



Building Better Business for Children:

**An Interim National Baseline Assessment of Australian
policy and law shaping business activities that impact
on children**

Full Report 2019

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Lead author: Alison Elliott, Senior Policy Adviser, UNICEF Australia.

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Children are among the most marginalized and vulnerable members of society and can be disproportionately, severely, and permanently impacted by business activities, operations, and relationships.

- **Special Representative of the United Nations Secretary-General on Business and Human Rights, Professor John Ruggie¹**

¹ The Danish Institute for Human Rights, *National Action Plans on Business and Human Rights*, 'Children's Rights' <<https://globalnaps.org/issue/childrens-rights/>>.

FOREWARD

When people think of business, they don't necessarily think of children. But we hope this important report by UNICEF Australia will be a game-changer on that. Building Better Business for Children provides an extensive examination into Australian policy and law that establishes the rules of the game for business; from restrictions on marketing and advertising practices and protections against child labour, to family-friendly employment conditions and access to parental leave.

This document identifies areas of good practice from the Australian Government, and key gaps that require better regulation to ensure that businesses adequately respect the rights of children in their operations in both Australia and overseas. The business and human rights agenda has evolved significantly in recent years.

Businesses everywhere are increasingly embracing activities which promote social purpose, and are endeavouring to help to make the world a better place.

In Australia, last year's passing of modern slavery acts by both the Commonwealth and NSW Parliaments demonstrated significant willingness in the community to address exploitation, slavery and trafficking in business supply chains. In addition, revelations of unacceptable business practices and cultures as articulated in the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry have served as a wakeup call that Australians demand, and deserve, more.

As globalisation intensifies, governments too are increasingly doing more to ensure that businesses take action to respect human rights. A child rights perspective, however, has not yet been explicitly addressed. This is, despite the fact, that almost all practices of the business world impacts on children, either directly or indirectly.

Take, for example, parental leave provisions. Currently in Australia, primary carers, usually new mothers, can access 18 weeks of paid leave. This is well below the average period of paid parental leave provided by OECD countries, and UNICEF Australia would like to see this increased to at least 26 weeks.

In my own professional career, I've worked hard to champion family friendly workplace practices, including at Westpac, and at the Office of the Status of Women. But good practice by some businesses is not sufficient to effect widespread change. Public policy to ensure workplaces support families, is transformative for parents and children. And so too, would be an Australia, where the recommendations of this report, are actioned.

This report recommends that the Australian Government adopt a National Action Plan on Business and Human Rights, and has suggested 10 clear areas where children would benefit from reform. As we brace ourselves to soon enter a brave, new decade, we urge our politicians to sit up, take notice, and make a real difference for children. It's time for the Australian Government to consider children and families when setting the rules of the game for business, and doing so will undoubtedly help us make inroads to achieving the Sustainable Development Goals 2030. Children are not an expense. They are an investment.

Ann Sherry AO

Chair, UNICEF Australia

PURPOSE

Building Better Business for Children – An Interim National Baseline Assessment of Australian policy and law shaping business activities that impact on children is intended as a resource for policy makers, the business sector and civil society in Australia.

Building Better Business for Children – An Interim National Baseline Assessment of Australian policy and law shaping business activities that impact on children uses a child rights lens to examine the duties of the Australian Government under international law such as the *Convention on the Rights of the Child* to respect and protect the rights of children specifically in policies, laws and practices that shape business operations and activities.

It is informed by the authoritative international principles outlined in the *United Nations Guiding Principles on Business and Human Rights* and the 'Protect, Respect, Remedy' framework.

Using the *Children's Rights National Baseline Assessment Template* published by UNICEF, the Danish Institute for Human Rights and the International Corporate Accountability Roundtable, it examines Australia's approach to regulating the business activities and operations, particularly those known to pose a risk to children in Australia and abroad – either directly or indirectly.

In doing so, it aims to help Australian Governments – particularly the Federal Government - create conditions that support, enable and, where necessary, require businesses to protect children from adverse impacts of business activities and operations where these exist. It recommends that this should be done through the development of a National Action Plan on Business and Human Rights, inclusive of specific commitments to children and their carers including the reforms recommended in this report.

EXECUTIVE SUMMARY

Children are regularly and routinely affected by the operations and activities of businesses. They are consumers of goods, services, and advertising; they can be workers in shops, restaurants and offices; and they are community members affected by business decisions made both near and far. How parents and carers are treated as employees also affects family life and therefore children's experiences growing up.

Our interconnected world means that the decisions made by Australian businesses can also affect the lives of children and communities internationally. The trend of sourcing goods and services through complex global supply chains shapes labour practices across many jurisdictions. Online technology has infinitely expanded the reach of both opportunities and risks. And the environmental impacts of business operations and activities can extend well beyond national boundaries.

The impact of businesses on children can be positive or negative; direct or indirect; intentional or unintentional. The United Nations Committee on the Rights of the Child has observed²:

Business can be an essential driver for societies and economies to advance in ways that strengthen the realization of children's rights through, for example, technological advances, investment and the generation of decent work. However, the realization of children's rights is not an automatic consequence of economic growth and business enterprises can also negatively impact children's rights.

Focused on the 'State Duty to Protect' and 'Access to Remedy' as outlined in the *United Nations Guiding Principles on Business and Human Rights*³, ***Building Better Business for Children*** provides an initial 'national baseline assessment' from a child rights perspective. Using the *Children's Rights National Baseline Assessment Template*⁴, it provides a first examination of Australia's approach to regulating activities and operations known to pose a risk to children in Australia and abroad – either directly or indirectly. Areas examined include Australia's approach to **marketing and advertising, workplace protections, the regulation of child labour, and family-friendly employment conditions**.

Building Better Business for Children recognises strengths in Australia's approach – such as the world's first mandatory tobacco plain packaging law, legal protections against discrimination in the workplace, statutory mandate holders to help protect privacy and children in online environments, and a significant commitment to address online child exploitation. These measures indicate that, when actual and potential adverse human rights impacts are viewed as a priority in Australia, responses are often devised and implemented in a thoughtful and effective way.

Building Better Business for Children also highlights several significant gaps in Australian policy, law and practice that leave children and carers vulnerable to adverse impacts of business activity, and potentially without remedy when these occur. These include **weaknesses in the regulation of marketing and advertising of unhealthy foods and beverages, inadequate protections against child labour, Australia's relatively limited paid parental leave scheme, and limited financial security for employees and their children experiencing domestic and family violence**.

² United Nations Committee on the Rights of the Child, *General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights*, UN Doc CRC/C/GC/16 (17 April 2013)

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=_CRC%2FC%2FGC%2F16&Lang=en> 'General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights'.

³ Office of the High Commissioner for Human Rights, *United Nations Guiding Principles on Business and Human Rights* (2011) <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> ('United Nations Guiding Principles on Business and Human Rights').

⁴ The Danish Institute for Human Rights, International Corporate Accountability Roundtable and UNICEF, *Children's Rights in National Action Plans (NAPs) on Business and Human Rights - A thematic supplement to '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'* (2015)

<https://www.humanrights.dk/files/media/dokumenter/udgivelses/hrb_2015/childrens_rights_in_naps_2015.pdf> ('Children's Rights in National Action Plans (NAPs) on Business and Human Rights').

To address these gaps for children and their carers, ***Building Better Business for Children*** recommends that the Australian Government:

- 1 Adopt a National Action Plan on Business and Human Rights (**NAP**) to fully implement the *United Nations Guiding Principles on Business and Human Rights*.
- 2 Commit to specific, measurable and time-bound measures to better protect children and their carers as part of, or in addition to, the NAP, including the following measures to address the gaps identified in this report:
 - 2 (i) Continue to improve systems and business practices to keep children safe – in person and online;
 - 2 (ii) Help protect the economic security of workers experiencing domestic and family violence through introducing 10 days' paid domestic and family violence leave for employees;
 - 2 (iii) Consider introducing mandatory human rights due diligence laws;
 - 2 (iv) Fully leverage the Government's own business activities to promote and require respect for human rights, including children's rights, for example, through incorporating human rights considerations into public procurement rules, policies and processes;
 - 2 (v) Commit to addressing child labour through signing and ratifying the *International Labour Organisation Convention No. 138 on the Minimum Age for Admission to Employment*;
 - 2 (vi) Ensure Australians, particularly young people and carers of children, can maintain an adequate standard of living through better data and a parliamentary inquiry;
 - 2 (vii) Support the healthy development of children in their first thousand days through expanding family-friendly policies, including a strategy to progressively increase the parental leave pay entitlement to at least 26 weeks;
 - 2 (viii) Ensure access to affordable, quality and culturally appropriate childcare and early learning opportunities for all children, especially Aboriginal and Torres Strait Islander children through implementing the recommendations of *Family Matters*;
 - 2 (ix) Curb rising childhood obesity through a national strategy that includes legislated measures to reduce children's exposure to marketing and advertising of unhealthy foods and beverages; and
 - 2 (x) Ensure access to remedy for children harmed by business activities and operations – both domestically and extraterritorially.

Australia committed to respect, protect and fulfil the rights of children in 1990 when it took the important step of ratifying the *Convention on the Rights of the Child (Children's Convention)*. In accordance with these obligations, governments are required to give special consideration to children across all areas of policy, law and regulation to ensure their best interests are protected, including those that shape business activities and operations.

As of April 2019, 23 countries have adopted a National Action Plan on Business and Human Rights to help identify priority areas for government action, and at least a further 12 countries are in the process of developing such a plan.

Although Australia has progressively adopted a number of positive measures that seek to protect children, Australia is yet to take this important step of developing a National Action Plan on Business and Human Rights of its own. We urge the Government to adopt such a plan, in order to require and support a shift to sustainable and ethical business practices that respect the human rights of all members of the community – both domestically and internationally.

This is the Full Report, which includes ***Part 5: Research and analysis – An Interim National Baseline Assessment of Australian policy and law shaping business activities that impact on children and their carers***. A Summary Report can be accessed at www.unicef.org.au/about-us/publications.

PART 1: ABOUT UNICEF AND UNICEF AUSTRALIA

Established in 1946, UNICEF is the United Nations children's agency. With a mission to promote and protect the rights of children, UNICEF works in over 190 countries.

UNICEF has worked directly on children's rights and business issues since 2010, having developed the *Children's Rights and Business Principles*⁵ and other related guidance for governments and businesses.⁶

The goal of UNICEF's children's rights and business agenda is to promote the corporate responsibility to respect and support children's rights in the workplace, marketplace and community, and support government action to protect, promote and realise children's rights in the context of business activity.

Building on the 'Protect, Respect and Remedy' framework and the United Nations Guiding Principles on Business and Human Rights (UNGPs), UNICEF engages governments, companies and civil society to place children's rights at the heart of the corporate social responsibility (CSR) agenda.

The Committee on the Rights of the Child adopted *General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights*⁷ in 2013 to help governments take action to protect children in the context of business activity. To help States implement this General Comment in practice, UNICEF has also published *Obligations and Actions on Children's Rights and Business: A practical guide for States on how to implement the UN Committee on the Child's General Comment no. 16* and several other guidance documents.⁸



Source: UNICEF tools on State obligation regarding the impact of the business sector on children's rights available from <https://www.unicef.org/csr/engagement-with-governments.html>.

UNICEF engages the business community regarding its impact on children across four major sub-themes; global supply chains and workplaces, marketing and advertising, the power of finance and the impact of digital technologies.⁹ Across these work streams and different industries (extractive sector, information communication

⁵ UNICEF, Save the Children and the United Nations Global Compact, *Children's Rights and Business Principles* (2012) <<https://www.unicef.org/csr/12.htm>>.

⁶ See, for example, UNICEF, *Corporate Social Responsibility* <<https://www.unicef.org/csr/>>; UNICEF and International Commission of Jurists, *Obligations and Actions on Children's Rights and Business* (2015) <https://www.unicef.org/csr/files/CSR_GC_OBLIGATIONS_AND_ACTIONS_FINAL_AUGUST05.pdf>; UNICEF, *Children are everyone's business – Workbook 2.0* (2013) <https://www.unicef.org/csr/css/Workbook_2.0_Second_Edition_29092014_LR.pdf> and UNICEF, *Engaging Stakeholders on Children's Rights* (2014) <https://www.unicef.org/csr/css/Stakeholder_Engagement_on_Childrens_Rights_021014.pdf>.

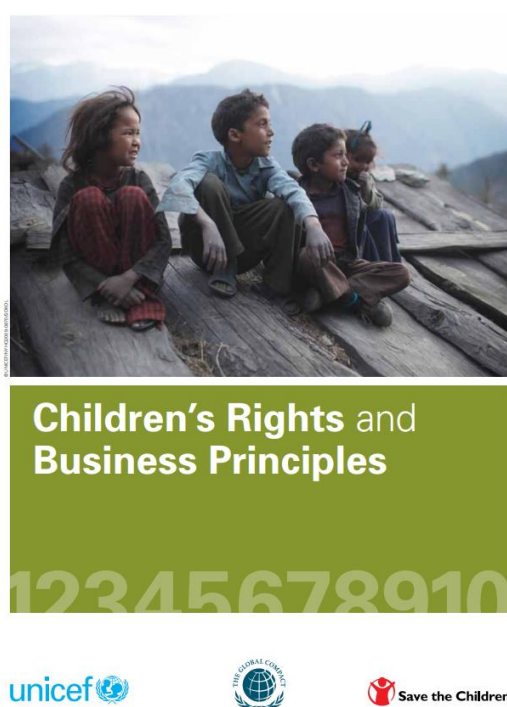
⁷ General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights, n 2.

⁸ UNICEF, *State obligation regarding the impact of the business sector on children's rights* (2015) <<https://www.unicef.org/csr/332.htm>>.

⁹ UNICEF, *Better Business for Children, How UNICEF supports better business for children* <<https://www.unicef.org/csr/>>.

and technology, travel and tourism, and sports), and with a focus on the links to programmatic result areas, UNICEF provides:¹⁰

- **Research and evidence generation** to build a knowledge base of the impacts on children across themes and industries, the unique risks and opportunities faced in a particular country, and the role of key influencers in addressing these impacts.
- **Policy guidance** to identify gaps and offer potential solutions to companies. UNICEF has developed a number of tools, including generic child rights and sustainability tools, ICT tools and the Children's Rights and Business Atlas¹¹ that companies can use to improve their policies and processes to better respect and support children's rights in practice.
- **Advocacy and thought leadership** by engaging companies, governments, industry and multi-stakeholder platforms in processes to generate evidence, draft policy guidance, develop standards for responsible business conduct in relation to child rights impacts, and amplify advocacy messages across the themes.

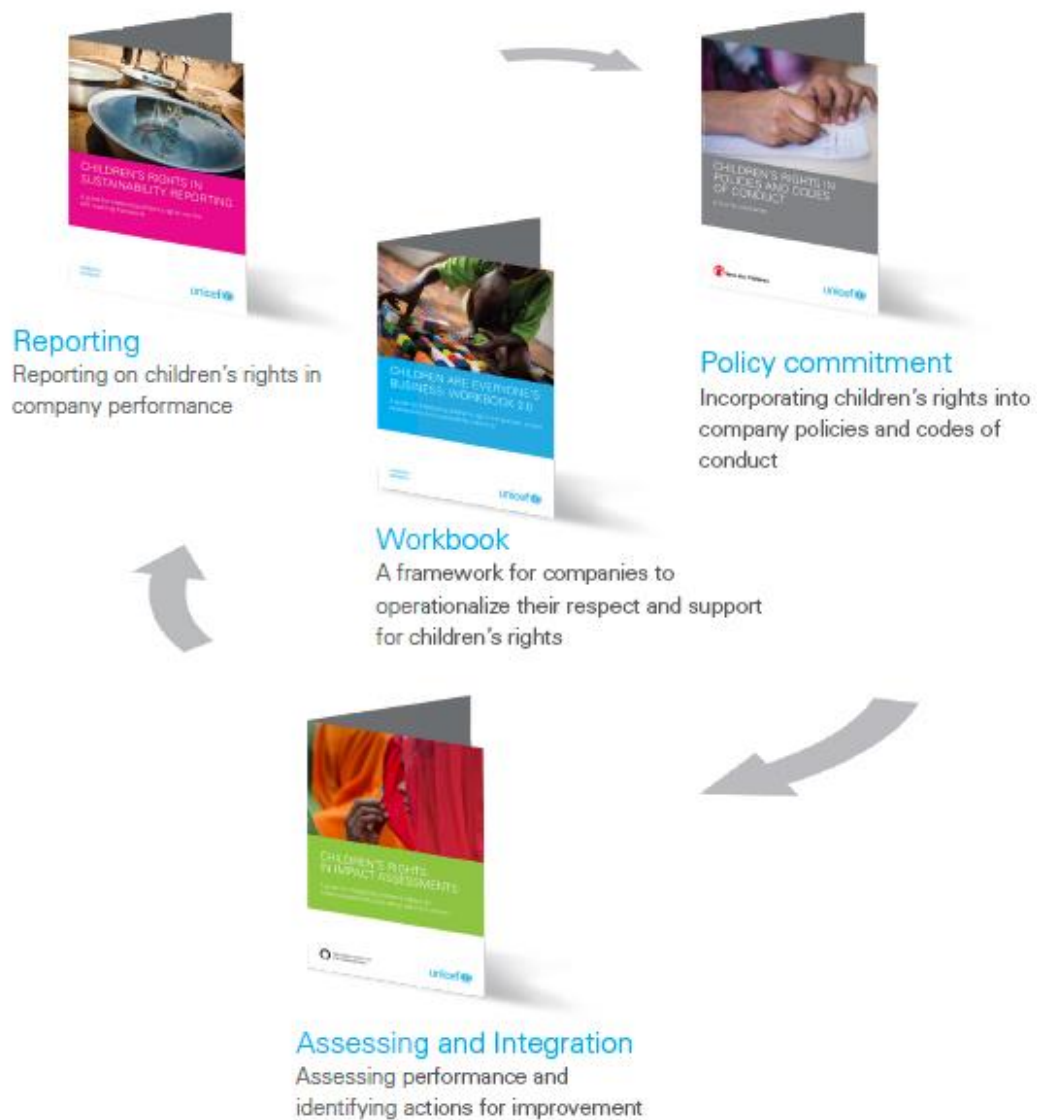


Source: UNICEF, United Nations Global Compact and Save The Children, *Children's Rights and Business Principles* <https://www.unicef.org/csr/css/PRINCIPLES_23_02_12_FINAL_FOR_PRINTER.pdf>.

¹⁰ Ibid.

¹¹ UNICEF and Global Child Forum, *Children's Rights and Business Atlas* <<https://www.childrensrightsatlas.org/>>.

Putting the Children's Rights and Business Principles into practice



Source: UNICEF, *Children's Rights and Business Tools*,
<https://www.unicef.org/csr/css/Child_Rights_and_Business_Tools_15012014.pdf>.

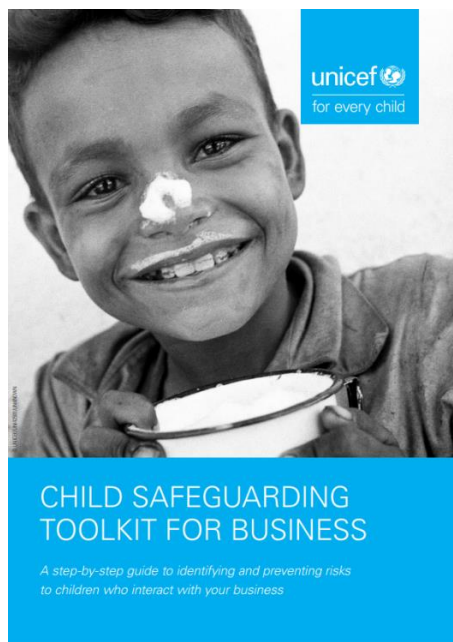
UNICEF has also developed the **Children's Rights and Business Atlas** to help businesses identify potential impacts on the lives of children, and guides the integration of children's rights into company due diligence practices and procedures. It provides country-by-country data on children's rights in the workplace, marketplace and community and environment.



