site unfit for residents.**

Please describe the situation and how the issues relate to the OECD Guidelines: **BHP's emissions are excessive and not protecting the community in which they operate.** BHP is seen as having undue influence in Government licensing and conditions.

What do you hope to achieve through the complaint process?: BHP to comply with current national and world practices for air pollution in communities and towns.

What is your desired outcome(s) of mediation: Review BHP's licence to ensure they meet current environmental and health standards for safe living, before Government increases the license to allow industrial pollution to increase.

What actions do you think the enterprise should take to resolve the situation? If BHP do not want to spend money on stop[p]ing the pollution, then pay a fair compensation to residents.
  - 12.2 The Association's initial submission contained various attachments, including a document entitled 'Chapter V. Environment' which included the statement 'BHP has failed to maintain a system of environmental management appropriate to the enterprise for several decades' and gave various details. This is understood as a reference to Chapter VI of the Guidelines which concerns the Environment and includes the expectation on companies to 'maintain a system of environmental management

appropriate to the enterprise'. Guidelines Chapter V is about labour relations, and the Association raised no concerns in relation to that.

- 12.3 On 5 March 2021 the AusNCP wrote to the Association and BHP inviting further information, including: 'Which particular parts of the OECD Guidelines are raised in the complaint, and what material relates to the matters complained of?'. The parties were invited to respond by 19 March. The Association was unable to do so in that time, informing the AusNCP they were a small local community group that volunteers their time and they had arranged an unpaid volunteer to research and write the response to the questions, and planned to do this work during the school holidays (2 – 18 April). An extension was given and, on 16 April, the entire extent of the Association's answer to this question was as follows.

Environment and Human Rights. clean safe air, international right for all humans, but not in BHP's Pilbara iron ore operational areas from Pilbara minesites, including Mining area c, South Flank, Whaleback, transfer stations and loading facilities.

Uncovered BHP ore is stockpiled, transferred, unloaded and loaded, without covers, enabling fugitive dust to escape into communities, causing a health risk.

Other minesites operators in Western Australia such as Geraldton and Esperance are covered, and must be as part of their government issued environmental licence, to ensure the community is safe.

- 12.4 Each party was given the others' responses to the AusNCP questions, and permitted to provide 'any further submission they wish to make, as a result of the other's response'. The Association then provided lengthy material, including further detail and also new issues and assertions.

- i. The Association stated that persons in the Port Hedland special control area (the western side of town, close to the port) are being 'polluted at levels that are quite simply grotesque in terms of actual exceedances over the Australian and State NEPMs standards'. This is a reference to the 'Australian National Environment Protection (Ambient Air Quality) Measure' or 'NEPM'. The Association considers NEPM standards 'have long provided to be the appropriate target standard for the protection of human health from such dust'.
- ii. The Association referred to a WA Government health risk assessment about dust and PM10 in Port Hedland.<sup>11</sup> [The Independent Examiner understands **PM10** are small particles found in dust with diameter below 0.01mm and are a common air pollutant.<sup>12</sup>]
- iii. The Association said it is not possible for the public to access information on 'current [dust] levels as we understand the State asserts that this data is still being held and controlled by an organisation of which BHP is a founding member (and is believed to wield great infl[u]ence)(ie. PHIC) [Port Hedland Industry Council]. This delay is apparently due to a pending handover to the State of the dust monitoring network and data. That handover was announced by



the State in October 2018, but it appears this has still not occurred due to delayed negotiations between the State and the body PHIC'.

- iv. The Association raised concerns about dust issues in Newman (a town 400km from Port Hedland) and about water use and legal proceedings involving BHP operations in Chile.
- v. The Association considered BHP could achieve dust emissions at a level which is safe and consistent with relevant standards, through investing and using current technology.
- vi. The Association contended that the air quality standard applied by the State Government to Port Hedland is lower than any other group of people in Western Australia, and 'is not adequate for the health of those residents and their families'. The Association referred to the Universal Declaration of Human Rights article that 'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family'.
- vii. On 2 June 2021, in its final submissions, the Association referred to damage to Indigenous heritage caused by another mining company about 300km south east of Port Hedland and raised questions about BHP's interaction with Indigenous heritage.

13. The Association identified what it considered was required by the OECD Guidelines.

[T]o comply with the OECD Guidelines BHP needs to: (a) continue to remain liable for breaches of the EP Act where it causes fugitive dust emissions that result in 'pollution', 'material environmental harm' or 'serious environmental harm' under the EP Act; and (b) ensure that the fugitive dust emissions from its operations do not result in 'pollution', 'material environmental harm' or 'serious environmental harm' under the EP Act'.

[T]o comply with the OECD Guidelines BHP needs to, not allow its fugitive dust emissions from within its licence area to escape so as to increase the dust in Port Hedland or Newman to over the Australian and State's legislated NEPMs. This must include all the NEPMs for PM1 and PM2.5 dust, both assessed daily and annually.

14. BHP responded to the Association's Complaint, providing four separate submissions to the AusNCP.
15. A complaint under the OECD Guidelines is *not* about compliance nor breach of Australian laws but, instead, meeting the expectations in the Guidelines. Actions which parties take, in following Australian law, *can* also be relevant to meeting the Guidelines. But the Guidelines' complaint process is not an exercise of determining compliance with domestic law. Accordingly, the parties' assertions about consistency or breach of laws (including environmental and town planning laws) are not relevant to determining whether the Complaint meets the six admissibility criteria. Nor are these determinative of whether BHP has complied with the OECD Guidelines.

## Criterion 1: Party's identities and interests

16. The first admissibility criteria is 'the identity of the party concerned and its interest in the matter'. The parties submitting a complaint 'should have some interest in the matters they raise in their submissions'.<sup>13</sup>
17. There was some ambiguity as to whether the complaint was from Ms Ford or the Association of which she is President. This is not significant in relation to dust impacts in Port Hedland because either would be appropriate parties given their interest in residential and community issues in Port Hedland. However, neither party has demonstrated the same connection or interest with other matters raised in the initial Complaint and their following submissions concerning other locations (eg. Newman, Chile) and other subjects (eg. royalty payments, Indigenous heritage).
18. It appears one interest of the Association is the amount of compensation in a proposed buy-back scheme for Port Hedland residential properties. In a media report in January 2021, shortly before the Complaint was lodged, Ms Ford is quoted as follows.

[I]f a polluter cannot maintain their emissions on their own boundary, then they are duty bound to either pay compensation to those people they pollute, or to come to some negotiation to pay a fair and reasonable compensation price. ... This is an exact example of the polluter not paying, but the government allowing them to shift their responsibility and not hold them accountable.<sup>14</sup>

While the Complaint did not provide detail about this aspect (of compensation values being offered), impact on property is a legitimate interest under the Guidelines. Accordingly, this also informs the assessment of the Complaint.

19. Regarding this first criteria, the Complaint is admissible and examined in relation to the issue of dust impacts in Port Hedland, but not in relation to other aspects raised by the Association or Ms Ford. This approach accords with the emphasis in the initial Complaint, and also in response to clarifications sought by the Independent Examiner, where the Association explained 'All matters raised are linked to air pollution from BHP's uncovered practices [in processing minerals, which] has contaminated land use for communities'.

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

20. The second admissibility criteria, 'whether the issue is material and substantiated', assesses whether 'the issues are plausible and related to the application of the OECD Guidelines, and that there is a plausible link between the enterprise's activities and the issues raised'.<sup>15</sup> The materiality of issues is assessed against the recommendations and standards of the OECD Guidelines, not in relation to Australian law.<sup>16</sup> There is no need, at the initial assessment stage, for a complaint to provide formal evidence of a causal link between the enterprise and the issues.<sup>17</sup>

21. The issue of dust management processes and its impact on neighbouring communities (such as Port Hedland) is certainly 'material' and comes within the Guidelines. The Association provided a copy of a Certificate of Title of a property in Port Hedland's west-end, showing a Government warning which is placed on these properties.

