

Recent developments in Business & Human Rights

[John Southalan](#), 11 December 2018

Standards and materials regarding business and human rights continues to develop. This outline summarises the key documents and some recent and emerging developments.

UN Guiding Principles on Business and Human Rights¹ (UNGPs)

Adopted by UN in 2011, and accepted and endorsed by many businesses. Human rights obligations on (and of) the state remain but, *in addition*, each business has ‘responsibility’ to respect human rights, comprising three elements:

- adopt a human rights policy (GP 16);
- conduct human rights due diligence of its operations, including identifying & preventing *potential* impacts, and addressing *actual* impacts (GP 17); and
- have remediation processes for impacts which have occurred (GP 22 & 31), comprising: (1) for impacts the company has caused or contributed to - provide for, or cooperate in, remedy; and (2) for impacts with which the company is ‘directly linked’, such as harm by supplier - use leverage to prevent and mitigate its recurrence and, if unsuccessful, consider ending the relationship.

By ‘human rights’, the UNGPs include the standards in the UNDP, ICESCR, ICCPR, 8 core ILO conventions, plus others relevant where ‘specific groups or populations ... may have adverse human rights impacts on them’ such as UNDRIP, CRC, CEDAW, CPRD, CMW etc.

UNGP processes, or parts thereof, have legal implications for businesses in four main ways. **(1) National or regional regulation**, like France’s *Due Diligence law*, California’s *Transparency in Supply Chains Act*, EU’s *Directive on Disclosures of Non-Financial Information*. **(2) Contractually**, particularly membership & certification requirements, such as involvement in the *International Council on Mining and Metals*, the *Roundtable on Sustainable Palm Oil*, and the *International Code of Conduct for Private Security Service Providers*; and increasing examples within procurement contracts from large organisations like the Dutch Government and FIFA. **(3) Financier requirements**, for certain types of projects and financial assistance from the World Bank (*IFC Performance Standards on Environmental and Social Sustainability*) and Equator Principles Banks; also stock exchange listing requirements like UK’s *Strategic Report and Directors’ Report Regulations 2013*, South Africa’s *Companies Regulations 2011* (r43), and conflict minerals reporting under the US *Dodd-Frank Act*. **(4) General procedures**, involving reporting or complaints investigation, such as the International Labour Organisation and UN initiatives (eg. OHCHR statements, treaty-body ‘jurisprudence’) - the broadest of which the OECD’s Guidelines on MNEs.

OECD Guidelines on Multinational Enterprises²

Widest application of UNGPs is through the OECD Guidelines: an intergovernmental agreement featuring a complaints mechanism and implementation bodies (‘National Contact Points’ or NCPs). The OECD Guidelines apply to any multinational company from an ‘adhering country’ (incl. Australia), involving a complaints-mediation process where companies are not complying with basic UNGP requirements. Published decisions of NCPs still relatively new, and somewhat uneven (some NCPs are well resourced and active; but others do little to promote the OECD Guidelines and their compliance). However NCP decisions provide an important guide on UNGP implementation and requirements. This is the only current international mechanism (with government, company and community support) which examines UNGP compliance at a case level, so the OECD Guidelines are an important and increasing area of attention.

¹ [Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework](#) (UN Human Rights Council, 6 June 2011).

² [OECD Guidelines for Multinational Enterprises](#) (OECD Publishing, 25 May 2011).

Australian National Contact Point for OECD Guidelines

The AusNCP³ is the Australian Government body (an individual within Commonwealth Treasury) which oversees the implementation of the OECD Guidelines in Australia. Can receive, and mediate, complaints that Australian companies are breaching the OECD Guidelines. Has operated for nearly 20 years, with variable effect. Some earlier cases saw action reducing Australian company impacts on human rights (eg. 2006 about children in detention and GSL Australia; 2009 about environmental and social impacts of BHP Billiton subsidiary in Colombia) but there have also been less positive results (eg. 2011 with Xstrata Coal unwilling to engage in mediation over union issues; 2016 the AusNCP rejected a complaint about G4S in Manus because it 'could be interpreted as a comment on government policy').

In 2017, an independent review identified many deficiencies in the AusNCP's work and procedures. Treasury recently committed to improvements, and a recent AusNCP case and statement about ANZ investments in Cambodia also herald more scope for AusNCP involvement in companies and HR in the future.

UN and international developments

The UN's Human Rights Council continues to debate the role and content of a possible treaty about business and human rights. This does not envisage any changes to human rights standards; rather it envisages more mechanisms (and obligations on states and companies) than what exists under the UNGPs and associated structures. The first draft of a proposed treaty was released, in July 2018, by a working group of the UN Human Rights Council.⁴ Whether anything, and what, may develop from this is uncertain and, even at its highest, still remains a state-based mechanism, directed at states to enforce (through courts or other national initiatives) and envisages a usual treaty-monitoring committee (comprising members chosen by state parties).

Australian Modern Slavery laws

The *Modern Slavery Bill 2018* is shortly to become law (bill passed both Houses 29 Nov 2018). The law requires entities based, or operating, in Australia with >\$100m annual consolidated revenue, to annually report on 'the risks of modern slavery in their operations and supply chains, and actions to address those risks'.⁵ Expected to cover more than 3,000 entities, and Commonwealth agencies, the reporting obligations will require entities to report about their operations and supply chains, and how these address modern slavery risks. Reports will be published in a free, online register and the Government can identify entities which should have reported but failed to do so. Commonwealth's Home Affairs is currently consulting about proposed Guidance on the detail required to prepare and submit the annual statements.

Relevance for WA practitioners

Key questions for WA lawyers, in determining a company's requirements to 'respect human rights':

1. how much can you rely on Australian law defining parties' rights and responsibilities; and
2. if the Australian law/practice is insufficient to meet international standards, what more is required from the company (eg. to ensure it is compliant with the OECD Guidelines)?

Lawyers need familiarity with this area to properly advise and assist clients (and perhaps even avoid professional negligence/liability⁶) – whether the client is corporate, government or a third-party affected by company activities. Useful materials include IBA & Law Council of Australia materials and training,⁷ OECD guidance,⁸ and the OHCHR's *Interpretive Guide*.⁹

³ <http://ausncp.gov.au/contactpoint/>

⁴ *Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises* (UN Human Rights Council, 16 July 2018).

⁵ *Modern Slavery Bill 2018* (Cwth), cl 3.

⁶ 'Human rights and business lawyers: The 2011 watershed' (Southalan, *2016 Australian Law Journal* 90/12, 889), 905-906.

⁷ <https://www.ibanet.org/LPRU/Business-and-Human-Rights-for-the-Legal-Profession.aspx>

⁸ Particularly *Due Diligence Guidance for Responsible Business Conduct* (OECD, 31 May 2018).

⁹ *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (UN Office of the High Commissioner for Human Rights, 2012).