Business and Human Rights: Relevance for WA Lawyers

By John Southalan

Barrister (WA Bar Association); Adjunct Academic (University of Dundee, UWA, Murdoch); Member of Business-Human Rights Committee (Law Council of Australia) and Academic Network for the OECD Guidelines on Multinational Enterprises; Resources Law Network

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

1 UN Guiding Principles on Business and Human Rights

The Guiding Principles on Business and Human Rights (known as the UNGPs) were adopted by the United Nations in 2011 and have been accepted and endorsed by many businesses. The UNGPs have become the predominant framework of the current understanding and approach to business and human rights. The UNGPs confirm that human rights obligations on (and of) the state remain unchanged, but, in addition, each business has a ‘responsibility to respect’ human rights. By ‘human rights’, the UNGPs include the standards in the 1948 UN Declaration of Human Rights plus all the main international human rights treaties which have since been developed – even if the particular treaty has not been adopted by the country where the company is operating, or that country’s domestic law is inconsistent. That is: if the domestic law permits activities below what is specified by international human rights standards, then the company is expected to respect the international standards. The ‘respect’ for human rights, as explicated in the UNGPs, comprises three elements.

a) The business should adopt a human rights policy, involving a public commitment of the organisation’s responsibilities and expectations regarding human rights impacts of its work and workers, reflected in operational policies and procedures.

b) The business needs to conduct human rights due diligence of its operations, which involves identifying and preventing potential impacts as well as addressing actual impacts.

c) Remediation processes should be established for impacts which have occurred or been identified. This aspect comprises two areas, depending on the company’s connection with the impact. For impacts the company has caused or contributed to – the business must provide for, or cooperate in, remediation itself. However, for impacts with which the company is ‘directly linked’ (such as harm by a supplier to the company) the business need only use leverage to prevent and mitigate its recurrence but, if unsuccessful, consider ending the relationship.

1.1 Implementing the UNGPs

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

• The first is national or regional regulation, like France’s Due Diligence law, California’s Transparency in Supply Chains Act, and the EU’s Directive on Disclosures of Non-Financial Information. The Commonwealth Modern Slavery Act 2018 is another example of this, and is examined further below.

• The second way in which UNGPs have legal implications is through contractual obligations, particularly prevalent in membership and certification requirements such as involvement in the International Council on Mining and Metals, the Roundtable on Sustainable Palm Oil, and the International Code of Conduct for Private Security Service Providers; and increasing examples within procurement contracts from large organisations like the Dutch Government and FIFA.

• Financer requirements is the third way in which UNGP compliance arises, such as certain types of projects and financial assistance from the World Bank (through the IFC Performance Standards on Environmental and Social Sustainability) and Equator Principles Banks, which in Australia includes the ‘big four’. Financial requirements relevant: to human rights and the UNGPs also arise in stock exchange listing obligations like the UK’s Strategic Report and Directors’ Report Regulations 2013, South Africa’s
Companies Regulations 2011 (3), and conflict minerals reporting for listing on the US Stock Exchange, under the US Dodd-Frank Act.

- The fourth way in which UNGP compliance may arise for companies is through general procedures, including reporting or complaint mechanisms — such as the International Labour Organisation and UN initiatives14 — the broadest of which the OECD’s Guidelines on Multinational Enterprises which is examined in section 2.

1.2 UNGP statements and Australian laws on misleading conduct

The UNGPs — and related reporting obligations such as modern slavery laws — have expanded corporate publications about human rights, which will give increased relevance to the regulation of statements under the Australian Consumer Law. The prohibition on false or misleading statements was not envisaged as addressing human rights reporting but can extend to corporate statements which occur through the UNGPs. While this has not yet arisen in Australia, corporate liability for human rights and related statements has occurred in the USA15 and the UK.16 The area will likely mirror how regulation responds to other corporate statements — where companies face civil action and regulator prosecutions if they make false claims or misrepresentations about their products or services.17

2 OECD Guidelines on Multinational Enterprises

The widest application of the UNGPs is through the OECD Guidelines, which are an internationally-agreed code of standards for responsible business, featuring a complaints mechanism and implementation bodies (National Contact Points) or NCPs. The OECD Guidelines apply to any multinational business, and therefore any Australian company operating overseas, or overseas companies operating in Australia. The OECD Guidelines cover much more than just human rights,18 in also outlining expected standards regarding ‘Employment and Industrial Relations’, ‘Environment’, ‘Competition’ and ‘Taxation’.