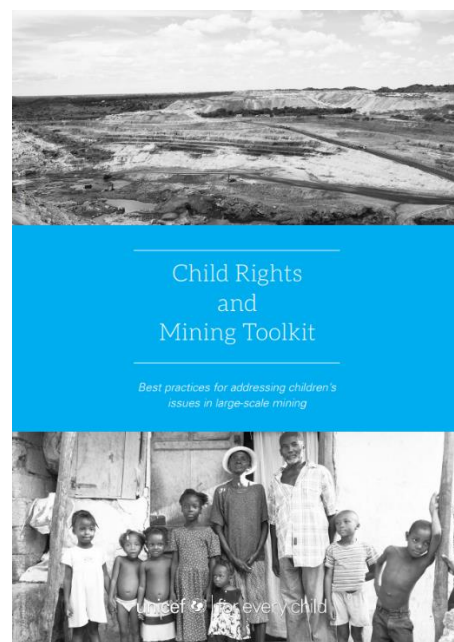
See: <https://www.childrensrightsatlas.org/>

UNICEF has also published a range of thematic and industry-based tools for businesses.

Thematic tools



Industry tools



See: <https://www.unicef.org/csr/tools.html> and <https://www.unicef.org/csr/industryapproach.html>

UNICEF Australia is a national committee of UNICEF that advocates for the rights of all children to be protected and promoted. UNICEF Australia works to improve public and government support for children's rights and international development.

Case study: UNICEF's work to promote better businesses for children and caregivers affected by global supply chains

Children are affected by global supply chains in many different ways. While child labour is a recognised concern, supply chains often have a range of additional direct and indirect impacts on children's rights. For example, lack of decent working conditions for parents, limited maternity protections and the absence of childcare and breastfeeding support in the workplace all impact children.

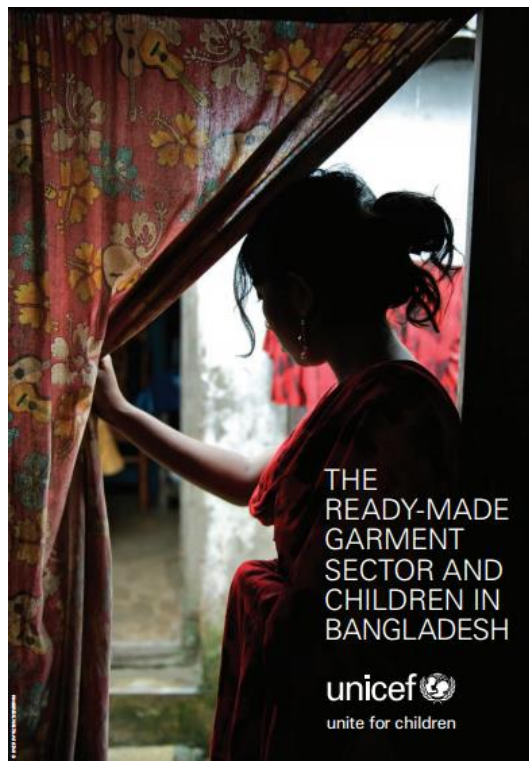
Importantly, impacts on children are not limited to the workplace. Inadequate living conditions, poor maternal health and nutrition, lack of access to basic services and environmental pollution can have significant impacts on the health and development of children living in areas affected by global supply chains.¹²

Addressing children's rights in what are often complex and fragmented sourcing networks can be a challenging task for business. Companies may not always have full visibility and control over business partners, especially in the deeper tiers of the supply chain. Moreover, root causes for adverse impacts are typically manifold, and cannot be addressed effectively by individual companies alone.

Together with key partners, UNICEF has launched a set of innovative pilot projects to address these challenges. By helping companies understand impacts and take action, UNICEF is supporting the development and piloting of promising solutions that can lead towards better work and living conditions for workers and their families in global supply chains.

UNICEF is working specifically in apparel and footwear, cocoa, tea and palm oil.¹³

UNICEF's work on supply chains has indicated the following impacts on children:



¹² See, for example, UNICEF, *The Ready-made Garment Sector and Children in Bangladesh* (2015) <https://www.unicef.org/csr/files/CSR_BANGLADESH_RMG_REPORT.PDF> 3.

¹³ See UNICEF, *Global supply chains* <<https://www.unicef.org/csr/global-supply-chains.html>>.



Source: UNICEF, *Impacts on Children's Rights in Global Supply Chains*
<https://www.unicef.org/csr/files/Impact_Areas_in_Global_Supply_Chains.pdf>.

PART 2: ABOUT *BUILDING BETTER BUSINESS FOR CHILDREN – AN INTERIM NATIONAL BASELINE ASSESSMENT OF AUSTRALIAN POLICY AND LAW SHAPING BUSINESS ACTIVITIES THAT IMPACT ON CHILDREN*

Why is action needed?

Children are regularly and routinely affected by the operations and activities of businesses. They are consumers of goods, services, and advertising; they can be workers in shops, restaurants and offices; and they are community members affected by business decisions made both near and far. How parents and carers are treated as employees also affects family life and therefore children's experiences growing up.

In these regards, Australia is little different to other countries.

Our interconnected world means that the decisions made by Australian businesses also affect the lives of children and communities in countries near and far. The trend of sourcing goods and services through complex global supply chains shapes labour practices across many jurisdictions. Technology has infinitely expanded the reach of both opportunities and risks online. And the environmental impacts of business operations and logistics can extend well beyond our national boundaries.

The impact of businesses on children can be positive or negative; direct or indirect; intentional or unintentional. The United Nations Committee on the Rights of the Child has observed¹⁴:

Business can be an essential driver for societies and economies to advance in ways that strengthen the realization of children's rights through, for example, technological advances, investment and the generation of decent work. However, the realization of children's rights is not an automatic consequence of economic growth and business enterprises can also negatively impact children's rights.

The challenge for governments, businesses and communities alike in these circumstances is to ensure that children benefit equally from the vast positive potential of the private sector, at the same time enjoying effective protections from the risks presented by business activities and operations.

Although not always obvious, the expectations and requirements that governments set for businesses can have flow on effects for children. *Building Better Business for Children*, specifically, **Part 5: Research and analysis – An Interim National Baseline Assessment of Australian policy and law shaping business activities that impact on children and their carers**, outlines evidence that demonstrates the need for action by the Australian Government to ensure that businesses practices respect and support children's rights – in the workplace, marketplace and community. For example:

- Children in Australia are exposed to an estimated 3 advertisements for unhealthy foods every hour (2015).¹⁵
- Over 1 million Australian families with children aged 0 – 4 years had one or both parents in employment at June 2017.¹⁶
- In the 12 months to June 2016, 8% of children and 19% of teenagers were cyberbullied.¹⁷
- Women and primary carers in Australia are entitled to 37.2 weeks less paid parental leave than their OECD counterparts.¹⁸

¹⁴ General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights, n 2.

¹⁵ Wendy L Watson, Vivien Lau, Lyndal Wellard and Clare Hughes Kathryn Chapman, 'Advertising to children initiatives have not reduced unhealthy food advertising on Australian television' (1 December 2017) *Journal of Public Health*, 39(4), 787–792, 787.

¹⁶ Australian Bureau of Statistics, 6224.0.55.001 *Labour Force, Australia: Labour Force Status and Other Characteristics of Families, June 2017* (4 December 2017) <<https://www.abs.gov.au/ausstats/abs@.nsf/mf/6224.0.55.001>> ('6224.0.55.001 Labour Force, Australia: Labour Force Status and Other Characteristics of Families').

¹⁷ Office of the eSafety Commissioner, Submission to the Parliamentary Inquiry into the adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying (date unknown) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Cyberbullying/Submissions>.

¹⁸ Organisation for Economic Co-operation and Development, *Parental Leave Systems* (2016) <http://www.oecd.org/els/soc/PF2_1_Parental_leave_systems.pdf>.

- Fathers and partners in Australia are entitled to 6.2 weeks less paid parental leave than their OECD counterparts.¹⁹
- Almost one quarter (24.9%) of Australian children aged 5-17 years were overweight or obese in 2017-2018.²⁰
- In 2016, around 415,100 children and young people were on junior wages, with average weekly earnings below the minimum wage (\$679.60/week on average for full-time employees on junior wages and \$188.70/week for part-time employees on junior wages).²¹
- Approximately 800,000 women, or around one in six female workers have experienced, or are experiencing, family violence.²²
- Tens of thousands of children have been sexually abused in many Australian institutions.²³
- There is a gap of 15,000 early learning places for Aboriginal and Torres Strait Islander children.²⁴
- Obesity cost the Australian economy \$8.6 billion in 2011-12 alone.²⁵

What does *Building Better Business for Children – An Interim National Baseline Assessment of Australian policy and law shaping business activities that impact on children* seek to do?

Australia's commitments under the *Convention on the Rights of the Child*²⁶ requires governments to respect, protect and fulfil the rights of children in all circumstances, including in the context of business activity. ***Building Better Business for Children*** examines Australia's approach to policy, law and practice shaping a range of business activities and operations with the potential to impact children. It seeks to:

- Provide a **high-level overview** of Australia's approach to the regulatory issues relevant to the protection of children's rights in the context of business activity – including product safety, marketing and advertising and workplace practices;
- **Identify 10 key gaps and limitations** in the implementation of the State 'Duty to Protect' and obligation to ensure 'Access to Remedy' under the *United Nations Guiding Principles on Business and Human Rights* with respect to children and their carers; and
- **Recognise 10 key strengths** in Australia's approach to protecting children and their carers from potentially adverse impacts of business where notable practices exist.

This research was undertaken in order to assist the Australian Government, Australian businesses and the community to identify and better understand potential gaps in current policy, law and practice that have the potential to leave children and families vulnerable to adverse impacts of business activity, and to provide recommendations on how these could be addressed. Undoubtedly though, this Interim National Baseline Assessment just a first step. Further research, analysis and consultation – including with children and families themselves, and the community more broadly – is necessary to provide the Australian Government with a comprehensive understanding of these gaps – both domestically and extraterritorially.

¹⁹ Organisation for Economic Co-operation and Development, *PF2.1: Key characteristics of parental leave systems*, Table PF2.1.B. Summary of paid leave entitlements for fathers paid paternity leave and paid parental and home care leave reserved (or effectively reserved) for fathers, in weeks, 2016b (2016) <www.oecd.org/els/soc/PF2_1_Parental_leave_systems.pdf>.

²⁰ Australian Bureau of Statistics, *National Health Survey – First Results – Australia 2017-18* 4364.0.55.001 (2018) <[http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/4B3976684C09F43FCA258399001CE630/\\$File/4364.0.55.001%20-%20national%20health%20survey,%20first%20results,%202017-18.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/4B3976684C09F43FCA258399001CE630/$File/4364.0.55.001%20-%20national%20health%20survey,%20first%20results,%202017-18.pdf)> 70 ('National Health Survey – First Results – Australia 2017-18').

²¹ Australian Bureau of Statistics, *6306.0 - Employee Earnings and Hours, Australia* (May 2016) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/6306.0/>> ('6306.0 - Employee Earnings and Hours, Australia').

²² Australian Human Rights Commission, *Fact sheet: Domestic and family violence - a workplace issue, a discrimination issue* (2014) <<https://www.humanrights.gov.au/our-work/family-and-domestic-violence/publications/factsheet-domestic-and-family-violence-workplace#fn11>> 2.

²³ Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Preface and executive summary* (2017) <https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_preface_and_executive_summary.pdf> 5 ('RCIRCSA Final Report').

²⁴ SNAICC – National Voice for our Children, the University of Melbourne, Griffith University, and Save the Children Australia, *Family Matters Report 2017* (2017), 43-47 <<https://www.familymatters.org.au/wp-content/uploads/2017/11/Family-Matters-Report-2017.pdf>>.

²⁵ Australian Institute of Health and Welfare, *A picture of overweight and obesity in Australia* (2017) <<https://www.aihw.gov.au/getmedia/172fba28785e-4a08-ab37-2da3bbae40b8/aihw-phe-216.pdf.aspx?inline=true>> vii.

²⁶ Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

What is to be gained by protecting children from adverse impacts of business activities?

As outlined above, Australia committed to respect, protect and fulfil the rights of children in 1990 when it took the important step of ratifying the Children's Convention. The preamble recognises "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth". This is the case across all areas of policy, law and regulation, including those that shape business activities and operations. In addition to yielding great potential to help realise children's rights – such activities can also create numerous risks to children's rights which, if not avoided, can have lifelong and inter-generational impacts on children and their communities.²⁷

As such, children, young people and their carers in Australia stand to benefit significantly from government action to create a business environment that respects and supports their rights in accordance with the Children's Convention. It is required by Australia's commitments at international law, and is the ethical thing to do. Just some of the areas where children stand to benefit is outlined above under **Why is action needed?**

Additionally, experience and research has shown that it is frequently the economically smart and sustainable thing to do – delivering social and environmental benefits. For example, focusing on obesity alone, projections indicate that if that no interventions are made to curb Australia's growing rates of child and adult obesity and overweight, this increasing crisis will cost \$87.7 billion in additional direct and indirect costs to Australia accumulated across the 10 years to 2025.²⁸ Behind this economic quantification is the significant impact on the wellbeing of children, families and members of the Australian community. Given children cannot critically assess advertising due to the stage of their brain development, marketing and advertising techniques used to promote high fat, sugar and salt products, and the numerous channels through which they are displayed to children, must come under examination as part of a comprehensive policy to address this growing health concern. It is necessary that considerations of any upfront cost due to changes to the regulatory environment for businesses must be weighed against the best interests of children as a primary consideration, and the often considerable social and economic costs that will be borne by the Australian community over the longer term if governments do not act.

How this report has been prepared

As discussed further below under **National Action Plans on Business and Human Rights as a way to implement the UNGPs and pursue sustainable development**, a necessary step in the process of developing a National Action Plan on Business and Human Rights (NAP) is for governments to identifying gaps in the State implementation of the UNGPs. The UN Working Group on Business and Human Rights has recommended that this be done through undertaking a 'national baseline assessment'.²⁹ Tools have been developed to help countries do this in practice, including:

- *National Action Plans on Business and Human Rights Toolkit* (2017)³⁰ and the previous 2014 version *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* (2014) (2014 NAP Toolkit)³¹ – published by the Danish Institute for Human Rights and the International Corporate Accountability Roundtable; and

²⁷ General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights, n 2.

²⁸ PwC, *Weighing the cost of obesity: A case for action* (2015) <<https://www.pwc.com.au/pdf/weighing-the-cost-of-obesity-final.pdf>>.

²⁹ United Nations Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights* (2016) <http://www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf> 7.

³⁰ The Danish Institute for Human Rights and the International Corporate Accountability Roundtable, *National Action Plans on Business and Human Rights Toolkit* (2017 Edition) <<https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/5a3bd3bf9140b7ab3607ee6d/1513870272126/FINAL+NAPs+Toolkit+Update+2017.pdf>>.

³¹ The Danish Institute for Human Rights and the International Corporate Accountability Roundtable, *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* (2014) <<https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/5865d59fe6f2e17f4f0cb629/1483068841826/DIHR-ICAR-National-Action-Plans-NAPs-Report3.pdf>>.

- *Children’s Rights in National Action Plans on Business and Human Rights*, which includes the *Children’s Rights National Baseline Assessment Template* – published by UNICEF, the Danish Institute for Human Rights and the International Corporate Accountability Roundtable (2015).³² This resource is a thematic supplement to the 2014 Toolkit, and provides a template to help highlight gaps in the implementation of the UNGPs specifically relating to the benefit and protection of children.

The objective of a national baseline assessment (**NBA**) has been described by the Danish Institute for Human Rights and the International Corporate Accountability Roundtable as follows:³³

An NBA on business and human rights has the primary objective of assessing the current level of implementation of the UNGPs in a given state. It brings together an analysis of the legal and policy gaps in UNGP implementation with an overview of the adverse human rights impacts of business to identify the most salient human rights issues in a given context. In this way, it serves to inform the formulation and prioritisation of actions in a NAP.

Although it is ultimately the responsibility of governments to conduct a national baseline assessment (in consultation with stakeholders), in countries where governments have not taken this step civil society organisations have conducted civil society-led national baseline assessments. These have included civil society organisations in South Africa, Tanzania, Mozambique, Guatemala, and Burma/Myanmar.³⁴

Similarly, this report has used the *Children’s Rights National Baseline Assessment Template* in the absence of a government-led NBA to assess the status of children’s rights and business in Australia. This template (including the specific research questions it includes) forms the basis of the research and analysis of this report, and is included in **Part 5: Research and analysis – An Interim National Baseline Assessment of Australian policy and law shaping business activities that impact on children and their carers**. The explanation of what Australia has in place in relation to the research questions posed uncovers gaps in the implementation of the UNGPs with respect to children, and highlights priority areas for action to better protect children from adverse impacts of business.

It is intended to help policy makers and those involved in public policy discussions to identify priority areas of reform for inclusion in an Australian National Action Plan on Business and Human Rights. Of course, improvements in any of these areas could be made independently of a NAP.

This report has been described as ‘interim’ in recognition of the desirability of the Australian Government undertaking a thorough, complete and comprehensive NBA, with due input from all relevant stakeholders and the members of the community; both domestically and internationally where Australian businesses operate and source goods and services. In the absence of a Government-led, consultative process to identify gaps in the implementation of the UNGPs in Australia, the *Building Better Business for Children - An Interim National Baseline Assessment of Australian policy and law shaping business activities that impact on children* provides a starting point of this analysis from a child rights perspective. It should not be interpreted as a conclusive end point.

Limitations

Readers of this report should be conscious of the following limitations:

- Focus on Pillars 1 and 3 of the UNGPs – In line with the remit of both the 2014 *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* and *Children’s Rights in National Action Plans on Business and Human Rights*, this report focuses primarily on the role of the state in implementing the UNGPs, including issues of public policy, legislation and regulation. As such, the

³² Children’s Rights in National Action Plans (NAPs) on Business and Human Rights, n 4.

³³ The Danish Institute for Human Rights and the International Corporate Accountability Roundtable, n 30, 25.

³⁴ Ibid, 15.

focus is on Pillar 1 ‘The state duty to protect’ and Pillar 3 ‘Access to Remedy’ of the UN Guiding Principles on Business and Human Rights. Therefore, the actions of businesses in accordance with Pillar 2 ‘The corporate responsibility to respect human rights’ are not covered in this report. However, in November 2017, the Danish Institute for Human Rights³⁵ published an updated version of the toolkit which incorporates all three pillars of the UNGPs as part of its analysis and a Government-led NBA should review all three pillars of the UNGPs.

- Methodology – This report has been prepared primarily as a desk-top review, supplemented with select consultation with experts in the business and human rights field (between January 2018 and April 2019) and federal Government Departments and Agencies (between July 2018 and April 2019). It is possible therefore that new policies or reforms announced by Government during or since that time might not necessarily be reflected in this report. Additionally, further research and wider consultation – including with children and families themselves, civil society, the business community and all levels of government – is needed for a comprehensive approach. For example, the updated guidance of the Danish Institute for Human Rights and the International Corporate Accountability Roundtable recommends that the NBA methodology should include (references omitted):³⁶

...a combination of quantitative and qualitative methods. Quantitative methods include surveys to generate new data or, where resources are scarce or reliable data already exists, to extract secondary data, ideally with support from statisticians or specialists. Qualitative methods, such as interviews or focus groups, can be used to gather complementary information about values, opinions, behaviour, and context, such as social and cultural factors.

To develop a fuller picture of the adverse human rights impacts experienced by children and families - both within Australia but particularly overseas - further research, assessment and consultation with affected communities and other stakeholders is necessary. This would need to include research and meaningful consultation both domestically and overseas, including with children and children’s rights organisations and advocates. *Children’s Rights in National Action Plans on Business and Human Rights* sets out how governments can do this in practice.³⁷ For these reasons, the report is described as an ‘interim’ national baseline assessment.