Factor Affecting Use of Enjoyment of Land

1. The Western Australian Department of Health has advised in a preliminary investigation that it does not support medium density residential development in this area due to a potential causal link between the dust generated by nearby ore mining processes and port facilities and increased likelihood of respiratory health impacts.
  2. Seniors, children and persons with existing heart or lung disease appear to be at an elevated risk of dust related health impacts.<sup>18</sup>
22. The WA Government's Department of Water and Environmental Regulation recently stated 'the department acknowledges that dust emissions from port operations to date have generally been assessed by the department as high risk... [T]he air guideline value ... has been assessed by the department as likely to be exceeded at receptor locations west of Taplin Street'<sup>19</sup>. This is the area of Port Hedland known as 'West End', where people live and work.
23. The issue of dust impacts in Port Hedland is material and substantiated, so the criteria is satisfied. This is not, however, the case for other matters included in the Complaint.

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

24. The third criteria to be examined is 'whether there seems to be a link between the enterprise's activities and the issue raised in the complaint'.
25. BHP does not contest there is a link between their activities and dust issues in Port Hedland. There is, however, a complexity in that dust in Port Hedland has many sources and causes and cannot be ameliorated by BHP alone.

- 25.1 The WA Government's Department of Health webpage on 'Port Hedland air quality'<sup>20</sup> includes this explanation.

Port Hedland is the world's largest volume port for bulk materials export. Iron ore, salt, manganese, chrome and copper concentrates and other commodities, including cattle, fuel and chemicals pass through Port Hedland. Stockpiles containing iron ore, salt, manganese and copper are located relatively close to residential areas ... Heavy vehicles and ships, material stockpiling and handling and a predominantly dry, windy climate contribute to dust (particulate matter) dispersal over the local residential areas.

- 25.2 The WA Government's Department of Water and Environmental Regulation visited Port Hedland in 2016, 2017 and 2020 to inform the

assessment of BHP's operation and better understand dust sources and issues in area. It reported that, in addition to BHP's operations, other contributions to dust in Port Hedland included: an industrial area 4.3 km south, other Port users exporting iron ore and other materials, local dust from 'vast areas of land surrounding Port Hedland townsite that are cleared for future development or are sparsely vegetated...[and have] red pindan sands, which due to its colour, may be appear similar to iron ore dust', nearby spoil grounds from the dredging of the Port Hedland, and 'a portion ... recorded at monitoring sites ... may also be attributed to sea salt spray'.<sup>21</sup>

25.3 The Department also examined historical data about air quality, BHP's operations, and the total ore exports from Port Hedland (i.e. including other operators). The Department concluded there is no clear correlation between BHP's operations and the contemporaneous measured PM10 concentration.<sup>22</sup>

26. The fact that some dust may come from causes other than BHP does not, however, mean the OECD Guidelines have no application. Companies still have obligations regarding impacts even where they are only contributory rather than the sole cause. There is a clear link between BHP's activities and the issue of dust impacts in Port Hedland. This is confirmed by one of BHP's licences which acknowledges their operations contribute to dust risks in Port Hedland.

The Premises [BHP's operations in Port Hedland] contributes to cumulative concentrations of PM<sub>10</sub> and that cumulative concentrations of PM<sub>10</sub> may exceed specific consequence criteria and may result in adverse health effects to the community requiring medical treatment. ...

[T]here may be a high level of impact to amenity experienced by residents and businesses in the West End as a result of dust levels. It is considered that the Premises will contribute to cumulative levels of dust in the West End of Port Hedland. Therefore the consequence of impacts to amenity from fugitive dust emissions is rated as major.<sup>23</sup>

27. It is also necessary to understand BHP's actions concerning dust. Where an enterprise meets the Guidelines' expectations, that informs whether there remains 'an issue with the implementation of the Guidelines' (i.e. whether the 'good offices' stage is appropriate).

27.1 BHP has various licences and permits for its operations around Port Hedland. These are publicly available and include requirements regarding dust control and monitoring.<sup>24</sup> These are examined under the next criteria 'applicable law and procedures'.

27.2 A body called the 'Port Hedland Industries Council' (PHIC - including BHP and the other companies operating and using the port facilities) has ongoing involvement and engagement with dust and other industry issues regarding Port Hedland. The PHIC has a 'Community and Industry Forum', which includes the Association.

27.3 BHP explained, in its submissions in response to the Complaint, its relevant policies and operational procedures about environmental impact and

community engagement. These described engagement beyond the regulatory minimum, including 'an open invitation to any interested stakeholders...to view its port operations', and convening quarterly 'stakeholder engagement groups'.

27.4 BHP also detailed the numerous engagements it had had with the Association and Ms Ford regarding the dust issues in the Complaint.

28. The Association does not consider BHP has done sufficient to address dust emissions and potential harm from these. There is a link between BHP's activities and the issue of dust emissions raised in the Complaint, so this criteria is satisfied.

## Criterion 4: Applicable law and procedures

29. 'The relevance of applicable law and procedures, including court rulings' is the fourth of the admissibility criteria. 'Relevance' relates to issues under the Guidelines. The Guidelines contain a broad due-diligence expectation of enterprises,<sup>25</sup> summarised in the OECD's 2018 Guidance:

Due diligence is the process enterprises should carry out to identify, prevent, mitigate and account for how they address these actual and potential adverse impacts in their own operations, their supply chain and other business relationships... Effective due diligence should be supported by efforts to embed RBC [responsible business conduct] into policies and management systems, and aims to enable enterprises to remediate adverse impacts that they cause or to which they contribute.<sup>26</sup>

30. As explained earlier, the NCP complaint process does not examine compliance with domestic law<sup>27</sup> - that is the function of domestic authorities.<sup>28</sup> Accordingly, the Association's allegations that BHP may not have complied with WA environmental protection law is not a question to be examined in an OECD Guidelines' complaint. The Association is, however, correct that compliance with domestic law does not necessarily ensure consistency with the requirements of the OECD Guidelines.<sup>29</sup> What is relevant is whether BHP's actions meet the expectations of the Guidelines.

31. The due-diligence expectations of the OECD Guidelines are not limited to only those matters within a company's direct legal control. The UN Guiding Principles, which inform the OECD Guidelines, explain the 'responsibility to respect human rights' covers a company's own activities *but also* requires the company to 'prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts'.<sup>30</sup> This is reflected in OECD Guidelines' expectation of companies.

If the enterprise identifies a risk of contributing to an adverse impact, then it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impacts to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of the entity that causes the harm.<sup>31</sup>

[W]here an enterprise has not contributed to an adverse human rights impact, but that impact is nevertheless directly linked to its operations, products or services by its business relationship with another entity. ... Meeting the expectation ... would entail an enterprise ... to use its leverage to influence the entity causing the adverse human rights impact to prevent or mitigate that impact. 'Business relationships' include relationships with business partners, entities in its supply chain, and any other non-State or State entity directly linked to its business operations, products or services. Among the factors that will enter into the determination of the appropriate action in such situations are the enterprise's leverage over the entity concerned, how crucial the relationship is to the enterprise, [and] the severity of the impact...<sup>32</sup>

32. The Association made various references to, and use of, the OECD Guidelines' statement that enterprises should not accept 'exemptions not contemplated in the statutory or regulatory framework'.<sup>33</sup> The Association considers the conditions or requirements in various licences and approvals given by the WA Government are insufficient to deal with dust problems. The level of state regulation is not, however, what the Guidelines proscription addresses in measures 'not contemplated' by a regulatory scheme. As indicated by other NCP decisions, this aspect of the Guidelines does not apply where the 'statutory and regulatory framework appears to contemplate such exemptions'.<sup>34</sup> The Association has not demonstrated how this provision of the Guidelines is relevant here.
33. There are many applicable laws and procedures addressing dust issues. In addition to WA's compulsory laws and licensing regime, the Association and BHP both referred to various inter-governmental and industry processes, including community advisory groups. Regulators, BHP and broader industry are aware of dust issues in Port Hedland. Recent and ongoing processes include the following.
  - 33.1 Environmental laws and licencing requirements of WA, which include public input on environmental assessment and proposed regulation, and also public availability of approvals and performance reports. This includes annual audit compliance reports which are published on a government website.
  - 33.2 More broadly, BHP explained that regarding WA's environmental controls and licencing: 'There is a high level of transparency ... Licences, works approvals and annual performance reports are all publicly available on DWER's website. Where amendments to a prescribed premises or licence are required, applications are advertised and are subject to a public comment period. DWER assesses applications and makes decisions within a risk-based framework, applying contemporary conditions that are responsive to the assessed level of risk and with regard to public submissions received. The regime also includes third party appeal rights (with no standing requirements)'.
  - 33.3 Dust issues were examined by a 2009 'Taskforce', comprising WA Government, local government, companies; which had a community advisory group (in which BHP says Ms Ford was involved, although this was not indicated in the Complaint). The Taskforce recommended a health risk assessment and industry-funded dust monitoring.