The OECD Guidelines establish a complaint-mediation process — through the National Contact Point — about company compliance with the content of the Guidelines which, since 2011, has included the UNGPs. Like the UNGPs, the OECD Guidelines emphasise that where domestic law falls below international human rights standards, a company is expected to ensure compliance with the international standards. If domestic law actually prohibits conduct which complies with the international standards, then the OECD Guidelines would not require a company to breach the domestic law.19 However, in many cases, the domestic law will only enable company rights or actions without the level of protection of rights which international standards specify, and so the domestic law does not prevent a company from meeting the higher international standards by acting consistently with domestic law.

The OECD Guidelines are the only current international mechanism (with government, business and labour endorsement) which examines UNGP compliance at a case level, so the OECD Guidelines are an important and increasing area of attention. The majority of complaints since 2011 have been about corporate non-compliance with human rights.20 The OECD Guidelines ‘complaint’ process essentially involves the following stages:

1. Any party can make a ‘complaint’ (i.e. there is no need for ‘standing’ or any connection with the matter or the alleged victim). The complaint is formally termed a ‘complaint’ or ‘complaint process’ under the OECD Guidelines. It is lodged with the NCP of the country where the impact occurred or where the company is registered — frequently a complaint is lodged with both ‘host’ and ‘home’ country NCPs. A complaint must identify those parties of the OECD Guidelines alleged to have been breached. Where it is related to human rights, a complaint normally alleges some deficiency of the company regarding a human rights policy, due diligence, or remediation (these concepts having been framed by the UNGPs).

2. The NCP conducts an initial assessment. The National Contact Point decides whether a complaint has been demonstrated if not, then the NCP refuses to proceed with the matter or would occur within three months of receipt of the complaint.

3. If a NCP considers a bona fide case exists then the NCP can facilitate mediation between the parties. This is formally termed the OECD ‘offering its good offices to help the parties involved to resolve the issues’.21 There is no time limit on these processes.

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

4. The NCP issues a final statement, which should be less than three months after any mediation finishes. The final statement is effectively the NCP’s decision or report on the process and:

- wherever possible, any statement and outcomes are agreed by the parties;
- may include the NCP’s recommendations for the company, and observations on compliance with the OECD Guidelines and;
- may presage the OECD undertaking future review of the matter and following up with statements on compliance.

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

- In 2005-2006, the Australian NCP mediated a dispute between an NGO and GSK Australia, about the treatment of children in detention centres managed by the company. The outcome saw the company commit to_upholding the human rights of those in its care...[and] embedding this approach within the company’s policies and procedures, including training of its officers.
- In 2013 the NCPs from Norway, the Netherlands, and South Korea all examined complaints about the South Korean steel company, POSCO, and its mining and processing developments in India. Concerns about environmental and social impacts of the development, and alleged non-compliance with the OECD Guidelines, were lodged against POSCO and also two of its investors who were government pension funds. The Korean NCP dismissed the complaint against POSCO.22 The Korean NCP dismissed the complaint against POSCO.22 The Dutch NCP engaged in mediation involving the Netherlands Government Pension Fund (which had encouraged POSCO to withdraw from the project) and decided that pension fund had complied with its obligations under the OECD Guidelines. However, the Norwegian
proceedings took a different path, after the Norwegian Government Pension Fund refused to mediate. The fund reasoned that it was not responsible under the OECD Guidelines as a minority investor and that its work had broader implications for the Norwegian legal system. The Norwegian NCP concluded, however, that the Norwegian pension fund "violates the OECD Guidelines through a decision on how to react if it becomes aware of human rights risks related to companies in which it holds minority participation apart from child labour violations".

• In 2009, the Australian NCP issued a final statement about a mediation following a complaint about the environmental and social impacts from coal mining operations of a BHP subsidiary in Colombia. Following an independent review of the case, the mediation saw the parties’ agreement including "contributions ... to the US $1 million and a further US $1.3 million for sustainable projects", with BHP also agreeing to ongoing pollution monitoring and management, and other provisions to affected communities.

