Stocktake on Business and Human Rights in Australia

(APRIL 2017)
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INTRODUCTION

In March 2016, following its appearance at the United Nations (UN) Human Rights Council’s Universal Periodic Review (UPR) in November 2015, Australia committed to undertaking a national consultation on the implementation of the UN Guiding Principles on Business and Human Rights (UNGPs).1

The UNGPs are the authoritative global standard that articulates the relationship between business and human rights and the expectations of States and business with regard to preventing and addressing business-related human rights harm. They were unanimously endorsed by the UN Human Rights Council in 2011 including co-sponsorship by Australia.2

In December 2016, the Australian Government announced that it would be establishing a Multi-Stakeholder Advisory Group comprising business, industry, civil society and academia, to provide expert advice and support broader consultations on the implementation of the UNGPs.3 As part of the national consultation, the development of a National Action Plan (NAP) on business and human rights has been discussed in both business and civil society forums as one way to further implementation of the UNGPs in Australia. Other policy tools have also been raised.

This Stocktake on Business and Human Rights in Australia (Stocktake) was commissioned by the Department of Foreign Affairs and Trade (DFAT) to identify the existing Australian laws, government policies and business practices relevant to the UNGPs.

The Stocktake is not intended to be a comprehensive ‘national baseline assessment’ which some States have carried out as part of their consultations on the implementation of the UNGPs. It maps existing laws, policies and practice but does not provide a gap analysis or other judgment on the effectiveness of existing measures. Rather, it is a precursor to further multi-stakeholder consultation on implementation of the UNGPs in Australia and is intended to inform future discussions, including regarding the question of the potential development of a NAP. The existence of the Stocktake does not preclude the Government from carrying out a national baseline assessment in the future.

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The structure of the Stocktake follows the UNGPs, which are founded on the three pillars of the UN Protect, Respect and Remedy Framework, welcomed by the UN Human Rights Council in 2008:

**PILLAR 1**
the State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation and adjudication;

**PILLAR 2**
the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others; and

**PILLAR 3**
greater access by victims to effective remedy, both judicial and non-judicial.⁴

It is acknowledged that all human rights are universal, and indivisible, and that business can impact the enjoyment and realisation of human rights. As informed by the UNGPs, the Stocktake focuses its analysis on the internationally recognised human rights in the International Bill of Human Rights (comprising the Universal Declaration of Human Rights (**UDHR**), the International Covenant on Civil and Political Rights and its two Optional Protocols (**ICCPR**), and the International Covenant on Economic, Social and Cultural Rights (**ICESCR**)). The Stocktake also considers the principles concerning fundamental labour rights as set out in the International Labour Organisation’s (**ILO**) Declaration on Fundamental Principles and Rights at Work and the principles contained in the UN Declaration of the Rights of Indigenous Peoples (**UNDIP**).

As the Stocktake aims to ‘map’ the regulatory, policy and practice landscape in relation to business and human rights, it surveys activity at the Commonwealth, state and territory levels. However, it focuses on the Federal government as the relevant primary obligation holder.

In preparing this Stocktake, guidance has been taken from a range of sources, particularly the UN Working Group on Business and Human Rights’ ‘Guidance on National Action Plans on Business and Human Rights’ (**UNWG Guidance on NAPs**),⁵ the International Corporate Accountability Roundtable and the Danish Institute for Human Rights Toolkit (**ICAR/DIHR Toolkit**),⁶ and the practice of other States.

The Stocktake has been prepared by Allens with a team led by Rachel Nicolson and Peter Haig⁷ with advice from Vanessa Zimmerman, in her capacity as an independent specialist on business and human rights.

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⁷ With Freya Dinshaw, Alex Lee, Shamistha Selvaratnam and Indiana Watkins.
Summary of Findings
PILLAR 1: The State Duty to Protect

GENERAL
The Stocktake of Pillar 1 of the UNGPs identifies laws, policies and practices of the Federal, state and territory governments that implement the State's duty to protect against human rights abuse by third parties, including business enterprises.

The Stocktake of laws identifies laws that are expressly aimed at requiring business enterprises to respect human rights, and laws that have the effect of requiring business enterprises to respect human rights. These laws have been grouped according to the broad category of human rights that they protect. Special note has been made of laws that require or encourage human rights-related due diligence, human rights reporting or that operate extraterritorially. Policy and guidance on business and human rights considerations, practices with regard to commercial arrangements entered into by the State (including trade-related treaties, procurement practices and privatisation arrangements), and support for international fora and initiatives have also been identified under Pillar 1 of the Stocktake.

States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

The following categories of legislation and regulations, enacted by Federal, state and territory governments, provide direct or indirect protection, to varied extents, against certain human rights abuse, including by business:

- Laws establishing human rights institutions;
- The Constitution, the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) (Parliamentary Scrutiny Act), the Human Rights Act 2004 (ACT) (ACT HRA Act), and the Human Rights and Responsibilities Act 2006 (Vic) (Victorian Charter);
- Equality and anti-discrimination laws;
- Laws that prohibit the commission of or involvement in international crimes, such as genocide;
- Privacy laws;
- Labour laws;
- Environmental laws;
- Industry-specific legislation (for example, regulating tobacco, high sugar content food and drink, illegal logging and aged care);
- Corporations and securities laws;
- Anti-bribery and corruption laws;
- Consumer laws;
- Occupational health and safety (OH&S) laws;
- Native title laws; and
- Cultural heritage laws.

Details of Government policies which protect individuals against business-related human rights abuses are detailed at UNGPs 2, 3, 7 and 8 below.

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8 As discussed further at 1.2.1(d)(i)(A), environmental laws can be understood as contributing indirectly to human rights insofar as healthy environmental conditions promote the realisation of the highest attainable standards of health and other related rights.
States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.

The Attorney-General's Department has published a statement on its website to the effect that the Australian Government believes that business should respect human rights, the Government is obliged to ensure that non-state actors, including businesses, respect human rights, and the Australian Government encourages businesses to apply the UNGPs.9

The commentary to UNGP 2 highlights that, while States are 'not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction', there are 'strong policy reasons for home States to set out clearly the expectation that business respect human rights abroad'.

The categories of laws and regulations listed above under UNGP 1 also set out the current status of the Government's legal expectations of business with respect to human rights. These include laws that apply extra-territorially to Australian companies, including foreign bribery and other offences under the Commonwealth Criminal Code which prohibit serious international crimes such as genocide, crimes against humanity and war crimes) in addition to the crimes of trafficking and slavery; as well as the Corporations Act 2001 (Cth); the Competition and Consumer Act 2010 (Cth); and the Fair Work Act 2009 (Cth).

The Australian Government's support of, and participation in, various multi-stakeholder initiatives (including the initiatives mentioned under UNGP 7, below) also underlines the expectation that Australian businesses should respect human rights when operating abroad.

In meeting their duty to protect, States should:

(a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;

(b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;

(c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;

(d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.

Relevant laws regulating domestic conduct of corporations and/or alleged breaches of law that are confined to domestic facts are regularly enforced. There has been less active enforcement action with regard to the extraterritorial application of laws, and/or where the facts involve a significant international component. For example, there has been no enforcement against corporations in Australian courts for serious international crimes (genocide, crimes against humanity and war crimes) or trafficking and slavery crimes provisions contained in the Commonwealth Criminal Code (which appears as a Schedule to the Criminal Code Act 1995 (Cth) (the Criminal Code) and limited enforcement of the foreign bribery offence in the Criminal Code.10

Australian laws governing the creation and operation of business enterprises, including corporations law and the ASX Listing Rules, do not constrain business respect for human rights and in some instances require and encourage business respect for human rights. This was identified in the Australian report for the Corporate Law Tools Project carried out by the author of the UNGPs, Professor John Ruggie.11

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10 For details of enforcement to date, see section 1.3.1(a) at Footnote 202.

The Australian Government provides guidance on business and human rights through:

- specific programs run for businesses operating at home and abroad by certain government departments and agencies;
- support of the Australian Human Rights Commission (AHRC), which provides guidance on the UNGPs and other human rights-related topics for business; and
- support of relevant international initiatives, including the OECD Guidelines for Multinational Enterprises (OECD Guidelines), the UN Global Compact, International Code of Conduct for Private Security Service Providers (ICOC), the Voluntary Principles on Security and Human Rights (VPs), the UN Working Group on Business and Human Rights (UNWG) and the Extractive Industries Transparency Initiative (EITI).

While there is no stand-alone requirement specifically requiring business enterprises to report on their human rights practices, the Australian Government encourages business enterprises to communicate how they address their human rights impacts by laws which require or encourage companies to engage in forms of human rights due diligence or human rights-related reporting practices. The Government also endorses or financially supports the following international initiatives that require human rights-related reporting by business: Global Reporting Initiative (GRI), UN Global Compact Communication on Progress, EITI, and the Kimberley Process Certification Scheme (Kimberley Process). The Australian Government has also announced that, as part of strengthening its response to human trafficking and slavery, it will consider the feasibility of a model for large businesses to publicly report on their actions to address supply chain exploitation.\(^\text{12}\)

### 4

**States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.**

At the Federal level, State-owned enterprises are referred to as ‘Government Business Enterprises’, or GBEs. Of the six GBEs reviewed for this Stocktake, all made a clear policy statement of the importance of compliance with equal opportunity and anti-discrimination laws. One had a supplier code of conduct which requires compliance with international human rights laws throughout its supply chain. Three had general corporate social responsibility policies, and many had policies that by their nature promoted respect for human rights (such as safety or environment).

Government agencies that take human rights considerations into account in their business dealings include the Export Finance and Insurance Corporation (EFIC, Australia’s export credit agency), the Future Fund (Australia’s sovereign wealth fund), and the Department of Health’s Human Research Ethics Committee (which considers investment into medical research).

### 5

**States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.**

The Australian Government takes into account some human rights-related considerations when engaging in the following categories of contracts:

- Public Private Partnerships;
- Federal private security contracts; and

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Federal health contracts. The Charter of Rights and Responsibilities Act 2006 (Vic) (Victorian Charter) and the Human Rights Act 2004 (ACT) (ACT HRA Act) apply to corporations that fall within the definition of a ‘public authority’, which in certain circumstances can include carrying out functions of a public nature (such as the provision of public transport or private prison facilities).

6 States conduct a variety of commercial transactions with business enterprises, not least through their procurement activities. This provides States – individually and collectively – with unique opportunities to promote awareness of and respect for human rights by those enterprises, including through the terms of contracts, with due regard to States’ relevant obligations under national and international law.

The Australian Government, and each state and territory, has procurement guidelines that take into account some human rights-related matters. The Australian Government takes account of the following considerations in its procurement practices:

- presence of slavery and/or human trafficking in supply chains;
- ‘dishonest, unethical or unsafe’ supplier practices;
- privacy considerations;
- sustainability; and
- Indigenous employment, supplier use, and community considerations.

While each state and territory has different procurement practices, generally ethical conduct, sustainability, cultural heritage, employment rights and occupational health and safety are required to be taken into account.

7 Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by:

(a) Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;

(b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;

(c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation;

(d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.

A number of Australian laws require respect for human rights by businesses that operate in conflict-affected areas, including laws on the commission of, or complicity in, serious international crimes abroad, anti-bribery and corruption laws, and laws regarding the Kimberley Process. Australia also provides some guidance for businesses operating in conflict-affected areas through its support for international industry initiatives such as the VPs, EITI, ICOC and the Kimberley Process.

Australia’s export credit agency (EFIC) and sovereign wealth fund (the Future Fund), both have policies in place that restrict support for entities involved in gross human rights abuses, including in conflict-affected areas.
UNGP FINDINGS

8 States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State's human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.

The Australian Government provides support and guidance across government in relation to business and human rights through the following methods:

- consultations on the implementation of the UNGPs, including the establishment of an inter-departmental steering group on business and human rights;
- coordination between government agencies;
- all-of-government approach to combatting human trafficking and slavery;
- coordination between DFAT and other government departments, including the Department of Industry and the Australian Border Force, on the implementation of the Kimberley Process;
- coordination between DFAT and other government departments, including the Department of Industry, Innovation and Science, to promote awareness of the VPs; and
- other specific initiatives taken by government departments.

The Australian Government also seeks to ensure that the Federal Parliament is aware of the State's human rights obligations through the Parliamentary Joint Committee on Human Rights. In Victoria and the ACT, training is provided to government, public authorities and their employees on their responsibilities under the Victorian Charter and ACT HRA Act.

9 States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.

It does not appear that there is a formal Australian Government policy requiring human rights provisions to be included in free trade and investment treaties. However, human rights-related provisions were found to have been included in approximately one third of Australian investment treaties reviewed for the purposes of this Stocktake.

Human rights-related considerations in free trade and investment treaties included:

- provisions seeking to preserve the State's ability to adopt or enforce measures 'necessary to protect human, animal or plant life or health';
- chapters or provisions reaffirming commitments to labour protections;
- provisions permitting State parties to take measures relating to products of prison labour;
- provisions requiring obligations to be implemented in a manner that respects privacy and the protection of personal data;
- provisions reaffirming the importance of States encouraging enterprises to voluntarily incorporate into their internal policies corporate social responsibility standards, guidelines and principles; and
- provisions preserving policy space for measures to be taken in relation to the rights of Indigenous persons, including rights under the Treaty of Waitangi (which applies within New Zealand).

The incorporation of human rights provisions in Government contracts is discussed further under UNGP 6. Further, it is noted that several contracts between state governments and companies are publicly available (particularly in relation to the extractives sector). Such contracts can be enshrined in legislation, thus promoting transparency around state government commercial arrangements.
UNGP FINDINGS

10 States, when acting as members of multilateral institutions that deal with business-related issues, should:

(a) Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights;

(b) Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising;

(c) Draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges.

The Australian Government seeks to promote business respect for human rights in international fora and in cooperation with other states through initiatives relevant to business and human rights considerations at the UN, World Bank, OECD and regional levels, as well as through support of the international initiatives listed above. In particular, Australia has co-sponsored resolutions on business and human rights at the UN Human Rights Council, contributed financially to the Office of the UN High Commissioner for Human Rights (OHCHR) Accountability and Remedy Project, and participates in regional efforts on human trafficking, slavery and labour exploitation.

PILLAR 2 – The Corporate Responsibility to Respect Human Rights

GENERAL Pillar 2 of the UNGPs relates to the corporate responsibility to respect human rights. The National Action Plans and National Baseline Assessments of other countries have not traditionally analysed the level of implementation of Pillar 2. Notwithstanding the limited methodological guidance available for conducting this analysis, the Australian Government considers that the Stocktake should address Pillar 2 of the UNGPs.

The methodology used in this Stocktake for addressing Pillar 2 included the review of existing information on business and human rights practices in Australia. It also included a desk-top survey of the publicly available statements, policies and procedures regarding human rights of the 50 largest ASX companies13 (ASX 50) and the top 10 companies on the AFR Top 500 Private Companies 201614 (Private 10) (the Company Survey). Given the small sample size of the Company Survey, the results should be seen as indicative only and further research would need to be conducted to gain a clearer picture of the level of implementation of Pillar 2 in Australia.15

11 Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

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13 The ASX 50 companies surveyed were the top 50 companies by market cap in the ASX 100, as available on https://www.asx100list.com/ on 7 October 2016. A list of these companies is provided at Annexure B.
14 The Private 10 were the top 10 private companies ranked by revenue, available at http://www.afr.com/leadership/brw-lists/top-500-private-companies/afr-top-500-private-companies-20160828-gr2zyt on 5 October 2016. A list of these companies is provided at Annexure B.
15 Immediately prior to the publication of this Stocktake, the 2017 Corporate Human Rights Benchmark was released which is also likely to be of assistance to future work in this space (https://www.corporatebenchmark.org/). The results of the Benchmark have not been incorporated in the Stocktake, although it is noted that a number of Australian companies were featured.
Australian businesses are increasingly aware of the Pillar 2 Foundational Principles and the content of the expectations embedded within those principles. The AHRC and the UN Global Compact Network Australia (GCNA) convene a ‘national dialogue’ annually with representatives of a number of Australia’s biggest companies, NGOs, government departments, investors and academia to discuss ways to prevent and address the involvement of Australian business in adverse human rights impacts in Australia and abroad (Australian Dialogues). The Australian Dialogues have included extensive discussions regarding the motivations for corporate respect for human rights, including the importance of ‘doing the right thing’ (rather than simply doing what is legal), ensuring a social licence to operate, and the clear nexus between a human rights approach to business and risk management.

The 2015 Australian Dialogue highlighted that momentum was building around business and human rights in Australia, but that challenges remain. Key areas for focus and improvement were identified, including:

- transparency and disclosure;
- translating human rights into local operations;
- integrating human rights across business functions;
- managing human rights in supply chains; and
- engaging and improving performance in those companies that may lag behind others in human rights (such as Small to Medium sized Enterprises (SMEs), for example because of lack of awareness, capacity or scrutiny.

In considering human rights-related reported incidents involving Australian companies, the Company Survey also identified that:

- 8 of the ASX 50 and 2 of the Private 10 have been the subject of publicised allegations, reports or findings of human rights breaches (such as discrimination or poor labour conditions) in Australia since 1995.
- 14 of the 34 ASX 50 companies that have operations or conduct business overseas have been the subject of publicised allegations, reports or findings of human rights breaches overseas since 2000. 6 of the Private 10 companies have operations or conduct business overseas, but none have been the subject of publicised allegations, reports or findings of human rights breaches overseas.

**12** The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.

UNGP 12 informs the overall methodology behind the Stocktake, and Pillar 2 implementation has been measured against these standards.

**13** The responsibility to respect human rights requires that business enterprises:

(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;

(b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

See discussion of Operational Principles UNGPs 16-24, below.

**14** The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with
the severity of the enterprise’s adverse human rights impacts.

Larger companies, such as the ASX 50 and Private 10, are typically high-profile and are generally subject to greater public scrutiny on human rights issues. Larger companies may therefore be more familiar with human rights principles, and have greater resources to dedicate to human rights issues than smaller, less well-resourced companies. Companies whose operations pose particular human rights-related risks also address, to some extent, their human rights risk profiles by engaging with industry-level sector specific initiatives, such as the Accord on Fire and Building Safety in Bangladesh (Accord), the VPs, or the Roundtable on Sustainable Palm Oil.

The Australian Dialogues have identified SMEs’ lack of resources as one barrier to their engagement with human rights. In order to increase SMEs’ awareness of human rights, the AHRC engages with an array of bodies that represent the interests of SMEs. It also provides human rights related guidance and educational materials for SMEs. The Federal Small Business and Family Enterprise Ombudsman also provides training and online resources to small businesses.

In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

(a) A policy commitment to meet their responsibility to respect human rights;
(b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
(c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

Regarding 15(a), see UNGP 16 below.
Regarding 15(b), see UNGP 17 below.
Regarding 15(c), see UNGP 22 below.

As the basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through a statement of policy that:

(a) Is approved at the most senior level of the business enterprise;
(b) Is informed by relevant internal and/or external expertise;
(c) Stipulates the enterprise’s human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services;
(d) Is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties;
(e) Is reflected in operational policies and procedures necessary to embed it throughout the business enterprise.

16 Including the Council for Small Business Australia, the Australian Small Business and Family Enterprise Ombudsman, the Small Business NSW Commissioner, Business Enterprise Centres, and the Small Enterprise Association of Australia and New Zealand.
The Company Survey found that:

- 24 of the ASX 50 have made public commitments to respect human rights by way of a human rights commitment, policy or statement. Consistent with the approach taken by other surveys of publicly available human rights policies, the term 'human rights commitment, policy or statement' includes both stand-alone human rights policies and statements, and human rights policies and statements that are included in other documents, such as a code of conduct or corporate social responsibility documents. Only commitments, policies or statements that expressly refer to human rights have been included.\(^{19}\)
- Each of the ASX 50 and 6 of the Private 10 have publicly available policies that are relevant to human rights, with common examples being:
  - Diversity policies;
  - Health and safety policies;
  - Supply chain and sourcing policies; and
  - Codes of conduct.

A 2013 civil society report has examined company statements about free, prior and informed consent, finding that few companies have specific (and publicly available) commitments to free, prior and informed consent.\(^{20}\)

At the 2016 Australian Dialogue, the need for greater awareness and understanding of human rights and engagement with human rights issues at senior levels of business was discussed, together with the strong business case that can be made for building that engagement.

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17 In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.

- **Human rights due diligence:**
  - (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
  - (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
  - (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise’s operations and operating context evolve.

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The Company Survey found that:

- 2 of the ASX 50 reported, or made statements indicating, that they conduct specific human rights impact assessments and/or human rights due diligence.
- 8 of the ASX 50 reported, or made statements indicating, that they expressly incorporate human rights into broader due diligence processes.
- 3 of the ASX 50 reported, or made statements indicating, that they conduct assessments or analyses of human rights impacts.
- None of the Private 10 reported having similar processes.

Statements and publicly available information relating to human rights due diligence practices vary in their detail. Some companies outline the different

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steps taken in the due diligence process, and others simply state that human rights due diligence is undertaken.

18 In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should:
(a) Draw on internal and/or independent external human rights expertise;
(b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.

Participants at the Australian Dialogues have demonstrated an increasing awareness of what is involved in human rights risk and impact assessment. However, it was also noted that Australian companies may not always appreciate their supply chain links to higher-risk contexts, and may only consider the human rights issues in their supply chain after a significant incident (such as the Rana Plaza factory collapse). At the 2016 Australian Dialogue, it was noted that while supply chain audits can be a useful tool in identifying human rights risks, ‘there are also benefits of moving beyond auditing towards an approach focused on building long term relationships with suppliers’.

UNGP 18 also refers to businesses engaging in meaningful consultations with stakeholders. Providing a voice to local communities (including Indigenous communities) was identified as a key priority at the 2015 Australian Dialogue. It was noted that each community faces unique issues, so consultation must be adapted to the specific circumstances of each case and should be guided by the principles of free, prior and informed consent.

Consistently with the results of the Company Survey in relation to human rights due diligence and human rights impact assessments (finding that details of those processes are not usually publicly available), the 2013 CAER and Oxfam Australia Right to Decide report (referred to in relation to UNGP 16 above) found that the companies surveyed largely did not make available details of how they engaged with Indigenous peoples.

19 In order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action.
(a) Effective integration requires that:
   (i) Responsibility for addressing such impacts is assigned to the appropriate level and function within the business enterprise;
   (ii) Internal decision-making, budget allocations and oversight processes enable effective responses to such impacts.
(b) Appropriate action will vary according to:
   (i) Whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship;
   (ii) The extent of its leverage in addressing the adverse impact.

UNGP 19 relates to the horizontal integration within businesses of specific findings from assessing human rights impacts. Participants in the 2015 Australian Dialogue identified that integration of human rights within businesses is an ongoing and evolving process, noting that while some companies have internal human rights working groups to encourage cross-functional coordination, many are still deciding how best to effectively achieve integration. Participants noted the importance of not ‘siloing’ human rights within a particular function, empowering individual employees to identify and respond to risks, and having empowered internal experts who can help other colleagues to understand key issues and also manage dilemmas on the ground. Relevant functions include but are not limited to sustainability, legal, compliance, procurement, health and safety, risk, environment, communities and security.
UNGP 19 also relates to taking appropriate action where a business is involved in an adverse impact, whether through causing or contributing to the impact or being directly linked to it through its operations, products or services. What will constitute ‘appropriate action’ may depend on a company’s business relationships and its leverage. The challenges in companies understanding and in some cases using their drive change was noted in the 2015 and 2016 Australian Dialogues.

Relevantly to business relationships and leverage, there is also increasing scrutiny by companies on supply chain issues, with the resulting trend that companies’ supplier codes of conduct now tend to deal with specific human rights issues (such as child labour or forced labour).

**20** In order to verify whether adverse human rights impacts are being addressed, business enterprises should track the effectiveness of their response. Tracking should:

(a) Be based on appropriate qualitative and quantitative indicators;
(b) Draw on feedback from both internal and external sources, including affected stakeholders.

Tracking the effectiveness of a company’s responses to human rights impacts involves internal processes that are not often publicly accessible. Nevertheless, the UNGP Reporting Framework, which is designed to help companies report on human rights performance, includes questions on whether companies track and verify if their human rights responses are effective. The UNGP Reporting Framework has set up a database that ‘shows what companies say about how they are implementing the UNGPs’. The database now includes several Australian companies. Therefore, looking at the UNGP Reporting database and at the specific indicators on tracking can provide an insight into what tracking is being undertaken by the Australian companies that are included in the database.

The information relating to Australian companies available on the database shows that certain companies:

- collect data on certain indicators that are relevant to human rights, such as the gender composition of the workforce and health and safety, which could be analysed for its alignment with human rights, and necessary adjustments could be made;
- monitor and evaluate how their operations affect communities and stakeholders, although this monitoring is not always couched in human rights terms; and
- engage auditors to measure the impact of certain programs relevant to human rights.

**21** In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them. In all instances, communications should:

(a) Be of a form and frequency that reflect an enterprise’s human rights impacts and that are accessible to its intended audiences;
(b) Provide information that is sufficient to evaluate the adequacy of an enterprise’s response to the particular human rights impact involved;
(c) In turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.

The Company Survey found that:

- 15 of the ASX 50 have some form of explicit reference to human rights in their Annual Report or Sustainability Report (or similar report relating to corporate social responsibility), with 3 having a dedicated human rights section in their Annual Report (although many more refer to human rights related issues, like discrimination);
2 of the Private 10 have incorporated some form of explicit reference to human rights in a public report relating to sustainability or corporate social responsibility; and

7 of the ASX 50 have made statements on steps they have taken to ensure that slavery and human trafficking are not occurring in their supply chains or any parts of their business, under the Modern Slavery Act 2015 (UK). More Australian companies are expected to publish such statements in future reporting periods.

The Australian Stock Exchange Corporate Governance Council’s Corporate Governance Principles and Recommendations (ASX Corporate Governance Principles) recommend that a company listed on the ASX should disclose whether it has any material exposure to economic, environmental and social sustainability risks and, if it does, how it manages or intends to manage those risks. This includes by reference to certain domestic and international standards that include human rights matters including the UN Global Compact. The UNGP Reporting Framework provides guidance for companies on reporting their progress towards implementation of the UNGPs. The related UNGP Reporting Database compiles publicly reported human-rights related information, where it is accessible to companies themselves and other stakeholders, such as investors. Only a small number of Australian companies have been surveyed using the UNGP Reporting Framework.

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 UNGPs note that company-run grievance mechanisms can be an effective mechanism for enabling remediation and as such are an important part of the corporate responsibility to respect human rights. The results of the Company Survey in relation to company grievance mechanisms are outlined in UNGP 29. UNGP 31 describes the characteristics of effective grievance mechanisms.

Although grievance mechanisms can serve to enable remediation, the focus of UNGP 22 is on providing for or cooperating and playing a role in remediation, based on the level of involvement of the company in the harm. The Company Survey found that 3 of the ASX 50 expressly state in their human rights policy or statement that they will remediate adverse impacts.

In all contexts, business enterprises should:
(a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate;
(b) Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements;
(c) Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.

UNGP 23 relates to assessing and responding to differing levels of human rights risks that may be present when businesses operate in different countries, communities and sectors. The Company Survey found that 4 of the ASX 50 have made public statements to the effect that where local laws do not align with international standards, they will comply with domestic laws but also apply an international standard where that affords greater rights protection.

The commentary to UNGP 23 notes that companies can draw on external expertise, including from multi-stakeholder initiatives, in order to assess how best to respond to particular circumstances.

The Company Survey found that:
▶ 22 of the ASX 50 have publicly stated that they participate in voluntary human rights initiatives.
▶ One of the Private 10 has publicly stated that it participates in voluntary human rights initiatives.
International initiatives in which Australian businesses participate include the UN Global Compact, GRI, Ethical Trading Initiative, Equator Principles, Principles for Responsible Investment, Diamond Development Initiative, VPs, Accord, Better Cotton Initiative, Better Work, Fair Labour Association, Ethical Tea Partnership, Fairtrade Certification, Rainforest Alliance, Forest Stewardship Council and the Roundtable on Sustainable Palm Oil.

Where it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable.

That human rights impacts differ in their severity and require prioritisation has been recognised by a number of Australian companies, including at the 2014 Australian Dialogue. Australian companies surveyed using the UNGP Reporting Framework have identified areas of priority and focuses for reporting, although these are general statements and are not made in the context of prioritising responses to specific human rights impacts. At the 2016 Australian Dialogue, it was noted that some companies are undertaking supply chain audits and prioritising risk management within complex supply chains, in order to be better placed to respond to various human rights risks that may be connected to a company’s operations.

**PILLAR 3 – Access to Remedy**

**GENERAL**

Pillar 3 of the UNGPs provides that as part of its State duty to protect against business-related human rights abuse, Australia must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within its territory and/or jurisdiction, those who are affected have access to an effective remedy.

The Stocktake surveys the extent of Australia’s implementation of Pillar 3 of the UNGPs through a review of:

- State-based judicial mechanisms, including corporate criminal liability, civil liability, administrative sanctions, notions of secondary liability, and barriers to remedy;
- State-based non-judicial mechanisms, including dispute resolution mechanisms accessed via Government agencies and entities, including the OECD National Contact Point and relevant Ombudsmen; and
- Grievance mechanisms that are supported by Australia at the international and regional levels, as well as voluntary industry-level and operational mechanisms in which Australian business members participate.

As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.

This section outlines the availability of access to remedy under Australia’s criminal and civil law for human rights related harm under Australian legislation. It focuses on the processes and avenues available for access to effective remedy, and not on the decisions of Australian courts (including what these decisions may mean for future jurisprudence).

Under both Australia’s criminal and civil law, it is possible to hold a corporation liable either directly or indirectly in a human rights-related crime or cause of action (further detail of which is contained in both Pillars 1 and 3 of the Stocktake). In order to obtain a remedy, all elements of the crime or cause of action must be established, corporate liability must be established, and there must be no defences that apply. Sanctions and/or relief under criminal law include imprisonment of individuals, pecuniary penalties for corporations, and victim of crimes compensation in some instances. Relief under civil law is typically damages, however injunctions, specific performance or restitution may also be available.
Both the Victorian Charter and the ACT HRA Act require courts to interpret laws in a way that is compatible with protected rights. Neither instrument provides for damages to be granted as a remedy for breach and, in the case of the Victorian Charter, the provisions do not allow for a freestanding claim to a remedy.

26 States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.

The UNGPs note that legal barriers to access to remedy for business-related human rights harm can include where the claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim.

In order for Australia’s statutes to have extraterritorial application to Australian corporations operating outside of Australia including for the purposes of remedy, the statute must contain an express provision to this effect. For common law causes of action, the usual procedural barriers will apply (for example, establishing that the court has jurisdiction to hear the claim).

Other barriers to accessing remedy have been identified, including limited liability and corporate group structure considerations. Key mechanisms that support victim access to remedy include class action regimes (in the Federal, NSW and Victorian courts), litigation funding, some access to legal aid, and alternative forms of dispute resolution in federal and state court systems.

27 States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.

Australia has a number of State-based non-judicial mechanisms including:

- complaints mechanisms made available by the Australian and state/territory human rights commissions;
- the Fair Work Commission;
- the Australian OECD National Contact Point;
- EFIC; and
- state and territory Ombudsmen; and
- industry Ombudsmen (such as the Telecommunication Industry Ombudsman).

While this Stocktake does not consider the effectiveness of Australia’s State-based non-judicial mechanisms, this has been considered in multi-stakeholder discussions and by academic commentators.

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21 Victorian Charter, s 32; ACT HRA Act, s 30.
22 Victorian Charter, s 39(3); ACT HRA Act, s 40C(4).
23 The Victorian Charter does not create a right for a person to start a proceeding in relation to an alleged breach of the Victorian Charter. However, s 40C of the ACT HRA Act allows a person to start a proceeding in the Supreme Court against a public authority or rely on their rights under the ACT HRA Act in other legal proceedings if that person claims that the public authority has acted in contravention of s 40B and alleges that the person is or would be a victim of the contravention.
25 For example, the effectiveness of Australia’s National Contact Point has been criticised by some commentators: see Australian Human Rights Commission, ‘Implementing the UN Guiding Principles of Business and Human Rights in Australia: Joint Civil Society Statement’ (Report, Australian Human Rights Commission, 2016) 19-20; Dr Shelley Marshall, ‘OECD National Contact Points’ (Report Series 16, Corporate Accountability Research, 2016).
The Australian Government facilitates or does not otherwise prevent access to non-State based grievance mechanisms including:
- UN treaty body complaints mechanisms;
- complaints made to UN Special Rapporteurs and other UN special procedure mandate holders;
- investigations by the International Criminal Court;
- the World Bank Compliance Advisor Ombudsman; and
- industry level grievance mechanisms supported by the Australian Government.

To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.

The Company Survey found that 35 of the ASX 50 and 3 of the Private 10 have publicly stated that they have some form of grievance mechanism or means for making and receiving complaints (including internal procedures, such as whistle-blower and reporting mechanisms) relating to issues that are relevant to human rights (even if they do not use the term 'human rights'). These mechanisms are usually not specifically designed to handle human rights grievances but rather are mechanisms with broader remits around issues including corruption, discrimination, cultural heritage and harassment.

At the 2015 and 2016 Australian Dialogues, participants discussed the importance of timely responses to complaints.

A number of Australian companies also participate in collective or multi-stakeholder initiatives that require the establishment of internal grievance mechanisms, provide for industry-level grievance mechanisms, or provide guidance on how grievance mechanisms should be implemented. These are considered further in UNGP 30.

Industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available.

Voluntary collective and multi-stakeholder initiatives with Australian participants that provide some form of grievance or complaints handling mechanism include the UN Global Compact, Ethical Trading Initiative, the Accord, Fair Labour Association, Fairtrade Certification, Rainforest Alliance, Forest Stewardship Council, and Roundtable on Sustainable Palm Oil. Some of these mechanisms have faced civil society scrutiny over the functioning of and legitimacy of their grievance mechanisms.

Voluntary industry initiatives with Australian participants that provide guidance on, or require the establishment of, operational-level grievance mechanisms include the International Council on Mining & Metals, Ethical Tea Partnership, Ethical Clothing Australia, VPs, and ICOC and International Code of Conduct Association (ICOC).
In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:

(a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;

(b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;

(c) Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;

(d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;

(e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism’s performance to build confidence in its effectiveness and meet any public interest at stake;

(f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;

(g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;

Operational-level mechanisms should also be:

(h) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.

