



human rights in focus

In this edition we close off our exploration of human rights and the important role we as legal professionals play in shaping the laws which protect those in our community.

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Business and Human Rights: Relevance for WA Lawyers

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This article is an update to an original article by Southalan published in Brief 46/1 (February 2019) at pages 6–11. The new additions are solely the work of Feldman and Glass.

The implications of international human rights for businesses are rapidly expanding. Since John Southalan wrote the original version of this article, less than three years ago, the landscape in which businesses operate has continued to evolve apace. The *Modern Slavery Act 2018* (Cth) has commenced operation, completed its first reporting cycle, and is almost due for its three-year review.⁴ The Commonwealth Treasury has strengthened the human rights complaints mechanism under the *OECD Guidelines for Multinational Enterprises* (OECD Guidelines).⁵ And recent years have seen growing public focus on government inquiries examining business impacts in areas such as banking, aged-care providers, and the gig-economy.⁶ Many international standards are enacted as Australian law, for example: prohibiting discrimination on gender, race, age and other grounds; outlawing corruption and bribery; and criminalising trafficking.

Compliance with these regimes is a matter of Australian statutory, administrative and constitutional law. But there are also 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 *UN Guiding Principles on Business and Human Rights* (UNGPs)⁷ were adopted by the United Nations in 2011⁸ and have been accepted and endorsed by many businesses.⁹ The UNGPs have become the predominant framework underlying the current understanding and approach to business and human rights. The UNGPs confirm that human rights obligations on (and of) states remain unchanged¹⁰ but, *in addition*, each business has a “responsibility to respect” human rights. By “human rights”, the UNGPs include the standards in the 1948 *Universal Declaration of Human Rights*, plus all the main international human

rights treaties which have been developed thereafter – even if the particular treaty has not been adopted by the state in which the company is operating, or that state’s domestic law is inconsistent.¹¹ 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.¹² The “respect” for human rights, as explicated in the UNGPs, comprises three elements:

- 1 The business should adopt a human rights policy, involving a public commitment to the organisation’s responsibilities and expectations regarding human rights impacts of its work and workers, reflected in operational policies and procedures.¹³
- 2 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.¹⁴
- 3 Remediation processes should be established for impacts which have occurred or been identified.¹⁵ This aspect comprises two areas, ►



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depending on the company's connection with the impact. For impacts the company has caused or contributed to – the business must itself provide for, or cooperate in, remediation. 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.¹⁶

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*. Australia's *Modern Slavery Act 2018* (Cth) is another example of this, and is examined further in Section 4 below.
- The second way in which the UNGPs have legal implications is through **contractual obligations**, particularly prevalent in membership and certification requirements such as those involved 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*. There are increasing examples of such contractual obligations within procurement contracts from large entities like the Dutch Government and FIFA.
- **Financier requirements** is the third way in which UNGP compliance arises, as is the case for 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* (r 43), 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 Organization and UN initiatives¹⁷ – the broadest of which is the OECD Guidelines.¹⁸

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 statements¹⁹ was not envisaged as addressing human rights reporting but can extend to corporate statements which occur in the context of the UNGPs.²⁰ While this has not yet arisen in Australia, corporate liability for human rights and related statements has occurred in other jurisdictions.²¹ The area will likely mirror the manner in which regulation responded to corporate environmental statements – where companies face civil action and regulator prosecutions if they make unsubstantiated claims about their products or services.²²

2 OECD Guidelines for Multinational Enterprises

The widest application of the UNGPs is through the OECD Guidelines,²³ which are an internationally agreed code 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 NGOs²⁴) 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,²⁵ also outlining expected standards regarding “Employment and Industrial Relations”, “Environment”, “Competition”, and “Taxation”.

