



Australian
Human Rights
Commission

Implementing the UN Guiding Principles on Business and Human Rights in Australia

Joint Civil Society Statement

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Joint Civil Society Statement

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1 Summary of CSO Roundtable Outcomes

On 25 May 2016, the Australian Human Rights Commission (the Commission) hosted a roundtable meeting for civil society representatives, including non-governmental organisations and academia (the CSO Roundtable). This Joint Civil Society Statement (Statement) reflects the key outcomes of the CSO Roundtable.

The key question underpinning this Statement is: *how are the UNGPs to be operationalised in Australia?* This Statement sets out civil society's² initial recommendations to the Australian Government on the implementation of the UN Guiding Principles on Business and Human Rights (UNGPs) in Australia.

1.1 Key Recommendations

Civil society's key recommendations for the Australian Government are:

- establish a **multi-stakeholder advisory group** as a priority;
- conduct a thorough, consultative and efficient **national baseline assessment**;
- develop a **national action plan** on business and human rights (NAP) that contains specific, forward-looking commitments, timelines and allocated responsibilities;
- meet criteria for the NAP development **process**:
 - a high level of transparency
 - multi-stakeholder participation and consultations
 - an evidence-based approach
 - a monitoring and review mechanism
- meet criteria for NAP **content**:
 - UNGPs as a foundation
 - include action-orientated, forward-looking targets
 - address interests of all groups in society (including the most marginalised)
 - include measures to ensure adequate access to remedy
- lead by example, particularly in **public procurement** and the operation of state-owned, controlled and supported business enterprises;
- develop clear **guidance for business**³ on how to respect human rights in accordance with the UNGPs, including on human rights due diligence and reporting;
- develop options for safeguarding, supporting and developing mechanisms that provide access to **remedy** for the victims of business-related human rights abuses;
- strengthen the Australian **OECD National Contact Point**; and

- commit adequate **resources** to implementing the UNGPs.

1.2 Key Challenges

Civil society recognises the following issues as representing key business and human rights challenges for Australia and as requiring attention:

- migrant labour exploitation in Australia;
- labour abuses in the supply chains of Australian businesses;
- role of institutional investors and finance institutions in contributing, through their funding activities, to the commission of business-related human rights abuses;
- access to remedy for people who suffer harm as a result of corporate human rights abuses; and
- offshore operations of Australian companies.

2 Background

2.1 UN Guiding Principles

The [UN Guiding Principles on Business and Human Rights](#) (UNGPs) were unanimously endorsed by the United Nations Human Rights Council (UNHRC) in June 2011. The Australian Government co-sponsored this resolution. The UNGPs provide an international standard for addressing and preventing negative human rights impacts associated with business activity.

2.2 National Action Plans

National action plans (NAPs) are policy statements that provide an overall strategy and set of government commitments in a given policy area. In relation to business and human rights, NAPs articulate a government's strategy for implementing the UNGPs. This requires introducing improvements to the existing legal, regulatory and policy framework to fully implement the UNGPs and better protect against corporate-related human rights abuses. As State instruments, NAPs are primarily directed at meeting a State's obligations under Pillars 1 (duty to protect human rights) and 3 (providing access to remedy) of the UNGPs. NAPs also provide a mechanism for States to support business in fulfilling its obligations under Pillar 2 (corporate responsibility to respect human rights) of the UNGPs.

The development of business and human rights-related NAPs and uptake of the UNGPs are corresponding and complementary processes. The development of a NAP is intended to ensure that UNGPs implementation is efficient, targeted, measureable and informed and supported by relevant stakeholders.

The UN Human Rights Council (UNHRC) supports the development of NAPs as a method for achieving UNGP uptake. In June 2014, the UNHRC called on member

States to adopt NAPs as a means of implementing the UNGPs within their respective territories and jurisdictions.⁴ The Australian Government supported this resolution.

To date, 10 NAPs⁵ have been completed with a further 27⁶ underway across the world.

2.3 Steps Taken

In March 2016, the Australian Government announced its intention to undertake a national consultation in 2016 on the implementation of the UNGPs.⁷ The announcement was made in response to recommendations arising from Australia's UN Universal Periodic Review appearance in November 2015. The announcement also responded to calls for a NAP from civil society organisations in early 2016.⁸ It is hoped that a clear intention to develop a NAP to implement the UNGPs will emerge from the national consultation to be convened by the government later this year.

In response to this announcement, and in preparation for the government consultation, the Australian Human Rights Commission (the Commission) hosted a roundtable meeting on Wednesday 25 May 2016 for civil society representatives, including non-governmental organisations and academia (the CSO Roundtable). Those organisations identified as being in support of this Statement (on page 3) were represented at the CSO Roundtable.

The purpose of the CSO Roundtable was to discuss ideas and build consensus amongst representatives of civil society on the measures required to progress Australia's implementation of the UNGPs. The CSO Roundtable discussions were structured by reference to the three pillars of the UNGPs. The discussions focused on the role of the government in implementing the UNGPs in Australia.

