

## Mining: International Developments with Domestic Significance

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John Southalan<sup>1</sup>, Melanie Noid<sup>2</sup>

**Abstract:** International legal developments have increasing relevance for mining operations and mining law. While regulation of the soil and its resources remains quintessentially domestic law, broader responsibilities for business and its value chains involves law beyond WA's *Mining Act 1978*. The Commonwealth's recent *Modern Slavery Act 2018* is one example, but international standards and associated mechanisms have far wider application and implications for WA resources lawyers.

### Introduction

- [1] There have been significant mining law developments and cases in recent years, with implications for concepts like separate legal entity, freedom of contract, and domestic incorporation of international law. Lawyers should be aware of these in advising and assisting clients (whether as private practitioner or in-house). In some cases, there may be a need to adjust precedents, structures, and procedures. But, in other instances, it seems unlikely Australian law will follow recent developments in other common law jurisdictions. These matters are addressed under the following headings.<sup>3</sup>

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<sup>1</sup> Barrister (WA Bar Association), *Adjunct Professor* (University of Western Australia and Murdoch University)

<sup>2</sup> *Law Graduate* (Curtin Law School); LLB(Dist), BSc(Hort)(Hons), GradDip(SustainMgmt).

<sup>3</sup> This paper draws from two earlier articles: Southalan 2019 and Southalan 2016 (which have more detail on various aspects) and some of that text is extracted here.

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- [2] This paper is *not* about amorphous concepts like ‘social licence to operate’ or ‘corporate social responsibility’. Nor does it cover the many aspirational principles or ‘best practice’ statements from NGOs and others: materials unkindly characterised as ‘a cacophony of standards’.<sup>4</sup> Rather, this paper is aimed at the black letter lawyer and what they should know to advise their client regarding extractives operations. Five brief examples, examined in more detail later, may serve to focus attention.
- (a) The UK Supreme Court’s April 2019 decision in *Vedanta Resources v Lungowe* confirmed proceedings could continue against a UK parent company, asserting a direct duty of care to Zambian villagers impacted by a subsidiary’s mining operations. Commentary on the decision observed: ‘Since all parent companies usually promulgate group-wide policies (in line with best practice), this suggestion by the Supreme Court ... will no doubt be the subject of careful consideration by multinational groups in reviewing their governance and policy-making processes’.<sup>5</sup>
  - (b) The Canadian Supreme Court made a similar decision, in February 2020 (*Newsun Resources v Araya*), regarding claims by Eritrean citizens around impacts from a mine operated by a subsidiary of a Canadian miner. These proceedings have been programmed to trial, with the majority of the Canadian Supreme Court stating: ‘A compelling argument can ... be made... for a direct approach recognizing that since customary international law is part of Canadian common law, a breach by a Canadian company can theoretically be directly remedied based on a breach of customary international law’.<sup>6</sup>
  - (c) The London Metals Exchange issued its *Responsible Sourcing Requirements* in October 2019, which will apply to all brands listed for good delivery on the exchange, and is based on the *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals*.
  - (d) In December 2019, the US Securities & Exchange Commission released its latest proposed rule regarding Section 1504 of the *Dodd-Frank Act*, regarding US-listed extractives companies and disclosure of payments to governments. There is criticism that the proposed rule deviates significantly from the standards of the *Extractive Industries Transparency Initiative*. Various companies are considering whether and what changes ought occur in their payment disclosures.
  - (e) In February 2020, an agreement arising from conciliation by the *Australian National Contact Point for the OECD Guidelines* was published, about arrangements between the ANZ Bank and communities in Cambodia. The Bank acknowledged inadequacies in its earlier due diligence and that communities were affected by the related project; the Bank agreed to pay, to the affected communities, the gross profit it earned from the loan.

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<sup>4</sup> Professor Michael Porter observed, in 2006: ‘Rigorous and reliable ratings might constructively influence corporate behaviour [but] the existing cacophony of self-appointed scorekeepers does little more than add to the confusion’: Porter & Kramer 2006, 2. The subsequent 14 years have not clarified matters: the author recently learnt from a mid-tier mining company that, as at 2020, they perceive myriad possible standards and have chosen only two they consider provide justifiable value for the time & resources spent in compliance: the *Dow Jones Sustainability Index* and *FTSE4Good Index*. A comprehensive overview of corporate responsibility materials in general is provided in Leipziger 2015.

<sup>5</sup> Mulley & Leary 2019.

<sup>6</sup> *Newsun Resources -v- Araya* (CAN), [127].

- [3] This paper provides an examination of these, and other developments, relevant to WA extractives operators before summarising with some observations on the implications for lawyers.

### OECD Guidelines for Multinational Enterprises

- [4] The *OECD Guidelines for Multinational Enterprises*<sup>7</sup> are international standards for responsible business conduct, agreed by governments (with input from business and labour associations). The *OECD Guidelines* apply to any multinational company from an ‘adhering country’ (which includes Australia) and therefore cover all Australian companies with overseas operations, as well as multinationals operating in Australia. Relevant to the extractives sector, the *OECD Guidelines* outline expected conduct in areas including human rights, employment and industrial relations, environment, and competition.
- [5] The two areas in the *OECD Guidelines* of most relevance to extractives are the chapters on Environmental and Human Rights. Extracts from these indicate the type of expectations of business.

#### *VI Environment*

*Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements... take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development. In particular, enterprises should:*

...

2. *Taking into account concerns about cost, business confidentiality, and the protection of intellectual property rights: ... b) engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation.*
3. *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.*

#### *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:*

...

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.*

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<sup>7</sup> OECD 2011.

6. *Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.*

- [6] These expectations exist *in addition to* a company's obligations under the domestic law where it is operating.<sup>8</sup> If the domestic law actually prohibits conduct specified in international standards, then the *OECD Guidelines* would not require a company to breach the domestic law. But, in most situations where domestic law is inconsistent, that law simply enables company rights or actions below the level of protection enumerated in international standards. In such an instance, compliance with the *OECD Guidelines* requires the company to go beyond what is required by the domestic law.
- [7] For questions of company compliance with the *OECD Guidelines*, there is a complaint-conciliation process, through bodies called National Contact Points (or **NCPs**). Each 'adhering country' must establish an NCP, to promote the *OECD Guidelines* and also manage complaints about non-compliance. The Australian NCP is part of the Commonwealth Treasury Department.<sup>9</sup>
- [8] The *OECD Guidelines* 'complaint' process essentially involves four stages.
- (a) **Any party can make a 'complaint'**; there is no need for formal 'standing' or legal connection with the matter or the alleged victim. However the complainant should have some interest in the matter.<sup>10</sup>
  - (b) The **NCP conducts an 'initial assessment'**, to determine whether the complaint is authentic, substantiated, and within the scope of the *OECD Guidelines*.<sup>11</sup>
  - (c) **If a bona fide case exists, the NCP offers conciliation between the parties**<sup>12</sup> (which has sometimes also included independent NCP reviews of the events); but if the company does not participate, the NCP proceeds to the fourth stage.
  - (d) The **NCP issues a public statement**, which is effectively the NCP's decision or report on the process. Wherever possible, the statement and outcomes are those agreed between the parties. But the statement may include the NCP's recommendations for the company, and observations on company compliance (or lack thereof) with the *OECD Guidelines*.<sup>13</sup>
- [9] The published statements of NCPs are a relatively new and somewhat uneven 'jurisprudence'. Some NCPs are well-resourced and active, while others have had less significance. NCP statements can also be vague as to the principles/precedents involved, especially where the statement arises from a mediated outcome. But NCP conciliation is

<sup>8</sup> '[I]n countries where domestic laws and regulations conflict with the principles and standards of the *Guidelines*, enterprises should seek ways to honour such principles and standards to the fullest extent which does not place them in violation of domestic law': OECD 2011, Part I, [2].

<sup>9</sup> AUS Gov 2020.

<sup>10</sup> OECD 2019c, 6.