The OECD Guidelines establish a complaint-mediation process, through National Contact Points, for complaints about company compliance with the content of the OECD 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.²⁶ However, in many cases, the domestic law will simply enable company rights or actions without the level of protection of rights that 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.²⁷ The ‘complaint’ process under the OECD Guidelines 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 victim²⁸). The complaint is formally termed a “specific instance” under the OECD Guidelines.²⁹ It is lodged with the NCP of the country where the impact occurred or where the company is registered, and 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 being framed by the UNGPs).
- 2 **The NCP conducts an initial assessment.** The National Contact Point decides whether a *bona fide* case has been demonstrated³⁰ (if not, then the NCP refuses to proceed with the matter³¹). 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] good offices to help the parties involved to resolve the issues”,³² 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



On 3 November 2021, ANZ adopted a precedent-setting Human Rights Grievance Mechanism to evaluate and report on complaints of adverse human rights impacts associated with its institutional or corporate lending customers.³⁵

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;
- the final statement may include the NCP's recommendations for the company, and observations on company non-compliance (or compliance) with the OECD Guidelines; and
- the final statement may presage the NCP undertaking future review of the matter and following up with statements on compliance.

The published decisions of NCPs are a relatively young 'jurisprudence', and somewhat uneven (some NCPs are well-resourced and active, but others do little to promote the OECD Guidelines and compliance therewith³³). However, NCP decisions provide an important guide on UNGP implementation, and will be an increasing forum of disputation, as illustrated by some Australian NCP final statements of recent years.

- In February 2020, the Australian NCP issued a Follow Up Statement regarding a complaint submitted by NGOs on behalf of Cambodian families, against ANZ. The parties had ongoing contact following the 2018 Final Statement, and requested the Australian NCP to facilitate a dialogue through its "good offices" process. The Australian NCP noted that ANZ had acknowledged that "its initial due diligence, before

making this loan, was inadequate" and had "committed to review and strengthen its human rights policies and grievance mechanisms".³⁴ On 3 November 2021, ANZ adopted a precedent-setting Human Rights Grievance Mechanism to evaluate and report on complaints of adverse human rights impacts associated with its institutional or corporate lending customers.³⁵

- In June 2021, the Australian NCP issued a Final Statement about a complaint regarding ElectraNet Pty Ltd, which alleged that ElectraNet's construction of electricity facilities in South Australia had damaged Aboriginal heritage sites (for which the complainants, the Starkeys, have traditional custodial responsibilities).³⁶ ElectraNet was unwilling to engage in good offices, and so the complaint was independently reviewed and assessed. The Final Statement noted that most of the affected sites were subject to an agreement with the relevant indigenous bodies, and those bodies had given no indication of concerns with the agreements nor with ElectraNet's actions. Accordingly, the complaint was not accepted in respect of those sites. Regarding the one site outside those areas, nothing was provided to the Independent Examiner indicating ElectraNet engaged with the Starkeys consistently with the expectations of the OECD Guidelines. The Final Statement referred to expectations

under international standards and the OECD Guidelines regarding free, prior and informed consent (FPIC),³⁷ and recommended that ElectraNet engage in dialogue with the Starkeys to resolve the complaint in respect of the relevant site.

- In September 2021, a community association submitted a complaint regarding BHP, in which the association alleged that BHP's industrial emissions were "causing dangerous health risks to community".³⁸ After engaging with the parties from February to June 2021, the Australian NCP rejected the complaint as inadmissible, in part because BHP's existing measures appeared to be "consistent with much of the Guidelines' expectations regarding environmental management".³⁹ In declaring the complaint inadmissible, the NCP also took into account that the association had other "ongoing opportunities and procedures" available to it to engage with BHP and government agencies in respect of many of its concerns, including through "WA regulations and industry and BHP procedures", which already "provide much of the engagement expected by 'grievance mechanisms' under the OECD Guidelines".⁴⁰

These examples illustrate the range of outcomes possible under the NCPs' processes. While companies may be found to have breached the

OECD Guidelines, many complaints are summarily rejected or, when examined and mediated, result in confirmation that the company has not breached the OECD Guidelines.