3 Purpose of Joint Civil Society Statement

This Statement articulates the key outcomes of the CSO Roundtable. It draws on briefing papers that were prepared by a number of non-governmental organisations in advance of the CSO Roundtable. It has been prepared in order to provide recommendations to the Australian Government from civil society on next steps in implementing the UNGPs in Australia. The recommendations in this Statement relate to the national baseline assessment (NBA), a potential NAP and multi-stakeholder engagement and participation in both these processes.

The recommendations in this Statement constitute a starting point. They will be further developed by civil society as the consultation processes proceed.

4 National Baseline Assessment

The conduct of a comprehensive NBA of existing laws, policies, mechanisms and practices to determine the scope of current UNGPs implementation in Australia is a key priority for civil society.⁹ The development of an effective NAP requires adopting a tailor-made approach. One size does not fit all and a thorough NBA is essential to ensure that any future NAP is framed so as to address Australia's needs. Gaps in the implementation of the UNGPs identified in Australia's existing human rights

framework by the NBA can then be addressed in, and form the basis of, an ensuing NAP. It is critical that the NBA is approached as a gap analysis process and not merely a mapping of existing measures already undertaken by the government in relation to business and human rights.

Effective multi-stakeholder consultation and engagement will also be a critical in achieving successful NBA outcomes. It is recommended that representatives of all stakeholder groups impacted by business activities be consulted, including people and groups experiencing vulnerability, affected communities and human rights defenders¹⁰. It is recommended that an independent, multi-stakeholder advisory panel (the MS Panel) be established to advise the government on the NBA (see further at 5 below).

Civil society views a NBA as critical in order to:

- facilitate an evidence-based approach to NAP development;
- identify gaps in UNGP implementation; and
- establish forward-looking, specific, concrete steps to build strong foundations for an effective future NAP.

5 Multi-Stakeholder Participation and Advisory Panel

As stated previously, multi-stakeholder participation in the NBA and, potentially, NAP processes is essential and represents a key priority for civil society. To facilitate multi-stakeholder input into the process, the timely establishment of the MS Panel is recommended. This will enable key stakeholder engagement from the commencement of the NBA process which, in turn, will enhance the legitimacy and effectiveness of outcomes.

5.1 *Role of MS Panel*

It is recommended that the MS Panel be established to:

- act as an advisory group to provide independent expert advice to the government on the scope, content and conduct of the NBA and, potentially, the NAP processes;
- facilitate the exchange of expertise and knowledge; and
- act as a liaison point, and facilitate open lines of communication, between the government, civil society and the business community.

5.2 *Composition of MS Panel*

It is recommended that stakeholder groups with an interest and expertise in matters relating to business and human rights and national action plan initiatives are represented on the MS Panel. The composition of the MS Panel should reflect an

equitable balance of stakeholder groups, with business and civil society interests being equally represented. Key groups to be represented include:

- business and industry;
- non-governmental organisations;
- trade unions;
- academia; and
- the national human rights institution.

Civil society considers the establishment of the MS Panel to be critical in order to:

- assist in developing comprehensive frameworks for the NBA and NAP development; and
- facilitate effective multi-stakeholder participation and oversight in the NBA and NAP processes.

6 NAP Process

The development of a NAP via an inclusive, multi-stakeholder process in which all potentially impacted groups have an opportunity to participate is a key priority for civil society.

To assist in achieving this, it is recommended that the following criteria are met with respect to a NAP development process:

- establish the **MS Panel**;
- develop **terms of reference** and agreed language, using defined terms for greater certainty and common understanding;
- allocate adequate **resources** to the NAP process;
- develop a **participatory dialogue** process via multi-stakeholder engagement and communicate consultation outcomes;¹¹
- adopt an **evidence-based** approach involving a rigorous NBA¹² with the input of civil society;
- ensure **transparency** around the NAP development process and information generated by it;
- establish and publish a NAP **timetable**, relating to the initial NAP and subsequent updated versions;
- provide regular **opportunities** for review of NAP drafts;
- ensure **policy coherence** by adopting a whole of government approach to NAP development; and
- include a robust NAP impact **review mechanism** that involves civil society.

7 NAP Content

7.1 Overview

The development of a proactive, target-driven NAP that affects real change is a key priority for civil society.

In achieving this outcome, it is recommended that the content of a NAP meets the following criteria:

- include **statements** that:
 - the Australian Government is committed to implementing the UNGPs
 - Australian companies are expected to respect human rights, at home and overseas, and so are their subsidiary companies, wherever operating
 - Australian companies are expected to seek to prevent human rights abuses by other parties with which they are connected
- ensure that the NAP is founded on the **UNGPs**;
- **address gaps** in domestic frameworks, as identified by a NBA;
- address and protect the human rights of all members of society, particularly groups experiencing **vulnerability** including human rights defenders and those facing discrimination;¹³
- include Australia's **national priorities** for action;
- include specific, **forward-looking targets**;
- encourage and support corporate **human rights due diligence**;
- encourage corporate **reporting** on human rights issues and enhanced transparency regimes;¹⁴
- address the role of the **State as an economic actor**; and
- adequately address access to **remedy** in cases where companies adversely impact human rights.