- The scope of issues considered by the template – The scope of children’s rights affected by business activity is broad. In addition to the many public policy issues discussed in this report, the UN Committee on the Rights of the Child has outlined numerous other issues relevant to children’s rights and business, including taxation, environmental degradation and discrimination in the provision of goods and services.³⁸ In Australia and internationally, there is growing recognition of the unique risks to, and impacts on, children presented by climate change.³⁹ This is an issue that many children and young people in Australia have expressed concern about, with thousands of students protesting a lack of action to address climate change in Australia.⁴⁰ Aboriginal and Torres Strait Islander young people are also taking action to seek action on climate change and measures to create a more sustainable world.⁴¹ However, the *Children’s Rights National Baseline Assessment Template* does not at present seek to evaluate Australia’s response to climate change, although, a

³⁵ The Danish Institute for Human Rights and the International Corporate Accountability Roundtable, n 30.

³⁶ Ibid, 26.

³⁷ Children’s Rights in National Action Plans (NAPs) on Business and Human Rights, n 4.

³⁸ See generally, General Comment No. 16 on State obligations regarding the impact of the business sector on children’s rights, n 2.

³⁹ See, for example, UNICEF, *Unless we act now: The impact of climate change on children* (November 2015) <https://www.unicef.org/publications/index_86337.html>.

⁴⁰ ‘Students strike for climate change protests, defying calls to stay in school’ *ABC News* (1 December 2018)

<<https://www.abc.net.au/news/2018-11-30/australian-students-climate-change-protest-scott-morrison/10571168>> and ‘Australian students defy PM with climate protests’ *SBS News* (1 December 2018) <<https://www.sbs.com.au/news/australian-students-defy-pm-with-climate-protests>>.

brief overview of the policy approach is outlined at **2.2 – National Priorities**). In this respect, the issues identified for recommendations are not intended as comprehensive or otherwise exclusive, rather, further research and analysis on this and other areas is undoubtedly required in order to produce a comprehensive NBA.

- The significant focus on the role of the Federal Government – Although all Australian Governments have a role to play to respect, protect and realise the rights of children, this report largely focusses on the role of Federal Government, and federal policy and law. This is due to the primary responsibility that the Federal Government has with respect to the majority of the areas considered by this report by virtue of the Australian Constitution. Specific state and territory policy and law is touched upon where the issue is primarily relevant to these jurisdictions. However, further examination and consultation with State and Territory Governments is undoubtedly desirable.
- Assessment of the adequacy of existing policies, laws and regulations – As outlined above, comprehensively assessing the adequacy of each policy, law, regulation and initiatives identified in this report would require government-initiated process involving broad consultation (particularly with affected communities) as well as the commissioning of both qualitative and quantitative research. This would require dedicated resources, significant and diverse stakeholder engagement and the engagement of specialist research expertise. As an interim measure, and, recognising the often mixed picture of policy and legal frameworks, the report has identified 10 positive aspects and 10 limitations to Australia’s current approach, based on desk-top research as informal consultations.

⁴¹ See, for example, Seed Indigenous Youth Climate Network and the Australian Youth Climate Coalition, *Seed* <<https://www.seedmob.org.au/>>.

PART 3: HOW IS THE AUSTRALIAN GOVERNMENT LIVING UP TO ITS DUTY TO PROTECT CHILDREN FROM ACTUAL OR POTENTIAL ADVERSE HUMAN RIGHTS IMPACTS OF BUSINESS ACTIVITIES?

Australia's Commitments To Children

Australia is required to act in order to fulfil its commitments to children made when it ratified the *Convention on the Rights of the Child*, as well as to help achieve the *2030 Agenda for Sustainable Development – The Sustainable Development Goals* (SDGs).

The Convention on the Rights of the Child

Australia committed to respect, protect and fulfil the rights of children in 1990 when it took the important step of ratifying the *Convention on the Rights of the Child* (**Children's Convention**). Outlining rights to survival and development, participation, non-discrimination and the right to have their best interests taken as a primary consideration, the Children's Convention sets the basic requirements for children to survive, thrive and to reach their full potential.

This obligation requires States to protect children against infringements of rights by third parties, including businesses. The United Nations Committee on the Rights of the Child has explained this 'obligation to protect' as follows:⁴²

[t]his duty is of primary importance when considering States' obligations with regards to the business sector. It means that States must take all necessary, appropriate and reasonable measures to prevent business enterprises from causing or contributing to abuses of children's rights. Such measures can encompass the passing of law and regulation, their monitoring and enforcement, and policy adoption that frame how business enterprises can impact on children's rights. States must investigate, adjudicate and redress violations of children's rights caused or contributed to by a business enterprise. A State is therefore responsible for infringements of children's rights caused or contributed to by business enterprises where it has failed to undertake necessary, appropriate and reasonable measures to prevent and remedy such infringements or otherwise collaborated with or tolerated the infringements.

The Committee on the Rights of the Child adopted *General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights*⁴³ to help governments take such action in practice.

The 'Protect, Respect and Remedy' framework and the UN Guiding Principles on Business and Human Rights

The United Nations 'Protect, Respect and Remedy' framework⁴⁴ was developed in the wake of numerous and mounting examples of communities and individuals harmed by the activities and operations of businesses, and the recognised need for greater clarity and guidance about the duties and responsibilities of different stakeholders.

Developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Professor John Ruggie, it provides a conceptual and policy framework for all stakeholders in society to 'provide more effective protection to individuals and communities against corporate-related human rights harm'.⁴⁵ It articulates:

- 1. the State duty to protect against human rights abuses** by third parties, including business;
- 2. the corporate responsibility to respect human rights;** and
- 3. the need for victims of business-related human rights abuses to have access to effective remedies.**

⁴² General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights, n 2, [28].

⁴³ Ibid.

⁴⁴ Human Rights Council, *Protect, Respect and Remedy: a Framework for Business and Human Rights - Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, UN Doc. A/HRC/8/5 (7 April 2008) [1] ('Protect, Respect and Remedy: a Framework for Business and Human Rights').

⁴⁵ Ibid.

To guide the practical implementation of the Protect, Respect and Remedy Framework, Professor Ruggie developed the *United Nations Guiding Principles on Business and Human Rights (UNGPs)*.⁴⁶ Unanimously endorsed by member states of the United Nations Human Rights Council in 2011, the UNGPs have become an authoritative international standard to guide government and business action to best protect the rights of communities in a world increasingly affected by business activity.

The 2030 Agenda for Sustainable Development – The Sustainable Development Goals

In 2015, the 193 member states of the United Nations General Assembly – including Australia – established the *2030 Agenda for Sustainable Development – The Sustainable Development Goals (SDGs)*. The SDGs set out a plan of ‘bold and transformative’ action that aims to wipe out poverty by placing the world on a more sustainable path; economically, socially and environmentally.

The SDGs acknowledge that many current practices connected to production and consumption are unsustainable, and that these have often led to negative impacts on both people and planet. They are an appeal to everyone in society - governments, international organizations, the business sector, civil society and individuals alike - to contribute to changing these unsustainable and harmful practices. Governments including the Australian Government proclaimed:⁴⁷

[w]e will foster a dynamic and well-functioning business sector, while protecting labour rights and environmental and health standards in accordance with relevant international standards and agreements and other ongoing initiatives in this regard, such as the Guiding Principles on Business and Human Rights and the labour standards of the International Labour Organization, the Convention on the Rights of the Child and key multilateral environmental agreements, for parties to those agreements.

The Australian Government has taken a number of steps to help progress the Sustainable Development Goals, including through participation in the voluntary national review in 2018.⁴⁸

National Action Plans on Business and Human Rights as a way to implement the UNGPs and pursue sustainable development

Increasingly, states are developing *National Action Plans on Business and Human Rights* to implement the UNGPs in a national setting.⁴⁹ Such plans are also increasingly used as a means to help achieve the business-related targets of the SDGs.⁵⁰ The UN Working Group on Business and Human Rights defines a National Action Plan on Business and Human Rights as an “evolving policy strategy developed by a state to protect against adverse human rights impacts by business enterprises in conformity with the UN Guiding Principles on Business and Human Rights...”⁵¹

National Action Plans on Business and Human Rights can demonstrate a government’s commitment to specific improvements in policy or regulation, and help formulate a plan of action on priority issues to achieve positive change over time.

As of April 2019, 23 countries have adopted a National Action Plan on Business and Human Rights (the United Kingdom, the United States, Belgium, Germany, France, Ireland, Netherlands, Norway, Sweden, Switzerland, Denmark, Finland, South Korea, Luxembourg, the Czech Republic, Spain, Poland, Italy, Lithuania, Slovenia, Georgia, Chile and Colombia).⁵² At least a further 12 countries were in the process of developing one (Argentina, Honduras, India, Indonesia, Japan, Kenya, Malaysia, Mexico, Morocco, Peru, Scotland, and Thailand).⁵³

⁴⁶ United Nations Guiding Principles on Business and Human Rights, n 3.

⁴⁷ United Nations General Assembly, *Resolution adopted by the General Assembly on 25 September 2015 Transforming our world: the 2030 Agenda for Sustainable Development – The Sustainable Development Goals*, GA Res 70/1, 70th sess, Agenda items 15 and 116, UN Doc A/RES/70/1 (21 October 2015) (‘The Sustainable Development Goals’).

⁴⁸ Australian Government, *Report on the Implementation of the Sustainable Development Goals* (2018) <<https://dfat.gov.au/aid/topics/development-issues/2030-agenda/Documents/sdg-voluntary-national-review.pdf>>.

⁴⁹ United Nations Working Group on Business and Human Rights, n 29, i.

⁵⁰ The Danish Institute for Human Rights, ‘About’ *National Action Plans on Business and Human Rights* <<https://globalnaps.org/about/>>.

⁵¹ United Nations Working Group on Business and Human Rights, n 29, i.

⁵² The Danish Institute for Human Rights, *National Action Plans on Business and Human Rights* <<https://globalnaps.org/country/>>.

⁵³ Ibid.

Australia has not yet committed to develop a National Action Plan on Business and Human Rights or otherwise articulated a plan to realise the UNGPs for children and communities in Australia and abroad where Australian businesses source and operate.

Case Study: The Belgian National Action Plan on Business and Human Rights

Since 2011, Belgium has considered business impacts on children, including child labour, to be a priority policy area.⁵⁴

In regard to children, the Belgian NAP indicates an intention:⁵⁵

“to give special attention to this particular issue in its NAP by engaging through several parallel measures:

- *Systematic reference in international fora and bilaterally to concerned States on the ratification of Conventions Nos. 138 (on minimum age) and 182 (on the worst forms of child labor) of the ILO.*

- *Active support and awareness raising of companies on the Principles governing enterprises in the field of children’s rights, in order to allow Belgian companies to maximize the positive effects of their activities on the lives of children by supporting and respecting their rights and those of their parents or guardians, including the right to a decent wage.*

- *Continued support to UNICEF activities, including the publication of the reading guide for the Committee on the Rights of the Child’s Observation No. 16 and the creation of a platform for businesses that wish to commit to the basis of the Principles governing businesses in the field of children’s rights.*

- *Emphasis on children’s rights in awareness building throughout the network of Belgian diplomacy, particularly through active distribution of the Principles governing businesses in the area of children’s rights in the Toolbox set out in Action Point 1.*

- *Ratification of the Protocol of 2014 to the ILO Convention on Forced Labor.”*

The UN Working Group on Business and Human Rights has outlined comprehensive guidance on how states can develop a meaningful and effective NAP. It recommends the following process:⁵⁶

Phase 1: Initiation

- 1) Seek a formal commitment of the Government to engage in a NAP process.
- 2) Create a format for cross-departmental collaboration and designate leadership.
- 3) Create a format for engagement with nongovernmental stakeholders.
- 4) Develop and publish a work plan and allocate adequate resources.

Phase 2: Assessment and consultation

- 5) Get a sound understanding of adverse business-related human rights impacts.
- 6) Identify gaps in State and business implementation of the UNGPs.
- 7) Consult relevant stakeholders on actions to address gaps and identify priority areas.

Phase 3: Drafting of initial NAP

- 8) Draft the initial NAP.
- 9) Consult on the draft with interested stake-holders.
- 10) Finalize and launch the initial NAP.

Phase 4: Implementation

- 11) Implement actions and continue cross-departmental collaboration.

⁵⁴ Business and Human Rights Resource Centre, *Belgium* <<https://www.business-humanrights.org/en/belgium>>.

⁵⁵ The Danish Institute for Human Rights, *National Action Plans on Business and Human Rights – Belgium* <<https://globalnaps.org/country/>>.

⁵⁶ United Nations Working Group on Business and Human Rights, n 29, i-ii.

- 12) Ensure multi-stakeholder monitoring.

Phase 5: Update

- 13) Evaluate impacts of the previous NAP and identify gaps.
- 14) Consult stakeholders and identify priority areas.
- 15) Draft updated NAP, consult on, finalize, and launch it.

As outlined, the UN Working Group on Business and Human Rights views the identification of gaps in the implementation of the UNGPs as indispensable in the process of developing a NAP. Critically, this analysis must consider the gaps in implementation for vulnerable or marginalised groups that are particularly susceptible to corporate-related human rights abuses. These groups include children, women, indigenous peoples, migrant workers and their families, persons with disabilities, ethnic minorities and human rights defenders.⁵⁷

Steps towards a National Action Plan on Business and Human Rights in Australia

Despite some promising initial developmental steps throughout 2016 and 2017, as at April 2019, Australia has not committed to a NAP, nor committed to a plan to implement the UNGPs.

In early 2016, as part of Australia's participation in the Universal Periodic Review, the Australian Government committed to 'undertake a national consultation on the implementation of the UN Guiding Principles on Business and Human Rights'.⁵⁸ Initial consultations followed in mid-2016 with members of the business community convened by the Global Compact Network Australia (GCNA) and the Department of Foreign Affairs and Trade to consider the implementation of the UNGPs. Subsequently, in June 2017, the Australian Government established a *Multi-Stakeholder Advisory Group on the Implementation of the UN Guiding Principles on Business and Human Rights (MSAG)* comprised by experts from civil society, business, unions, academia, and independent consultancy.⁵⁹ As part of its work, the MSAG recommended that the Australian Government undertake a gap analysis of legislation as part of the state duty to protect human rights.⁶⁰ In August 2017, the group's 'Advice on the prioritisation of issues and actions to implement the UN Guiding Principles on Business and Human Rights' concluded that it:

sees value in the Australian Government delivering a coordinated policy statement in the form of a National Action Plan, which sets out the concrete steps it will take to implement the UNGPs, including its expectations of business and other stakeholders regarding their conduct in Australia and abroad, and what support it will provide in helping them meet those expectations.

This echoed calls made in 2016 by civil society organisations and the Australian Human Rights Commission for the Australian Government to give priority to adopting a NAP and conducting a national baseline assessment.⁶¹

Despite the expert advice of the MSAG members, the Australian Government has not committed to developing a NAP, nor has it conducted a national baseline assessment to help uncover the gaps in Australia's implementation

⁵⁷ United Nations General Assembly, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises to the UN General Assembly*, UN Doc. A/69/263 (5 August 2014) [41] and [92].

⁵⁸ Human Rights Council, *Report of the Working Group on the Universal Periodic Review* Australia Addendum Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review (Advance Version)*, UN Doc A/HRC/31/14/Add.1, (29 February 2016) <<https://www.ag.gov.au/RightsAndProtections/HumanRights/United-Nations-Human-Rights-Reporting/Documents/ResponsetoUPRrecommendations.pdf>> [63].

⁵⁹ Minister for Foreign Affairs, The Hon Julie Bishop MP, *Establishment of an Advisory Group on Business and Human Rights* (2 June 2017) <https://foreignminister.gov.au/releases/Pages/2017/jb_mr_170602b.aspx>.

⁶⁰ Multi-Stakeholder Advisory Group on the Implementation of the UN Guiding Principles on Business and Human Rights, *Advice on the prioritisation of issues and actions to implement the UN Guiding Principles on Business and Human Rights* (August 2017) <<http://dfat.gov.au/international-relations/themes/human-rights/business/Documents/final-msag-priorities-paper.pdf>>.

⁶¹ Australian Human Rights Commission, *Implementing the UN Guiding Principles on Business and Human Rights in Australia – Joint Civil Society Statement* (August 2016) <<https://www.humanrights.gov.au/sites/default/files/Implementing%20UNGPs%20in%20Australia%20-%20Joint%20Civil%20Society%20Statement.pdf>> 6-7 ('Implementing the UN Guiding Principles on Business and Human Rights in Australia – Joint Civil Society Statement').

of the UNGPs.⁶² Since that time, progress towards a NAP has halted and, in late 2017, the MSAG was dissolved. The Government has since progressed some alternative actions and initiatives in lieu of a formal NAP – many of which are discussed throughout this paper.

Subsequently, the Vice-Chairperson of the UN Working Group on Business and Human Rights, Professor Surya Deva, issued an open letter in December 2017 expressing disappointment with the decision of the Australian Government not to proceed with a NAP.⁶³ While applauding the steps that the Australian Government and other members of Parliament had taken towards adopting a modern slavery act, the letter stated:⁶⁴

...the proposed modern slavery legislation as well as other measures to eliminate modern slavery (such as the Bali Process) should not be seen as a substitute for developing a NAP on business and human rights. As we had noted in our May 2017 letter, “governments need to consider the full range of internationally recognized human rights when seeking to meet the State’s duty to protect against human rights abuse involving business enterprises. While efforts to address forced labour are laudable and necessary, governments should take steps toward full implementation of the UNGPs, including through the development of national action plans.”

As such, both Australian and international experts have identified a need for further examination of the gaps in Australia’s current approach with regard to the UNGPs across all human rights, including from a child rights perspective. ***Building Better Business for Children – An Interim National Baseline Assessment of Australian policy and law shaping business activities that impact on children*** is a first step towards establishing this picture for children and their caregivers.

RECOMMENDATION 1 – Adopt a National Action Plan on Business and Human Rights – That the Australian Government adopt a *National Action Plan on Business and Human Rights (NAP)* by 2020 to implement the UN Guiding Principles on Business and Human Rights. The NAP should be developed in line with relevant guidance including that issued by the UN Working Group on Business and Human Rights⁶⁵ and the recommendations of the Multi-Stakeholder Advisory Group on the Implementation of the UN Guiding Principles on Business and Human Rights⁶⁶.

Areas of Government that have a role to play

The decisions of government - Ministers, parliamentarians and departmental staff - who set expectations and requirements of business, can very often affect children; in some way, at some point.

From employment laws to product safety; corporate reporting requirements to marketing and advertising standards; measures to keep consumers safe online and access to avenues for redress through courts and other mechanisms – children might not be front of mind when policy makers set these standards, but their rights and interests are affected all the same; rights to health, protection from economic exploitation, rights to education and to access and benefit from information.

Most Federal Ministers and their Departments therefore have a role to play to protect children from adverse impacts of business activity and, in ratifying the *Convention on the Rights of the Child*, Australia made a commitment to children that it would do so. Based on the research questions contained in the *Children’s Rights*

⁶² Rather, it commissioned a ‘Stocktake on Business and Human Rights’. Published in April 2017, this document compiles information about existing initiatives. See Allens & Linklaters, *Stocktake on Business and Human Rights in Australia* (April 2017) <<http://dfat.gov.au/international-relations/themes/human-rights/business/Documents/stocktake-on-business-and-human-rights-in-australia.pdf>>.

⁶³ United Nations Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Professor Surya Deva, *Letter to Mr. John Paton Quinn*, Reference: SPB/SHD/UH/ff (18 December 2017) <http://www.ohchr.org/Documents/Issues/Business/LetterAustralia_20171218.pdf>.

⁶⁴ Ibid.

⁶⁵ United Nations Working Group on Business and Human Rights, n 29.

⁶⁶ Multi-Stakeholder Advisory Group on the Implementation of the UN Guiding Principles on Business and Human Rights, n 60.