<sup>11</sup> The detailed criteria for initial assessment are outlined in OECD 2019c.

<sup>12</sup> This is formally phrased as follows: "Where the issues raised merit further examination, offer good offices to help the parties involved to resolve the issues. For this purpose, the NCP will ... d) offer, and with the agreement of the parties involved, facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist the parties in dealing with the issues": OECD 2011, Procedural Guidance C2.

<sup>13</sup> Further details in OECD 2019b.

likely to be an increasing forum for disputes. This is apparent from some cases concerning issues of interest to extractives companies and those interested in their operations.

- (a) A 2009 case examined environmental and social impacts from coal mining operations of a BHP subsidiary in Colombia. The Australian NCP coordinated mediation and independent reviews, which resulted in agreement for over \$3 million for sustainable projects and ongoing pollution monitoring and reporting.<sup>14</sup>
- (b) A 2013 case involved environmental and social impacts from iron/steel mining and processing developments in India by POSCO (South Korean steel company) which had limited investment from government pension funds in Norway and Holland.<sup>15</sup> The Norwegian Pension Fund refused to mediate, and the NCP of Norway concluded the pension fund was in violation of the *OECD Guidelines* for refusing to engage and not having a strategy on how to deal with human rights risks in its investments.<sup>16</sup>
- (c) A 2019 case examined human rights impacts from release of personal information about a sexual assault complaint by Mercer PR acting for the Nauruan Government. The company refused to participate in mediation. The Australian NCP's final statement observed the company: (1) was in breach of the *OECD Guidelines*, (2) should consider an apology and remedying the impacts, and (3) have management do human rights training and incorporate these into its procedures. The Australian NCP stated it will follow up on these recommendations.<sup>17</sup>
- (d) A 2020 statement was issued by the Australian NCP regarding human rights impacts connected to an ANZ loan for sugarcane operations in Cambodia. The Australian NCP had examined complaints in 2018 and made some observations about non-compliance.<sup>18</sup> After further discussions in 2020, the parties agreed a resolution which involved the ANZ paying, to the affected communities, the gross profit it earned from the loan.<sup>19</sup>

[10] The OECD Secretariat has produced a range of 'due diligence' guides to assist businesses in understanding the expectations in the *OECD Guidelines*. Most relevant to the extractives sector and its supply chains, these include the following.

- (a) *Corporate Lending and Securities Underwriting*, issued in October 2019,<sup>20</sup> which has some additional material building on the March 2017 guide for *Institutional investors*.<sup>21</sup>
- (b) *Responsible Business Conduct*, in general (ie. not sector-specific) was published May 2018.<sup>22</sup>

<sup>14</sup> AusNCP 2009.

<sup>15</sup> Further detail in Southalan 2016, 897.

<sup>16</sup> NOR NCP 2013, 6.

<sup>17</sup> AusNCP 2019.

<sup>18</sup> AusNCP 2018.

<sup>19</sup> AusNCP 2020.

<sup>20</sup> OECD 2019a.

<sup>21</sup> OECD 2017b.

<sup>22</sup> OECD 2018.

- (c) *Extractive Sector*. Published in February 2017,<sup>23</sup> this has two chapters (Recommendations for corporate planning or to management; and Recommendations to on-the-ground personnel) and then a series of appendices with details on these matters:

*Annex A. Monitoring and evaluation framework for meaningful stakeholder engagement*

*Annex B. Engaging with indigenous peoples*

*Annex C. Engaging with women*

*Annex D. Engaging with workers and trade unions*

*Annex E. Engaging with artisanal and small-scale miners*

- (d) *Responsible Supply Chains of Minerals*, the 3<sup>rd</sup> edition of which was released in April 2016.<sup>24</sup>

[11] The 2016 guide, on supply chain of minerals, was originally adopted in 2011 addressing *Minerals from Conflict-Affected and High-Risk Areas*. That had developed from UN and other processes (involving industry and government) regarding conflict minerals from the Great Lakes Region and the Democratic Republic of the Congo. By 2016, the OECD foreword explained: ‘The updated edition now clarifies that the Guidance provides a framework for detailed due diligence as a basis for responsible supply chain management of all minerals’.<sup>25</sup>

[12] Company compliance with the OECD’s due diligence guides can be examined through the NCP complaint process. However there are other ways in which these documents have relevance. The text of the 2016 *Responsible Supply Chains of Minerals* has been used in other standards and processes, including the London Metals Exchange and the Chinese Due Diligence Guidelines (both of which are examined below). Closer to home, the OECD guides could potentially inform what is reasonable conduct by extractives companies, thus having relevance in negligence and other areas. The High Court observed, in *CGU Insurance -v- Porthouse*, that: ‘A particular practice or standard of conduct, whether laid down by a professional body or sanctioned by common usage, may be relevant to establishing a standard of care in a case of professional negligence’.<sup>26</sup>

### Chinese Due Diligence Guidelines

[13] China is not an ‘adhering country’ to the *OECD Guidelines* and therefore the NCP-complaint process does not apply to Chinese companies operating in any countries which are not adherents to the *OECD Guidelines*. The OECD engaged with China and Chinese mineral-using businesses about supply chain issues and developed the text of the *Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains*<sup>27</sup> (**Chinese Guidelines**). The Chinese Guidelines were adopted by the China Chamber of Commerce of Metals Minerals and Chemicals Importers & Exporters in December 2015.

<sup>23</sup> OECD 2017a.

<sup>24</sup> OECD 2016.

<sup>25</sup> OECD 2016, 4.

<sup>26</sup> *CGU Insurance -v- Porthouse* (AUS), [72] per Gummow, Kirby, Heydon, Crennan & Kiefel JJ; see also *Florida Hotels -v- Mayo* (AUS), 593 per Barwick CJ (Kitto, Taylor & Menzies JJ agreeing) and 601 per Windeyer J.

<sup>27</sup> CCCMC 2015.

- [14] The *Chinese Guidelines* state they are ‘guidance to all Chinese companies which are extracting and/or are using mineral resources and their related products ... to observe the UN Guiding Principles on Business and Human Rights during the entire life-cycle of the mining project’.<sup>28</sup> These ‘UN Guiding Principles on Business and Human Rights’ are a 2011 standard agreed by the United Nations,<sup>29</sup> and their main implications for companies have been incorporated in the human rights requirements of the *OECD Guidelines*, which were summarised above.<sup>30</sup>
- [15] The *Chinese Guidelines* requires all Chinese companies extracting or using minerals to have a risk-based, supply chain due-diligence framework and, where there is risk in their supply chain, to act to reduce that.<sup>31</sup> Consistent with the *OECD Guidelines*, the *Chinese Guidelines* indicate they require company compliance beyond domestic law.<sup>32</sup> This can be seen in how the *Chinese Guidelines* require companies to assess and address risk in their supply chain, and define ‘risk’ as including:
- Extracting or sourcing resources from land where the free, prior and informed consent of local communities... has not been obtained, including those for which the extractor holds a legal title, lease, concession, or license.*<sup>33</sup>
- [16] The *Chinese Guidelines* do not, as yet, have any structure for their implementation or monitoring, and so their potential is unclear but potentially vast. If Chinese companies which process or use minerals *do* begin assessing compliance with the *Chinese Guidelines*, then those companies will need to ensure their raw product is sourced consistently with the *Chinese Guidelines*. Relevant to Australia, this could have significant implications for miners selling minerals to Chinese customers needing to demonstrate they have obtained the free, prior and informed consent of local communities regardless of whether the miner holds a legal title.

### Financier & stock exchange requirements

- [17] There are increasing requirements – concerning environmental social and governance (**ESG**) issues – from lenders and stock exchanges, as a condition for the company receiving funds or listing for public investment.
- [18] The earliest examples are conditions on World Bank funding and involvement. These have gone through various iterations and their present format is the 2012 *Performance Standards on Environmental and Social Sustainability*.<sup>34</sup> For extractives projects with involvement of the International Finance Corporation (**IFC**), these Performance Standards are usually contractually embedded to be observed by the client, with ongoing IFC monitoring and the potential for independent oversight by the IFC’s Compliance Advisor/ Ombudsman.<sup>35</sup> The most common application, of the Performance Standards during an extractives operation, is being used in a complaint by

<sup>28</sup> CCCMC 2015, 8.