7.2 The State Duty to Protect Human Rights (Pillar 1)

(a) General

Under international human rights law and the UNGPs, States are required to protect human rights from business-related abuse.¹⁵ To meet this obligation, States should consider implementing preventative and remedial measures including policies, legislation, regulations and adjudication.¹⁶

Civil society considers the following to be key mechanisms through which the Australian Government can discharge its duty to protect human rights under the UNGPs:

- education, training and awareness-raising programs;

- regulation; and
- public procurement practices.

(b) ***Human rights-related regulation***

(i) ***Domestic***

It is recommended that, in taking steps to discharge its duty to protect against business-related human rights abuse, the Australian Government gives full consideration to appropriate and effective domestic regulatory measures.

Further, it is recommended that the Australian Government:

- conducts a thorough analysis of existing legal and policy frameworks via a NBA (see section 4 above);
- considers how best to encourage a corporate culture of respect for human rights through preventative measures;
- develops guidance for business on how to respect human rights in accordance with the UNGPs;¹⁷
- focuses on and explores both legislative options, such as those provided by corporate law frameworks, and non-legislative options for enhancing human rights protections in business practice;¹⁸
- supports and promotes effective corporate human rights due diligence practices (see section 7.3(a) below); and
- encourages and facilitates greater transparency through enhanced human rights-related reporting and disclosure by companies (see 7.3(b) below)

(ii) ***Extra-territoriality***

The Australian Government has endorsed the UNGPs and has an obligation to implement them. Under the UNGPs, States are required to 'protect against human rights abuse within their *territory and/ or jurisdiction by third parties*'.¹⁹ The UNGPs also require States to set out an expectation that 'all business enterprises domiciled in their territory and/ or *jurisdiction* respect human rights *throughout their operations*'.²⁰ The UNGPs clearly articulate an expectation that States will take steps to control and influence business activities occurring beyond their geographical borders.

The extra-territorial control of business activities and prevention of human rights abuses in foreign jurisdictions is fundamental to the protection of human rights in a business context. Australian companies frequently operate extra-territorially, either directly or indirectly through their subsidiaries or business relationships. Whilst the question of extra-territorial regulation of Australian business enterprises raises complex legal issues, there is precedent for action.²¹

It is recommended that the Australian Government:

- examines, as part of a NBA, the scope of existing domestic laws with extra-territorial application;
- considers the potential of domestic laws in providing a roadmap for enhancing human rights-based regulation of Australian companies in their overseas operations;
- ratifies relevant international conventions (together with optional protocols);
- supports and encourages Australian parent companies in conducting adequate due diligence, in accordance with the UNGPs, to ensure awareness of potential and actual human rights abuses and facilitate prevention or remediation of abuses;
- considers legislative reform imposing liability on parent companies where there is a procedural failure to act with due diligence;
- provides certainty for Australian businesses by clearly articulating an expectation that they respect human rights abroad;
- promotes adherence to human rights standards by Australian businesses in multi-lateral, international and regional fora (such as the UN, the OECD and APEC);
- adequately addresses, in a NAP, issues relating to the regulation and control of Australian business enterprises, both at home and abroad;
- protects and supports, via diplomatic and consular missions, the work of human rights defenders in providing protection against business-related human rights abuse occurring overseas; and
- focuses on Australia's diplomatic missions and consular activities as a vehicle to enhance human rights protection for local communities impacted by Australian businesses operating overseas.

(c) ***State-Business nexus – ensuring State adherence to human rights standards in its own activities***

A key priority for civil society is that the Australian Government adequately reflects human rights standards in its own policies and procedures. The government is an economic actor in its own right. As such, it is also required to adhere to human rights standards in its business-related activities.²² Further, it would be commendable for the government to endeavour to act as a role model and lead Australia's corporate sector by example.²³

(i) ***Government-owned and supported business enterprises***

The Australian Government bears responsibility for the human rights impacts of the businesses that it owns or controls such as the Australian Government Future Fund, the Australian Broadcasting Corporation and Australia Post or supports through, for example, the Department of Foreign Affairs and Trade, Austrade, Tourism Australia, Export Finance and Insurance Corporation, or the Australian Centre for International Agricultural Research (SOEs).

If the government is to effectively promote UNGPs adoption by the private sector, it should similarly adhere to relevant obligations. The UNGPs make it clear that States

are required to take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State.²⁴ These additional steps may include requiring human rights due diligence.²⁵ Similarly, the government should ensure that it does not provide support for companies that are failing to meet their human rights responsibilities.

As a first step, it is recommended that the government reviews, as part of the NBA, its policies and procedures relating to SOEs and identifies measures to improve its practices. In considering its obligations, it is recommended that the government has regard to the State-directed recommendations in the report of the UN Working Group on Business and Human Rights to the UN Human Rights Council, *Leading by example – The State, State-owned enterprises and Human Rights*, May 2016.²⁶

It is further recommended that the Australian Government:

- ensures that human rights due diligence requirements are built into its own business practices and are a condition of financial, or other, support to business entities with which it partners;
- ensures that companies to which it provides financial, or other, support meet all relevant human rights standards;
- reviews available grievance mechanisms for people affected by the operations of government-owned or controlled companies to ensure their adequacy and consistency with the UNGPs; and
- includes provision for human rights requirements relating to government-owned and/ or supported business enterprises in a NAP.