2.1 Australian National Contact Point for OECD Guidelines

The AusNCP is the Australian Government body (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 cases have seen outcomes reducing Australian company impacts on human rights,⁴¹ but there have also been less positive results.⁴²

In 2017, an independent review identified many deficiencies in the AusNCP's work and procedures, particularly related to inadequate resources.⁴³ In November 2018, the Commonwealth Treasury committed to improvements and greater resourcing;⁴⁴ and recent AusNCP cases and statements herald increased AusNCP involvement in companies and human rights issues.⁴⁵

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,⁴⁶ as well as in NCP decisions. These OECD guidance documents include a general guide (2018)⁴⁷ 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);⁴⁸
- Responsible Supply Chains of Minerals (2016);⁴⁹
- Meaningful Stakeholder Engagement in the Extractives Sector (2017);⁵⁰
- Institutional Investors (2017);⁵¹ and
- Responsible Supply Chains in the Garment and Footwear Sector (2018).⁵²

3 UN and international developments

The UN Human Rights Council continues to debate the role and content of a possible treaty about business and human rights. The contemplated treaty is not proposed to effect any changes to human rights standards. Rather, it envisages more mechanisms, and stronger obligations on states and companies, than those which currently exist under the UNGPs and associated structures. The third revised draft of the proposed treaty was released in August 2021 by a working group of the UN Human Rights Council.⁵³ The direction of development of the proposed treaty remains uncertain and, even at its highest, the treaty 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 states 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.⁵⁴ However there are *already* existing processes at the international level – through the UN and elsewhere – which consider compliance by companies with international human rights law.

There are various UN bodies and groups which produce materials addressing companies and human rights. These materials can focus on a specific company or state, or on the issue more generally (e.g. by expounding how the UNGP processes should work). They provide important information on how a company should implement its 'responsibility' for human rights. Examples include:

- **Statements and reports from the Office of the High Commissioner for Human Rights.** For example, the Commissioner provided observations on remediation initiatives relating to the Porgera mine site in Papua New Guinea.⁵⁵
- **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 theory⁵⁶ 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 the 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 [i.e. 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...

⁵⁷

- **Inquiries and recommendations of UN bodies and officials**, examples of which include the recent statement on *Corporate Human Rights Due Diligence*,⁵⁸ the Human Rights Council's recommendations to Australia,⁵⁹ and observations of various Special Rapporteurs.⁶⁰

While many of these recommendations are explicitly directed at 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.

4 Australian Modern Slavery laws

The *Modern Slavery Act 2018* (Cth) commenced at the start of 2019.⁶¹ The *Modern Slavery Act* requires entities based or operating in Australia with annual revenue of at least \$100 million to report annually on "*the risks of modern*

slavery in their operations and supply chains, and actions to address those risks".⁶² The first full cycle of reporting under the *Modern Slavery Act* ended on 30 June 2021, with close to 2,500 modern slavery statements submitted, covering more than 4,400 reporting entities.⁶³ A review of statements lodged by top ASX companies under the *Modern Slavery Act*, published by the Australian Council of Superannuation Investors (ACSI), found that most companies have complied with the minimum requirements of modern slavery reporting, with "clear groups of leaders and laggards".⁶⁴ In ACSI's analysis, the majority of statements have appeared to follow a "race to the middle approach", seeking to satisfy the legal requirements of the *Modern Slavery Act* without disclosing more than key peers.⁶⁵ ACSI identified key opportunities for companies to improve, by:

- deepening disclosure on operational risks;
- providing more detail about how policies, risk assessments and training are being implemented;

- collaborating with suppliers and other stakeholders to address their modern slavery risks;
- strengthening grievance mechanisms to manage modern slavery complaints; and
- outlining how the effectiveness of actions to address modern slavery risks is measured and assessed.⁶⁶

The next 12 months will be critical to strengthening and broadening companies' risk management and reporting processes. The *Modern Slavery Act* is scheduled for a statutory review in January 2022,⁶⁷ and it remains to be seen what reforms, if any, will be recommended.⁶⁸

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

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- (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 ►

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monitoring mechanisms, investigation, and redress of such abuses, with a view to improving accountability, transparency and prevention of violations...⁵⁷

- **Inquiries and recommendations of UN bodies and officials**, examples of which include the recent statement on *Corporate Human Rights Due Diligence*,⁵⁸ the Human Rights Council's recommendations to Australia,⁵⁹ and observations of various Special Rapporteurs.⁶⁰

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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.