- 33.4 The health risk assessment was undertaken by the WA Government's Health Department and reported in 2016, recommending more controls (which are being undertaken).
- 33.5 The Western Australian Planning Commission administers development controls aimed at implementing the Taskforce's recommendations to restrict residential population growth and other sensitive land uses in 'the West End' (area of Port Hedland near the port operations).<sup>35</sup>
- 33.6 An industry-funded and government guaranteed 'voluntary buy-back scheme' began in early 2021 for residential properties near the port operations and higher dust impacts.<sup>36</sup> The WA Government-established 'buy back' scheme involves property owners in these areas being offered a settlement price comprising: (1) the value as at August 2019 (indexed) plus (2) an additional 35 per cent, plus (3) an amount of up to \$20,000 for verifiable transaction costs.<sup>37</sup>
- 33.7 The industry-funded dust monitoring is also in place. This provides 'live' online information from dust monitors,<sup>38</sup> and is discussed further below.
- 33.8 In May 2021 (after the Complaint was lodged), the WA Department of Water and Environmental Regulation released its Port Hedland Regulatory Strategy. In relation to dust issues, this includes the following.

In 2021, the department will finalise the development of a Dust Management Guideline that will be applicable to port operators in Port Hedland<sup>39</sup>

The department expects industry to achieve reductions in prescribed premises dust emissions, which will in turn produce measurable reductions in ambient dust levels (not simply reduce the number of air guideline value exceedances) across the entire Port Hedland peninsula, and in particular the West End.

The department, by virtue of the transfer of the ambient monitoring network, will display clear and transparent information relating to ambient dust levels in real time. As per the current situation, a detailed analysis of the dust impacts in the greater Port Hedland area will be published on an annual basis by the department.<sup>40</sup>

34. These initiatives confirm there are significant dust issues around Port Hedland and that industry and government have measures in response to this. The Complaint, and BHP's response, made various references to the NEPM or *National Environment Protection (Ambient Air Quality) Measure*.<sup>41</sup> The Association considers this is being improperly applied or modified by the WA Government. BHP contests the Association's position on NEPM use. These differences do not need to be resolved for the purposes of dealing with this Complaint<sup>42</sup> because it is apparent that BHP's dust emissions cause some impact and therefore BHP should be responding consistently with the Guidelines.
35. The Guidelines' chapter on the environment does not envisage that company operations will never cause any environmental impact. Rather, there should be measures in place, increasing in requirements corresponding to the significance

of the impact.<sup>43</sup> This involves a 'mitigation hierarchy'<sup>44</sup> of: avoidance (for 'severe project-related human rights impacts'<sup>45</sup>), minimisation, and compensation/offset; all informed by what is 'technically and financially feasible'.<sup>46</sup> The two Guidelines paragraphs most relevant here identify what should occur where there are known impacts (emphasis added).

**Enterprises should ...Assess, and address in decision-making, the foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle with a view to avoiding or, when unavoidable, mitigating them. Where these proposed activities may have significant environmental, health, or safety impacts, and where they are subject to a decision of a competent authority, prepare an appropriate environmental impact assessment.**

**Enterprises should ...Maintain contingency plans for preventing, mitigating, and controlling serious environmental and health damage from their operations, including accidents and emergencies; and mechanisms for immediate reporting to the competent authorities.**

36. Assessed against those two provisions, it appears BHP dust measures are consistent with much of the Guidelines' expectations regarding environmental management, as detailed below.

36.1 BHP followed environmental impact assessment processes, and received approval for its Port Hedland operations, in 1996 updated in 2007 and 2017.<sup>47</sup>

36.2 From these, and other environmental approvals, there are extensive requirements for BHP to minimise dust from the operations. The licence requirements on BHP's operations include:

- i. minimum direct shipping amounts (which 'results in the elimination of many significant dust sources/activities such as stockpiles, reclaimers and stackers'<sup>48</sup>), minimum ore moisture requirements; and maintenance and use of dust control equipment<sup>49</sup>
- ii. maintaining point source discharge monitoring and air quality boundary monitoring<sup>50</sup>
- iii. depending on the readings from those monitors, BHP must take various dust-management action ranging from sprays and other dust suppression activities, additional monitoring, to 'ceasing or changing Iron Ore handling activities' until the dust readings decrease<sup>51</sup>
- iv. obtaining ambient air quality monitoring in the town of Port Hedland (the 'Taplin Street monitor'), measuring PM10 and providing both continuous and 24-hour average readings<sup>52</sup>
- v. wherever an event exceeds specified dust levels, BHP must investigate and report to the regulator, with reporting being provided quarterly and including extensive detail of any exceedances including the readings, the processing activities at that time, the



responses, investigations and 'all corrective and management actions undertaken'.<sup>53</sup>

- 36.3 These comprise examples of the type of measures the Guidelines envisage in its expectations of 'plans for preventing, mitigating, and controlling serious environmental and health damage ...and mechanisms for immediate reporting to the competent authorities'.
37. There are, however, three aspects which merit further attention because the existing laws and procedures, and BHP's information to date, do not unequivocally demonstrate consistency with the OECD Guidelines' expectations. These are:
- 37.1 problems with the air-monitor at Taplin Street (on which BHP's licence conditions rely)
  - 37.2 the management of the air-monitoring system around the Port Hedland townsite
  - 37.3 the compensation offered as part of discouraging people from living in the West End of Port Hedland – this is addressed under criteria six (later in this decision).
38. Regarding air-monitors, the following is relevant to considering the OECD Guidelines and the 'applicable law and procedures'.

#### ***Air monitor at Taplin Street***

- 38.1 BHP's operations have licences/permits which impose requirements regarding dust monitoring and management. This includes, in relation to a monitor in Port Hedland (at Taplin Street), requirements relating to 1-hour observations and, where readings exceed a specified level, 'management actions to commence immediately upon being notified'.<sup>54</sup>
- 38.2 The Taplin Street monitor is part of a network established through PHIC and provides real-time monitoring publicly available on PHIC's website.<sup>55</sup> BHP's submission, in response to the Complaint, emphasised the importance of this:
- The [monitoring] Network is fully funded by PHIC and maintained and operated by ... an independent third party provider. It includes a web-based platform which allows PHIC members, and the public, to access the data collected in real time across 8 monitoring sites. Data from the Network was vital in supporting the work of the Taskforce and the HHRA [human health risk assessment]. It continues to act as a means of providing timely, and measurable data to the public. It is used for the purposes of regulating dust emissions at the port, as reference and monitoring sites in respect to which performance against the Interim [ambient air quality] Guideline can be measured.<sup>56</sup>
- 38.3 A Government report, informing BHP's 2018 licence, noted some deficiencies regarding these monitors in Port Hedland because of nearby obstructions 'which may restrict airflows in the vicinity of the monitor inlet

or absorb some particulate matter affecting results... potentially limiting the reliability of data'.<sup>57</sup>

38.4 The Taplin Street monitor has particular significance – as explained by the WA Government:

The Taplin Street ambient air quality monitor is significant. It was previously the measurement point for the interim ambient air quality guideline as established by the Taskforce in 2009 and is currently used as a reference monitoring location for reporting of dust events mandated through licence conditions.<sup>58</sup>

38.5 The Taplin Street monitor was inaccurate and under-reporting actual dust levels, over a year and half, to late 2019.<sup>59</sup> This was identified by the Government, and PHIC subsequently advised it had replaced the faulty monitor.<sup>60</sup>

### **Management of the air-monitoring system**

38.6 In 2016, it was recommended that responsibility for the air-monitoring network be transferred from PHIC to the Government's environment department (Department of Water and Environmental Regulation or DWER).<sup>61</sup> In 2018, the WA Government reported that: 'To implement this recommendation quickly, Government has approved capital expenditure under the 2018/19 budget to DWER for the transfer and refurbishment of the monitoring network'.<sup>62</sup> The WA Government has advised that 'Following a procurement process, DWER awarded a contract to a monitoring services provider for the ongoing operation and maintenance of the ambient monitoring network and is arranging land access agreements between all relevant parties. The full takeover of the network is expected to be completed by September 2021'.<sup>63</sup>

38.7 The time-period for the transfer of the air monitoring network, combined with the faults with the Taplin Street monitor, appears to have led to concerns about the accuracy and accountability of the air-monitoring system arising in various media reports and questions to Parliament.<sup>64</sup>

39. These points are addressed in criteria 6.

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

40. The fifth admissibility criteria is 'how similar issues have been, or are being, treated in other domestic or international proceedings'. This assists in ensuring relevant precedents are known, to promote consistency and avoid duplication.