<sup>29</sup> The text of the UN Guiding Principles are contained in UN 2011a, Annex; and were formally endorsed by the UN in UN 2011b, [1].

<sup>30</sup> Being the policy, due diligence, remediation aspects included in *OECD 2011*, Ch IV (see [5] above).

<sup>31</sup> CCCMC 2015, 12-21.

<sup>32</sup> The domestic law dynamic of the *OECD Guidelines* was explained in [6] above.

<sup>33</sup> CCCMC 2015, 18-19 (emphasis added).

<sup>34</sup> IFC 2012.

<sup>35</sup> The ‘mission’ of the Compliance Advisor/ Ombudsman ‘is to serve as a fair, trusted, and effective independent recourse and accountability mechanism, and to improve the environmental and social performance of the International Finance Corporation...’: CAO 2013, 2.

stakeholders against the operation demanding remedial action by the IFC. However there are also examples where companies have used the standards in their contracting requirements of government, as a risk control measure.<sup>36</sup>

- [19] The IFC's Performance Standards influenced the development of the *Equator Principles (EP)* by banks and other financial institutions for determining, assessing and managing their environmental and social risk in projects. These have operated since 2003, and July 2020 will see the commencement of the latest version of standards in EP4.<sup>37</sup> Australian four large banks, and Export Finance Australia, are members, which involves implementing the EPs in their internal environmental and social processes for financing projects and not providing various types of financial support to projects where the client does not comply with the EPs.
- [20] Stock exchanges have reporting requirements, for companies wishing to list on them to enable share trading and capital raising. In Australia, miners are well familiar with the listing requirements about reporting their exploration and mineral holdings. There is, however, increasing attention to other ESG issues connected with extractives. Requirements relevant to human rights and conflict minerals arise in stock exchange listing obligations like the UK's *Strategic Report and Directors' Report Regulations 2013*, South Africa's *Companies Regulations 2011* (r43), and conflict minerals reporting for listing on US stock exchanges under the US *Dodd-Frank Act* s1504. These broadly target certain minerals or activities and require companies to disclose their action to avoid sourcing conflict minerals. Since s1504 has been enacted, there have been various changes about the particular requirements for company reporting (from court decisions, Congressional disapprovals, and rules from the US Securities and Exchange Commission or **SEC**). The SEC's latest proposed rules<sup>38</sup> have resulted in significant and ongoing disagreement about the extent of 'project' reporting<sup>39</sup> and extractives firms are considering what changes (if any) should occur in their reporting.<sup>40</sup>
- [21] These various forms of reporting often require action from a party even if it is not directly covered itself. Most reporting mechanisms set minimum thresholds, aimed at requiring compliance and reporting only from larger operations. But these mechanisms also require those reporting to have assurance from their supply chains, which is frequently done by the larger company sending the compliance standards to its suppliers and demanding their contractual commitment to meet those standards. This kind of dynamic exists under the reporting for the Commonwealth's *Modern Slavery Act 2018*, and many law firms will already have received a request from their larger corporate clients, asking for various forms of assurance about the lawyers' working conditions and operations. That illustrates the width of these types of standards and the need to be cognisant of them. Even if an operation is not directly required to comply, that potential may arise through future customers, suppliers, or partners.

<sup>36</sup> eg. in one Latin American example known to the author, a company's contract with government involved assurance that the government would not forcibly relocate people in a way contrary to the IFC standards.

<sup>37</sup> EP4 2019.

<sup>38</sup> US Gov 2019.

<sup>39</sup> Brian & Stretton 2020.

<sup>40</sup> The Business & Human Rights Resource Centre maintains an updated page (BHR 2020) detailing company approaches including (as at 18 Mar 2020) responses from ArcelorMittal, Barrick Gold, BHP, BP, ConocoPhillips, Eni, Freeport-McMoRan, Newmont, Rio Tinto, Shell, Total and Vale.

## Tortious liability for subsidiaries<sup>41</sup>

[22] Western Australian mining companies with offshore subsidiaries should consider their relationship with their subsidiaries in light of two cases due to be heard in 2020. In the United Kingdom, Zambian villagers are suing Vedanta Resources plc (**Vedanta**) and in Canada, Eritrean citizens are suing Nevsun Resources Ltd (**Nevsun**). About 170 Australian Stock Exchange-listed mining and other resource companies that are operating in around 35 African countries will be watching these decisions.<sup>42</sup> So too, should Western Australian mining equipment, technology and services companies which operate in many of the world's resource-rich regions.<sup>43</sup>

### *Vedanta Resources (UK company with Zambian subsidiary)*

[23] In 2015, over one thousand Zambian citizens commenced proceedings in the UK courts against Konkola Copper Mines (**KCM**) and Vedanta for contamination of watercourses used for drinking, livestock and irrigation purposes from the Nchanga Copper Mine in Zambia.<sup>44</sup> Vedanta, incorporated and domiciled in the United Kingdom, is the ultimate parent company of KCM, a public company incorporated in Zambia.<sup>45</sup>

[24] Vedanta challenged the jurisdiction of the UK Courts to hear the matter however in April 2019, the Supreme Court affirmed the lower courts' decisions, allowing the case to proceed in the UK.<sup>46</sup> One of Vedanta's grounds of appeal had been that there was no triable issue against it because it had not 'done anything in relation to operation of the mine sufficient either to give rise to a common law duty of care in favour of the claimants or a statutory liability.'<sup>47</sup>

[25] The Supreme Court rejected Vedanta's appeal, referring to 'published materials in which Vedanta ...asserted its own assumption of responsibility for the maintenance of proper standards of environmental control over the activities of its subsidiaries, and in particular the operations at the mine, [and] also implemented those standards by training monitoring and enforcement...'.<sup>48</sup> The judgment signals that a parent company's potential liability in negligence for its activities of its subsidiaries may be drawn from group-wide standards and policies,<sup>49</sup> sustainability reports,<sup>50</sup> and published statements. This was especially where the parent had some intervention in operations and 'holds itself out as exercising the degree of supervision and control of its subsidiaries, even if it does not in fact do so' and where

<sup>41</sup> This section of the paper was researched and written by Melanie Noid.

<sup>42</sup> AUS Plmnt 2018, 9.

<sup>43</sup> Satchwell & Redden 2016, 2-3.

<sup>44</sup> *Vedanta Resources -v- Lungowe* (GBR), [1] & [5].

<sup>45</sup> *Vedanta Resources -v- Lungowe* (GBR), [2], indicating KCM was not a 100% subsidiary of Vedanta, and that the Zambian Government held a minor stake in KCM.

<sup>46</sup> *Vedanta Resources -v- Lungowe* (GBR), [102].