(ii) ***Privatisation***

The UNGPs recognise that States do not relinquish their international human rights obligations when public services are privatised.²⁷ The government is obliged to promote compliance with the UNGPs when setting conditions for the privatisation of essential services.

It is recommended that the Australian Government:

- conducts a human rights impact assessment of the potential consequences of any planned privatisation of public services;
- establishes institutional and contractual protections to ensure that human rights are respected in the operation of privatised services; and
- includes provision for human rights requirements relating to privatisation measures in a NAP.

(iii) ***Government procurement***

Achieving respect for human rights in the Commonwealth's procurement practices is a key priority for civil society.

The government is itself a consumer of goods and services. It wields enormous influence over the private sector's human rights policies and practices through its procurement practices. Procurement spending across all Australian government departments represents approximately 10 percent of Australia's GDP and in 2014-15

the Commonwealth Government signed over 69,000 contracts with a combined value of over \$59 million.²⁸ Where the suppliers of goods and services to the government are responsible for human rights violations, including in their supply chains, the government may itself be directly implicated.

The UN's former Special Representative on Business and Human Rights, Professor John Ruggie, has recommended that any partnerships between the public and private sectors should:

'include in their governance arrangements measures to reinforce existing State duties as well as corporate due diligence processes to avoid adverse impacts, and to address them where they do occur. Multi-stakeholder initiatives should also ensure they have in place effective grievance mechanisms consistent with the provisions set out in the guiding principles'.²⁹

The Commonwealth procurement policy framework already aims to ensure that businesses supplying goods or services to the government do not use products affected by human trafficking, slavery or slavery-like practices in supply chains.³⁰ The Commonwealth Procurement Rules preclude entering into contracts with tenderers who have had a judicial decision against them relating to employee entitlements and who have not satisfied any resulting order.³¹ These provisions create a model for a more comprehensive incorporation of human rights protections into Commonwealth procurement practices.

It is recommended that:

- the award and renewal of procurement contracts by the government is conditional on the human rights record of a business enterprise and its ongoing commitment to respect human rights;
- ongoing commitments by a business to respect human rights include effective human rights due diligence conducted in accordance with the UNGPs;
- due consideration is also given to the government's obligations under the Sustainable Development Goals (including Target 12.7 which requires the promotion of sustainable public procurement practices);³²
- human rights requirements are included in the Commonwealth Procurement Rules; and
- human rights-related procurement requirements are applied to the supply of goods or services to the government from both Australian and overseas suppliers.

(iv) ***Aid and development policy***

Australia's official development assistance includes a focus on 'sustainable economic growth driven by the private sector' and directs Australia's development assistance towards the pursuit of economic growth through the promotion of free markets, trade agreements and private sector development.³³ Examples of DFAT programs that seek to harness the private sector include the Mining for Development Initiative, 'aid for trade' policy and private sector involvement in the delivery of aid.

While the private sector has the capacity to contribute to economic growth, poverty alleviation and human development, businesses can also undermine those goals

when they fail to respect human rights. Aid effectiveness principles and Australia's international human rights obligations require that aid and development initiatives that involve supporting or partnering with companies must incorporate effective safeguards to protect human rights and facilitate remedies for victims where violations occur.

It is recommended that the Australian Government:

- conducts human rights impact assessments of aid and development projects and of private sector partners involved in their implementation;
- expresses a clear commitment not to partner with, or support, companies or projects responsible for human rights violations;
- establishes an effective, transparent and accessible grievance mechanism for its aid and development program available to those adversely affected by government projects; and
- investigates and remedies, via the aid and development grievance mechanism, human rights abuse when it occurs.

(d) ***Maintaining policy coherence***

Government policy should be consistent in promoting respect for human rights.³⁴ The adoption and maintenance of a strong, coherent message on human rights by the government across domestic, regional and international fora is a key priority for civil society.

It is recommended that the Australian Government:

- undertakes, as part of the NBA, a thorough examination of its current business and human rights policy framework on a domestic (horizontal) and international (vertical) basis;
- analyses the results of the NBA to identify how best to ensure enhanced vertical and horizontal policy integration and coherence on business and human rights policy;
- proactively participates in and supports international and regional bodies (including the UN, ILO, WTO, Commonwealth, OECD, G20 and ASEAN), processes and initiatives (such as the Voluntary Principles on Security and Human Rights and the Children's Rights and Business Principles) so as to promote the UNGPs framework and responsible business practices; and
- includes, in a NAP, proposals for achieving and maintaining a consistent, coherent approach to promulgating policies that enable the government to meet its obligations under the UNGPs.