41. A text search of all NCP cases,<sup>65</sup> and the UN's human rights decisions and materials,<sup>66</sup> revealed no previous case examining corporate responsibilities regarding dust emissions from industrial operations. There are general statements about the need to address dust emissions from extractives and other industrial developments.<sup>67</sup>

42. Just because there may be domestic laws/processes which address some issues does not automatically make all companies compliant with the Guidelines. BHP provided a document (and agreed for the AusNCP to provide a copy to the Association) which tabulated the current and anticipated regulatory process against the opportunities for public participation, showing substantial overlap with matters identified by the Complaint. In response, and in answer to the Independent Examiner's question 'Are there legal or regulatory processes underway that relate to the issues raised in this complaint?', the Association stated: 'No, we are seeking resolution through this process'.
43. The Guidelines commentary indicates that understanding any other 'domestic or international proceedings addressing similar issues' is relevant because the NCP should 'evaluate whether an offer of good offices could make a positive contribution to the resolution of the issues raised'.<sup>68</sup> Parties are expected to 'assist NCPs in their consideration of these matters by providing relevant information' on any parallel proceedings. There are no 'parallel proceedings' here which would preclude a 'good offices' engagement. The Association's response, however, indicates an indifference to the 'legal or regulatory processes' in WA relevant to the issues raised in this complaint and that it is 'seeking resolution through this process'. That is relevant to the initial assessment.

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

44. The final admissibility criteria is 'whether the consideration of the complaint would contribute to the purposes and effectiveness of the OECD Guidelines'. This criteria 'is intentionally broad and can encompass a wide range of issues'.<sup>69</sup> This includes considering 'whether providing good offices through facilitating an exchange between the parties, discussing the issues and expectations of the Guidelines with the enterprises in question, or developing meaningful recommendations with respect to enterprise conduct would support or encourage the resolution of the issues'.<sup>70</sup>
45. The Association's expectations, which it summarised in submitting its Complaint on 1 February 2021, were:
  - 45.1 'its desired outcome was 'Review BHP's licence to ensure they meet current environmental and health standards for safe living, before Government increases the license to allow industrial pollution to increase'
  - 45.2 'the action the Association thought should be taken to resolve the situation was 'If BHP do not want to spend money on stop[p]ing the pollution, then pay a fair compensation to residents'.
46. There are significant dust impacts from industrial activity in Port Hedland, to which BHP's operations contribute. The summary, from a 2016 health risk assessment by the WA Government, explains the situation succinctly.

There is sufficient evidence of potential impacts on human health from dust...to warrant dust management controls and strategic and land-use planning to reduce community exposure to dust.

The majority of the public health burden of dust in Port Hedland is associated with PM<sub>10</sub> concentrations over 70 µg/m<sup>3</sup>. ... The areas affected are closest to the Port.

A legacy of the rapid growth of Port Hedland is the close proximity of residential areas to commercial operations ... This means that fugitive dust from port and commercial operations ...disperses over residential areas under certain meteorological conditions, despite good dust management control.

PM<sub>10</sub> concentration in ambient air decreases with distance from the harbour therefore the level of risk could be well managed in residential areas further east...

...[A]reas nearest the harbour ... are unlikely to meet the interim guideline. Targeting industry alone however, would ignore broader dust management and exposure reduction opportunities. Exposure risk in these areas could be managed through land-use planning to limit exposure and population growth in Port Hedland.

Further recommendations to manage and understand the risks posed by dust in Port Hedland ... include continued air monitoring, air-quality modelling to better understand the dust impact area of the port, Nelson Point and Finucane Island operations and further research on the health effects of crustal dusts.<sup>71</sup>

47. The Association's concern about dust levels, and industry and government responses to these, are understandable. The Government's 2016 report also stated: 'The actual number of people potentially affected in Port Hedland is very small because the population is small and ... based on the modelling, the current levels of PM<sub>10</sub> at Richardson Street may account for one extra death per year from all causes'.<sup>72</sup> That approach - that a problem is small because few people are affected by it and it may involve 'one extra death a year' - is not consistent with the OECD Guidelines.<sup>73</sup> It should be emphasised, however, that was not a statement of BHP, and is not something for which BHP is responsible. However, the approach does inform the context within which BHP's operations occur near Port Hedland. A more recent WA Government publication observes:

There is some uncertainty as to the impacts from dust exposure and how and where the boundary of air quality standards is applied. There is also some ongoing conflict between minimising population growth due to dust impacts and developing a growing vibrant town on the [Port Hedland] peninsula. Still, Department of Health strongly supports all efforts to reduce dust levels to as low as reasonably achievable and separating residential areas from industry source emissions.<sup>74</sup>

48. As apparent under criteria 4, many of BHP's actions relevant to the issues in the Complaint accord with the Guidelines and its due-diligence expectations. There are, however, two areas requiring further examination, regarding the ambient dust monitors in Port Hedland, and the compensation program.

49. In relation to compensation, some Hedland property owners want more money to be offered in the buy-back scheme.<sup>75</sup> Property values in WA mining towns, including Port Hedland, have fluctuated associated with the economics of the mining industry (and thus demand for residential and other property).<sup>76</sup> The year from which the Government scheme is calculating prices (2019) had lower average prices than before (during a previous mining boom) and current (with prices increasing again).<sup>77</sup> Decreased property values from broader economic changes is not, however, something the Guidelines consider companies have a responsibility to address.
50. The OECD Guidelines scope for good offices does not include issues which solely address government policy, nor commercial disputes between parties.<sup>78</sup> The operation and values of the 'buy-back scheme' are not suitable matters for a good offices engagement between the Association and BHP.
51. The air-monitoring with the Port Hedland townsite is the responsibility of PHIC and is imminently to be transferred to the WA Government. The Association considers the WA Government's assessment and regulation of dust levels is inadequate. The WA Government's regulation and management of monitors are not issues amenable to a good offices engagement between the Association and BHP.
52. The position and statements of the party making a complaint are relevant in determining whether good offices should be offered. The OECD expects an NCP to 'assess whether ... facilitating an exchange between the parties, discussing the issues and expectations of the Guidelines ... would support or encourage the resolution of the issues'.<sup>79</sup> This accords with the expectations of the Guidelines that 'The effectiveness of the specific instances procedure depends on good faith behaviour of all parties involved in the procedures. Good faith behaviour in this context means responding in a timely fashion... and genuinely engaging in the procedures with a view to finding a solution to the issues raised in accordance with the Guidelines'.<sup>80</sup>
  - 52.1 In this case, the Association has not provided clear explanations of the Guidelines issues it wishes to resolve with BHP.
  - 52.2 Neither of the two main aims the Association sought from the Complaint (review BHP's licence under WA law, and obtain 'fair' compensation) are within the Guidelines' scope.
  - 52.3 There are also ongoing opportunities and procedures available to the Association to engage with BHP and government agencies on many concerns it has raised in its various submissions, many of which are outside the scope of the OECD Guidelines.

In this context, it is not apparent that offering good offices exchange between the parties would contribute to the purposes and effectiveness of the OECD Guidelines.

53. The Association contends that BHP could do more. However, it is difficult to see how good offices between the Association and BHP could contribute to further effectiveness of the Guidelines. The existing processes, through WA regulations and industry and BHP procedures, provide much of the engagement expected

by 'grievance mechanisms' under the OECD Guidelines.<sup>81</sup> When combined with the Association's limited detail of alleged shortfall of the Guidelines, it is not apparent what could be advanced through a 'good offices' engagement which is not already able to occur in other procedures.

