



Business and Human Rights: Relevance for WA Lawyers

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There are growing implications, for the operation of businesses, from international human rights. The *Modern Slavery Act 2018* (Cwth) commenced operation on 1 January 2019; the Commonwealth Treasury is strengthening a complaints mechanism around multinational enterprises and human rights; and various government inquiries are examining business impacts in banking, aged-care providers, and the gig-economy.² Many international standards are enacted as Australian law – e.g. prohibiting discrimination on gender, race, age and other grounds; outlawing corruption and bribery; criminalising trafficking – and compliance with these is a matter of Australian statutory, administrative and constitutional law. But there are increasing roles and legal implications of international human rights standards *regardless of Australian domestic law*. This article summarises the key documents and recent developments.

1 UN Guiding Principles on Business and Human Rights

The *Guiding Principles on Business and Human Rights* (known as the **UNGPs**)³ were adopted by the United Nations in 2011⁴ and have been accepted and endorsed by many businesses.⁵ The UNGPs have become the predominant framework of the current understanding and approach to business and human rights. The UNGPs confirm that human rights obligations on (and of) the state remain unchanged⁶ but, *in addition*, each business has a ‘responsibility to respect’ human rights. By ‘human rights’, the UNGPs include the standards in the 1948 *UN Declaration of Human Rights* plus all the main international human rights treaties which have since been developed⁷

– even if the particular treaty has not been adopted by the country where the company is operating, or that country’s domestic law is inconsistent. That is: if the domestic law permits activities below what is specified by international human rights standards, then the company is expected to respect the international standards.⁸ The ‘respect’ for human rights, as explicated in the UNGPs, comprises three elements.

- a) The business should **adopt a human rights policy**, involving a public commitment of the organisation’s responsibilities and expectations regarding human rights impacts of its work and workers, reflected in operational policies and procedures.⁹
- b) The business needs to **conduct human rights due diligence** of its operations, which involves identifying and preventing *potential* impacts as well as addressing *actual* impacts.¹⁰
- c) **Remediation processes** should be established for impacts which have occurred or been identified.¹¹ This aspect comprises two areas, depending on the company’s connection with the impact. For impacts the company has *caused or contributed to* – the business must provide for, or cooperate in, remediation itself. However, for impacts with which the company is ‘directly linked’ (such as harm by a supplier to the company) the business need only use leverage to prevent and mitigate its recurrence but, if unsuccessful, consider ending the relationship.¹²

1.1 Implementing the UNGPs

UNGP processes, or parts thereof, have gained legal implications for businesses in four main ways.

- The first is **national or regional regulation**, like France’s *Due Diligence law*, California’s *Transparency in Supply Chains Act*, and the EU’s *Directive on Disclosures of Non-Financial Information*. The Commonwealth *Modern Slavery Act 2018* is another example of this, and is examined further below.
- The second way in which UNGPs have legal implications is through **contractual obligations**, particularly prevalent in membership and 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.
- **Financier requirements** is the third way in which UNGP compliance arises, such as certain types of projects and financial assistance from the World Bank (through the *IFC Performance Standards on Environmental and Social Sustainability*) and Equator Principles Banks, which in Australia includes the ‘big four’. Financial requirements relevant to human rights and the UNGPs also 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 the US Stock Exchange, under the US *Dodd-Frank Act*.

- The fourth way in which UNGP compliance may arise for companies is through **general procedures**, involving reporting or complaints investigation – such as the International Labour Organisation and UN initiatives¹³ – the broadest of which the OECD's *Guidelines on Multinational Enterprises* which is examined in section 2.

1.2 UNGP statements and Australian laws on misleading conduct

The UNGPs – and related reporting obligations such as modern slavery laws – have expanded corporate publications about human rights, which will give increased relevance to the regulation of statements under the Australian Consumer Law. The prohibition on false/misleading statements¹⁴ was not envisaged as addressing human rights reporting but can extend to corporate statements which occur through the UNGPs.¹⁵ While this has not yet arisen in Australia, corporate liability for human rights and related statements has occurred in the USA¹⁶ and the UK.¹⁷ The area will likely mirror how regulation responded to corporate environmental statements – where companies face civil action and regulator prosecutions if they make unsubstantiated claims about their products or services.¹⁸

2 OECD Guidelines on Multinational Enterprises

The widest application of the UNGPs is through the OECD Guidelines,¹⁹ which are an internationally agreed code of standards for responsible business, featuring a complaints mechanism and implementation bodies ('National Contact Points' or **NCPs**). The OECD Guidelines apply to any multinational company (but also to state-owned entities and even NGOs²⁰) from an 'adhering country', which includes Australia, and therefore any Australian company operating overseas as well as multinationals operating in Australia. The OECD Guidelines cover much more than just human rights,²¹ in also outlining expected standards regarding 'Employment and Industrial Relations', 'Environment', 'Competition' and 'Taxation'.