As it is beyond the remit of this Stocktake to analyse the effectiveness of the mechanisms and remedies set out in this section, the implementation of UNGP 31 has not been addressed. However, the Stocktake may provide a basis from which future analysis can be conducted in this area. It is noted that there have been multi-stakeholder discussions regarding the effectiveness of Australia’s State-based judicial mechanisms.26 Further, at least four companies from the Company Survey have taken the effectiveness criteria from UNGP 31 into account when establishing grievance mechanisms.

Pillar 1: The State's Duty to Protect
1.1 Methodology

This section is structured by reference to each of the UNGPs that sit under Pillar 1. As to content within that structure, this section surveys:

• **Australian laws** that protect against business-related human rights impacts, both within Australia and in relation to the extraterritorial operations and activities of companies domiciled in Australia;\(^{27}\)

• **Australian Government policies** on business and human rights-related issues implemented at the international and domestic levels; and

• **Relevant Australian Government practices**, including those of State-owned corporations at the international and domestic levels.

(a) **Australian laws**

In general terms, the following categories of Australian laws relating to business and human rights have been considered in this Stocktake:

(i) **Laws expressly aimed at requiring business enterprises to respect human rights**

Laws falling into this category are laws enacted for the express purpose of incorporating Australia’s international human rights law obligations into domestic law.

This first category of laws is the focus of the Stocktake of Pillar 1. This is because these laws are those most directly relevant to the foundational principle in UNGP 1 that States must ‘protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises’, which requires ‘taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulation and adjudication’. An example is the **Racial Discrimination Act 1975** (Cth) ([Racial Discrimination Act](#)).

(ii) **Laws that have the effect of requiring business enterprises to respect human rights**

This category includes laws that were not enacted for the express purpose of incorporating Australia’s international human rights law obligations into domestic law, but are laws that nevertheless have the effect of requiring business enterprises to respect human rights.

An example of laws falling within this category are the suite of Federal, state and territory privacy laws.\(^{28}\)

Another example of laws that may be argued to fall within this category include those that apply to specific business sectors, for example certain laws regulating tobacco, liquor and sugary food and beverages. This Stocktake has surveyed these industry-specific laws at a very high level only.

Australian investment treaties and free trade agreements ([FTAs](#)) have also been surveyed for the purposes of stocktaking Australia’s implementation of UNGP 9 (see below at 1.3.7).

(b) **Australian Government policies and practices**

The Australian Government policies and practices considered for the purpose of this Stocktake have been directly sourced from:

(i) **DFAT and other Australian Government agencies**;\(^{29}\)

(ii) information submitted by the Australian Government during the UPR in 2015; and

(iii) desktop research focusing on Commonwealth, state and territory government and agency websites, as well as the websites of State-owned corporations.

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\(^{27}\) The UNGPs commentary to UNGP 2 provide that ‘while at present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so provided that there is a recognised jurisdictional basis’. It also states that ‘[t]here are strong policy reasons for home States to set out clearly the expectation that business respect human rights abroad’ (at 3-4).

\(^{28}\) See discussion of these laws at 1.2.1(c)(iv), below.

\(^{29}\) This includes the Attorney-General’s Department, the Department of Communication and the Arts, the Department of Employment, the Department of Environment, the Department of Finance, the Department of Health, the Department of the Prime Minister and Cabinet, the Department of Social Services, the Great Barrier Reef Marine Park Authority, Parks Australia and the Department of Treasury.
1.2 Foundational Principles

1.2.1 UNGP 1

**UNGP 1 provides:**
States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

This section of the Stocktake identifies legislation, regulations and policies that protect against human rights abuse by business. The relevant international human rights law obligations to which Australia is a party are listed in section 1.2.1(a). Much of the legislation considered in this Stocktake contributes to implementation of these commitments. The relevant laws and regulations have been grouped according to the broad category of human rights that they protect, namely:

- civil and political rights (section 1.2.1(c));
- economic, social and cultural rights (section 1.2.1(d)), including:
  - labour rights (section 1.2.1(d)(iii)); and
  - Indigenous peoples’ rights (section 1.2.1(d)(iv)).

(a) Australia’s international human rights law commitments

Australia is party to the following core UN human rights treaties:

- ICESCR,$^{32}$
- *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),*$^{33}$
- ICCPR,$^{34}$
- *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),*$^{35}$
- *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),*$^{36}$
- *Convention on the Rights of the Child (CROC),*$^{37}$ and
- *Convention on the Rights of Persons with Disabilities.*$^{38}$

Australia has also ratified seven of the eight core ILO conventions, including the Forced Labour Convention; Freedom of Association and Protection of the Right to Organise Convention; Right to Organise and Collective Bargaining Convention; Equal Remuneration Convention; Abolition of Forced Labour Convention; Discrimination (Employment and Occupation Convention); and Worst Forms of Child Labour Convention.$^{39}$

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30 Adjudication and other remedial measures directed to punishment and redress for business-related human rights abuses are discussed in Pillar 3 of the Stocktake.
31 These overlap with, but are broader than, the human rights in the International Bill of Human Rights referred to above.
(b) Laws establishing human rights institutions

**Federal laws**

The Australian Human Rights Commission Act 1986 (Cth) (**AHRC Act**) establishes the AHRC. The duties, functions and powers of the AHRC include:

- handling complaints against business under anti-discrimination legislation;
- intervening in court proceedings that involve human rights matters;
- specific functions to monitor the human rights of indigenous people under the AHRC Act and the **Native Title Act 1993** (Cth);
- handling complaints relating to discrimination on other grounds proscribed by the Australian Human Rights Commission Regulations 1989 (Cth) (including distinction, exclusion or preference on the grounds of medical record, criminal record, marital or relationship status, sexual orientation or trade union activity); and
- other functions in relation to international human rights instruments (including the ICCPR, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities and ILO Convention 111, which relates to equal opportunity in employment).

The AHRC may, in certain circumstances, consider complaints made relating to incidents occurring outside of Australia, however the AHRC has stated that the President will not travel abroad in order to hear complaints made outside of Australia.\(^41\)

**State and territory laws**

State and territory laws that establish state and territory conciliation agencies are: Human Rights Commission Act 2005 (ACT); Anti-Discrimination Act 1977 (NSW); Anti-Discrimination Act 1992 (NT); Anti-Discrimination Act 1991 (Qld); Equal Opportunity Act 1984 (SA); Anti-Discrimination Act 1998 (Tas); Equal Opportunity Act 2010 (Vic); Equal Opportunity Act 1984 (WA).

(c) Civil and political rights

(i) Bills of rights / human rights charters

**Federal laws**

Australia does not have a Federal bill of human rights. In 2009, the National Human Rights Consultation Committee published its report on the protection and promotion of human rights in Australia which, among other things, recommended the enactment of a federal Human Rights Act.\(^{42}\)

The Commonwealth Constitution does not contain a list of personal rights or freedoms enforceable in the courts. However, it does contain certain guarantees and restrictions on the kinds of law Parliament may enact which have a rights-protective effect, including:

- the implied requirement that legislative disqualification from voting must be for a substantial reason;\(^{43}\)
- the guarantee that a trial on indictment of any offence against a Commonwealth law shall be by jury (s 80);
- the prohibition on laws establishing any religion, imposing religious observance or prohibiting free exercise of any religion (s 116); and

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\(^{40}\) AHRC Act s7. The AHRC is an independent national human rights institution that is supported, but not influenced, by the Australian Government in line with the Paris Principles: see *National institutions for the promotion and protection of human rights*, UN GAOR, 48th sess, Agenda Item 114(b), UN Doc A/RES/48/134 (4 March 1994) annex.


\(^{42}\) See *National Human Rights Consultation: Report* (September 2009) (**National Human Rights Consultation**), Recommendation 18. Separately, the National Human Rights Consultation also considered the greater recognition of the human rights responsibilities of corporations, including Professor John Ruggie’s recommendation that the Government should adopt the UNGP ‘Protect, Respect and Remedy’ framework (at 147–48). Members of the private sector also contributed submissions to the Committee; for example Telstra (which contributed a submission in support of a federal human rights Act) and the Australian Chamber of Commerce and Industry (which questioned the utility of a federal human rights act).

\(^{43}\) *Roach v Electoral Commissioner* (2007) 233 CLR 162. This right is not absolute. Section 41 gives a limited form of protection to the franchise by providing that adults who have or acquire the right to vote for the lower house of a State Parliament, cannot be prevented from voting in Commonwealth elections by any law passed by the Commonwealth Parliament. It has generally been interpreted narrowly by the High Court. There have also been attempts to find implied constitutional protection of the right to vote by drawing implications from the requirement that members of Parliament be ‘directly chosen by the people’: see, for example, *Attorney-General (Cth), Ex Rel McKinlay v Commonwealth* (1975) 135 CLR 1; *McGinty v Western Australia* (1996) 186 CLR 140 at 166.
• the guarantee of just compensation for property acquired by the Commonwealth Government (s 51(xxxi)).

The High Court has also considered whether it is possible to imply from the Constitution certain rights and freedoms.\(^{44}\)

The relevance of constitutional rights (whether explicit or implied) to corporations is limited because the rights relate to the conduct (principally, legislation) of the Commonwealth and the states and are not enforceable as such against corporations.

Although there is no Federal human rights statute, the Parliamentary Scrutiny Act establishes the Parliamentary Joint Committee on Human Rights, the main function of which is to examine all Commonwealth bills and legislative instruments for compatibility with human rights,\(^ {45} \) and to report to both Houses of Parliament on its findings. The Parliamentary Scrutiny Act relates to the State’s duty to protect, since it provides an accountability mechanism where legislation and legislative instruments (including legislation and instruments relating to business) must be examined for compatibility with human rights and requires that where incompatibilities exist they must be explained.

**State and territory laws**

The ACT HRA Act provides an explicit statutory basis for respecting, protecting and promoting civil and political rights of everyone in the ACT. These rights primarily reflect those set out in the ICCPR, however the ACT HRA Act also enshrines a right to education.\(^ {46} \) However, it does not directly apply to corporations, except insofar as a corporation might fall within the definition of a ‘public authority’.\(^ {47} \) Under the ACT HRA Act, the definition of ‘public authority’ includes an entity whose functions are or include functions of a public nature (for example, the operation of detention places and correctional centres; the provision of gas, electricity and water supply services; and the provision of public transport).\(^ {48} \) When it is exercising those functions for the Territory or a public authority.\(^ {49} \) In addition, the ACT HRA Act contains a provision allowing entities that are not public authorities to elect to be subject to the obligations of public authorities under the Charter.\(^ {50} \)

The Victorian Charter sets out twenty key human rights that it is designed to protect. Like the ACT HRA Act, the human rights protected by the Victorian Charter are civil and political rights and primarily derive from the ICCPR.\(^ {51} \) Similarly to the ACT HRA Act, the Victorian Charter obliges ‘public authorities’ to respect the human rights of all people in Victoria.\(^ {52} \) Under the Victorian Charter, the definition of ‘public authority’ includes an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority.\(^ {53} \) It may therefore apply to a corporation in limited circumstances (for example, under the Corrections Act 1986 (Vic) a private company may have the function of providing correctional services, such as managing a prison, which would likely be characterized as a function of a public nature being carried out on behalf of the State).\(^ {54} \) For example in *AGL Loy Yang v CFMEU* [2014] FWC 8093 (21 November 2014), the Fair Work Commission commented that AGL Loy Yang ‘may

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\(^{44}\) Notably, it has held that, based on the provisions establishing a system of representative and responsible government, there exists an implied freedom of communication as to matters of government and politics: *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520; *Nationwide News Pty Ltd v Willis* (1992) 177 CLR 1; *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 CLR 104.

\(^{45}\) Section 3 of the Parliamentary Scrutiny Act defines ‘human rights’ as the rights contained in the following seven human rights treaties: ICCPR; ICESCR; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of Discrimination against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; and the Convention on the Rights of Persons with Disabilities.

\(^{46}\) Section 27A of the ACT HRA Act provides that every child has the right to have access to free school education and that everyone has the right to further education and vocational and continuing training.

\(^{47}\) Section 40A explains that functions that are taken to be of a public nature include the operation of detention and correctional centres, and the provision of certain services (including gas, electricity and water supply, public health services, public transport and public housing).

\(^{48}\) ACT HRA Act s 40A(3).

\(^{49}\) ACT HRA Act s 40D. The list of declarations that certain entities, as a result of ‘opting in’, are to be subject to the obligations of public authorities is available at: [http://www.legislation.act.gov.au/nl/current/nh.asp](http://www.legislation.act.gov.au/nl/current/nh.asp). The entities are Companion House Inc; Women’s Legal Centre; Centre for Australian Ethical Research; Relationships Australia Canberra and Region; Amnesty International Australia; ACT Disability, Aged and Carer Advocacy Service; and Advocacy for Inclusion Incorporated.


\(^{51}\) Victorian Charter Pt 3 Div 4. Section 38 provides that it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

\(^{52}\) Victorian Charter s 4(1)(c).

\(^{53}\) Victorian Charter s 4(2)(b).
well be [a public authority] when engaged in the supply of electricity, but was not a public authority when exercising other private (non-public) functions, such as determining matters associated with the employment of its employees. Similarly, in Goode v Common Equity Housing Ltd (Human Rights) [2016] VCAT 93 (21 January 2016), VCAT held that when exercising the function of providing affordable social or community housing for low income tenants, Common Equity Housing Ltd (a registered housing association) was a public authority within the meaning of the Victorian Charter.

(ii) Equality and non-discrimination

Federal laws

Australia has enacted a range of laws to meet its international human rights law obligations regarding equality and non-discrimination. The Racial Discrimination Act prohibits discrimination on the basis of race, colour, descent or national or ethnic origin and in some circumstances, immigrant status. The purpose of the Act was to implement into Australian law the obligations contained in the ICERD. The Act also prohibits racial hatred (defined as a public act(s) likely to offend, insult, humiliate or intimidate on the basis of race) unless an exemption applies. These prohibitions apply to corporations. The Racial Discrimination Act does not, generally, have extraterritorial application.

The Sex Discrimination Act 1984 (Cth) (Sex Discrimination Act) prohibits discrimination on the basis of sex, marital or relationship status, pregnancy or potential pregnancy, breastfeeding, family responsibilities, sexual orientation, gender identity, and intersex status. The Act also prohibits sexual harassment. These prohibitions apply to a corporation in its capacity as an employer or principal, and also apply to a partnership. The objects of the Sex Discrimination Act include, among other things, giving effect to certain obligations in CEDAW. The Act applies throughout Australia and, in some cases applies to:

- discrimination in the course of trade or commerce between Australia and a place outside of Australia; and
- discrimination within Australia involving persons or things, or matters arising outside Australia.

The Disability Discrimination Act 1992 (Cth) (Disability Discrimination Act) aims to provide protection for everyone in Australia against discrimination based on disability. The concept of discrimination includes less favourable treatment of a person because of a disability and extends to discrimination against people because they are relatives, friends, carers, co-workers or associates of a person with a disability. The Act’s prohibitions on disability discrimination apply to a corporation in its capacity as an employer, principal, and also apply to a partnership. The impetus for enacting the Disability Discrimination Act included

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55 [71].
56 [82].
57 Second Reading Speech for the Racial Discrimination Bill 1974 (Cth).
58 Racial Discrimination Act s 18C.
59 The prohibitions set out by the Act apply to 'a person'. Section 2C of the Acts Interpretation Act 1901 (Cth) provides that a reference to a 'person' includes a body corporate as well as an individual.
60 See RDA ss 9 and 15.
61 Section 14 of the Act provides it is unlawful for an employer to discriminate against an employee on the ground of the person’s sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities.
62 Sections 15 and 16 of the Act provide that it is unlawful for a principal to discriminate against commission agents and contract workers.
63 Section 17 of the Act provides it is unlawful for a partnership of 6 or more persons to discriminate against a person (including a partner in the partnership) on the ground of the person’s sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities.
64 Sex Discrimination Act s 3.
65 Sex Discrimination Act s 9.
66 This is described in ss 5 and 6 of the Disability Discrimination Act as ‘direct disability discrimination’ and ‘indirect disability discrimination’, respectively.
67 Section 7 of the Disability Discrimination Act deals with discrimination in relation to associates and has the effect that, among other things, it is unlawful for an employer to discriminate against an employee on the ground of a disability of any of the employee’s ‘associates’.
68 Section 15 of the Disability Discrimination Act provides that it is unlawful for an employer to discriminate against a person on the ground of that person’s disability.
69 Sections 16 and 17 of the Disability Discrimination Act provide that it is unlawful for a principal to discriminate against a commission agent or contract worker on the ground of that person’s disability.
70 Section 18 of the Disability Discrimination Act provides it is unlawful for a partnership of three or more persons to discriminate against a person (including a partner in the partnership) on the ground of that person’s disability.
giving domestic effect to Australia’s international obligations and to the UN Declaration on the Rights of Persons with Disabilities.\(^{71}\) The Disability Discrimination Act applies throughout Australian and, in some cases applies to:

- discrimination in the course of trade or commerce between Australia and a place outside of Australia; and
- discrimination within Australia involving persons or things, or matters arising outside Australia.\(^{72}\)

The Age Discrimination Act 2004 (Cth) (\textit{Age Discrimination Act}) prohibits discrimination on the basis of age, defined as less favourable treatment because of the age of a person or imposing unreasonable conditions, requirements or practices that have the effect of disadvantaging persons of a particular age. Similarly to the other Commonwealth anti-discrimination legislation, the Act’s prohibitions on age discrimination apply to a corporation in its capacity as an employer, principal, and also apply to a partnership.\(^{73}\) The Act was amended in May 2011 to create an office for an Age Discrimination Commissioner within the AHRC.\(^{74}\) The Age Discrimination Bill Second Reading Speech describes the Bill as ‘consistent with the international commitment to eliminate age discrimination ensuring full participation in public life by older persons as reflected in the Political Declaration adopted by the Second World Assembly on Ageing 2002’. The Age Discrimination Act has effect throughout Australia and, in some cases, applies to discrimination involving persons, things or matters outside of Australia.\(^{75}\)

### State and territory laws

The following state and territory laws address anti-discrimination generally:

- Discrimination Act 1991 (ACT);
- Anti-Discrimination Act 1977 (NSW);
- Anti-Discrimination Act 1996 (NT);
- Anti-Discrimination Act 1991 (Qld);
- Equal Opportunity Act 1984 (SA);
- Anti-Discrimination Act 1998 (Tas);
- Equal Opportunity Act 1984 (WA); and
- Equal Opportunity Act 2010 (Vic).

These Acts apply to employers, partners in a firm, and qualifying bodies (person or body that is empowered to confer, renew or extend an occupational qualification).\(^{76}\)

The Racial and Religious Tolerance Act 2001 (Vic) (vilification on the basis of race or religion), and the Spent Convictions Act 1988 (WA) (discrimination on the basis of having a spent conviction is prohibited under this Act) are examples of state legislation dealing with additional specific areas of discrimination and which again apply to corporations.

### Criminal offences

Australian law recognises the concept of direct and vicarious liability for corporations under criminal and civil law. A corporation can be held liable, in its own right, for its misconduct, including involvement in human rights violations and serious human rights abuses. Attribution of liability under the Criminal Code to corporations is discussed in greater detail in Pillar 3, at 3.2.1(a)(ii)(A) below.

Each state and territory also has its own criminal legislation which extends to cover bodies corporate.\(^{77}\) At the Federal level, the Criminal Code is the key legislative

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\(^{72}\) See section 12 of the Disability Discrimination Act.

\(^{73}\) See Age Discrimination Act ss 18–21.

\(^{74}\) See Sex and Age Discrimination Legislation Amendment Act 2011 (Cth) sch 2 pt 1.

\(^{75}\) Age Discrimination Act s 9.

\(^{76}\) See, eg, Equal Opportunity Act 2010 (Vic).
instruments concerning Federal offences, including genocide, various crimes against humanity, war crimes, slavery, forced labour and people trafficking. The Criminal Code applies, with modifications, to corporations in the same way that it does to natural persons and specifies that a corporation may be found guilty of any offence, including offences punishable by imprisonment. Chapter 2 of the Criminal Code sets out the general principles of criminal responsibility and provides (among other things) that the fault elements of an offence (for those other than negligence) can be established in four ways. Examples of how liability can be attributed to a body corporate for an offence include by proving that the corporation’s board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence, or by proving that the corporate culture existed that directed, encouraged, tolerated or led to non-compliance with the relevant provision. The Criminal Code also provides that the physical element of an offence can be attributed to a body corporate by showing that an employee, agent or officer of a body corporate acted within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority. The Crimes Act 1914 (Crimes Act) also prohibits certain Federal offences.

(A) Genocide, crimes against humanity and war crimes

The International Criminal Court (Consequential Amendments) Act 2002 (Cth) was enacted as part of Australia’s ratification of the Rome Statute of the International Criminal Court (Rome Statute). It amended the Criminal Code to include the crimes of genocide, crimes against humanity (for example, enforced disappearances of persons and enslavement), war crimes (for example, sentencing or execution without due process) and torture. Though not tested in a formal proceeding, these crimes could be attributed to companies under the Criminal Code if the general principles of criminal responsibility that apply to corporations under the Criminal Code can be established (see 1.2.1(c)(iii) and 3.2.1(a)(ii)(A)). These criminal offence provisions apply extra-territorially.

Under the Defence Force Discipline Act 1982 (DFD Act) defence contractors (including, possibly, a corporate contractor) can be prosecuted for certain offences under the DFD Act if such a contractor is designated a ‘defence civilian’. The DFD Act has extra-territorial application in relation to defence members and defence civilians outside of Australia. The DFD Act is discussed further at 3.2.1(a)(v), below.

(B) Trafficking, slavery and slavery-like practices

Division 270 of the Criminal Code criminalises both slavery (defined as the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised) and ‘slavery-like practices’ (including servitude, forced labour and deceptive recruiting). These offence provisions apply extra-territorially.

Division 271 of the Criminal Code fulfils Australia’s obligation under the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially

77 Interpretation Act 1987 (NSW) s 21 ‘person’ includes an individual, a corporation and a body corporate or politic; Interpretation of Legislation Act 1984 (Vic) s 38 ‘person’ includes a body politic or corporate as well as an individual; Acts Interpretation Act 1954 (Qld) s 32D References to persons generally ‘(i) in an Act, a reference to a person generally includes a reference to a corporation as well as an individual’ Interpretation Act 1984 (WA) s 5 person or any word or expression descriptive of a person includes a public body, company, or association or body of persons, corporate or unincorporated; Acts Interpretation Act 1915 (SA) s 4 a ‘person’ or ‘party’ includes a body corporate; Acts Interpretation Act 1931 (Tas) ss 35 and 41. The Commonwealth Acts Interpretation Act applies to the Northern Territory and the Australian Capital Territory.

78 Criminal Code s 12.1(1). Crimes Act 1914 (Cth) s 4B.

79 Criminal Code s 12.2(2). Further detail on the physical and fault elements is provided at 3.2.1(a).

80 Criminal Code s 12.3(2)(c). ‘Corporate culture’ is defined as an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place: see Criminal Code, s 12.3(6).

81 Criminal Code s 12.2.

82 These offences are contained in Chapter 8 of the Criminal Code. Crimes against humanity included in the Criminal Code are: murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, sexual violence, persecution, enforced disappearance of persons, apartheid and other inhuman acts.

83 Criminal Code s 12.2(1). See pt 2.7 div 15 of the Criminal Code, which provides for extended geographical jurisdiction for particular offences. Section 268.117 of the Criminal Code provides that extended geographical jurisdiction applies to genocide, crimes against humanity and war crimes.

84 DFD Act s 3.

85 DFD Act s 9.

86 See Subdivisions B and C respectively. Regarding ‘slavery-like practices’, see also the discussion of labour law (1.2.1(d)(iii) above).

87 Criminal Code s 270.3A.
Women and Children (Trafficking Protocol). It is not limited to trafficking for the purposes of sexual exploitation, and includes offences for child trafficking, organ trafficking, harbouring a victim of trafficking and debt bondage (unfair debt contracts or arrangements which force victims into providing services to pay off large debts).

Again, though not tested, these crimes could be attributed to companies under the Criminal Code. These offence provisions apply extra-territorially.

Other laws and regulations provide for similar protections against trafficking, slavery, and slavery-like practices. The Migration Act 1958 (Cth) makes it an offence to allow a person to work (or refer a person to work) if the person is an unlawful non-citizen or a lawful non-citizen working in breach of a visa condition, and further provides that it is an aggravated offence if the worker is exploited and the person knows of, or is reckless to, that circumstance. Similarly, the Fair Work Act 2009 (Cth) (FWA) (discussed below at 1.2.1(d)(iii)) contains minimum entitlements for all employees in the Federal workplace system, including foreign workers. Also, the Proceeds of Crime Act 2002 (Cth) (POCA) provides a scheme for tracing, restraining and confiscating the proceeds of crime against Australian law, including human trafficking and slavery. In the specific context of the sex work industry, there are state and territory laws regulating the sex work industry in Australia. The POCA generally has extra-territorial application.

On 15 February 2017, the Attorney-General referred an inquiry into establishing a Modern Slavery Act in Australia to the Foreign Affairs and Aid Sub-Committee of the Parliament’s Joint Standing Committee on Foreign Affairs, Defence and Trade.

(C) Corporate manslaughter and wrongful death

There is no Commonwealth criminal offence of corporate manslaughter. However, in the ACT there is a crime of industrial manslaughter.

All of the Australian states and territories allow civil claims for wrongful death. For example, the Wrongs Act 1958 (Vic) provides that an action may be brought for the benefit of the dependents of a person whose death has been caused by a ‘wrongful act, neglect or default’ (and such an action could theoretically be brought against a company).

(D) Other statutory regimes indirectly-related to protecting human rights

Under the Charter of United Nations Act 1945 (Cth) and the Autonomous Sanctions Act 2011 (Cth), Australia implements two types of sanctions regimes: United Nations Security Council sanctions regimes (which Australia is obliged to implement as a matter of international law); and Australian autonomous sanctions regimes (which Australia implements as a matter of Australian foreign policy).

The purposes of sanctions include, among other things, imposing punitive measures responding to grave repression of human rights or democratic freedoms. Australia’s sanctions laws serve, among other things, to prevent business from providing or receiving financial or other benefits to or from those that may be involved in breaches of human rights.

88 See, eg, Second Reading Speech, Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012 (27 February 2013), which refers to Australia’s obligation under the trafficking protocol to criminalise organ trafficking.
89 See s 271.7 (offence of domestic trafficking in children), sub-div 8A (organ trafficking), sub-div BB (harbouring a victim), and s C (harbouring a victim).
90 Criminal Code s 271.10.
91 Article 8 of the ICCPR prohibits slavery, holding persons in servitude, and forced or compulsory labour. Article 11 provides that no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.
92 For example, Victoria’s sex industry is regulated under the Sex Work Act 1994 (Vic) and the Sex Work Regulations 2016 (Vic).
93 POCA s 13.
95 Crimes Act 1900 (ACT) s 49C.
96 For further discussion, see below at 3.2.1(a)(iv).
97 Wrongs Act 1958 (Vic) ss 16 and 17.
98 Explanatory Memorandum, Autonomous Sanctions Bill 2010 (Cth).
Regulation 9AA of the *Customs (Prohibited Exports) Regulations 1958 (Prohibited Exports Regulations)*, prohibits all exports of rough diamonds that may have been obtained in conflict affected areas unless certain requirements are met meaning that they are 'conflict free'. The goods must be exported in a tamper resistant container to a country which is a participant in the Kimberley Process, and a Kimberley Process Certificate granted by the Minister for Resources and Northern Australia, or an authorised person must accompany the shipment. The Kimberley Process is further discussed at 1.3.1(d)(ii)(D) below.

(iv) Privacy

**Federal laws**

The Privacy Act 1988 (Cth) (*Privacy Act*) regulates how personal information is handled, and gives effect to the right to privacy.99 Personal information refers to information or an opinion about an identified individual, or an individual who is reasonable identifiable (such as an individual’s name, signature, address, telephone number, date of birth, medical records and bank account details).100

The Privacy Act includes thirteen Australian Privacy Principles (*APPs*).101 The APPs apply to 'APP entities', which includes some private sector organisations, namely, all private sector and not-for-profit organisations with an annual turnover of more than $3 million, all private health service providers, and some small businesses. The Privacy Act also requires an agency entering into a Commonwealth contract with a contracted service provider to take contractual measures to ensure that the service provider does not do an act, or engage in a practice, that would break the APPs.102 Therefore, the APPs effectively apply to service providers that enter into Commonwealth contracts.

All APP entities are required to have a clearly expressed and up-to-date privacy policy about the management of personal information by the entity.103 Health information is treated by the Privacy Act as one of the most sensitive types of personal information, such that all organisations that provide a health service and hold health information (other than in an employee record) are covered by the Privacy Act, whether or not they are a small business. Finally, the Privacy Act also regulates consumer credit reporting in Australia.104

The Privacy Act has extraterritorial application in respect of businesses with an ‘Australian link’ (for example, a business incorporated in Australia).105

**State and territory laws**106

The following state and territory laws deal with the protection of privacy: *Privacy and Data Protection Act 2014 (Vic)*,107 *Privacy and Personal Information Protection Act 1998 (NSW)*,108 *Health Records and Information Privacy Act 2002*,109 *Information Privacy Act 2014 (ACT)*, *Information Act (NT)*, *Information Privacy Act 2009 (Qld)* (which covers the Queensland public sector), *Personal Information and Protection Act 2004 (Tas)* (which covers the Tasmanian public sector), and the *Freedom of Information Act 1992 (WA)*. South Australia has issued an administrative

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99 The Preamble to the Privacy Act states: ‘WHEREAS Australia is a party to the International Covenant on Civil and Political Rights, the English text of which is set out in Schedule 2 to the AHRC Act, AND WHEREAS, by that Covenant, Australia has undertaken to adopt such legislative measures as may be necessary to give effect to the right of persons not to be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence’.

100 Privacy Act s 6(1). For example, information which in and of itself would not be considered ‘personal information’, such as a telephone number, may be treated as personal information if it is associated with other information about an individual (for example, if the telephone number were included in records held about the particular individual).

101 The APPs are contained in Schedule 1 of the Privacy Act.

102 Privacy Act s 95B.

103 Privacy Act sch 1 cl 1.3. Clause 1.4 to Schedule 1 of the Privacy Act sets out information that must be contained in the privacy policy.

104 See Part IIIA of the Privacy Act, which is supported by the *Privacy Regulation 2013 (Cth)* and the *Privacy (Credit Reporting) Code 2014 (Cth)*.

105 Privacy Act s 5B(2).


107 This includes ten information Privacy Principles (*IPP*) contained in Schedule 1 to the Victorian Privacy Act, which (pursuant to Section 13 of the Act) apply, inter alia, to all Victorian Government contracted service providers. Part 6 of the Act also establishes the Office for the Commissioner for Privacy and Data Protection.

108 The NSW Privacy Act applies to NSW public sector agencies, statutory authorities, universities, NSW local councils, and other bodies whose accounts are subject to the Auditor General but does not apply to state-owned corporations such as RailCorp and Sydney Water. The Act also sets out the role of the NSW Privacy Commissioner.

109 The HRP Act outlines how New South Wales public sector agencies and health service providers manage the health information of NSW public members. It applies to private sector organisations that provide a health service or collect, hold or use health information, and private sector organisations with an annual turnover of more than $3 million that collect, store or use your health information.
instruction requiring government agencies to generally comply with a set of ‘Information Privacy Principles’. These Acts generally apply only to public sector organisations, but may apply to corporations insofar as they are (for example) a contracted service provider under a State contract.

(v) Freedom of thought, conscience, religion, opinion, peaceful assembly and freedom of association

Laws protecting these rights and freedoms are discussed in the following sections of this Stocktake: 1.2.1(c) (human rights charters), 1.2.1(c)(ii) (discrimination laws), 1.2.1(d)(iii) (labour laws) and 1.2.1(c)(vii) (laws protecting rights of minorities).

(vi) Rights of the family and the child

Laws providing for protections against child labour are discussed below at 1.2.1(d)(iii)(D), and laws providing for rights of family (including special protections for mothers during a reasonable period before and after childbirth) are discussed below at 1.2.1(d)(iii)(E). In addition, the Victorian Charter and ACT HRA Act discussed above at 1.2.1(c) protect these rights insofar as they apply to corporations that satisfy the definition of ‘public authorities’.

(vii) Rights of ethnic, religious, and linguistic minorities

Relevant laws in this category, all of which apply to corporate conduct, include:

• laws providing for recognition of native title or other cultural heritage laws (see below at 1.2.1(d)(iv)(B));

• laws prohibiting discrimination on the basis of race (although discrimination on the basis of religion alone is not unlawful under Federal anti-discrimination law, some cases have found religious discrimination to be covered by discrimination on the grounds of ‘ethnic origin’ under the Racial Discrimination Act);\(^\text{112}\)

• the general prohibition on discrimination by an employer against an employee (which includes a prohibition on taking adverse action against an employee because of the employee’s race, religion, national extraction or social origin),\(^\text{113}\) and the prohibition on termination of an employee’s employment based on the employee’s race, religion, national extraction or social origin,\(^\text{114}\) and

• laws prohibiting racial vilification, including the prohibition on conduct that insults, humiliates, offends or intimidates another person or group in public on the basis of their race.\(^\text{115}\)

(d) Economic, social and cultural rights

(i) Adequate standard of living and the highest attainable standard of physical and mental health

(A) Environmental laws

In practical effect, Australia’s environmental laws can be understood as contributing indirectly to promoting business respect for human rights.\(^\text{116}\) According to various international human rights law bodies, there is a nexus between healthy environmental conditions and the realisation of the highest attainable standards of health. Environmental laws also impact on the right to an adequate standard of living including clean drinking

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\(^{110}\) The NSW Privacy and Personal Information Protection Act 1998 applies to ‘public sector agencies’. Similarly, the Victorian Privacy and Data Protection Act 2014 applies to ‘public sector organisations’.

\(^{111}\) See, eg, the Victorian Privacy and Data Protection Act 2014 s 13(1)(j).


\(^{113}\) FWA s 351(1). See also below at 1.2.1(d)(iii)(B).

\(^{114}\) FWA s 772(1)(c).

\(^{115}\) Racial Discrimination Act s 18C. There are similar racial vilification laws in the state and territories. See, eg, Racial and Religious Tolerance Act 2001 (Vic) s 7; Anti-Discrimination Act 1977 (NSW) s 20C.