(e) ***Trade and investment agreements***

The UNGPs require States to have due regard to their human rights obligations in entering into international investment and trade agreements and not to act so as to constrain their ability to meet these obligations.³⁵

It is recommended that the Australian Government:

- reviews and analyses, as part of the NBA, Australia's trade and investment relationships and agreements from a human rights compliance perspective (with special reference to investor-state dispute settlement mechanisms and stabilisation clauses); and
- explores options for human rights protections relating to Australia's trade and investment arrangements to be included in a NAP.

7.3 The Corporate Responsibility to Respect Human Rights (Pillar 2)

Business enterprises are required to respect human rights.³⁶ The UNGPs should be taken as representing a floor, rather than a ceiling, for responsible business practices. Companies should be encouraged to go beyond 'respecting' human rights and do more to 'protect' human rights, particularly when interacting with human rights defenders, who frequently risk criminalisation, violent attacks and even death, in seeking to protect human rights in at risk communities.³⁷

Pillar 2 of the UNGPs contains the corporate responsibility to respect human rights and requires the establishment of policies and procedures, including human rights due diligence and reporting, to meet this responsibility.

In meeting its obligations under Pillar 1 of the UNGPs, the Australian Government should assist and support business in meeting the corporate human rights responsibilities articulated in Pillar 2 of the UNGPs. Keys mechanisms for achieving this include human rights due diligence and reporting – the 'know and show' elements, respectively, of the corporate responsibility to respect human rights, as expressed by the UNGPs.

(a) Human rights due diligence

Properly conducted human rights due diligence enables companies to uncover their actual and potential human rights impacts. This represents the 'know' element of corporate responsibility to respect human rights.³⁸ It is recommended that the government takes steps to reinforce the corporate responsibility to respect human rights by encouraging and supporting companies in their adoption of effective and appropriate human rights due diligence processes.

It is acknowledged that an insufficient number of Australian companies have introduced human rights due diligence processes in accordance with the UNGPs. This is particularly the case in relation to small and medium enterprises (SMEs). Civil society recommends that the Australian Government prioritises facilitating effective structural change in this area.

To achieve this, it is recommended that the Australian Government:

- examines, as part of the NBA, the current human rights due diligence activities of Australian companies;

- assesses, as part of a NBA, existing legislative due diligence requirements;
- considers options for building upon existing foundations so as to enhance the human rights due diligence requirements of Australian businesses;
- endeavours, through education and training programs, to bring about a cultural shift in corporate attitudes towards, and understanding of, human rights due diligence processes and procedures, with an emphasis on engaging SMEs;
- develops guidance for companies on interpreting and implementing the human rights due diligence requirements under the UNGPs, with a particular focus on SMEs;
- collaborates with civil society in developing human rights due diligence guidance for business;
- adopts human rights due diligence processes in its own business practices (see further at 7.2(c) above); and
- seeks compliance by companies with human rights due diligence guidelines and standards.

(b) **Reporting**

Where a company's operations, or operating context, poses the risk of severe human rights impacts, then the UNGPs require the company to report formally on how it addresses that risk.³⁹ Reporting constitutes the 'show' element of the corporate responsibility to respect human rights. The UNGPs require States to promote communication by business enterprises on their human rights impacts.⁴⁰

Targeted corporate human rights reporting can play a critical role in changing patterns of behaviour and achieving greater corporate responsibility with respect to human rights. It encourages companies to critically examine their potential and actual human rights impacts and the steps required to address these impacts. It also facilitates transparency. The information yielded by company reporting provides a valuable source of information for civil society and other stakeholders (such as investors, customers and employees) on corporate endeavours to improve human rights records. This enables greater scrutiny and evaluation of the human rights performance of Australian businesses.

Increasingly, companies are required to publicly disclose information on human rights issues arising from their operations, such as steps to eradicate abusive labour practices in their supply chains.⁴¹ There is also a growing trend in corporate regulators requiring greater transparency in company reporting. Companies are increasingly required to report on non-financial information, including their human rights performance. Mandatory environmental, social (generally accepted as including human rights) and governance disclosures are now required by a number of stock exchanges, including in the US, the UK and, most recently, Singapore⁴².

The goal of achieving greater transparency through public reporting on human rights is a priority for civil society.

In working towards this, it is recommended that the Australian Government:

- examines, as part of a NBA, the current human rights-related disclosure and reporting requirements of companies in Australia, including under the Australian Stock Exchange (ASX) Listing Rules, ASX Corporate Governance Principles and Recommendations and the Corporations Act 2001 (Cth) to ascertain whether they support the corporate responsibility to respect human rights under the UNGPs;
- consults, as part of a NBA, with stakeholders, including corporate regulators, ASIC, ASX and AusTRAC, on the adequacy from a human rights perspective of current reporting requirements in Australia and compliance with the UNGPs;
- considers, as part of the NBA, the extent to which human rights-related matters potentially meet materiality thresholds under existing mandatory disclosure requirements;
- examines, as part of a NBA, the current reporting practices of Australian businesses, particularly SMEs;
- considers options for excluding potential business partners from public procurement opportunities and other public contracts where the entity does not adequately comply with human rights-related disclosure and reporting requirements;
- considers human rights self-reporting measures;⁴³
- considers developing best practice guidelines for companies on disclosures relating to human rights and other mechanisms to encourage enhanced reporting on human rights, in conjunction with civil society and corporate regulators;⁴⁴
- explores options for prescribing specific human rights disclosures and enforcement mechanisms so as to effect structural change; and
- includes its reporting expectations of Australian businesses in a NAP.