The OECD Guidelines establish a complaint-mediation process – through the National Contact Points – about company compliance with the content of the Guidelines which, since 2011, has included

the UNGPs. Like the UNGPs, the OECD Guidelines emphasise that where domestic law falls below international human rights standards, a company is expected to ensure compliance with the international standards. If domestic law actually *prohibits* conduct which complies with the international standards, then the OECD Guidelines would not require a company to breach the domestic law.²² However, in many cases, the domestic law will simply enable company rights or actions without the level of protection of rights which international standards specify, and so the domestic law does not prevent a company from meeting the (higher) international standards while acting consistently with domestic law.

The OECD Guidelines are the only current international mechanism (with government, business and labour endorsement) which examines UNGP compliance at a case level, so the OECD Guidelines are an important and increasing area of attention. The majority of complaints since 2011 have been about corporate non-compliance with human rights.²³ The OECD Guidelines 'complaint' process essentially involves the following stages.

1. **Any party can make a 'complaint'** (i.e. there is no need for 'standing' or any connection with the matter or the alleged victim²⁴). The complaint is formally termed a 'specific instance' under the OECD Guidelines.²⁵ It is lodged with the NCP of the country where the impact occurred or where the company is registered – frequently a complaint is lodged with both 'host' and 'home' country NCPs. A complaint must identify those parts of the OECD Guidelines alleged to have been breached. Where it is related to human rights, a complaint normally alleges some deficiency of the company regarding a human rights policy, due diligence, or remediation (those concepts having been framed by the UNGPs).
2. **The NCP conducts an initial assessment.** The National Contact Point decides whether a *bona fide* case has been demonstrated²⁶ (if not, then the NCP refuses to proceed with the matter²⁷). This should occur within three months of receipt of the complaint.
3. **If a NCP considers a *bona fide* case exists, then the NCP can facilitate mediation** between the parties. This is formally termed the NCP "offer[ing its] good offices to help the parties involved to resolve the issues",²⁸ and there is no time limit on these processes.

This stage can also involve the NCP commissioning independent inquiries and reports.

4. **The NCP issues a final statement**, which should be less than three months after any mediation finishes. The final statement is effectively the NCP's decision or report on the process and:
 - wherever possible, any statement and outcomes are agreed by the parties;
 - may include the NCP's recommendations for the company, and observations on company default of (or compliance with) the OECD Guidelines; and
 - may presage the NCP undertaking future review of the matter and following-up with statements on compliance.

The published decisions of NCPs is a relatively young 'jurisprudence', and somewhat uneven (some NCPs are well-resourced and active; but others do little to promote the OECD Guidelines and their compliance²⁹). However NCP decisions provide an important guide on UNGP implementation, and will be an increasing forum of disputation, as illustrated by some NCP final statements of recent years.

- In 2005-2006, the Australian NCP mediated a dispute between an NGO and GSL Australia, about the treatment of children in detention centres managed by the company. The outcome saw the company commit "to upholding the human rights of those in its care ... [and] embedding this approach within the company's policy and procedures, including training of its officers".³⁰
- In 2013 the NCPs from Norway, the Netherlands, and South Korea all examined complaints about the South Korean steel company, POSCO, and its mining and processing developments in India. Concerns about environmental and social impacts of the development, and alleged non-compliance with the OECD Guidelines, were raised against POSCO and also two of its investors who were government pension funds in Norway and Holland. The Korean NCP dismissed the complaint against POSCO.³¹ The Dutch NCP engaged in mediation involving the Netherlands Government Pension Fund (which had encouraged POSCO to ameliorate its impacts) and decided that pension fund had complied with its obligations under the OECD Guidelines.³² However, the Norwegian

proceedings took a different path, after the Norwegian Government Pension Fund refused to mediate. The Fund reasoned that it was not responsible under the OECD Guidelines as a minority investor and that its work had broader human rights benefits. The Norwegian NCP concluded, however, that the Norwegian pension fund "violates the OECD Guidelines chiefly on two accounts. ...[1] by refusing to cooperate with the OECD NCP ...[and 2] by not having any strategy on how to react if it becomes aware of human rights risks related to companies in which NBIM [the Fund] is invested, apart from child labour violations".³³