• In 2016, the Dutch NCP addressed a complaint about the misuse of arbitration clauses in bilateral investment treaties in executions in US courts. Authorities there had begun mining drugs for communication purposes and later other producers prevented their products from being so used. The Mylan anesthetics were made in India, were "never delivered, marketed, or distributed... for use in lethal injections" and should have been monitored by US authorities for any misuse. Nevertheless, the Dutch NCP mediated, and in its final statement made two important points: (1) that despite a company’s earlier precautions, if it learns of new impacts the company has an obligation to do more, and (2) a company’s responsibilities exist not only up the supply chain to customers, but also down the supply chain to airlines and users.

NCPs do not, however, routinely find companies in breach of the OECD Guidelines. Many complaints are summarily rejected or, when examined, are rejected, and result in the NCP confirming the company has not breached the OECD Guidelines. A complaint is also found to be non-informative. The NCP received a complaint and arranged a mediation concerning a wind energy project which was impacting an indigenous group in Sweden. The NCP decided that the lengthy consultation and review processes under Swedish law, which the company had followed and addressed environmental and social impacts, sufficed to meet the UNGPs and the OECD Guidelines and, although there were impacts, the company’s conduct did not breach the OECD Guidelines. The decision was not that the company’s adherence to national law was sufficient but rather that the national laws and procedures followed here ensured compliance with the relevant requirements in the UNGPs and OECD Guidelines. There are cases where a company’s compliance with national laws was insufficient to meet the OECD Guidelines because the national laws and procedures did not ensure the relevant international standards were fulfilled.

2.1 Australian National Contact Point for OECD Guidelines

The AusNCP is the Australian Government body (an individual within the Commonwealth Treasury) which oversees the implementation of the OECD Guidelines in Australia. The AusNCP can receive, analyze, and compile complaints that Australian companies have breached the OECD Guidelines. It has operated for nearly 20 years. Recently, with variable effects in earlier cases, the usual presenting conditions such as cause was reducing Australian company impacts on human rights (e.g. by G2GL and BHP cases summarized above) but there have also been less positive results. For example, in 2001, a case involving Xstrata Coal ended because the company was unwilling to engage in the AusNCP’s mediation of concerns by unions; and in 2016 the AusNCP rejected a complaint about the Gina Kirschenbaum’s management of the Manus Island detention Centre for various reasons including that "aspects of the allegations should be interpreted as a comment on government policy".

In 2017, an independent review identified many deficiencies in the AusNCP’s work and procedures, particularly related to inadequate resources. The Commonwealth Treasury committed, in November 2018, to improvements and stronger accountability, and recent AusNCP cases and statements herald improved AusNCP involvement in companies and human rights issues. Two recent examples are these.

• In June 2017, the AusNCP issued an initial statement regarding a complaint about workplace conditions in factories of subsidiaries of Ansell Ltd in Sri Lanka and Malaysia. The matter was mediated and reached an agreed outcome, including that the company ensure the OECD Guidelines are reflected in its policies and statements, and "keep abreast of any changes or further guidance published by the OECD, particularly... regarding business restructuring and operational arrangements." 46

• In 2018, the AusNCP examined complaints that the ANZ Bank had breached the OECD Guidelines (including human rights) in its financing of a sugar plantation and refinery in Cambodia. After mediation, the AusNCP issued a final statement, acknowledging ANZ’s policies were sufficient but did not verify whether they had been followed in practice, given the impacts and ANZ’s decision to restructure its client. However, the AusNCP recommended the ANZ improve its internal compliance procedures, strengthen its human rights due diligence and, establish grievance mechanisms.

2.2 Due diligence guidelines

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

• Responsible Agricultural Supply Chains (2016); 47
• Responsible Supply Chains of Minerals (2018);
• Meaningful Stakeholder Engagement in the Extractives Sector (2017); 48
• Institutional investors (2017); 49 and
• Responsible Supply Chains in the Garment and Footwear Sector (2018). 50

3.1 UN human rights reports and information

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

• Statements and reports from the Office of the High Commissioner for Human Rights. For example, the Commissioner provided observations on remodelling initiatives developed by the Global Compact on human rights and impacts related to its Pongara mine site in Papua New Guinea. 51

• Observations and decisions from treaty bodies (being the committees established to oversee implementation of each human rights treaty and monitor national compliance). These committees sometimes address corporate responsibility in theory but have even greater relevance in raising flags for companies’ ‘attention’ where they address specific cases. For example, in its reports on Australia, the Committee on the Rights of the Child made the following statement.