## Conclusions and observations

54. The Independent Examiner decides, after considering all six admissibility criteria, this Complaint should not proceed to good offices. The AusNCP Procedures state:
- 54.1 '[6.2.1] Where the complaint was rejected, **the final statement will also include an explanation of how the complaint was assessed** in the initial assessment process'<sup>82</sup> – this reasoning was explained in the above section
- 54.2 '[4.16] Acceptance or **rejection of a complaint is not an assessment of whether the enterprise's actions are consistent with the OECD Guidelines**'<sup>83</sup> - this is particularly relevant here, where the decision not to offer good offices was partly informed by the Association's position and actions
- 54.3 '[6.8] ...The Examiner has discretion to accommodate any reasonable requests... in relation to sensitivities around publication content'<sup>84</sup> – while BHP's identity was not previously disclosed by the AusNCP, this Final Statement references and relies on BHP's licence and other public material, and so the identity of BHP and the Association are both included in this statement
- 54.4 '[10.3] Information shared between the parties should be kept confidential, including following the conclusion of the complaint, unless the providing party agrees to its disclosure or this would be contrary to the provisions of a national law' – the Independent Examiner has checked with each party, about information they provided which is identified in this statement, and neither objected to their own extracts in this statement.
55. The Independent Examiner emphasises the Guidelines' requirements regarding due diligence are continuous. Thus, where new information or circumstances arise, indicating an enterprise's operations may involve human rights impacts, these should be carefully examined by the enterprise. It may be that existing arrangements adequately address the situation in a manner consistent with the Guidelines. Or it could be that earlier arrangements are insufficient and further action is needed by the enterprise in order to ensure consistency with the Guidelines' due diligence expectations.<sup>85</sup>
56. This is relevant to the situation of the ambient air monitors in Port Hedland. The Independent Examiner has determined that is not a suitable issue for good offices in this particular Complaint, but noted concerns about the lack of accuracy and transparency ambient monitoring (summarised in para 38.7 above). This context should inform and be considered by BHP in its on-going due-diligence of future operations near Port Hedland. Ongoing efforts to improve public awareness and accountability by all involved will be important to

promote community confidence in the management of dust impacts in Port Hedland.

57. A draft of this Final Statement was provided, for comment, to the AusNCP's Governance and Advisory Board and also the WA Government,<sup>86</sup> and then to the parties. All comments were carefully considered by the Independent Examiner, in finalising this Statement, with the decision remaining the responsibility of the Independent Examiner.

John Southalan

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OECD Guidelines for Multinational Enterprises

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# ANNEXURES

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## Overview of the AusNCP and its role

1. The Australian Government is committed to promoting the use of the OECD Guidelines and implementing them effectively and consistently. Through business cooperation and support, the OECD Guidelines can positively influence business conduct and ultimately economic, environmental and social progress.
2. The OECD Guidelines are recommendations on responsible business conduct addressed by governments, including Australia, to multinational enterprises. Importantly, while the OECD Guidelines have been endorsed within the OECD international forum, they are not a substitute for, nor do they override, Australian or international law. They represent standards of behaviour that supplement Australian law and therefore do not create conflicting requirements.
3. Companies operating in Australia and Australian companies operating overseas are expected to act in accordance with the principles set out in the OECD Guidelines and to perform to — at minimum — the standards they recommend.
4. The OECD Guidelines can be seen as:
  - 4.1 a useful aid to business in developing their own code of conduct (they are not aimed at replacing or preventing companies from developing their own codes)
  - 4.2 complementary to other business, national and international initiatives on corporate responsibility, including domestic and international law in specific areas such as human rights and bribery
  - 4.3 providing an informal structure for resolving issues that may arise in relation to implementation of the OECD Guidelines in complaints.

## Governance

5. Countries adhering to the OECD Guidelines have flexibility in organising their National Contact Points (NCPs) and in seeking the active support of social partners, including the business community, worker organisations, other non-governmental organisations, and other interested parties.
6. Accordingly, the OECD Guidelines stipulate that NCPs:
  - 6.1 will be composed and organised such that they provide an effective basis for dealing with the broad range of issues covered by the OECD Guidelines and enable the NCP to operate in an impartial manner while



maintaining an adequate level of accountability to the adhering government

- 6.2 can use different forms of organisation to meet this objective. An NCP can consist of senior representatives from one or more ministries, may be a senior government official or a government office headed by a senior official, be an interagency group, or one that contains independent experts. Representatives of the business community, worker organisations and other non-governmental organisations may also be included
  - 6.3 will develop and maintain relations with representatives of the business community, worker organisations and other interested parties that are able to contribute to the effective functioning of the OECD Guidelines.
7. The AusNCP Governance and Advisory Board (the Board), which includes non-government members as well as representatives from key government agencies, provides advice and assistance to the AusNCP Secretariat in relation to the handling of complaints. The Board was consulted in the development of this statement.
  8. The Board helps to ensure that the AusNCP is visible, accessible, transparent and accountable, in accordance with its obligations under the OECD Guidelines for Multinational Enterprises. Members may be called on to conduct procedural reviews of AusNCP complaints and may be consulted on various operational and administrative matters as needed.
  9. Conflicts of interest are managed through the AusNCP Complaint Procedures and the Governance and Advisory Board Terms of Reference. Before assessing this complaint, the Independent Examiner checked any actual or perceived conflicts of interest with the parties and received no objections.

## Schedule of events

Date	Details
1 February 2021	Association submits Complaint – electronic submission form only (AusNCP website).
2 February 2021	AusNCP contacts Association to clarify information supporting Complaint submission; suggesting complaint submissions should clearly link to chapters in the Guidelines
10 February 2021	Association emails additional documents to support Complaint submission including document entitled title 'Chapter V'
12 February 2021	AusNCP emails BHP with full Complaint submission and materials
5 March 2021	Independent Examiner writes to parties: <ul style="list-style-type: none"> <li>• seeking further information for Initial Assessment by 19 March</li> <li>• explaining the decision to accept or reject is per six admissibility criteria</li> <li>• setting out chapters of Guidelines possibly relevant to the Complaint</li> <li>• inviting the parties to respond to four specific questions.</li> </ul>
16 March 2021	Association requests extension to 19 April to respond to Independent Examiner.
19 March 2021	AusNCP and Independent Examiner contact parties, seeking agreement on extension. Parties do not agree. Independent Examiner decides extension to 12 April to provide further information.
14 April 2021	Association contacts AusNCP request further extension to respond to Independent Examiner.
15 April 2021	AusNCP emails Association confirming Initial Assessment is underway but Independent Examiner will consider any material from Association received by 16 April.
16 April 2021	Association half-page email to AusNCP responding to Independent Examiner questions of 5 March.
16 April 2021	Independent Examiner emails both parties: <ul style="list-style-type: none"> <li>• sharing submissions responding to questions of 5 March</li> <li>• inviting further submissions responding to the subsequent material in parties responses</li> <li>• informing responses must be received by 24 April.</li> </ul>
21 April 2021	Association requests extension to 26 April. Independent Examiner agrees to 26 April deadline with no further extensions.
23 April 2021	BHP responds to Independent Examiner email of 16 April.
26 April	Association responds to Independent Examiner email of 16 April.
29 April 2021	AusNCP provides both parties with each other's' submissions.
10 May 2021	Independent Examiner emails both parties: <ul style="list-style-type: none"> <li>• noting Initial Assessment is underway</li> <li>• informing no further material required for Initial Assessment</li> <li>• providing opportunity for BHP to make any final submissions by 24 May and then Association by 31 May</li> </ul>

Date	Details
	<ul style="list-style-type: none"> <li>requesting that if parties unable to comply with timing, to notify immediately.</li> </ul>
24 April 2021	BHP submission provided to AusNCP.
31 May 2021	Association requests extension (to 14 June) to respond to BHP submission.
31 May 2021	Independent Examiner informs Association that request for extension is not granted and suggests Association submit whatever submissions it can by deadline.
2 June 2021	Association email to Independent Examiner with its final submissions in response to BHP submission dated 24 May
25 June 2021	Draft final statement provided to the Governance and Advisory Board for comment.
28 June 2021	Draft final statement provided to WA Government for comment.
23 July 2021	Draft final statement provided to the parties for comment.
3 & 4 Aug 2021	AusNCP receives comments from parties on draft final Statement.
13 Aug 2021	Revised Final Statement provided to the Governance and Advisory Board for comment.
27 Aug 2021	Embargo copy of Final Statement to parties, Governance and Advisory Board, and WA Government.
1 Sep 2021	Final Statement published on <a href="http://www.AusNCP.gov.au">www.AusNCP.gov.au</a> and reported to the OECD.