7.4 Access to Remedy (Pillar 3)

The UNGPs require States to take appropriate steps to ensure access to effective remedy for those affected by business-related human rights abuse.⁴⁵ This applies to both judicial and non-judicial grievance mechanisms. A State is required to take these steps in fulfilment of its duty to protect against human rights abuses by business.

The area of remedies is one in which governments around the world have consistently delayed in implementing the UNGPs. In Australia, civil society recommends that the government embraces the opportunities provided by the NBA and NAP processes to identify key areas in which efforts can be enhanced so as to improve access to justice for victims of corporate human rights abuses, via both judicial and non-judicial mechanisms.

(a) ***Barriers to accessing justice***

Barriers exist which block victims of business-related human rights abuse from accessing justice and obtaining redress. These hurdles are:

- financial: prohibitive costs and lack of funding or other forms of support for legal action;
- procedural: jurisdiction of the courts, statutes of limitations, disclosure requirements and rules governing applicable law;
- practical: public awareness and access to information, claimant security and difficulties associated with evidence gathering; and
- legal: limitations on parent company legal liability due to doctrines of limited liability, separate legal personality of companies and operation of the corporate veil.

The UNGPs require States to consider ways to reduce such barriers.⁴⁶ To improve access to remedy for human rights abuses committed by Australian businesses, it is recommended that existing barriers are identified and analysed in the NBA and addressed in a NAP.

(b) ***Steps to improve access to justice***

It is recommended that the Australian Government:

- conducts, as part of a NBA, an evaluation of Australia's State-based judicial and non-judicial mechanisms and measures directed at providing remedy to victims;
- examines, as part of the NBA, barriers that exist in Australia that hinder access to justice for business-related human rights abuse;
- explores options for reducing existing barriers that prevent victims of corporate human rights abuse from obtaining effective remedy;
- reviews and analyses, as part of the NBA, current support for non-State-based complaints procedures, such as those administered by companies themselves, via industry or multi-stakeholder groups or through regional and international bodies or initiatives;
- explores, as part of the NBA, the role of Australia's diplomatic and consular missions in providing redress for business-related human rights grievances and coordinating between home and host state mechanisms;
- considers options for strengthening existing State-based judicial and non-judicial remedy mechanisms;
- considers options for enhancing support for non-State-based grievance mechanisms;
- explores options for developing and strengthening alternative remedy mechanisms that provide an alternative to the 'traditional' judicial system;⁴⁷

- develops and implements a public education and awareness-raising program about the availability of business-related complaints mechanisms, with a special focus on non-judicial mechanisms; and
- identifies measures to effectively remove or reduce barriers, such as measures to assist financially disadvantaged claimants.⁴⁸

(c) **Australia's OECD National Contact Point**

A key civil society priority is the need to reform the Australian OECD National Contact Point (AusNCP) in terms of its resourcing and functionality.

The OECD Guidelines on Multinational Enterprises (MNE) (the Guidelines) provide government-backed recommendations for the responsible business conduct of multinational corporations in countries adhering to the Guidelines. They cover a broad range of areas relating to business ethics, including human and labour rights, disclosure, taxation and the environment. The Guidelines have been endorsed by the Australian Government.

A potentially significant grievance mechanism for victims of business-related human rights abuse is provided by the Guidelines in the form of the National Contact Point (NCP) complaints mechanism. An NCP is the entity responsible for promoting the Guidelines on a national level within a country. It handles enquiries and matters related to the Guidelines, including investigating complaints about companies operating, or headquartered, in its country.

As noted, considerable hurdles exist to accessing justice via the judicial system in cases of business-related human rights abuse. The NCP complaints system potentially offers a number of benefits as an alternative method of dispute settlement. As a State-based non-judicial grievance mechanism, it represents a consensual and non-adversarial method of dispute resolution which is potentially cheaper and faster than more formal legal proceedings. As NCPs are not limited to considering negative human rights impacts occurring within their borders, the complaints system offers a valuable tool for tackling global human rights issues, such as those arising in transnational supply chains.

The AusNCP requires adequate funding and resourcing with staff holding relevant human rights qualifications and experience. It also requires greater independence from the government to enable it to function as an effective complaints handling procedure. It represents a key factor in Australia's implementation of the UNGPs and, as such, should be reformed, strengthened and better supported in order to enhance its functionality and help realise its potential as a non-judicial complaints mechanism in cases of business-related human rights abuse.⁴⁹

In 2015, G7 leaders committed to strengthening mechanisms for providing access to remedies through NCPs, by encouraging OECD promotion of peer reviews and ensuring their own NCPs '*are effective and lead by example*'.⁵⁰ Civil society would welcome the demonstration of similar leadership by our government and a reform program for the AusNCP.