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); issues regarding native title and respect for traditional cultural heritage and sacred sites; investment contracts with governments; and operators in conflict-prone or failing states.⁷⁰ The key question for WA lawyers, in determining the content of a company's responsibility to "respect human rights" is: if the Australian domestic law and 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 liability for professional negligence⁷¹) – whether the client is corporate, government or a third-party affected by company activities. Useful materials include:

- IBA and Law Council of Australia materials and training;⁷²
- OECD guidance documents (see Section 2.2 above);
- the UN's 2012 *Interpretive Guide*⁷³ and more recent publications;⁷⁴ and
- publications of the Parliamentary Joint Committee on Human Rights.⁷⁵ ■

Endnotes

- 1 Special Counsel (Norton Rose Fulbright), Jo Feldman and Alyssa Glass are grateful for the input of Chris Owen, Partner and National Pro Bono Head of Practice (Norton Rose Fulbright).
- 2 Associate (Norton Rose Fulbright).
- 3 Barrister (WA Bar Association); Adjunct Academic (University of Dundee, UWA, Murdoch, Curtin). Disclosure: John Southalan commenced as Independent Examiner of the AusNCP in August 2019, after the original article was published. He had no responsibility in the updating of this article.
- 4 The *Modern Slavery Act 2018* (Cth) is discussed in Section 4 of this article.
- 5 The *OECD Guidelines* and the Australian National Contact Point thereunder are discussed in Section 2 of this article.
- 6 The government inquiries are:
The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. See Commissioner Hayne, Final Report: *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, Australian Government, 4 February 2019. In the interim report, Commissioner Hayne 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 Royal Commission into Aged Care Quality and Safety, 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": *Letters Patent Establishing the Royal Commission into Aged Care Quality and Safety*, Australian Government, 6 December 2018, para (a). See Commissioners Pagone and Briggs, Final Report: *Care, Dignity and Respect*, Australian Government, 1 March 2021.
The Inquiry into the Victorian On-Demand Workforce, which reported in July 2020 on working conditions in the 'on-demand' economy: Chairperson James, *Report of the Inquiry into the Victorian On-Demand Workforce*, Victorian Government, July 2020. For further background, see also: Chapter 8, "The Gig Economy: Hyper Flexibility or Sham Contracting?", in *Senate Standing Committee on Education and Employment Corporate Avoidance of the Fair Work Act*, Australian Parliament, 6 September 2017.
- 7 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) (UNGPs).
- 8 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).
- 9 Prominent international examples are BP, BT, Cisco, Ericsson, H&M, Nestlé, Newmont and Unilever. In

Australia, examples include BHP Billiton (pages 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), and Wesfarmers (Managing Director, *2018 Modern Slavery Statement for Wesfarmers*, 13 September 2018).

- 10 UNGPs, Guiding Principle 1. This principle confirms the existing international law and structures which oblige states to respect and protect human rights (through laws, policies and measures) and fulfil human rights (ensuring remedies where these human rights are violated). Further detail is provided in *Guiding Principles 2–10*. The obligations arise under existing treaty and UN processes (see 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: R.K.M. Smith, *Textbook on International Human Rights* (OUP 2012) Chapter 10.
- 11 UNGPs, *Guiding Principle 12* and its accompanying 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. See 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) (UNGPs Interpretive Guide) pages 11–12.
- 12 UNGPs, Principle 23.
- 13 UNGPs, *Guiding Principle 16*.
- 14 UNGPs, *Guiding Principles 17–21*.
- 15 UNGPs, *Guiding Principles 13* (distinguishing between the three instances of cause, contribute and linkage through a business relationship), 22, and 31.
- 16 The concepts of "directly linked" and "leverage" are further explicated in UNGPs *Interpretive Guide*, pages 46–51.
- 17 See Section 3 of this article.
- 18 The *OECD Guidelines* are examined in Section 2 of this article.
- 19 See e.g.: *Competition and Consumer Act 2010* (Cth) Schedule 2 (Australian Consumer Law) s 18; *Australian Securities and Investments Commission Act 2001* (Cth) s 12DA; *Corporations Act 2001* (Cth) s 1309.
- 20 J. Southalan, 'Say what? The Regulation of Company Statements Arising from UNGP Processes' (2017) 1(1) *Human Rights Law Committee News* 51.
- 21 For example, there was US litigation against Nike regarding its statements about its factory conditions. These proceedings 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). However, similar court proceedings continue to arise in the United States: see C. Myers, 'What's the Legal Definition of PR?: An Analysis of Commercial Speech and Public Relations' (2016) 42(5) *Public Relations Review* 821.
- 22 Relevant concepts are summarised in *Australian Competition and 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. The latter court orders are summarised in *Australian Competition and Consumer Commission statements: Environmental Bag Claims 'Misleading'* (Release No. MR 087/04, 25 May 2004) and *Federal Court Finds "Green" Claims to be Misleading* (Release No. MR 235/03, 11 November 2003).
- 23 OECD (Adhering Governments), *OECD Guidelines for Multinational Enterprises* (Organisation for Economic Co-operation and Development, 25 May 2011) (OECD Guidelines).
- 24 See e.g.: OECD (Secretary-General), *Annual Report on the OECD Guidelines for Multinational Enterprises 2017* (OECD, 19 June 2018) (*OECD 2017 Annual Report*) page 18 (describing cases under the OECD Guidelines involving state-owned entities and "a non-profit organisation involved in commercial activity (World Wildlife Federation)").
- 25 The *OECD Guidelines* were originally adopted in 1976 but have been amended various times and their latest format (dating to 2011) incorporates UNGP frameworks.
- 26 *OECD Guidelines*, 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".
- 27 OECD (Secretary-General), *Implementing the OECD*