\(^{116}\) Article 12 of ICESCR provides that States Parties recognize the right to the enjoyment of the highest attainable standard of physical and mental health, and further provides that steps to achieve the full realization of this right include the improvement of all aspects of environmental industrial hygiene. According to the UN Committee established to oversee the implementation of the ICESCR, the Article 12 right to health extends not only to timely and appropriate health care but also to the underlying determinants of health, including healthy environment conditions. Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14 (2000):The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), (E/C.12/2000/4), [4], [11], [15] (the right to healthy natural and workplace environments). In particular, according to the CESCR, Article 12.2(b) embraces the prevention and reduction of the population’s exposure to harmful substances (such as radiation and harmful chemicals) or other detrimental environmental conditions that impact upon human health: CESCR, General Comment No. 14 (2000) [15].
water and sanitation, amongst other rights. In recent years, there has also been increasing discussion of the human rights ramifications of climate change.\textsuperscript{117}

Each Australian jurisdiction has enacted its own environmental legislation, giving rise to a vast array of statutes imposing controls on corporations in relation to the environment, health and safety. There are several hundred statutes in Australia that may be described as environmental legislation, governing a wide range of concerns and activities.\textsuperscript{118} Different legislative regimes may apply to the same activity, for example, companies are often subject to Federal, state and territory environment laws and regulations applying to the same activity.\textsuperscript{119} However, the Federal Government has played an increasingly active role in harmonising Australian environmental standards, laws and procedures.\textsuperscript{120} The key legislation at the Federal, state and territory levels is set out below.

**Federal laws**

At the Federal level, the *Environment Protection And Biodiversity Conservation Act 1999* (Cth) (*EPBC Act*) provides a legal framework to protect and manage nationally and internationally important flora, fauna, ecological communities and heritage places – defined in the EPBC Act as matters of national environmental significance. The EPBC Act applies to corporate conduct in Australia, and does not generally apply outside Australia.\textsuperscript{121}

**State and territory legislation**

As noted above, there is a vast array of state and territory legislation in this area. By way of example, the Victorian Environment Protection Authority administers the *Environment Protection Act 1970* (Vic) (*Victorian EPA Act*), *Pollution of Waters by Oils and Noxious Substances Act 1986* (Vic) and the *National Environment Protection Council (Victoria) Act 1995* (Vic).\textsuperscript{122} The Victorian EPA Act applies to corporations and provides a legal framework to protect the environment in Victoria, and applies to noise emissions and the air, water and land in Victoria, the territorial sea along the Victorian coast and to the discharge of waste to the Murray River from any premises in Victoria.

**(B)**

**Industry-specific legislation**

As a matter of international law, the right to health, which includes the improvement of all aspects environmental and industrial hygiene, has been considered to include the discouragement of the abuse of alcohol, the use of tobacco, drugs, and other harmful substances.\textsuperscript{123}

Specific legislation regulating the tobacco industry includes the *Tobacco Advertising Prohibition Act 1992* (Cth) (which prohibits publishing a ‘tobacco advertisement’), and the *Tobacco Plain Packaging Act 2011* (Cth) and *Tobacco Plain Packaging Regulations 2011* (Cth) (which specify requirements for the packaging and appearance of tobacco products). There are also various state and territory laws which regulate the tobacco industry.\textsuperscript{124}

In the context of high sugar food and drinks, sales of these products are restricted at school canteens across Australia, with some states using a traffic light system for indicating the ‘healthiness’ of food and drink, and


\textsuperscript{118} Gerry Bates, *Environmental Law in Australia* (LexisNexis, 8th ed, 2013) 189 [6.7].

\textsuperscript{119} Ibid.

\textsuperscript{120} See also Jennifer Hill, ‘Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique’ (Spring 2003) *Journal of Business Law* 1. For example, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) established a regime conferring on the Commonwealth an expanded role in providing assessment and approval for certain developments and requiring Commonwealth Government agencies to report annually on ecologically sustainable development outcomes. See Department of the Environment and Energy, *National Review of Environmental Regulation Interim Report* (March 2015).

\textsuperscript{121} EPBC Act s 5.


\textsuperscript{123} CESC, General Comment no.14 (2000), [15].

\textsuperscript{124} See, eg, *Public Health (Tobacco) Act 2008* (NSW).
foods in the 'red' category are restricted to no more than two occasions per term.125 Queensland,126 South Australia,127 New South Wales128 and the ACT129 have implemented mandatory kilojoule labelling schemes for chain restaurants, while the Victorian government introduced proposed legislation to mandate point of sale kilojoule labelling in September 2016.130

The Illegal Logging Prohibition Act 2012 (Cth) (Illegal Logging Act) prohibits the importation of illegally logged timber131 and the processing of illegally logged raw logs,132 and requires importers of regulated timber products and processors of raw logs to conduct due diligence in order to reduce the risk that illegally logged timber is imported or processed.133 The Explanatory Memorandum justifies these prohibitions on the basis that lack of measures restricting or prohibiting importing illegally logged timber in timber consumer countries exacerbates the problem of illegal logging in timber producing countries.134

The Commonwealth Aged Care Act 1997 (Aged Care Act), which applies to corporations,135 requires 'approved providers' of aged care to comply with general responsibilities to care recipients, including the 'User Rights Principles' (set out in Schedule 1 to the User Rights Principles 2014 regulations, made under s 96–1 of the Act).136 The User Rights Principles provide that care recipients are entitled to rights including:

- full and effective use of personal, civil, legal and political rights;
- personal privacy;
- the right to continue his or her cultural and religious practices;
- freedom of speech; and
- freedom of association.

(ii) Other relevant laws

(A) Corporations and securities laws

The Corporations Act 2001 (Cth) (Corporations Act) imposes requirements on financial product disclosure, including in relation to the preparation and content of Product Disclosure Statements (PDSs).137 The PDS content requirements in the Corporations Act require that if a product has an investment component (including superannuation products, managed investment products and investment life insurance products), the PDS must set out the extent to which labour standards or environment, social or ethical considerations (ESE Considerations) are taken into account in the

127 Food Act 2006 (Qld) ch 6A.
128 Food Regulations 2002 (SA) reg 10A.
129 Food Act 2003 (NSW) pt 8 div 3.
131 Premier of Victoria, Chain Food Outlets To Show Kilojoules By 2018 (Media Release, 14 September 2016), available at: http://www.premier.vic.gov.au/chain-food-outlets-to-show-kilojoules-bys-2018/. The proposed legislation is the Food (Kilojoule Labelling Scheme and Other Matters) Amendment Bill 2016 (Vic) which requires, among other things, that large chain food outlets and large supermarkets to display the kilojoule content of food and drinks on menus, menu boards, price tags and online menus.
132 Ibid pt 3 div 1.
133 Ibid ss 14 (due diligence requirements for importing regulated timber products), 18 (due diligence requirements for processing raw logs).
135 See, eg, Aged Care Act s 8.1.
136 Aged Care Act pt 4.2 (User rights).
137 Corporations Act pt 7.9 div 2.
selection, retention or realisation of the investment. Where labour standards or ESE Considerations are not taken into account, the Corporations Regulations state that the PDS must explicitly state this. Under the Corporations Act, listed companies are subject to ASX listing rules requirements. The Act provides that the Listing Rules are enforceable against listed entities and their associates. Each ASX listed entity is required under Listing Rule 4.10.3 to include in its annual report either a 'corporate governance statement' that meets the requirements of that rule (or the URL of the page on its website where such a statement is located). A corporate governance statement is defined in Listing Rule 19.12 to mean the statement referred to in Listing Rule 4.10.3 which discloses the extent to which an entity has followed the recommendations set by the ASX Corporate Governance Principles. The ASX Corporate Governance Principles, which apply to all listed entities, set out recommended corporate governance practices for companies listed on the ASX. A number of these recommendations are relevant to human rights, including recommendations that a listed entity should:

- have a diversity policy;
- have and disclose a code of conduct; and
- disclose whether it has any material exposure to economic, environmental and social sustainability risks and, if it does, how it manages or intends to manage those risks. A footnote to the term ‘social sustainability’ refers to the Australian Council of Superannuation Investors and the Financial Services Council ESG Reporting Guide for Australian Companies: Building the foundation for meaningful reporting. UN Global Compact's ten principles which include two stand-alone human rights principles, the OECD Guidelines for Multinational Enterprises (OECD Guidelines) which include a human rights chapter and the GRI. ‘Social sustainability’ is defined as the ability of a listed company to continue operating in a manner that meets accepted social norms and needs over the long term. It is arguable that the responsibility to respect human rights fall within ‘accepted social norms’ and that adverse human rights impacts would be material in some contexts.

The Corporations Act applies to Australian companies operating abroad.

(B) Anti-bribery and corruption laws

Federal laws

In Australia, certain forms of bribery are prohibited by the Criminal Code. Section 70.2 creates the offence of bribing a foreign public official. The bribery offence provision applies to conduct occurring wholly outside of Australia if the offender is an Australian citizen, resident or a corporation incorporated under a Commonwealth, state or territory law at the time of the alleged offence.

Bribery of a Commonwealth public official is also prohibited by the Criminal Code. As set out at 1.2.1(c)(iii) these provisions apply to corporations, with some modifications.

State and territory laws

State criminal laws provide for private bribery offences not involving public officials. For example, it is an offence under section 176 of the Crimes Act.

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138 Corporations Act s 1013D(1)(l).
139 To date, there does not appear to have been any action taken against a company in relation to a failure to disclose ESE Considerations.
140 Corporations Act ss 793C, 1101B.
141 See the ASX Corporate Governance Council Principles and Recommendations (2014), recommendations 1.5, 3.1 and 7.4.
142 Ibid 38.
143 Corporations Act s 5.
144 Criminal Code s 141.1.
145 See Criminal Code s 12.1 (‘This Code applies to bodies corporate in the same way as it applies to individuals.’).
1958 (Vic) for a person to give or offer to give an agent of another person a secret commission as an inducement to influence the conduct of the principal's business.

(C) Consumer laws

Australia’s consumer laws can be understood as indirectly giving effect to some economic and social rights protected and therefore as promoting business compliance with these human rights. For example, it has been argued that the right to physical and mental health (ICESCR art 12) includes the improvement of environmental and industrial hygiene and that, since the protection of individuals from hazardous products is an object of consumer protection laws, this provision also implicitly protects consumers.146 It is also possible that consumer protection laws may be used in a human rights context, for example, consumer laws prohibiting 'misleading and deceptive conduct' could theoretically be used to restrain a company from portraying itself as an ethical entity when the contrary is true.147

Federal

The Australian Consumer Law (ACL),148 prohibits misleading and deceptive conduct (s 18), unconscionable conduct (ss 20 and 21), unfair contract terms (s 23), false or misleading representations (ss 29 and 30) and other specific protections.149 The Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act) provides for similar consumer protections in relation to financial services.150 Both Acts apply to corporations.

The ACL provisions (other than Part 5-3, that relates to country of origin representations), apply to conduct outside of Australia by:151

• corporations incorporated or carrying on business within Australia;
• Australian citizens; and
• persons ordinarily resident in Australia.

Although the Competition and Consumer Act 2010 (Cth) (Competition and Consumer Act) applies extraterritorially, where a claim is made under section 82 or section 236 of the ACL, a person is not entitled to rely on the extraterritorial application of the Act without obtaining the written consent of the Minister, and the Minister may refuse consent if it is not in the national interest that consent be given.152

State and territory laws


(iii) Labour rights

The FWA and the Fair Work Regulations 2009 (Cth) govern the majority of employer/employee relationships in Australia. They aim to provide a safety net of minimum entitlements, enable flexible working arrangements and prevent discrimination against employees. Specifically, the FWA regulates terms and

146 Some of the economic and social rights in the ICESCR can be conceived of as consumer protection. Some commentators have argued that the right to an adequate standard of living in Article 11 of the ICESCR includes the right to adequate food, clothing, housing and continuous improvement of living conditions. which in turn requires safety, information about consumer products: see, eg, Iris Benöhr, EU Consumer Law and Human Rights (Oxford Scholarship Online, 2013), 49–50.
147 David Kinley and Sarah Joseph, 'Multinational Corporations and Human Rights: Questions About Their Relationship', (2002) Vol 27(1) Alternative Law Journal 7, 8. Similar provisions have been used abroad (for example, the US case of Nike v Kaske (2003) 539 US 654 concerned a suit against Nike for unfair and deceptive practices under Californian law on the basis of allegedly false statements and material omissions by Nike in relation to working conditions under which Nike products are manufactured.
148 The ACL appears as Schedule 2 of the Competition and Consumer Act.
149 For other specific protections, see generally Chapter 3 of the ACL.
150 See ASIC Act pt 2, which prohibits unfair contract terms, unconscionable conduct, consumer protection and provides for certain warranties in relation to the supply of financial services.
151 Competition and Consumer Act s 5.
152 Competition and Consumer Act s 5(3).
conditions of employment, provides for rights and responsibilities of employees, enables flexible working entitlements (including unpaid parental leave and related entitlements), regulates the termination of employment (including notification or payment in lieu), and enables a victim of workplace bullying to apply for an order from the Fair Work Commission to stop bullying.

The FWA applies to:

- employees who work for a constitutional corporation;
- employees who work in both the public and private sector in Victoria, the Australian Capital Territory or the Northern Territory;
- employees in the private sector in New South Wales, Queensland or South Australia; and
- employees in the private sector or local government in Tasmania.

The FWA applies to constitutional corporations, body corporates incorporated in a territory and certain persons engaged in constitutional trade or commerce, and therefore the majority of employees in the private sector.

The FWA applies to Australia’s exclusive economic zone and continental shelf, and – in some cases – beyond the exclusive economic zone and continental shelf. Similar conditions and standards apply to those employers and employees that continue to be covered by the following state government legislation:

- Industrial Relations Act 1996 (NSW);
- Industrial Relations Act 1999 (Qld);
- Industrial Relations Act 1984 (Tas);
- Industrial Relations Act 1979 (WA); and

This state government legislation applies to:

- employees in the state public sector or who work for a non-constitutional corporation in either local government or private industry in Western Australia;
- employees in the state public sector or local government in New South Wales, Queensland or South Australia; and
- employees in the state public sector in Tasmania.

(A) Safe and healthy working conditions

In December 2009, the Workplace Relations Ministers’ Council endorsed the Model Workplace Health and Safety Act (WHS Act). Each of the Commonwealth, the ACT, New South Wales, the Northern Territory and Queensland enacted mirror legislation adopting the WHS Act which commenced on 1 January 2012.

The WHS Act (which applies to corporations) sets out ‘health and safety duties’ and provides that reckless conduct by a person who has a health

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153 Chapter 2 of the FWA sets out the National Employment Standards (NESs) (pt 2-2), modern awards (pt 2-3), enterprise agreements (pt 2-4), workplace determinations (pt 2-5), minimum wages (pt 2-6), equal remuneration (pt 2-7), and other employment terms and conditions (pt 2-9).
154 Relevantly, Chapter 3 of the FWA deals with general protections (pt 3-1), unfair dismissal (pt 3-2), industrial action (pt 3-3), and other rights and responsibilities (pt 3-6).
155 Part 6-3 of the FWA deals with unpaid parental leave and requests for flexible working arrangements (s 65).
156 FWA pt 2-2.
157 FWA pt 6-4B.
158 Except if the employee is a law enforcement officer or an executive in the public sector in Victoria, or a member of the Police Force in the Northern Territory.
159 See, eg, FWA s 14 (definition of ‘national system employer’).
160 FWA s 33.
161 FWA s 34.
163 WHS Act s 30.
and safety duty (which exposes an individual to whom that duty is owed to a risk of death, serious injury or illness), or a failure by a person to comply with health and safety duties, are offences under the Act.164 ‘Health and safety duties’ under the WHS Act include duties to ensure the health and safety of workers,165 duties to undertake due diligence in relation to work health and safety matters,166 business-specific health and safety duties,167 and duties to notify the regulator of the death or serious injury of a person (or other dangerous incident).168 The WHS Act extends to every external territory but does not otherwise have extraterritorial application.169

(B) Freedom of association and right to collective bargaining

The FWA provides that an employer must not terminate an employee’s employment because of that employee’s trade union membership or participation in trade union activities (or, with the employer’s consent, during working hours).170

The FWA provides a framework for collective bargaining (the process where employers, employees and bargaining representatives bargain for an enterprise agreement). Under the FWA, employers, employees and bargaining representatives (including employee organisations) can bargain for enterprise agreements.171 It also regulates industrial action taken by employees and employers to whom the FWA applies (see above at 1.2.1(d)(iii)).172 State and territory legislation also aims to protect these rights. For example, the Equal Opportunity Act 2010 (Vic) provides that employment activity173 and industrial activity174 are attributes on the basis of which discrimination is prohibited.

(C) Forced or compulsory labour

Laws relating to forced or compulsory labour are discussed above at 1.2.1(c)(iii)(A).

(D) Child labour

In relation to child labour protections, there are various state and territory laws that provide minimum age restrictions for when a person is allowed to work.175 For example, the Child Employment Act 2003 (Vic) regulates the employment of children using a system of permits and provides for a minimum age for the employment of a child.176 Among other things, the Act sets out general limitations relating to the employment of children, including the minimum age of employment and the number of hours worked; a system of permits to allow the employment of children under the age of 15; prohibitions on certain types of employment; and requirements that work does not adversely affect a child’s education, and that the health, safety and moral welfare of children at work is protected. Similar Acts in other state and territory jurisdictions are as follows:

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164 WHS Act ss 32 and 33.
165 WHS Act s 19.
166 WHS Act s 27.
167 See WHS Act pt 2 div 3, which imposes duties on persons conducting businesses or undertakings according the type of business (for example, particular duties apply to a person conducting businesses that manufacture plant, substances or structures: s 23).
168 WHS Act s 38.
169 WHS Act s 11.
170 FWA s 772.
171 FWA pt 2-4 div 3 (Bargaining and representation during bargaining).
172 FWA pt 3-3.
173 ‘Employment activity’ means an employee in his or her individual capacity – (a) making a reasonable request to his or her employer, orally or in writing, for information regarding his or her employment entitlements; or (b) communicating to his or her employer, orally or in writing, the employee’s concern that he or she has not been, is not being or will not be, given some or all of his or her employment entitlements: Equal Opportunity Act 2010 (Vic) s 4(1).
174 ‘Industrial activity’ means (a) being or not being a member of, or joining, not joining or refusing to join, an industrial organisation or industrial association; or (b) establishing or being involved in establishing an industrial organisation or forming or being involved in forming an industrial association; or (c) organising or promoting or proposing to organise or promote a lawful activity on behalf of an industrial organisation or industrial association; or (d) encouraging, assisting, participating in or proposing to encourage, assist or participate in a lawful activity organised or promoted by an industrial organisation or industrial association; or (e) not participating in or refusing to participate in a lawful activity organised or promoted by an industrial organisation or industrial association; or (f) representing or advancing the views, claims or interests of members of an industrial organisation or industrial association: Equal Opportunity Act 2010 (Vic) s 4(1).
176 Section 10 provides that, subject to specified exceptions, the minimum age for employment of a child is 13 years of age.
Industrial Relations (Child Employment) Act 2006 (NSW),177 the Fair Work Act 1994 (SA),178 Child Employment Act 2006 (Qld), and the Children and Community Services Act 2004 (WA). In addition to rules regarding the employment of children within child employment or child welfare legislation, a number of frameworks operate together with the aim of abolishing child labour including, compulsory education and work health and safety legislation.179

(E) Discrimination in employment

Federal laws

Under the FWA, an employer must not take ‘adverse action’180 against an employee or prospective employee because of that person’s race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin.181

Several protections relating to termination of employment were expressly enacted to give effect to certain ILO Conventions, namely:182 111 (concerning Discrimination in respect of Employment and Occupation), 156 (concerning Equal Opportunities and Equal Treatment for Men and Women Workers and Workers with Family Responsibilities), 158 (concerning Termination of Employment at the Initiative of the Employer) and ILO Recommendation 166 (a Recommendation supplementing the Termination of Employment Convention).

Other Federal anti-discrimination laws also apply to prohibit workplace discrimination in certain circumstances.183

Other relevant Federal laws are:

- Paid Parental Leave Act 2010 (Cth);
- Paid Parental Leave Rules (Cth);
- Workplace Gender Equality Act 2012 (Cth);
- Workplace Gender Equality (Matters in Relation to Gender Equality Indicators) Instrument 2013 (No 1) (Cth);
- Workplace Gender Equality (Minimum Standards) Instrument 2014 (Cth);
- Fair Entitlements Guarantee Act 2012 (Cth);
- Fair Entitlements Guarantee Regulations 2012 (Cth);
- Fair Entitlements Guarantee (Indexation of Maximum Weekly Wage) Regulation 2013 (Cth).

The recent Senate Inquiry into Australia’s temporary work visa programs examined (among other things) the wages, conditions, safety and entitlements of Australian workers and temporary work visa holders, and the adequacy of the monitoring and enforcement of the temporary work visa programs and their integrity. The Committee’s report makes a number of law reform proposals (including, for example, making temporary visa holders eligible for the same entitlements as their Australian

177 Section 4 of the NSW Act provides that employers must provide certain minimum conditions of employment for a child employee.

178 Section 98A of the South Australian Act sets out a special provision relating to child labour, including determining that children should not be employed in particular categories of work, imposing limitations on hours of employment for child employees, providing for special rest periods applying to children, and supervision of children who work. The objects of the Act, set out in Section 3, include giving effect to the Termination of Employment Convention and ensuring that the relevant authorities have regards to Worst Forms of Child Labour Convention 1999, Workers with Family Responsibilities Convention 1981, and the Workers’ Representatives Convention 1971.

179 For example, see the Education Act 1964 (Qld); Education Act 1972 (SA); Education Act 1990 (NSW); Education Act 1994 (Tas); Education Act 2004 (ACT); Education Act 2015 (NT); Education and Training Reform Act 2006 (Vic); School Education Act 1999 (WA); Work Health and Safety Act 2011 (Cth), Work Health and Safety Act 2011 (ACT), Work Health and Safety Act 2011 (NT), Work Health and Safety Act 2011 (Qld), Work Health and Safety Act 2012 (SA), Work Health and Safety Act 2012 (Tas), Occupational Health and Safety Act 2004 (Vic), and Occupational Safety and Health Act 1984 (WA).

180 ‘Adverse action’ includes where an employer dismisses an employee, injures an employee in his or her employment, alters the position of an employee to the employee’s prejudice, or discriminates between an employee and other employees of the employer: s 342.

181 FWA s 351. The general prohibition on discrimination against employees by employers does not apply to action that is not unlawful under any of the anti-discrimination laws, discussed above at 1.2.1(c)(ii).

182 See above at 1.2.1(c)(ii).
counterparts). Similarly, the Fair Work Ombudsman recently completed its Inquiry into the wages and conditions of people working under the 417 Working Holiday Visa Program, recommending (among other things) the establishment of an Employer Register for employers of 417 visa holders.

State and territory laws

Relevant state and territory anti-discrimination laws, which also apply to discrimination in employment, discussed above at 1.2.1(c)(ii).

In the context of the clothing industry, the Outworkers (Improved Protection) Act 2003 (Vic) aims to ensure protection and fairness for outworkers in the clothing industry in Victoria. The Act increases the entitlements of outworkers and provides a simple low-cost process to recover money owing.

(iv) Indigenous peoples' rights

(A) Freedom from discrimination

Freedom from discrimination, including discrimination based on Indigenous origin or identity, is discussed above at 1.2.1(c)(ii).

(B) Rights relating to Indigenous lands, territories and resources

Federal laws

Companies operating in Australia are subject to legislation in respect of Aboriginal and Torres Strait Islanders' land.

The preamble of the Native Title Act 1993 (Cth) (NTA) refers to the Australian Government's obligation to protect the rights of all of its citizens under various international human rights treaties, and states that the legislation is intended to be a 'special measure' for the advancement and protection of Aboriginal peoples and Torres Strait Islanders within the meaning of the ICERD and the Racial Discrimination Act.

The NTA provides for the recognition and protection of native title, establishes ways in which future dealings affecting native title may proceed and sets standards for those dealings, and establishes a mechanism for determining claims to native title.

Companies must consider the effects of the NTA when their projects involve land over which native title exists or may exist. This is because the NTA provides that certain future acts are invalid to the extent they affect native title, unless the future act is expressly provided for by the NTA. Where the future act is not provided for in the NTA, the parties may negotiate an Indigenous Land Use Agreement (ILU Agreement). A registered ILU Agreement enables parties to do certain things on native title land – for example, create or vary mining rights – which would otherwise require the parties to negotiate in accordance with the 'right to negotiate' procedures under the NTA every time a variation is required.

There is also federal legislation in relation to Indigenous land rights and compensation.

State and territory laws

There are various state and territory laws that complement the Federal native title scheme:

- Native Title Act 1994 (ACT);
- Native Title (New South Wales) Act 1994 (NSW);
- Native Title Act 1993 (Qld); and

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185 Fair Work Ombudsman, Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program (October 2016) 7. At the time of writing, the Parliamentary Inquiry into establishing a Modern Slavery Act in Australia will also consider '[t]he implications for Australia’s visa regime, and conformity with the Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children regarding federal compensation for victims of modern slavery': see Australian Government, 'Terms of Reference', available at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery/Terms_of_Reference
187 NTA s 3.
188 NTA s 24OA.
189 See Aboriginal Land Rights (Northern Territory) Act 1976 (Cth).
there are a number of relevant laws in South Australia: *Native Title (South Australia) Act 1994* (SA) (which provides for the determination of native title claims and confers jurisdiction on the Environment, Resources and Development Court and the Supreme Court); *Land Acquisition (Native Title) Amendment Act 1994* (SA) (which provides for the acquisition of native title land for public purposes or under a special Act); *Environment, Resources and Development Court (Native Title) Amendment Act 1994* (SA); and *Mining (Native Title) Amendment Act 1995* (SA) (which amended the Mining Act 1971 (SA) and inserted a new Part 9B dealing with exploration and mining on ‘native title land’).

There are various state and territory native title statutes validating past state actions that might have otherwise been deemed invalid due to the existence of native title.190 There are also various state and territory statutes in relation to Indigenous land rights and compensation.191

(C) Cultural heritage laws

Federal laws

The Commonwealth is responsible for protecting Indigenous heritage places that are nationally or internationally significant, or that are situated on land that is owned or managed by the Commonwealth. This protection operates under the EPBC Act (discussed above at 1.2.1(d)(i)), which prohibits a person (including corporations) from taking any action that has or will have a significant impact on the ‘Indigenous heritage values’ of a place that is recognised in the National Heritage List.192

In addition, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (ATSIHP Act) can protect areas and objects that are of particular significance to Aboriginal people. The ATSIHP Act allows the Environment Minister, on the application of an Aboriginal person or group of persons, to make a declaration to protect an area, object or class of objects from a threat of injury or desecration.193 The ATSIHP Act applies to corporations.194

Other Commonwealth laws regulating aspects of Indigenous heritage are as follows: the *Protection of Movable Cultural Heritage Act 1986* (Cth), the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and the *Native Title Act 1993* (Cth).

State and territory laws

Generally Australia’s state and territory governments are responsible for the protection of Australia’s Indigenous heritage places. All states and territories have laws that aim to protect various types of Indigenous heritage.195

Usually state and territory laws automatically protect various types of areas or objects, while enabling developers to apply for a permit or certificate to allow them to proceed with activities that might affect Indigenous heritage. For example, the *Victorian Heritage Act 1994* generally prohibits harming Aboriginal cultural heritage,196 except where a person is acting in accordance with a cultural heritage permit or approved cultural heritage management plan.197

1.2.2 UNGP 2

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190 Native Title (Tasmania) Act 1994 (Tas); Land Titles Validation Act 1994 (Vic); Validation (Native Title) Act 1994 (NT); and the Titles (Validation and Native Title (Effect of Past Acts) Act 1995 (WA).
191 For example, the *Aboriginal Land Rights Act 1983* (NSW).
192 Section15B(4). ‘Indigenous heritage values’ means a heritage value of the place that is of significance to indigenous persons in accordance with their practices, observances, customs, traditions, beliefs or history (s 528).
193 The ATSIHP Act applies to corporations.194
194 See ATSIHP Act s 22.
196 Sections 27 and 28.
197 Section 29.
(a) **Government has provided a coherent statement of policy on business and human rights**

Following the release of the ‘Respect, Protect and Remedy’ Framework on business and human rights in 2008, the Australian Senate passed a motion calling on the Australian Government to:

- encourage Australian companies to respect the rights of members of the communities in which they operate and to develop rights-compliant grievance mechanisms, whether acting in Australia or overseas;
- consider the development of measures to prevent the involvement or complicity of Australian companies in activities that may result in the abuse of human rights, including by fostering a corporate culture that is respectful of human rights in Australia and overseas; and
- support development at the international level of standards and mechanisms aimed at ensuring that transnational corporations and other business enterprises respect human rights.\(^{198}\)

The Attorney-General’s Department includes the following Business and Human Rights Statement on its website:

> The Australian Government believes that business and respect for human rights go hand in hand. Businesses must comply with all Australian laws. In addition, under international law, the government is obliged to ensure that non-state actors, including businesses, respect human rights.


There are numerous other policy statements relevant to business and human rights, however this is the most complete statement regarding the UNGPs.

As at the date of this Stocktake, none of the state or territory governments have provided a simple statement of policy directly on business and human rights.

(b) **Laws with extraterritorial effect**

The Stocktake of laws set out above provides a summary of the federal, state and territory government’s current legal expectations of business with regard to human rights.

The commentary accompanying this Guiding Principle states that while, at present, States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction, States are also not generally prohibited from doing so provided there is a recognised jurisdictional basis.\(^{200}\) As the commentary also notes there are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad. UNGP 2 is also concerned with the notion of States taking steps to prevent abuse abroad by businesses within their jurisdiction, including by extraterritorial legislation and enforcement.

The extraterritorial application of Australian laws is discussed throughout Section 1.1(a) of this Stocktake. In summary, laws relevant to business and human rights, and which have extra-territorial application, include:

- certain offences under the Commonwealth Criminal Code which prohibit serious international crimes (such as genocide, crimes against humanity and war crimes) and crimes such as trafficking and slavery;
- foreign bribery offences;

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\(^{200}\) Commentary to the UNGPs, 3-4.
The Australian Government’s support of, and participation in, various multi-stakeholder initiatives such as the Kimberley Process and the VPs (as well as other initiatives set out at 1.3.1.(c)(v) and 1.3.5, below) also underlines the expectation that Australian businesses should respect human rights when operating abroad.

1.3 Operational Principles

1.3.1 UNGP 3

UNGP 3 provides:

In meeting their duty to protect, States should:

(a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;

(b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;

(c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;

(d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.

(a) Enforcement of laws aimed at, or having the effect of, requiring business enterprises to respect human rights

Regarding the enforcement of laws aimed at requiring business respect of human rights, laws regulating domestic matters or alleged breaches of law that are confined to domestic facts (see 1.2.1 above) are regularly enforced.201 There has been significantly less enforcement action with regard to the extraterritorial application of relevant laws, and/or where the facts involve a significant international component.202 An example of steps to enforce the extraterritorial application of laws related to business and human rights include steps taken by the Privacy Commissioner to investigate alleged privacy breaches by an overseas company selling the personal data of Optus, Telstra and Vodafone customers for commercial gain.203


202 One investigation was commenced by the AFP into the actions of Australian company Anvil Mining in relation to allegations of complicity in killings by public security forces in the DRC. However, the investigation was closed based on a finding of insufficient evidence to prosecute and, as a result, no charges were laid. See BHRRC, Anvil Mining lawsuit (re Dem. Rep. of Congo), available at: https://business-humanrights.org/en/anvil-mining-lawsuit-re-dem-rep-of-congo. Note that ICAR and Amnesty International have reported on the lack of domestic enforcement of international crimes brought against corporations globally, including an analysis of potential reasons behind this: see ICAR and Amnesty International, The Corporate Crimes Principles: Advancing Investigations and Prosecutions in Human Rights Cases (October 2016), available at: http://icar.ngo/wp-content/uploads/2016/10/Corporate-Crimes-Principles-FINAL.pdf. Note also that some of the trafficking and slavery crimes were enacted relatively recently in 2013: see Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013 (Cth).

In July 2011, the CDPP laid the first foreign bribery charges under Australian law against Securency (a company partly owned by the Reserve Bank of Australia) and Note Printing Australia Limited (NPA) (a wholly owned subsidiary of the Reserve Bank of Australia), as well as eight individuals associated with the companies. Security and NPA were each charged with contravening the foreign bribery provisions in the Criminal Code with each charge carrying a maximum fine of $330,000. The individuals were charged with offences of conspiring to offer bribes to foreign officials in order to obtain a benefit under the Criminal Code, carrying a maximum penalty of 10 years imprisonment and/or a fine of up to $66,000. However, enforcement of these provisions is expected to increase. There are approximately 20 investigations into foreign bribery on foot, some of which are expected to result in prosecution of companies.

203 Business Insider, ‘The Privacy Commissioner is Pursuing Optus, Telstra and Vodafone over a Customer Data Breach’ (17 November 2016).
Notwithstanding the requirement for Ministerial consent discussed at 1.2.1(d)(ii) above, there are some instances of extraterritorial enforcement of the Competition and Consumer Act. 204

A more detailed discussion of enforcement of relevant criminal and civil laws is set out in Pillar 3 at 3.2.1(c).

(b) Ensuring that other laws and policies governing the creation and ongoing operation of business enterprises do not constrain but enable business respect for human rights

While directors’ duties do not expressly require directors to take into account human rights considerations, they might arguably implicitly extend to require directors to take into account the human rights impacts of companies in order to act in the company’s best interest and manage material risks. For example, a director was recently found to have breached the duty to act with care and diligence in s 180(1) of the Corporations Act by failing to make adequate enquiries regarding the propriety of particular payments and, as a consequence, failing to prevent improper payments being made in contravention of sanctions laws. 205

In a 2008 report to Professor Ruggie on corporate law in Australia, it was also noted that:

[i]t is arguable that the human rights impacts of the conduct of the company or a subsidiary, supplier or business partner, wherever that occurs, could affect the standing or reputation of the company and, consequently, investor or public confidence in its business, and may therefore be a relevant consideration. Directors may also breach their duties if their decisions cause the company to breach laws, including those protecting the rights of non-members. 206

Australian domestic laws governing the creation and operation of business enterprises, including corporations law and the ASX Listing Rules, are discussed above at 1.2.1(d)(iii).

(c) Provide effective guidance on how to respect human rights throughout their operations

(i) General guidance

The Australian Government provides guidance on business and human rights generally through the Attorney-General’s Department website. 207 It also does so through its support of the AHRC and the GCNA, discussed below at 1.3.1(c)(ii) and 1.3.1(c)(v)(B). Some guidance regarding compliance with anti-discrimination and equal opportunity legislation is provided by state human rights commissions.