<sup>47</sup> *Vedanta Resources -v- Lungowe* (GBR), [17]

<sup>48</sup> *Vedanta Resources -v- Lungowe* (GBR), [61]

<sup>49</sup> *Vedanta Resources -v- Lungowe* (GBR), [52]-[53] & [55]

<sup>50</sup> *Vedanta Resources -v- Lungowe* (GBR), [58]

management services agreements existed between the parent and subsidiary.<sup>51</sup> The trial's first hearing commenced on 5 February 2020.<sup>52</sup>

*Nevsun resources (Canadian company with Eritrean subsidiary)*

[26] Nevsun is a publicly-held British Columbia corporation.<sup>53</sup> The Canadian Court proceedings arose from Nevsun's 60% interest through a chain of subsidiary corporations for the development of a large gold, copper and zinc mine located in Eritrea.<sup>54</sup> The plaintiffs (Eritrean refugees) assert that Nevsun has liabilities from the conduct of its subsidiary Bisha Mine Share Company (**BMSC**). The claim, filed in November 2014, alleges that Nevsun was 'complicit in the use of forced labour, slavery, torture, inhuman or degrading treatment, and crimes against humanity at the mine.'<sup>55</sup> Nevsun argued that it did not owe a duty of care because of the 'several corporations in the corporate ladder between itself and BMSC'.<sup>56</sup> Further it said that 'BMSC required that no forced labour be used to build the mine and had various policies in place including a Construction, Environmental and Social Management Plan to guard against abuses.'<sup>57</sup> The lower Canadian courts rejected Nevsun's jurisdictional challenges, and this was also the decision of the Canada's Supreme Court in February 2020 in *Araya -v- Nevsun Resources*.<sup>58</sup> The trial is due to commence on 1 April 2020.<sup>59</sup>

[27] Like the UK Supreme Court decision in *Vedanta*, the Canadian *Araya* decision is not a direct precedent that a parent company *is* liable for the impacts from a subsidiary's mining operations, but these decisions confirm *such a claim may succeed*. One main difference is the Canadian proceedings are also asserting corporate violations of international customary law.<sup>60</sup> That is, the plaintiff's claim 'damages under customary international law...for the use of forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity' on the argument this is actionable through Canadian common law.<sup>61</sup> The Canadian Supreme Court rejected Nevsun's application for summary dismissal that such a claim could not succeed, with the majority judgment (Wagner CJ, Abella, Karakatsanis, Gascon & Martin JJ) observing the following.

*[85]... Some areas of international law, like treaties, require legislative action to become part of domestic law ... [86] On the other hand, customary international law is automatically adopted into domestic law without any need for legislative ... In England this is known as the doctrine of incorporation and in Canada as the doctrine of adoption. ...*

*[114] Ultimately, for the purposes of this appeal, it is enough to conclude that the breaches of customary international law, or jus cogens, relied on by the Eritrean workers may well apply to Nevsun.*

<sup>51</sup> *Vedanta Resources -v- Lungowe* (GBR), [53],[55] &[59]

<sup>52</sup> Chimbela 2020.

<sup>53</sup> *Araya -v- Nevsun Resources*, (CAN), [2].

<sup>54</sup> *Araya -v- Nevsun Resources*, (CAN), [2].

<sup>55</sup> *Araya -v- Nevsun Resources*, (CAN), [4].

<sup>56</sup> *Araya -v- Nevsun Resources*, (CAN), [13]

<sup>57</sup> *Araya -v- Nevsun Resources*, (CAN), [10]

<sup>58</sup> *Nevsun Resources -v- Araya* (CAN).

<sup>59</sup> *Araya -v- Nevsun Resources*, (CAN), [10]

<sup>60</sup> In addition to also seeking damages for torts including conversion, battery, false imprisonment, conspiracy and negligence: *Nevsun Resources -v- Araya* (CAN), [4].

<sup>61</sup> *Nevsun Resources -v- Araya* (CAN), [60] extracting the pleadings.

*The only remaining question is whether there are any Canadian laws which conflict with their adoption as part of our common law. I could not, with respect, find any.*

[132] *Customary international law is part of Canadian law. Newsun is a company bound by Canadian law. It is not “plain and obvious” to me that the Eritrean workers’ claims against Newsun based on breaches of customary international law cannot succeed. Those claims should therefore be allowed to proceed.*

### *Australian comparators*

[28] In Australia, with the exception of asbestos-related cases, there are few court decisions involving parent-company responsibility for harm done by its subsidiary. There are, of course, various *statutory* regimes where other parties may be liable for a company’s actions<sup>62</sup> but these are not examined here. The focus of this paper is the potential for *common law* – in the absence of any statutory regime – to impose liability on a parent company because of activities performed by a subsidiary.

[29] The most relevant example is the NSW Court of Appeal’s 1997 decision in *CSR Ltd -v- Wren*.<sup>63</sup> The Court found a parent company (CSR Ltd) liable for its subsidiary (Asbestos Products Pty Ltd) because ‘CSR brought itself into a relationship with the employees of Asbestos Products Pty Ltd by placing its staff in the role of management at Asbestos Products Pty Ltd.’<sup>64</sup> This approach is consistent with WA cases. The first Australian decision which directly imposed liability on a parent company from its subsidiary<sup>65</sup> was the WA Supreme Court’s 1988 decision *Barrow -v- CSR Ltd*. Justice Rowland’s reasoning there was similar to that in *CSR Ltd -v- Wren*, that it was the extent of the parent company’s involvement and control which grounded the direct duty and liability.<sup>66</sup> A similar result occurred in *CSR -v- Young*.<sup>67</sup>

[30] These decisions are not necessarily ‘piercing the veil’ but perhaps better understood in a different way. That is: the courts are *not* examining and consciously ignoring the corporate structure, but rather the particular facts show parent company officers directly involved, sufficient to legally implicate the parent company itself. Justice Rowland, in *Heys v CSR*, saw this as perhaps semantics.

*‘[W]hether one defines all of the above in terms of agency, and in my view it is, or control, or whether one says that there was a proximity between CSR and the employees of ABA, or whether one talks in terms of lifting the corporate veil, the effect is, in my respectful submission, the same.’<sup>68</sup>*

<sup>62</sup> Such as director’s liability for breach of duties (eg. *Corporations Act* (AUS), s180-181; *Circle Petroleum (Qld) Pty Ltd v Greenslade* (AUS)) or misleading conduct (eg. eg. *Australian Consumer Law* (AUS), s18; *Australian Competition Commission -v- Energy Watch*, (AUS), [107]-[110] per Marshall J); parent company liability for subsidiary insolvent trading (eg. *Corporations Act* (AUS), s588V; *Re Parker*, (AUS)); or officer liability for corruption or other criminal offences (eg. *Corporations Act* (AUS), s1307 (falsification of books); *Gregg -v- DPP* (AUS))

<sup>63</sup> *CSR Ltd -v- Wren* (AUS).

<sup>64</sup> *CSR Ltd -v- Wren* (AUS), 463 & 485. See also Turner 2015, 52-55.

<sup>65</sup> Warren 2017, 677.

<sup>66</sup> *Barrow -v- CSR Ltd* (AUS), 217-218 (although the Judge framed the decision in terms of ‘proximity’, consistent with the negligence law at that time).

<sup>67</sup> ‘On the facts CSR was conducting the mining operations through ABA and was in a relationship of proximity to her’: *CSR -v- Young* (AUS).

<sup>68</sup> *Barrow -v- CSR Ltd* (AUS), 218.

- [31] However, His Honour’s analysis here has not relevantly featured in any subsequent jurisprudence.<sup>69</sup> Much of the asbestos jurisprudence seems more influenced by the dynamics of product liability (and the circumstances in which that arises and attaches liability to the producer<sup>70</sup>) rather than making general precedents in parent-subsidary liability.
- [32] A useful indication of contemporary Australian approaches on potential parent-subsidary liability is the 2007 decision of *Premier Building v Spotless Group* (causes of action were in negligence, nuisance and statutory compensation).<sup>71</sup> The Victorian Supreme Court’s reasons outlined the relevant criteria:
- (a) managerial control including the number directors of the subsidiary who were also directors of the parent company;<sup>72</sup>
  - (b) accounting practices especially which company had paid accounts and wages;<sup>73</sup>
  - (c) dealings with regulatory authorities, specifically which company held licences;<sup>74</sup> and
  - (d) the company making the strategic decisions.<sup>75</sup>
- [33] In *Premier*, the Victorian Supreme Court concluded that the facts did not indicate a relationship of principal and agent or common enterprise so as to attach liability for the polluting acts of the subsidiary to the parent company.<sup>76</sup> There has been a similar result in the NSW Court of Appeal, in *James Hardie & Co -v- Hall*,<sup>77</sup> with the unanimous reasoning there leaving little doubt.
- In the absence of any evidence that a subsidiary company is a mere facade, the fact that a parent company exercises control and influence over its subsidiary does not of itself justify lifting the corporate veil so as to create a duty of care on the part of the parent company towards an employee of the subsidiary*<sup>78</sup>
- [34] These developments led to the view of Professor Warren (until 2017, the Chief Justice of the Supreme Court of Victoria) that: ‘The Australian experience has certainly been that direct parent liability has almost completely fallen off the radar, although much of that can probably be attributed to the narrow approach taken by the Australian cases’.<sup>79</sup>

<sup>69</sup> It appears in only two decisions since: *Queensland Newspapers Pty Ltd and Ipswich City Council* [2015] QICmr 30, [43] per Commissioner Smith (where, in a footnote, the Commissioner noted that in some circumstances the concepts of ‘agency’, ‘alter ego’ and ‘piercing the corporate veil’ can produce similar results) and *Wintle v Stevedoring Industry Finance Committee* [2002] VSC 39 (an application for judicial recusal for apprehended bias).