More specifically, it is recommended that the Australian Government:

- undertakes a comprehensive review of the AusNCP in the NBA;

- develops a strategy to promote the Guidelines, including the complaint mechanism, amongst the business and non-business community;
- restructures the AusNCP so as to ensure independence from government agencies whose role it is to promote and fund international business activity;
- considers options to increase the visibility, accessibility and effectiveness of the AusNCP;
- restructures the AusNCP to promote independence and impartiality;
- ensures that the AusNCP's structure incorporates qualified independent specialists with experience relevant to the Guidelines, including in human rights;
- considers publishing findings on whether the Guidelines have been breached where parties fail to resolve a complaint, or where an MNE refuses to engage in the AusNCP's complaint resolution process;
- develops a mechanism to ensure that recommendations of the AusNCP are taken into account by governmental authorities in their decisions on, for example, public procurement, export credits and investment guarantees;
- encourages the AusNCP to undergo the OECD-facilitated NCP peer review process;
- encourages the AusNCP to regularly contribute to conducting peer reviews of other NCPs;
- explores options for introducing a follow-up process to monitor a company's compliance with the AusNCP's recommendations;⁵¹ and
- provides adequate resourcing for the AusNCP.

8 Conclusion

Civil society welcomes the announcement by the Australian Government that it will hold public consultations in 2016 on implementing the UNGPs. It is hoped that, following these consultations, Australia will progress to developing a NAP.

As outlined in this Statement, a fully participatory NBA and NAP process is a key priority for civil society. We look forward to working together with the government, business and other stakeholders, to implement the UNGPs in Australia.

Endnotes

¹ Noting that the Human Rights Law Centre authored the following sections of this Statement: 7.2(c)(i)-(iv) (inclusive).

² In this Statement, a reference to 'civil society' includes academia and trade unions.

³ See UNGP 3(c).

⁴ Human Rights Council Res. A/HRC/26/L.1. *Rep. of the Human Rights Council*, 26th Sess., June 10-27, 2014 (27 June 2014). Available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G14/062/40/PDF/G1406240.pdf?OpenElement>.

⁵ These being, the UK, the Netherlands, Italy, Denmark, Spain, Finland, Lithuania, Sweden, Norway and Colombia. Information available at: <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> (accessed on 29 June 2016).

⁶ At: <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> (accessed on 29 June 2016).

⁷ Available at: http://www.upr-info.org/sites/default/files/document/australia/session_23_-_november_2015/a_hrc_31_14_add.1_e.pdf.

⁸ These calls include a letter from a coalition of non-governmental organisations, 27 January 2016 (available at: <http://hrhc.org.au/wp-content/uploads/2016/01/NAP-civil-society-letter.pdf>) and a *Policy Paper on an Australian NAP*, Australian Lawyers for Human Rights, 16 February 2016 (available at: <http://alhr.org.au/wp/wp-content/uploads/2016/03/NAP-Policy-Paper.pdf>).

⁹ Noting Annex 4 (National Baseline Assessment Template), *National Action Plans on Business and Human Rights, A Toolkit for the Development, Implementation and Review of State Commitments to Business and Human Rights Frameworks*, Danish Institute for Human Rights and International Corporate Accountability Roundtable (ICAR), pages 88-145. At: <http://icar.ngo/wp-content/uploads/2014/06/DIHR-ICAR-National-Action-Plans-NAPs-Report3.pdf>.

¹⁰ In framing a NBA, regard should be had to the International Service for Human Rights' (ISHR) and ICAR's *Human Rights Defenders in National Action Plans (NAPs) on Business and Human Rights*, June 2016. Available at: <http://icar.ngo/wp-content/uploads/2016/06/HRDs-English-FINAL.pdf>.

¹¹ Including representatives from non-governmental organisations, academia, impacted communities, the Commission, trade unions and other industry bodies business.

¹² As contemplated by The Office of the High Commissioner for Human Rights, *Accountability and Remedy* report, 10 May 2016, page 11. Available at: http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/A_HRC_32_19_AEV.pdf.

¹³ Including children, women, persons with disabilities, indigenous Australians, migrant workers and their families, LGBTIQ, impacted communities and older Australians.

¹⁴ Noting recent corporate disclosure developments in the UK, the US and the EU relating to conflict minerals and modern slavery.

¹⁵ See UNGP 1. Available at:

http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

¹⁶ See Commentary on UNGP 1.

¹⁷ Including guidance on managing supply chain relationships, directors' duties, human rights due diligence and reporting.

¹⁸ Noting that there should also be a focus on ensuring that existing and future laws do not constrain the ability of companies, and their officers, to act in accordance with the UNGPs.

¹⁹ See UNGP 1 (author's emphasis).

²⁰ See UNGP 2 (author's emphasis).

²¹ An example of Australian legislation with extra-territorial effect is provided by the *Illegal Logging Prohibition Act 2012*.

²² See UNGPs 4, 5 and 6.

²³ Human Rights Council Res. A/HRC/32/45, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, 4 May 2016.

Available at: <https://documents-ddsny.un.org/doc/UNDOC/GEN/G16/091/71/PDF/G1609171.pdf?OpenElement>.