## Endnotes

<sup>1</sup> Major operators at Port Hedland include BHP, Fortescue Metals Group Limited, Roy Hill, Pilbara Ports Authority and Dampier Salt: Department of Water and Environment Regulation *Mapping dust plumes at Port Hedland using a LiDAR* (Technical series - Report No. 2, February 2018) Government of Western Australia, p 1 & 3.

<sup>2</sup> Australian National Contact Point *Complaint Procedures* (September 2019) Treasury, [4.4] (**AusNCP Procedures**).

<sup>3</sup> Adhering Governments, *OECD Guidelines for Multinational Enterprises* (2011, OECD Publishing, 25 May 2011) (**OECD Guidelines**).

<sup>4</sup> Under the OECD Guidelines, a complaint is entitled a 'specific instance' but the AusNCP Procedures uses 'complaint' and that is how it is termed in this Statement.

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

<sup>6</sup> *AusNCP Procedures* (above n2), 4.10.

<sup>7</sup> *OECD Initial Assessments Guides* (above n5), 6.

<sup>8</sup> *OECD Initial Assessments Guides* (above n5), 19-20, drawing from *OECD Guidelines* (above n3), ch I C & Commentary [9] & [22]; and Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (2011, United Nations Human Rights Council, 21 March 2011) (**UNGPs**).

<sup>9</sup> *OECD Guidelines* (above n3), Procedural Guidance I, C.

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- <sup>10</sup>Examples of these statements (with rhetorical questions and implied improprieties) were identified in a draft decision provided to the parties. The statements fall outside the scope of what is examined in this Complaint (being dust impacts in Port Hedland - see para 19 of this decision), and so are not replicated in this public decision.
- <sup>11</sup>The document is {WA Gov, 2016 #11304}, and is considered, below, in para 47 of this decision.
- <sup>12</sup><https://www.epa.vic.gov.au/for-community/environmental-information/air-quality/pm10-particles-in-the-air> (accessed 10 June 2021)
- <sup>13</sup>OECD *Initial Assessments Guides* (above n5), 6.
- <sup>14</sup>K Michelmore, *Shipping industry baulks at extra fees at Port Hedland for iron ore — Australia's most important export* (11 January 2021, ABC Pilbara, <https://www.abc.net.au/news/2021-01-11/shipping-industry-to-fund-port-hedland-dust-affected-buyback/13043368>, accessed 11 Jun 2021).
- <sup>15</sup>AusNCP *Complaint Procedures* (above n2), 4.10(b) & 4.11.
- <sup>16</sup>OECD *Initial Assessments Guides* (above n5), 21.
- <sup>17</sup>OECD *Initial Assessments Guides* (above n5), 20
- <sup>18</sup>Statement from Certificate of Title 1549/933 (in Port Hedland) dated 1 May 2012 (copy provided in Complaint).
- <sup>19</sup>Department of Water and Environmental Regulation *Port Hedland Regulatory Strategy* (May 2021) Government of Western Australia, 5.
- <sup>20</sup>[https://ww2.health.wa.gov.au/Articles/N\\_R/Port-Hedland-air-quality](https://ww2.health.wa.gov.au/Articles/N_R/Port-Hedland-air-quality) (accessed 10 June 2021).
- <sup>21</sup>Department of Water and Environmental Regulation *L4513/1969/18* (BHP Billiton Iron Ore Port Hedland Operations 17/11/2013 to 16/11/2030 (as amended), 16 February 2018) Government of Western Australia, (available [https://www.der.wa.gov.au/component/k2/item/download/7166\\_527f2c1e77c8196083f83d7d5c30bbf7%20](https://www.der.wa.gov.au/component/k2/item/download/7166_527f2c1e77c8196083f83d7d5c30bbf7%20)), Decision Report, pp17-18 (**BHP Hedland Licence L4513/1969/18**)
- <sup>22</sup>'[T]here is no apparent correlation between hourly tonnages [processed by BHP] and ambient PM<sup>10</sup> concentrations [ie. measurements of dust] [and] ...[T]here is no clear correlation between the [BHP] throughput and annual average PM10 concentrations': *BHP Hedland Licence L4513/1969/18* (above n21), Decision Report, p27. The exchange between BHP and the Government regarding this analysis and drafting is also transparent in the document, at p95. PM10 is explained in para 13.4(iv) of this statement and n12 (above).
- <sup>23</sup>*BHP Hedland Licence L4513/1969/18* (above n21), Decision Report, p50.
- <sup>24</sup>e.g. *BHP Hedland Licence L4513/1969/18* (above n21).
- <sup>25</sup>The OECD Guidelines expects enterprises to 'carry out risk-based due diligence ... to identify, prevent and mitigate actual and potential adverse impacts ... [and] 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': *OECD Guidelines* (above n3), Ch II, [10] & [14] and commentary.
- <sup>26</sup>OECD Council, *Due Diligence Guidance for Responsible Business Conduct* (2018, Organisation for Economic Co-operation & Development, 31 May 2018), 15 (**OECD Due Diligence Guidance**).
- <sup>27</sup>OECD *Initial Assessments Guides* (above n5), 8.
- <sup>28</sup>e.g. Point de contact national français de l'OCDE, *Specific Instance "EDF and EDF Renewables in Mexico"* (2020, Ministère de l'Économie et des Finances, 10 March 2020), 14; Norges OECD-kontaktpunkt, *Jijnjevaerie Saami village – Statkraft SCA Vind AB (SSVAB)* (2016, Norwegian National Contact Point for the OECD Guidelines for Multinational Enterprises, 8 February 2016), 7 & 10.
- <sup>29</sup>'[A]n enterprise's responsibility [under the OECD Guidelines] to conduct due diligence across business relationships is not a legal expectation in most jurisdictions': *OECD Initial Assessments Guides* (above n5), 8.
- <sup>30</sup>UNGP (above n8), Guiding Principle 13(b), further detailed in Guiding Principles 18 & 19.
- <sup>31</sup>OECD *Guidelines* (above n3), ch II, Commentary [19].
- <sup>32</sup>OECD *Guidelines* (above n3), ch IV, Commentary [43]; see also *OECD Due Diligence Guidance* (above n26), p77 & 81 (addressing 'How can an enterprise seek to prevent and mitigate adverse impacts linked to business relationships with whom it does not have a contractual relationship?').
- <sup>33</sup>OECD *Guidelines* (above n3), ch II, A, [5].
- <sup>34</sup>Canadian National Contact Point for the OECD Guidelines for Multinational Enterprises, *Initial Assessment re Centerra Gold* (2012, Department of Foreign Affairs, Trade and Development Canada, 2 November 2012), 3.
- <sup>35</sup>Department of Water and Environmental Regulation *Port Hedland Regulatory Strategy*, (above n19), 4.
- <sup>36</sup>*Port Hedland Regulatory Strategy* (above n19), 4.

<sup>37</sup> The Government has established the Hedland Maritime Initiative to operate the buy-back scheme, with information on the scheme at <https://hedlandmaritime.com.au/projects/port-hedland-voluntary-buy-back-scheme/> (accessed 12 Jun 2021).

<sup>38</sup> The website is <http://www.phicmonitoring.com.au/> (accessed 23 Jun 2021).

<sup>39</sup> *Port Hedland Regulatory Strategy* (above n19), 6.

<sup>40</sup> *Port Hedland Regulatory Strategy* (above n19), 9.

<sup>41</sup> Further information on NEPM is available at <http://nepc.gov.au/nepms/ambient-air-quality> (accessed 23 Jun 2021).

<sup>42</sup> And, in any event, the legal status of NEPMs does not appear amenable to easy resolution, involving questions of Australian constitutional law and policy. One academic article has noted: 'The degree of legal enforceability of NEPMs ... is dependent on a number of arguments ... WA has made no provision for the automatic adoption of NEPMs in state law. In fact, it has gone further than the other States/Territories to make incorporation of NEPMs discretionary': G Leane & ors, 'Promise or Pretence - Compliance with the Intergovernmental Agreement on the Environment: The National Environment Protection Council (Western Australia) Act 1996' (1997) 4/1 *Murdoch University Electronic Journal of Law* (available <http://classic.austlii.edu.au/cgi-bin/sinodisp/au/journals/MurdochUeJLLaw/1997/8.html> , accessed 21 Jun 2021) [75] & [92].

<sup>43</sup> That is apparent in various materials.