<sup>70</sup> eg. *Amaca P/L -v- Moss* (AUS); *Amaca P/L -v- Hannell* (AUS).

<sup>71</sup> *Premier Building -v- Spotless Group* (AUS), [15].

<sup>72</sup> *Premier Building -v- Spotless Group* (AUS), [355], [372] & [388]

<sup>73</sup> *Premier Building -v- Spotless Group* (AUS), [375] & [390].

<sup>74</sup> *Premier Building -v- Spotless Group* (AUS), [360] & [375].

<sup>75</sup> *Premier Building -v- Spotless Group* (AUS), [368] & [377].

<sup>76</sup> *Premier Building -v- Spotless Group* (AUS), [384]

<sup>77</sup> *James Hardie & Co -v- Hall* (AUS)

<sup>78</sup> *James Hardie & Co -v- Hall* (AUS). The quote is from the headnote summarising the reasoning particularly at 584-585 per Sheller JA (agreed by Beazley & Stein JJA). The NSWLR report notes ‘an application for special leave to appeal to the High Court was refused’: p554.

<sup>79</sup> Warren 2017, 686.

### *Implications*

[35] The implications from *Vedanta* and *Araya*, for WA resource firms and lawyers, can be understood from two perspectives. Obviously, the potential for similar WA/Australian proceedings; but there are also implications beyond our land ‘girt by sea’. There, the message is a simple: watch this space. For parties working with companies incorporated in Canada or the UK, the progress of *Vedanta* and *Araya* and any resultant decisions will show what changes ought be considered. However, as far as potential WA/Australian proceedings, it seems unlikely our common law would emulate the recent Canadian and UK approaches.

- (a) Australian courts take a different approach to Canada’s automatic adoption of international *customary* law (and its rights) by the common law. The few Australian precedents that exist indicate such a development needs statutory intervention. In *Nulyarimma -v- Thompson*, a majority of the Full Federal Court indicated that courts/common law cannot ‘enforce’ international customary law without legislative enactment of that law.<sup>80</sup> While there has been significant academic critique of that decision,<sup>81</sup> it has been subsequently noted and approved.<sup>82</sup> The strongest the argument has been judicially accepted in recent times is that customary international law can be ‘a potential *source* of Australian common law but not an automatic part of it’ (emphasis in original).<sup>83</sup>
- (b) Also, as regards rights under international *treaty* law: the courts have repeatedly indicated that Australia’s entry into a treaty does not give rise to a direct source of rights and obligations in Australian domestic law.<sup>84</sup>
- (c) Australian courts also have a different approach to the UK in relation to parent – subsidiary liability in tortious claims. This is succinctly outlined in Warren’s 2017 article.

‘[T]he English law has taken a more generous approach when delimiting the circumstances in which it will consider imposing a duty of care on a parent company. ...[F]eatures of parent company control of the subsidiary, such as the issuing of instructions to the subsidiary; parental approval for capital expenditure; products manufactured to parent company standards; and superior knowledge on the part of the parent company regarding health issues... were enough [in the UK case of *Chandler v Cape*<sup>85</sup>] to sustain a duty of care on the part of the parent; but in the judgment of the NSW Court of Appeal in *James Hardie*,<sup>86</sup> they fell short of the circumstances required to lift the corporate veil.’<sup>87</sup>

<sup>80</sup> *Nulyarimma -v- Thompson* (AUS), [26] per Wilcox J; [57] per Whitlam J. This decision concerned whether customary international law on genocide was directly actionable. Merkel J was in dissent on this aspect, at [132] & [160]-[161].

<sup>81</sup> eg. Cassidy 2009, 126; Walker & Mitchell 2005; Charlesworth & o’rs 2003, 455-457.

<sup>82</sup> eg. *Mokbel -v- R* (AUS), [28]-[30] per Maxwell ACJ, Buchan & Weinberg JJA; *Sumner -v- GBR* (AUS), [32] per Nyland J.

<sup>83</sup> *Sumner -v- GBR* (AUS), [32] per Nyland J.

<sup>84</sup> eg. *Minogue -v- Williams* (AUS), [22] per Ryan, Merkel & Goldberg JJ; *Dietrich -v- R* (AUS), 305-306 per Mason CJ & McHugh J, 321 per Brennan J, 348-349 per Dawson J, & 350-360 per Toohey J.

<sup>85</sup> *Chandler -v- Cape Plc* (GBR).

<sup>86</sup> *James Hardie & Co -v- Hall* (AUS)

<sup>87</sup> Warren 2017, 683.

- (d) Warren’s view was that any significant changes to ‘be made to veil-piercing within corporate groups, that will have to be done by legislation’.<sup>88</sup> This is further confirmation (in addition to the cases noted above) that Australian common law seems unlikely to develop that way anytime soon. Indeed, a search of Australian court databases (for issues and cases arising in *Vedanta*) revealed almost nothing of relevance.<sup>89</sup>

## London Metals Exchange

- [36] In October 2019, after a year’s consultation, the London Metal Exchange (**LME**) announced its responsible sourcing requirements to be followed by ‘all brands listed for good delivery on the LME’ which includes aluminium, cobalt, copper, lead, nickel, tin and zinc.<sup>90</sup> The LME’s Overview document explained the rationale and content of the requirements.

*The LME ... believes that consumers of metal are entitled to a minimum standard – even if they do not themselves choose to analyse the metals which make up the supply chain of products that they consume. Accordingly, the LME believes that standards are a crucial element of its system. ... [T]he LME’s requirements build on ...OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas ... in requiring both minimum standards and transparency from all brands, wherever they source their metal’.*<sup>91</sup>

- [37] The LME process outlines a framework based on the ‘OECD five steps’, which it summarises as:

*Step 1: Establish strong company management systems*

*Step 2a: Identify risks in the supply chain*

*Step 2b: Assess risk of adverse impacts*

*Step 3: Design and implement a strategy to respond to identified risks*

*Step 4: Carry out independent third-party audit of supply chain due diligence*

*Step 5: Report on supply chain due diligence*

- [38] The LME process understand and allows companies to use various methods to address these. But it will require some type of audit, assurance or verification of steps 1 and 2a, and also evidence of this through public reporting. The details are specified in LME’s *Policy on Responsible Sourcing of LME-Listed Brands*.<sup>92</sup>

<sup>88</sup> Warren 2017, 673.

<sup>89</sup> There was one proceeding, against Anvil Mining companies, which did not proceed beyond pre-action discovery to determine whether there was sufficient evidence to support a case that the companies facilitated government troops in violent human rights abuses. The company brought an application objecting to the proceedings on the basis of the lawyers’ funding (*Pierre -v- Anvil Mining* (AUS)). The proceedings were subsequently withdrawn after the applicants’ instructions could not be obtained because the Congolese authorities were preventing the relevant NGOs from travelling and obtaining instructions, and there had been death threats: *Pierre -v- Anvil Mining* (AUS), [6]-[11] per Master Sanderson.