The importance of national human rights institutions to the implementation of UNGP 3 is noted in the commentary to the UNGPs, 208 and has been included as an indicator in the ICAR/DIHR Toolkit. 209

(ii) Australian Human Rights Commission

The AHRC is an independent statutory body that is responsible for the promotion and protection of human rights in Australia. The AHRC is directly supported by the Australian Government through funding.

In its Strategic Plan (2014-18), the AHRC has identified the theme of ‘engaging with business on human rights’ as a priority. Through this work, the AHRC will seek to encourage innovation in promoting human rights, to provide support to prevent workplace discrimination and to assist in resolving disputes.

As discussed above, the AHRC and the GCNA have convened the Australian Dialogues with representatives of a number of Australia’s biggest companies, NGOs, government departments, investors and academia since 2014 to discuss ways to address business-related human rights harm in Australia and abroad. On 25 May 2016, the AHRC hosted a roundtable meeting for civil society

204 See, eg, the following cases: ACCC v StoresOnline International Inc [2007] FCA 1597 (injunction granted against companies in the USA that conducted seminars and workshops in Australia when they failed to comply with a s 87B undertaking previously given to the ACCC not to engage in misleading and deceptive conduct in the seminars and workshops in Australia); ACCC v Jurlique International Pty Ltd [2007] FCA 79 (Jurlique admitted to entering into agreements to supply its products in Korea, China, India and Taiwan, that contained a term that the companies would not sell the products at prices other than the specified prices); and ACCC v Worldplay Services Pty Ltd [2004] FCA 1138 (where it was held that, in facts involving an internet based pyramid selling scheme run from Australia but not accessible by Australian consumers, it was immaterial that the persons who participated in the scheme were not in Australia).

205 See ASIC v Flugge & Geary [2016] VSC 779.


208 Commentary to the UNGPs, 6.

209 ICAR/DIHR Toolkit, above n 6, 107.
representatives, including non-governmental organisations and academia examining ‘how are the UNGPs to be operationalised in Australia?’.

The AHRC also provides guidance to business on the implementation of UNGPs. In particular, the AHRC has an online hub ‘to assist Australian businesses and employers to support workplace diversity, meet their obligations under anti-discrimination law and integrate a human rights approach into their policies and practice’.210

The online hub includes:

- **The Good Practice, Good Business factsheets** to help promote diversity and prevent discrimination in the workplace;
- **Business and human rights factsheets** to assist Australians businesses embed human rights into their operations;
- **Toolkits and guidelines** on a range of issues including gender equality, sexual harassment, recruitment and retention of older workers, managing employees with family and carer responsibilities, workplace cultural diversity and employment of people with disabilities.

The AHRC also has a Business and Human Rights Network, which is free to join, and is described as a ‘voluntary informal forum for information exchange and discussion on human rights and business’.211 Members are invited to ‘quarterly Network events and receive monthly emails in order to share experiences, discuss best practices, and collaboratively develop solutions to human rights challenges’.212

Other AHRC initiatives, such as ‘Male Champions of Change’ which seeks to promote women’s representation in business leadership,213 also provide guidance and assist in promoting the UNGPs.

(iii) **State and Territory Human Rights Commissions**

None of the state and territory human rights commissions (HRCs) provide express guidance to business on implementing the UNGPs. However, a number of the HRCs provide relevant guidance on business and human rights issues.

All nine HRCs provide guidance and training for employers on anti-discrimination and equal opportunity laws.214 The HRCs also handle complaints under the relevant state or territory anti-discrimination legislation.215 Some HRCs, such as in Queensland and the Northern Territory, have recognised the difficulties in addressing human rights issues for small business, and have developed specific guidance in this area.216 The ACT HRC has introductory e-learning modules available for use by individuals and businesses on anti-discrimination and human rights law.217 The Victorian HRC has also published suggested guidelines regarding respect for rights contained in the Victorian Charter for local councils to use when engaging contractors and consultants,218 and provides human rights training to representatives, including non-governmental organisations and academia examining ‘how are the UNGPs to be operationalised in Australia?’.


public authorities and their employees (which, as discussed above at 1.2.1(c)(i), can include certain corporations). 219

(iv) Specific guidance provided by the Australian Government

The Australian Government also provides guidance and support in respect of particular human rights issues that can be linked to business activity. Some key examples are as follows.

(A) Extractives

The Department of Industry Innovation and Science administers two programs that provide human rights related guidance for extractives companies: the Leading Practice Sustainable Development Program for the Mining Industry (LPSDP) and the Working In Partnership Initiative (WIP).

The LPSDP promotes sustainable development and industry self-regulation through proactive adoption of leading practice principles, and provides guidance to business through workshops, handbooks and other resources. 220 The WIP aims to build effective long term relationships and encourages wider adoption of best practice in relationships between the mining industry, services industries, and communities (including Indigenous communities). 221

The Department of Industry has previously published a handbook entitled ‘Social Responsibility in the Mining and Metals Sector in Developing Countries’, which provides guidance on the social and environmental responsibilities of businesses operating abroad including on impact assessments, due diligence, grievance mechanisms and stakeholder engagement. 222

(B) Human trafficking

The Australian Government has put together guidance for employers in respect of human trafficking, which is a priority area for the Government. Among other issues, the guidance directs business to check whether trafficking occurs at any point in the supply chain, and to set out clear policies for its workers and supply chain companies on minimum wages, working hours and overtime. 223 The Australian Government has also committed to create a suite of awareness-raising materials on human trafficking and slavery for business. 224

(C) Gender discrimination

The Australian Government engages with stakeholders in the business and community sectors to support women’s increased representation in leadership and decision-making roles. In particular, the Australian Government partners with the Australian Institute of Company Directors to deliver the Board Diversity Scholarship Programme in order to expand the number of women on private and non-government boards. 225

The National Plan to Reduce Violence against Women and Their Children 2010–2022, 226 aims to connect the work being done by Australian governments, together with the non-government sector, business and communities, and individuals to reduce violence.

The National Plan includes the following two strategies that refer to engaging business in respecting the human rights of women, namely:

225 UN Human Rights Council, National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21* Australia, UN GAOR, 23rd sess, UN Doc A/HRC/WG.6/23/AU/1 (2-13 November 2015) [65].
Strategy 1.1 (Promoting community involvement), which includes encouraging schools, community, sporting and business groups to prevent, respond to, and speak out against violence; and

• Strategy 1.2 (Focus on primary intervention), which includes supporting schools, community and sporting groups, and workplaces to build positive attributes, beliefs and social norms, and challenge unacceptable behaviour.

The National Plan is being delivered through a series of four three-year Action Plans. The Third Action Plan, released in October 2016, sets out a range of actions in regard to these two strategies.

(D) Child protection in private enterprise

The Australian Government has provided guidance to DFAT staff and partner organisations in relation to children protection in private enterprise programming, to ensure children are safe and protected from harm and exploitation. The guidance sets out the common child protection risks within private sector programs and suggests strategies in order to mitigate these risks. For example, the guidance suggests that robust policies and procedures and complaint handling mechanisms should be implemented, and child protection risk assessments should be undertaken.227

(E) Charitable fundraising

The Department of Communications and the Arts is negotiating with the Fundraising Institute of Australia (FIA) to review its current Standard of Charitable Telemarketing Fundraising Practice (the Standard) to better protect the interests of vulnerable persons. The FIA is the peak representative body for charitable institutions engaged in fundraising activities and members are required to adhere to the Standards established by the FIA. Organisations that are not FIA members may follow the Standard in order to be seen as implementing industry best practice.

The negotiation followed increasing complaints from individuals, carers and family members of vulnerable people who claimed that charities or associated call centres had used high pressure tactics in order to solicit donations. In cases where an individual agrees to make a contribution, the donor’s name and contact details are often passed to another charity as a ‘good prospect’ for further donations. This in turn has led to increased pressure on vulnerable people to make donations.

In consultation with the ACCC, the Department has developed the following definition of a vulnerable person for the purposes of telemarketing activities:

A vulnerable person is defined as a person who is capable of readily or quickly suffering detriment in the process of being asked for a donation through telemarketing fundraising. A vulnerable person may be in a vulnerable circumstance or require additional care and support to make an informed decision including, but not restricted to, one or a combination of the following factors: physical and mental medical conditions; intellectual disability and/or learning difficulties; stress and/or anxiety due to bereavement or loss of employment; financial vulnerability; where English is not the first language; and being under the influence of alcohol or drugs.

(F) Export activity

Austrade, the Australian Government’s Trade and Investment Commission, recommends that exporters consider the legal requirements of their export markets including human rights, trade sanctions, and recognition of personal property rights as part of their international business risk mitigation strategy.228 Austrade also provides guidance on exports to specific countries, which may include human rights considerations. For example, in relation to Myanmar, the Austrade website states:

Australian companies operating in Myanmar are advised to familiarise themselves with Australia’s laws and penalties pertaining to bribery of

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foreign officials. They should consider implementing the guidance set out in such corporate responsibility frameworks as the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.229

(G) SMEs
Australian Government support for SMEs regarding the responsibility to respect human rights is discussed at 2.2.1, below.

(v) Guidance through support for initiatives
The Australian Government also provides guidance to business through support of international initiatives. They include:

(A) The OECD Guidelines
As an OECD country, Australia is a signatory to the OECD Guidelines (discussed above at 1.2.1(d)(ii)). The OECD Guidelines, revised for alignment with the UNGPs in 2011, set out voluntary principles and standards for responsible business conduct in a variety of areas including human rights, anti-corruption, taxation, labour relations, environment, information disclosure and consumer protection.

The Australian Government encourages all companies operating in Australia and Australian companies operating overseas to act in accordance with the principles set out in the OECD Guidelines and to perform to – at minimum – the standards they suggest.230 It has also established the Australian OECD National Contact Point which can hear and address complaints made in relation to alleged breaches of the OECD Guidelines, discussed further at 3.3.2(c) below.

Recently, the OECD has released the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas,231 which is the first example of a collaborative government-backed multi-stakeholder initiative on responsible supply chain management of minerals from conflict-affected areas.232 The OECD is currently working on producing other sector-specific guides.233

(B) UN Global Compact
The UN Global Compact is a set of ten aspirational principles on human rights, the environment and anti-corruption agreed to on a voluntary basis by business, states and civil society. When a business signs up to the UN Global Compact, it agrees to aim to align its activities with these ten principles. The UN Global Compact requires signatories to report on their alignment with the ten principles on an annual basis, through a ‘Communication on Progress’.

In 2015, DFAT entered into a partnership with GCNA, the Australian local network of the UN Global Compact.234 GCNA plays a key role in educating Australian business on the UNGPs and corporate respect for human rights. DFAT has provided $350,000 in funding to GCNA over a two-year period.235 DFAT is a member of the advisory group for the Dialogues held by GCNA and also jointly convened business roundtables in May and June 2016 on exploring the possibility of a NAP on business and human rights.

GCNA’s ‘Human Rights Leadership Group’, launched in 2010, provides an informal forum for joint learning and best practice sharing, aimed at building the capacity of Australian businesses to understand and manage human rights-related challenges and opportunities.236

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235 Ibid.
(C) **ICOC and ICOCA**

Australia is one of six state members of the ICOCA. It became a member on 20 September 2013. Australia is making a financial contribution of $250,000, disbursed over five years, to support measures including certification, monitoring and complaint procedures, and has also committed to encouraging additional states to join ICOCA. The ICOC sets out principles and guidelines for the conduct and operations of private security companies with the aim of ensuring respect for human rights and international humanitarian law. This includes guidance on operating in in complex jurisdictions.

(D) **Voluntary Principles on Security and Human Rights**

Australia has been a government member of the VPs initiative since 27 February 2013, and a full member since July 2016. Established in 2000, the VPs are a multi-stakeholder initiative involving governments, companies, and NGOs that promotes implementation of a set of Principles that guide oil, gas, and mining companies on providing security for their operations in a manner that respects human rights. The VPs also provide guidance for business on a number of issues relating to operating in complex jurisdictions.

The Australian Government's National Action Plan on Security and Human Rights sets out its commitment to promote awareness and guidance around the VPs. This includes a commitment to provide private and public security companies with human rights training run by the Australian Federal Police or NGOs.

The Security and Human Rights Community of Practice, established by GCNA and supported by DFAT and the Australia-Africa Minerals & Energy Group, has provided a forum in which senior security representatives from extractives companies and community relations personnel discuss challenges and best practice in relation to security and human rights. The Community of Practice has provided an opportunity for the Australian Government to engage directly with extractives companies on the VPs.

(E) **Extractive Industries Transparency Initiative**

On 6 May 2016, Australia announced that it would implement the EITI, a global standard that promotes revenue transparency and accountability in the extractive sector, and is a global benchmark for natural resource revenue management.

(d) **Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts**

(i) **Due diligence laws and reporting**

The following laws require or encourage companies to engage in due diligence practices in order to protect against human rights-related abuses:

- Section 731 of the Corporations Act, which requires that a person must have made all reasonable inquiries and believed on reasonable grounds that a statement in a prospectus was not misleading and deceptive;
- Sections 66B(1A)(b) and (c) of the Environment Protection Act 1970 (Vic), which provides that it is a defence to a prosecution under the Act if an

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individual can prove they used all due diligence to prevent a contravention;244

- Section 27 of the WHS Act, which provides that officers of corporations must exercise due diligence to ensure that the person conducting a business or undertaking complies with its health and safety duties;
- Section 16 of the Autonomous Sanctions Act 2011 (Cth) which provides that a corporation does not contravene the Commonwealth sanctions regime if it takes reasonable precautions and exercises due diligence to avoid contravening the sanctions regime; and
- Section 12.5 of the Criminal Code provides that a corporation can rely on a mistake of fact defence to a strict liability offence if it demonstrates that it exercised due diligence to prevent the conduct that constitutes the offence.

The following laws require companies to report or communicate in relation to human rights-related issues:
- Section 1013D(1)(l) of the Corporations Act (see ‘Corporations and securities laws’, above at 1.2.1(d)(ii));
- The ASX Corporate Governance Principles (2014), recommendations 1.5 (listed entity should have a diversity policy), 3.1 (listed entity should have a directors’ code of conduct) and 7.4 (listed entity should disclose whether it has material exposure to economic, environmental and social sustainability risks); and
- Section 33D of the Privacy Act provides that the Privacy Commissioner may direct an agency to give a ‘privacy impact assessment’ if an agency proposes to engage in an activity involving the handling of personal information about individuals and the Commissioner considers that the activity might have a significant impact on the privacy of individuals. The purpose of a ‘privacy impact assessment’ is to identify the impact that an activity of function may have on the privacy of individuals and set out recommendations for managing, minimising or eliminating that impact.

(ii) Government policies that encourage human rights reporting

The Australian Government does not currently have specific policies that require businesses to report or otherwise communicate in relation to human rights practices.

The Office of the Australian Information Commissioner encourages APP entities to undertake a ‘privacy impact assessment’ in relation to any projects that handle personal information to ensure that the projects are compliant with privacy laws.245

The Australian Government has also announced that as part of strengthening its response to human trafficking and slavery it will:
- consider the feasibility of a model for large businesses to publicly report on their actions to address supply chain exploitation;
- examine options for an awards program for businesses that take action to address supply chain exploitation; and
- explore the feasibility of a non-regulatory, voluntary code of conduct for high risk industries.246

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244 Similar laws exist in New South Wales and South Australia. Section 66B(1) of the Environment Protection Act 1970 (Vic) provides that, if a corporation contravenes any provision of the Act, a director of the corporation or a person who is concerned in the management of the corporation is also guilty of the offence. However, subsection (1A) provides that it is a defence to such a charge if the director (or person concerned in the management of the corporation) used all due diligence to prevent the contravention by the corporation. Since the prohibitions imposed by the Act are, generally, strict liability offences (meaning that the intent of the defendant is irrelevant to liability) it is appropriate to characterise the availability of this defence as encouraging companies to engage in environmental due diligence, as carrying out due diligence may act as a complete defence to strict liability on the part of its directors and other management persons.


Further, the Government endorses or financially supports the following international initiatives that require reporting or communication by companies in respect of human rights-related issues.

(A) **Global Reporting Initiative**
GRI is an international independent standards organisation that produces reporting standards and frameworks for various sectors on human rights and other sustainability issues. In August 2015, the Australian Government entered into a partnership with GRI, supporting a program to encourage sustainability reporting occurring throughout Australian supply chains with a particular focus on suppliers in the Asia-Pacific region. While the partnership is intended to improve human rights-related reporting among Australian companies as a whole, there is a particular focus on compliance with these standards in the extractives sector.

(B) **UN Global Compact Communication on Progress**
As described further above at 1.3.1(c)(v)(B), the GCNA is supported by the Australian Government. The UN Global Compact, which the GCNA helps to support, requires signatories to report on their alignment with the ten principles on an annual basis through a ‘Communication on Progress’. Communications on Progress can form part of sustainability reporting, and are published on the UN Global Compact website. Signatories that fail to report on their compliance with the UN Global Compact principles are publicly listed, following which they may be expelled for non-compliance.

(C) **Extractive Industries Transparency Initiative**
As discussed above at 1.3.1(c)(v)(E), the EITI outlines fiscal transparency principles which set an international standard for increased transparency and accountability in the oil, gas and mining sectors.

(D) **Kimberley Process**
The Kimberley Process is a joint government, industry and civil society initiative to stem the flow of conflict diamonds. Conflict diamonds are rough diamonds used by rebel movements to finance wars against legitimate governments. Australia is active in the Kimberley Process, and will act as Chair in 2017. The Kimberley Process imposes extensive requirements on its members to enable them to certify shipments of rough diamonds as ‘conflict-free’ following communication and reporting by business. The regulatory requirements imposed in Australia as a result of the Kimberley Process are discussed in further detail at 1.2.1(c)(iii)(A) above.

(E) **Voluntary Principles on Security and Human Rights**
In its National Action Plan on Security and Human Rights, the Australian Government committed to ‘endorsing, promoting and proactively implementing the VPs, particularly with respect to Australian companies in the extractive sector operating abroad’. As discussed below at 2.3.8(g), the VPs require company participants to report annually to the initiative.
(a) **State-owned enterprises**

At the Federal level, state-owned enterprises are referred to as 'Government Business Enterprises', or GBEs. Of the six prescribed GBEs in Australia, 253 all had a clear policy statement on the importance of compliance with equal opportunity and anti-discrimination laws. One had a supplier code of conduct which requires compliance with international human rights laws throughout its supply chain. 254 Three had general corporate social responsibility policies, and many had policies that by their nature promoted respect for human rights (such as safety or environment).

The relevant regulation governing GBEs is the Public Governance, Performance and Accountability Act 2013 (Cth) (PGPA Act), and the Commonwealth GBE governance and oversight guidelines (RMG-126). Neither the PGPA Act nor the Guidelines refer to human rights-related matters. RMG-126 does make reference to financial and non-financial measures of performance, however this is not directly expanded upon. 255

Section 16 of the PGPA Act provides that accountable authorities of all Commonwealth entities must establish and maintain appropriate systems of risk oversight, management and internal control for the entity. The Commonwealth Risk Management Policy provides guidance as to how these risks should be identified and addressed, 256 however it does not refer specifically to human rights related risks.

For the purposes of this Stocktake, the survey of state-owned entities has been limited to prescribed Commonwealth GBEs only, namely:

- Australia Post; 257
- Defence Housing Australia; 258
- ASC Pty Limited; 259
- Australian Rail Track Corporation Limited; 260
- Moorebank Intermodal Company Ltd; 261

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254 See Footnote 257 for further details of policy wording.


257 Australia Post’s 2016 Corporate Responsibility Strategy is informed by the United Nations Sustainable Development Goals and leading sustainability frameworks and covers four key pillars: (i) people; (ii) customers; (iii) community and (iv) environment. It also has a community stakeholder engagement program through which those affected by changes to Australia Post can share their views. Australia Post requires its suppliers to sign up to a Supplier Code of Conduct that sets out the need for commitment to human rights and fair employment practices in accordance with existing international human rights laws, such as:

- the United Nations Universal Declaration of Human Rights
- the International Labour Organisation Declaration on Fundamental Rights

Australia Post has the Sedex (Supplier Ethical Data Exchange) system, which allows it to track the performance of its suppliers on sustainability and social matters. Over 2016/17, it intends to introduce a number of practices related to supply chain awareness, including audits and implementing operational-level grievance mechanisms. Australia Post is signatory to a number of initiatives, including the UN Global Compact and the GRI.

258 Defence Housing Australia has published a CSR statement, in which it seeks to integrate the principles of social responsibility into its core business activities by exhibiting the behaviours of good corporate governance, ethical decision making, by minimising its environmental impact and seeking to enhance the amenity of residential communities. It also has a complaints procedure available for use by its customers.

259 ASC (formerly Australian Submarine Corporation) has published some policies and procedures that relate to human rights issues (such as safety, equal opportunity and environmental issues), although it does not expressly refer to human rights. ASC’s supplier questionnaire contains questions relating to equal opportunity for women and Aboriginal and Torres Strait Islanders, diversity and equity, and policies relating to safety. 259 ASC states that these responses are taken into account when engaging suppliers.

260 ARTC has a Code of Conduct with which employees, directors, contractors, and consultants are required to comply. 260 The policy prohibits bullying, discrimination and harassment and references safety requirements (which are contained in separate policies). Safety is also one of ARTC’s key values, stated as ‘No harm’ in the workplace.

ARTC’s 2014/2015 Annual Report referenced the importance of ‘managing its operational activities and services in an environmentally responsible manner to meet legal, social and ethical obligations’. 
(b) State agencies that provide substantial support and services to enterprises

A range of state agencies that provide substantial support and services to enterprises either directly or indirectly consider human rights matters in provision of this support. Key examples include:

(i) EFIC

EFIC, Australia’s export credit agency, facilitates and encourages Australian export trade on a commercial basis. EFIC’s human rights policy, adopted by its board in December 2015, identifies that EFIC is required, in fulfilling its role, to have regard to Australia’s obligations under international agreements, including its human rights obligations. The policy states that respect for human rights is reflected in EFIC’s operations and governance processes, which are subject to ongoing review. In engaging in environmental and social impact assessments on the projects and businesses it supports, EFIC is bound by the OECD Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence. EFIC also voluntarily applies the Equator Principles and the IFC Performance standards (outlined in further detail at 2.3.8(d)-(f) below). EFIC ‘declines transactions if it determines that the environmental and/or social impacts do not satisfy relevant benchmarks’. The IFC Social and Environmental Performance Standards were reviewed in order to better align with the UNGPs in 2011-13. EFIC states that it undertakes due diligence on environmental and social issues in accordance with the international standards listed above in determining whether to support specific transactions.

(ii) The Future Fund

The Future Fund is Australia’s sovereign wealth fund. It has developed an environmental, social and governance (ESG) risk management policy, which takes into account ‘human and labour rights’ alongside bribery and corruption, environmental and other considerations. The Future Fund’s ESG risk management policy provides a framework which assists it in determining what entities and sectors are excluded from the investment portfolio for non-financial reasons. For example, The Future Fund has excluded entities on the basis of Australia’s international convention commitments or direct involvement in the manufacture of tobacco products or unlawful military weapons.

(iii) Human Research Ethics Committee

The Department of Health’s Human Research Ethics Committee (HREC) operates in accordance with the National Statement on Ethical Conduct in Human Research (2007) and the Guidelines for Ethical Conduct in Aboriginal and Torres Strait Islander Health Research (2003). The Department’s HREC provides ethical assessment of non-biomedical research proposals involving humans that are funded by the Department, require access to Departmental data collections, or are initiated or conducted by Departmental staff. A key objective of the HREC is to protect the welfare and rights, including privacy and confidentiality, of participants involved either directly or indirectly in proposed research.

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261 MIC oversees the development of the Moorebank intermodal freight precinct – ‘a nationally significant infrastructure project that will help Sydney manage the expected growth in freight moving through the city’. One of MIC’s key objectives is to ‘achieve sound environmental and social outcomes that are considerate of community views’. An environmental impact statement has been completed for the project, which has considered some of the potential social impacts on affected communities.

262 NBN Co has a Code of Conduct, applicable to all employees, contractors and consultants, which prohibits discrimination, bullying and harassment as well as requiring respect for cultural, ethnic and religious differences. NBN’s CSR website references environmental and safety initiatives. NBN also has a Fraud and Corruption Control Policy and Plan.


265 Ibid.


268 Ibid.
1.3.3 UNGP 5

**UNGP 5 provides:**

States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.

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(a) **Public Private Partnerships**

The Australian, state and territory governments have allowed for the privatisation of certain public services, or alternatively have entered into Public Private Partnerships (PPPs) in order for public services to be delivered by the private sector through contractual arrangements.

The National PPP Guidelines highlight the importance of recognising risks relating to the following areas that touch upon the following human rights-related issues:

- cultural heritage;
- native title; and
- OH&S.269

While Infrastructure Australia’s guidelines and state and territory governments require compliance with domestic laws that protect human rights as outlined in 1.2.1, there is no general policy requiring human rights provisions to be inserted in PPP Project Deeds and related subcontracts, or that require human rights due diligence or impact assessments to occur.

Australia’s privatisation of offshore detention facility arrangements with regard to human rights considerations has been the subject of controversy, as noted below at 2.2.1(e) below.

(b) **Federal private security contracts**

The Australian Government has included human rights compliance in at least one request for tender (RFT) document relating to private security. The RFT for private security arrangements at the Australian High Commission in Islamabad contained the following criteria:

- ‘Established management systems and procedures demonstrating capacity to comply with The Montreux Document of 17 September 2008’; and
- ‘Established management systems and procedures demonstrating capacity to comply with the International Code of Conduct for Private Security Providers at [link](http://www.icoc-psp.org/) an initiative to create better governance, compliance and accountability with principle stipulations regarding respect for human rights, humanitarian law and respect of cultures’.270

(c) **Federal health contracts**

On 1 July 2015, 31 Primary Health Networks (PHNs) were established in order to improve health outcomes for those living in more remote areas. PHNs operate as a national network of independent primary health care organisations, funded by the Australian Government.

The initial six national priority areas for PHNs are: mental health; Aboriginal and Torres Strait Islander health; population health; health workforce, digital health and aged care.

As recipients of grant funding, PHNs are responsible for delivering health services in accordance with the obligations contained in the PHN Programme’s contractual arrangements. Contractual arrangements between PHNs and the Department of Health require PHNs to manage third party contracts and relationships, including human rights-related considerations. These include but are not limited to details in relation to identification of third parties who have been contracted, the nature of such services, dealing with sensitive cultural information and legislated requirements (such as adherence to privacy provisions) as set out in the Privacy Act and purchasing or commissioning services.

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269 Infrastructure Australia, *National PPP Guidelines - Appendix D: Public Sector Comparators*, available at: https://ausinf.affinitext.com/viewer/book/id=5323&toc_id=7379207&highlight=1&index_name=c_614c39e599468454803304b02f2048&q query_string=human%20right&sub_query=&exact=0&title_only=0&case_sensitive=0&stemmed=0#PG_7379207_78480288_55, 56, 68.

from third parties who are compliant with the Australia’s *Workplace Gender Equality Act 2012*).

In addition, the PHN Programme Guidelines require that the governance of PHNs should reflect sound corporate governance principles (with reference to the ASX Corporate Governance Principles). This includes the inherent responsibility to respect human rights and protect people from discrimination and harassment in accordance with Australia’s anti-discrimination laws.

**The Victorian Charter and the ACT HRA Act**

As noted above at 1.2.1(c)(i), the Victorian Charter and the ACT HRA Act provide that the human rights obligations enshrined in those instruments apply to any ‘public authority’, which extends in certain circumstances to corporations that perform services generally identified as being a function of government (for example, the function of providing correctional services).

The Victorian HRC has stated on its website that:

Businesses and not-for profit organisations may be bound by the Charter when they are contracted or funded by local councils to perform functions of a public nature...local councils should ensure that their procurement policies and contracts are consistent with the Charter. For example, the City of Boroondara Procurement Policy provides that all procurement activities must be carried out in compliance with the Charter.

Victorian public authorities, including the Department of Human Services Disability Services, the Department of Justice’s Health unit and Victoria Police have also required that contractors engaged by those public authorities act in a manner that is consistent with the principles contained in the Victorian Charter when carrying out services.

From a desktop review, it does not appear that the ACT’s agencies have made similar commitments to date.

**1.3.4** **UNGP 6**

<table>
<thead>
<tr>
<th>UNGP 6 provides:</th>
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<tr>
<td>States conduct a variety of commercial transactions with business enterprises, not least through their procurement activities. This provides States – individually and collectively – with unique opportunities to promote awareness of and respect for human rights by those enterprises, including through the terms of contracts, with due regard to States’ relevant obligations under national and international law.</td>
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(a) **Federal government**

(i) **Procurement practices**

Commonwealth procurement is governed by the Commonwealth Procurement Rules, issued under the PGPA Act. The Australian government does not have an overarching policy that requires human rights provisions to be inserted into its contracts with businesses. However, there are some situations in which human rights considerations are factored in when the Government transacts with business, as outlined in this section.

In 2013, the Australian Government announced a government-wide initiative to assist in identifying and eliminating slavery and human trafficking in public procurement and supply chains. The Commonwealth Procurement Rules require officials to act ethically throughout the procurement process. This includes not seeking to benefit from supplier practices that may be dishonest, unethical or unsafe.

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272 Victorian Charter, s 4(c); ACT HRA Act, s 40D.


The Commonwealth Procurement Rules include the following general requirement, which addresses ‘dishonest, unethical or unsafe’ supplier practices (while not specifically targeting human rights issues):

Relevant entities\(^{276}\) must not seek to benefit from supplier practices that may be dishonest, unethical or unsafe. This includes not entering into contracts with tenderers who have had a judicial decision against them (not including decisions under appeal) relating to employee entitlements and who have not satisfied any resulting order. Officials should seek declarations from all tenderers confirming that they have no such unsettled orders against them.\(^{277}\)

Further, officials are also encouraged to take into account ‘sustainability’ when engaging in public procurement. In the context of procurement, sustainability ‘refers to a capacity for development that can be sustained into the future’. It does, however, appear to relate primarily to environmental sustainability.\(^{278}\)

(ii) Indigenous Procurement Policy

The Department of the Prime Minister and Cabinet is responsible for the Indigenous Procurement Policy (\textit{IPP}). The primary purpose of the IPP is to stimulate the Indigenous business sector by leveraging the Commonwealth’s purchasing power in part, to improve human rights outcomes among Indigenous communities.

The IPP was launched on 1 July 2015. In its first year of implementation (2015-2016 financial year), the Commonwealth awarded contracts, valued in total at over $284.2 million, to 493 Indigenous businesses. This compares to around $6.2 million in Commonwealth contracts awarded to Indigenous businesses in 2012-13.

Further, from 1 July 2016, businesses tendering for Commonwealth domestic contracts valued at or above $7.5 million in one of eight industry sectors will need to meet mandatory minimum requirements for Indigenous supplier and/or employment participation targets in their contracts. This policy is intended to build skills and provide economic benefits to Indigenous Australians, including in remote areas.

Parks Australia has also developed a number of guidelines, policies and practices for engaging with Aboriginal and Torres Strait Islanders on the development of management plans for marine protected areas and in the course of implementing a collaborative management approach to managing Commonwealth marine reserves.

(iii) Health procurement

The structure described above at 1.3.3(c) is designed to ensure that PHNs are working with all relevant stakeholders to improve the health of their communities. PHNs are also increasingly adopting a co-design approach to planning, commissioning and implementation of services. PHNs purchase and/or commission services for local groups most in need, for example, patients with complex chronic conditions, people from culturally and linguistically diverse backgrounds, Aboriginal and Torres Strait Islander people, youth, those at risk of suicide, and other hard to reach groups.

The Australian Government also takes into account human rights considerations when awarding aged care contracts under the My Aged Care Regional Assessment Services (\textit{RAS}) program. In particular, the RAS must ensure that health services can be provided to all areas (including very remote areas, with the exception of in Victoria and Western Australia), and must be able to account for the needs of special interest cohorts such as Aboriginal and Torres Strait Islander people, migrants, refugees, people with dementia and people from culturally and linguistically diverse backgrounds.

(iv) Reef 2050 Plan

The Department of Environment, together with the Queensland Government, has developed and are implementing a ‘Reef 2050 Plan’ which will guide management of the Great Barrier Reef for the next 35 years. The Australian and Queensland

\(^{276}\) The Commonwealth Procurement Rules define ‘relevant entity’ as non-corporate Commonwealth entities, and prescribed corporate Commonwealth entities.


Governments aim to address human rights-related impacts on Indigenous rights in the plan by seeking to develop and implement an Indigenous Business Development Plan, and assisting Traditional Owners to generate economic benefits from use and management of their traditional estates.

An Indigenous Implementation Plan has also been developed to support and guide implementation of the 23 Traditional Owner-led actions in the Reef 2050 Plan. The Plan identifies three key areas of focus for implementation, namely coordination between Traditional Owners and interest groups, working to protect cultural heritage and improve knowledge retention, and fostering business capacity for Traditional Owner groups. This facilitates stakeholder engagement with business, as well as protecting Indigenous and cultural heritage rights against commercial activity that may affect the interests of Traditional Owners.