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

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

3.2 Chinese Guidelines regarding minerals

The Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains state that “guidance to all Chinese companies which are extracting and/or using minerals and their related products... to observe the UN Guiding Principles on Business and Human Rights during the entire life-cycle of the mining project.” The Chinese Guidelines were adopted, in December 2015, by the China Chamber of Commerce of Metals Minerals and Chemicals Importers & Exporters. The Guidelines requires all Chinese companies operating or using minerals to have a risk-based, supply chain due diligence framework and, where there is a lack of their supply chain, to act to reduce that. 54 Consistent with the UNGPs and the OECD Guidelines, the Chinese Guidelines emphasize the need for companies to ensure compliance beyond domestic law. This can be seen in how the Chinese Guidelines require companies to assess and address risk in their supply chain, and define ‘risk’ as including:

- Extracting or sourcing resources from and where the free, prior and informed consent of local communities... has not been obtained, including those for which the extractor holds a legal title, lease, concession, or license.

The Chinese Guidelines do not, as yet, have any structure for their implementation or monitoring, and so their potential is unclear but potentially vast, if Chinese companies which process or use minerals do begin assessing their risks. However, while the Chinese Guidelines have obtained the free, prior and informed consent of local communities regardless of whether the extractor holds a legal title.

4. Australian Modern Slavery laws

The Modern Slavery Act 2010 commenced on the start of 2019. This requires entities based, or operating, in Australia with annual revenue exceeding $100m to report on modern slavery in their operations and supply chains, and actions to address those risks. 53 The regime is expected to cover more than 3,000 entities and Commonwealth agencies. These organisations must lodge an annual statement (the first statement due in 2023, which are published in a free, online register and the Government can identify entities which are but failed to do so). 54 The Department of Home Affairs is currently consulting on proposed guidelines, which is required to prepare and submit the annual statements.

5. Relevance for WA practitioners

The main implication from the above, for WA lawyers, is that advising and representing clients involves more than
proceedings took a different path, after the Norwegian Government Pension Fund refused to mediate. The fund reasoned that it was not responsible under the OECD Guidelines as a minority investor and that its work had broader implications. The Norwegian NCP concluded, however, that the Norwegian pension fund “violates the OECD Guidelines” and “should have acted to prevent or stop the activity from taking place from which it benefits.”

20. In 2009, the Australian NCP issued a formal statement about a mediation following an investigation into the environmental and social impacts from coal mining operations of a BHP subsidiary in Colombia. Following an independent review of the case, the mediation saw the parties’ agreement including “contributions ... totally US$ 1 million and a further US$ 1.3 million for sustainable projects”, with BHP also agreeing to ongoing pollution monitoring paid for by the companies affected.

21. In 2016, the Dutch NCP addressed a complaint about the misuse of assistive technologies for communication in executions in US jails. Authorities there had been buying drugs for conducting executions in order to prevent other prisoners from accessing products from being so used. The Mylan anesthetics were made in India, were “never delivered, marketed, or distributed... for use in lethal injections” and should have been monitored by US authorities for any misuse. Nevertheless, the Dutch NCP mediated, and in its final statement made two important points: (1) that despite a company’s earlier precautions, if it learns of new impacts the company has an obligation to do more, and (2) a company’s responsibilities exist not only up the supply chain to clients, but also down the supply chain to customers and users.