National Baseline Assessment Template,⁶⁷ issues relating to the following portfolios are identified and discussed in this report:

| Department | Issues and agencies discussed in <i>Building Better Business for Children – An Interim National Baseline Assessment of Australian policy and law shaping business activities that impact on children</i> |
|------------------------------------|--|
| Attorney-General's | Responsible for delivering programs and policies to maintain and improve Australia's law and justice framework (including access to justice and administration of federal anti-discrimination legislation). The portfolio includes several agencies discussed in this report, including the Australian Human Rights Commission, Commonwealth Director of Public Prosecutions, and the Office of the Australian Information Commissioner. |
| Communications and the Arts | Responsible for policies and budgetary decisions that determine children's access to digital technologies (for example, through the national broadband network), broadcasting standards, restrictions on advertising seen by children and measures to increase online safety, as well as the work of the eSafety Commissioner. |
| Finance | Responsible for legislation and policies relating to Commonwealth public sector resource management, governance and accountability frameworks, including the Commonwealth Procurement Framework. Finance is responsible for the financial framework for Australian Government Agencies, and maintains shareholder oversight for Government Business Enterprises (GBEs). These activities are a critical aspect to the 'State-Business Nexus' as explained by the UNGPs, namely, where business enterprises are owned or controlled by the state, or where the state has significant leverage to promote respect for human rights by business enterprises through establishing the conditions in which it will engage in commercial transactions. |
| Foreign Affairs and Trade | Responsible for trade negotiations, development assistance policies and programs (particularly when they involve or affect the private sector i.e. the DFAT Child Protection Policy). DFAT also led on consultations connected to conducting a consultation on implementing the UN Guiding Principles on Business and Human Rights. Portfolio agencies include the Export Finance and Insurance Corporation (Efic). |
| Health | Responsible for policies to help provide better health outcomes relating to consumer goods (including tobacco and high sugar, salt and fat food products), and the work of agencies such as Food Standards Australia New Zealand. |
| Home Affairs | Responsible for Australia's whole-of-government response to human trafficking and slavery, including reporting on modern slavery in supply chains, as well as child sexual abuse offences in the Commonwealth Criminal Code. Home Affairs also has responsibility for the Australian Government's response to the Criminal Justice and Working With Children Checks recommendations from the Royal Commission into institutional child sexual abuse, and has responsibility for the protection of children in immigration programmes. |

⁶⁷ Children's Rights in National Action Plans (NAPs) on Business and Human Rights, n 4.

| Department | Issues and agencies discussed in <i>Building Better Business for Children – An Interim National Baseline Assessment of Australian policy and law shaping business activities that impact on children</i> |
|----------------------------|--|
| Human Services | Responsible for the development of service delivery policy and providing access to social, health and other payments and services. This includes social security provision to young people and caregivers who are employed or looking for work, the Child Care Subsidy to help eligible families with the cost of child care, as well as support through paid parental leave for working caregivers. The Department also oversees Child Support through assessing, collecting and disbursing child support payments to help separated parents and their children, including through employers. |
| Jobs and Small Business | Responsible for employment and workplace relations law and policy (including non-discrimination in the workplace), and the work of agencies including the Fair Work Commission, the Fair Work Ombudsman and Safe Work Australia. |
| Prime Minister and Cabinet | Provides advice to the Prime Minister and Cabinet, and works across portfolios to coordinate the national agenda and development of policy and programs. Also responsible for policy areas that are a priority to the national interest, including domestic issues (such as Indigenous Affairs, work to help protect women and children from violence, and child safety through the National Office for Child Safety), and international issues (such as the negotiation of trade agreements, and advancing Australia's interests regarding the Women, Peace and Security agenda, the Convention on the Elimination of all Forms of Discrimination Against Women, and the Commission on the Status of Women). The Workplace Gender Equality Agency is also part of this portfolio. |
| Social Services | Responsible for oversight of the National Framework for Protecting Australia's Children 2009-2020; and has responsibility for family and children's policy and programs. Also responsible for social security support to young people and caregivers (such as Parental leave/Youth Allowance/Newstart), and policy responses to domestic and family violence including and the National Plan to Reduce Violence against Women and their Children. |
| Treasury | Responsible for product safety and the work of the Australian Competition and Consumer Commission, corporate reporting requirements and the Australian Securities and Investments Commission. The Australian National Contact Point established in accordance with Australia's obligations under the <i>OECD Guidelines for Multinational Enterprises</i> is also located within Treasury. |

What are Australia's current gaps and limitations in protecting children and their carers from actual or potential adverse impacts of business?

Building Better Business for Children (specifically, **Part 5: Research and analysis – An Interim National Baseline Assessment of Australian policy and law shaping business activities that impact on children and their carers**) reveals numerous gaps in the implementation of the UNGPs in Australia that affect children – both domestically and overseas. Based on the research and issues discussed in **Part 5: Research and analysis – An Interim National Baseline Assessment of Australian policy and law shaping business activities that impact on children and their carers**, UNICEF Australia has identified the following gaps and limitations in protections from actual and potential impacts on children's rights:

- 1) **The need for continued action to improve organisational approaches to keep children safe – both in person and in online environments** – In Australia, recent inquiries have revealed serious shortcomings in our approach to keeping children safe – both in person and online. These inquiries have frequently reiterated that all stakeholders in society have a role to keep children safe, including the business community. For example, the *Royal Commission into Institutional Responses to Child Sexual Abuse* revealed serious and widespread failures to prevent and respond to child sexual abuse in institutions across Australia, with the Commission concluding that tens of thousands of children have been sexually

abused in many Australian institutions.⁶⁸ The Royal Commission observed widespread shortcomings in organisational approaches to protecting children from sexual abuse, along with serious deficiencies in the system of *Working With Children Checks* which is often used by businesses as part of pre-employment screening. The response of the Australian Government to the findings of the Royal Commission have included various commitments, including to working with State and Territory Governments to help ensure greater national consistency with Working With Children Checks, and also the establishment of the National Redress Scheme for people who have experienced institutional child sexual abuse. Following on from the Royal Commission, the members of the Council of Australian Governments also endorsed the National Principles for Child Safe Organisations. These ‘reflect ten child safe standards recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse, and...have a broader scope that goes beyond child sexual abuse to cover other forms of potential harm to children and young people.’⁶⁹ Importantly, the National Principles are intended to apply to all organisations dealing with children, regardless of their location, sector or size, and includes businesses or organisations employing staff and/or volunteers providing services to and working with children and young people. The findings of the Royal Commission, and the Australian Government’s response to them, have significant and on-going lessons for all Australian society, including businesses, particularly whose volunteers or employees have direct contact with children. Continued action to implement the recommendations of the Royal Commission and the *National Principles for Child Safe Organisations* is needed to ensure a robust approach to child safeguarding into the future. Children’s exposure to cyberbullying, and safety online generally, has also been raised as a national priority domestically. This is an issue of particular relevance to technology companies, whose services and devices provide the infrastructure that can enable cyberbullying to occur. While recognising that previous efforts have delivered some results, a statutory review into the *Enhancing Online Safety Act 2015* (Cth) published in February 2019 concluded that Australia’s system remains fragmented and uncoordinated, and that ‘[t]he practice to date has largely been one of retrofitting child protection safeguards into online services and products after harm emerges, or the damage is done.’⁷⁰ The Independent Reviewer went on to make a series of recommendations designed to address weaknesses in our current approach to online safety, including through a new and more proactive regulatory regime and a National Online Safety Plan.⁷¹ The Senate Standing Committee on Legal and Constitutional Affairs’ has also outlined a range of recommendations to help strengthen Australia’s response to cyberbullying as part of its inquiry into the *Adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying* (see further **2.2 – National Priorities**).

- 2) **The absence of paid domestic and family violence leave to help ensure the economic security of employees** – Domestic and family violence has been recognised as a widespread, prevalent, and serious national concern in Australia. Reducing the prevalence of family violence, and responding appropriately to support people experiencing family violence, requires efforts on behalf of members of society, including businesses in their critical role as employers. Research indicates that it takes on average 141 hours and costs \$18,000 to leave a violent relationship. As such, the ability of people experiencing family violence to leave a violent relationship whilst maintaining their income is crucial. Some Australian employers have taken a leadership position and have voluntarily introduced access to paid domestic and family violence leave for their employees. The Australian Government has also recently introduced five days of unpaid domestic violence leave per year as part of the National Employment Standards, and committed to develop a “one-stop shop” for resources on effective workplace

⁶⁸ Royal Commission into Institutional Responses to Child Sexual Abuse, n 23, 5.

⁶⁹ Australian Human Rights Commission, *Child Safe Organisations – About the National Principles* <<https://childsafe.humanrights.gov.au/national-principles/about-national-principles>>.

⁷⁰ Lynelle Briggs, *Report of the Statutory Review of the Enhancing Online Safety Act 2015 and the Review of Schedules 5 and 7 to the Broadcasting Services Act 1992 (Online Content Scheme)* (15 February 2019) <<https://communications.govcms.gov.au/publications/report-statutory-review-enhancing-online-safety-act-2015-and-review-schedules-5-and-7-broadcasting>> 2-3 (‘Report of the Statutory Review of the Enhancing Online Safety Act 2015 and the Review of Schedules 5 and 7 to the Broadcasting Services Act 1992 (Online Content Scheme)’).

⁷¹ *Ibid.*

responses to violence against women and their children. However, the provision of unpaid leave falls short of the reforms recommended by the Australian Law Reform Commission to introduce paid family and domestic violence leave as a statutory entitlement to help ensure economic security for all employees experiencing domestic and family violence, and their children (see further **2.2 – National Priorities**).

- 3) **No mandatory human rights due diligence or child rights due diligence** – In accordance with the UNGPs, a human rights due diligence broadly is a process of identifying and assessing actual or potential risks of adverse human rights impacts in company operations and supply chains (not just in the first tier of relationships); prioritising responsive action to prevent or mitigate harm by reference to the scale and severity of harm; and acting on the findings so that responses are integrated management systems and practices. A child rights due diligence is such a process, focusing specifically on children. Currently however there is no Australian law that expressly requires businesses to undertake human rights due diligence, nor child rights due diligence. This is in contrast to other jurisdictions such as France which introduced a Duty of Vigilance law in 2017, and in Germany where the National Action Plan on Business and Human Rights sets out an expectation that large businesses will adopt human rights due diligence by 2020, and signals consideration of introducing a law requiring human rights due diligence in the event that this does not occur. Recognising this gap, the Government-established Multi-Stakeholder Advisory Group on the Implementation of the UN Guiding Principles on Business and Human Rights recommended in 2017 that the Australian Government '[c]onsider the development of legislation mandating human rights due diligence, considering the approaches in, for example, the Illegal Logging Prohibition Act and Regulations (2013) which prioritises at-risk sectors, or the French Corporate Duty of Vigilance Law 2017, which requires large French companies to identify and prevent adverse human rights (and environmental) impacts' (see further **3.1.2 – Due Diligence**).
- 4) **Gaps in the Government's own businesses activities** – To ensure policy coherence towards the goal of protecting and promoting human rights – including children's rights – and to fully leverage the influencing ability of government policy, it is necessary that human rights considerations are incorporated across government functions, particularly the commercial activities of government. Across a range of businesses-related activities of the Australian Government and state-owned enterprises (referred to as the 'State-Business nexus' by the UNGPs), human rights are very rarely, if ever, a factor requiring consideration by relevant public officials in discharging their duties. For example, human rights considerations are not expressly incorporated into the following:
 - public procurement (noting however that the requirements of the *Modern Slavery Act 2018* (Cth) will apply to the Commonwealth – a notable exception);
 - privatisation processes;
 - export credit provision;
 - private sector delivery of aid programs;
 - trade and investment agreements; and
 - decision making by departments, agencies and state-owned or controlled entities.

This risks conflicting policy objectives with other government departments and agencies that seek to promote and protect human rights of children and adults in the community. Australia should be seeking to ensure policy coherence across all activities of government so that human rights concerns are not siloed in particular departments and that other policies such as those relating to export credit assistance and corporate and securities law are not formed in isolation from, and in disregard of, the state duty to protect human rights (see further section **3.1.5 – Public Finance / Procurement / Privatisation**).

- 5) **Lacking protections against child labour** – On any given day in 2016, 152 million children were engaged in child labour. Of these, 73 million children were engaged in hazardous work and 62 million were in

Asia Pacific.⁷² Child labour is work that deprives children of their childhood and is harmful to their physical and mental development.⁷³ It can also hamper the human and economic development of whole nations. Despite the need for concerted efforts to reduce the alarming numbers of children engaged in child labour globally, Australia has not ratified *ILO Convention No. 138 on the Minimum Age for Admission to Employment*. This is so despite recognition by the Australian Parliament that doing so would provide important leadership at the international level.⁷⁴ Further, unlike most employment legislation, an exception in the *Fair Work Act 2009* (Cth) means that the regulation of ‘child labour’ in Australia is the responsibility of individual State and Territory governments. Although legislation generally provides restrictions to ensure that children cannot generally work during school hours, Australia has a highly variable and ad hoc approach to regulating child labour across States and Territories. Although a few jurisdictions, such as Victoria and the Australian Capital Territory, have adopted very comprehensive laws to regulate the employment of children, others such as South Australia have very few legal requirements. Commentators have observed Australia’s approach to child labour and youth work domestically to be a ‘fragmented and haphazard’⁷⁵ (see further **3.2 – Child labour / young workers**).

- 6) **Concerns regarding the ability of young people and the carers of children to maintain an adequate standard of living** – The safety net of a minimum wage has existed in Australia for many years. However concerns have been raised around the extent to which young people in Australia have access to a living wage, have equal treatment in employment, and can access adequate welfare income to help ensure they do not experience poverty. Due to Australia’s system of ‘junior wages’, the reality for many young employees under 21 years of age is that they frequently receive only a percentage of the relevant minimum wage in their occupation or industry, purely on the basis of their age. Despite calls for reviews and reform of this system to ensure it is not discriminatory, no federal Government has committed to examine this issue in recent years. At the same time, many groups have raised concerns about the nature, level and conditions connected to social security payments and welfare supports for young people and carers of children who are underemployed or who are looking for work (including in particular, the disproportionate impact of the Community Development Program and the ParentsNext program on Aboriginal and Torres Strait Islander families). Recent economic and labour force trends that have seen stagnated wage growth and greater numbers of young people in long-term unemployment. In light of this, as well as the concerns raised about junior wages and welfare income, there is a significant need for the Australian Government to understand the barriers to young people and their carers maintaining an adequate standard of living (whether through income through employment and/or welfare income), and respond to these through non-discriminatory measures (see further **3.3.1 – Living wage**).
- 7) **Australia’s system of paid parental leave is behind comparable jurisdictions** – The first thousand days of a child’s life is recognised as a period of unparalleled brain development, and the role of parents and carers over this time is critical.⁷⁶ It is therefore essential that governments create conditions that support parents and carers to spend time with their children over this period, including through the provision of paid parental leave for employed or working parents and carers. Despite improvements in recent years, Australia lags behind other Organisation for Economic Co-operation and Development (OECD) countries in the provision of paid maternity and parental leave for employed parents and carers.

⁷² International Labour Organisation, *Global Estimates of Child Labour – Results and Trends, 2012 - 2016* (2017) <https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_575499.pdf> 5.

⁷³ International Labour Organisation, *What is child labour* <<http://www.ilo.org/ipec/facts/lang--en/index.htm>>.

⁷⁴ National Interest Analysis [2013] ATNIA 2 with attachment on consultation International Labour Organization Convention No. 138: Convention concerning Minimum Age for Admission to Employment (Geneva, 26 June 1973) [2013] ATNIF 2, 6.

⁷⁵ Andrew Stewart and Natalie van der Waarden, ‘Regulating Youth Work: Lessons from Australia and the United Kingdom’ in Robin Price et al (eds), *Young People and Work* (Taylor and Francis, 2011) 185, 186.

⁷⁶ UNICEF, *Early Moments Matter for every child* (2017) 63 <https://www.unicef.org/media/files/UNICEF_Early_Moments_Matter_for_Every_Child_report.pdf>.

In Australia, mothers (or ‘primary carers’) can access 18 weeks of parental leave pay (paid at the federal minimum wage)⁷⁷ compared to an OECD average of 55 weeks in the early years of a child’s life⁷⁸. Fathers and partners can access two weeks of paid leave compared to an OECD average of 8.17 weeks (father-specific leave).⁷⁹ Especially given Australia’s relative economic prosperity, Australia should be seeking to better support children and working parents and carers during the critical early years of a child’s development (see further **3.3.4 – Parental leave**).

- 8) **Concerns around access to quality and culturally safe early childhood education and care (ECEC), particularly for Aboriginal and Torres Strait Islander children** – The ability of families to access affordable, quality and culturally safe early childhood education and care (ECEC) opportunities is critical for their child’s development. It is essential that governments provide such opportunities for all children, including, but not limited to, the children of working parents and carers. Although Australia has made significant progress in improving quality and increasing participation rates in recent years, concerns persist about affordability of ECEC, as well as the availability of culturally competent services for Aboriginal and Torres Strait Islander children and families. Evidence indicates that Aboriginal and Torres Strait Islander children in particular access ECEC at significantly lower rates than non-Indigenous children, with Aboriginal and Torres Strait Islander children being about 50 per cent less likely to attend a Child Care Benefit approved child care service than non-Indigenous children. Additionally, Aboriginal and Torres Strait Islander 5 year olds are about 2.5 times more likely to be developmentally vulnerable in 2 or more domains of the Australian Early Development Census when they start school.⁸⁰ In 2014, it was estimated that an additional 15,000 ECEC places would be required if Aboriginal and Torres Strait Islander children’s enrolment was proportionate to their representation in the general population, and participation rates have not improved since. Furthermore, recent changes to Australia’s childcare system under the Jobs for Families Child Care Package introduced an activity test that decreases the minimum government subsidised hours of childcare available for some families on low incomes where either parent does not meet work or study requirements. Though reliable data are not yet available, services for Aboriginal and Torres Strait Islander children have reported that children are accessing fewer hours of early childhood education and care or dropping out because of challenges with the new system, including because of the activity test that unjustly excludes children based on their parents’ circumstances.⁸¹ Evidence indicates that improving access to quality and culturally safe early childhood education and care for Aboriginal and Torres Strait Islander children requires local ownership of programs, employing Aboriginal and Torres Strait Islander people; and incorporating culture, including Aboriginal and Torres Strait Islander languages, within services (see further **3.3.6 – Access to services**).
- 9) **Weaknesses in the regulation of marketing and advertising, particularly regarding high fat, sugar, salt foods and beverages** – In recent decades, the global prevalence of obesity and overweight has increased at an alarming rate.⁸² As of 2016, there were 41 million overweight or obese infants and young children (aged 0 – 5) globally and, if current trends continue, this number will increase to 70 million by 2025.⁸³ The Australian Bureau of Statistics has reported ‘[a]lmost one quarter (24.9%) of children aged 5-17 years were overweight or obese in 2017-18 (17% overweight and 8.1% obese). The

⁷⁷ Department of Human Services, *Parental Leave Pay* <<https://www.humanservices.gov.au/customer/services/centrelink/parental-leave-pay>>.

⁷⁸ Organisation for Economic Co-Operation and Development, n 18.

⁷⁹ Organisation for Economic Co-Operation and Development, *Length of maternity leave, parental leave and paid father-specific leave* (2016) <<http://www.oecd.org/gender/data/length-of-maternity-leave-parental-leave-and-paid-father-specific-leave.htm>>.

⁸⁰ SNAICC – National Voice for our Children, the University of Melbourne and Griffith University, *Family Matters Report* (2018) <<http://www.familymatters.org.au/wp-content/uploads/2018/11/Family-Matters-Report-2018.pdf>> 31.

⁸¹ SNAICC – National Voice for our Children, *Survey on Impacts of the transition to the New Child Care Package* (December 2018), unpublished.

⁸² World Health Organisation, *Global Strategy on Diet, Physical Activity and Health - Childhood overweight and obesity* <<https://www.who.int/dietphysicalactivity/childhood/en/>>.