<sup>90</sup> LME 2019a, 3.

<sup>91</sup> LME 2019a, 5.

<sup>92</sup> LME 2019b

## Conclusions

- [39] This paper examined various international developments around mining law, and identified implications for WA lawyers.
- (a) The various due-diligence guides issued through the OECD – particular the 2016 publication on *Responsible Supply Chains of Minerals* – are being increasingly referenced and implemented through different mechanisms. The complaints-process, through National Contact Point, will likely be an increasing feature for companies whose actions are not consistent with the OECD guides. The supply chain guide has also been incorporated into procedures issued by the London Metals Exchange and the China Chamber of Commerce of Metals, Minerals and Chemicals Importers & Exporters. Implementation of those procedures lies with each organisation.
  - (b) Financier and stock-exchange reporting is demanding more attention on ESG issues, by companies wanting to access those forms of finance.
  - (c) Tortious actions, for liabilities of subsidiary operators, are proceeding in the UK and Canadian courts. While these are obviously being closely watched by anyone with corporate connections in those jurisdictions, they seem unlikely to result in similar claims succeeding under contemporary Australian common law.

### *About Resources Law Network*

- [40] Resources Law Network is network of practicing lawyers, barristers and academics<sup>93</sup> who consider the development and use of resources (minerals, petroleum, or renewables) is a vitally important activity for any society. The Network members also believe that good regulation maximises the benefits and minimises the negative impacts of resource extraction, and recognise the importance of the rule of law in achieving that balance. This paper has been written by, and is the sole responsibility of, John Southalan (with research assistance from Melanie Noid)

#### **John Southalan**

(ABN 58 778 632 415)  
Barrister (WA Bar Association)  
Adjunct Academic (Dundee, UWA, Murdoch, Curtin)  
118 Railway Street, West Perth  
PO Box 3248, East Perth WA 6892  
T: (+61 8) 9226 0358  
[john@southalan.net](mailto:john@southalan.net)

#### **Melanie Noid**

LLB(Dist)  
BSc(Hort)(Hons), GradDip(SustainMgmt)  
[melanie.noid@postgrad.curtin.edu.au](mailto:melanie.noid@postgrad.curtin.edu.au)

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<sup>93</sup> Further information available at <https://resourceslawnetwork.com/about/>

## References

- Amaca P/L -v- Hannell (2007). Decision of Supreme Court of Western Australia - Court of Appeal (AUS), *Amaca Pty Ltd (formerly James Hardie & Co Pty Ltd) v Hannell* [2007] WASCA 158; 34 WAR 109 (2 August 2007). Available <<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/wa/WASCA/2007/158.html>> 18 Mar 2020.
- Amaca P/L -v- Moss (2007). Decision of Supreme Court of Western Australia - Court of Appeal (AUS), *Amaca Pty Ltd (formerly James Hardie & Co) v. Dennis Moss* [2007] WASCA 162 (2 August 2007). Available <<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/wa/WASCA/2007/162.html>> 18 Mar 2020.
- Araya -v- Nevsun Resources (2017). Decision of Court of Appeal for British Columbia (CAN), *Gize Yebeyo Araya & others v. Nevsun Resources Ltd* 2017 BCCA 401 (21 November 2017). Available <<https://www.bccourts.ca/jdb-txt/ca/17/04/2017BCCA0401.htm>> 16 Mar 2020.
- AUS Gov, 2020. Australian National Contact Point, *About*, Webpage. Canberra: Australian Department of the Treasury. Available <<https://ausncp.gov.au/about>> 16 Mar 2020.
- AUS Plmnt, 2018. Foreign Affairs Defence and Trade Committee, *Australia's trade and investment relationships with the countries of Africa*, Department of the Senate, 21 June 2018. Canberra: Commonwealth of Australia. Available <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Foreign\\_Affairs\\_Defence\\_and\\_Trade/TradeInvestmentAfrica/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/TradeInvestmentAfrica/Report)> 16 Mar 2020.
- AusNCP, 2009. Patrick Colmer, *Statement on BHP Billiton – Cerrejon Coal Specific Instance*, Australian National Contact Point, 12 June 2009. Canberra: Department of Treasury. Available <[www.oecd.org/daf/inv/corporateresponsibility/43175359.pdf](http://www.oecd.org/daf/inv/corporateresponsibility/43175359.pdf)> 4 March 2015.
- , 2018. Australian National Contact Point for the OECD Guidelines for Multinational Enterprises, *Final Statement: Specific Instance by Equitable Cambodia and Inclusive Development International regarding ANZ Group*, 27 June 2018. Canberra: Treasury. Available <[https://cdn.tspace.gov.au/uploads/sites/112/2018/10/11\\_AusNCP\\_Final\\_Statement.pdf](https://cdn.tspace.gov.au/uploads/sites/112/2018/10/11_AusNCP_Final_Statement.pdf)> 7 Nov 2018.
- , 2019. Australian National Contact Point for the OECD Guidelines for Multinational Enterprises, *Final Statement: Specific Instance by Australian Women Without Borders against Mercer PR*, 9 July 2019. Canberra: Treasury. Available <[www.ausncp.gov.au/sites/default/files/inline-files/16\\_AusNCP\\_Final\\_Statement\\_Online.pdf](http://www.ausncp.gov.au/sites/default/files/inline-files/16_AusNCP_Final_Statement_Online.pdf)> 11 Oct 2019.
- , 2020. Australian National Contact Point for the OECD Guidelines for Multinational Enterprises, *Follow Up Statement, Regarding complaint submitted by Equitable Cambodia and Inclusive Development International on behalf of Cambodian families*, 27 February 2020. Canberra: Treasury. Available <[https://ausncp.gov.au/sites/default/files/2020-02/Complaint\\_11\\_statement.pdf](https://ausncp.gov.au/sites/default/files/2020-02/Complaint_11_statement.pdf)> 16 Mar 2020.
- Australian Competition Commission -v- Energy Watch (2012). Decision of Federal Court of Australia (AUS), *Australian Competition and Consumer Commission v Energy Watch Pty Ltd and Benjamin Polis* [2012] FCA 425 (30 April 2012).
- Australian Consumer Law (AUS). Australian Parliament, *Australian Consumer Law* (Sch 2 to Competition and Consumer Act 2010, 24 August 1974). Available <[https://www.legislation.gov.au/Details/C2020C00079/Html/Volume\\_3#\\_Toc32223193](https://www.legislation.gov.au/Details/C2020C00079/Html/Volume_3#_Toc32223193)> 16 Mar 2020.
- Barrow -v- CSR Ltd (1988). Decision of Supreme Court of Western Australia (AUS), *Timothy Barrow v. CSR Limited and Micalco Pty Ltd* [1988] WASC 236 (4 August 1988). Available <<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/wa/WASC/1988/236.html>> 18 March 2020.
- BHR, 2020. Business & Human Rights Resource Centre, *USA: Publish What You Pay calls on extractive companies to comment on latest SEC payment disclosure rules; including company responses*, Webpage of requests and company responses. New York (USA). Available <<https://www.business-humanrights.org/en/usa-publish-what-you-pay-calls-on-extractive-companies-to-comment-on-latest-sec-payment-disclosure-rules-including-company-responses>> 18 Mar 2020.
- Brian, D & Stretton, T, 2020. Project On Government Oversight, *POGO Opposes the SEC's Resource Extraction Disclosure Rules*, Letter to Securities and Exchange Commission: Comment in Response to Proposed Rulemaking: Disclosure of Payments by Resource Extraction Issuers, 16 March 2020. Washington DC: POGO. Available <<https://www.pogo.org/letter/2020/03/pogo-opposes-the-secs-resource-extraction-disclosure-rules/>> 18 Mar 2020.
- CAO, 2013. Office of the Compliance Advisor/Ombudsman, *Operational Guidelines*. Washington DC: World Bank Group. Available <[www.cao-ombudsman.org/howwework/documents/CAOOperationalGuidelines2013\\_ENGLISH.pdf](http://www.cao-ombudsman.org/howwework/documents/CAOOperationalGuidelines2013_ENGLISH.pdf)> 31 March 2016.
- Cassidy, J, 2009. 'The Problematic Relationship Between Customary International Law and the Do-mestic Courts' 2 *Journal of Applied Law and Policy* 119. Available <<http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/JlAppLawP/2009/3.html>> 18 Mar 2020.
- CCCCMC, 2015. *Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains*, 2 December 2015. Beijing: China Chamber of Commerce of Metals, Minerals and Chemicals Importers & Exporters. Available <[https://www.globalwitness.org/documents/18138/201512\\_Chinese\\_Due\\_Diligence\\_Guidelines\\_for\\_Responsible\\_Mineral\\_Supply\\_Chains\\_-\\_En\\_K83fzvt.pdf](https://www.globalwitness.org/documents/18138/201512_Chinese_Due_Diligence_Guidelines_for_Responsible_Mineral_Supply_Chains_-_En_K83fzvt.pdf)> 20 Jan 2016.
- CGU Insurance -v- Porthouse (2008). Decision of High Court (AUS), *CGU Insurance Limited v Porthouse* [2008] HCA 30; 235 CLR 103 (30 July 2008). Available <[www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2008/30.html](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2008/30.html)> 30 Mar 2016.
- Chandler -v- Cape Plc (2012). Decision of England and Wales Court of Appeal (Civil Division) (GBR), *Chandler v Cape Plc* [2012] EWCA Civ 525 (25 April 2012). Available <[www.bailii.org/ew/cases/EWCA/Civ/2012/525.html](http://www.bailii.org/ew/cases/EWCA/Civ/2012/525.html)> 6 Jan 2016.
- Charlesworth, H; Chiam, M; Howell, D & Williams, G, 2003. 'Deep Anxieties: Australia and the International Legal Order' 25(4) *Sydney Law Review* 423-465. Available <<http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/SydLawRw/2003/21.html>> 18 Mar 2020.
- Chimbelu, C, 2020. Welle, D, *Lungowe v. Vedanta: How to hold multinationals liable for harmful activities*, 4 February 2020. Available <<https://www.dw.com/en/lungowe-v-vedanta-how-to-hold-multinationals-liable-for-harmful-activities/a-52233779>> 16 Mar 2020.