- In 2009, the Australian NCP issued a final statement about a mediation following complaints about environmental and social impacts from coal mining operations of a BHP subsidiary in Colombia. Following an independent review of the case, mediation saw the parties' agreement including "contributions ... totalling US\$1.8 million; and a further US\$1.3 million for sustainable projects", with BHP also agreeing to ongoing pollution monitoring and those results being provided to affected communities.³⁴
- In 2016, the Dutch NCP addressed a complaint about the misuse of anaesthetics produced by Mylan, in executions in US jails. Authorities there had begun mixing drugs for conducting the death penalty, after other producers prevented their products from being so used. The Mylan anaesthetics were made in India, were "never delivered, marketed, or distributed... for use in lethal injections"³⁵ and should have been monitored by US authorities for any misuse. Nevertheless, the Dutch NCP mediated, and in its final statement made two significant points: (1) that despite a company's earlier precautions, if it learns of new impacts the company has an obligation to do more, and (2) a company's responsibilities exist not only up the supply chain to suppliers, but also down the supply chain to customers and users.³⁶

NCPs do not, however, routinely find companies in breach of the OECD Guidelines. Many complaints are summarily rejected³⁷ or, when examined and mediated, result in the NCP confirming the company has not breached the OECD Guidelines occurred. A 2016 Swedish NCP decision is informative. The NCP received a complaint and arranged a mediation concerning a wind energy project which was impacting

an indigenous group in Sweden. The NCP decided that the lengthy consultation and review process under Swedish law, which the company had followed and addressed environmental and social impacts, sufficed to meet the UNGPs and the OECD Guidelines and, although there were impacts, the company's conduct did not breach the OECD Guidelines.³⁸ The decision was *not* that adherence to national laws was sufficient but rather that the national laws and procedures followed here ensured compliance with the relevant requirements in the UNGPs and OECD Guidelines. There are cases where a company's compliance with national laws was insufficient to meet the OECD Guidelines because the national laws and procedures did not ensure the relevant international standards were fulfilled.³⁹

2.1 Australian National Contact Point for OECD Guidelines

The AusNCP⁴⁰ is the Australian Government body (an individual within Commonwealth Treasury) which oversees the implementation of the OECD Guidelines in Australia. The AusNCP can receive, and mediate, complaints that Australian companies have breached the OECD Guidelines. It has operated for nearly 20 years, with variable effect. Some earlier cases saw outcomes reducing Australian company impacts on human rights (e.g. the GSL and BHP cases summarised above) but there have also been less positive results.⁴¹ For example a 2011 case involving Xstrata Coal ended because the company was unwilling to engage in the AusNCP's mediation of concerns raised by unions;⁴² and in 2016 the AusNCP rejected a complaint about the G4s company's management of the Manus Island detention Centre for various reasons including that "aspects of the complaint could be interpreted as a comment on government policy".⁴³

In 2017, an independent review identified many deficiencies in the AusNCP's work and procedures, particularly related to inadequate resources.⁴⁴ The Commonwealth Treasury committed, in November 2018, to improvements and greater resourcing;⁴⁵ and recent AusNCP cases and statements herald increased AusNCP involvement in companies and human rights issues. Two recent examples are these.

- In June 2017, the AusNCP issued a final statement regarding a complaint about workplace conditions in factories of subsidiaries of Ansell Ltd in Sri Lanka and Malaysia. The matter was mediated and reached an agreed

outcome, including that the company ensure the OECD Guidelines are reflected in its policies and statements, and "keep abreast of any changes or further guidance published by the OECD, particularly ...[regarding] business structures and operational arrangements."⁴⁶

- In 2018, the AusNCP examined complaints that the ANZ Bank had breached the OECD Guidelines (including human rights) in its financing of a sugar plantation and refinery in Cambodia. After mediation, the AusNCP issued a final statement, acknowledging ANZ's *policies* were sufficient but doubted whether they had been followed *in practice*, given the impacts and ANZ's decision to continue funding its client.⁴⁷ The AusNCP recommended the ANZ improve its internal compliance procedures, strengthen its human rights due diligence, and establish grievance mechanisms.⁴⁸