- Guidelines for Multinational Enterprises: The National Contact Points from 2000 to 2015* (OECD, 21 June 2016) (OECD (2016)) page 40; *OECD 2017 Annual Report*, page 23.
- 28 NCPs have accepted complaints lodged by parties impacted, unions, companies, local government, politicians, community groups, lawyers, and others.
- 29 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 recent annual reports (rather than “statements” on “specific instances”), see e.g.: *OECD 2017 Annual Report*, pages 8 (“cases”) and 19 (“determinations”).
- 30 *OECD Guidelines*, 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”: *OECD Guidelines*, Part II, Commentary, [25].
- 31 And 20–50% of complaints resolve in this manner: OECD (2016), pages 32–34; *OECD 2017 Annual Report*, page 13.
- 32 *OECD Guidelines*, Part II, Procedural Guidance C [2].
- 33 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); *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* (OECD, 20 June 2018).
- 34 AUS NCP (Australian National Contact Point), *Follow Up Statement Regarding Complaint Submitted by Equitable Cambodia and Inclusive Development International on behalf of Cambodian Families* (Department of Treasury, 27 February 2020) [5].
- 35 ANZ, *ANZ Human Rights Grievance Mechanism Framework* (ANZ, November 2021).
- 36 AUS NCP (Australian National Contact Point), *Final Statement: Complaint by Andrew Starkey and Robert Starkey Regarding ElectraNet Pty Ltd* (Department of Treasury, 9 June 2021).
- 37 See also, in this regard, the recently released final report on the destruction of indigenous heritage sites at Juukan Gorge, which recommended “[e]mbedding FPIC in Australia’s legislative and regulatory frameworks”: Parliament of the Commonwealth of Australia, *A Way Forward: Final Report into the Destruction of Indigenous Cultural Heritage Sites at Juukan Gorge* (Joint Standing Committee on Northern Australia, October 2021) Part 7, [7.47]–[7.53] and Recommendation 3.
- 38 AUS NCP (Australian National Contact Point), *Final Statement: Complaint by Port Hedland Community Progress Association Regarding BHP* (Department of Treasury, 1 September 2021).
- 39 AUS NCP (Australian National Contact Point), *Final Statement: Complaint by Port Hedland Community Progress Association Regarding BHP* (Department of Treasury, 1 September 2021) page 16.
- 40 AUS NCP (Australian National Contact Point), *Final Statement: Complaint by Port Hedland Community Progress Association Regarding BHP* (Department of Treasury, 1 September 2021) pages 21–22.
- 41 See e.g.: AUS NCP (Australian National Contact Point), *Statement on GSL Australia Specific Instance* (Department of Treasury, 6 April 2006) [10]; AUS NCP (Australian National Contact Point), *Statement on BHP Billiton – Cerrejon Coal Specific Instance* (Department of Treasury, 12 June 2009) [15]–[17].
- 42 See, broadly: K. Zornada (Non-Judicial Human Rights Redress Mechanisms Project), *The Australian OECD National Contact Point: How It Can Be Reformed* (Corporate Accountability Research, 12 June 2017).
- 43 Department of Treasury, *Independent Review: Australian National Contact Point under the OECD Guidelines for Multinational Enterprises* (Australian Government, 26 September 2017) pages 11, 44–45.
- 44 Department of Treasury, *Treasury Response to the 2017 AUSNCP Independent Review* (Australian Government, November 2018).