- The Guidelines 'due diligence' incorporates risk assessment to guide prioritisation, where 'The significance of an adverse impact is understood as a function of its likelihood and severity. [and] Severity of impacts will be judged by their scale, scope and irremediable character': *OECD Due Diligence Guidance* (above n26, p42, with the application of this concerning environmental impacts on p43).
- The Guidelines explain 'The text of the Environment Chapter broadly reflects the principles and objectives contained in the *Rio Declaration on Environment and Development, in Agenda 21*': *OECD Guidelines* (above n3), ch VI, Commentary, [60]. Agenda 21 identifies responsibilities for Governments and others, including 'the private sector' to act to 'minimize industrial pollution and adverse impacts on the atmosphere; Encourage industry to increase and strengthen its capacity to develop technologies, products and processes that are safe [and] ... Support the promotion of less polluting and more efficient technologies and processes in industries ...with a view to limiting industrial pollution, and adverse impacts on the atmosphere': *Agenda 21* (UN Conference on Environment & Development, UN doc A/CONF.151/26/Rev.1, annex II), [9.18].
- Statements from other NCPs such as Finnish NCP, *Final statement on OECD Specific Instance concerning Pöyry Plc and the Xayaburi hydropower project in the Lao PDR* (2013, Ministry of Employment and the Economy), 12, where the Finnish NCP explained the company had 'attempted to mitigate the environmental risks and adverse impacts related to the project, although the opinions of the various parties differ on the adequacy of these measures. ...[and the company] cannot be considered to have violated the OECD's Guidelines'.

<sup>44</sup> Para 14 of {IFC, 2012 #6094}, *Performance Standard 1: Assessment and Management of Environmental and Social Risks and Impacts (IFC Performance Standard 1)*. The IFC Performance Standards are a standard applied in {OECD, 2017 #4372}, [98] and also the {OECD, 2016 #11362} (**Common Approaches**), which is referenced in the {OECD, 2018 #5515}26).

<sup>45</sup> '[F]or example, impacts that are particularly grave in nature (e.g. threats to life, child/forced labour and human trafficking), widespread in scope (e.g. large-scale resettlement and working conditions across a sector), cannot be remediated (e.g. torture, loss of health and destruction of indigenous peoples' lands) or are related to the project's operating context (e.g. conflict and post-conflict situations)': {OECD, 2016 #11362} (Common Approaches), 9.

<sup>46</sup> *IFC Performance Standard 1* (n44 above), [14]. The IFC defines these:

- 'Technical feasibility is based on whether the proposed measures and actions can be implemented with commercially available skills, equipment, and materials, taking into consideration prevailing local factors such as climate, geography, demography, infrastructure, security, governance, capacity, and operational reliability.
- *Financial feasibility* is based on commercial considerations, including relative magnitude of the incremental cost of adopting such measures and actions compared to the project's investment, operating, and maintenance costs, and on whether this incremental cost could make the project nonviable...': *IFC Performance Standard 1* (n44 above), fn 20 & 21; further detailed in GN61-GN63 of 'Guidance Note 1: Assessment and Management of Environmental and Social Risks and Impacts' in {IFC, 2021 #11364}.

<sup>47</sup> Minister for the Environment *Upgrade of Dust Management at Finucane Island and Nelson Point* (Ministerial Statement 0433, 14 November 1996) Government of Western Australia; Minister for the



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Environment Upgrade Dust Management at Finucane Island and Nelson Point (Ministerial Statement 740, 16 May 2007) Government of Western Australia; Minister for the Environment Upgrade of Dust Management at Finucane Island and Nelson Point (Ministerial Statement No. 1070, 18 December 2017) Government of Western Australia.

<sup>48</sup> BHP Hedland Licence L4513/1969/18 (above n21), Decision Report, p67. These to be in place until '31 December 2020; or compliance with' other management conditions to address dust: BHP Hedland Licence L4513/1969/18 (above n21), condition 5.

<sup>49</sup> BHP Hedland Licence L4513/1969/18 (above n21), conditions 5 (direct shipping), 12-15, 23 & schedule 6 (dust control equipment), and 19-20 (ore moisture requirements).

<sup>50</sup> BHP Hedland Licence L4513/1969/18 (above n21), condition 21 & 22.

<sup>51</sup> BHP Hedland Licence L4513/1969/18 (above n21), condition 23.

<sup>52</sup> BHP Hedland Licence L4513/1969/18 (above n21), condition 24.

<sup>53</sup> BHP Hedland Licence L4513/1969/18 (above n21), condition 25 and schedule 4.

<sup>54</sup> BHP Hedland Licence L4513/1969/18 (above n21), condition 25 and schedule 4.

<sup>55</sup> BHP Hedland Licence L4513/1969/18 (above n21), Decision Report, p23.

<sup>56</sup> BHP Submission to Independent Examiner, 9 April 2021.

<sup>57</sup> 'It is important to note that the siting of some PHIC air monitoring equipment may not satisfy Australian/New Zealand Standard 3580.1.1: Guide to siting air monitoring equipment. For example, the ambient air monitor at Neptune Street is located within a few metres of two dwellings and a 1.8m tall fence, which may restrict airflows in the vicinity of the monitor inlet or absorb some particulate matter affecting results. Other monitors are also located in residential areas with obstructions within close proximity to the monitor potentially limiting the reliability of data. However, it is understood that there are often significant constraints with regard to availability of land or other tenure issues when selecting suitable monitoring locations. It is considered the monitoring network is generally satisfactory with regard to both the methods and equipment used.': BHP Hedland Licence L4513/1969/18 (above n21), Decision Report, p25-26.

<sup>58</sup> Department of Water and Environmental Regulation Port Hedland Air Quality (<https://www.wa.gov.au/service/environment/environment-information-services/port-hedland-air-quality> accessed 3 June 2021) Government of Western Australia.

<sup>59</sup> Hedland Air Quality (above n58), explained under 'Taplin Street monitor'.

<sup>60</sup> Hedland Air Quality (above n58), explained under 'Taplin Street monitor'.

<sup>61</sup> Department of State Development Port Hedland Dust Management Taskforce Report to Government (August 2016) Government of Western Australia, 16.

<sup>62</sup> Department of Jobs Tourism Science and Innovation Government response (Port Hedland Dust Management Taskforce Report, October 2018) Government of Western Australia.

<sup>63</sup> The PHIC website states 'Operation and management of the Network is being transferred to the Department of Water and Environmental Regulation' (<https://www.phic-hedland.com.au/index.php/our-environment/monitoring-network/> accessed 14 Jun 2021); update on status of the transfer provided via communication from W.A Government on 26 July 2021.

<sup>64</sup> eg. S Mangan, *Mining industry hid issues with dust monitoring in Port Hedland from regulator* (13 October 2020, ABC News, <https://www.abc.net.au/news/2020-10-13/port-hedland-dust-monitoring-failures-iron-ore-industry/12732718>, accessed 14 Jun 2021), reporting on a letter 'obtained through freedom of information...from DWER director-general Michael Rowe ... to the PHIC of his "extreme disappointment" about the failure [of the Taplin Street monitor]. "I note that PHIC and its members had been aware of, and had been investigating, the potential issue for a long period dating back to April 2018," he said ... [and] "The monitor guides and directs management actions at a number of major operations within the port, and the failure of the monitoring site has the potential to undermine the entire regulatory approach of the department" Mr Rowe said in the letter'.

See also:

- M Pascual Juanola, *Port Hedland investors in property doldrums as dust blows away house prices* (5 November 2020, WA Today, <https://www.watoday.com.au/national/western-australia/port-hedland-investors-in-property-doldrums-as-dust-blows-away-house-prices-20201028-p569qi.html>, accessed 12 Jun 2021) (**Port Hedland investors**)
- Minister for Environment *Dust Management — Air Quality Monitoring — Port Hedland* (Response to Question without notice No 902, Hansard, 10 September 2020) Hansard Legislative Council
- Question on Notice (for which there is no record of a response): Council, *Question on Notice No. 3184* (2020, Parliament of Western Australia, 10 September 2020).

<sup>65</sup> The OECD's Database of specific instances at <https://mneguidelines.oecd.org/database/> (accessed 9 June 2021).