2.2 Due diligence guidelines

The OECD (sometimes partnering with other international organisations) has produced a range of 'due diligence' guidance to assist businesses in understanding their human rights responsibilities and conducting due diligence. Some of these OECD documents are then used and referenced by international and domestic laws and standards in identifying appropriate corporate conduct,⁴⁹ as well as in NCP decisions. These OECD guidance documents include a general guide (2018)⁵⁰ but also particular guides for sectors or actors with higher prevalence of human rights impacts or specific issues to consider in due diligence. These include the following:

- Responsible Agricultural Supply Chains (2016);⁵¹
- Responsible Supply Chains of Minerals (2016);⁵²
- Meaningful Stakeholder Engagement in the Extractives Sector (2017);⁵³
- Institutional investors (2017);⁵⁴ and
- Responsible Supply Chains in the Garment and Footwear Sector (2018).⁵⁵

3 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 propose any changes to human rights standards; rather, it envisages

more mechanisms (and obligations on states and companies) than what currently 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.⁵⁶ Whether anything, and what, may develop from this is uncertain and, even at its highest, still envisages a state-based mechanism, directed at states to enforce (through courts or other national initiatives), with the usual treaty-monitoring committee (comprising members chosen by state parties). As such, in the absence of state action, this provides no *current* implications for corporate observance of human rights, and little change in the foreseeable future.⁵⁷ However there are *already* existing processes at the international level – through the UN and elsewhere – which consider UNGP compliance by companies. Two of these, expanded below, are reports from UN bodies and the ‘Chinese Due Diligence Guidelines’.

3.1 UN human rights reports and information

There are various UN bodies and groups which produce materials addressing companies and human rights. These can focus on a specific company/country, or on the issue more generally (e.g. in expounding how the UNGP processes should work). This material produced by the UN provides important information in how a company should implement its ‘responsibility’ for human rights. Examples include the following.

- **Statements and reports from the Office of the High Commissioner for Human Rights.** For example, the Commissioner provided observations on remediation initiatives developed by Barrick Gold Corporation regarding impacts related to its Porgera mine site in Papua New Guinea.⁵⁸
- **Observations and decisions from treaty bodies** (being the committees established to oversee implementation of each human rights treaty and monitor national compliance). These committee publications sometimes address corporate responsibility in theory⁵⁹ but have even greater relevance (in raising flags for companies’ attention) where they address specific cases. For example, in its 2012 observations on Australia, the Committee on the Rights of the Child made the following statement.

27. *The Committee is concerned at reports on Australian mining companies’ participation and*

complicity in serious violations of human rights in countries such as the Democratic Republic of Congo, the Philippines, Indonesia and Fiji...

28. *In light of Human Rights Council resolutions... adopting the... [UNGPs], in which it is noted that the rights of the child should be included when exploring the relationship between business and human rights, the Committee recommends that the State party [ie. the Australian Government]:*

(a) *Examine and adapt its legislative framework (civil, criminal and administrative) to ensure the legal accountability of Australian companies and their subsidiaries regarding abuses to human rights, especially child rights, committed in the territory of the State party or overseas and establish monitoring mechanisms, investigation, and redress of such abuses, with a view to improving accountability, transparency and prevention of violations;*⁶⁰

- **Inquiries and recommendations of UN bodies and officials,** examples of which include the recent statement on ‘Corporate human rights due diligence – Getting started, emerging practices, tools and resources’,⁶¹ the Human Rights Council’s recommendations to Australia,⁶² and observations of various Special Rapporteurs.⁶³

While many of these recommendations are explicitly directed at nation-states, they still have relevance for companies. The identification, in a UN document, of human rights impacts and deficiencies in a state’s responses, should be red flags to a company operating in that environment: extra attention will be needed in the company’s due diligence and remediation processes under the UNGPs.

3.2 Chinese Guidelines regarding minerals

The *Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains* 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.”⁶⁴ The Chinese Guidelines were adopted, in December 2015, by the China

Chamber of Commerce of Metals Minerals and Chemicals Importers & Exporters. The 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.⁶⁵ Consistent with the UNGPs and the OECD Guidelines, the Chinese Guidelines emphasise they require company compliance beyond domestic law. 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.*⁶⁶

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 Guidelines, then those companies will need to ensure their raw product is sourced consistently with the Chinese Guidelines. Relevant to Australia, this would have significant implications for businesses selling minerals to Chinese customers because they will need to demonstrate they have obtained the free, prior and informed consent of local communities regardless of whether the extractor holds a legal title.

