

**Advice on the prioritisation of issues and actions to implement  
the UN Guiding Principles on Business and Human Rights (UNGPs)**

**Context**

The Multi-Stakeholder Advisory Group (MSAG) on the Implementation of the UN Guiding Principles on Business and Human Rights (UNGPs) considered the three pillars of the UNGPs: the state duty to protect human rights; the business responsibility to respect human rights; and access to effective remedy.

In 2011, the Australian Government co-sponsored the UN Human Rights Council resolution endorsing the UNGPs. The MSAG welcomes the Government's current moves to translate the UNGPs into the domestic legal and policy framework and build on existing initiatives. The MSAG sees value in the Australian Government delivering a coordinated policy statement in the form of a National Action Plan, which sets out the concrete steps it will take to implement the UNGPs, including its expectations of business and other stakeholders regarding their conduct in Australia and abroad, and what support it will provide in helping them meet those expectations.

Pillar One of the UNGPs reflects a state's obligations under international human rights law. States have a duty to protect against human rights abuse by business within their territory and/or jurisdiction. According to the UNGPs, states should set out clear expectations that business respect human rights. States are also expected to ensure that laws and policies, such as corporate law, do not constrain, but rather enable and encourage, business respect for human rights. The MSAG considers that the Australian Government can meet this duty, and take a leadership role, by respecting human rights in its own business dealings, including through State-Owned Enterprises (SOEs), as well as introducing a variety of measures to build business capacity, and drive good practice.

Under Pillar Two of the UNGPs, business enterprises have a responsibility to respect human rights. In order to meet this responsibility, businesses should have in place a policy commitment and a human rights due diligence process, as well as a process to remediate any adverse human rights impacts which they identify they have caused or contributed to. The MSAG considers that in order for human rights to be respected meaningfully by business, businesses need practical assistance from government to build understanding of their responsibility to respect human rights, to develop good practices, and effectively report on human rights.

Under Pillar Three of the UNGPs, as part of their duty to protect states and business must take appropriate steps to ensure through judicial, administrative, legislative or other appropriate means, that those whose human rights are adversely affected by business-related conduct within their territory and/or jurisdiction have access to effective remedy. As part of their responsibility to respect human rights, where business enterprises identify that they have caused or contributed to adverse impacts they should provide for, or cooperate in, their remediation through legitimate processes. The MSAG recommends the Australian Government take action to implement Pillar Three of the UNGPs by strengthening such mechanisms and supporting effective access to remedy.

Any policy framework should clearly set out the Government's own role in this, as well as the expectations of business around remediation of business-related human rights harm, at home and abroad.

Throughout this paper, it is important to bear in mind that, in line with the UNGPs, the responsibility of business to respect human rights applies to all business enterprises regardless of factors such as their size, sector and operational context, ownership and structure. However, as the UNGPs highlight, the means through which a business meets its responsibility will be proportional to its size, among other factors. The UNGPs state that small and medium sized enterprises (SMEs) may have less capacity as well as more informal processes and management structures than large companies, so their respective policies and processes will take on different forms. SMEs may also have limited leverage to effect change over a larger company or government. At the same time, where SMEs have severe human rights impacts, the UNGPs note that they may need corresponding measures regardless of their size.

This document was developed by the MSAG using a consensus approach. While not all recommendations expressed are unanimously supported, they have all been subject to consideration between members to reach the positions included. The MSAG is comprised of a diverse group of people participating in their individual capacity with backgrounds in civil society, business, unions, academia, and independent consultancy. As such, the views expressed in this document do not formally represent the views of these stakeholder groups, and further consultation with them will be necessary. This includes further consultation across the broad spectrum of the business community. It will also be important to consult other stakeholders, particularly at risk and vulnerable groups, including Indigenous peoples, migrant workers and women, if the Government decides to proceed with a National Action Plan.

Changing behaviour on business and human rights will be an iterative process. We have prioritised the recommendations below within clusters, to put 'easy wins' or first steps up front, and actions that will take longer lower down. The recommendations are placed sequentially, with the second often, but not always, flowing from the first in the cluster.

## **Pillar One: State duty to protect human rights**

### ***Gap analysis and risk assessment***

#### *Immediate to short term*

- Undertake a risk assessment of sectors in Australia and their business relationships and supply chains most at risk of human rights violations, at home and abroad, to inform all next steps.
- Undertake a gap analysis of legislation.

### ***Government-business relationships: what government can do to lead by example***

#### *Immediate to short term*

- Develop capability within government organisations to understand human rights risks, targeted at procurement officers and contract managers, and focussed on identifying human rights related risks of goods and services providers. Develop practical guidance for the implementation of para 10.18 of the Commonwealth Procurement Rules.

- Work with States and Territories to reform existing government procurement rules and policies in line with the UNGPs.

#### *Medium to long term*

- Amend the Commonwealth procurement rules to give weight to the commitment of business enterprises to respect human rights in line with the UNGPs and, having regard to tendering enterprises' size and capacity, develop mandatory minimum criteria appropriately prioritising access to Commonwealth procurement contracts for those businesses with identifiable human rights due diligence, reporting frameworks, and positive human rights records.
- Review existing guidance for Foreign Investment Review Board decisions and develop human rights guidance in line with international good practice specific to the nature of the transaction.
- Strengthen human rights performance standards and monitoring procedures used by the Australian Government in its business relationships, including in national investment mechanisms and by Efic.
- Develop human rights performance standards and monitoring procedures for SOEs and work with them to implement the UNGPs.
- Support the capacity of the Parliamentary Joint Committee on Human Rights to ensure business-related legislation's compatibility with Australia's human rights commitments.