⁸³ World Health Organisation, *Commission on Ending Childhood Obesity – Facts and Figures on childhood obesity* (last updated 13 October 2017) <<https://www.who.int/end-childhood-obesity/facts/en/>>.

rates were similar for boys and girls and this has remained stable over the previous ten years.⁸⁴ The Australian Institute of Health and Welfare (AIHW) has therefore referred to overweight and obesity as a 'major public health issue in Australia'.⁸⁵ Yet, in 2015, children in Australia were exposed to an estimated 3 advertisements for unhealthy foods every hour.⁸⁶ In the same year, analysis of Australia's system of self-regulatory codes found that since their introduction, there has been no change to the rate of unhealthy food advertising.⁸⁷ Further analysis has concluded that this system is 'ineffective'⁸⁸ and 'clearly not drafted with a view to limiting the amount or type of food advertising to which children are exposed'.⁸⁹ Given the drastic impacts overweight and obesity has both on the health of individual children, and the costs to society as a whole, it is incumbent on the Australian Government to take meaningful and mandatory measures to protect children from the influence of marketing and advertising of unhealthy foods (see further **3.6.2 – Harmful products**).

- 10) **A lack of access to remedy for children who have experienced business-related human rights abuses, particularly where these have occurred outside Australia** – Children and their families in Australia who are or might have been adversely affected by Australian businesses face significant legal, financial, procedural and practical barriers to access remedies for business-related human rights abuses.⁹⁰ These barriers include the complexities around the legal standing rights of children, a lack of knowledge and understanding of rights and remedies, and the costs of bringing cases. For children in foreign legal jurisdictions who have experienced business-related human rights abuses, these barriers are further exacerbated by complex rules governing applicable law, restricted interpretations of court jurisdiction and difficulties determining potentially liable parties and their location. Remedies are, with rare exceptions, generally confined to those available under local law and in practice, are rarely effective. Only exceptionally will the child (or adult) victim of business-related human rights abuse have a remedy against the parent company of the perpetrator or the brand retailer the execution of whose supply order causes the harm. Some avenues that are available in Australia for business-related abuses have been criticised for having significant deficiencies. For example, the Australian National Contact Point – a forum in the Treasury established in accordance with Australia's obligations under the OECD Guidelines on Multinational Enterprises – was found to be 'significantly lacking' against core criteria of visibility, accessibility, transparency and accountability, according to an independent review conducted in 2017.⁹¹ Additionally, Australia has not signed and ratified the *Optional Protocol to the Convention on the Rights of the Child on a communications procedure* that would provide children with an important avenue of complaint through the United Nations Committee on the Rights of the Child. It is essential that Australia establish or otherwise improve avenues through which children and families – both domestically and overseas – can pursue remedies in the event of business-related human rights abuses (see further **3.10.1 – Mechanisms** and **1 – Legal and Policy Framework**).

In addition to these gaps, Australia lacks a number of general measures and legal protections that would better protect and promote the rights of all members of the community, including children. These include the absence of a federal human rights act (see further **1.3 – National Standards**).

⁸⁴ National Health Survey – First Results – Australia 2017-18, n 20.

⁸⁵ Australian Institute of Health and Welfare, n 25, vi.

⁸⁶ Watson, Lau, Wellard, Hughes and Chapman, n 15, 787.

⁸⁷ Ibid.

⁸⁸ Elizabeth Handsley and Belinda Reeve, 'Holding Food Companies Responsible for Unhealthy Food Marketing to Children: Can International Human Rights Instruments Provide a New Approach?' (2018) 41(2), 22, *University of New South Wales Law Journal* (Advance).

⁸⁹ Ibid, 21.

⁹⁰ For example, the independent review of the Australian National Contact Point conducted in 2017 highlighted the limitations of non-judicial grievance mechanisms. See Alex Newton, *Independent Review 2017 – Australian National Contact Point under the OECD Guidelines for Multinational Enterprises* (September 2017) <<https://cdn.tspace.gov.au/uploads/sites/112/2018/02/Final-Report.pdf>> 19-22.

⁹¹ Alex Newton, n 90.

What are Australia's current strengths in protecting children and their carers from actual or potential adverse impacts of business?

At the same time, *Building Better Business for Children*, specifically, **Part 5: Research and analysis – An Interim National Baseline Assessment of Australian policy and law shaping business activities that impact on children and their carers**, outlines many policies, laws, statutory roles and initiatives that have been adopted by Australian Governments over the years to help protect children from business-related human rights abuses. Although improvements can always be made, particularly with regard to monitoring and enforcement, these measures are noteworthy both for their demonstration of government commitment, and often in their novel approach to help workplace practices, and the functioning of markets, to respect and support the rights of children.

Positive aspects of Australia's approach include:

- 1) **Mandatory plain packaging of tobacco products** – In 2011, the Australian Government introduced the world's first law to mandate plain (or 'standardised') packaging of tobacco products.⁹² Evidence indicates the intervention has effectively reduced the attractiveness and appeal of tobacco products, including among young people, and has increased rates of quitting and attempts to quit among adult smokers.⁹³ Not only are rates of smoking comparatively low in Australia compared to other jurisdictions,⁹⁴ but recent evidence indicates that fewer young people are taking up smoking.⁹⁵ The World Health Organisation considers this world-first measure to be 'an effective public health intervention'⁹⁶ and, in response to the evidence of the positive effect of this measure, numerous other countries have since introduced a similar plain packaging law, or are in the process of doing so (see further **3.6.2 – Harmful products**).
- 2) **A consumer protection framework, including product safety laws for many products intended for use by children** – Australia has established numerous legal requirements relating to goods intended for use by children. A federal regulator - the Australian Competition and Consumer Commission (ACCC) – also exists to protect consumers, amongst other things. On numerous occasions, the ACCC has commenced court action to enforce Australia's laws regarding misleading and deceptive conduct in advertising, including against companies that produce products consumed by children (see further **3.5 – Products**).
- 3) **Work health and safety laws** – The Commonwealth, State and Territory jurisdictions across Australia each have extensive work health and safety laws that are intended to help keep all workers, including young workers, safe at work. The laws are generally consistent across most jurisdictions as they are based, in most jurisdictions, upon the model work health and safety laws developed by Safe Work Australia. These laws provide, for example, that persons conducting a business or undertaking have a duty to, as far as reasonably practicable, ensure the health and safety of the workers they engage. They also create offences and penalties for certain breaches of these duties. These laws are enforced by regulators in each jurisdiction that conduct workplace health and safety compliance activities, respond to reports of injuries and conduct licensing activities. States, Territories and the Commonwealth each administer workers' compensation schemes to support employees who suffer a work-related injury (see further **3.2.4 – Protection of young workers**).

⁹² *Tobacco Plain Packaging Act 2011* (Cth).

⁹³ World Health Organisation, *Plain packaging of tobacco products – Evidence, design and implementation* (2016)

<http://apps.who.int/iris/bitstream/handle/10665/207478/9789241565226_eng.pdf;jsessionid=383882481BA7ABC90371AB63C5A5431C?sequence=1> 10-11.

⁹⁴ World Health Organisation, *Prevalence of tobacco smoking – Age standardized prevalence of current tobacco smoking among persons aged 15 years and older (%)*, 2015: Male <http://gamapserver.who.int/gho/interactive_charts/tobacco/use/atlas.html>.

⁹⁵ Australian Institute of Health and Welfare, *National Drug Strategy Household Survey 2016: Detailed findings* (2017)

<<https://www.aihw.gov.au/getmedia/15db8c15-7062-4cde-bfa4-3c2079f30af3/21028a.pdf.aspx?inline=true>> 23.

⁹⁶ World Health Organisation, n 93, 18.

4) **Protections in the context of employment, including a prohibition of discrimination on the grounds of pregnancy, breastfeeding and family responsibilities, and the Workplace Gender Equality Agency –**

There are considerable protections established under Australian law that benefit all employees, including young people and caregivers of children. These include:

- the National Employment Standards that mandate 10 minimum entitlements for all employees;
- mechanisms of educating and assisting workers, and carrying out compliance and enforcement activities through the office of the Fair Work Ombudsman;
- laws to help protect vulnerable workers from unscrupulous practices of employers, for example, when working in a franchise or undertaking work trials; and
- protections against discrimination on the basis of sex, family responsibilities, pregnancy and breastfeeding.

Additionally, the Workplace Gender Equality Agency (WGEA) is responsible for promoting and improving gender equality in Australian workplaces in accordance with the *Workplace Gender Equality Act 2012* (Cth). A central part of the work of the WGEA is to receive annual reports by employers with 100 or more employees that report against standardised gender quality indicators, improve transparency of company progress and track progress against the gender equality indicators (see further **3.3 – Decent work for young people / parents / caregivers**).

5) **Mandatory reporting requirements to increase corporate transparency on ‘modern slavery’ risks –** In June 2018, the New South Wales (NSW) Parliament passed the *Modern Slavery Act 2018* (NSW) which requires commercial organisations with an annual turnover of at least \$50 million⁹⁷ and employees in NSW to publish an annual modern slavery statement. Modern slavery statements outline the steps taken during the financial year to ensure that the organisation’s goods and services are not a product supply chains in which ‘modern slavery’ is taking place.⁹⁸ Modern slavery is defined in the *Modern Slavery Act 2018* (NSW) to include a range of offences including slavery, forced labour and trafficking and forced marriage. The Act also established the role of the NSW Anti-Slavery Commissioner, who has important functions of identifying and providing assistance and support for victims of modern slavery, and providing public awareness about modern slavery, amongst other things (see further **3.1.4 – Reporting** and **3.4.4 – Protection**). At the federal level, and, after extensive consultation by the Government over 2017 and 2018⁹⁹ including a major parliamentary inquiry by the Joint Standing Committee on Foreign Affairs, Defence and Trade¹⁰⁰, the Australian Parliament passed the *Modern Slavery Act 2018* (Cth) in November 2018. The federal Act requires entities with an annual consolidated revenue of more than \$100 million and that are based, or operating, in Australia, to provide the federal Government with an annual ‘Modern Slavery Statement’. The Statement must contain prescribed information on the risks of modern slavery (including the worst forms of child labour) in their operations, supply chains, and those of their controlled entities, action taken to assess and address those risks, and how they measure the effectiveness of that action. The federal Act also requires the Commonwealth to report, and provides that other entities may report voluntarily. The Minister will be required to keep an online public repository of statements (the ‘Modern Slavery Statements Register’). A Business Engagement Unit has also been established within the Department of Home Affairs to provide advice and support to businesses on modern slavery reporting. Ultimately a tool to enhance transparency for consumers, investors, businesses and governments alike, the federal *Modern Slavery Act 2018* (Cth) builds upon key elements of the *UK Modern Slavery Act 2015* (such as the requirement

⁹⁷ The final turnover amount will be set by regulation, but, in accordance with s 24(1)(b), this will not be less than \$50 million.

⁹⁸ The information to be included in modern slavery statements under the *Modern Slavery Act 2018* (NSW) will be settled by regulation (s 24(3)).

⁹⁹ Department of Home Affairs, *Modern Slavery Reporting Requirement – Public Consultation* <<https://www.homeaffairs.gov.au/about/consultations/modern-slavery-supply-chains-reporting-requirement>>.

¹⁰⁰ Parliament of the Commonwealth of Australia, Joint Standing Committee on Foreign Affairs, Defence and Trade, *Hidden in Plain Sight: An inquiry into establishing a Modern Slavery Act in Australia* (December 2017) <<http://parlinfo.aph.gov.au/parlInfo/download/committees/>>

to be approved by the board of directors or equivalent, and signed by a director), while introducing additional aspects (such as the Government-run register of Modern Slavery Statements and application to public procurement) (see further **3.1.4 – Reporting**).

- 6) **Statutory office holders to help protect children online and to help protect the privacy of consumers –** In 2015, the Australian Government appointed the world's first eSafety Commissioner through the *Enhancing Online Safety Act 2015* (Cth). This remains the only government agency in the world solely dedicated to leading and coordinating online safety efforts nationally, and to helping keep its citizens safer online. A core function of the eSafety Commissioner is its work with industry to take action against and remove child abuse material, image-based abuse and serious cyberbullying material targeting an Australian child from online services. Since June 2017, the eSafety Commissioner has been developing a Safety-by-Design framework to assist, support and harness industry's responsibility to safeguard its users. Additionally, the Office of the Australian Information Commissioner is an independent statutory agency which was established in 2010. Its responsibilities include conducting investigations and handling complaints regarding privacy, as well as providing advice to the public, government and businesses about privacy and freedom of information¹⁰¹ (see further **2.2 – National Priorities – 1) The safety and protection of children – Children in context: Online safety and protection from cyberbullying** and **3.7.4 – Online protection**).
- 7) **Criminal law prohibiting child exploitation and a coordination centre within Government to stop child exploitation –** The Australian Government has also indicated that combating child exploitation online is a priority issue for action. Australian law criminalises online child exploitation, and these laws apply to corporations and, in certain circumstances, apply extraterritorially. In March 2018, the Federal Government announced the establishment of the Australian Centre to Counter Child Exploitation (ACCCE) using \$68.6 million from the 2018-19 Budget. The ACCCE is focused on combating child abuse and exploitation in Australia broadly (including online, and child sex offences overseas) and brings together the Australian Federal Police (AFP), relevant Commonwealth, State and Territory agencies, non-government organisations and industry to 'create a hub of expertise and specialist skills needed to disrupt, prevent and investigate exploitation'¹⁰² (see further **3.7.4 – Online protection**).
- 8) **Measures to prevent 'orphanage tourism' –** The Commonwealth *Criminal Code* criminalises human trafficking, slavery and slavery-like practices such as forced labour, as well as child sex offences committed overseas – and these offences may be applicable in cases involving child exploitation in overseas residential institutions.¹⁰³ In addition, the *Joint Standing Committee on Foreign Affairs, Defence and Trade* recommended in 2017 additional measures to address orphanage trafficking and child exploitation in overseas residential institutions. Subsequently, the Australian Government announced in 2018 the 'Smart Volunteering Campaign' which aims to prevent 'Australians from inadvertently contributing to child exploitation through the practice of orphanage tourism, including by participating in misleading volunteer programs'¹⁰⁴ (see further **3.4 – Trafficking and commercial sexual exploitation**). Additionally, the *Modern Slavery Act 2018* (Cth) requires certain large businesses in

report/jnt/024102/toc_pdf/HiddeninPlainSight.pdf;fileType=application%2Fpdf> ('Hidden in Plain Sight: An inquiry into establishing a Modern Slavery Act in Australia').

¹⁰¹ Office of the Australian Information Commissioner, *Australian Information Commissioner Act* <<https://www.oaic.gov.au/about-us/who-we-are/australian-information-commissioner-act>>.

¹⁰² The Hon Angus Taylor MP, Joint media release with the Hon Peter Dutton MP - Australian Centre to Counter Child Exploitation (Media Release 25 March 2018) <<http://minister.homeaffairs.gov.au/angustaylor/Pages/australian-centre-to-counter-child-exploitation.aspx>>.

¹⁰³ However, offences in the *Criminal Code* covering human trafficking, slavery and slavery-like practices have not as yet been tested in court in the context of child exploitation in overseas residential institutions. See further Parliament of the Commonwealth of Australia, House of Representatives, *Modern Slavery Bill 2018 – Explanatory Memorandum* (28 June 2018)

<https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6148_ems_9cbeaf3-b581-47cd-a162-2a8441547a3d/upload_pdf/676657.pdf;fileType=application/pdf> [50] ('Modern Slavery Bill 2018 – Explanatory Memorandum').

Australia to report annually on their actions to address modern slavery risks in their operations, supply chains and those of their controlled entities (including risks in their operations or supply chains of child trafficking in overseas residential institutions), action taken to assess and address those risks, and how they measure the effectiveness of that action (see further **3.1.4 – Reporting**).

- 9) **The Department of Foreign Affairs and Trade (DFAT) Child Protection Policy** – The Australian Department of Foreign Affairs and Trade has a Child Protection Policy that applies to all DFAT business, including activities of its funded partners. The policy articulates a ‘zero tolerance’ of child exploitation and abuse,¹⁰⁵ and states that ‘DFAT will not knowingly engage—directly or indirectly—anyone who poses a risk to children.’ It requires that, where contact with children is identified, an assessment of child protection risk be conducted.¹⁰⁶ It is unique because it expresses both a policy of the federal Government not to engage with businesses that pose a risk to children, and because it applies to certain private sector entities operating abroad (albeit, a relatively small number of private sector organisations receiving DFAT funding) (see further **2.2 – National Priorities**).
- 10) **Information for businesses on children’s rights featured on the business.gov.au portal** – The Australian Government’s guidance for businesses on the business.gov.au website helps promote awareness that business operations can potentially affect the rights of children. A collaboration between the National Children’s Commissioner and the Department of Industry, Innovation and Science, the online resource includes a brief overview of children as consumers and of children’s rights. It refers businesses to the associated work of the Australian Human Rights Commission and the Fair Work Ombudsman. It also includes links to practical resources for businesses, such as the *Children’s Rights and Business Principles*, the *Children’s Rights and Business Atlas* and the *Age Discrimination Act 2004* (Cth)¹⁰⁷ (see further **1.4 – Other Standards**).

Although not specific to the issue of business impacts, children in Australia also benefit generally from the following:

- **A National Children’s Commissioner and an Aboriginal and Torres Strait Islander Social Justice Commissioner** – Established in 2013, the National Children’s Commissioner is a statutory office-holder within the Australian Human Rights Commission – Australia’s national human rights institution. Currently held by Megan Mitchell, the National Children’s Commissioner regularly consults with children in Australia, and has, as part of her work, sought to raise the profile of the impact of business practices on children’s rights in Australia (see further **1.3 – National Standards**). Additionally, the Aboriginal and Torres Strait Islander Social Justice Commissioner is another statutory officer located within the Australian Human Rights Commission. This office-holder plays an important role to protect and promote the rights of Aboriginal and Torres Strait Islander Australians, including children. This role is currently held by June Oscar AO (see further **2.2 – National Priorities**).
- **An Assistant Minister for Children and Families** – In December 2017, the Australian Government announced the creation of a new Assistant Minister for Children and Families. Working in close collaboration with the Minister for Families and Social Services, this portfolio has the responsibility of

¹⁰⁴ Minister for Foreign Affairs, The Hon Julie Bishop MP and Minister for Education and Training, Senator the Hon Simon Birmingham, *New campaign to tackle orphanage tourism* (Joint Media Release, 1 March 2018) <https://foreignminister.gov.au/releases/Pages/2018/jb_mr_180301.aspx>.

¹⁰⁵ Department of Foreign Affairs and Trade, *Child Protection Policy 2017* (2018) 3 <<http://dfat.gov.au/international-relations/themes/child-protection/Documents/child-protection-policy.pdf>>.

¹⁰⁶ Ibid.

¹⁰⁷ Australian Government, *How to respect and support children’s rights in your business* <<https://www.business.gov.au/news/how-to-respect-and-support-childrens-rights-in-your-business>>.

improving the social framework for children and their families¹⁰⁸ (see further **2.2 – National Priorities** and **2.1 – Public Sector Initiatives**).

- **Parliamentary scrutiny of bills regarding human rights, including with regard to the *Convention on the Rights of the Child*** – The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) requires that all bills introduced to Federal Parliament contain a Statement of Compatibility with Human Rights, and be examined by the Parliamentary Joint Committee on Human Rights for compatibility with human rights, including compatibility with the *Convention on the Rights of the Child*.¹⁰⁹ The intention is to help federal parliamentarians understand the impact of proposed laws on the rights and wellbeing of children (see further **3.1.3 – Impact Assessment**).
- **National Framework for Protecting Australia’s Children 2009-2020** – the National Framework for Protecting Australia’s Children 2009-2020 was endorsed by the Council of Australian Governments (COAG) in 2009 and is aimed at achieving six outcomes:
 - i. Children live in safe and supportive families and communities;
 - ii. Children and families access adequate support to promote safety and intervene early;
 - iii. Risk factors for child abuse and neglect are addressed;
 - iv. Children who have been abused or neglected receive the support and care they need for their safety and wellbeing;
 - v. Indigenous children are supported and safe in their families and communities; and
 - vi. Child sexual abuse and exploitation is prevented and survivors receive adequate support.The National Framework for Protecting Australia’s Children 2009-2020 is supported by four, three-year Action Plans, and is underpinned by principles of the Children’s Convention. The National Framework recognises that protecting children is everyone’s responsibility, including the business and corporate sector. One of the four Priority Areas for the Fourth Action Plan 2018-2020, is improving organisations’ and governments’ ability to keep children and young people safe from abuse.
- **A National Office for Child Safety** – The National Office for Child Safety was established on 1 July 2018 as a direct response to the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission). Although initially located in the Department of Social Services, the Office moved to the Department of the Prime Minister and Cabinet on 24 January 2019 to reflect ‘...the importance of the work being led by the National Office and the high priority the Australian Government places on the safety and protection of children.’¹¹⁰ The Office has national leadership role, working across governments and sectors, to develop and implement policies and strategies to enhance children’s safety and reduce future harm to children.