4 Australian Modern Slavery laws

The *Modern Slavery Act 2018* commenced at the start of 2019. This requires entities based, or operating, in Australia with annual revenue exceeding \$100m to report on “the risks of modern slavery in their operations and supply chains, and actions to address those risks”.⁶⁷ The regime is expected to cover more than 3,000 entities and Commonwealth agencies. These organisations must lodge an annual statement (the first statements due in 2020), which are published in a free, online register and the Government can identify entities which should have reported but failed to do so.⁶⁸ The Department of Home Affairs is currently consulting about proposed guidance on the detail required to prepare and submit the annual statements.

5 Relevance for WA practitioners

The main implication from the above, for WA lawyers, is that advising and representing clients involves more than

just the relevant 'domestic' law (be that Western Australian or Commonwealth). Lawyers therefore need to understand whether international human rights standards indicate further requirements beyond the Australian law relevant to the particular events or transaction on which the lawyer is advising. Perhaps discomfitingly, the High Court is not the arbiter of international human rights standards and has acknowledged that Australian law – including its pronouncements – may interpret obligations differently to international bodies.⁶⁹ It is those international standards which reign in this field. As the AusNCP observed, in one of its statements, the OECD Guidelines "represent standards of behaviour supplemental to domestic laws and, as such, do not create conflicting requirements".⁷⁰

Australia's laws and government procedures provide many human rights protections, and companies are, of course, entitled to rely on these. However there are areas where Australian law does not ensure international human rights standards, and additional attention would be prudent in these situations, such as the extractives sector (mining, oil, gas); native title issues; investment contracts with governments; and operators in conflict-prone or failing states.⁷¹ The key question for WA lawyers, in determining a company's requirements to 'respect human rights' is: if the Australian law/practice is insufficient to meet international standards, what more is required from the company (e.g. 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/liability⁷²) – 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;⁷³
- OECD guidance documents (see section 2.2 above);
- the UN's 2012 *Interpretive Guide*⁷⁴ and more recent publications;⁷⁵ and
- publications of the Parliamentary Joint Committee on Human Rights.⁷⁶

To learn more about the topics covered in this article, register for the Law Society's CPD seminar 'Modern Slavery: What it Means for Your Clients' on Tuesday, 12 March 2019. Register online at lawsocietywa.asn.au/event/modern-slavery