NCPs do not, however, routinely find companies in breach of the OECD Guidelines. Many complaints are summarily rejected or, when examined, not mediated, result in the NCP confirming the company has not breached the OECD Guidelines. A complaint was not investigated in an informative. The NCP received a complaint and arranged a mediation concerning a wind energy project which was impacting an indigenous group in Sweden. NCP decided that the lengthy consultation and review procedures under Swedish law, which the company had followed and addressed environmental and social issues, suited to meeting the UNIGPs and the OECD Guidelines and, although there were impacts, the company’s conduct did not breach the OECD Guidelines. The decision was not that adherence to national law was sufficient but that the national laws and procedures followed here ensured compliance with the relevant requirements in the UNIGPs and OECD Guidelines. There are cases where a company’s compliance with national laws was insufficient to meet the OECD Guidelines because the national laws and procedures did not ensure the relevant international standards were fulfilled.

2.1 Australian National Contact Point for OECD Guidelines

The Australian NCP is the Australian Government body (an individual within the Commonwealth Treasury) which overseas the implementation of the OECD Guidelines in Australia. The Australian NCP can receive, and decide complaints that Australian companies have breached the OECD Guidelines. It has operated for nearly 20 years, with variable effectiveness. Earlier cases saw outcomes reducing Australian company impacts on human rights (e.g. to GLS and BHP cases summarised above) but there have also been less positive results. For example, in 2003 a case involving Xstrata Coal ended because the company was unwilling to engage in the Australian NCP’s mediation of concerns by unions; and in 2018 the Australian NCP rejected a complaint about the Gits company’s management of the Manus Island detention Centre for various reasons including that “aspects of the case... cannot be interpreted as a comment on government policy.”

In 2017, an independent review identified many deficiencies in the Australian NCP’s work and procedures, particularly related to inadequate resources. The Commonwealth Treasury committed, in November 2018, to improvements and additional funding. In recent years, a large number of cases and statements heralded increased Australian NCP involvement in companies and human rights issues. Two recent examples are these.

2. In June 2017, the Australian NCP issued a final statement regarding a complaint about workplace conditions in factories of subsidiaries of Ansell Ltd in Sri Lanka and Malaysia. The matter was mediated and reached a good result, including that the company ensure the OECD Guidelines are reflected in its policies and statements, and "keep abreast of any changes or further guidance published by the OECD, particularly... (regarding) business structure and operational arrangements.”

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

2.2 Due diligence guidelines

The OECD (sometimes partnering with other international organisations) has produced a range of due diligence guidelines to assist businesses in understanding their human rights responsibilities and conduct due diligence. Some of these OECD documents are then used and referenced by international and domestic regulatory standards in newly establishing appropriate corporate conduct, as well as in NCP decisions. These OECD guidance documents include the "Guidance for implementing the OECD Due Diligence Guide on Responsible Supply Chains in Peace and Security (2016)” but also particular guides for sectors or actors with higher perception of human rights impacts or specific issues to consider in due diligence. These include the following:

- Responsible Agricultural Supply Chain (2016);
- Responsible Supply Chains of Minerals and Metals (2012);
- Meaningful Stakeholder Engagement in the Extractives Sector (2017);
- Institutional investors (2017); and

3. UN and international developments

The UN’s Human Rights Council continues to develop the core of conventional treaty about business and human rights. This does not propose any changes to human rights standards; rather, it envisages more mechanisms (and obligations on states and companies) than what currently exists under the UNIGPs and associated structures. The draft of a proposed treaty was released in July 2018, by a working group of the UN Human Rights Council. The treaty draft, if adopted, may develop from this is uncertain and, even all its highest, still envisages a state-based model with local protection mechanisms (through courts or other national initiatives), with the usual treaty-monitoring committee (comprising members chosen by state parties). As such, in the absence of state action, this provides no current implications for corporate observance of human rights, and little change from applicable future. However there are already existing processes at the international level – through the UNHCR and the UNHRC – which consider UNGP compliance by companies. Two of these, expanded below, are reports from UN bodies and the ‘Chinese Due Diligence Guidelines’.

3.1 UN human rights reports and information

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

- Statements and reports from the Office of the High Commissioner for Human Rights. For example, the Commissioner provided observations on remediation initiatives developed by Shell companies; and the relationship between human rights impacts and decisions in the Pogore mine in Papua New Guinea.
- Observations and decisions from treaty bodies (being the committees established to oversee implementation of each human rights treaty and monitor national compliance). These committees publish sometimes address corporate responsibility in theory but have even greater relevance in raising flag for companies’ attention’ where they address specific cases. For example, in its 2016/2017 report on Australia, the Committee on the Rights of the Child made the following statement.