¹⁰⁸ Note that the role should ideally be situated in cabinet, and requires adequate resources to discharge the important and broad functions of the role.

¹⁰⁹ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ss 7-9.

¹¹⁰ Department of the Prime Minister and Cabinet, *The National Office for Child Safety* <<https://pmc.gov.au/domestic-policy/national-office-child-safety>>.

PART 4: SUMMARY OF RECOMMENDATIONS TO THE AUSTRALIAN GOVERNMENT

Based on the research and issues identified in *Building Better Business for Children* (specifically, **Part 5: Research and analysis – An Interim National Baseline Assessment of Australian policy and law shaping business activities that impact on children and their carers**) UNICEF Australia recommends that the Australian Government:

Recommendation 1

Adopt a National Action Plan on Business and Human Rights

That the Australian Government adopt a *National Action Plan on Business and Human Rights (NAP)* by 2020 to implement the UN Guiding Principles on Business and Human Rights. The NAP should be developed in line with relevant guidance including that issued by the UN Working Group on Business and Human Rights¹¹¹ and the recommendations of the Multi-Stakeholder Advisory Group on the Implementation of the UN Guiding Principles on Business and Human Rights¹¹².

Recommendation 2

Commit to specific, measurable and time-bound measures to better protect children and their carers as part of, or in addition to, the NAP

That the NAP include specific, measurable and time-bound commitments to better protect children and their carers from actual or potential adverse impacts of business activities and operations – whether they are in Australia or abroad. On this basis, the Australian Government should action the following recommendations, ensuring that measures adopted are informed by consultation with relevant stakeholders (including children and families) and guidance such as *General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights* and *Children's Rights in National Action Plans on Business and Human Rights*¹¹³:

Recommendation 2 (i)

Continue to improve systems and business practices to keep children safe – in person and online

- a) Ensure the next iteration of a national plan to keep children safe (proceeding the conclusion of the *National Framework for Protecting Australia's Children* in 2020) includes measures that require the private sector to keep children safe and support them to do so. Specific measures should include:
 - strengthening the Working With Children Check system as recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse; and
 - supporting, expanding and building capacity in relation to the *National Principles for Child Safe Organisations* project including through ensuring oversight from an appropriate, independent institution resourced and equipped to help capacity build different sectors and business types.
- b) Implement the recommendations contained in the *Report of the Statutory Review of the Enhancing Online Safety Act 2015 and the Review of Schedules 5 and 7 to the Broadcasting Services Act 1992 (Online Content Scheme)* including a more proactive regulatory regime and a National Online Safety Plan.
- c) Implement the recommendations contained in the *Senate Standing Committee on Legal and Constitutional Affairs' inquiry into the Adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying*, including specifically to:
 - improve preventative and early intervention initiatives, including education;
 - ensure that law enforcement authorities appropriately investigate and prosecute serious cyberbullying complaints; and

¹¹¹ United Nations Working Group on Business and Human Rights, n 29.

¹¹² Multi-Stakeholder Advisory Group on the Implementation of the UN Guiding Principles on Business and Human Rights, n 60.

¹¹³ Children's Rights in National Action Plans (NAPs) on Business and Human Rights, n 4.

- take regulatory measures to require social media platforms to prevent and respond to cyberbullying, including to introduce a duty of care of platforms to ensure the safety of users, and through financial penalties where insufficient progress is achieved.

Recommendation 2 (ii)

Help protect the economic security of workers experiencing domestic and family violence

Legislate a minimum statutory entitlement to 10 days' paid domestic and family violence leave for employees, and promote guidance and support to workplaces on appropriate responses to domestic and family violence.

Recommendation 2 (iii)

Consider introducing mandatory human rights due diligence laws

Consider introducing legislation that mandates human rights due diligence as recommended by the Multi-Stakeholder Advisory Group on the Implementation of the UN Guiding Principles on Business and Human Rights.

Recommendation 2 (iv)

Fully leverage the Government's own business activities to promote and require respect for human rights, including children's rights

Incorporate explicit and specific human rights considerations (including human rights due diligence, where appropriate) into the following:

- public procurement (i.e. the Commonwealth Procurement Rules);
- privatisation processes;
- export credit provision;
- private sector delivery of aid programs;
- trade and investment agreements; and
- decision making by departments, agencies and state-owned or controlled entities (including Government Business Enterprises).

Recommendation 2 (v)

Commit to preventing and addressing child labour

Support efforts to reduce the numbers of children involved in child labour through:

- a) signing and ratifying the *International Labour Organisation Convention No. 138 on the Minimum Age for Admission to Employment*; and
- b) working with State and Territory Governments to strengthen and coordinate legal protections against child labour across states and territories in Australia (particularly in South Australia and Tasmania), as well as ensure appropriate monitoring and enforcement.

Recommendation 2 (vi)

Ensure Australians, particularly young people and carers of children, can maintain an adequate standard of living

Adopt a comprehensive strategy to help ensure young people and carers of children can maintain an adequate standard of living. Specifically, the Australian Government should:

- a) resource and support government agencies (such as the Australian Institute of Health and Welfare and/or Australian Bureau of Statistics) to collect and analyse data on the experiences of young people so that their incomes (both through wages and social security payments), expenses and living arrangements can be benchmarked and tracked over time.
- b) establish a parliamentary inquiry to examine the ability of all people, including young people and carers of children, to maintain an adequate standard of living. The inquiry should examine, amongst other things;
 - i. the impact of junior wages on the incomes of young people, and its consistency with the human rights of young people;

- ii. non-discriminatory options to help young people transition into employment;
- iii. the feasibility and appropriateness of adopting a living wage in Australia; and
- iv. the structure, conditions and level of welfare income, particularly for young people and carers of children who unemployed or underemployed.

Recommendation 2 (vii)

Support the healthy development of children in their first thousand days through expanding family-friendly policies

Enhance access to parental leave pay to better support children and their carers in the early years of a child's life. Specifically, the Australian Government should adopt a strategy to progressively:

- a) increase the parental leave pay entitlement to at least 26 weeks (to allow for exclusive breastfeeding, amongst other things);
- b) increase the uptake of paid parental leave by fathers and partners through extending entitlement of paid parental leave to them (for example, through 'use it or lose it' leave entitlements);
- c) review the qualifying period for parental leave pay (i.e. 12 month service requirement); and
- d) provide superannuation entitlements as part of paid parental leave.

Recommendation 2 (viii)

Ensure access to affordable, quality and culturally appropriate childcare and early learning opportunities for all children, especially Aboriginal and Torres Strait Islander children

- a) Ensure access to affordable, quality and culturally appropriate childcare and early learning opportunities for all children, including children with working parents and caregivers.
- b) As recommended by *Family Matters*, ensure Aboriginal and Torres Strait Islander children have access to quality and culturally safe early childhood education and care through measures including:
 - i. A target and strategy to Close the Gap in developmental outcomes for Aboriginal and Torres Strait Islander children in the early years, and in access to vital preventive services in early childhood education and care (ECEC) and maternal and child health. This must include:
 - Funding universal preschool access for 3 and 4 year olds, including additional funding to ensure a minimum 3 days per week access for Aboriginal and Torres Strait Islander children; and
 - Investing in quality Aboriginal and Torres Strait Islander community-controlled integrated early years services through a specific program with targets to increase coverage in areas of high Aboriginal and Torres Strait Islander population and high levels of disadvantage.
 - ii. Priority investment in service delivery by community-controlled organisations in line with self-determination, including through investment targets aligned to need and "Aboriginal and Torres Strait Islander first" procurement policies for services to Aboriginal and Torres Strait Islander families.
 - iii. Establishment and resourcing of state-based and national commissioners, peak bodies and other representative bodies for Aboriginal and Torres Strait Islander children.

Recommendation 2 (ix)

Curb rising childhood obesity through a national strategy that includes measures to reduce children's exposure to marketing and advertising of unhealthy foods and beverages

Ensure that the 'national strategy on obesity' as announced by the COAG Health Council in October 2018:

- a) is informed by the *Convention on the Rights of the Child* and specifically the right to health.
- b) has a stated objective of reducing children's exposure to the marketing of food high in saturated fats, trans-fatty acids, free sugars and salt (HFSS) in line with the World Health Organisation's 'Set of

Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children’ and the ‘Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children’.

- c) includes measures (including legislative measures) to strengthen the regulation of marketing and advertising of unhealthy foods in line with recommendations of public health experts, including mandatory time-based restrictions of unhealthy food and beverage advertising on broadcast media (television and radio), defining and addressing digital food marketing and providing for independent monitoring and enforcement.

Recommendation 2 (x)

Ensure access to remedy for children harmed by business activities and operations – both domestically and extraterritorially

Improve and establish avenues to remedies for children who have experienced business-related human rights abuses, including where abuses have occurred outside Australia. Specifically, the Australian Government should:

- a) as recommended by the UN Committee on the Rights of the Child ‘[e]xamine and adapt its legislative framework (civil, criminal and administrative) to ensure the legal accountability of Australian companies and their subsidiaries regarding abuses to human rights, especially child rights, committed in the territory of the State party or overseas and establish monitoring mechanisms, investigation, and redress of such abuses, with a view to improving accountability, transparency and prevention of violations’;
- b) ensure legal aid commissions and community legal centres are established and funded to ensure specialist children’s legal services are available to advise and represent children in every jurisdiction (state/territory and federal);
- c) ensure access to community legal services that are culturally safe and ideally Aboriginal and Torres Strait Islander-led for Aboriginal and Torres Strait Islander children;
- d) implement all of the reforms recommended in the 2017 Independent Review of the Australian National Contact Point;
- e) establish a national compensation scheme for victims/survivors of Commonwealth crimes (including trafficking and slavery); and
- f) sign and ratify the *Optional Protocol to the Convention on the Rights of the Child on a communications procedure*.

PART 5: RESEARCH AND ANALYSIS – AN INTERIM NATIONAL BASELINE ASSESSMENT OF AUSTRALIAN POLICY AND LAW SHAPING BUSINESS ACTIVITIES THAT IMPACT ON CHILDREN AND THEIR CARERS

| 1. LEGAL AND POLICY FRAMEWORK | | |
|--------------------------------------|--------------------------------|---|
| 1.1 | International Standards | <p>Has the government signed and ratified relevant international children's rights legal instruments, such as:</p> <p>Child-specific international standards</p> <ul style="list-style-type: none"> • Convention on the Rights of the Child; • Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict; • Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; • Optional Protocol to the Convention on the Rights of the Child on a communications procedure; • International Labour Organization (ILO) Convention No. 138 on the Minimum Age for Admission to Employment (and ILO Recommendation No. 146 on the Minimum Age for Admission to Employment); and • ILO Convention No. 182 on the Worst Forms of Child Labour. <p>International standards not specific to children but relevant to business and human rights issues</p> <ul style="list-style-type: none"> • Covenant on Economic, Social and Cultural Rights; • Optional Protocol to the International Covenant on Economic, Social and Cultural Rights; • International Labour Convention (ILO) Protocol of 2014 to the Forced Labour Convention, 1930; • ILO Domestic Workers Convention No. 189; and • Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. |

The Australian Government **has** signed and ratified the following international children's rights legal instruments:

Child-specific international standards

- Convention on the Rights of the Child (signed: 22 August 1990; ratified: 17 December 1990), with a reservation to article 37(c) (which requires that children are not to be detained with adults);¹¹⁴
- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (signed: 21 October 2002; ratified: 26 September 2006);¹¹⁵
- Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (signed: 18 December 2001; ratified: 8 January 2007);¹¹⁶ and
- ILO Convention No. 182 on the Worst Forms of Child Labour (ratified: 19 December 2006).¹¹⁷

International standards not specific to children

- Covenant on Economic, Social and Cultural Rights (signed: 18 December 1972, ratified: 10 December 1975).¹¹⁸

The Australian Government **has not** signed and ratified the following:

Child-specific international standards

- Optional Protocol to the Convention on the Rights of the Child on a communications procedure;¹¹⁹ and
- ILO Convention No. 138 on the Minimum Age for Admission to Employment (including supplementing ILO Recommendation No. 146 on the Minimum Age for Admission to Employment).¹²⁰ However, Australia has ratified ILO Conventions on the minimum age for admission to certain professions.¹²¹

International standards not specific to children

- Optional Protocol to the International Covenant on Economic, Social and Cultural Rights;¹²²
- Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;¹²³
- ILO Convention No. 189 concerning decent work for domestic workers;¹²⁴ and
- ILO Protocol of 2014 to the Forced Labour Convention,¹²⁵ however, the Australian Government pledged in November 2017 to ratify this convention.¹²⁶

¹¹⁴ *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) <https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-11&chapter=4&lang=en>.

¹¹⁵ *United Nations Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, opened for signature 25 May 2000, A/RES/54/263 (entered into force 12 February 2002)

<https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11-b&chapter=4&lang=en>.

¹¹⁶ *United Nations Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, opened for signature 25 May 2000, A/RES/54/263 (entered into force 18 January 2002)

<https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11-c&chapter=4&lang=en>.

¹¹⁷ International Labour Organization, *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* (No. 182), adopted 17 June 1999 (entered into force 19 November 2000)

<http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C182>.

¹¹⁸ *United Nations Convention on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&lang=en>.

¹¹⁹ *United Nations Optional Protocol to the Convention on the Rights of the Child on a communications procedure*, opened for signature 28 February 2012, A/RES/63/117 (entered into force 14 April 2014)

<https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&lang=en>.

| | |
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| 1.2 Regional Standards | <p>Has the government signed and ratified relevant regional human rights instruments, such as:</p> <ul style="list-style-type: none"> • African Charter on the Rights and Welfare of the Child; • European Convention on the Exercise of Children's Rights; and • Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse |
| <p>There are no regional human rights instruments covering Asia-Pacific.¹²⁷</p> <p>The inter-governmental body of South East Asia, the Association of Southeast Asian Nations (ASEAN), has a Charter which refers to human rights and has created the Intergovernmental Commission on Human Rights and the ASEAN Human Rights Declaration.¹²⁸ Australia however is not a member state of ASEAN, rather, it is only a 'dialogue partner'.¹²⁹</p> | |
| 1.3 National Standards | <p>What, if any, are the overarching national laws and policies on children's rights (e.g. an act incorporating the CRC into national law)?</p> |
| <p>There is no comprehensive child rights or human rights legislation at the federal level which gives full and direct effect to the Convention on the Rights of the Child (Children's Convention),¹³⁰ nor other human rights treaties through which children would also benefit such as the <i>International Covenant on Economic, Social and Cultural Rights</i> (ICESCR) and the <i>International Covenant on Civil and Political Rights</i> (ICCPR).¹³¹</p> <p>In 2008, the Australian Government established a National Human Rights Consultation Committee to consider the desirability of a human rights act in Australia. After extensive consultation and consideration, the Committee concluded in 2009 that 'there is a patchwork of human rights protection in Australia. The</p> | |

¹²⁰ International Labour Organization, *Convention concerning Minimum Age for Admission to Employment* (No. 138), adopted 26 June 1973 (entered into force 19 June 1976)

<http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312283:NO>.

¹²¹ International Labour Organization Minimum Age (Agriculture) Convention, 1921 (No. 10); Minimum Wage Fixing Machinery (Agriculture) Convention, 1951 (No. 99); Minimum Age (Fishermen) Convention, 1959 (No. 112); Minimum Age (Underground Work) Convention, 1965 (No. 123); Minimum Wage Fixing Convention, 1970 (No. 131); Maritime Labour Convention 2006 (MLC, 2006).

¹²² *United Nations Optional Protocol to the Covenant on Economic, Social and Cultural Rights*, opened for signature 24 September 2009, A/RES/63/117 (entered into force 5 May 2013) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3-a&chapter=4&clang=_en>.

¹²³ *United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, opened for signature 18 December 1990, A/RES/45/158 (entered into force 1 July 2003) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-13&chapter=4&clang=_en>.

¹²⁴ International Labour Organization, *Convention concerning decent work for domestic workers* (No. 189), adopted 16 June 2011 (entered into force 5 September 2013) <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C189>.

¹²⁵ International Labour Organization, *Protocol of 2014 to the Forced Labour Convention, 1930*, adopted 11 June 2014 (entered into force 9 November 2016) <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:P029>.

¹²⁶ Department of Jobs and Small Business, *Australia's pledge to progress ratification of the Forced Labour Protocol* (18 October 2018) <<https://docs.jobs.gov.au/documents/australias-pledge-progress-ratification-forced-labour-protocol>>.

¹²⁷ Sarah Joseph, Adam McBeth and Erica Contini, *Submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade regarding the 'Inquiry into Human Rights Mechanisms and the Asia-Pacific Region'* (November 2008) <https://www.monash.edu/_data/assets/pdf_file/0007/139462/hrs-mech-asia-pacific-sub.2.pdf>.

¹²⁸ ASEAN Intergovernmental Commission on Human Rights, *About* <<http://aichr.org/about/>>.

¹²⁹ Australian Mission to ASEAN, *About us* <<http://asean.mission.gov.au/>>.

¹³⁰ United Nations Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention - Concluding Observations: Australia*, UN Doc CRC/C/AUS/CO/4 (28 August 2012) <http://www2.ohchr.org/english/bodies/crc/docs/co/CRC_C_AUS_CO_4.pdf>.

¹³¹ Kirsty Magarey and Roy Jordan, Law and Bills Digest Section, *Parliament and the protection of human rights*, Parliament of Australia (2010) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook43p/humanrightsprotection>.

patchwork is fragmented and incomplete, and its inadequacies are felt most keenly by the marginalised and the vulnerable.¹³² The Committee went on to recommend that Australia adopt a federal Human Rights Act,¹³³ however this has not been supported by the two major political parties in Australia.¹³⁴

Federal Government

The power to make laws in Australia is derived from the *Constitution Act 1901* (Cth) (**Constitution**). The Constitution contains certain heads of power of the Commonwealth (e.g. trade and commerce, corporations, external affairs).¹³⁵ Areas that are not enumerated in the Constitution as a power of the Commonwealth are left to the states and territories (e.g. roads and education).

The Constitution includes five explicit individual rights although they are not specific to children: the right to vote (s 41), protection against acquisition of property on unjust terms (s 51 (xxi)), the right to a trial by jury (s 80), freedom of religion (section 116) and the prohibition of discrimination on the basis of State of residency (s 117). The High Court has also determined an implied freedom of political communication, derived from ss 7 and 24 of the Constitution.¹³⁶

The Constitution does not specifically enumerate whether the Commonwealth Government has power to make laws regarding children, and Constitutional powers affecting the lives children and families are generally held by the States and Territories (for example, with regard to the care and protection of children). Several exceptions to this include s 51(xxiiiA) that provides the Commonwealth Parliament with legislative power over '[t]he provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorise any form of civil conscription), benefits to students and family allowances', as well as powers regarding marriage (s 51(xxi), parental rights, custody and guardianship of infants (s 51(xxii)).

Additionally, the 'external affairs' power in s 51(xxix) of the Australian Constitution gives the Commonwealth Parliament the power to enact legislation with respect to matters physically external to Australia and to implement international treaties to which Australia is a party.¹³⁷ Federal legislation that includes human rights protections and that generally apply to children as well include:

- *Racial Discrimination Act 1975* (Cth) (that gives effect to Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination);
- *Sex Discrimination Act 1984* (Cth) (that gives effect to Australia's obligations under the Convention on the Elimination of All Forms of Discrimination Against Women);
- *Disability Discrimination Act 1992* (Cth);
- *Privacy Act 1998* (Cth); and
- *Age Discrimination Act 2004* (Cth).