Endnotes

- The author is grateful for feedback on earlier drafts from Kate Eastman SC, Professor Paul Redmond and Lauren Zanetti. Any errors remain the author's responsibility. <https://resourceslawnetwork.com/john-southalan/>
- The developments in modern slavery and multinational enterprises are detailed in sections 2-4 of this article. The government inquiries are:
 - The interim report of the Royal Commission on Banks, which noted: 'The more complicated the law, the easier it is for compliance to be seen as asking "Can I do this?" and answering that question by ticking boxes instead of asking "Should I do this? What is the right thing to do?": Commissioner Hayne *Interim Report* Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. Australian Government, 28 September 2018, 290 (emphasis in original);
 - The forthcoming 'Royal Commission into Aged Care Quality and Safety' is a national inquiry examining how "aged care services... meet the needs of the people accessing them...including mistreatment and all forms of abuse ... and any actions that should be taken in response": <https://agedcare.royalcommission.gov.au/Pages/Terms-of-reference.aspx> (accessed 30 Dec 2018); and
 - The 'Inquiry into the Victorian on-demand workforce' will report in 2019 on working conditions in the 'on-demand' economy: Inquiry into the Victorian On-Demand Workforce *Background Paper* Victorian Government, December 2018; see also Ch 8 'The gig economy: hyper flexibility or sham contracting?' of Senate Standing Committee on Education and Employment *Corporate Avoidance of the Fair Work Act* Australian Parliament, 6 September 2017.
- UN (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. United Nations Human Rights Council, 21 March 2011 (UNGP's).
- UN (Human Rights Council), *Human rights and transnational corporations and other business enterprises*, UN doc A/HRC/RES/17/4. United Nations, 6 June 2011.
- Prominent international examples are BP, BT, Cisco, Ericsson, H&M, Nestlé, Newmont and Unilever. In Australia, examples include **BHP Billiton** (p 18-19 of *BHP Billiton, Our Code of Conduct*, The guide to bringing our Charter values to life. August 2018), **Commonwealth Bank** (Chairman, *Human Rights Position Statement*, Commonwealth Bank of Australia, 2015), **Rio Tinto** (Executive Committee, *Human Rights Policy*, EXT-A-001. October 2015), and **Wesfarmers** (Managing Director, *2018 Modern Slavery Statement for Wesfarmers*, 13 September 2018).
- UNGPs (refer note 3), Guiding Principle 1. This confirms the existing international law and structures which oblige states to respect & protect human rights (through laws, policies and measures) and fulfil human rights (ensuring remedies where these human rights are violated); further detail expanded in Guiding Principles 2-10. The obligations arise under existing treaty and UN processes (e.g. Human Rights Committee *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (UN doc CCPR/C/21/Rev.1/Add.13, 26 May 2004), [4]-[8]; see more generally Smith, R, *Textbook on International Human Rights*, Oxford University Press, 2012, ch 10).
- UNGPs (refer note 3), Guiding Principle 12 and its following Commentary, which explicitly identifies some standards of the UN and the International Labour Organization but also incorporates "additional standards...depending on the circumstances" which has been understood to include subsequent human rights treaties and declarations: e.g. UN (Office of the UN High Commissioner for Human Rights), *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, UN doc HR/PUB/12/02. United Nations, June 2012, 11-12.
- UNGPs (refer note 3), Principle 23.
- UNGPs (refer note 3), Guiding Principle 16.
- UNGPs (refer note 3), Guiding Principles 17-21.
- UNGPs (refer note 3), Guiding Principles 13 (distinguishing between the three instances of cause, contribute and linkage through a business relationship), 22 & 31.
- The concepts of 'directly linked' and 'leverage' are further explicated in UN 2012 (refer note 7), 46-51.
- See this article section 3.1 *UN human rights reports and information*.
- e.g. Section 18 of *Australian Consumer Law* (sch 2 to *Competition and Consumer Act 2010* (Cwth)); s12DA of *Australian Securities and Investments Commission Act 2001* (Cwth); s1309 of *Corporations Act 2001* (Cwth).
- Southalan, J, 'Say what? The regulation of company statements arising from UNGP processes', *Human Rights Law Committee News*, 1/1 (2017) 51.
- There was US litigation against Nike regarding its statements about its factory conditions. These settled after a 2003 US Supreme Court decision (*Nike Inc v.*
- Kasky 539 U.S 654, dismissing an appeal and directing the proceeding to continue) but similar court proceedings continue to arise in the US: see Myers, C, 'What's the legal definition of PR?: An analysis of commercial speech and public relations', *Public Relations Review*, 42/5 (2016) 821.
- e.g. United Kingdom Advertising Standards Authority *Final Adjudication - Shell International* (A08-50657, 13 August 2008).
- Relevant concepts are summarised in Australian Competition & Consumer Commission *Green marketing and the Australian Consumer Law ACCC 03/11_30681_292*. Australian Government, 11 March 2011; and cases include *Australian Competition and Consumer Commission -v- Holden Ltd* [2008] FCA 1428 and earlier decisions against Lloyds and Sanyo: those court orders reported in Australian Competition and Consumer Commission statements *Environmental bag claims 'Misleading'* (release # MR 087/04, 25 May 2004) and *Federal Court finds "Green" claims to be misleading* (release # MR 235/03, 11 November 2003).
- OECD (Adhering Governments), *OECD Guidelines for Multinational Enterprises*, Organisation for Economic Co-operation & Development, 25 May 2011 (**OECD Guidelines**).
- e.g. OECD (Secretary General), *Annual Report on the OECD Guidelines for Multinational Enterprises 2017*, Organisation for Economic Co-Operation and Development, 19 June 2018, 18 (describing cases under the OECD Guidelines involving state-owned entities and 'a non-profit organisation involved in commercial activity (World Wildlife Federation)').
- The OECD Guidelines were originally adopted 1976 but have been amended various times and their latest format (2011) incorporates UNGP frameworks.
- OECD Guidelines* (refer note 19), Part I, [2]. The actual wording is: "...in 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 (Secretary-General of the OECD), *Implementing the OECD Guidelines for Multinational Enterprises*, The National Contact Points from 2000 to 2015. Organisation for Economic Co-Operation and Development, 21 June 2016, 40; OECD 2018 (refer note 20), 23.
- Complaints have been accepted by NCPs having been lodged by parties impacted, unions, companies, local government, politicians, community groups, lawyers and others.
- Although the OECD Guidelines formally use the terms 'specific instance' (rather than 'complaint' to an NCP) and 'statement' (rather than 'decision' of an NCP); they are nonetheless developing a forum of 'determinations' on 'cases' – both those terms are used by the OECD Secretariat in its latest annual report (rather than 'statements' on 'specific instances'): see OECD 2018 (refer note 20), 8 ('cases') and 19 ('determinations').
- OECD Guidelines* (refer note 19), Part II, Commentary [27]. In assessing 'bona fide' and whether to continue with the matter, 'the NCP will take into account:
 - the identity of the party concerned and its interest in the matter;
 - whether the issue is material and substantiated;
 - whether there seems to be a link between the enterprise's activities and the issue raised in the specific instance;
 - the relevance of applicable law and procedures, including court rulings;
 - how similar issues have been, or are being, treated in other domestic or international proceedings; and]
 - whether the consideration of the specific issue would contribute to the purposes and effectiveness of the *Guidelines*: *ibid.*, [25].
- And 20-50% of complaints resolve in this manner: OECD 2016 (refer note 23), 32-34; OECD 2018 (refer note 20), 13.
- OECD Guidelines* (refer note 19), Part II, Procedural Guidance C(2).
- See, more generally, about the OECD Guidelines and NCP decisions: OECD Watch (Secretariat), *Effective NCPs now! Remedy is the reason*, Centre for Research on Multinational Corporations (SOMO), November 2017; Roberts-Freeman, C & ors (OECD Watch Secretariat), *Calling for Corporate Accountability*, A Guide to the 2011 OECD Guidelines for Multinational Enterprises. Centre for Research on Multinational Corporations (SOMO), October 2017; OECD, *OECD Guidelines for Multinational Enterprises: a Glass Half Full*, Liber Amicorum for Roel Nieuwenkamp. Organisation for Economic Co-Operation and Development, 20 June 2018.
- AUS NCP (Australian National Contact Point), *Statement on "GSL Australia Specific Instance"*, Gerry Antioch (Department of Treasury), 6 April 2006, [10].
- The South Korean NCP stated that it "considers the complaint to be related to the administrative activities of the provincial government of India rather than business activities of Posco... and it is not the Korean NCP but the Indian court that should determine legality and legitimacy of such activities": p8 of KOR NCP (Korean National Contact Point), *Initial Assessment of Complaint on Violation of OECD Guidelines for Multinational Enterprises*, Annex 7 to NLD National Contact Point for OECD