(b) State and territory governments

(i) ACT

The ACT Department of Procurement and Capital Works is required by law to take into account ‘ethical behaviour’ when undertaking procurement.279 The ACT’s Sustainable Procurement Policy encourages agencies to consider ‘social responsibility and ethical practices’ when undertaking impact assessments. It also expressly includes ‘labour conditions and human rights of workers’ as considerations for ‘social procurement’, 280 as well as a number of other human rights-related issues such as avoidance of bonded labour and supply chain awareness.281

(ii) New South Wales

The New South Wales government has procurement policies that state that sustainability should be taken into account in determining value for money. The sustainability issues are divided into environmental, ethical and socio-economic considerations. These include:

• Heritage and culture / planning law considerations;
• Ethical manufacturing and production;
• Social procurement / social investment;
• Skills development, workplace and supply chain diversity; and
• Employee rights and conditions, unfair competition, and ethical behaviour.282

(iii) NT

The Northern Territory Procurement Code establishes a set of minimum standards for the conduct of business in the territory.283 The Code seeks to ensure that businesses ‘observe the highest ethical principles in tendering’ and ‘maintain high standards in occupational health safety and rehabilitation and in environmental management’, among other considerations.284

(iv) Queensland

Queensland has six procurement principles, the fourth of which is:

We use our procurement to advance the government’s economic, environmental and social objectives and support the long-term wellbeing of our community.285

The Queensland Government has also committed to doing business with ethical and socially responsible suppliers.286 For example, the Gold Coast 2018 Commonwealth Games Corporation, supported by the Queensland Government,

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279 Government Procurement Act 2001 (ACT), s 22A.
281 Ibid.
284 Ibid 4.
286 Ibid.
has stated that it responsibly manages its supply chains in procurement activities and reports on its activities in accordance with the GRI.\textsuperscript{287}

Further, the Queensland Department of Premier and Cabinet, together with the Great Barrier Reef Marine Park Authority (\textit{GRBMPA}) have committed to Indigenous participation targets and working collaboratively with Traditional Owners.\textsuperscript{288} Indigenous participation is one of the performance indicators included in GBRMPA’s Annual Business Plan.\textsuperscript{289}

\textbf{(v) South Australia}

The South Australian Government has Sustainable Procurement Guidelines which set out considerations for public authorities to take into account, including whether the ‘procurement has an adverse impact on human health and wellbeing, ethical practices or fair working conditions’ and whether suppliers have Corporate Social Responsibility policies.\textsuperscript{290}

\textbf{(vi) Tasmania}

The Tasmanian Government’s procurement principles include ‘compliance with ethical standards and the procurement code of conduct’.\textsuperscript{291} While these considerations mainly relate to the environment, the policy also requires agencies to require ‘suppliers to act ethically and in accordance with relevant industrial relations and occupational health and safety legislation’.\textsuperscript{292}

\textbf{(vii) Victoria}

The Victorian government requires that construction companies that work on Victorian projects are accredited under the Australian Government Building and Construction OH&S Accreditation Scheme, which requires demonstrated compliance with safety standards.\textsuperscript{293}

\textbf{(viii) Western Australia}

The Western Australian Government has a ‘Sustainable Procurement Policy’. According to the policy, ‘sustainable procurement involves an organisation meeting a need for goods and services in a way that achieves value for money and generates benefits not only to the organisation, but also to society and the economy, while minimising damage to the environment’.\textsuperscript{294}

The Policy states that:

\begin{quote}
Being sustainable is also considering the social factors of a good or service. Suppliers can be socially responsible by adopting ethical practices and being compliant with legislative obligations and other actions that benefit society including inclusiveness, equality, diversity, regeneration and integration.\textsuperscript{295}
\end{quote}

It states that public authorities should consider sustainability:

- when preparing procurement plans;
- in Request design, including selection criteria;
- in Request specifications that reflect environmental standards, codes or legislation;
- when determining methods of verification of a preferred bidder’s claims made regarding sustainability, in evaluation reports; and

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{287} Gold Coast 2018 Commonwealth Games Corporation, \textit{Sustainability}, available at: https://www.gc2018.com/about/sustainability.
\item \textsuperscript{289} Ibid.
\item \textsuperscript{292} Ibid.
\end{itemize}
\end{footnotesize}
• as a measure of a supplier’s contract performance against agreed commitments.296

1.3.5 UNGP 7

**UNGP 7 provides:**
Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by:

(a) Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;

(b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;

(c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation;

(d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.

A number of Australian laws in effect require respect for human rights by businesses operating in conflict-affected areas, primarily by making it an offence to commit or be complicit in an international crime, which may be more likely to occur in conflict-affected areas. These laws and their enforcement are discussed at 1.2.1(c)(iii)(A)-(B) and 1.3.1(a) above.

The Australian Government also provides some guidance for businesses operating in conflict-affected areas through its support for international industry initiatives. This is discussed in further detail at 1.3.1(c) above. In particular, Australia's support for the VPs, EITI, Kimberley Process and the ICOC, and its developing practice in requiring compliance with the standards set out in the Montreux Document is relevant, as described at 1.3.1(c)(v) and 1.3.3(b) above. Through these initiatives the Australian Government also engages with host Governments around steps they may take to engage with businesses around human rights.297 Austrade also provides businesses with country-specific guidance on conducting export activities, which includes some references to the UNGPs.298

Australia’s export credit agency and sovereign wealth fund, EFIC and the Future Fund, both have policies in place that restrict support for entities involved in gross human rights abuses, including in conflict-affected areas. This is addressed at 1.3.2(b), above.

1.3.6 UNGP 8

**UNGP 8 provides:**
States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State’s human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.

(a) **Federal level**
The Australian Government provides support and guidance across government in relation to business and human rights through the following methods:

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(i) **Attorney-General’s Department and DFAT**

The Attorney-General’s Department states on its business and human rights website that it ‘works closely with other government agencies on business and human rights, including DFAT on economic diplomacy and aid, Austrade on bribery of foreign officials and sustainable business practices in export markets, and the Department of Employment on workplace discrimination.” 299

DFAT has primary responsibility for consultations on the implementation of the UNGPs, including the establishment of an inter-departmental steering group on business and human rights.

(ii) **Modern Slavery and Human Trafficking**

The Australian Government has specifically developed an all-of-government approach to combatting human trafficking and slavery, including in relation to labour and employment issues. This involves cooperation with states and territories together with defined roles and responsibilities of the various government agencies involved.300

(iii) **Kimberley Process**

The Kimberley Process is a joint initiative that combats the flow of conflict diamonds (see above at 1.3.1(d)(ii)(A) for further information). The Department of Industry, Innovation and Science works collaboratively with DFAT and the Australian Customs and Border Protection Service to ensure that the Kimberley Process is implemented efficiently and correctly in Australia.301

(iv) **Voluntary Principles on Security and Human Rights**

DFAT is responsible for managing Australia’s participation in the VPs initiative. DFAT also works with other government departments including the Department of Industry, Innovation and Science to raise awareness of the VPs.302

(v) **Department of Employment Seasonal Worker Program**

The Seasonal Worker Program provides access to work opportunities in Australian agriculture and accommodation industries for seasonal workers from participating countries including Fiji, Kiribati, Nauru, Papua New Guinea, Samoa, Solomon Islands, Timor-Leste, Tonga, Tuvalu and Vanuatu.303 Although the Seasonal Worker Program does not expressly refer to human rights, the pastoral care elements of the program reinforces human rights principles – in particular freedom of association – by ensuring that seasonal workers can readily access community organisations (particularly religious and pacific islander community organisations) and experience social inclusion.

The Australian Government also seeks to ensure that the Federal Parliament is aware of the State’s human rights obligations through the Parliamentary Joint Committee on Human Rights, as outlined above at 1.2.1(c).

(b) **State and territory level**

In Victoria and the ACT, the respective HRCs provide training to government, public authorities and their employees on their responsibilities under the Victorian Charter and ACT HRA Act (described above at 1.2.1(c)). These include government departments, agencies and State-based institutions that help in shaping business practices.

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303 Note that, in May 2016, a number of recommendations were made as part of a Senate Inquiry into the Season Worker Programme: see Australian Parliament, *Seasonal Worker Inquiry*, available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Migration/Seasonal_Worker_Programme.
It does not appear that there is a formal Australian Government policy requiring human rights provisions to be included or negotiated into bilateral investment treaties (BITs) or FTAs. However, human rights-related provisions have been included in approximately one third of Australian BITs and FTAs reviewed for the purposes of this Stocktake.\footnote{A total of 35 treaties were surveyed. 21 of those treaties did not contain any human rights-related provisions, and were: Thailand-Australia FTA; and BITs with the following counterparties: Argentina, China, Czech Republic, Egypt, Hong Kong, Hungary, Indonesia, Laos, Lithuania, Mexico, Pakistan, Papua New Guinea, Peru, Philippines, Poland, Romania, Sri Lanka, Turkey, Uruguay, Vietnam.}

While the following list is not meant to be exhaustive, a review of all 21 BITs\footnote{Department of Foreign Affairs and Trade, Australia's Bilateral Investment Treaties (10 February 2017) available at: http://dfat.gov.au/trade/topics/investment/Pages/australias-bilateral-investment-treaties.aspx.} and 13 trade agreements,\footnote{Department of Foreign Affairs and Trade, 'Status of FTA negotiations' available at: http://dfat.gov.au/trade/agreements/Pages/status-of-fta-negotiations.aspx#negotiation.} as well as the proposed Trans-Pacific Partnership (TPP),\footnote{At the time of writing, the fate of the TPP is unclear. However, given it is the most recently negotiated agreement that Australia has signed, it was considered appropriate to include it in this Stocktake.} identified that:

1. \footnote{TTP, art 9.10(3)(d)(ii); Australia-Korea FTA, art 11.9(5)(b); Australia-Chile FTA, art 10.7(3)(c)(ii); Australia-United States FTA, art 11.9(3)(c)(ii); Australia-Fiji Trade Agreement, art 5(2)(a)(ii); South Pacific Regional Trade and Economic Co-operation Agreement, art VI(1)(c), Australia-PNG Trade Agreement, art 8(i).} 7 have protections which read similarly to Article 9.8(1)(a) of the Australia-China FTA, covering investment as well as trade in goods and services.\footnote{Australia reserves the right to adopt or maintain any measure according to the TPP, with the right to maintain such measures for the purposes of this Chapter and subject to the requirement that such measures are not applied in a manner which would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures: (a) necessary to protect human, animal or plant life or health; (ii) 6 have provisions similarly worded to the above Article 9.8(1)(a) of the Australia-China FTA, but where the provision is restricted to investment; (iii) 4 contain chapters or provisions reaffirming commitments to labour protections; (iv) 7 permit state parties to take measures relating to products of prison labour; (v) 7 require obligations to be implemented in a manner that respects privacy and the protection of personal data; (vi) 5 FTAs provide policy space for the Australian Government to take measures to promote the rights of Indigenous persons. For example, a reservation to the Japan-Australia Economic Partnership Agreement provides: States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business entities, for instance through investment treaties or contracts.}

2. \footnote{TTP, art 9.10(3)(d)(ii); Australia-Korea FTA, art 11.9(5)(b); Australia-Chile FTA, art 10.7(3)(c)(ii); Australia-United States FTA, art 11.9(3)(c)(ii); Australia-Fiji Trade Agreement, art 5(2)(a)(ii); South Pacific Regional Trade and Economic Co-operation Agreement, art VI(1)(c), Australia-PNG Trade Agreement, art 8(i).} 7 require obligations to be implemented in a manner that respects privacy and the protection of personal data.\footnote{See Australia-Fiji Trade Agreement, art 8(ii); Australia-PNG Trade Agreement, art 8(ii); Japan-Australia Economic Partnership Agreement, art 17.20(2)(d); Australia-US FTA, art 15.12(1)(d); Australia-Chile FTA, art 15.23(1)(d); Korea-Australia FTA, art 12.2; TPP, art 15.3.}

3. \footnote{TTP, arts 13.4 and 14.8; Australia-Singapore FTA, art 19(ii); ASEAN-Australia-New Zealand FTA, art 26(5); Australia-Malaysia FTA, art 12.18(1)(d)(ii); Australia-Korea FTA, art 12.21(3)(b); Australia-Japan Economic Partnership Agreement, arts 10.3(4)(b) and 14.15(c)(i); Australia-Chile FTA, art 11.34(1)(b). Note: the Australia-Chile FTA also requires that, in meeting their obligations, the parties do not disclose confidential information (of any kind) if that disclosure would be against the public interest. However, the wording of this provision is silent on the individual right to privacy.} 5 FTAs provide policy space for the Australian Government to take measures to promote the rights of Indigenous persons.\footnote{Australia-US FTA, Ch 18; Australia-Korea FTA, Ch 17; TPP, Ch 19. Side letters to the Malaysia–Australia FTA confirmed that, as both States were shortly to enter into the TPP, Malaysia and Australia have jointly concluded that it is appropriate that labour issues not be addressed in the Agreement at this time.} For example, a reservation to the Japan-Australia Economic Partnership Agreement provides:

- The following is a list of the BITs and FTAs reviewed for the purposes of this Stocktake.

1. TPP, arts 13.4 and 14.8; Australia-Singapore FTA, art 19(ii); ASEAN-Australia-New Zealand FTA, art 26(5); Australia-Malaysia FTA, art 12.18(1)(d)(ii); Australia-Korea FTA, art 12.21(3)(b); Australia-Japan Economic Partnership Agreement, arts 10.3(4)(b) and 14.15(c)(i); Australia-Chile FTA, art 11.34(1)(b). Note: the Australia-Chile FTA also requires that, in meeting their obligations, the parties do not disclose confidential information (of any kind) if that disclosure would be against the public interest. However, the wording of this provision is silent on the individual right to privacy.
Australia reserves the right to adopt or maintain any measure with respect to investment that accords preferences to any Indigenous person or organisation or providing for the favourable treatment of any Indigenous person or organisation.

For the purpose of this reservation, an Indigenous person means a person of the Aboriginal and Torres Strait Islander peoples.314

(vii) At least one treaty leaves policy space for state parties to take measures relating to disabled persons in government procurement and hiring;315 and

(viii) At least two treaties have other bespoke human rights-related provisions:

• **TPP, Article 9.17:**
  The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party.

• **Australia-New Zealand Investment Protocol, Article 23:**
  1. Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Party or as a disguised restriction on investment, nothing in this Protocol shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Maori in respect of matters covered by this Protocol including in fulfilment of its obligations under the Treaty of Waitangi.
  2. The Parties agree that the interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be the subject of consultations pursuant to Article 25 (Consultations).

The incorporation of human rights provisions in Government contracts is discussed further at Pillar 1 and 1.3.4 above. Further, it is noted that several contracts between state governments and companies are publicly available (particularly in relation to the extractives sector).316 Such contracts can be enshrined in legislation, thus promoting transparency around state government commercial arrangements.

### 1.3.8 UNGP 10

**UNGP 10 provides:**

States, when acting as members of multilateral institutions that deal with business-related issues, should:

(a) Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights;

(b) Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising;

(c) Draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges.

Australia has promoted business respect for human rights in international fora and in cooperation with other States through the following actions:

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314 Japan-Australia Economic Partnership Agreement, Annex 7, Part 1, Schedule of Australia, Section 1, Reservation 2 (p 1035).
316 For example, see Iron Ore (FMG Chichester Pty Ltd) Agreement Act 2006 (WA) and Mount Isa Mines Limited Agreement Act 1985 (Qld).
(a) **UN Mechanisms**

Australia co-sponsored the 2011 Human Rights Council Resolution adopting the UNGPs, and has co-sponsored a subsequent resolution on business and human rights in 2014.\(^{317}\)

Australia provides responses to the UN Human Rights Council's questionnaires on business and human rights in order to contribute to the development of best practice and lessons learnt. It also earmarked funding of $100,000 in 2015 towards the OHCHR Accountability and Remedy Project.\(^{318}\)

Australia has also shared information on the implementation of the UNGPs and discussed processes around the development of NAPs with other states, including the UK, US, Netherlands, Norway and Germany.

(b) **World Bank**

The World Bank and the Australian Government have a Partnership Framework, which sets out the common goals which are sought to be achieved.\(^{319}\) Australia’s support for the World Bank group supports access to remedy initiatives including for cases that may involve business-related human rights abuses, as discussed at 3.3.3(a)(iv) below.

(c) **OECD**

The Australian Government states that it is committed to promoting the use of the OECD Guidelines.\(^{320}\) The OECD Guidelines are described in further detail above at 1.3.1(c)(v)(A).

(d) **Regional efforts**

Australia engages with other states in the Asia-Pacific region to address human trafficking and forced labour. In November 2016, the Australian Government committed to strengthening its response in the Asia-Pacific Region, including by working collaboratively with business and civil society to consider the implementation of a number of initiatives, including public reporting by large businesses on action taken against supply chain exploitation and exploring the feasibility of a non-regulatory, voluntary code of conduct for high risk industries.\(^{321}\)

Australia’s approach in this area is also underpinned by its *International Strategy to Combat Human Trafficking and Slavery*, launched in March 2016,\(^{322}\) which coordinates Australia’s engagement at the bilateral, regional and multilateral levels. Support is provided in particular through leadership and engagement with the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (*Bali Process*).\(^{323}\) The Bali Process will hold a 'Business Forum' for the first time in 2017, with the aim of engaging leading business figures from member countries in efforts to detect and prevent trafficking in persons.\(^{324}\) The business-led Forum is intended to both promote 'good business practices in the private sector and legislative rigour in governments'.\(^{325}\)

The Australia Asia Program to Combat Trafficking in Persons (*AAPTIP*) also supports ASEAN Member states with ratifying and implementing the *ASEAN Convention Against Trafficking in Persons, Especially Women and Children*.

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\(^{323}\) The Bali Process was established in 2002 and currently has 45 member countries and three international organisation members, namely the Netherlands, Norway and Germany.


Australia’s aid programs also support initiatives to prevent serious labour exploitation, with a particular focus on women and girls. Australia has committed $2 million to the UN Women project, Preventing the Exploitation of Women Migrant Workers in ASEAN, aimed at improving outcomes for women migrant workers throughout the region. From 1 June 2016, the Australian Government has provided additional funding of US$3 million over three years to the Better Work Programme which improves labour standards in garment factories in developing countries, contributing to country programs in Indonesia, Vietnam, Cambodia and Bangladesh.

(e) **Government support for international initiatives**

See discussion at 1.3.1(c)(iv), above.
Pillar 2: The Corporate Responsibility to Respect Human Rights
2.1 Methodology

Pillar 2 of the UNGPs relates to the corporate responsibility to respect human rights. This section is structured by reference to each of the UNGPs that sit under Pillar 2.

As NAPs are principally adopted to facilitate state compliance with the UNGPs, the National Baseline Assessments (NBA) and similar processes undertaken by other countries to inform their approaches to NAPs have generally not directly addressed company practices.\(^{326}\) Such an approach is consistent with the ICAR/DIHR Toolkit, which excludes Pillar 2 from its NBA Template for what it states are largely practical reasons, noting that most States lack the data needed to respond to indicators under Pillar 2. The ICAR/DIHR Toolkit states that ‘few countries currently gather data on the number of companies within their territory or jurisdiction that have a human rights policy or that publicly report on human rights’.\(^{327}\) While this is also true in the Australian context, the Australian Government considers that the Stocktake should address Pillar 2, as a starting point of data on Australian business practice.

The methodology used in this Stocktake for considering Pillar 2 has included consideration of not only existing information on business and human rights practices in Australia. It also included conducting a desk-top survey of large Australian companies’ publicly available statements, policies and procedures in respect of human rights (the Company Survey).

The existing information on business and human rights practices in Australia considered for the purposes of assessing Pillar 2 is set out below, along with a summary of the Company Survey:

(a) Dialogue among Australian businesses and multi-stakeholder groups

As discussed above, the Australian Dialogue on Business and Human Rights is an annual multi-stakeholder, multi-sector meeting convened by the AHRC and the GCNA, which explores current practices, challenges and opportunities associated with the UNGPs. The most recent Australian Dialogue was held on 28 October 2016. Notes of these dialogues have been published by the convenors.\(^{328}\) The Dialogues provide some insight into the extent to which Australian companies comply with the responsibility to respect human rights as articulated in Pillar 2, and have been drawn on in the analysis below.

(b) Adoption of and commitments to various voluntary initiatives and standards

This Stocktake has considered the extent to which Australian companies are participants, members or signatories to voluntary human rights related standards and initiatives. Details of the major initiatives and the number of Australian participants are set out in section 2.3.8 below.

(c) Reports on corporate behaviour

This Stocktake has considered a number of significant reports by reputable non-governmental organisations and media outlets on corporate behaviour as they relate to Australian businesses’ implementation of the UNGPs. Relevant information provided through UN reporting processes, such as the Universal Periodic Review, has also been considered.

(d) The Company Survey: Public statements, policies and procedures

While there are examples of surveys conducted by civil society of companies’ public statements and publicly available policies and procedures in respect of human rights, not many of these reviews focus on Australian companies.\(^{329}\)

The Company Survey conducted for the purposes of the Stocktake comprised a desk-top survey of the publicly available statements, policies and procedures of 60 companies. This did not involve any direct interviews or other communication with companies that were included. Sources including company websites, corporate sustainability reports, annual reports (where the company did not publish a sustainability report, or where that report did

\(^{326}\) Although some of the National Action Plans prepared by other countries refer to Pillar 2, they focus on state expectations of companies and measures to improve corporate compliance with the UNGPs. They do not directly consider company practices. One NBA that does consider business practices is the recent NBA published by Scotland on 28 October 2016, which examined business practices by way of a survey and a small number of interviews.

\(^{327}\) ICAR/DIHR Toolkit, above n 6, 33.


\(^{329}\) See, for example: (a) the Business and Human Rights Resource Centre’s Company Action Platform (https://business-humanrights.org/en/company-action-platform/about), which records the results of a December 2014 survey of 180 companies in relation to their policies and practices on human rights; and (b) UN Guiding Principles Reporting Framework database (<http://www.ungreporting.org/>). Immediately prior to the publication of this Stocktake, the 2017 Corporate Human Rights Benchmark was released which is likely to be of assistance to future work in this space (https://www.corporatebenchmark.org/).
not refer to human rights) and any reports in accordance with the Global Compact or GRI G4 were reviewed. As for the rest of the Stocktake, the review of these materials was not designed as a gap analysis but rather to set out the current state of play.

The Company Survey considered the ASX 50 and the Private 10, which include companies from all major Australian business sectors.

It is important to understand that, given the high-level, desk-top nature of the survey, and the small sample sizes used, the results are indicative rather than conclusive and should be understood as such.

(e) **Awareness of business and human rights by SMEs**

The ASX 50 and Private 10 may not be representative of the majority of Australian companies. These large (often high-profile) companies are generally subject to greater public scrutiny, may be more familiar with international standards including human rights principles, and have greater resources to dedicate to human rights issues than smaller, less well-resourced companies. Therefore, the awareness of SMEs of human rights issues was also examined.

It is challenging to consider the SME sector as a whole, due to its diversity and breadth. Collecting data or evidence in relation to the practices of SMEs can present logistical difficulties. Rather than undertake a survey, SMEs’ awareness of human rights principles has been considered in this Stocktake by reference to guidance and educational materials available for SMEs.

### 2.2 Foundational Principles

#### 2.2.1 UNGPs 11 to 15

The Foundational Principles in Pillar 2 represent the overarching requirements and goals of the corporate responsibility to respect human rights, whereas the Operational Principles provide detail around policies and procedures that companies should have in place in order to properly respect human rights. Foundational Principles 11-15 are set out below.

**UNGP 11 provides:**

Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

**UNGP 12 provides:**

The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.

**UNGP 13 provides:**

The responsibility to respect human rights requires that business enterprises:

(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;

(b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

**UNGP 14 provides:**

The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise’s adverse human rights impacts.

**UNGP 15 provides:**

In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

(a) A policy commitment to meet their responsibility to respect human rights;

(b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;

(c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.
Australian businesses are increasingly aware of the Pillar 2 Foundational Principles and the content of the expectations embedded within those principles. This is evidenced by, among other things, the discussion at the Australian Dialogues, which has been grounded in the language of the UNGPs.

The Australian Dialogues have included extensive discussions regarding the motivations for corporate respect for human rights, including the importance of ‘doing the right thing’ (rather than simply doing what is legal), ensuring a social licence to operate, and the clear nexus between a human rights approach to business and risk management. Participants highlighted that discussion about business and human rights has moved beyond simply asking ‘why’ business should respect human rights, to the practical questions around ‘how’ to effectively do so.

The Australian Dialogues evidence Australian companies engaging with human rights, including as articulated in Pillar 2. The level of understanding and engagement has, however, been acknowledged as inconsistent across companies, with it being noted at the 2015 Australian Dialogue that while some businesses are making significant investments in human rights, others have not done so for a number of reasons, including a lack of awareness or because they do not consider that they face the same exposure to human rights issues as companies overseas, particularly if they are only operating in Australia. At the 2016 Australian Dialogue it was noted that businesses are engaging with human rights in relation to a number of issues, such as indigenous rights, non-discrimination and health and safety, but they do not often use the language of human rights or draw the issues together within a human rights framework.

The 2015 and 2016 Australian Dialogues highlighted that momentum is building around business and human rights in Australia, but that challenges remain. Key areas for focus and improvement were identified, including:

(a) transparency and disclosure – in relation to human rights impact assessments, supply chains and more general human rights performance;
(b) translating human rights into local operations, including to what extent human rights language needs to be used by business for it to truly manage human rights risks;
(c) building awareness and capacity around human rights at the CEO and board level;
(d) integrating human rights across business functions;
(e) managing human rights in supply chains, including modern slavery and other labour issues, both in Australia and overseas; and
(f) engaging and improving performance in those companies that may lag behind others in human rights (such as SMEs), for example because of lack of awareness, capacity or scrutiny.

In relation to this final point, the Australian Dialogues have identified the importance of SME engagement with human rights. Particularly given the large numbers of SMEs in Australia, increasing their understanding of, and engagement with, human rights was identified in the Dialogues as having the potential to drive better human rights outcomes. However, SMEs’ lack of resources was noted as one barrier in this regard.

Similar observations were made at the business roundtables convened in May and June 2016 to consider the development of an Australian NAP (the Roundtables). Nonetheless, the Roundtables noted there are some SMEs doing good work in relation to human rights, and that SMEs may be addressing their responsibilities even if they do not use human rights language to describe their work. It was noted that SMEs’ understanding of human rights is integral to ensuring respect for human rights through larger businesses’ supply chains. The Roundtables identified additional government investment in this area would be valuable, given the lack of dedicated resources available to SMEs to engage with human rights.

In order to increase SMEs’ awareness of human rights, the AHRC engages with an array of bodies that represent the interests of SMEs. It also provides human rights related guidance and educational materials for SMEs. The Federal Small Business and Family Enterprise Ombudsman also provides training to small businesses and online resources. At the Roundtables, the NAP was identified as a potential opportunity to further develop these materials, or create new guidance and
toolkits, and to support larger companies to build the human rights capacity of the SMEs in their supply chains.334

An example of industry engaging with the UNGPs is the Mineral Council of Australia and GCNA publication, *The Australian Minerals Industry & Human Rights: Managing Human Rights Risks and Opportunities through the UN Guiding Principles on Business and Human Rights*.335 It provides an introduction to the UNGPs for extractives companies, and describes case studies demonstrating how mining companies are practically implementing the UNGPs.

A number of NGO or expert body reports have discussed general trends in the business and human rights field in Australia.336 For example, in 2015 the AHRC, Australian Centre for Corporate Social Responsibility and GCNA published *Human Rights in Supply Chains: Promoting Positive Practice*. This report was the result of research into Australian business practice in addressing human rights in supply chains, identifying challenges and potential improvements. The report’s key findings included:

(a) Between 2011 and 2015, addressing human rights issues became more important within Australian businesses’ sustainability agendas, with a seven percent increase in the level of priority that businesses give to this issue.

(b) The level of priority accorded to human rights and supply chain issues increased over this period for organisations that are mature in their approach to corporate social responsibility or sustainability, but decreased for others.

(c) Less than half of the companies that responded to the survey (47%) agreed that their business had a written policy on human rights. Even fewer (36%) agreed that their business reported publicly on its human rights policy and commitments.

(d) The most important human rights issues for Australian businesses are those that concern their immediate workforce, such as workplace health and safety, non-discrimination, gender equality, and diversity and inclusion.

(e) Community engagement to address impacts on social, economic and cultural rights was also an important issue for most businesses, particularly in the mining sector.

A 2011 report by ACCA, Net Balance Foundation and CAER, *Disclosures on Managing Human Rights Risks*, examined human rights risk exposure and public disclosure of human rights management among ASX 100 companies as at May 2011. The report’s key findings are set out below.

(a) 47 ASX 100 companies were identified as the most exposed to human rights risks because they operated in countries with serious human rights concerns, as classified by Experts in Responsible Investment Solutions. Of these 47 companies, the report found that:

(i) the management systems of 90% appeared to be inadequate to mitigate exposure to human rights risks;

(ii) 5% disclosed evidence of a human rights policy commitment; and

(iii) 6% had adequate reporting on human rights management and outcomes.

(b) The other 53 companies were considered to have inadequate policies or disclosures on human rights.

(c) The results of Australian companies were considered to be worse than similar European companies, but better than similar North American companies.

The Company Survey conducted for this Stocktake identified that:

- 8 of the ASX 50 and 2 of the Private 10 have been the subject of publicised allegations, reports or findings of human rights breaches (such as discrimination or poor labour conditions) in Australia since 1995.

- 14 of the 34 ASX 50 companies that have operations or conduct business overseas have been the subject of publicised allegations, reports or findings of human rights breaches overseas since 2000. 6 Private 10 companies have operations or conduct business overseas, but none have been the subject of publicised allegations, reports or findings of human rights breaches overseas.


336 Note that any references to reports in this Stocktake should not necessarily be taken as reflecting endorsement of their content.
The higher number of overseas, as opposed to Australian, allegations, reports or findings of human rights breaches identified by the Company Survey is consistent with some UN, NGO and expert body reports into Australian companies' compliance with human rights. Examples of such reports include those summarised below.

(a) **Compilation Report prepared by the Office of the United Nations High Commissioner for Human Rights for Australia's 2015 Universal Periodic Review**

The Compilation Report noted the 2012 Concluding Observations of the UN Committee on the Rights of the Child that Australia examine and adapt its legislative framework to ensure the legal accountability of Australian companies and their subsidiaries regarding human rights abuses committed in Australia or overseas. The Committee also recommended that Australia establish monitoring mechanisms, investigation, and redress of such abuses, given reports of Australian mining companies' participation and complicity in serious human rights violations in foreign countries, including violations of children's rights. 337

(b) **Behind the Barcode, *Electronics Industry Trends* (2016)**

This report assessed 56 Australian and international electronics companies on the strength of their labour rights management systems to mitigate the risk of exploitation in their supply chains. While the report was critical of a number of Australian companies, one was described as a 'stand out' improver, due to increased disclosures about traceability and proof that workers in its first tier factories were receiving wages above the minimum. 338

(c) **Behind the Barcode, *Australian Fashion Report* (2016)**

This report assessed 87 Australian and international companies in the fashion industry on the strength of their labour rights management systems to mitigate the risk of exploitation in their supply chains. The report awarded several Australian companies a B+ grade, with one identified as having improved its investments to improve labour rights, and as having significantly improved traceability and the quality of its auditing and supplier relationships. Some large Australian retailers were praised for publicly sharing detailed supplier information. 339

(d) **Oxfam, Banking on Shaky Ground (2014) and Still Banking on Land Grabs (2016)**

Oxfam's Banking on Shaky Ground reports 340 discuss the Australian financing of agribusiness in emerging markets where there is a risk of land-grabs (large scale land acquisitions that violate human rights or do not adequately consider or compensate local land-owners or communities). The reports outline allegations of complicity in various human rights violations by Australian banks, and provide recommendations for avoiding complicity in the future, including the implementation of due diligence measures.

(e) **No Business in Abuse, *Complicity in gross human rights abuses within Australia’s offshore detention regime* (2015)**

This report discussed alleged breaches of the UNGPs, the OECD Guidelines and the UN Global Compact Principles by the Australian operator of regional processing centres in Nauru and Papua New Guinea. 341

Although the above reports focus on international issues, there is also increasing scrutiny on domestic issues:

(a) **Australian Broadcasting Corporation, *Four Corners – Slaving Away* (2015)**

This program alleged exploitation of migrant workers in the food industries in Australia, detailing allegations of low wages (including wages below legal limits), long working hours, abuse, harassment and assault. The food picked and produced using the allegedly exploited labour was said to then be sold in Australia's largest supermarkets. 342

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337 See A/HRC/6/WG.6/23/AUS/2, [74]-[75].


342 For video and transcript see, ABC Four Corners, *Slaving Away*, available at [http://www.abc.net.au/4corners/stories/2015/05/04/4227055.htm](http://www.abc.net.au/4corners/stories/2015/05/04/4227055.htm).
2.3 Operational Principles

2.3.1 UNGP 16

UNGP 16 provides:

As the basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through a statement of policy that:

(a) Is approved at the most senior level of the business enterprise;
(b) Is informed by relevant internal and/or external expertise;
(c) Stipulates the enterprise’s human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services;
(d) Is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties;
(e) Is reflected in operational policies and procedures necessary to embed it throughout the business enterprise.

Numerous Australian businesses have made public statements committing to respect human rights, and have related operational policies and procedures. The Company Survey found that:

(a) 24 of the ASX 50 have made public commitments to respect human rights by way of a human rights commitment, policy or statement. Consistent with the approach taken by other surveys of publicly available human rights policies, the term ‘human rights commitment, policy or statement’ encompasses various documents which publicly set out a company’s commitments, acknowledgements and actions in relation to human rights. It includes both stand-alone human rights policies and statements, and human rights policies and statements that are included in other documents, such as a code of conduct or corporate social responsibility documents. Only commitments, policies or statements that expressly refer to human rights have been included.

(b) The sector breakdown of these 24 companies is as follows:

- Financials – 9 of 20 companies;
- Telecommunications – 1 of 1 company;
- Materials (which includes metals, minerals and mining companies) – 4 of 8 companies;
- Consumer staples – 2 of 4 companies;
- Energy (which includes oil and gas companies) – 3 of 5 companies;
- Industrials – 3 of 6 companies;
- Health care – 2 of 3 companies;
- Utilities – 0 of 2 companies; and
- Information Technology – 0 of 1 company.

Typical public commitments by the ASX 50 to respect human rights involved at least a statement that the company respects, or aims to respect human rights. Many public statements referred to diversity, workplace safety and conditions and child labour. Some described relevant policies and practices that the company had in place in order to comply with human rights.

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344 See, for example, the Business and Human Rights Resource Centre’s list of company policy statements on human rights, available at: https://business-humanrights.org/en/company-policy-statements-on-human-rights.

345 The ASX categorises companies into sectors in accordance with the Global Industry Classification Standard – see http://www.asx.com.au/products/gics.htm for an explanation of each sector.
Each of the ASX 50 and 6 of the Private 10 have publicly available policies that are relevant to human rights, with common examples being:

- Diversity policies;
- Health and safety policies;
- Supply chain and sourcing policies; and
- Codes of conduct.

One potential driver of the adoption of human rights related policies by business is the ASX Corporate Governance Council Principles and Recommendations, discussed above at 1.3.1(d)(i), which recommend that companies listed on the ASX should have a diversity policy and have and disclose a code of conduct.\(^{346}\)

In 2012, MSCI ESG Research conducted a study which examined public commitments to human rights and company human rights policies.\(^ {347}\) The study identified the extent to which ASX200 companies had publicly disclosed human rights policies and labour policies, their alignment with global human rights and labour conventions, and the breadth of application of these policies across company operations. The report’s findings included that:

(a) 14% of companies assessed had formal policies that address a wide cross section of labour and human rights issues, with a similar proportion specifically prohibiting forced labour (13%) and child labour (14%).

(b) 23% of companies provided specific protections of freedom of association and the right to collective bargaining.

(c) 86% of companies made commitments to anti-discrimination, and 90% made commitments to occupational health and safety.