²⁴ See UNGP 4.

²⁵ See UNGP 4.

²⁶ Human Rights Council Res. A/HRC/32/45, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, 4 May 2016.

Available at: <https://documents-ddsny.un.org/doc/UNDOC/GEN/G16/091/71/PDF/G1609171.pdf?OpenElement>

²⁷ See Commentary on UNGP 5.

²⁸ Australian Government, Department of Finance, *Statistics on Government Procurement Contracts*, available at: <http://www.finance.gov.au/procurement/statistics-on-commonwealth-purchasing-contracts/>

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- ²⁹ John Ruggie, *Making public-private partnerships work*, 11 September 2013, available at: <http://www.trust.org/item/20130911091253-vmh6s/>.
- ³⁰ Ethical Procurement: *Information Sheet for Commonwealth Government Procurement Officers*, available at: <https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/Human-Trafficking-Information-sheet-for-Commonwealth-Government-procurement-officers.pdf>.
- ³¹ Commonwealth Procurement Rule 6.7, available at: <https://www.finance.gov.au/sites/default/files/2014%20Commonwealth%20Procurement%20Rules.pdf>.
- ³² See *UN Sustainable Development Goals*, available at: <https://sustainabledevelopment.un.org/?menu=1300>
- ³³ Julie Bishop, *2014 Magna Carta Lecture: A new paradigm in development assistance – harnessing the private sector* (Speech delivered at the Parliament of Victoria, 29 April 2014) available at: <https://www.gov.uk/government/world-location-news/transcript-magna-carta-lecture-2014>.
- ³⁴ See UNGPs 8 and 10.
- ³⁵ See UNGP 9.
- ³⁶ See UNGP 11.
- ³⁷ In developing a NAP, regard should be had to ISHR and ICAR's *Human Rights Defenders in National Action Plans (NAPs) on Business and Human Rights*, June 2016, available at: <http://icar.ngo/wp-content/uploads/2016/06/HRDs-English-FINAL.pdf>.
- ³⁸ See UNGPs 17-21, inclusive.
- ³⁹ See UNGP 21.
- ⁴⁰ See UNGP 3(d).
- ⁴¹ Examples include the UK's *Modern Slavery Act 2015* and the US' *California Transparency in Supply Chains Act 2010*.
- ⁴² 'Sustainability Reporting for all listed companies mandatory from FY2017', *Today* (online), 21 June 2016. At: <http://www.todayonline.com/business/sustainability-reporting-all-listed-companies-mandatory-fy2017>.
- ⁴³ In the manner of the US Department of Labor reporting on forced and child labour. At: <https://www.dol.gov/agencies/ilab/resources/reports/child-labor>.
- ⁴⁴ Noting the findings of KPMG's *ASX Corporate Governance Council Adoption of Third Edition Corporate Governance Principles and Recommendations Analysis of Disclosures for the Financial Years Ended Between 1 January 2015 and 31 December 2015*, available at: <https://assets.kpmg.com/content/dam/kpmg/pdf/2016/05/asx-corporate-governance-council-principles-recommendations-jan-dec-2015.pdf>. This report identifies two main issues relating to disclosures against ASX Corporate Governance Recommendation 7.4 (disclosure of material exposure to economic, environmental or social sustainability risks and how these are managed). Issue 1: differences in interpretation of what constitutes 'material risk'. Issue 2: no information provided by entities to support how the material risk is assessed.
- ⁴⁵ See UNGP 25.
- ⁴⁶ See UNGP 26 in relation to judicial mechanisms. See also Commentary on UNGP 27 with regard to barriers preventing access to non-judicial remedy mechanisms.
- ⁴⁷ Examples include mechanisms provided via the OECD National Contact Point, International Finance Corporation Compliance Advisor Ombudsman (CAO), Australian Human Rights Commission, Multi-Stakeholder Initiatives (such as the Ethical Trading Initiative and Roundtable on Sustainable Palm Oil).
- ⁴⁸ Noting the Office of the High Commissioner for Human Rights, *Accountability and Remedy Project* draft Discussion paper for consultation 19-20 November 2015, 'good practice indicators', Box 2, page 21, accessible at: <http://businesshumanrights.org/sites/default/files/documents/Accountability%20and%20Remedy%20Project%20-%20Discussion%20paper%20for%20consultation.pdf>.
- ⁴⁹ See OECD Watch, *A "4x10" plan for why and how to unlock the potential of the OECD Guidelines*, 3 June 2016, at: <http://www.oecdwatch.org/news-en/a-201c4x10201d-plan-for-why-and-how-to-unlock-the-potential-of-the-oecd-guidelines>.
- ⁵⁰ See *G-7 Leaders' Declaration*, Schloss Elmau, Germany, 8 June 2015, at: <https://www.whitehouse.gov/the-press-office/2015/06/08/g-7-leaders-declaration>.
- ⁵¹ The AusNCP is noteworthy in this regard for not having a follow-up mechanism. See Trade Union Cases, *National Contact Point Comparison*, available at: <http://www.tuaoecdmnecguidelines.org/NCPcomparisonAll.asp>.