- Guidelines 'Final Statement: ABP/APG' 18 September 2013, Dutch Ministry of Foreign Affairs, 21 June 2013.
- 32 NLD NCP (Netherlands National Contact Point for OECD Guidelines for Multinational Enterprises), *Final Statement: ABP/APG - Lok Shakti Abhiyan, KTNC Watch, Fair Green and Global Alliance, Forum for Environment and Development*, NLD National Contact Point for OECD Guidelines, Ministry of Foreign Affairs, Netherlands Government, 18 September 2013, p7.
- 33 NOR NCP (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, National Contact Point for OECD Guidelines, 27 May 2013, 6.
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- The Mosi-oo-Tunya Declaration, adopted on 13 September 2018 at the International Conference on Artisanal and Small-scale Mining and Quarrying ...
 - In May 2017, the European Union adopted Regulation (EU) 2017/821 ...[which] ... lays down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas ... The EU Regulation will enter into force in January 2021.
 - The Chinese Due Diligence Guidelines [see n64 and related text below] ...
 - In 2012, the US Securities and Exchange Commission recognised the OECD Guidance as an international framework for due diligence measures undertaken by companies that are required to file a conflict minerals report under the final rule implementing section 1502 of the Dodd-Frank legislation.
 - The Lusaka Declaration signed by 11 Heads of State of the International Conference on the Great Lakes Region (ICGLR) in December 2010 ...[and]
 - The United Nations Security Council resolution 1952 (2010) supports taking forward the due diligence recommendations contained in the UN Group of Experts on the Democratic Republic of the Congo' www.oecd.org/daf/inv/mne/mining.htm (accessed 30 Dec 2018).
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