(d) Company size had a significant correlation with the adoption and disclosure of labour and human rights policies. The degree of industry-specific risks had a smaller, albeit significant, relationship with the adoption and disclosure of policies.

(e) Small numbers of companies pledged support for or mentioned the United Nations Global Compact (7%), the Universal Declaration of Human Rights (13%), or the ILO’s Declaration on Fundamental Principles and Rights (5%).

At the 2016 Australian Dialogue, the need for greater awareness and understanding of human rights and engagement with human rights issues at senior levels of business was discussed, together with the strong business case that can be made for building that engagement. It was also noted that, even where a company has a strong commitment to and awareness of human rights, it remains difficult to embed that across large, geographically dispersed and culturally diverse operations.

In 2013, CAER and Oxfam Australia examined company statements about free, prior and informed consent in their report, *The Right to Decide: Company Commitments and Community Consent*. The report examined the positions of Australian mining and oil and gas companies, regarding the participation of Indigenous peoples in decisions affecting them. The report made a number of findings, including that less than 25% of the 53 ASX 200 extractive companies considered in the report had a public statement respecting the rights of Indigenous peoples, two companies had a public commitment to adhere to the UNDRIP or ILO Indigenous and Tribal Peoples Convention, and one company had a public commitment to free, prior and informed consent.

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\(^{346}\) See the ASX Corporate Governance Council, above n 141, recommendations 1.5 and 3.1.

\(^{347}\) The study was entitled *Labour and Human Rights Standards in Corporate Australia* (sponsored by LUCRF Super, commissioned by Australian Council of Super Investors).
We acknowledge that it is difficult to capture accurately all company activity relevant to human rights due diligence by review of publicly available material alone. The Stocktake’s findings should be read bearing this in mind.

The Company Survey found that:

(a) 2 of the ASX 50 reported, or made statements indicating, that they conduct specific human rights impact assessments or due diligence.

(b) 8 of the ASX 50 reported, or made statements indicating, that they expressly incorporate human rights into broader due diligence processes.

(c) 3 of the ASX 50 reported, or made statements indicating, that they conduct assessments or analyses of human rights impacts.

The sector breakdown of these 13 companies is as follows:

• Financials – 6 of 20 companies;
• Materials (which includes metals, minerals and mining companies) – 2 of 8 companies;
• Consumer staples – 4 of 4 companies; and
• Energy (which includes oil and gas companies) – 1 of 5 companies.

(d) None of the Private 10 reported having similar processes.

Statements and publicly available information relating to human rights due diligence practices vary in their detail. Some companies outline the different steps taken in the due diligence process, and others simply state that human rights due diligence is undertaken.

Human rights due diligence was also discussed at each of the Australian Dialogues. The challenges and significant time associated with carrying out thorough human rights due diligence were acknowledged, together with the need for continual reassessment, especially in companies with large supply chains. At the 2016 Australian Dialogue the issue of transparency was also explored in this context. It was noted that human rights impact assessments are not usually made public due to confidentiality concerns and other sensitivities (including for impacted people). However, it was observed that where possible, disclosing impact assessments can build trust and accountability.

The Australian Dialogues noted that effective human rights due diligence requires companies to better understand the language of human rights, and where it overlaps with existing business functions, areas or risks, like safety. This was considered to be a particularly significant challenge given the need for businesses to understand where certain operations may impact human rights, and to be able to identify and address these risks accordingly.

**UNGP 17 provides:**

In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:

(a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;

(b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;

(c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise’s operations and operating context evolve.
2.3.3 UNGP 18

**UNGP 18 provides:**

In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should:

(a) Draw on internal and/or independent external human rights expertise;

(b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.

As with broader human rights related due diligence, we acknowledge that it is difficult to capture accurately all company activity relevant to assessing human rights impacts by review of publicly available material alone. The Stocktake’s findings should be read bearing this in mind.

The commentary to UNGP 18 notes that the process of assessing human rights impacts should occur regularly, because human rights issues can readily evolve. It emphasises undertaking human rights due diligence prior to a proposed business activity as well as prior to major decisions or changes in the operation, in response to or in anticipation of changes in the operating environment and periodically throughout the life of an activity or relationship. Therefore, assessment of human rights impacts should not be reactive.

Participants at the Australian Dialogues demonstrated that there is an increasing awareness of what is involved in assessing human rights impacts among participants. However, it was also noted that Australian companies may not always appreciate their supply chain links to higher-risk contexts, and may only consider the human rights issues in their supply chain after a significant incident, such as the 2013 Rana Plaza building collapse in Bangladesh. At the 2016 Australian Dialogue, it was noted that while supply chain audits can be a useful tool in identifying human rights risks, ‘there are also benefits of moving beyond auditing towards an approach focused on building long term relationships with suppliers’. Supply chain audits may have limitations, especially if they are conducted over a short period, are not truly independent, or are conducted by inexperienced auditors. They also may not capture specific issues like differential impacts on women and girls (such as sexual harassment in the workplace).

The *Australian Minerals Industry & Human Rights: Managing Human Rights Risks and Opportunities through the UN Guiding Principles on Business and Human Rights* publication provides a case study of a mining company that undertook human rights impact assessments between 2010 and 2013 and gives details of one of the company’s human rights impact assessment methodologies that was applied to the company’s operations in Australia. That methodology involved:

(a) research into the human rights context;

(b) identifying and prioritising the human rights that are most likely to be material to the operations in question;

(c) stakeholder engagement;

(d) analysing and making practical recommendations in relation to systems, practices and grievance mechanisms; and

(e) reporting on findings and recommendations.\(^{348}\)

UNGP 18 also refers to businesses engaging in meaningful consultations with stakeholders. Providing a voice to local communities (including Indigenous communities) was identified as a key priority at the 2015 and 2016 Australian Dialogues. It was noted at the Dialogue that each community faces unique issues, so consultation must be adapted to the specific circumstances of each case and should be guided by the principles of free, prior and informed consent. Building trust and a long-term relationship were noted as essential elements in the design of a human rights impact assessment.

The 2013 CAER and Oxfam Australia *Right to Decide* report (referred to in section 2.3.1 above) found that the companies surveyed largely did not make available details of how they engaged with Indigenous peoples, for example through policies on resettlement or grievance mechanisms. This finding is consistent with the results of the Company Survey, detailed at 2.3.2 above, in relation to

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human rights due diligence and assessing human rights impacts. Although some companies stated that they had such processes in place, details of those processes were usually not publicly available.

Civil society engages with Australian business regarding expectations relating to consultation with affected rights holders. For example, Oxfam Australia has a ‘Listening Project’, which details the experiences of affected communities. 349 Oxfam and the Melbourne Business School also hold annual Sustainable Mining Symposia, which discuss human rights issues and challenges in the mining sector. 350

2.3.4 UNGP 19

UNGP 19 provides:

In order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action.

(a) Effective integration requires that:

(i) Responsibility for addressing such impacts is assigned to the appropriate level and function within the business enterprise;

(ii) Internal decision-making, budget allocations and oversight processes enable effective responses to such impacts.

(b) Appropriate action will vary according to:

(i) Whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship;

(ii) The extent of its leverage in addressing the adverse impact.

Business alignment with UNGP 19 cannot be assessed meaningfully by reference to public statements or publicly available information. As a result, our comments are limited to a high-level consideration of discourse at the Australian Dialogues, and reference to the human rights policy of one ASX 50 company by way of example.

UNGP 19 relates to the horizontal integration within businesses of specific findings from assessing human rights impacts as well as general internal coherence around human rights performance. Participants in the 2015 Australian Dialogue identified that integration of human rights within businesses is an ongoing and evolving process, noting that while some companies have internal human rights working groups, many are still deciding how best to effectively achieve integration. At least one of the ASX 50 has publicly stated that it has an internal human rights working group, which helps the business to have a coordinated approach to human rights. 351

Participants at the 2015 Australian Dialogue also noted the importance of not ‘siloing’ human rights within a particular function, empowering individual employees to identify and respond to risks, and having empowered internal experts who can help other colleagues to understand key issues and also manage dilemmas on the ground. Relevant functions include but are not limited to sustainability, legal, compliance, procurement, health and safety, risk, environment, communities and security.

UNGP 19 also relates to taking appropriate action where a business contributes or may contribute to an adverse human rights impact. What will constitute ‘appropriate action’ may depend on a company’s business relationships and its leverage. The importance of working collaboratively and using collective influence was noted at the 2015 and 2016 Australian Dialogues, especially in regions with weak governance. Participants at the 2016 Australian Dialogue discussed examples of companies deciding either to walk away from operations in environments with weak governance, or to remain and attempt to use their influence to drive change. An important aspect of UNGP 19 is a company’s ability to appropriately use its leverage to address human rights impacts with which it is involved. A company is considered to have leverage when it has the ability to effect change in the wrongful practices of an entity that causes harm. In practice, this leverage may be exercised in a variety of ways. For example, one ASX 50 company explicitly requires its suppliers, customers or business partners to have or implement practices and policies that aim to ensure that human rights


are respected. The company also requires that human rights due diligence be conducted by, and requests human rights updates from, its suppliers, customers or business partners. Further, the company states that it can exercise its leverage by refraining from doing business, or exiting relationships, with companies that do not meet its standards for human rights compliance.

Relevantly to business relationships and leverage, there is also increased scrutiny on supply chain issues and a resulting trend that companies’ supplier codes of conduct now tend to deal with specific human rights issues, at least (for example) child labour and forced labour. Companies have recognised the importance of ensuring they are taking steps to eradicate slavery and human trafficking from their supply chains, with a number of companies lodging submissions with the Foreign Affairs and Aid Sub-Committee of the Parliament’s Joint Standing Committee on Foreign Affairs, Defence and Trade in relation to the inquiry into establishing a Modern Slavery Act in Australia.352

2.3.5 UNGP 20

**UNGP 20 provides:**

In order to verify whether adverse human rights impacts are being addressed, business enterprises should track the effectiveness of their response. Tracking should:

(a) Be based on appropriate qualitative and quantitative indicators;

(b) Draw on feedback from both internal and external sources, including affected stakeholders.

Tracking the effectiveness of a company’s responses to human rights impacts involves internal processes, about which information is not generally publicly accessible.

The UNGP Reporting Framework,353 which is designed to help companies report on human rights performance, includes questions on whether companies track and verify if their human rights responses are effective. The UNGP Reporting Framework has set up a database that ‘shows what companies say about how they are implementing the UNGPs’.354 The database now includes several Australian companies. Therefore, looking at the UNGP Reporting database and at the specific indicators on tracking can provide an insight into what tracking is being undertaken by the Australian companies that are included in the database.

The UNGP Reporting Database notes that one Australian company collects data on certain indicators that are relevant to human rights, such as the gender composition of the work force and health and safety. The company notes that although this data does not specifically monitor human rights impacts and responses, this data could be analysed for its alignment with human rights, and necessary adjustments could be made. It also notes that it continually monitors and evaluates how its operations affect communities and stakeholders, although this monitoring is not couched in human rights terms. Another Australian company refers to monitoring progress against targets and reporting on that progress in its Annual Review and Sustainability Report. A third company refers to engaging an auditor to measure the impact of its Reconciliation Action Plan programs.355

Participants at the 2015 and 2016 Australian Dialogues discussed the effectiveness of grievance mechanisms as indicators of systemic human rights impacts, and how they are being addressed. At the 2016 Australian Dialogue participants discussed an example of a grievance mechanism set up to address different impacts and provide different types of remediation. It was noted that it was critically important to consult with all stakeholders in relation to the operation of this mechanism, not just its establishment.

At the 2015 Australian Dialogue participants discussed that the lack of complaints to a company run mechanism may not indicate an absence of human rights impacts, but may in fact indicate an ineffective grievance mechanism. This was identified as highlighting the need to examine both qualitative as well as quantitative indicators when tracking performance.

2.3.6 UNGP 21

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As noted above in section 1.3.1(d)(i), the ASX Corporate Governance Principles recommend that a company listed on the ASX should disclose whether it has any material exposure to economic, environmental and social sustainability risks and, if it does, how it manages or intends to manage those risks. The commentary to the recommendation elaborates on the term 'social sustainability' by referring to the Australian Council of Superannuation Investors and the Financial Services Council ESG Reporting Guide for Australian Companies: Building the foundation for meaningful reporting, UN Global Compact's ten principles (which include two stand-alone human rights principles), the OECD Guidelines (which include a stand-alone human rights chapter) and the GRI.356 The 2016 Corporate Reporting in Australia: Progress in Disclosure of Sustainability Risks among S&P/ASX200 Companies report by the Australian Council of Superannuation Investors examined corporate reporting requirements during the first reporting period since the introduction of Recommendation 7.4 of the ASX Corporate Governance Principles and Recommendations, regarding economic, environmental and social sustainability risks (see above). While the report did not specifically address human rights, key findings of the report included that:

(a) There has been a continuing improvement in reporting practices in aggregate.
(b) There has been a 30% increase (from 42 companies in 2015 to 55 in 2016) in reporting against the GRI and a steady take-up of the GRI’s G4 guidelines. 357
(c) 57 companies (approximately 30% of the ASX 200) were assessed as providing either no reporting or only a basic level of information.

The UNGP Reporting Framework provides guidance for companies on reporting their progress towards implementation of the UNGPs. The related UNGP Reporting Database compiles publicly reported human-rights related information, where it is accessible to companies themselves and other stakeholders, such as investors. As noted above in section 2.3.5, only a small number of Australian companies have been surveyed using the UNGP Reporting Framework.

Other initiatives that collate information about companies’ human rights policies, processes and performance are the Corporate Human Rights Benchmark358 and the Business and Human Rights Resource Centre’s Company Action Platform.359 Although few Australian companies were included in these databases at the time of writing, the benchmarking criteria developed by these initiatives will likely influence how Australian companies report on human rights impacts as the databases expand over time. The Company Survey found that:

(a) 15 of the ASX 50 include some form of explicit reference to human rights in their Annual Report or Sustainability Report (or similar report relating to corporate social responsibility), with three having a dedicated human rights section in their Annual Report (although many more refer to human rights related issues, like discrimination).
(b) The content of these references varies between reports:

(i) The majority of dedicated human rights sections in Annual Reports and/or Sustainability Reports include a broad statement that sets out the company’s standards or commitment to human rights, the principles that guide the company, and the training programs and processes implemented by the company. They then

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356 See the ASX Corporate Governance Council, above n 141, recommendation 7.4, footnote 40.
357 The G4 Guidelines contain detailed human rights aspects, see the G4 materials available at: https://www.globalreporting.org/information/g4/Pages/default.aspx.
358 The pilot benchmark was released on 13 March 2017, see https://www.corporatebenchmark.org/, shortly prior to publication of this Stocktake.
usually summarise the work done by the company in the area of human rights, including any data, awards and programs. Some also include company targets for the next year.

(ii) Other references merely refer to the company human rights policy or the different initiatives to which the company is a signatory. Some sections contain a general commitment to upholding human rights or statement about respecting human rights of individuals (for example, in the OHS context);

(c) Two of the Private 10 include some form of explicit reference to human rights in a public report relating to sustainability or corporate social responsibility;

(d) Many of the above reports are in line with the GRI Guidelines – see section 2.3.8 below for more detail on the GRI or environmental, social and corporate governance reporting; and

(e) Seven of the ASX 50 have made statements on steps they have taken to ensure that slavery and human trafficking are not occurring in their supply chains or any parts of their business, under the Modern Slavery Act 2015 (UK). More Australian companies are expected to publish such statements in future reporting periods.

The 2015 Australian Dialogue included discussion around the benefits of disclosure as well as businesses' concerns about public disclosure of human rights issues, including in terms of the potential for reputational and financial risk, damage to relationships or risks for stakeholders. As noted at 2.3.2 above, at the 2016 Australian Dialogue participants discussed the benefits of disclosure of human rights impact assessments, and outlined a number of options for how this might be achieved.

2.3.7 UNGP 22

**UNGP 22 provides:**

Where business enterprises identify that they have caused or contributed to an adverse human rights impact, they should provide for or cooperate in their remediation through legitimate processes.

The commentary to UNGP 22 notes that even with the best policies and practices in place, a company may nonetheless cause or contribute to an adverse human rights impact. In these instances the UNGPs provide that businesses should provide for or cooperate in their remediation through legitimate processes. In addition to setting out the expectations of businesses that identify that they have caused or contributed to an adverse human rights impact, the commentary to UNGP 22 also highlights that where adverse impacts have occurred that the business enterprise has not caused or contributed to, but which are directly linked to its operations, products or services by virtue of a business relationship, the responsibility to respect human rights does not require that the enterprise itself provide for remediation, though it may take a role in doing so.

Grievance mechanisms can be an effective mechanism for enabling remediation and as such are an important part of the corporate responsibility to respect human rights. UNGP 31 describes the characteristics of effective grievance mechanisms, including stating that operational-level grievance mechanisms should be based on engagement and dialogue. Stakeholder groups for whose use the grievance mechanisms are intended should be consulted on their design and performance, and the mechanism should focus on dialogue as the means to address and resolve grievances.

Although grievance mechanisms can serve to enable remediation, the focus of UNGP 22 is on providing for or cooperating and playing a role in remediation, based on the level of involvement of the company in the harm. The Company Survey found that 3 of the ASX 50 expressly state in their human rights policy or statement that they will remediate adverse impacts.

The Final Statements made by the Australian OECD National Contact Point in relation to specific instance complaints can provide examples of company cooperation in the remediation of adverse impacts through legitimate processes. The Final Statements may include information such as a summary of any mediation or whether the parties refused to take part in mediation. 360

Of the three Final Statements that have been published in which the complaint was accepted and examined, two record that the company in question participated in meetings and/or a mediation, and one records that the company refused to participate in face to face discussions. 361

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At the 2016 Australian Dialogue, it was noted that in July 2016 the UN Human Rights Council had adopted a resolution which, amongst other things, called on businesses to participate in good faith in judicial processes around remediation.

2.3.8 UNGP 23

UNGP 23 provides:
In all contexts, business enterprises should:
(a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate;
(b) Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements;
(c) Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.

UNGP 23 relates to assessing and responding to differing levels of human rights risks that may be present when businesses operate in different countries, communities and sectors. The Company Survey found that 4 of the ASX 50, when discussing compliance with local laws and international standards, explain how they will address a situation in which the different norms may be in conflict. Broadly, they will comply with domestic law but also apply an international standard, if that affords greater rights protection. However, companies generally say that they will comply with local law, implying that they may not apply international standards if prohibited by domestic law. One of the companies had a different formulation, stating that it considers human rights commitment to be satisfied by completion of host government processes or compliance with domestic laws where they are consistent with the principles of ICMM Position Statement on Indigenous Peoples and Mining.

The commentary to UNGP 23 notes that companies can draw on external expertise, including from multi-stakeholder initiatives, in order to assess how best to respond to particular circumstances. Numerous Australian companies participate in voluntary initiatives that aim to uphold human rights. The Company Survey found that:
(a) 22 of the ASX 50 have publicly stated that they participate in voluntary human rights initiatives. The companies are from the following sectors:
   • Financials – 8 of 20 companies;
   • Telecommunications – 1 of 1 company;
   • Materials (which includes metals, minerals and mining companies) – 4 of 8 companies;
   • Consumer staples – 4 of 4 companies;
   • Energy (which includes oil and gas companies) – 2 of 5 companies;
   • Industrials – 2 of 6 companies; and
   • Utilities – 1 of 2 companies.
(b) One of the Private 10 has publicly stated that it participates in voluntary human rights initiatives.

The ASX 50 and Private 10 companies are not the only Australian companies to participate in voluntary human rights related initiatives. The following examples of initiatives, standards and organisations, grouped by sector, all involve some level of participation by Australian companies and can be seen as furthering business respect for human rights.362

General
(a) The UN Global Compact
The GCNA,363 as discussed above at 1.3.1(c)(v)(B) has 79 members (59 businesses, 3 business associations, 10 non-profit organisations and 7 academic institutions).364

362 Note that not all of the below initiatives include express human rights principles or guidance and of those that do, the extent of their focus on human rights varies.
Global Reporting Initiative Reporting Guidelines

The GRI is an international independent standards organisation that produces reporting standards and frameworks for various sectors on human rights and other sustainability issues. The GRI Sustainability Reporting Guidelines (GRI Reporting Guidelines) include reporting categories for the existence and performance of human rights, labour practices, social impact and environmental grievance mechanisms. The guidelines are cross-referenced to the OECD Guidelines for Multinational Enterprises. 120 Australian organisations published sustainability reports with content reflecting the latest GRI Reporting Guidelines (the G4 Guidelines).

Ethical Trading Initiative

The Ethical Trading Initiative is a multi-stakeholder initiative focussing on labour rights in various sectors, including garments, fresh produce and stoneware. The initiative involves companies, trade unions and NGOs with a reputation for human rights advocacy. The initiative has three Australian participants.

Finance sector

Equator Principles

The Equator Principles are a ‘financial industry benchmark for determining, assessing and managing environmental and social risk in projects’, that are underpinned by the IFC Performance Standards. The principles have been widely adopted by financial institutions as governing their approach on financing projects in emerging markets. The Equator Principles were reviewed for alignment with the UNGPs in 2012. There are five Australian participants in the Equator Principles.

Principles for Responsible Investment

The Principles for Responsible Investment are an investor initiative which encourages companies in the finance sector to consider environmental, social and governance factors when making all financing and investment decisions. The Principles for Responsible Investment partners with the UN Environment Program Finance Initiative and UN Global Compact. The Australian signatories fall into the following categories: 34 asset owners, 72 investment managers and 13 service providers.

Resources/extractives sector

Diamond Development Initiative

The Diamond Development Initiative is a multi-stakeholder initiative focused on labour rights and the Millennium Development Goals, in the context of the social and economic issues faced by artisanal diamond diggers in Africa and South America. One Australian company participates in the Diamond Development Initiative.

Voluntary Principles on Security and Human Rights

The VPs, discussed above at 1.3.1(c)(v)(D) and 1.3.6(a)(iv), are a multi-stakeholder initiative developed to give guidance to the extractive industry in balancing the promotion of security with the preservation of human rights, especially security and conflict-related human rights. They address risk assessment, interactions between companies and public security, and interactions between companies and private security. Companies, NGOs and governments can participate. Australia is one of 10 government participants and there are 5 Australian company participants.

367 Note that there are different levels of adherence to the GRI Guidelines, with the lowest level being a report which does not declare that it is ‘in accordance with’ the GRI Guidelines, but does contain a GRI Content Index (i.e. refers to the disclosure topics contained in the GRI Guidelines). Note also that not all 120 organisations are public or private companies, for example some universities are included in the list.
368 See generally http://www.ethicaltrade.org/.
372 See generally https://www.unpri.org/.
374 See generally http://www.ddiglobal.org/.
376 See generally http://www.voluntaryprinciples.org/.
377 The five companies referred to are those headquartered in Australia. Other participants have Australian subsidiaries or Australian members of their corporate group, but are headquartered elsewhere, so have not been included in this total. See http://www.voluntaryprinciples.org/for-companies/.
Garment sector

(h) Accord on Fire and Building Safety in Bangladesh
The Accord[^379] is an agreement between global brands, retailers and trade unions focusing on labour rights - specifically health, safety and the environment, building safety and trade union rights in Bangladeshi textile and garment sectors. There are 11 Australian participants.[^379]

(i) Better Cotton Initiative
The Better Cotton Initiative[^380] is a multi-stakeholder organisation with members from civil society, producers, retailers, brands, suppliers, manufacturers and independents. There are 5 Australian participants (4 companies and 1 industry group).[^381]

(j) Better Work
Better Work[^382] is an industry initiative focusing on labour rights. It is funded by the ILO and IFC and involves governments, global brands, factory owners, and unions and workers in various countries including Indonesia, Cambodia, Thailand, Vietnam and Bangladesh. Better Work has 1 Australian participant.[^383]

(k) Fair Labour Association
The FLA[^384] is a multi-stakeholder initiative that promotes respect for labour rights in global footwear and a apparel supply-chains. There is 1 Australian participant.[^385]

Consumer sector

(l) Ethical Tea Partnership
The Ethical Tea Partnership[^386] is an industry-led initiative with tea company and retailer members, focussed on labour rights. It provides standards and certification for producers and brands. The Partnership has 1 Australian participant.[^387]

(m) Fairtrade Certification
Fairtrade Certification[^388] is an independent certification initiative whereby companies and producers can apply to have their commodities certified as Fairtrade by demonstrating compliance with standards relating to economic and labour rights. There are 192 Fairtrade licensees and traders in Australia.[^389]

(n) Rainforest Alliance
The Rainforest Alliance[^390] is a multi-stakeholder certification program with a broad sustainability focus, including on ILO core labour rights. Approximately 50 brands sold in Australia are certified under the Rainforest Alliance program.[^391]

Forestry sector

(o) Forest Stewardship Council
The Forest Stewardship Council[^392] is a multi-stakeholder certification initiative focussed on sustainability, Indigenous peoples’ rights, and workers’ rights. The initiative includes economic members, environmental members and social members. The Council has 54 Australian member companies, 12 Australian retail supporters, 8 certified Australian paper brands and more than 100 certified Australian printers.[^393]

The Roundtable on Sustainable Palm Oil (RSPO) 394 is a multi-stakeholder standards and certification initiative for sustainable palm oil, focusing on Indigenous peoples’ rights, labour rights and ILO standards in palm oil supply chains. The membership base and the board are comprised of growers, manufacturers, retailers, financiers and NGOs. The Roundtable has 114 Australian participants. 395

2.3.9 UNGP 24

**UNGP 24 provides:**

Where it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable.

At the 2014 Australian Dialogue it was noted that human rights impacts differ in their severity. It was suggested that company grievance mechanisms may not be apt to handle particularly egregious abuses, such as sexual violence, which should instead be referred to judicial procedures (with a view to the sensitivities of the victim).

A representative of one ASX 50 company interviewed for the Human Rights in Supply Chains: Promoting Positive Practice report referred to the need to prioritise specific risks when the company became aware of them. 396

The UNGP Reporting Framework encourages companies to identify and state salient human rights issues associated with the company’s activities. A small number of Australian companies have been surveyed using the UNGP Reporting Framework and the issues that they identify as salient are provided. By way of example, one mining company identified gender, cultural heritage and workplace safety (amongst other issues) as focuses for reporting, and one bank identified forced and child labour, illegal land acquisition and free, prior and informed consent as focuses for their due diligence processes. These are general statements and are not made in the context of prioritising responses to specific human rights impacts. Nonetheless, identifying salient issues allows companies to prioritise actions, as described in UNGP 24. 397

The potential for severe human rights impacts to occur within Australia, and not just in overseas operations and supply chains, is demonstrated by the reports of labour rights breaches, detailed at 2.2.1 above. Participants in the 2016 Australian Dialogue discussed these risks and the need for companies to examine their Australian supply chains. As noted in above in section 2.3.3 and 2.3.4, some companies are undertaking supply chain audits and prioritising risk management within complex supply chains in order to be better placed to respond to various human rights risks that may be connected to a company’s operations.

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394 See generally [http://www.rspo.org/about](http://www.rspo.org/about).
Pillar 3: Access to Remedy
Under Pillar 3 of the UNGPs, as part of a State's duty to protect against business-related human rights abuse, where such abuses occur within their territory and/or jurisdiction, Australia should take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that those who are affected have access to effective remedy.

There is a close relationship between Pillars 1 and 3, with Pillar 1 setting out the State's duty to protect against abuses and Pillar 3 requiring the provision of access to remedy for abuses. Consequently, there is significant cross-referencing between these sections of the Stocktake.

The commentary to the UNGPs notes that '[a]ccess to effective remedy has both procedural and substantive aspects'. Remedies may include apologies, restitution, rehabilitation, financial and non-financial compensation and punitive sanctions, as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition. The UNWG Guidance on NAPs suggests that a 'smart mix' of mandatory and voluntary, international and national measures is likely to be the most effective in addressing adverse impacts linked to corporate behaviour.

### 3.1 Methodology

This section of the Stocktake surveys the extent of Australia's implementation of Pillar 3 of the UNGPs. The Stocktake of Pillar 3 involved a review of:

- **State-based judicial mechanisms** for providing access to remedy for corporate human rights violations, including corporate criminal liability, civil liability, administrative sanctions, notions of secondary liability, and barriers to remedy;
- **State-based non-judicial mechanisms**, including dispute resolution mechanisms accessed via Government agencies and entities, including the OECD National Contact Point and relevant Ombudsmen; and
- **Grievance mechanisms**, including mechanisms supported by Australia at the international and regional levels, as well as voluntary collective and multi-stakeholder mechanisms in which Australian businesses and, in some cases, the Australian Government participate.

UNGP 31 sets out the criteria for effective non-judicial grievance mechanisms. As it is beyond the remit of this Stocktake to analyse the effectiveness of the mechanisms and remedies set out in this section, the implementation of UNGP 31 has not been covered in this Stocktake. Nevertheless, the Stocktake may provide a basis for which future analysis can be conducted on the implementation of UNGP 31 and the effectiveness of the mechanisms and remedies identified in the Stocktake.

#### (a) State-based judicial mechanisms

In a recent report by the UN High Commissioner for Human Rights, it was noted that effective state-based judicial mechanisms are 'at the core of ensuring access to remedy'.

In this light, the Stocktake aims to identify the key gateways to accessing remedies against companies for human rights-related impacts in Australian courts.

In particular, this section considers the criminal and civil law mechanisms that are in place in Australia where business-related human rights grievances can be raised and addressed, including the ability of these mechanisms to provide access to remedy for harms experienced extraterritorially. It also identifies modes of liability under the criminal and civil regimes, and considers the types of remedies that are available through the courts to provide redress for business-related human rights abuses.

Financial and procedural barriers to access to remedy and measures taken by the Federal and state governments to alleviate financial and procedural obstacles to bringing legitimate cases before the courts are also considered.

#### (b) State-based non-judicial mechanisms

There are a number of State-based non-judicial mechanisms available in Australia. The importance of such remedies is highlighted by UNGP 27, which requires the provision of effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.

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399 UNWG Guidance on NAPs, above n 5, 28.
400 Ibid, 12.
401 OHCHR Report, above n 318, 3 [3].
In this section, the Stocktake identifies available State-based non-judicial mechanisms, including mediation-based mechanisms, adjudicative mechanisms and other relevant mechanisms. These include grievance mechanisms available through the AHRC, the OECD National Contact Point, ombudsmen at the Federal, state and territory levels, and other relevant grievance mechanisms.

(c) Non-State-based grievance mechanisms

Grievance mechanisms are the focus of UNGPs 28-31, and form an important aspect of access to remedy. This review is divided into two sub-categories: access to remedy at the international level, and industry and operational-level mechanisms to which Australian businesses have committed.

The first sub-category has been further broken down into three classes of international-level grievance mechanisms: UN, World Bank, and regional mechanisms.

The second sub-category of grievance mechanisms considered are voluntary grievance mechanisms related to collective or multi-stakeholder initiatives that may be available to persons affected by Australian business operating anywhere in the world, due to a commitment by the company to submit to a specific dispute resolution process. The review is limited to mechanisms that were found to have been adopted by Australian business as identified under Pillar 2.

While company-level operational grievance mechanisms are the focus of UNGP 29, only high-level commentary is provided in relation to implementation of this aspect of access to remedy due to the fact that it remains uncommon for Australian companies to provide detailed public information on how their grievance mechanisms work in practice.

3.2 Foundational Principles

3.2.1 UNGP 25

**UNGP 25 provides:**

As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.

This section outlines the availability of access to remedy under Australia's criminal, civil and administrative law. It considers the processes and avenues available for access to effective remedy, but does not focus on the decisions of Australian courts (including what these decisions may mean for future jurisprudence).

(a) Remedies under criminal law

(i) Overview

As noted in Pillar 1 at 1.2.1(c)(iii)(A), Australia's criminal law provides certain remedies at the Federal, state and territory levels for business and human rights-related offences.

In order for a remedy to be accessed under Australia's criminal law against a corporation:

- all the elements of the offence must be made out;
- corporate liability must be established under statute or at common law;
- the standard of proof must be met; and
- no defences must be available to the corporation.

If the above criteria are met, the court will determine an appropriate remedy. There are a number of aims that Australian courts will consider in determining an appropriate remedy. Those aims are:

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402 ICAR/DIHR Toolkit, above n 6, 139.
403 The relevant standard of proof that the prosecution must satisfy is beyond reasonable doubt.
• to punish the offender;
• to deter the offender from committing further crimes and deter others who may contemplate committing similar offences;
• to achieve retribution;
• to rehabilitate the offender; and
• to protect the community from the offender. 404

(ii) Corporate liability under the Criminal Code

(A) Primary liability under the Criminal Code

At the Federal level, the Criminal Code is the key criminal law. A body corporate may be found guilty of any offence in the Criminal Code, including one punishable by imprisonment, 405 if the requirements for corporate criminal responsibility set out at Division 12 of Part 2.5 are met.

The majority of offences under the Criminal Code contain both physical and mental elements. Pursuant to s 12.3, if a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the scope of their actual employment, or within their actual or apparent authority, the physical element must also be attributed to the body corporate. The concept of ‘scope of employment or authority’ is wide, and can cover illegal conduct. The distinction drawn by the courts is between ‘a mode, albeit improper, of doing that which the employee is employed to do and conduct which is outside the scope of the employee’s employment’. 406

As to the mental element, intention or knowledge is attributed to a company if the company expressly, tacitly or impliedly authorises or permits the commission of an offence. The means by which such an authorisation or permission may be established include:

• proving the corporation’s board of directors intentionally or knowingly carried out the relevant conduct or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
• proving that a high managerial agent of the corporation intentionally or knowingly engaged in the relevant conduct or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
• proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the offence provision; or
• proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

The corporate culture provisions in the Criminal Code are a relatively innovative feature of Australia’s criminal law system. Corporate culture is defined as an ‘attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.’ 407 Factors relevant to determining whether corporate culture allowed the conduct include whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation that a high managerial agent of the body corporate would have authorised or permitted the offence. 408

405 Criminal Code s 12.1(1); Crimes Act 1914 (Cth) s 4B.
407 Criminal Code s 12.3(6).
408 Criminal Code s 12.3(4).
The Criminal Code also provides that where negligence is a fault element of an offence, the conduct of the corporation's employees, officers or agents will be viewed as a whole. Therefore, a corporation can be found negligent, even if the physical act of an employee, agent or officer was not in itself negligent. A corporation may be found negligent in circumstances where the prohibited conduct was substantially attributable to inadequate corporate management or supervision, or where there was a failure to provide adequate systems for conveying relevant information to persons in the body corporate.

Where an offence is one of strict liability, there are no fault elements for any of the physical elements of the offence.