- 45 See e.g.: AUS NCP (Australian National Contact Point), *Final Statement: Industrial Global Union on Behalf of the Free Trade Zones and General Services Employee Union (FTZGSEU) of Sri Lanka and the National Union of Employees in Companies Manufacturing Rubber Products (NUECMRP) of Malaysia, against Ansell Limited* (Department of Treasury, June 2017) page 9; AUS NCP (Australian National Contact Point), *Final Statement: Specific Instance by Equitable Cambodia and Inclusive Development International Regarding ANZ Group* (Department of Treasury, 27 June 2018) [30], [37], [46]–[48].
- 46 For example, the *OECD Due Diligence Guidance for Responsible Mineral Supply Chains* is referenced in a range of international declarations, regulations and initiatives, including:
- the *Mosi-qa-Tunya Declaration*, adopted on 13 September 2018 at the International Conference on Artisanal and Small-scale Mining and Quarrying;
 - the *European Union’s Regulation* (EU) 2017/821, adopted in May 2017, which lays down supply chain due diligence obligations for EU importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas;
 - the *Chinese Due Diligence Guidelines*;
 - the *US Dodd-Frank Act* (s 1502), reflecting recognition by the US Securities and Exchange Commission in 2012 that the OECD Guidance is an international framework for due diligence measures by companies that are required to file a conflict minerals report;
 - the *Lusaka Declaration*, signed by eleven Heads of State of the International Conference on the Great Lakes Region (ICGLR) in December 2010; and
 - *UN Security Council Resolution 1952* (2010), which supports taking forward the due diligence recommendations put forward by the UN Group of Experts on the Democratic Republic of the Congo.
- 47 OECD (OECD Council), *Due Diligence Guidance for Responsible Business Conduct* (OECD 2018).
- 48 OECD (OECD Investment Committee, OECD Committee for Agriculture, Cabinet of FAO Director-General), *OECD-FAO Guidance for Responsible Agricultural Supply Chains* (OECD, 11 March 2016).
- 49 OECD (Secretariat), *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (3rd edn, OECD, April 2016). Note that, despite the title, this 2016 “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”: page 4 (emphasis added).
- 50 OECD (OECD Secretariat), *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector* (OECD, 2 February 2017).
- 51 OECD (Secretary-General), *Responsible Business Conduct for Institutional Investors: Key Considerations for Due Diligence under the OECD Guidelines for Multinational Enterprises* (OECD, 28 March 2017).
- 52 OECD (Secretary-General), *Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector* (OECD, 7 March 2018).
- 53 UN (Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights), *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Third Revised Draft* (UN Human Rights Council, 17 August 2021). The Working Group’s seventh session took place from 25 to 29 October 2021, with the report on that session currently available in draft form: UN Human Rights Council, *Draft Report: Report on the Seventh Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights*, UN Doc A/HRC/49/[XX] (UN Human Rights Council, draft form, due for distribution January 2022).
- 54 A large collation of opinions and blogs about the draft, and the general potential for a business-human rights treaty, is accessible at: <<https://www.business-humanrights.org/en/binding-treaty/statements-initiatives-commentaries>>.
- 55 UN (OHCHR), *Opinion Regarding the Porgera Remediation Framework* (United Nations, July 2013).
- 56 See e.g.: Committee on Economic Social and Cultural Rights, General Comment No. 24 on State Obligations in the Context of Business Activities, UN Doc E/C.12/GC/24 (United Nations, 10 August 2017).
- 57 Committee on the Rights of the Child, *Concluding Observations: Australia*, UN Doc CRC/C/AUS/CO/4 (United Nations, 28 August 2012).