Children are also sought to be protected through various federal legislation, for example, the *Criminal Code 1995* (Cth) which criminalises child sex offences outside Australia and has extraterritorial jurisdiction.¹³⁸

Human rights can also be protected by the judiciary in its interpretation of legislation and in applying common law principles. For example, the common law right to a fair trial.¹³⁹

Also at the federal level, the Australian Human Rights Commission (**AHRC**) plays an important role in the protection and promotion of human rights in Australia.¹⁴⁰ The AHRC is Australia's national human rights

¹³² National Human Rights Consultation Committee, *National Human Rights Consultation Report*, Commonwealth of Australia (September 2009) <http://library.bsl.org.au/jspui/bitstream/1/1320/1/NHRC_Report.pdf> 127.

¹³³ National Human Rights Consultation Committee, *National Human Rights Consultation Report*, Commonwealth of Australia (September 2009) <http://library.bsl.org.au/jspui/bitstream/1/1320/1/NHRC_Report.pdf> recommendation 18, xxxiv.

¹³⁴ Kirsty Magarey and Roy Jordan, Law and Bills Digest Section, n 131.

¹³⁵ *Constitution Act 1901* (Cth) ss 51(i), (xiii), (xiv).

¹³⁶ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

¹³⁷ *Commonwealth v Tasmania* (1983) 158 CLR 1; *Polyukhovich v Commonwealth* (1991) 172 CLR 501; *Horta v Commonwealth* (1994) 181 CLR 183.

¹³⁸ *Criminal Code 1995* (Cth) div 272.

¹³⁹ *Dietrich v R* (1992) 177 CLR 292.

¹⁴⁰ See *Australian Human Rights Commission Act 1986* (Cth) pt IIAA.

institution and it has 'A' Status under the *United Nations Principles Relating to the Status of National Institutions*.¹⁴¹ The AHRC is an independent statutory body established by the *Australian Human Rights Commission Act 1986* (Cth). The AHRC reports annually to the Federal Parliament on issues pertaining to human rights in Australia. It has various functions including to inquire into any act or practice that may be inconsistent with or contrary to any human right (including children's rights), to inquire into complaints of discrimination, examine proposed laws for their consistency with human rights and to undertake research and educational programs.¹⁴² The *Australian Human Rights Commission Act 1986* (Cth) includes as a schedule the Declaration on the Rights of the Child and provides that certain commissioners must have regard to the Children's Convention when discharging their functions. However, the AHRC does not have enforcement powers to compel the Government to implement recommendations made by it or the UN Committee on the Rights of the Child.¹⁴³

The statutory office of the National Children's Commissioner is also situated in the AHRC. This officeholder is the key advocate for children in Australia and their rights under the Children's Convention at the federal level. The National Children's Commissioner promotes awareness of children's rights, undertakes research and educational programs, and examines existing federal laws to ascertain whether and how they protect the human rights of children. The AHRC has published annual reports on the National Children's Commissioner's investigations and findings in relation to children's rights in Australia.¹⁴⁴ These reports often provide data, information and guidance on the rights of children in relation to Australia's business sector.

State and Territory Governments

Only Victoria, the Australian Capital Territory and Queensland have specific human rights legislation:¹⁴⁵

- Australian Capital Territory – *Human Rights Act 2004* (ACT);
- Queensland – *Human Rights Act 2019* (Qld); and
- Victoria – *Charter of Human Rights and Responsibilities Act 2006* (Vic)

Whilst these acts apply to all persons generally, there are some child specific rights included within them.

The *Human Rights Act 2004* (ACT) includes the following specific child rights:

- Section 11 provides that the family is entitled to be protected by society and that every child has the right to protection needed by the child, without distinction or discrimination of any kind;
- Section 20 provides the rights of children involved in criminal processes including to be segregated from accused adults, treated in a way that is appropriate for a person of the child's age who has not been convicted, brought to trial as quickly as possible and, for a convicted child, treated in a way that is appropriate for a person of the child's age;
- Section 22(3) provides for the right of child who is charged with a criminal offence to a procedure that takes account of the child's age and the desirability of promoting the child's rehabilitation; and
- Section 27A provides the right of a child to have access to free school education appropriate to their needs (although this right is limited see section 27A(3)(b)).

The *Human Rights Act 2019* (Qld) includes the following child specific rights:

- Section 26 – provides for the protection of families and children, including protection in the best interests of the child and to birth registration;
- Section 32(3) – rights in criminal proceedings that take into account the child's age and the desirability of promoting rehabilitation;

¹⁴¹ Attorney General's Department, *Australian Human Rights Commission*

<<https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Australian-Human-Rights-Commission.aspx>>.

¹⁴² *Australian Human Rights Commission Act 1986* (Cth) s 11.

¹⁴³ Australian Human Rights Commission, *Australia's commitment to children's rights and reporting to the UN* (October 2007) <<https://www.humanrights.gov.au/publications/australias-commitment-childrens-rights-and-reporting-un>>.

¹⁴⁴ Australian Human Rights Commission, *Children's Rights Reports* <<https://www.humanrights.gov.au/our-work/childrens-rights/projects/childrens-rights-reports>>.

¹⁴⁵ Australian Human Rights Commission, *Submission to the Committee on the Rights of the Child* (August 2011)

<https://www.humanrights.gov.au/sites/default/files/content/legal/submissions/2011/201108_child_rights.pdf>.

- Section 33 – rights in criminal proceedings including to be segregated from detained adults and to be brought to trial as quickly as possible;
- Section 36 – the right to access primary and secondary education appropriate to the child's needs.

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) includes the following specific child rights:

- Section 17 provides that families are entitled to be protected by society and the State, and that every child has the right, without discrimination, to such protection as is in his/her best interests and is needed by him/her by reason of being a child;
- Section 23 provides the rights of children involved in criminal processes including that a child who is detained (with or without charge) must be segregated from all detained adults, must be brought to trial as quickly as possible and treated in a way that is appropriate for his/her age; and
- Section 25(3) provides that a child charged with a criminal offence has the right to a procedure that takes account of his/her age and the desirability of promoting the child's rehabilitation.

Under these Acts, it is unlawful for a public authority/public entity to act in a way that is incompatible with a human right or, in making a decision, fail to give proper consideration to a relevant human right.¹⁴⁶

New South Wales, Northern Territory, Western Australia, South Australia and Tasmania do not currently have a human rights charter or act.

Additionally, each state and territory has its own equal opportunity and anti-discrimination agency, with statutory responsibilities under anti-discrimination legislation as follows:

- Australian Capital Territory – *Discrimination Act 1991* (ACT)
- New South Wales – *Anti-Discrimination Act 1977* (NSW)
- Northern Territory – *Anti-Discrimination Act 1996* (NT)
- Queensland – *Anti-Discrimination Act 1991* (Qld)
- South Australia – *Equal Opportunity Act 1984* (SA)
- Tasmania – *Anti-Discrimination Act 1998* (Tas)
- Victoria – *Equal Opportunity Act 2010* (Vic)
- Western Australia – *Equal Opportunity Act 1984* (WA)

Additionally, States and Territories across Australia also have statutory roles for children – referred to differently as children's commissioners, advocates or guardians - each empowered to protect the rights of children in certain circumstances.¹⁴⁷ Those statutory office holders each have different functions and powers. Their powers can include conducting special inquiries into issues affecting children and young people and making recommendations to the relevant government on legislation, practices, reports, procedures, services and policies affecting children and young people.

¹⁴⁶ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38; *Human Rights Act 2004* (ACT) s 40(B) and *Human Rights Act 2019* (Qld) s 58.

¹⁴⁷ Australian Capital Territory: Children and Young People Commissioner; New South Wales: NSW Advocate for Children and Young People, NSW Office of the Children's Guardian; Northern Territory: Children's Commissioner; Queensland: Queensland Family and Child Commission, Office of the Public Guardian; South Australia: Commissioner for Children and Young People, Guardian for Children and Young People, Council for the Care of Children; Tasmania: Commissioner for Children and Young People; Victoria: Principal Commissioner for Children and Young People, Commissioner for Aboriginal Children and Young People; and Western Australia: Commissioner for Children and Young People.

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| 1.4 Other Standards | <p>What other relevant children's rights standards and initiatives has the government signed, engaged with or otherwise endorsed, such as:</p> <ul style="list-style-type: none"> • CRC General Comment No. 16 on children's rights and business; • Children's Rights and Business Principles; • CESCR General Comment No. 18 on the right to work, para 14, 15, 24; • ILO Decent Work Agenda; • United Nations Global Compact Principles on Child Labour; • UN Declaration on the Rights of Indigenous Peoples; • UN Sustainable Development Goals 2030; • UNICEF/International Telecommunications Union ('ITU') Child Online Protection Guidelines for Industry; • Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism; and • International Code of Marketing Breast-milk Substitutes. |
|----------------------------|--|

The Australian Government has published helpful guidance for businesses on the business.gov.au website to help promote awareness of children's rights issues within business operations. Developed through a collaboration between the National Children's Commissioner and the Department of Industry, Innovation and Science, the online article includes a brief summary of children's rights in general and as children as consumers, and it refers to the websites of the Australian Human Rights Commission and the Fair Work Ombudsman. Significantly, it includes a link to the *Children's Rights and Business Principles*, the *Children's Rights and Business Atlas* and the *Age Discrimination Act 2004* (Cth) to help guide businesses regarding employing children.¹⁴⁸

The Australian Government engaged with the 'ILO Decent Work Agenda' by forming an ILO Partnership Agreement for 2010-2015 in April 2010.¹⁴⁹ Under the partnership, the Australian Government committed AUD\$15 million to promote sustainable employment and decent work initiatives in the Asia-Pacific including the Better Work programme, labour governance and migration in the Pacific, Green Jobs in Asia, the Youth Employment Promotion Programme (Timor-Leste) and the Pacific Growth and Employment Project.¹⁵⁰

The Australian Government renewed its funding to Better Work in 2016, providing US\$1 million per year over three years to support the programme in Bangladesh, Cambodia, Indonesia and Vietnam.¹⁵¹

The Australian Government has sought to give effect to the 'International Code of Marketing Breast Milk Substitutes through the Marketing in Australia of Infant Formulas Agreement' (**MAIF**). This is a voluntary, self-regulatory code of conduct between manufacturers and importers of infant formula in Australia.¹⁵²

¹⁴⁸ Australian Government, n 107.

¹⁴⁹ International Labour Organization, *The Australian Government – ILO Partnership Agreement (2010–2015)* <http://www.ilo.org/asia/WCMS_159330/lang-en/index.htm>.

¹⁵⁰ International Labour Organization, *The Australian Government – ILO Partnership Agreement (2010–2015)* <http://www.ilo.org/asia/WCMS_159330/lang-en/index.htm>.

¹⁵¹ Department of Foreign Affairs and Trade, *Amplifying Our Impact: Australia's International Strategy to Combat Human Trafficking and Slavery* (23 March 2016) <<https://dfat.gov.au/about-us/publications/Documents/amplifying-our-impact-australias-international-strategy-to-combat-human-trafficking-and-slavery.pdf>> 16.

The Australian Government has indirectly engaged with the Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism through a (then) AusAid representative at the 18th meeting of the Task Force for the Protection of Children in Tourism in 2006.¹⁵³

Australia, as a member of the United Nations General Assembly, committed in 2015 to seek to realise the UN *2030 Agenda for Sustainable Development – The Sustainable Development Goals* (SDGs). Among other things, the SDGs require states to ‘*take immediate and effective measure to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms*’ (Goal 8.7).¹⁵⁴ Goals 8.6 and 8.8 are aimed at the reduction of youth unemployment and the protection of labour rights as well as the promotion of safe and secure environments for all workers. More recently, the Australian Government participated in the IV Global Conference on the Sustained Eradication of Child Labour in Buenos Aires in November 2017.

In 2007, Australia initially voted against the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) together with the USA, Canada and New Zealand. Two years later though, the Australian Government confirmed the Declaration’s importance in re-setting the Government’s relationship with Aboriginal and Torres Strait Islander peoples by issuing a formal statement of support for the Declaration.¹⁵⁵ The UNDRIP includes a provision regarding the protection of Indigenous children from economic exploitation.¹⁵⁶

Through the Department of Foreign Affairs and Trade the Australian Government continues to engage with the local network of the UN Global Compact, the Global Compact Network Australia.¹⁵⁷

Besides the above-mentioned online guidance for businesses in terms of employing children, the Australian Government does not appear to have formally endorsed:

- General Comment No. 16 on children’s rights and business (issued by the UN Committee on the Rights of the Child);
- CESCR General Comment No. 18 on the right to work; and
- UNICEF/International Telecommunications Union (**ITU**) Child Online Protection Guidelines for Industry.

¹⁵² Department of Health, *Marketing in Australia of Infant Formulas: Manufacturers and Importers Agreement - The MAIF Agreement* (April 2003) <[http://www.health.gov.au/internet/main/publishing.nsf/Content/89B9943609D8AC36CA257BF0001F3F82/\\$File/maif-agreement.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/89B9943609D8AC36CA257BF0001F3F82/$File/maif-agreement.pdf)>.

¹⁵³ World Tourism Organisation, *18th meeting of the Task Force for the Protection of Children in Tourism* (10 March 2016) <<http://ethics.unwto.org/event/18th-meeting-task-force-protection-children-tourism>>.

¹⁵⁴ *Transforming our world: the 2030 Agenda for Sustainable Development*, GA Res 70/1, Agenda items 15 and 116, UN Doc A/Res/70/1 (21 October 2015) Goal 8.7 <<https://undocs.org/A/RES/70/1>>.

¹⁵⁵ Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples* (speech delivered at Parliament House, Canberra, 3 April 2009) <https://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf>.

¹⁵⁶ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, Agenda item 68, UN Doc A/RES/61/295 (13 September 2007) art 17(2) <<http://www.un-documents.net/a61r295.htm>>.

¹⁵⁷ For example, through convening roundtables. See Global Compact Network Australia, *Towards a National Action Plan on Business and Human Rights: Business Roundtables* (2 August 2016) <<http://www.unglobalcompact.org.au/2016/08/02/towards-a-national-action-plan-on-business-and-human-rights-business-roundtables>>.

2. INITIATIVES AND RESPONSES ON CHILDREN'S RIGHTS

2.1 Public Sector Initiatives

What projects and programs has the government undertaken to foster the promotion and protection of children's rights with respect to the business sector?

The Australian Government has no specific projects or programs that directly and specifically focus on children's rights with respect to the business sector.

Although not specific to children, the federal Attorney-General's Department states that the Australian Government promotes responsible business conduct and encourages businesses to apply aspects of the UN Guiding Principles on Business and Human Rights through, for example:¹⁵⁸

- enforcing domestic laws that incorporate obligations on businesses (e.g. regarding employment and non-discrimination);
- establishing multi-stakeholder initiatives that focus on specific business and human rights concerns (e.g. 'National Action Plan to Combat Human Trafficking and Slavery' (2015-2019) and the Supply Chains Working Group);
- encouraging businesses to adhere to the *OECD Guidelines on Multinational Enterprises* and the *Voluntary Principles on Security and Human Rights*; and
- engaging with industry and civil society (e.g. via the annual Dialogue on Business and Human Rights¹⁵⁹ and the annual Department of Foreign Affairs and Trade (DFAT) NGO Forum on Human Rights¹⁶⁰).

The Australian Human Rights Commission which is funded by the Australian Government (discussed above at **1.3 – National Standards**) conducts activities to support Government, the community and the business sector to better protect and promote human rights. The AHRC works with businesses to inspire action, provides guidance material and factsheets, makes submissions to parliamentary and other inquiries to identify human rights issues that arise in proposed or existing laws and policies, holds events including the National Dialogue on Business and Human Rights and established the Business and Human Rights Network.¹⁶¹ The AHRC assists Australian businesses and investors integrate a human rights approach to decision making and internal practices. It can also accept and conciliate complaints from individuals (including children and young people) relating to discrimination, harassment and bullying in many areas of public life, for a number of attributes, which can include conduct of businesses in certain circumstances (see further **3.10.1 – Mechanisms**). In February 2018, the AHRC also launched a major project with the aim of developing 'innovative ways of insuring the rapid rise of new technology protects and promotes human rights', with the project being led by the Human Rights Commissioner, Edward Santow.¹⁶² The AHRC has also convened civil society stakeholders to discuss business and human rights issues, and helped compile the Joint Civil Society Statement on Implementing the UN Guiding Principles on Business and Human Rights in Australia.¹⁶³

The AHRC, together with the Global Compact Network Australia, coordinates the annual Australian Dialogue on Business and Human Rights (**Dialogue**). The Dialogue has run annually since 2014, and a report is published after each occasion.¹⁶⁴ Topics discussed at the dialogues have included embedding human rights in global supply chains,¹⁶⁵ human rights due diligence¹⁶⁶ and stakeholder and board engagement.¹⁶⁷

¹⁵⁸ Attorney-General's Department, *Business and Human Rights*

<<https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Business-and-Human-Rights.aspx>>.

¹⁵⁹ Global Compact Network Australia, *2017 Australian Dialogue on Business and Human Rights*

<<http://www.unglobalcompact.org.au/events/2018-australian-dialogue-on-business-and-human-rights>>.

¹⁶⁰ Department of Foreign Affairs and Trade, *DFAT NGO Forum on Human Rights 2018* <<http://dfat.gov.au/international-relations/international-organisations/un/unhrc-2018-2020/Pages/dfat-ngo-forum-on-human-rights-2018.aspx>>.

¹⁶¹ Australian Human Rights Commission, *Business and Human Rights* <<http://www.humanrights.gov.au/employers/business-and-human-rights>>.

¹⁶² Australian Human Rights Commission, *Human Rights and Technology* (7 February 2018) <<https://www.humanrights.gov.au/our-work/rights-and-freedoms/projects/human-rights-and-technology>>.

¹⁶³ Implementing the UN Guiding Principles on Business and Human Rights in Australia – Joint Civil Society Statement, n 61, 13-4.

¹⁶⁴ Australian Human Rights Commission, *Business and human rights* <<http://www.humanrights.gov.au/employers/business-and-human-rights>>.

In 2015, the National Children's Commissioner undertook research and consultations into the rights of children within the Australian business and consumer context, focusing on children as consumers of goods and services, particularly online.¹⁶⁸ The findings were documented in the 2015 Children's Rights Report, and included a range of recommendations to the Australian Government regarding business and children's rights.¹⁶⁹ The National Children's Commissioner raised, amongst other things, issues regarding parental consent and children's privacy online, the impact of online advertising on children, and children's lack of knowledge about avenues of enforcement and redress.¹⁷⁰ Because of her observation that it also remains unclear what problems children are experiencing as online consumers,¹⁷¹ the National Children's Commissioner recommended the Australian Government:

- provide guidance to business and industry on how it can better respect and support children's rights; and
- resource the Australian Human Rights Commission to undertake research on the relationship between business and children's rights in the Australian context, particularly in relation to high risk areas such as the online consumer environment.¹⁷²

There was no progress with regard to resourcing the Australian Human Rights Commission to undertake this research reported by the National Children's Commissioner in her 2016 report.¹⁷³ However, in that year the Commissioner collaborated with the Department of Industry, Innovation and Science to develop new content on children's rights for business.gov.au, an online government resource for the business sector (discussed above). In 2017, the National Children's Commissioner also advised the Fair Work Ombudsman on the development of guides for young workers and businesses employing young workers.¹⁷⁴

In accordance with its legal obligations under the Organisation for Economic Co-operation and Development's (OECD) *Decision of the Council on the OECD Guidelines for Multinational Enterprises*,¹⁷⁵ the Australian Government established the Australian National Contact Point (ANCP) in the Federal Treasury over 2000-2002 and tasked it with promoting the OECD Guidelines for Multinational Enterprises and accepting 'specific instance' complaints. However, a 2017 Review of the ANCP concluded 'the Australian National Contact Point (ANCP) is falling short of fulfilling these commitments' and that the ANCP was 'significantly lacking' across all criteria for effectiveness including 'the OECD's core criteria of visibility, accessibility, transparency and accountability; and the guiding principles for specific instances that NCPs will deal with complaints in a way that is impartial, predictable, equitable and compatible with the principles and standards of the Guidelines'¹⁷⁶ (see further **3.10.1 – Mechanisms**).