(B) Ancillary liability under the Criminal Code

Part 2.4, Division 11 of the Criminal Code provides for ancillary offences for which a corporation may be held liable, including attempt, complicity, incitement and conspiracy. Both the physical and fault elements must be established in order for a corporation to attract secondary liability for an offence under the Criminal Code.

For example, for the offence of complicity, the physical element of any offence will be established and attributed to a corporation if it is proven that a corporation's conduct in fact aided, abetted, counselled or procured the commission of the offence and the offence was committed by the other person. The mental element will be the intention to aid, abet, counsel or procure the commission of an offence.

(iii) Defences under the Criminal Code

Defences available to corporations under the Criminal Code include the defence of due diligence. Where misconduct is committed by a high managerial agent, the corporation will not be liable if it can prove that it 'exercised due diligence to prevent the conduct, or the authorisation or permission'. Similarly, the Criminal Code provides that, in cases of strict or absolute liability offences, it is a defence if a corporation can show that 'the employee, agent or officer of the body corporate who carried out the conduct was under a mistaken but reasonable belief about facts that, had they existed, would have meant that the conduct would not have constituted an offence,' and 'the body corporate proves that it exercised due diligence to prevent the conduct.'

(iv) State criminal laws

In addition to the Federal offences discussed above, each Australian state and territory has its own criminal legislation, each of which extends to cover bodies

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409 Criminal Code s 12.4(2).
410 Criminal Code s 12.4(3).
411 Criminal Code s 6.1(1).
412 The Criminal Code provides for an offence of attempting to commit a principal offence and stipulates that the attempt carries the same penalty as the principal offence: Criminal Code s 11.1. It is not a requirement that any of the conduct in the 'attempt' offence occur in Australia, however the principal offence must include some conduct which is intended to occur in Australia.
413 The Criminal Code provides that a person who aids, abets, counsels or procures the commission of a principal offence by another person is taken to have committed that offence: Criminal Code s 11.2(1). It is not a requirement that any of the conduct in the 'complicity' offence occur in Australia, however the principal offence must include some conduct which is intended to occur in Australia. Under s 11.2(1), a corporation may be liable for aiding and abetting an offence committed by one of its employees. This provision requires that the offence actually be committed by the other person, and for the secondary party's conduct to have in fact aided, abetted, counselled or procured the commission of that offence. This requires intention or recklessness to aid or abet on the part of the secondary party.
414 The Criminal Code provides that a person who urges the commission of a principal offence by another person is guilty of the offence of incitement: Criminal Code s 11.4. None of the conduct in the 'inciting' offence need occur in Australia, however the principal offence must include some conduct which is intended to occur in Australia.
415 The Criminal Code provides that a person who conspires with another person to commit a principal offence is guilty of the offence of conspiracy to commit the principal offence and is punishable as if the principal offence had been committed: Criminal Code s 11.5. None of the conduct in the 'conspiring' offence need occur in Australia, however the principal offence must include some conduct which is intended to occur in Australia.
416 Criminal Code s 11.2.
417 Criminal Code s 11.2(3).
418 Criminal Code s 12.3(3). The term 'due diligence' is not defined in the Criminal Code, but section 12.5 provides that 'inadequate corporate management' or 'failure to provide adequate systems for conveying relevant information' are evidence of a lack of due diligence.
419 Criminal Code s 12.5.
Similarly to Australia’s Federal criminal law regime, the majority of the offences under Australian state and territory criminal law require both the physical element and mental element of the offence to be satisfied in order to attribute liability to a corporation. The necessary elements will vary depending on the offence.

(v) Criminal or quasi-criminal offences in other laws concerning business

As discussed in Pillar 1, there are a number of other criminal or quasi-criminal offences relevant to business human rights harms, for which remedies in the form of criminal sanctions may be available against corporations. Examples include:

- Offences under the Corporations Act, as outlined at 1.2.1(d)(ii)(A) above;
- Offences under the ACL for false or misleading representations and consumer transactions;
- Offences under the Competition and Consumer Act for cartel conduct;
- As referred to above at 1.2.1(c)(iii)(D), the Autonomous Sanctions Act 2011 (Cth) includes criminal offences for corporations that contravene sanctions laws and failed to take reasonable precautions or due diligence to prevent the contraventions from occurring; and
- The DFD Act, discussed above at 1.2.1(c)(iii)(A), allows for offences committed by members of the Australian Defence Force (ADF) to be dealt with by military tribunals. The DFD Act provides for persons accompanying the ADF outside of Australia or on operations against the enemy to be ‘defence civilians’, which places them on ‘roughly equal footing with ADF members’. However, such persons must consent (in writing) to being a defence civilian. Therefore, defence contractors who do not consent to being a defence civilian do not fall within the reach of the DFD Act.

Nonetheless, those contractors may come within the reach of the Crimes (Overseas) Act 1964 (Cth), which extends criminal law to Commonwealth contractors in ‘declared foreign countries’. However, the Crimes (Overseas) Act 1964 (Cth) only applies to Australian citizens and permanent residents who are contracted by the Government.

(vi) Common law crime

A company can be found primarily or vicariously liable for crimes under Australian common law. However, as this is ‘judge made’ law rather than the result of governmental action, it is not a focus of the Stocktake.

(vii) Sanctions and relief on successful prosecution

An individual from a corporation can be held criminally liable for committing a criminal offence, however, this is not a focus of the Stocktake. The most common sanction for a corporation found criminally liable is a finding of guilt and a pecuniary penalty.

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420 In New South Wales, ‘person’ includes an individual, a corporation and a body corporate or politic: Interpretation Act 1987 (NSW) s 21. In Victoria, ‘person’ includes a body politic or corporate as well as an individual: Interpretation of Legislation Act 1984 (Vic) s 38. In Queensland, in an Act, a reference to a person generally includes a reference to a corporation as well as an individual: Acts Interpretation Act 1994 (Qld) s 32D(1). In Western Australia, ‘person’ or any word or expression descriptive of a person includes a public body, company, or association or body of persons, corporate or unincorporated: Interpretation Act 1998 (WA) s 5. In South Australia, ‘person’ or ‘party’ includes a body corporate: Acts Interpretation Act 1915 (SA) s 4. In Tasmania, every provision of an Act elating to offences punishable upon indictment or upon summary conviction shall be construed to apply to bodies corporate as well as to individual persons. Further, in any Act the expressions person and party respectively shall include any body of persons, corporate or unincorporate, other than the Crown: Acts Interpretation Act 1931 (Tas) ss 35, 41. In the Northern Territory and the ACT, a reference to a ‘person’ includes a body corporate as well as an individual: Acts Interpretation Act 1992 (Cth) s 2C.

421 ACL ch 4 pt 4-1 div 1.
422 ACL ch 4 pt 4-2.
423 Competition and Consumer Act pt IV div 1 sub-div B.
424 Autonomous Sanctions Act 2012 (Cth) ss 16(5)(9).
425 Rain Liivoja, ‘Out of sight, out of mind, out of reach?’ (2016) 1 Australian Red Cross International Humanitarian Law Magazine 17.
426 DFD Act s 3.
427 Crimes (Overseas) Act 1964 (Cth) s 3.
(A) Penalties

At the Federal level, 'penalty unit' is defined in the Crimes Act 1914 (Cth) (Crimes Act). A 'penalty unit' is currently defined, under the Crimes Act, to mean the amount of $180. However, on 1 July 2017, the amount of a 'penalty unit' will increase to $210. The Crimes Act allows a court to impose a pecuniary penalty instead of, or in addition to, a term of imprisonment. Unless otherwise specified, if a body corporate is convicted of the offence, a court can impose a fine of an amount not greater than five times the maximum fine that the court could impose on an individual convicted of the same offence. The table at Annexure B summarises the criminal penalties for corporations in relation to the offences outlined at 1.2.1(c)(iii) above from 1 July 2017.

Similar principles apply in Australia's state and territory criminal law regimes. For example, the Penalties and Sentences Act 1992 (Qld) and the Sentencing Act 1995 (WA) provide that the maximum fine for a body corporate is five times the maximum amount that could be imposed if the offender were an individual.

(b) Victims of crimes assistance

Each state and territory in Australia provides assistance and support for victims of particular crimes that result in physical, mental or other types of harm or injury (as defined on a state by state basis). In some states, such as Victoria, it is not necessary for the perpetrator to have been charged by the police or to have been found guilty at court as a precursor to support being granted under the relevant legislation.

Generally, primary victims, secondary victims, and related victims are eligible for support under the relevant legislation. Types of support available include counselling services, financial assistance (generally up to a cap), financial compensation, and legal costs. This support is theoretically available to victims of corporate crime, provided that corporate liability for the crime can be demonstrated.

(b) Remedies under civil law

(i) Overview

Importantly, unlike much of criminal law, remedies for breaches of a corporation's civil law obligations are directed to the affected person. Available remedies can be accessed directly through the courts.

In order for an affected person to access a remedy against a corporation under Australian civil law:

- all the elements of the unlawful act must be made out;
- corporate liability must be established; and

- the police or to have been found guilty at court as a precursor to support being granted under the relevant legislation.

Generally, primary victims, secondary victims, and related victims are eligible for support under the relevant legislation. Types of support available include counselling services, financial assistance (generally up to a cap), financial compensation, and legal costs. This support is theoretically available to victims of corporate crime, provided that corporate liability for the crime can be demonstrated.

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- all the elements of the unlawful act must be made out;
- corporate liability must be established; and

• no defences must be available to the corporation.

If those elements can be established, the court may grant the affected person a remedy.

We have included analysis of liability and relief available under statute, as well as under common law. The latter is provided for completeness, though as noted at 3.2.1(a)(vi) above, this is 'judge made' law and so not the focus of the Stocktake.

(ii) Elements of cause of action

An affected person must make out the elements of an unlawful act before corporate liability is considered. The burden of proof is on the complainant, who must be able to establish the claim to an evidentiary standard of the balance of probabilities.

(iii) Civil corporate liability

In Australia, a corporation is afforded a separate legal personality from its shareholders and directors439 and is afforded the legal capacity and responsibility of a natural person within and outside the jurisdiction in which it is registered or incorporated.440 Corporate liability typically arises pursuant to statute, or in private law through primary liability or vicarious liability.

(A) Corporate liability under statute

As discussed above at 1.2.1, corporations can be held directly liable under statute for a number of human rights-related breaches of domestic law.

(B) Corporate liability under private law

Primary liability

A corporation can have primary liability for the commission of torts or breaches of equitable causes of action under Australian law. In these circumstances, the act or omission of the person engaging in the breach of law must be directly attributed to the corporation. Liability will depend on whether the corporation had the requisite knowledge. This requires the state of mind of the person or persons who engaged in the breach of law also to constitute the corporation's 'directing mind', to the extent that this can be imputed to the corporation itself.441 As the House of Lords held in Tesco Supermarkets Ltd v Nattrass (and later adopted in Australia),442 where an employee, director or agent has such a degree of control or influence over a company, the person will be acting as the corporation, rather than for the corporation.443

Vicarious liability

A corporation can be held vicariously liable for certain actions of its directors, officers or employees when they are within the scope of employment.444 The concept of 'scope of employment' has been interpreted widely by the courts.445 Vicarious liability may extend to acts that are specifically prohibited by law and/or by corporate policy if such acts are performed in the scope of employment.446

In most cases, liability of a corporation can be imposed vicariously, meaning that it is not necessary to determine the directing mind of the

439 Salomon v Salomon & Co [1897] AC 22. This notion has been recognised in the statutory and common law regime that governs Australian corporations. Section 5 of the Corporations Act defines an 'entity' to include an individual, a body corporate, an unincorporated body, a partnership or trustees. A company comes into existence as a body corporate at the beginning of the day on which it is registered and remains in existence until it is deregistered: Corporations Act ss 119, 601AD.

440 Corporations Act s 124.

441 Hamilton v Whitehead (1988) 166 CLR 121.


445 The High Court has endorsed the following formulation: 'an employer is liable even for unauthorised acts if they are so connected with authorised acts that they may be regarded as modes – although improper modes – of doing them, but the employer is not responsible if the unauthorised and wrongful act is not so connected with the authorised act as to be a mode of doing it, but is an independent act': New South Wales v Lepore (2003) 212 CLR 511, 536 (Gleeson CJ), quoting Salmond on Torts (9th ed, 1936) 94-5.

446 For example, in Nationwide News Pty Ltd v Naidu; ISS Security Pty Ltd v Naidu [2007] NSWCA 377, a corporation was found vicariously liable for the actions of a Fire and Safety Officer who engaged in bullying and harassment. The corporation argued that the conduct was therefore 'unauthorised' and not connected to his employment obligations. The New South Wales Court of Appeal found that 'the exercise of a brutalised form of control [by the Officer] was the performance of his actual tasks in an inappropriate manner' and therefore was sufficiently connected with his duties as Fire and Safety Officer.
company to establish primary liability. However, in some cases, it may still be necessary to establish primary liability, for example, where proof of a statutory defence requires reference to the conduct of the company itself.447

(iv) Defences

Due diligence has been described as ‘the converse of negligence’448 and in certain circumstances may be relied on by a corporation to argue that its duty of care was discharged. In general terms this will require either a statutory defence of due diligence to be expressly available, or for it to be relevant in terms of disproving a cause of action under private law.

In either circumstance, a corporation may argue that an extensive due diligence process indicates that the corporation took sufficient precautions to prevent the harm suffered by the plaintiff. In general, the extent of due diligence necessary in a given case will depend on what is deemed reasonable in the circumstances.449

Some examples of Australian laws that include due diligence defences are outlined at 1.3.1(d) above.

For certain torts, due diligence processes will have little effect on the liability of a corporation. For example, in the case of inherently dangerous goods (as opposed to hazards in an otherwise harmless good), the degree of requisite diligence has been described as amounting ‘practically to a guarantee of safety’450 that requires the corporation to observe ‘consummate care’451 ‘approaching, even if it does not attain, strict or absolute liability’.452

(v) Relief under civil law

(A) Breach of statute

Where statutory requirements have been established in respect of particular breaches of Australian laws, remedies can be provided pursuant to the specific statutory provisions.453 This can include statutorily prescribed penalties. The table at Annexure B summarises the civil penalties for breaches of relevant statutes that were outlined under Pillar 1. Damages may also be awarded by discretion of the court where not prescribed. This is discussed directly below.

Further, all of the Australian states and territories allow civil claims for wrongful death.454 Damages are awarded after determining the loss suffered by the claimants up to the date of the trial, and then by assessing the prospective detriment likely to be suffered.455 The extent of the loss suffered will include consideration of the lost earning capacity of the deceased and any substantial household services which the deceased had provided.456

(B) Principles regarding damages

In all Australian states and territories, persons affected by breaches of some of the statutory civil laws set out above at 1.2.1, or of tort law or contract law are generally able to obtain financial compensation in the form of damages. The amount of damages awarded is at the discretion of the court.

450 Donoghue v Stevenson [1932] AC 562, 612 (Lord Macmillan) endorsed in Adelaide Chemical & Fertilizer Co Ltd v Carlyle (1940) 64 CLR 514, 522-3 (Starke J); Burnie Port Authority v General Jones Pty Ltd (1994) 179 CLR 520, 554 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).
451 Adelaide Chemical & Fertilizer Co Ltd v Carlyle (1940) 64 CLR 514, 522-3 (Starke J).
453 For example, the following remedies can be granted for corporate breaches of the Racial Discrimination Act pursuant to s 46PO(4), together with any other order the Court sees fit: an order declaring that the respondent has committed unlawful discrimination and directing the respondent not to repeat or continue such unlawful discrimination; an order requiring a respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by an applicant; an order requiring a respondent to employ or re-employ an applicant; an order requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent; an order requiring a respondent to vary the termination of a contract or agreement to redress any loss or damage suffered by an applicant; or an order declaring that it would be inappropriate for any further action to be taken in the matter.
454 See, for example, Compensation to Relatives Act 1897 (NSW) s 3(1); Civil Proceedings Act 2011 (Qld) s 64; Wrongs Act 1958 (Vic) s 16.
In tort, compensatory damages are generally awarded to put the affected person in the same position he or she would have been in had the tort not been committed. The following damages may also be awarded in addition to compensatory damages:

- aggravated damages;
- exemplary damages; and
- nominal damages.

Where the court considers damages to be an inadequate remedy, injunctive relief may be awarded. Injunctive relief may be appropriate in order to prevent harm from happening or continuing.

(C) Relief under the Victorian Charter and ACT HRA Act

Both the Victorian Charter and the ACT HRA Act require courts to interpret laws in a way that is compatible with protected rights. Both international laws and judgments from domestic, foreign or international jurisdictions may be considered when interpreting a statutory provision. Neither instrument provides for damages to be granted as a remedy for breach and, in the case of the Victorian Charter, the provisions do not allow for a freestanding claim to a remedy.

However, both instruments allow the Supreme Court to grant remedies in the form of a declaration of inconsistent interpretation or a declaration of incompatibility, which may lead to a change of law. Further, the Victorian Charter protects individuals the right ‘to seek a declaration of unlawfulness and associated relief including an injunction’ in respect of an act or decision of a public authority.

(vi) Costs

The general rule in Australia is that ‘costs follow the event’. This means that in the exercise of the judicial discretion to award costs, the unsuccessful party in litigation generally is ordered to pay the costs of the successful party. With regard to ‘public interest’ litigation, courts have stated that there is no uniformity of judicial view as to whether ‘public interest’ matters should attract different cost rules. Nevertheless, it appears that courts are more willing to exercise their discretion to depart from the usual costs rule in litigation of this kind than other forms of litigation.

(c) Enforcement of relevant laws

(i) Criminal law

At the Federal level, there are two key public bodies responsible for investigating alleged breaches of criminal law and taking enforcement action:

- The Australian Federal Police (AFP) has primary responsibility for investigating criminal offences against the Commonwealth.
- The Office of the Commonwealth Director of Public Prosecutions (CDPP) is responsible for prosecuting alleged offences against Commonwealth law, including crimes under the Criminal Code.

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457 Victorian Charter, s 32; ACT HRA Act s 30.
458 Victorian Charter s 39(3); ACT HRA Act s 40C(4).
459 The Victorian Charter does not create a right for a person to start a proceeding in relation to an alleged breach of the Victorian Charter. However, s 40C of the ACT HRA Act allows a person to start a proceeding in the Supreme Court against a public authority or rely on their rights under the ACT HRA Act in other legal proceedings if that person claims that the public authority has acted in contravention of s 40B and alleges that the person is or would be a victim of the contravention.
460 Victorian Charter s 36.
461 ACT HRA Act s 32.
462 Victorian Charter s 39(2).
464 Qantas Airways Ltd v Cameron (No 3) (1996) 68 FCR 387, 389D.
465 Dal Pont, above n 463, 257.
Further, the Australian Securities and Investments Commission (ASIC), Australia's key corporate regulator, can bring an action against companies in relation to breaches of the corporate crime provisions contained in Corporations Act. The Australian Competition and Consumer Commission (ACCC) has the ability to bring an action against companies for breaches of quasi-criminal offences under the Competition and Consumer Act. Other relevant regulators include environmental authorities, that have responsibility for enforcement of environmental laws.

As discussed above at 1.3.1(a), enforcement of federal criminal laws against corporations that involve a cross-border element has also been limited.

At the state levels, state police and offices of public prosecution have primary responsibility for enforcement of criminal law. Enforcement activity against corporations in state or territory courts has also been limited. 467

(ii) Quasi-criminal and civil law enforcement

As with criminal law, a number of regulators are responsible for investigating alleged breaches of certain civil statutory provisions that provide for civil or quasi-criminal (ie, civil penalty) relief and taking enforcement action against corporations and individuals, including instituting court proceedings.

These enforcement agencies include the ACCC, ASIC and environmental authorities, all of whom have the power to commence investigations and actions in their own right. They also have a range of administrative enforcement powers, such as enforceable undertakings or directions under statute. Both the ACCC and ASIC have the power to initiate actions on behalf of others, including as representative proceedings. 468

3.3 Operational Principles

3.3.1 UNGP 26

UNGP 26 provides:

States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.

In addressing UNGP 26, we have considered some of the key barriers to obtaining remedy for business-related human rights abuses, namely extraterritorial application of laws and the corporate group structure. 469 We have also considered measures that have been introduced in Australia to assist those who may face barriers in accessing remedy. Such measures include the class actions regime, alternative dispute resolution (ADR), litigation funding and other financial assistance to claimants.

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466 Prosecutions commenced by ASIC are generally conducted by the CDPP: see ASIC, Our role (17 November 2016) <http://asic.gov.au/about-asic/what-we-do/our-role/>.

467 An example of enforcement directly against a company is the case of Denbo Pty Ltd and Another, Unreported, Supreme Court of Victoria, Teague J, 14 June 1994, in which a defendant company plead guilty to a charge of manslaughter in relation to the death of one of its employees who was killed when he lost control of the truck he was driving, due to brake failure.

468 The ACCC has the power to enforce Australian consumer laws through issuing administrative resolutions, entering into enforceable undertakings with companies, and/or instituting court proceedings against companies. Under the Competition and Consumer Act, the ACCC is able to bring actions on behalf of persons who have allegedly suffered losses who seek compensation. The ACCC may also commence representative proceedings under the Federal Court of Australia Act 1976 (Cth), even where it does not seek any personal relief. In addition to instituting proceedings itself, the ACCC provides guidance to consumers on taking legal action against businesses that have allegedly breached the ACL. ASIC has similar powers to the ACCC to initiate a form of representative proceeding on behalf of a group of aggrieved individuals. On some occasions, ASIC may intervene as a party in private litigation. Alternatively, ASIC may appear as amicus curiae. Generally, ASIC will only intervene in private litigation or appear as amicus curiae where there is a ‘broad regulatory benefit that may be achieved through [its] intervention.’ ASIC may also take enforcement action that is relevant to private claims. For example, ASIC may apply to the court for a declaration of contravention of a civil penalty provision and apply for other relief.

(a) **Key barriers to accessing remedies**

(i) **Extraterritorial application of laws**

In order for Australia’s statutes to have extraterritorial application to Australian corporations operating outside of Australia, the statute must contain an express provision stating that it (or specific provisions contained in the statute) operates outside of Australia. The extent to which relevant laws have extraterritorial application is set out under 1.2.1 above.

Then, factually, the requisite nexus must exist between the extraterritorial act and Australia (such as the defendant carrying on business in Australia or the plaintiff suffering consequential damage in Australia). For example, s 5 of the Competition and Consumer Act extends the application of the Act to conduct outside Australia. Under s 5(1)(g), specific provisions of the Act extend to conduct engaged in outside Australia by ‘bodies corporate incorporated or carrying on business within Australia’. In determining whether overseas conduct was engaged in by bodies corporate carrying on business within Australia, Australian courts consider whether a company has a presence in Australia by examining the ‘totality of the relationship between the principal and the agent’ in light of the nature of the company’s business and that of the agent.\(^{470}\)

However, even if an Australian statute has extraterritorial application (because it contains an express provision to that effect and the requisite nexus exists), Australian courts retain a discretion to decline to exercise their jurisdiction under the common law. In broad terms, Australian courts generally will not decline to exercise jurisdiction in a matter unless it can be demonstrated that the Australian court is a ‘clearly inappropriate forum’.\(^{471}\) It is open to the defendant to argue that the court should decline to exercise its jurisdiction on the basis that an Australian court is a clearly inappropriate forum.

(ii) **The corporate group structure**

The concepts of ‘separate legal personality’ and the ‘corporate veil’ can present barriers to accessing remedies for corporate human rights violations in Australia.\(^{472}\)

Whilst the concept of separate legal personality enables liability to attach to corporations, it may also impact on liability attaching to other members within a corporate structure. For example, where an impecunious subsidiary has caused or contributed to a human rights violation, the parent corporation may be immune from suit by reason of its separate legal personality.

In Australia, there are limited circumstances in which the corporate veil can be lifted in order to identify a director, shareholder or related company who should be held responsible for the actions of the corporation.

There are various statutory provisions that allow for the corporate veil to be pierced in certain circumstances. For example, under the Criminal Code, there are specific provisions which address the liability of corporations that take part in the ‘management’ of an entity, or where they exercise ‘control or direction over an entity’, or provide finance for the business, where that entity engages in certain crimes such as slavery or forced labour.\(^{473}\) In those instances, the corporation would commit an offence for the purposes of the Criminal Code. Furthermore, under the aiding and abetting provisions discussed above at 3.2.1(a)(ii)(B), a parent company may be prosecuted for aiding and abetting the commission of an offence by one of its subsidiary entities. And under the ACL, a person, who is ‘involved’ with a corporation’s breaching of the ACL may be found personally liable to compensate those persons affected.\(^{474}\) There are also a number of other Federal statutes that provide for the lifting of the corporate veil in certain circumstances. These include

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\(^{470}\) Commonwealth Bank v White, ex parte Lloyd’s [1999] VSC 262 [30].

\(^{471}\) Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538.


\(^{473}\) Criminal Code ss 270-271.

\(^{474}\) ACL ss 2, 236.
occupational health and safety laws, competition law, income tax laws and environmental protection laws. Australian courts have also found that a statute contains an implied requirement that acts of a company may be ascribed to its members, where the statute would not achieve its aims unless a requirement to look beyond a company was implied.

However, common law remains the primary avenue by which the piercing of the corporate veil occurs as between the corporation and its members or between the subsidiary and the parent company (with the result that the parent company is held liable for the actions of the subsidiary). For example, where the primary perpetrator cannot be held responsible, it may be possible to seek to hold a parent company liable under the law of negligence. The liability of the parent corporation will depend on whether the plaintiff can establish that the parent owes a duty of care to the plaintiff who claims to have suffered harm, whether the conduct of the corporation fell below the required standard of care, and whether the actions of the corporation caused the harm to the plaintiff.

(b) Mechanisms to assist access to remedy

Australia has taken a number of measures designed to reduce the financial and procedural barriers to bringing legitimate cases before the courts.

(i) Class action regimes

The Federal Court of Australia has a class actions regime, which allows a proceeding to be commenced where:

- at least seven persons have claims against the same person or persons;
- the claims arise out of the same, similar or related circumstances; and
- the claims of all those persons give rise to at least one substantial common issue of law or fact.

There are also regimes for class actions in the supreme courts of Victoria and New South Wales.

The Australian class action regimes allow proceedings to be brought on behalf of a group or class of persons to ensure that persons who have a cause of action are not 'prevented or discouraged from having that claim determined by a court as a result of lack of resources, cost barriers or ignorance of legal rights'.

(ii) Legal Aid

At the Federal level, the Attorney-General’s Department is responsible for providing advice in relation to and managing access to justice matters, including legal financial assistance, administrative law, constitutional law and issues about the jurisdiction of federal courts.

The Attorney-General’s Department may assist a person who is commencing proceedings for unlawful discrimination in the Federal Court or Federal Circuit Court. Applicants may apply for legal financial assistance where they have commenced, or propose to commence, proceedings alleging unlawful discrimination in the Federal Court or the Federal Circuit Court, or who are respondents to proceedings in either of these courts.

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475 Occupational Health and Safety Act 2004 (Vic) s 26(1).
476 Competition and Consumer Act s 44ZZD.
477 Income Tax Assessment Act 1936 (Cth) pt IVA.
478 Environment Protection Act 1970 (Vic) s 1F(2).
481 A recent report by Corporate Accountability Research noted that people making claims still face ‘significant barriers in accessing and using relevant procedures’, including financial costs and the ability to maintain action in the face of continued hardship: May Miller-Dawkins et al, ‘Redress for Transnational Business-Related Human Rights Abuses in Australia’ (Report Series 3, Corporate Accountability Research, 2016) 7.
482 Federal Court of Australia Act 1976 (Cth) pt IVA.
483 Ibid s 33C.
484 Supreme Court Act 1986 (Vic) pt IVA, Civil Procedure Act 2005 (NSW) pt 10. In August 2016, the Queensland Government introduced into Parliament the Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Bill 2016 (Qld), which provides for a class action regime in its supreme court. The proposed class regime is similar to the regimes in New South Wales and Victoria.
486 AHRC Act s 46PU.
The Attorney-General’s Department also administers funding to the following legal assistance programmes:

- National Partnership Agreement on Legal Assistance Services;\(^{487}\)
- Indigenous Legal Assistance Programme;\(^{488}\)
- Community Legal Services Programme;\(^{489}\)
- Expensive Commonwealth Criminal Cases Fund;\(^{490}\) and
- Commonwealth legal financial assistance schemes.\(^{491}\)

Legal aid commissions in each state and territory offer free legal services in the areas of criminal law, civil law and family law. In order to obtain a grant of legal aid, an individual must meet the stringent eligibility criteria.\(^{492}\) The services provided by Legal Aid and the eligibility criteria vary depending on the state or territory in which a particularly individual resides.

(iii) Application fees

Some state and territory tribunals do not charge application fees for lodging human rights related complaints, in order to promote access to remedy for these claims.\(^{493}\) Further, state and territory tribunals will waive or postpone the payment of application fees for bringing claims where payment would result in the person being unable to provide food, accommodation, clothing, medical treatment, education or other basic necessities for themselves or their dependants.\(^{494}\) Other circumstances that may give rise to fee relief include being eligible for Legal Aid, or being a prisoner, a minor or a person affected by family violence.\(^{495}\)

(iv) Alternative Dispute Resolution (ADR)

ADR methods, including arbitration and mediation are incorporated into the rules and practices of all Australian courts. For example, the Federal Court of Australia has had an ‘assisted dispute resolution’ program since 1987, whereby the Court may refer all or part of the proceeding to arbitration, mediation or another ADR process.\(^{496}\) All jurisdictions also have express power to refer all or part of the proceedings to mediation, with some jurisdictions also allowing for other forms of ADR, such as arbitration or settlement conferences.\(^{497}\) Often these ADR processes sit within the context of judicial case management to assist with the flow of proceedings, and have the objective of reducing delay and costs in proceedings.

3.3.2 UNGP 27

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\(^{489}\) Australian Government Attorney-General’s Department, Community Legal Services Programme (17 November 2016), available at: https://www.ag.gov.au/LegalSystem/Legalaidprogrammes/LegalServicesProgram/Pages/default.aspx.


\(^{492}\) To be eligible for a grant of legal assistance, a person must satisfy the means and merits tests, and meet the relevant legal aid commission’s guidelines.


\(^{494}\) To be eligible for a grant of legal assistance, a person must satisfy the means and merits tests, and meet the relevant legal aid commission’s guidelines.

\(^{495}\) Australian Government Attorney-General’s Department, Federal Court Rules 2011 (Cth) s 28.05.

\(^{496}\) Ibid.

\(^{497}\) Ibid.
Australia has a number of State-based non-judicial mechanisms, the key ones being the complaints mechanisms made available by human rights commissions, the Fair Work Commission, the Australian OECD National Contact Point, EFIC and state and territory Ombudsmen.

(a) Human Rights Commissions

(i) AHRC

As noted above in Pillar 1 at 1.2.1(a), the AHRC was established in 1986 by the AHRC Act and is an independent statutory organisation that reports to the Federal Parliament through the Attorney-General.

The AHRC has the power to investigate and resolve specific complaints of discrimination, harassment and bullying based on a person’s sex, disability, race, age, and, in relation to employment contexts, sexual preference, criminal record, trade union activity, political opinion, religion or social origin. The AHRC can also investigate and resolve complaints regarding alleged breaches of human rights against the Commonwealth and its agencies. The AHRC may, in certain circumstances, consider complaints made relating to incidents occurring outside of Australia, however the AHRC has stated that the President will not travel abroad in order to hear complaints made outside of Australia.498

The AHRC resolves complaints through conciliation. Available remedies can include:

- an apology;
- reinstatement to a job;
- compensation for lost wages;
- changes to a policy; or
- developing and promoting anti-discrimination policies.

The agreed outcome cannot be appealed. If the AHRC terminates a complaint, any person affected in relation to the complaint has 60 days in which to take his or her case to the Federal Court or Federal Circuit Court of Australia alleging unlawful discrimination by one or more of the respondents to the complaint.

In addition to its ability to hear and resolve complaints, the AHRC has the power to intervene in court proceedings that involve human rights matters with the court’s leave.499

The AHRC’s 2007-2008 complaint statistics show that private enterprises were the respondents in 31% of complaints under the Racial Discrimination Act, 55% of complaints under the Sex Discrimination Act, 51% of complaints under the Disability Discrimination Act, 58% of complaints under the Age Discrimination Act, and 46% of complaints under the Human Rights and Equal Opportunity Commission Act (Cth).500

(ii) State and territory human rights commissions

The guidance and training provided by each Australian state and territory HRC is discussed above in Pillar 1 at 1.3.1(c)(iii). Each of these human rights bodies has a

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499 AHRC Act s 11(1)(o).

500 Human Rights and Equal Opportunity Commission, Annual Report 2007-2008 Ch 4.3 ('Complaint Handling Statistics'). Note that the Human Rights and Equal Opportunity Commission Act (Cth) was later replaced by the AHRC Act.
complaints mechanism. Complaints to these human rights bodies are resolved through conciliation, which aims to facilitate the parties reaching an agreement as to how a particular dispute will be resolved. These bodies do not have the power to make orders or award compensation. The outcome of conciliation may include an apology, financial compensation and an agreement to alter behaviour.

(b) Fair Work Commission

The Fair Work Commission is Australia’s national workplace relations tribunal. It was created by the FWA (discussed above at 1.2.1(d)(iii)). One of its tasks is to resolve workplace disputes (both collective and individual) relating to bargaining, employment conditions, rates of pay and redundancy entitlements, discrimination, rights of entry, stand downs and consultative processes under the terms of an award or a collective or enterprise agreement or the general protection provisions of the FWA.

The Fair Work Commission uses a range of dispute resolution mechanisms to resolve complaints, including mediation, conciliation and in some cases arbitration. Available remedies can include:

- reinstatement to a job;
- compensation for lost wages;
- an apology;
- a statement of service;
- payment of owed entitlements; or
- a non-disparagement agreement.

A person who is aggrieved by a decision or order of the Fair Work Commission can seek permission to appeal that decision or order. The Fair Work Commission will grant permission to appeal if it is satisfied that it is in the public interest to do so. Parties who do not agree with the outcome of an appeal heard by the Fair Work Commission may make an application to the Federal Court to deal with the matter.

(c) Australian OECD National Contact Point

Pursuant to the OECD Guidelines (discussed above at 1.3.1(c)(v)(A)), Australia has a National Contact Point (NCP), which is a grievance mechanism to hear specific instances regarding alleged breaches of the OECD Guidelines, which include a chapter on human rights that closely follows the UNGPs. The current NCP is the General Manager in the Foreign Investment and Trade Policy Division of the Treasury. A function of the NCP is to mediate specific instances, including investigating complaints from ‘interested parties’ about companies operating, or headquartered, in Australia. The NCP is tasked with facilitating the resolution of complaints through conciliation or mediation and issuing final and follow-up statements and recommendations.