- The Committee is concerned at reports on Australian mining companies’ participation and

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

28. In light of human rights Council resolutions... adopting the... [UNIGPs], in which it is noted that “The Committee recommends that states parties should be included when exploring the relationship between business and human rights, the Committee recommends that the State party... (ie the Australian Government).”

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

- Inquiries and recommendations of UN bodies and nections, for example in special rapporteur (2017).

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

3.2 Chinese Guidelines regarding minerals

The Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains state that “they are guidelines to all Chinese companies which are extracting and/or using minerals and their related products... to observe the UN Guidance Principles on Business and Human Rights during the entire life-cycle of the mining project.” The Chinese Guidelines were adopted, in December 2015, by the China Chamber of Commerce of Metals Minerals and Chemicals Importers & Exporters. The Guidelines require all Chinese companies extracting or using minerals to have a risk-based, supply chain due diligence framework and, where there is breach in their supply chain, to act to reduce that. Consistent with the UNIGPs and the OECD Guidelines, the Chinese Guidelines emphasise the need for companies to establish and maintain due diligence compliance beyond domestic law. This can be seen in how the Chinese Guidelines require companies to assess and address risk in their supply chain, and define ‘risk’ as including:

- Extracting or sourcing resources from border the free, prior and informed consent of local communities... not has been obtained, including those for which the extractor holds a legal title, lease, concession, or license.

The Chinese Guidelines do not, as yet, have any structure for their implementation or monitoring, and so their potential is unclear but potentially vast. If Chinese companies which process or use minerals do begin adopting these Guidelines, any similar implications for businesses selling minerals to Chinese customers because they will now become aware that they have obtained the free, prior and informed consent of local communities regardless of whether the extractor holds a legal title.

4. Australian Modern Slavery laws

The Modern Slavery Act 2018 commenced at the start of 2019. This requires entities, based, or operating, in Australia with annual revenue exceeding $100m to report on modern slavery in their operations and supply chains, and actions to address those risks.” The regime is expected to cover more than 3,500 entities and Commonwealth agencies. These organisations must lodge an annual statement (the first statements due in 2023, which are published in a free, online register and the Government can identify entities which have not met the requirements but failed to do so.) The Department of Home Affairs is currently consulting on proposed guidance notes that are required to prepare and submit the annual statements.

5. Relevance for WA practitioners

The main implication from the above, for WA lawyers, is that advising and representing clients involves more than
just the relevant ‘domestic’ law (be it Western Australia or Commonwealth). Lawyers therefore naturally believe whether international human rights standards indicate further requirements beyond the Australian law relevant to the particular events or transaction on which the lawyer is advising. Perhaps disappointingly, the consular and commercial laws of relevant countries is not the arbiter of international human rights standards and has acknowledged that the Australian law – including its pronouncements – may interpret obligations differently to international bodies.10 It is therefore clear that the standards which reign in this field. As the AusNCP observed, in one of its statements, the OECD Guidelines “represent standards of behavior superior to Australian law and, as such, do not create conflicting requirements.”

Australia’s laws and government procedures provide many human rights protections, and companies are, of course, entitled to rely on these. However there are areas where Australian law does not ensure international human rights standards, and additional attention would be provided to these situations, such as the extractives sector (mining, oil, gas); native title issues; investment disputes (domestic and international); and operators in conflict-prone or failing states.11 The key question for WA lawyers, in determining whether a company is required to ‘respect human rights’ is: if the Australian law/practice is insufficient to meet international standards, what more is required from the company (e.g. to ensure that it is compliant with the OECD Guidelines)?

Lawyers need familiarity with this area to properly advise and assist clients (and perhaps even avoid professional disciplinary sanctions). This is critical when the client is corporate, government or a third-party affected by company activities. Useful materials include:

- IBA & Law Council of Australia materials and training.
- OECD guidance documents (see section 2.2 above).
- the UN’s 2012 Intangible Guide12 and more recent publications;13
- publications of the Parliamentary Joint Committee on Human Rights.14

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

Evictions

The article is grateful to IF Research for earlier drafts with Katie Galligan, Professor Paul Fitzherbert and Lauren Jakeman.