<sup>66</sup> Two databases, which collate:

- the decisions and recommendations from the Universal Periodic Review; special procedures of the Human Rights Council; other investigative mechanisms of the UN's Security Council, General Assembly, Human Rights Council, Secretary-General and High Commissioner for Human Rights; and human rights Treaty Bodies (not including the committee's views on individual complaints) – contained in the UN's *Universal Human Rights Index* at <https://uhri.ohchr.org/en/search-human-rights-recommendations> (accessed 8 June 2021); and
- the views of human rights treaty bodies in deciding individual complaints – contained in the UN's Jurisprudence at <https://juris.ohchr.org/search/Documents> (accessed 8 June 2021).

<sup>67</sup> e.g. Special Rapporteur on human rights and hazardous substances and wastes, *Report of mission to Sierra Leone* (2018, Human Rights Council, 13 November 2018), [62] & [81]; Committee on the Elimination of Discrimination against Women, *Concluding observations: Republic of Korea* (2018, United Nations, 14 March 2018), [14].

<sup>68</sup> *OECD Guidelines* (above n3), Implementation Procedures, Commentary, [26].

<sup>69</sup> *OECD Initial Assessments Guides* (above n5), 10.

<sup>70</sup> *OECD Initial Assessments Guides* (above n5), 12.

<sup>71</sup> Department of Health *Port Hedland Air Quality Health Risk Assessment for Particulate Matter* (26 February 2016) Government of Western Australia, 4.

<sup>72</sup> *Hedland Air Risk Assessment* (above n71), 31.

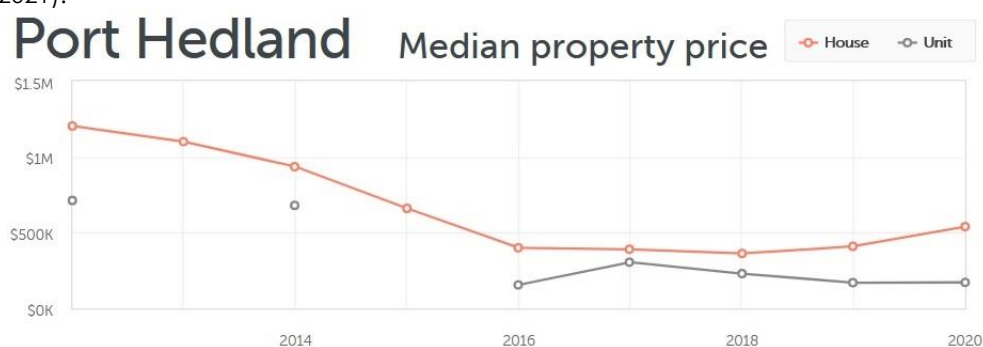
<sup>73</sup> *OECD Initial Assessments Guides* (above n5), 45: 'The OECD Guidelines for MNEs state that in the case of human rights, severity is a greater factor than likelihood in considering prioritisation. Thus where prioritisation is necessary enterprises should begin with those human rights impacts that would be most severe, recognising that a delayed response may affect remediability. FOR EXAMPLE, if a potential adverse impact can result in loss of life, it may be prioritised even if it is less likely (e.g. establishment of measures to prevent damage and loss life in case of natural disasters at a power facility)'.

<sup>74</sup> Department of Health Community fact sheet - Port Hedland air quality (<https://ww2.health.wa.gov.au/~media/Corp/Documents/Health-for/Infectious-disease/COVID19/Port-Hedland-air-quality-fact-sheet.pdf>), p 1.

<sup>75</sup> e.g. *Port Hedland investors* (above n64); V Gorman & L Birch, *Port Hedland voluntary buyback scheme sees first contracts signed but not all residents are happy* (10 June 2021, ABC News, <https://www.abc.net.au/news/2021-06-10/port-hedland-buy-back-contracts-signed-residents-unhappy/100201268>).

<sup>76</sup> F Haslam McKenzie & ors, *Housing market dynamics in resource boom towns* (July 2009, Australian Housing and Urban Research Institute, [https://www.ahuri.edu.au/\\_data/assets/pdf\\_file/0006/2130/AHURI\\_Final\\_Report\\_No135\\_Housing-market-dynamics-in-resource-boom-towns.pdf](https://www.ahuri.edu.au/_data/assets/pdf_file/0006/2130/AHURI_Final_Report_No135_Housing-market-dynamics-in-resource-boom-towns.pdf)), accessed 12 Jun 2021).

<sup>77</sup> Evident in the following graph from REA, *Port Hedland REA Group Ltd*, <https://www.realestate.com.au/neighbourhoods/port-hedland-6721-wa#median-price>, accessed 12 Jun 2021):



<sup>78</sup> *OECD Initial Assessments Guides* (above n5), 11 ('an issue raised that solely addresses government policy would be outside the scope of the Guidelines. Additionally, issues which do not concern the chapters of the Guidelines, such as commercial disputes between companies, would fall outside the scope.').

<sup>79</sup> *OECD Initial Assessments Guides* (above n5), 12.

<sup>80</sup> *OECD Guidelines* (above n3), Implementation Procedures, Commentary, [21].

<sup>81</sup> In WA, there are various processes by which parties can engage with companies and government about environmental management and regulation. These include processes under the environmental

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protection regime (<https://www.epa.wa.gov.au/public-comment-and-submissions-proposals>) and appeals (<https://www.epa.wa.gov.au/appeals-against-decision-or-recommendation-epa>), the Ombudsman (<https://www.ombudsman.wa.gov.au/Complaints/What.htm>) and the State Administrative Tribunal ([https://www.sat.justice.wa.gov.au/T/types\\_of\\_applications.aspx](https://www.sat.justice.wa.gov.au/T/types_of_applications.aspx)). Where a party considers an agency is acting improperly, in addition to these options, there may also be issues appropriate for court proceedings (eg.

[https://www.supremecourt.wa.gov.au/B/before\\_starting\\_or\\_defending\\_an\\_action.aspx?uid=5-1084-7710-6885](https://www.supremecourt.wa.gov.au/B/before_starting_or_defending_an_action.aspx?uid=5-1084-7710-6885)) and assistance from community legal centres (e.g. <https://www.edo.org.au/get-advice/>).

<sup>82</sup> *AusNCP Procedures* (above n2), 6.2.1 (emphasis added).

<sup>83</sup> *AusNCP Procedures* (above n2), 4.16 (emphasis added).

<sup>84</sup> Any discretionary decision should be informed by other parts and aims of the *AusNCP Procedures* and the *OECD Guidelines*:

- '[I]n exceptional cases, a party may raise concerns about being publicly identified in connection with a case. In such cases, the Examiner will duly consider any representations and determine whether it is appropriate to withhold identifying information.': *AusNCP Procedures* (above n2), 4.13
- 'When the NCP, after having carried out its initial assessment, decides that the issues raised in the specific instance do not merit further consideration, it will make a statement publicly available after consultations with the parties involved and taking into account the need to preserve the confidentiality of sensitive business and other information. If the NCP believes that, based on the results of its initial assessment, it would be unfair to publicly identify a party in a statement on its decision, it may draft the statement so as to protect the identity of the party.': *OECD Guidelines* (above n3), Implementation Procedures, Commentary, [32]
- 'The National Contact Point will contribute to the resolution of issues that arise relating to implementation of the Guidelines in specific instances in a manner that is impartial, predictable, equitable and compatible with the principles and standards of the Guidelines.': *OECD Guidelines* (above n3), Implementation Procedures, C.
- 'Information about the activities of enterprises and about their relationships with sub-contractors and their suppliers, and associated environmental impacts is an important vehicle for building confidence with the public. This vehicle is most effective when information is provided in a transparent manner and when it encourages active consultation with stakeholders such as employees, customers, suppliers, contractors, local communities and with the public-at-large so as to promote a climate of long-term trust and understanding on environmental issues of mutual interest.': *OECD Guidelines* (above n3), ch VI, Commentary [65].

<sup>85</sup> e.g. Nationaal Contactpunt, *Final Statement Bart Stapert, attorney, vs Mylan* (2016, Ministry of Foreign Affairs, 11 April 2016), 4-5; Norges OECD-kontaktpunkt, *Complaint from The Future In Our Hands (FIOH) against Intex Resources Asa and the Mindoro Nickel Project* (2011, Norwegian National Contact Point for the OECD Guidelines for Multinational Enterprises, 30 November 2011), 22-25.

<sup>86</sup> Consistent with *AusNCP Procedures* (above n2), 5.10.