- 58 UN (Working Group on Business and Human Rights), *Corporate Human Rights Due Diligence – Getting Started, Emerging Practices, Tools and Resources, Companion Note II to 2018 Report to the General Assembly* (United Nations, 16 October 2018).
- 59 UN (Working Group on the Universal Periodic Review), *Report on Australia*, UN Doc A/HRC/31/14 (Human Rights Council, 13 January 2016) [130] and [136].
- 60 See e.g.: UN (Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes), *Report on Mission to Germany*, UN Doc A/HRC/33/41/Add.2 (Human Rights Council, 14 September 2016) Section III, D; UN (Special Rapporteur on the Rights of Indigenous Peoples), *Report on Mission to Brazil*, UN Doc A/HRC/33/42/Add.1 (Human Rights Council, 8 August 2016) Section VI, H.
- 61 *Modern Slavery Act 2018* (Cth). See also: Department of Home Affairs, *Commonwealth Modern Slavery Act 2018: Guidance for Reporting Entities*, accessible at <<https://www.homeaffairs.gov.au/criminal-justice/files/modern-slavery-reporting-entities.pdf>>.
- 62 *Modern Slavery Act 2018* (Cth) s 3.
- 63 See: Australian Border Force, *Online Register for Modern Slavery Statements*, accessible at <<https://modernslaveryregister.gov.au/>>.
- 64 ACSI, *Moving from Paper to Practice: ASX200 Reporting under Australia’s Modern Slavery Act* (July 2021), accessible at <https://acsi.org.au/wp-content/uploads/2021/07/ACSI_ModernSlavery_July2021.pdf> (ACSI Report) page 6.
- 65 ACSI Report, page 6.
- 66 ACSI Report, page 4.
- 67 See: *Modern Slavery Act 2018* (Cth) s 24.
- 68 See e.g. the discussion around reforms to the United Kingdom’s *Modern Slavery Act 2015* (UK) in: Norton Rose Fulbright, *UK Government Proposals to Strengthen the Modern Slavery Act* (September 2020), accessible at <<https://www.nortonrosefulbright.com/en/knowledge/publications/50d846fe/uk-government-proposals-to-strengthen-the-modern-slavery-act>>. In New South Wales, reforms have just passed the NSW Parliament, with the result that the *Modern Slavery Amendment Act 2021* (NSW) will come into effect on 1 January 2022.
- 69 See e.g. *Maloney v R* (2013) 252 CLR 163; [2013] HCA 28, [15] and [23] (French CJ), acknowledging the possibility of divergence between the domestic law enforced by Australian courts, on the one hand, and the treaty bodies’ statements and jurisprudence regarding contemporary international obligations, on the other hand. See also: *Western Australia v Commonwealth* (1995) 183 CLR 373, 453 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ), holding that inconsistency with human rights protections does not invalidate legislation; *Western Australia v Ward* (2002) 213 CLR 1; [2002] HCA 28, [956]–[963] (Callinan J).
- 70 The specific issues, and relevant guidance material, are discussed further in: J. Southalan, ‘Human Rights and Business Lawyers: The 2011 Watershed’ (2016) 90(12) *Australian Law Journal* 889 (Southalan (2016)), pages 901–904.
- 71 See: *Southalan* (2016), pages 905–906.
- 72 See e.g.: IBA, *Handbook for Lawyers on Business and Human Rights* (IBA Legal Policy and Research Unit, September 2017).
- 73 UNGPs *Interpretive Guide*.
- 74 See e.g.: UN (Castan Centre for Human Rights Law), *Human Rights Translated 2.0: A Business Reference Guide*, UN Doc HR/PUB/17/1 (Monash University, 20 June 2016); UN (OHCHR), *Frequently Asked Questions about the Guiding Principles on Business and Human Rights*, UN Doc HR/PUB/14/3 (United Nations, October 2014).
- 75 Particularly: *Parliamentary Joint Committee on Human Rights, Guide to Human Rights* (Department of the Senate, June 2015).