- Circle Petroleum -v- Greenslade (1998). Decision of Supreme Court of Queensland (AUS), *Circle Petroleum (Qld) Pty Ltd v Greenslade* [1998] QSC 172; 16 ACLC 1577 (31 August 1998). Available <<https://jade.io/article/171811>> 16 Mar 2020.
- Corporations Act (AUS). Australian Parliament, *Corporations Act 2001* (No 50 of 2001, 28 June 2001). Available <[http://classic.austlii.edu.au/au/legis/cth/consol\\_act/ca2001172/](http://classic.austlii.edu.au/au/legis/cth/consol_act/ca2001172/)> 9 Jan 2019.
- CSR -v- Wren (1997). Decision of NSW Court of Appeal (AUS), *CSR Ltd v Wren* (1997) 44 NSWLR 463 (18 December 1997).
- CSR -v- Young (1998). Decision of New South Wales Court of Appeal (AUS), *CSR Ltd v Young* 16 NSWCCR 56; (1998) Aust Torts Reports 81-468 (25 February 1998).
- Dietrich -v- R (1992). Decision of High Court of Australia (AUS), *Dietrich v. The Queen* [1992] HCA 57; 177 CLR 292 (13 November 1992). Available <[www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1992/57.html](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1992/57.html)> 17 Dec 2015.
- EP4, 2019. *The Equator Principles*, July 2020, 18 November 2019. London: Equator Principles Association Secretariat. Available <<https://equator-principles.com/wp-content/uploads/2020/01/The-Equator-Principles-July-2020.pdf>> 18 Mar 2020.
- Florida Hotels -v- Mayo (1965). Decision of High Court (AUS), *Florida Hotels Pty Ltd v Mayo* [1965] HCA 26; 113 CLR 588 (25 May 1965). Available <[www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1965/26.html](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/1965/26.html)> 27 Mar 2016.
- Gregg -v- DPP (2019). Decision of Supreme Court of New South Wales - Court of Criminal Appeal (AUS), *Gregg v Commonwealth Director of Public Prosecutions* [2019] NSWCCA 254 (18 October 2019). Available <<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWCCA/2019/254.html>> 18 Mar 2020.
- IFC, 2012. International Finance Corporation, *Performance Standards on Environmental and Social Sustainability*, 1 January 2012. Washington DC. Available <[www.ifc.org/wps/wcm/connect/115482804a0255db96fbff1a5d13d27/PS\\_English\\_2012\\_Full-Documents.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/115482804a0255db96fbff1a5d13d27/PS_English_2012_Full-Documents.pdf?MOD=AJPERES)> 27 Apr 2015.
- James Hardie & Co -v- Hall (1998). Decision of New South Wales Court of Appeal (AUS), *James Hardie & Co Pty Ltd v Hall (as administrator of estate of Desmond Putt)* [1998] NSWSC 434; 43 NSWLR 554 (27 May 1998). Available <<http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/1998/434.html>> 18 Mar 2020.
- Leipziger, D, 2015. *The Corporate Responsibility Code Book* (3rd ed). Abingdon (GBR): Routledge.
- LME, 2019a. *Overview of LME responsible sourcing*, Setting the Global Standard, October 2019. London: London Metals Exchange. Available <<https://www.lme.com/-/media/Files/About/Responsibility/Responsible-Sourcing/issued/Overview-of-LME-responsible-sourcing-2.pdf?la=en-GB>> 18 Mar 2020.
- , 2019b. *Policy on Responsible Sourcing of LME-Listed Brands*, October 2019. London: London Metals Exchange. Available <<https://www.lme.com/-/media/Files/About/Responsibility/Responsible-Sourcing/issued/LME-Policy-on-Responsible-Sourcing-of-LME-Listed-Brands-2.pdf?la=en-GB>> 18 Mar 2020.
- Minogue -v- Williams (2000). Decision of Federal Court of Australia (AUS), *Minogue v Williams* [2000] FCA 125 (17 February 2000). Available <[www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2000/125.html](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2000/125.html)> 24 Dec 2015.
- Mokbel -v- R (2013). Decision of Supreme Court of Victoria - Court of Appeal (AUS), *Mokbel v The Queen* [2013] VSCA 118; 40 VR 625 (17 May 2013). Available <<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSCA/2013/118.html>> 18 Mar 2020.
- Mulley, G & Leary, J, 2019. 'Current Global Trends and Developments in Mining', in Emrich, A (ed.) *The International Comparative Legal Guide to: Mining Law 2020*. London: Global Legal Group. Available <<https://iclg.com/practice-areas/mining-laws-and-regulations/2-current-global-trends-and-developments-in-mining>> 15 Jan 2020.
- Nevsun Resources -v- Araya (2020). Decision of Supreme Court of Canada (CAN), *Nevsun Resources Ltd v. Gize Yebeyo Araya and others* 2020 SCC 5 (28 February 2020). Available <<https://www.canlii.org/en/ca/scc/doc/2020/2020scc5/2020scc5.html>> 16 Mar 2020.
- NOR NCP, 2013. Norges OECD-kontaktpunkt, *Lok Shakti Abhiyan, Korean Transnational Corporations Watch, Fair Green and Global Alliance and Forum for Environment and Development vs. POSCO (South Korea), Abp/ Apg (Netherlands) and NBIM (Norway)*, Final Statement, 27 May 2013. NOR: National Contact Point for OECD Guidelines. Available <[https://www.regjeringen.no/contentassets/8d118fcbacdb41918795434c4838f848/nbim\\_final.pdf](https://www.regjeringen.no/contentassets/8d118fcbacdb41918795434c4838f848/nbim_final.pdf)> 18 Dec 2015.
- Nulyarimma -v- Thompson (1999). Decision of Federal Court of Australia – Full Court (AUS), *Nulyarimma and Others v Thompson and Others* [1999] FCA 1192; 96 FCR 153 (1 September 1999). Available <<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/1999/1192.html>> 18 Mar 2020.
- OECD, 2011. Adhering Governments, *OECD Guidelines for Multinational Enterprises*, 25 May 2011. Paris: Organisation for Economic Co-operation & Development. Available <<http://dx.doi.org/10.1787/9789264115415-en>> 22 Oct 2012.
- , 2016. Secretariat, *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 3rd edition, April 2016. Paris: OECD Publishing. Available <<http://mneguidelines.oecd.org/mining.htm>> 28 Nov 2018.
- , 2017a. Secretary-General of the OECD, *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*, 2 Feb 2017. Paris: Organisation for Economic Co-Operation and Development. Available <[www.oecd-ilibrary.org/docserver/download/2016031e.pdf?expires=1494656046&id=id&accname=guest&checksum=3A5EA86D1EAE017F2A8733CDA4DECD](http://www.oecd-ilibrary.org/docserver/download/2016031e.pdf?expires=1494656046&id=id&accname=guest&checksum=3A5EA86D1EAE017F2A8733CDA4DECD)> 13 May 2017.
- , 2017b. Secretary-General of the OECD, *Responsible business conduct for institutional investors*, Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises, 28 March 2017. Paris: Organisation for Economic Cooperation and Development. Available <<http://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf>> 13 May 2017.
- , 2018. Council at Ministerial Level, *Recommendation on the OECD Due Diligence Guidance for Responsible Business Conduct*, 30 May 2018. Paris: Organisation for Economic Co-Operation and Development. Available <<https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>> 10 May 2019.
- , 2019a. Secretary-General, *Due Diligence for Responsible Corporate Lending and Securities Underwriting*, Key considerations for banks implementing the OECD Guidelines for Multinational Enterprises, 29 October 2019. Paris: OECD Publishing. Available