1. The development in the Australian legal landscape are enterprises that are subject to sections 2-6 of this article. The government may review this.
2. The interim report of the Royal Commission on Banks, which noted that “the banks are not necessarily (unless they are insolvent) the courts will have their say, and that is not something that is easy to do in terms of taking to do”. Commissioner Hope’s interim Report “progress and decision making in terms of the Supervision and Preventive Services Industry” – Australian Government, 28 May 2016 (emphasis in original).
3. The forthcoming “Royal Commission into Aged Care Services” has already indicated that “aged care services... meet the needs of the people accessing these...” including, according to the previous report of above... any actions that should be taken in Aged Care: Parliamentary Joint Committee on Human Rights, Paper/Petition Series (accessed reference to 19 December 2017).
6. An UN Human Rights Council, Human rights and economic, social and cultural rights and the enjoyment of all human rights, 2015 (emphasis in original).
7. Prominent international examples and cases in Australia, are listed in Australia, includes BHP Billiton 18-19 of the dissertations, this PhD of University of Melbourne. Their Observer watch is the BHP, Commonwealth Bank, BHP Billiton, Commonwealth Bank and of Australia, 2019 (emphasis in original). The two executive committees, human rights issues, each includes a variety of recommendations, and access to Australia, 2015 (emphasis in original).
9. Dunstan Stott (IIBA) and UN’s Global Compact (emphasis in original).
10. The UN’s principle of international human rights standards, and operators in conflict-prone or failing states.
11. The key question for WA lawyers, in determining whether a company is required to ‘respect human rights’ is: if the Australian law/practice is insufficient to meet international standards, what more is required from the company (e.g. to ensure that it is compliant with the OECD Guidelines)?

Lawyers need familiarity with this area to properly advise and assist clients (and perhaps even avoid professional disciplinary sanctions). This is critical when the client is corporate, government or a third-party affected by company activities. Useful materials include:

- IBA & Law Council of Australia materials and training.
- OECD guidance documents (see section 2.2 above).
- the UN’s 2012 Intangible Guide12 and more recent publications;13
- publications of the Parliamentary Joint Committee on Human Rights.14

To learn more about the topics covered in this article, register for the Law Society’s CPD Webinar: Freedom Slavery: What It Means for Your Clients’ on Tuesday, 12 March 2019. Register online at lawsocietywa.asn.au/event/modern-slavery
just the relevant ‘domestic’ law (be it Westminster or Commonwealth). Lawyers therefore need to determine whether international human rights standards indicate further requirements beyond the Australian law relevant to the particular events or transaction in which the lawyer is advising. Perhaps discomforting, the discussion in this section is not the orbiter of international human rights standards and has acknowledged that Australian law – including its pronouncements – may interpret obligations differently to international bodies. It is therefore the applicable standards which reign in this field. As the AusNCP observed, in one of its statements, the OECD Guidelines “represent standards of behaviour that supplement domestic law and, as such, do not create conflicting requirements.”

Australia’s laws and government procedures provide many human rights protections, and companies are, of course, entitled to rely on these. However there are areas where Australian law does not ensure international human rights standards, and additional attention would be prudent in these situations, such as the extractive sector (mining, oil, gas); native title issues; investment treaties; conflicts of interest; and governance in conflict-prone or failing states.

The key question for Wales, in determining whether the company has the ‘reasonable’ intention to respect ‘human rights’ is if the Australian law/practice is insufficient to meet international standards. What is more required from the company (e.g. to ensure that it is compliant with the OECD Guidelines)?

Lawyers need familiarity with this area to properly advise clients and parties (perhaps even apart from professional negligence implications). If the client is corporate, government or a third-party affected by company activities. Useful materials include:

- ISA & Law Council of Australia materials and training.
- OECD guidance documents (see section 2.2 above).
- the UN’s 2012 Intergovernmental Guide and more recent publications; and
- publications of the Parliamentary Joint Committee on Human Rights.

To learn more about the topics covered in this article, register for the Law Society’s CYP2019 Community: Freedom Slavery: What It Means for Your Clients’ on Tuesday, 12 March 2019. Register online at lawsocietywa.swna.event/modern-slavery