### **Reporting and due diligence**

#### *Short term*

- Consider enacting modern slavery reporting requirements in Australia.
- Develop a human rights disclosure framework to allow appropriate comparability between businesses. Disclosure should include involvement in adverse impacts through business relationships including related to operations, products or services in line with the UNGPs.

#### *Medium term*

- Consider the development of legislation mandating human rights due diligence, considering the approaches in, for example, the *Illegal Logging Prohibition Act and Regulations (2013)* which prioritises at-risk sectors, or the French Corporate Duty of Vigilance Law 2017, which requires large French companies to identify and prevent adverse human rights (and environmental) impacts.

### **Corporations Law**

#### *Short term*

- In consultation with ASIC, clarify the takeovers provisions of the Corporations Act 2001 (Cth) (Chapter 6) (Corps Act) to remove unintended inhibiting effects upon investors exercising their responsibility to seek to prevent or mitigate adverse human rights impacts to which they are linked by their investment through concerted action.
- Consider amending section 249N of the Corps Act to expressly allow shareholders to propose resolutions on sustainability issues (including human rights) for an advisory vote at general meetings.

#### *Medium to long term*

- Review Australian corporations law to clarify whether the duty to act in the best interests of the corporation contained in s.181(1) of the Corps Act permits directors to give effect to business enterprises' responsibility to respect human rights if the company does not derive benefit from expenditure to meet this responsibility, that is, if the expenditure is profit-sacrificing. A safe harbour or other protection should be provided to directors and other corporate officers, for example by extending the protection of s.180(2) to s.181(1).
- Review and clarify Australia's competition laws to ensure that they do not discourage competitors' collaboration on human rights issues.

## **Pillar Two: The responsibility of business to respect human rights**

### ***Guidance and capacity building***

#### *Short term*

- Establish an awareness-raising program in consultation and cooperation with business groups.
- Develop good practice guidance (and practical toolkits and templates), including through supporting relevant industry bodies and associations to develop materials as appropriate, on implementing the UNGPs including:
  - embedding human rights policies and practices in business enterprises' operations
  - guidance on human rights due diligence.
- In collaboration with ASIC and the ASX, define human rights 'materiality' to support better quality human rights reporting. Develop guidance and case studies to promote understanding of human rights risks and impacts, specifically on the materiality of human rights impacts or risk for the purposes of financial reporting, continuous disclosure obligations and ASX corporate governance reporting standards.

### ***Dialogue and engagement***

- Support the strengthening of coherence and connection between multi-stakeholder dialogues among business, civil society, academia, worker representatives and governments on human rights issues such as the Australian Dialogue on Business and Human Rights, the Voluntary Principles on Security and Human Rights, and the Bali Process Government and Business Forum.

## **Pillar Three: Access to remedy**

### ***Guidance and capacity building***

#### *Short term*

- Provide or support the establishment of training programs for Australian businesses/organisations on establishing and running legitimate and trusted operational grievance mechanisms in line with the UNGPs, recognising the need for appropriately designed tools for SMEs.
- Beginning with areas of highest risk or most severe adverse human rights impacts, provide resources for representatives of communities and workers likely to be affected by activities of Australian business enterprises to undertake capacity building, raise concerns, and access effective remedies.

### *Medium to long term*

- Develop a public reporting mechanism collating input from the Fair Work Ombudsman, the Australian Human Rights Commission, the Director of Public Prosecutions, and the Australian Small Business and Family Enterprise Ombudsman on investigations within their jurisdiction, including those involving human rights abuse of workers and ensuring coverage of workers at highest risk.
- Consider regulatory or legislative changes to ensure access to remedy for workers subject to human rights abuses, including those at highest risk.
- Continue building the capacity of the Australian Federal Police to develop a leadership role in leading cross-functional investigation on business and human rights-related crime.

### ***Judicial remedy***

#### *Short term*

- Establish an inquiry to consider how to reduce the procedural and substantive barriers to accessing remedy through judicial and administrative mechanisms for domestic and overseas business-related human rights abuses.

#### *Medium to long term*

- Taking into account any such inquiry, consider ways to reduce the procedural and substantive barriers to remedy through judicial and administrative mechanisms, considering the recommendations set out by the Office of the United Nations High Commissioner for Human Rights.

### ***Non-judicial remedy***

#### *Short term*

- Give full consideration to the outcomes of the 2017 review of the Australian National Contact Point for the OECD Guidelines for Multinational Enterprises (ANCP) and adopt all measures that would strengthen the ANCP and enhance its effectiveness, which may include:
  - appointing external representation on its oversight committee (eg civil society, unions, business)
  - improving transparency in relation to its procedures and decisions
  - appropriate resourcing and potentially resituating the ANCP within another department or branch
  - improving outreach with stakeholders
  - submitting to the OECD peer review process.