- <<https://www.oecd.org/investment/due-diligence-for-responsible-corporate-lending-and-securities-underwriting.htm>> 4 Feb 2020.
- , 2019b. Secretary-General, *Guide for National Contact Points on Recommendations and Determinations*, 17 May 2019. Paris: Organisation for Economic Co-Operation and Development. Available <<http://mneguidelines.oecd.org/Guide-for-National-Contact-Points-on-Recommendations-and-Determinations.pdf>> 4 June 2019.
- , 2019c. Secretary-General of the OECD, *Guide for National Contact Points on the Initial Assessment of Specific Instances*, OECD Guidelines for Multinational Enterprises. Paris: OECD Publishing. Available <<https://mneguidelines.oecd.org/Guide-for-National-Contact-Points-on-the-Initial-Assessment-of-Specific-Instances.pdf>> 26 Feb 2020.
- Pierre -v- Anvil Mining (2008a). Decision of Supreme Court of Western Australia (AUS), *Kunda Musopelo Pierre & Others -v- Anvil Mining Management NL* [2008] WASC 30 (27 February 2008). Available <[www.austlii.edu.au/au/cases/wa/WASC/2008/30.html](http://www.austlii.edu.au/au/cases/wa/WASC/2008/30.html)> 5 Nov 2014.
- (2008b). Decision of Supreme Court of Western Australia (AUS), *Kunda Musopelo Pierre & Others -v- Anvil Mining Management NL* [2008] WASC 30(S) (22 October 2008). Available <<https://ecourts.justice.wa.gov.au/eCourtsPortal/Decisions/ViewDecision?returnUrl=%2fcourtsPortal%2fDecisions%2fFilter%2fSC%2fCitationNumber&id=e7550329-a76a-1c02-c825-74eb000e7f7d>> 18 Mar 2020.
- Porter, M & Kramer, M, 2006. 'Strategy & Society: The link between Competitive Advantage and Corporate Social Responsibility' 84(12) *Harvard Business Review* 78-92. Available <[www.scribd.com/doc/19538319/CSR-Strategy-Society-Porter-Kramer-Competitive](http://www.scribd.com/doc/19538319/CSR-Strategy-Society-Porter-Kramer-Competitive)> 20 Feb 2010.
- Premier Building -v- Spotless Group (2007). Decision of Supreme Court of Victoria (AUS), *Premier Building and Consulting Pty Ltd (res apptd) v Spotless Group Ltd* [2007] VSC 377 (5 October 2007). Available <<http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2007/377.html>> 18 Mar 2020.
- Re Parker (1997). Decision of Federal Court of Australia (AUS), *In the matter of: ACN 007 537 000 Pty Ltd (in liquidation); Robert Colin Parker* [1997] FCA 1264; 80 FCR 1 (20 November 1997). Available <<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/1997/1264.html>> 18 Mar 2020.
- Satchwell, I & Redden, J, 2016. *Redefining Australian mining: Understanding the new global footprint*, Action Research Report, May 2016. Perth (AUS): International Mining for Development Centre. Available <<https://www.im4dc.org/wp-content/uploads/2016/06/160608-Redefining-Australian-Mining-final.pdf>> 16 Mar 2020.
- Southalan, J, 2016. 'Human rights and business lawyers: The 2011 watershed' 90(12) *Australian Law Journal* 889-907. Available <<http://sites.thomsonreuters.com.au/journals/2016/11/18/australian-law-journal-update-vol-90-pt-12/>> 22 Nov 2016.
- , 2019. 'Business and Human Rights: Relevance for WA Lawyers' 46(1) *Brief* 6-11. Available <<https://resourceslawnetwork.com/business-and-human-rights-relevance-for-wa-lawyers/>> 4 Sep 2019.
- Sumner -v- GBR (2000). Decision of Supreme Court of South Australia (AUS), *Sumner v United Kingdom of Great Britain* [2000] SASC 91 (13 April 2000). Available <<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/sa/SASC/2000/91.html>> 18 Mar 2020.
- Turner, R, 2015. 'Revisiting the Direct Liability of Parent Entities Following Chandler v Cape Plc' 33(1) *Company & Securities Law Journal* 45.
- UN, 2011a. 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*, Annex to UN doc A/HRC/17/31, 21 March 2011. Geneva (CHE): United Nations Human Rights Council. Available <[www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx](http://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx)> 25 Mar 2011.
- , 2011b. Human Rights Council, *Human rights and transnational corporations and other business enterprises*, UN doc A/HRC/RES/17/4, 6 June 2011. Geneva: United Nations. Available <<http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/RES/17/4&Lang=E>> 5 Nov 2012.
- US Gov, 2019. Securities and Exchange Commission, *SEC Proposes Rules to Implement the Statutory Mandate to Adopt Resource Extraction Disclosure Rules*, Press Release 2019-264, 18 December 2019. Washington DC. Available <<https://www.sec.gov/news/press-release/2019-264>> 18 Mar 2020.
- Vedanta Resources -v- Lungowe (2019). Decision of Supreme Court (GBR), *Vedanta Resources PLC and another v Lungowe and others* [2019] UKSC 20 (10 April 2019). Available <<https://www.supremecourt.uk/cases/uksc-2017-0185.html>> 10 April 2019.
- Walker, K & Mitchell, A, 2005. 'A Stronger Role for Customary International Law in Domestic Law?', in Charlesworth, H, Chiam, M, Hovell, D & Williams, G (eds.) *The Fluid State: International Law and National Legal Systems*, pp110. Sydney (AUS): The Federation Press. Available <<http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/ELECD/2005/51.html>> 18 Mar 2020.
- Warren, M, 2017. 'Corporate Structures, the Veil and the Role of the Courts' 40(2) *Melbourne University LR* 657-687. Available <<http://www.austlii.edu.au/au/journals/MelbULawRw/2017/7.html>> 9 Mar 2020.