Of the 14 complaints received by the NCP between 15 June 2005 and the time that this Stocktake was written:

- five have been rejected;
- five have been concluded;
- one is currently pending;
- five have been concluded.

Stocktake was written:...
two have reached agreement; and
one has been filed.505

(d) EFIC

Australia’s export credit agency, EFIC, has introduced a grievance mechanism that is open to
a broad range of stakeholders, including individuals, communities and customers, and
enables complaints to be made about projects financed by EFIC including where human
rights impacts are alleged.

EFIC’s General Counsel is responsible for managing the complaints mechanism, and all
complaints are reported to the EFIC Board Audit Committee. The mechanism sets guidance
around the time frames involved in the grievance mechanism process, and the process is
kept confidential. Resort may be made to third party mediators or experts, where
appropriate. Where complainants are not satisfied by the result, they may elect to lodge a
further complaint with the Commonwealth Ombudsman or investigate other avenues of
redress as appropriate.506

(e) Ombudsmen

Australia has a number of Ombudsman at the Federal, state and territory levels who are
able to undertake investigations and handle complaints in a range of industries, including
banking and insurance, building, energy and water, small business, employment, privacy
and telecommunications. These services are provided free of charge to consumers. While
the mandates of these Ombudsmen do not specifically refer to human rights, they can
provide access to remedy for various human rights-related issues, including labour, health
and safety complaints.

Each Ombudsman varies in its approach to resolving the complaints it receives. Generally,
when an Ombudsman receives a complaint, it investigates the complaint through making
enquiries and if the complaint is substantiated, the Ombudsman will use negotiation,
mediation or conciliation to remedy the dispute.

The following Ombudsmen have jurisdiction to hear complaints involving businesses that
fall within their jurisdiction:

(i) Federal

• Fair Work Ombudsman;
• Postal Industry Ombudsman;
• Private Health Insurance Ombudsman;
• Tolling Customer Ombudsman;
• Telecommunications Industry Ombudsman;
• Commonwealth Ombudsman;507
• Financial Ombudsman Service; and
• Credit and Investments Ombudsman Service.

(ii) States and territories

All states and territories have a state or territory-wide Ombudsman whose
responsibilities include investigating and resolving complaints concerning
administrative actions taken by Government departments, public statutory
authorities and local government councils within the state or territory.508

Additionally, NSW, Victoria, Queensland, WA and SA have an Energy and Water
Ombudsman, Tasmania has an Energy Ombudsman, Victoria has a Public Transport
Ombudsman and Queensland has a Health Ombudsman, each of which can hear
complaints from individuals alleging that businesses within these sectors have
committed human rights related abuses. For example, the Queensland Health

505 OECD Watch, NCP: National Contact Point Australia (17 November 2016), available at: http://www.oecdwatch.org/cases/advanced-
search.ncps/casesearchview?type=NCP&search=National%20Contact%20Point%20Australia.
mechanism/.
507 ‘The Commonwealth Ombudsman investigates the administrative actions of Federal Government departments and agencies, both in
response to complaints and on his or her own motion. The Ombudsman’s activities include oversight of Australia’s immigration detention
network, use of police powers, and the public sector whistleblowing scheme.’: UN Human Rights Council, National report submitted in
accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21* Australia, UN GAOR, 23rd sess, UN Doc
508 New South Wales Ombudsman, Victorian Ombudsman, Queensland Ombudsman, Ombudsman Western Australia, Ombudsman South
Australia, Tasmanian Ombudsman, Office of the Ombudsman Northern Territory and ACT Ombudsman.
Ombudsman can hear complaints from individuals alleging that a health service provider\(^509\) shared the individual's information without permission.

(f) **Other external dispute resolution mechanisms**

Australia has a number of other non-judicial mechanisms at the Federal, state and territory levels which are able to undertake investigations and handle complaints. Each mechanism varies in its approach to resolving complaints it receives; however, they generally provide redress for complaints following the process discussed at 3.3.2(e) above. The mechanisms may be able to provide redress for some direct or indirect business-related human rights-related matters that fall within their jurisdiction.

(i) **Federal**

The following Federal external dispute resolution mechanisms are government-based or government-related mechanisms:

- Superannuation Complaints Tribunal;
- Mortgage and Finance Association of Australia;
- Australian Communications and Media Authority; and
- Advertising Standards Bureau.

(ii) **State and territory**

Many of Australia's states and territories have mechanisms which are able to handle human rights-related complaints relating to, inter alia, privacy,\(^510\) health,\(^511\) industrial relations\(^512\) and consumer affairs.\(^513\)

3.3.3 **UNGP 28**

**UNGP 28 provides:**

States should consider ways to facilitate access to effective non-State based grievance mechanisms dealing with business-related human rights harms.

The Australian Government’s facilitation of access to non-State based grievance mechanisms is considered below in respect of the following:

- international grievance mechanisms, including those functioning under the auspices of the United Nations and the World Bank;
- regional grievance mechanisms; and
- industry-level grievance mechanisms.

(a) **International mechanisms**

(i) **UN Treaty bodies**

Australia has accepted the competence of five UN treaty bodies to examine individual complaints relating to alleged violations of the human rights protected by the Covenants or Conventions in respect of which each treaty body is responsible for overseeing implementation. These are: the Human Rights Committee, the Committee on the Elimination of Discrimination against Women, the Committee against Torture, the Committee on the Elimination of Racial Discrimination and the Committee on the Rights of Persons with Disabilities.

Complaints can only be made against States, as States are the subject of international law; however, complaints can be made about violations of rights that


\(^{510}\) For example, the Office of the Australian Information Commissioner (Federal), Information and Privacy Commission New South Wales (NSW), Commissioner for Privacy and Data Protection (Vic) and Office of the Information Commissioner (Qld).

\(^{511}\) For example, the NSW Health Care Complaints Commission (NSW), Office of Health Review (WA), Health Complaints Commissioner (Tas) and Health and Community Services Complaints Commission (NT).

\(^{512}\) For example, the Office of Industrial Relations (NSW), Queensland Industrial Relations Commission (Qld), Western Australian Industrial Relations Commission (WA), South Australian Industrial Relations Commission (SA) and Tasmanian Industrial Commission (Tas).

\(^{513}\) For example, the Consumer Protection Division of the Department of Commerce (WA), Department of Consumer Affairs and Fair Trading (Tas) and Commissioner of Consumer Affairs (NT).
relate to business conduct in circumstances where this is directly related to a State's failure to protect against human rights abuse by a non-State actor.

Any individual can lodge a complaint with a treaty body against Australia in relation to an alleged violation of a treaty so long as they are personally and directly affected by the alleged violation, and have exhausted all available domestic remedies prior to lodging the complaint.

As at the time of writing, none of the UN treaty bodies have heard any individual complaints brought against Australia relating to corporate conduct.

(ii) **Special Procedures**

In the framework of their mandate, some special procedure mandate holders of the UN Human Rights Council ([Special Procedures](#)), including Special Rapporteurs and Working Groups, can receive information or hear complaints on alleged violations of human rights committed by businesses where the alleged violations fall within the scope of their mandate. Special Procedures may then communicate with the concerned State and invite it to comment on the allegations. The Special Procedure may remind the State of its obligations under international law and request information, where relevant, on steps being taken by the authorities to redress the situation in question. Note, however, that the UNWG cannot hear business and human rights related complaints (while it can still receive information).

For example, the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, stated that ‘defenders working on land and environmental issues in connection with extractive industries and construction development projects’ face a high risk of violations. If a business committed human rights violations that affected a human rights defender, the defender could therefore potentially submit a complaint for the Special Rapporteur’s consideration (provided the complaint subject matter falls within the Special Rapporteur’s mandate).

The Australian Government has not imposed any barriers to individuals accessing the complaint mechanism that some Special Rapporteurs offer. Some Special Rapporteurs, including the Special Rapporteur on human rights and the environment, have raised concerns about Australian companies.

(iii) **International Criminal Court (ICC)**

The ICC was established by the Rome Statute, and has jurisdiction over the crime of genocide, war crimes, crimes against humanity and crimes of aggression. Australia is a State party to the Rome Statute and can refer a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed, requesting the Office of the Prosecutor to investigate the situation. The Office of the Prosecutor may decide on its own initiative to open an investigation on the basis of information on crimes within the jurisdiction of the Court. Such information may be provided by individuals, intergovernmental and non-governmental organisations.

The Australian Government has agreed to cooperate fully with the ICC pursuant to its obligations under the Rome Statute.

The ICC only has jurisdiction over individuals and not companies. Therefore, to date, the ICC has focused on individual criminal responsibility and not corporate criminal responsibility as business-related human rights violations have not been considered to be within the criminal remit of the ICC. Some commentators have speculated that the remit of the ICC may be widening, and that the ICC may prosecute government and corporate officials engaging in activities including land grabs and the exploitation of natural resources.

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517 Ibid art 5.

518 Ibid art 14(1).

519 Ibid art 15(1).

520 Ibid arts 86-88.

the ICC has stated that it will give consideration to ‘prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land’ in the context of, among other things, the environmental damage inflicted upon affected communities.footnoteRef522

(iv) World Bank supported mechanism

The World Bank has a grievance mechanism in order to provide access to remedies for persons adversely affected by its projects. The Compliance Advisor Ombudsman (CAO) was established in 1999 and is the independent recourse mechanism for the International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA). The CAO addresses and resolves the concerns of individuals, groups and communities affected by, or likely to be affected by IFC and MIGA projects. Complaints can be filed regarding alleged breaches of the IFC Performance Standards (outlined above at 2.3.8(d)) and may arise in relation to projects occurring in sectors such as agribusiness, mining, transportation, hydropower and other infrastructure sub-sectors.

Once an eligible complaint is received by the CAO, the CAO conducts an assessment of the conflict and the stakeholders’ alternatives for resolving the issues. The CAO then works with the relevant parties in resolving the dispute through using ‘assisted negotiation methods’, including conflict assessment, mediation and dispute resolution, consensus building, multi-stakeholder problem solving, and interest-based facilitation and negotiation. If a collaborative solution is not possible, the CAO will transfer the complaint to CAO Compliance.footnoteRef523

Accordingly, individuals, groups and communities affected by, or likely to be affected by, the World Bank’s IFC and MIGA projects being conducted in Australia, or overseas projects conducted or financed by Australian companies, can make a complaint to the CAO.

The Australian Government has not imposed any impediments to prevent individuals, groups or communities from lodging complaints with the CAO.

The CAO has received complaints brought by individuals in respect of Australian companies involved in projects abroad.footnoteRef524

(b) Regional mechanisms

Unlike Europe, Africa and the Americas, the Asia-Pacific region does not have a regional inter-governmental human rights institution or remedial mechanism.footnoteRef525 In recent years, there has been increasing dialogue about establishing an Asia-Pacific Human Rights Commission.

(c) Government support for access to industry initiatives

Some Government departments at the Federal, state and territory levels in Australia are involved in various industry initiatives in different ways. For example, Ethical Clothing Australia, discussed below at 3.3.5(a)(ii), is currently funded by the Victorian Department of Economic Development, Jobs, Transport and Resources.

As discussed above at Pillar 1 at 1.3.8(e), the Australian Government supports a number of international industry-level initiatives, including initiatives such as the ICOCA and the VPs (discussed further below, at 3.3.5(a)(ii)) that support the establishment of grievance mechanisms or provide guidance on accountability.


footnoteRef525 Whilst the ASEAN Intergovernmental Commission on Human Rights’ mandate does not explicitly provide for receiving and investigating complaints of human rights violations, complaints can be submitted to it via the ASEAN Secretariat. Although the availability of the complaints mechanism doesn’t directly apply to Australia, it could impact both Australian companies operating in ASEAN countries and ASEAN companies operating in Australia. The Asian Development Bank also has an Accountability Mechanism where people adversely affected by Asian Development Bank supported projects can report alleged non-compliance with Asian Development Bank’s operational policies and procedures: see Asian Development Bank, Accountability Mechanism, available at: https://www.adb.org/site/accountability-mechanism/main.
A number of business enterprises in Australia have developed operational-level grievance mechanisms for individuals and communities who may be adversely affected by their activities. The Company Survey found that 35 of the ASX 50 and 3 of the Private 10 have publicly stated that they have some form of grievance mechanism or means for making and receiving complaints (including internal procedures, such as whistle-blower and reporting mechanisms) relating to issues that are relevant to human rights, (even if they do not use the term 'human rights'). These mechanisms are usually not specifically designed to handle human rights grievances but rather are mechanisms with broader remits around issues including corruption, discrimination, cultural heritage and harassment.

Grievance mechanisms were also discussed at the 2014 and 2015 Australian Dialogues. Challenges in relation to grievance mechanisms were raised, including:

(a) Complaints units having sufficient access and leverage in a company to resolve issues;
(b) Integration with stakeholder relations/communities teams;
(c) Need to tailor grievance mechanisms so that they are culturally appropriate and available to all particular groups; and
(d) The difficulty of providing effective grievance mechanisms to offshore communities or on offshore projects.

At the 2015 Australian Dialogue, participants discussed the importance of timely responses to complaints. Prompt action was seen as important in demonstrating the sincerity of a business and in creating a relationship of trust. It was noted by business participants that the risk of escalation and conflict increased if matters were not promptly addressed. At the 2016 Australian Dialogue, the importance of companies committing to understanding the facts and impacts around complaints was highlighted, as well as conducting company-led investigations in certain circumstances. There was also discussion of understanding the human rights aspects of other impacts (e.g. environmental impacts), appropriate governance structures around internal grievance, and accessibility for those impacted.

A number of Australian companies also participate in industry-level initiatives that require the establishment of internal grievance mechanisms, provide for industry-level grievance mechanisms, or provide guidance on how grievance mechanisms should be implemented. These are discussed further at 3.3.5(a) below.

### 3.3.5 UNGP 30

**UNGP 30 provides:**

Industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available.

The aims of the voluntary initiatives with Australian participants and which provide grievance mechanisms are considered below. The effectiveness of these initiatives has not been assessed in this Stocktake.

(a) **Voluntary dispute resolution schemes**

Of the voluntary industry initiatives with Australian participants discussed under Pillar 2, the following are examples of voluntary initiatives that provide dispute resolution and/or grievance mechanisms, or require members to do so:

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(i) Provide grievance mechanism

(A) Ethical Trading Initiative

The Ethical Trading Initiative (ETI) is a UK-based multi-stakeholder initiative that promotes respect for the human rights listed in the ETI Base Code within the supply chains of ETI-member companies. The ETI has an internal complaints mechanism available for civil society member organisations to raise issues. Participating companies, which include a number of Australian companies, are required to implement grievance mechanisms within their supply chains. The ETI does not provide details of the complaints which have been brought against participating companies.

(B) The Accord on Fire and Building Safety in Bangladesh

The Accord is an independent, legally binding agreement between global brands and retailers and trade unions designed to build a safe and healthy Bangladeshi Ready Made Garment industry. The Accord has a Safety and Health Complaint Mechanism. Workers can make a complaint to the Accord via a hotline. Complaints are evaluated by complaint handler and may be investigated by the Accord. 527 11 Australian companies are a signatory to the Accord. 528 The Accord does not provide details of the complaints which have been brought against its signatories.

(C) Fair Labour Association

The Fair Labour Association is a US-based multi-stakeholder initiative which promotes respect for labour rights in global footwear and apparel supply-chains. The Fair Labour Association has a third party complaint procedure which allows for the reporting of serious violations of workers’ rights in facilities used by any company that has committed to FLA labour standards. The FLA can conduct an assessment, develop a remediation plan and even engage a third party to investigate the complaint. 529 The FLA does not provide details of the complaints which have been brought against participating companies.

(D) Fairtrade Certification

Fairtrade Certification is an independent certification initiative whereby companies and producers can apply to have their commodities certified as Fairtrade by demonstrating compliance with standards on pricing and hired labour. The Fair Trade Association of Australia and New Zealand oversees the certification of Australian brands and retailers. FLOCERT (the certification body that certifies Fairtrade products) allows for complaints and appeals in relation to the certification of companies, and compliance by a certified company with Fairtrade standards. 530 FLOCERT does not provide details of the complaints which have been brought against participating companies.

(E) Rainforest Alliance

The Rainforest Alliance is a multi-stakeholder certification program that aims to conserve biodiversity and ensure sustainable livelihoods by transforming land-use practices, business practices and consumer behaviour. The Rainforest Alliance has whistle-blower procedures for reporting illegal or unethical conduct in connection with the Rainforest Alliance’s finances, corporate policies or other aspects of its operations. 531 It is unclear if these procedures could be used against certified companies working with the Rainforest Alliance. Approximately 50 brands sold in Australia are certified. The Rainforest Alliance does not provide details of the complaints which have been brought against participating companies.

(F) **Forest Stewardship Council**

Forest Stewardship Council is a certification initiative which aims to ‘promote environmentally appropriate, socially beneficial, and economically viable management of the world’s forests’. The Forest Stewardship Council has a complaints procedure for dealing with stakeholder complaints against, among others, the board of directors, the Forest Stewardship Council or certificate holders. The complaints policy applies to any individual or group whose interests are affected by the Forest Stewardship Council Certification Scheme. 54 Australian companies are members of the Forest Stewardship Council, and 12 retailers are supporters. As at the date of this Stocktake, no Australian member company or retail supporter have been the subject of a complaint.

(G) **Roundtable on Sustainable Palm Oil**

The Roundtable on Sustainable Palm Oil (RSPO) is a multi-stakeholder standards and certification initiative for sustainable palm oil. It has a complaints system by which both RSPO members and non-members can make complaints against any RSPO member or the RSPO system itself. The RSPO can make an assessment and decide on an action plan to address the complaint. A number of Australian companies are members of the Roundtable on Sustainable Palm Oil. As at the date of this Stocktake, none of these companies have been the subject of a complaint.

(ii) **Provide guidance on, or require the establishment of, grievance mechanisms**

(A) **International Council on Mining & Metals**

The International Council on Mining & Metals is an industry driven initiative focussed on improving the social and environmental performance within the mining and metals industry. It does not have a formal grievance procedure, but it provides guidance to companies on best practice approaches to handling and resolving local level concerns & grievances. The Minerals Council of Australia is a member association of the International Council on Mining & Metals. Four Australian companies are also members of the International Council on Mining and Metals.

(B) **Ethical Tea Partnership**

The Ethical Tea Partnership is an industry-led initiative focussed on standards and learning, provides certification for producers and brands. The initiative itself does not have a formal grievance mechanism. However, under applicable standards, producers are required to set up an internal complaints mechanism.

(C) **Ethical Clothing Australia**

Ethical Clothing Australia (ECA) is an accreditation body that offers assistance to local textile, clothing and footwear companies manufacturing in Australia to ensure that their Australian supply chains are fully transparent and legally compliant. The Textile, Clothing and Footwear Union (TCFUA) conducts annual third-party compliance audits of accredited companies. The TCFUA can raise grievances on behalf of employees of accredited companies.

(D) **Voluntary Principles on Security and Human Rights**

The participation criteria for the VPs (discussed above at 2.3.8(g)) include an internal dispute resolution process, by which VPs participants can raise concerns about the performance of another VPs participant. However, it

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does not provide for a complaint mechanism for non-participants to raise complaints. Although the VPs do not specifically ask participants to set up a grievance mechanism to deal with complaints relating to security providers, they do contain guidance relating to accountability. For example, the VPs state that where physical force is used by public security, such incidents should be reported to the appropriate authorities and to the company, and companies should support efforts by government to strengthen state institutions to ensure accountability and respect for human rights. Some resources designed to help VPs participants meet the principles also provide guidance around accountability and remediation. 539 Five Australian resources companies are corporate participants of the VPs, alongside Australia as a government participant.

(E) ICOC and ICOCA
The ICOCA is a set of principles that apply to private security providers. It was created through a multi-stakeholder initiative. The ICOCA can receive complaints on alleged violations of the ICOC. The ICOCA does not act as a mediator, but can direct the complainant to a member company’s grievance mechanism, offer guidance to a company on the establishment of such a mechanism (if it does not already exist) and can report complaints to the relevant authorities if the complaint involves allegations of criminal activity. 540 The Australian Government has been a member of the ICOCA since September 2013.

(F) International Petroleum Industry Environmental Conservation Association (IPIECA)
IPIECA is a global oil and gas industry association that shares good practice and knowledge to help the industry and improve its environmental and social performance. 541 IPIECA has designed a ‘toolbox’ to enhance the ability of companies in the oil and gas industry to address and manage community concerns and grievances. The toolbox provides a guide to planning and implementing operational-level community grievance mechanisms. 542 Oil and gas companies operating in Australia are members of the IPIECA.

(G) Equator Principles
As discussed above at 2.3.8(d), the Equator Principles are a framework for assessing and managing environmental and social risk in projects adopted by financial institutions. Principle 6 requires, for certain projects, Equator Principle Financial Institutions to require the client to establish a grievance mechanism designed ‘to receive and facilitate resolution of concerns and grievances about the Project’s environmental and social performance.’ There are five Australian participants in the Equator Principles. 543

(H) UN Global Compact
As discussed at 1.3.1(c)(v)(B), the UN Global Compact is a corporate sustainability framework. Over 100 Australian companies are participants in the Global Compact. The UN Secretary-General has adopted a set of integrity measures to safeguard the integrity of the Global Compact. One of these integrity measures provides for a ‘dialogue facilitation process.’ 544 This process allows the Global Compact to receive information regarding allegations of systematic or egregious abuse of the Global Compact’s overall aims and principles by a participating organisation, and to take

544 UN Global Compact, Our Governance (6 December 2016), available at: https://www.unglobalcompact.org/about/integrity-measures.
steps to address the allegations. For example, the Global Compact can encourage dialogue between the participating company concerned and those who have raised concerns or refer the matter to one of the UN entities that are guardians of the Global Compact principles for advice, assistance or action.

The UN Global Compact also provides some guidance around company-level grievance mechanisms in relation to how companies can design effective grievance mechanisms.

3.3.6 UNGP 31

UNGP 31 provides:
In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:

(a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;

(b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;

(c) Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;

(d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;

(e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism’s performance to build confidence in its effectiveness and meet any public interest at stake;

(f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;

(g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;

Operational-level mechanisms should also be:

(h) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.

UNGP 31 sets out the criteria for effective non-judicial grievance mechanisms, both State-based and non-State-based.

With regard to non-State-based grievance mechanisms, it is noted that at least four companies from the Company Survey have taken the effectiveness criteria set out in UNGP 31 into account when establishing grievance mechanisms. These companies require their grievance mechanisms to align with the effectiveness criteria, including by being legitimate, accessible, predictable, equitable and transparent.

As it is beyond the remit of this Stocktake to analyse the effectiveness of the mechanisms and remedies set out in this section, the implementation of UNGP 31 has not been covered in this Stocktake. Nevertheless, the Stocktake may provide a basis for which future analysis can be conducted on the implementation of UNGP 31 and the effectiveness of the mechanisms and remedies identified in the Stocktake.

545 UN Global Compact, Integrity Measures Policy (6 December 2016), available at: https://www.unglobalcompact.org/docs/about_the_gc/Integrity_measures/Integrity_Measures_Note_EN.pdf.


Annexure A: The ASX 50 and Private 10
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<td>Commonwealth Bank of Australia</td>
<td>Financials</td>
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<tr>
<td>Westpac Banking Corporation</td>
<td>Financials</td>
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<td>ANZ</td>
<td>Financials</td>
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<tr>
<td>National Australia Bank Limited</td>
<td>Financials</td>
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<tr>
<td>Telstra Corporation Limited</td>
<td>Telecommunication Services</td>
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<td>Materials</td>
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<td>Wesfarmers Limited</td>
<td>Consumer Staples</td>
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<td>Woolworths Limited</td>
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<tr>
<td>Macquarie Group Limited</td>
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<tr>
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<tr>
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<td>Amcor Limited</td>
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<td>Newcrest Mining Limited</td>
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<td>Suncorp Group Limited</td>
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<td>Sydney Airport Forus</td>
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<td>Vicinity Centres Stapled</td>
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<td>40. Mirvac Group Stapled</td>
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<td>41. Treasury Wine Estates Limited</td>
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<td>43. Santos Limited</td>
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<td>45. Coca-cola Amatil Limited</td>
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<td>46. Qantas Airways Limited</td>
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<td>47. Seek Limited</td>
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<td>48. Computershare Limited</td>
<td>Information Technology</td>
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<td>49. Orica Limited</td>
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<td>50. Incitec Pivot Limited</td>
<td>Materials</td>
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<td><strong>Private Companies</strong></td>
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<td>1. Visy</td>
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<td>2. Co-operative Bulk Handling</td>
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<tr>
<td>3. 7-Eleven Stores</td>
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<td>4. BGC</td>
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<td>5. Teys Australia</td>
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<td>6. Meriton Apartments</td>
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<td>7. Devondale Murray Goulbourn</td>
<td>Consumer Staples</td>
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<td>8. Linfox</td>
<td>Industrials</td>
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<td>9. Hospitals Contribution Fund</td>
<td>Financials</td>
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<tr>
<td>10. The Good Guys</td>
<td>Consumer Discretionary</td>
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Annexure B: Table of Penalties for Corporations
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<thead>
<tr>
<th>Crime/Conduct</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murder</td>
<td>Section 115.1 of the Criminal Code provides penalties for the murder of Australian citizens or residents where the conduct occurs outside Australia. The penalty is $2,100,000. This conduct is also covered under war crimes and crimes against humanity (see below).</td>
</tr>
<tr>
<td>Serious and physical assault</td>
<td>Section 115.3 of the Criminal Code provides penalties for intentionally causing serious harm to Australian citizens or residents where the conduct occurs outside Australia. The penalty is $1,260,000. Section 115.4 of the Criminal Code provides penalties for recklessly causing serious harm to Australian citizens or residents where the conduct occurs outside Australia. The penalty is $945,000.</td>
</tr>
<tr>
<td>Torture and other forms of cruel, inhuman and degrading conduct</td>
<td>Section 274.2 of the Criminal Code provides penalties for torture. The penalty is $1,260,000.</td>
</tr>
</tbody>
</table>
| War crimes   | Subdivision D of Division 268 of the Criminal Code provides the penalties for war crimes. The penalties vary depending on the conduct. The penalty for the war crime of 'wilful killing' is $2,100,000. <sup>548</sup> Penalties for other war crimes include:  
  - torture provides for a penalty of $1,575,000; <sup>549</sup>  
  - inhumane treatment provides for a penalty of $1,575,000; <sup>550</sup>  
  - biological experiments provides for a penalty of $1,575,000; <sup>551</sup>  
  - wilfully causing great suffering provides for a penalty of $1,575,000; <sup>552</sup>  
  - destruction and appropriation of property provides for a penalty of $945,000; <sup>553</sup>  
  - compelling service in hostile forces provides for a penalty of $630,000; <sup>554</sup>  
  - denying a fair trial provides for a penalty of $630,000; <sup>555</sup> and  
  - unlawful deportation, unlawful confinement or taking hostages provides for a penalty of $1,071,000. <sup>556</sup> |
|             | Penalties for other war crimes are provided for in subdivisions E, F, G, H of Division 268 of the Criminal Code. |

<sup>548</sup> Criminal Code s 268.24.  
<sup>549</sup> Criminal Code s 268.73.  
<sup>551</sup> Criminal Code s 268.27.  
<sup>552</sup> Criminal Code s 268.28.  
<sup>553</sup> Criminal Code s 268.29.  
<sup>554</sup> Criminal Code s 268.30.  
<sup>555</sup> Criminal Code s 268.31.  
<sup>556</sup> Criminal Code s 268.32.
<table>
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<tr>
<th>Crime/Conduct</th>
<th>Penalty</th>
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| Crimes against humanity                          | Subdivision C of Division 268 of the Criminal Code provides the penalties for crimes against humanity. The penalties vary depending on the conduct. Crimes against humanity for murder and extermination provide for a penalty of $2,100,000. Penalties for other crimes against humanity include:  
  - enslavement provides for a penalty of $1,575,000;  
  - deportation provides for a penalty of $1,071,000;  
  - severe deprivation of physical liberty provides for a penalty of $1,071,000;  
  - torture provides a penalty of $1,575,000;  
  - rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and sexual violence provide for a penalty of $1,575,000;  
  - persecution provides for a penalty of $1,071,000;  
  - enforced disappearance of persons provides for a penalty of $1,071,000;  
  - apartheid provides for a penalty of $1,071,000;  
  - other inhumane act provides for a penalty of $1,575,000. |
| Genocide                                          | Subdivision B of Division 268 of the Criminal Code provides the penalties for genocide. The penalty for genocide is $2,100,000. |
| Summary or arbitrary executions                   | This conduct, as it relates to corporate entities, is covered by the provisions of the Criminal Code relating to murder and crimes against humanity (see above). |
| Enforced disappearances                           | Enforced disappearance is an offence listed under ‘crimes against humanity’. The penalty is $1,071,000. |
| Arbitrary and prolonged detention                 | This conduct is covered under the tort of false imprisonment. False imprisonment is actionable per se, without proof of damage. Civil damages are awarded as a non-compensatory means of signifying the infringement of the right. The court may also compensate injury to feelings, loss of reputation, pecuniary loss. Damages are at large and may be aggravated.  
This conduct is also covered under crimes against humanity provisions, in particular severe deprivation of physical liberty, enforced disappearance and other inhumane acts. |
| Enslavement                                       | Subdivision B of Division 270 of the Criminal Code provides the penalties for enslavement. The penalty for those intentionally entering into commercial transactions involving a slave is $1,575,000. The penalty for those recklessly entering into commercial transactions involving a slave is $1,071,000. |

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557 Criminal Code s 268.10.  
558 Criminal Code s 268.11.  
559 Criminal Code s 268.12.  
560 Criminal Code s 268.13.  
562 Criminal Code s 268.20.  
563 Criminal Code s 268.21.  
564 Criminal Code s 268.22.  
565 Criminal Code s 268.23.  
566 Criminal Code ss 268.3-268.268.7.  
567 Criminal Code s 268.21.  
568 See, for example, McDonald v Coles Myer Ltd [1995] Aust Torts Reports 81-361.  
569 Criminal Code s 270.3(1).  
570 Criminal Code s 270.3(2).
<table>
<thead>
<tr>
<th>Crime/Conduct</th>
<th>Penalty</th>
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| Slavery-like conditions, including forced labour, and human trafficking | Subdivision C of Division 270, and Division 271 of the Criminal Code provide the penalties for slavery-like conditions and human trafficking. For servitude offences, the penalties are:  
> $1,260,000, for an aggravated offence.  
> $945,000 for any other case. For forced labour offences, the penalties are:  
> $756,000, for an aggravated offence.  
> $567,000 for any other case. For human trafficking, the penalties are:  
> $1,575,000 for trafficking of children.  
> $1,260,000 for aggravated offence.  
> $756,000 for any other case. |
| Child labour | Sections 271.4 and 271.7 of the Criminal Code provide the penalties for the trafficking in children. The penalty for both the offence of trafficking in children and the offence of domestic trafficking in children is $1,575,000. Section 268.68 of the Criminal Code provides the penalties for the use of children during war:  
> use of children provides a penalty of $1,071,000,  
> conscription of children provides a penalty of $945,000,  
> enlisting of children provides a penalty of $630,000. Sections 273.5 to 273.7 provides penalties for conduct outside of Australia involving the use of children in pornographic or child abuse material:  
> $945,000,  
> $1,575,000 for an aggravated offence. Similar penalties apply for domestic offences under s 474.20 of the Criminal Code. Sections 309.3 and 309.4 of the Criminal Code provide penalties for supplying children with drugs for use in drug trafficking:  
> for marketable quantities, $7,875,000 and  
> for non-marketable quantities, $5,250,000. There are similar penalties for procuring children for trafficking drugs and precursors and for exposure of children to the manufacture of drugs. |

571 Criminal Code s 270.5.  
572 Criminal Code s 270.5.  
573 Criminal Code s 270.6A.  
574 Criminal Code s 270.6A.  
575 Criminal Code s 271.4.  
576 Criminal Code s 271.3.  
577 Criminal Code s 271.2.  
578 Criminal Code s 268.68(1).  
579 Criminal Code s 268.68(2).  
580 Criminal Code s 268.68(3).  
581 Criminal Code ss 273.5-273.6.  
582 Criminal Code s 273.7.  
583 Criminal Code s 309.3. Section 309.3 provides for a penalty of life imprisonment and/or 7,500 penalty units.  
584 Criminal Code s 309.4(1). Section 309.4 provides for a penalty of 25 years imprisonment and/or 5,000 penalty units.
<table>
<thead>
<tr>
<th>Crime/Conduct</th>
<th>Penalty</th>
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</table>
| Serious violations of workplace health and safety standards resulting in widespread loss of life or serious injury | Under the *Work Health and Safety Act* 2011 (Cth), penalties are imposed for violations of health and safety duties in the workplace which exposes individuals to a risk of death or serious injury. The penalty imposed varies depending on the type of violation:  
  - Reckless conduct penalty for bodies corporate is $3,000,000.585  
  - For failure to comply with the relevant duty, the penalty is up to $1,500,000.586  

There are no specific penalties for violations that result in widespread loss of life or serious injury. |
| Large-scale environmental pollution and/or damage | The *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) provides for penalties in contravention of a range of environmental protection provisions. These include:  
  - Civil penalty of $10,500,000 for an action that has or will or is likely to have a significant impact on the world heritage values of a declared World Heritage property of World Heritage protection provisions.587  
  - Criminal penalty of a fine not more than $441,000 for offences relating to declared World Heritage properties.588  
  - Similar penalties are provided for National Heritage sites,589 nuclear actions,590 coal seam gas development.591  

Environmental protection is also regulated by State and Territory legislation. For example, Chapter 5 of the *Protection of the Environment Operations Act* 1997 (NSW) provides:  
  - Disposal of waste, leaks, spills and emission of ozone depleting substances that cause harm to the environment are offences with a penalty of up to $5,000,000 for wilful offences or $2,000,000 for negligent offences.592  
  - Land pollution generally carries a maximum penalty of $1,000,000, with a further penalty of $120,000 for each day the offence continues.593  
  - Other offences include air pollution, water pollution, noise pollution and waste offences.  

Each State and Territory has varying penalty provisions for environmental pollution. |
| Other grave and systematic and/or large-scale abuses of economic, social and cultural rights | N/A |

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587 *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) s 12.  
588 *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) s 15A.  
589 *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) s 15B.  
591 *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) s 24D.  