The Government also engages with civil society groups on human rights issues at the annual DFAT NGO Forum on Human Rights and the annual NGO Forum on Human Rights conducted by the Attorney-General's

¹⁶⁵ Global Compact Network Australia, *2018 Australian Dialogue on Business and Human Rights* <<http://www.unglobalcompact.org.au/events/2018-adbhr>>.

¹⁶⁶ Global Compact Network Australia, *2017 Australian Dialogue on Business and Human Rights* <<http://www.unglobalcompact.org.au/events/2018-australian-dialogue-on-business-and-human-rights>>.

¹⁶⁷ Global Compact Network Australia, *2016 Australian Dialogue on Business and Human Rights – Building stakeholder engagement as a driver of business respect for human rights* (29 October 2016) <<http://www.unglobalcompact.org.au/new/wp-content/uploads/2016/12/FINAL-2016-Aus-Dialogue-on-BHR-Summary-Outcomes-Documents-1.pdf>>.

¹⁶⁸ Australian Human Rights Commission, *Children's Rights Report 2015 - National Children's Commissioner* (2015) <<https://www.humanrights.gov.au/our-work/childrens-rights/publications/childrens-rights-report-2015>>.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid, 82-4.

¹⁷¹ Ibid, 8, 82.

¹⁷² Ibid, 85.

¹⁷³ Australia Human Rights Commission, *Children's Rights Report 2016 - National Children's Commissioner* (2016) <<https://www.humanrights.gov.au/our-work/childrens-rights/publications/childrens-rights-report-2016>> 33-34.

¹⁷⁴ Fair Work Ombudsman, *Best Practice Guide – 04 A guide for young workers* (2017) <<https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/best-practice-guides/a-guide-for-young-workers>>; and Fair Work Ombudsman, *Best Practice Guide – 05 An employer's guide to employing young workers* (2017) <<https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/best-practice-guides/an-employers-guide-to-employing-young-workers>>.

¹⁷⁵ Organisation for Economic Cooperation & Development, *Decision of the Council on the OECD Guidelines for Multinational Enterprises* (adopted 27 June 2000, amended 25 May 2011) <<https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0307>>.

¹⁷⁶ Alex Newton, n 90, 4.

Department. At the 2018 DFAT Forum on Human Rights, participants had the opportunity to engage with DFAT experts and discuss the 2030 Agenda for Sustainable Development and modern slavery.¹⁷⁷

Consultation on implementing the UN Guiding Principles on Business and Human Rights

More recently, the Australian Government took steps towards implementing the UN Guiding Principles on Business and Human Rights. In early 2016 as part of the Universal Periodic Review, the Government confirmed that it would hold national consultations on the implementation of the UN Guiding Principles on Business and Human Rights.¹⁷⁸ The Global Compact Network Australia (GCNA) and the Department of Foreign Affairs and Trade convened business roundtables in mid-2016 to consider the development of an Australian National Action Plan on Business and Human Rights. Subsequently, the Australian Government established a Multi-Stakeholder Advisory Group on the Implementation of the UN Guiding Principles on Business and Human Rights which met in May 2017 for the first time.¹⁷⁹ To identify the existing laws, government policies and business practices relevant to the UN Guiding Principles on Business and Human Rights and to inform future consultations, DFAT also commissioned a *Stocktake on Business and Human Rights* in Australia.¹⁸⁰ DFAT also worked with the Business & Human Rights Resource Centre in Australasia 'to advance respect for human rights in business by building corporate transparency, strengthening accountability and empowering civil society'.¹⁸¹ However, in late 2017 the Government indicated that the Multi-Stakeholder Advisory Group and the associated consultation was being discontinued.¹⁸² In a publicly available letter to the Australian Government in December 2017, the Vice-chair of the United Nations Working Group on Business and Human Rights, Professor Surya Deva, expressed his disappointment 'by the Government's decision not to proceed with a NAP at this time.'¹⁸³ It is expected that the Government will still continue to progress alternative actions and initiatives in lieu of a formal NAP.

2.2 National Priorities

What priorities has the government identified in national children's rights strategies, including on the recommended role of businesses (if any)?

The Government has identified several priorities in national children's rights strategies, and, separately, priorities regarding business and human rights issues. However, very few make the explicit link between the responsibilities of businesses and the rights of children specifically.

The safety and protection of children – Domestically

A long-term national priority is ensuring the safety and well-being of Australia's children, especially through reducing child abuse and neglect. In April 2009, the *National Framework for Protecting Australia's Children 2009-2020* was endorsed by the Council of Australian Governments (COAG). The National Framework aims at six outcomes:

- Children live in safe and supportive families and communities;
- Children and families access adequate support to promote safety and intervene early;
- Risk factors for child abuse and neglect are addressed;
- Children who have been abused or neglected receive the support and care they need for their safety and wellbeing;
- Indigenous children are supported and safe in their families and communities; and
- Child sexual abuse and exploitation is prevented and survivors receive adequate support.¹⁸⁴

¹⁷⁷ Department of Foreign Affairs and Trade, *DFAT NGO Forum on Human Rights 2018* <<http://dfat.gov.au/international-relations/international-organisations/un/unhrc-2018-2020/Pages/dfat-ngo-forum-on-human-rights-2018.aspx>>.

¹⁷⁸ Human Rights Council, n 58, [63].

¹⁷⁹ Department of Foreign Affairs and Trade, *Communiqué Multi-Stakeholder Advisory Group on Implementation of the UN Guiding Principles on Business and Human Rights* (2 May 2017) <<http://dfat.gov.au/international-relations/themes/human-rights/business/Pages/multi-stakeholder-advisory-group-on-implementation-of-the-un-guiding-principles-on-business-and-human-rights.aspx>>.

¹⁸⁰ Allens & Linklaters, *Stocktake on Business and Human Rights in Australia* (April 2017) <<http://dfat.gov.au/international-relations/themes/human-rights/business/Documents/stocktake-on-business-and-human-rights-in-australia.pdf>>.

¹⁸¹ Department of Foreign Affairs and Trade, *Business and Human Rights – New partnership with Business & Human Rights Resource Centre* <<http://dfat.gov.au/international-relations/themes/human-rights/business/Pages/default.aspx>>.

¹⁸² Human Rights Law Centre, *Government ignores advice of expert group on business and human rights* (18 October 2017) <<https://www.hrlc.org.au/news/2017/10/17/government-ignores-advice-of-expert-group-on-business-and-human-rights>>.

¹⁸³ Professor Surya Deva, n 63.

¹⁸⁴ Council of Australian Governments, *Protecting Children is Everyone's Business - National Framework for Protecting Australia's Children 2009-2020* (2009) <https://www.dss.gov.au/sites/default/files/documents/child_protection_framework.pdf>.

The National Framework for Protecting Australia's Children 2009-2020 is supported by four, three-year Action Plans, and is underpinned by principles of the Children's Convention. The National Framework recognises that protecting children is everyone's responsibility, including the business and corporate sector to support parents to raise their children through family-friendly policies, and programs and initiatives to directly assist children and families, including direct financial assistance, pro bono activities of their staff and professional support to community organisations. The National Framework states that 'the business and corporate sector has a role to support parents to raise their children through family-friendly policies and to support initiatives to directly assist children and families'.¹⁸⁵ However there is very little information about how the corporate sector is being actively engaged in the National Framework in practice.¹⁸⁶ Although, a major ongoing area of focus and action for the National Framework relates to the promotion of 'child awareness' within the community generally. This has been supported by annual 'Child aware' conferences and educational campaigns.

An initiative being delivered under the Third Action Plan 2015-2018 is trailing ways of improving support to young people to break the cycle of disadvantage including to find and keep a job. Information sharing work undertaken under the Third Action Plan is examining the effectiveness of existing practices and identifying barriers and opportunities to improve information exchange between government and non-government organisations and other key stakeholders to support child safety.

One of the four Priority Areas for the Fourth Action Plan 2018-2020, agreed by Community Services Ministers, is improving organisations' and governments' ability to keep children and young people safe from abuse in recognition of the recommendations of the *Royal Commission into Institutional Responses to Child Sexual Abuse*.

Children in context: Child sexual abuse in Australian institutions

The Royal Commission into Institutional Responses to Child Sexual Abuse

A highly important development on the issue of protecting children in Australia was the *Royal Commission into Institutional Responses to Child Sexual Abuse*.

Due to numerous and mounting reports of child sexual abuse in institutions within Australian society, the then Prime Minister of Australia, Julia Gillard, announced the establishment of a *Royal Commission into Institutional Responses to Child Sexual Abuse* in November 2012. Prime Minister Gillard then observed:¹⁸⁷

Australians know ... that too many children have suffered child abuse, but have also seen other adults let them down - they've not only had their trust betrayed by the abuser but other adults who could have acted to assist them have failed to do so...There have been too many revelations of adults who have averted their eyes from this evil. I believe in these circumstances that it's appropriate for there to be a national response through a royal commission.

Over the course of approximately 5 years, the Royal Commission held 8,013 private sessions with survivors and their loved ones, received 25,964 letters and emails, and made 2,575 referrals to authorities including the police.¹⁸⁸

In its final report issued in December 2017, the Royal Commission concluded:¹⁸⁹

Tens of thousands of children have been sexually abused in many Australian institutions. We will never know the true number. Whatever the number, it is a national tragedy, perpetrated over generations within many of our most trusted institutions...The sexual abuse of children has occurred in almost every type of institution where children reside or attend for educational, recreational, sporting, religious or cultural activities. Some institutions

¹⁸⁵ Council of Australian Governments, *Protecting Children is Everyone's Business - National Framework for Protecting Australia's Children 2009-2020* (2009) <https://www.dss.gov.au/sites/default/files/documents/child_protection_framework.pdf>.

¹⁸⁶ Council of Australian Governments, *Protecting Children is Everyone's Business: National Framework for Protecting Australia's Children 2009-2020 - Annual Report 2013-14* (2015) <https://www.dss.gov.au/sites/default/files/documents/03_2016/attachment_1._dss020_14_landscape_version_1.1_-_final_16_december_2015.pdf>.

¹⁸⁷ Simon Cullen, 'Gillard Launches Royal Commission Into Child Abuse', *ABC News* (12 November 2012) <<http://www.abc.net.au/news/2012-11-12/gillard-launches-royal-commission-into-child-abuse/4367364>>.

¹⁸⁸ Royal Commission into Institutional Responses to Child Sexual Abuse, *Fast Facts* <<https://www.childabuseroyalcommission.gov.au/>>.

¹⁸⁹ Royal Commission into Institutional Responses to Child Sexual Abuse, n 23, 5.

have had multiple abusers who sexually abused multiple children. It is not a case of a few ‘rotten apples’. Society’s major institutions have seriously failed. In many cases those failings have been exacerbated by a manifestly inadequate response to the abused person. The problems have been so widespread, and the nature of the abuse so heinous, that it is difficult to comprehend.

Given the widespread failures that allowed this to occur, the findings and recommendations of the Royal Commission have ramifications for all members of Australian society. The Royal Commission outlined that keeping children safe is the responsibility of all parts of society, explaining:

Protecting children and promoting their safety is everyone’s business. It is a national priority that requires a national solution. Everyone – the Australian Government and state and territory governments, sectors and institutions, and communities, families and individuals – has a role to play to better protect children in institutions...While we heard about child sexual abuse in institutions that spanned the past 90 years, it is not a problem from the past. Child sexual abuse in institutions continues today. Through our private sessions and public hearings, we heard about abuse that occurred in the last 10 to 15 years in a range of institutions, such as schools, foster and kinship care, respite care, health and allied services, performing arts institutions, childcare centres and youth groups. We also learned that institutional cultures and practices that allow abuse to occur and inhibit detection and response continue to exist in contemporary institutions.¹⁹⁰

The Royal Commission recommended, amongst other things, the development of a new National Framework for Child Safety, reform of the different State and Territory-based systems of *Working With Children Checks* to achieve greater consistency, the establishment of a National Office for Child Safety and the creation of a Minister responsible for children’s policy issues, including the National Framework for Child Safety.¹⁹¹ Additionally, it detailed recommendations for all institutions regarding child safeguarding, including recommendations for private entities.

Prior to the Royal Commission’s final report, the Australian Government took a number of actions to commence addressing the gaps in protection of children as identified by the Commission. For example, the Australian Government agreed in August 2017 to establish a Commonwealth Child Safe Framework to promote and ensure the safety and wellbeing of children in Commonwealth care.¹⁹² The National Office for Child Safety (based within the Department of Prime Minister and Cabinet, and discussed further below) is leading the implementation of the Framework across Commonwealth entities. Australian Commonwealth agencies are also taking a consistent approach in implementing the Australian Government’s Commonwealth Child Safe Framework, which is embodied in the National Principles. By way of example, one government agency – the Fair Work Ombudsman – has been implementing the Framework through reviewing its policies and practices to address any shortcomings regarding the safety and well-being of children and young people, and, in line with this Framework, the FWO is providing education to staff about the requirements of the Framework. To refer issues to other bodies, FWO staff can report potential child abuse or neglect through an updated incident report form. Specific agency staff then determine any consequential actions to fulfil our mandatory reporting obligations (including referrals to relevant bodies if appropriate).

Additionally, the Australian Government established the role of Assistant Minister for Children and Families in December 2017. The Assistant Minister is tasked to work closely with the Minister for Social Services ‘to ensure children get the best start in life and families get all the support they need’.¹⁹³

The Royal Commission presented its Final Report to the Australian Government on 15 December 2017 and the Australian Government issued its full response in June 2018.¹⁹⁴ As part of its response, the Australian Government established the National Office for Child Safety on 1 July 2018.¹⁹⁵ Although initially located in the Department of Social Services, the Office was moved to the Department of the Prime Minister and Cabinet on 24

¹⁹⁰ Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 6 Making institutions child safe* (2017) <https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_6_making_institutions_child_safe.pdf>, 14.

¹⁹¹ Royal Commission into Institutional Responses to Child Sexual Abuse, n 23, Recommendations 6.15-6.18.

¹⁹² Attorney-General’s Department, *Australian Government Response to the Royal Commission into Institutional Responses to Child Sexual Abuse - Role of Australian Government Agencies* <<https://www.ag.gov.au/RightsAndProtections/Australian-Government-Response-to-the-Royal-Commission-into-Institutional-Responses-to-Child-Sexual-Abuse/Pages/role-australian-government-agencies.aspx>>.

¹⁹³ Malcolm Turnbull, *Ministerial Arrangements* (19 December 2017) <<https://www.malcolmturnbull.com.au/media/ministerial-arrangements-19-december-2017>>.

¹⁹⁴ Attorney-General’s Department, n 192.

¹⁹⁵ Department of Social Service, *The National Office for Child Safety* <<https://www.dss.gov.au/the-national-office-for-child-safety>>.

January 2019 to reflect ‘...the importance of the work being led by the National Office and the high priority the Australian Government places on the safety and protection of children.’¹⁹⁶ The Office has a national leadership role, working across governments and sectors, to develop and implement policies and strategies to enhance children’s safety and reduce future harm to children. The Office is leading on key Australian Government initiatives in response to the Royal Commission, including:¹⁹⁷

- implementation of the National Principles for Child Safe Organisations;
- a national strategy to prevent child sexual abuse;
- a national framework for child safety to proceed the current *National Framework for Protecting Australia’s Children 2009-2020, post 2020*;
- a national centre to raise awareness and understanding of the impacts of child sexual abuse, support help-seeking and guide best practice; and
- a prevalence of child maltreatment in Australia study.

Additionally, on 22 October 2018, the Prime Minister, Scott Morrison, delivered a National Apology to the Victims and Survivors of Institutional Child Sexual Abuse on behalf of all Australians:¹⁹⁸

Today the Australian Government and this Parliament, on behalf of all Australians, unreservedly apologises to the victims and survivors of institutional child sexual abuse.

For too many years our eyes and hearts were closed to the truths we were told by children.

For too many years governments and institutions refused to acknowledge the darkness that lay within our community.

Today, we reckon with our past and commit to protect children now and into the future.

Today, we apologise for the pain, suffering and trauma inflicted upon victims and survivors as children, and for its profound and ongoing impact.

As children, you deserved care and protection. Instead, the very people and institutions entrusted with your care failed you. You suffered appalling physical and mental abuse, and endured horrific sexual crimes.

As fellow Australians, we apologise for this gross betrayal of trust and for the fact that organisations with power over children — schools; religious organisations; governments; orphanages; sports and social clubs; and charities — were left unchecked.

Today, we say we are sorry. Sorry that you were not protected, sorry that you were not listened to. We are sorry for refusing to trust the words of children, for not believing you.

As we say sorry, we also say we believe you. We say what happened was not your fault.

We are sorry that perpetrators of abuse were relocated and shielded rather than held to account, that records have been withheld and destroyed, and accountability avoided.

We are sorry that the justice and child welfare systems that should have protected you, were at times used to perpetrate yet more injustices against you.

We apologise for the lifelong impacts this abuse has had on your health, your relationships, and your ability to live life to its full potential.

We also extend this apology to your children, your parents, siblings, families, friends and supporters; all those who have helped carry the burden of your experiences and helped advocate for accountability.

We regret that your children’s lives have been changed and relationships have been broken by the enduring effects of abuse.

We hear the rage, despair and hurt of parents whose trust was betrayed along with your own.

We admit that we failed to protect the most vulnerable people in our society from those who abused their power. Our community believed people and institutions who did not deserve our trust, instead of believing the children who did.

Because of our inaction, too many victims are no longer with us to hear this apology. They did not live to see the justice they deserved. But today we remember them, and we extend this apology, along with our sincere sympathies, to their families, friends and supporters.

As we say sorry, we honour the courage of survivors and advocates who spoke out to expose sexual abuse in our institutions, often at great personal cost. Your voices saved lives. Your bravery has allowed us to uncover this dark chapter of our national life and understand what we must now do to protect children.

¹⁹⁶ Department of the Prime Minister and Cabinet, n 110.

¹⁹⁷ Attorney-General’s Department, *Australian Government Response to the Royal Commission into Institutional Responses to Child Sexual Abuse – Part one: Final Report Response* (June 2018) <<https://www.ag.gov.au/RightsAndProtections/Australian-Government-Response-to-the-Royal-Commission-into-Institutional-Responses-to-Child-Sexual-Abuse/Pages/default.aspx>>.

¹⁹⁸ Australian Government, *National Apology to Victims and Survivors of Institutional Child Sexual Abuse* (22 October 2018) <<https://www.nationalapologyconsultation.gov.au/Pages/events.aspx>>.

We also acknowledge the many victims and survivors who have not spoken of their abuse. Your suffering is no less anguished for your silence.

Together, as a Government, a Parliament and a community we must all play a role in the protection of children from abuse. We must accept our responsibility to keep our eyes and ears open and speak out to keep our children safe.

We must listen to children and believe what they tell us.

Child sexual abuse is a serious criminal act, and a violation of Australian law. Perpetrators must and will be held to account.

Today, we commit to take action, to build awareness in our community and strengthen our systems to promote children's safety across Australia. We commit to ensuring that all of our institutions are child-safe.

We know that we must and will do better to protect all children in Australia from abuse and that our actions will give true and practical meaning to this apology.

Our children deserve nothing less.

In December 2018, the Australian Government published a progress report on the *Implementation of the recommendations of the Final Report of the Royal Commission into Institutional Responses to Child Sexual Abuse*.¹⁹⁹ It details the Government's action under the themes of:

- 1) Making institutions child safe;
- 2) Causes, support and treatment;
- 3) Responses to abuse (Redress and Civil Litigation Report);
- 4) Criminal justice and the protection of children; and
- 5) Accountability and annual reporting.

The findings of the Royal Commission, and the Australian Government's response, have significant and on-going lessons for all Australian society, including businesses. While the remit of the Royal Commission was to examine 'institutions' (including government and religious institutions), numerous survivors also told of sexual abuse that occurred in private organisations, such as childcare centres, medical practices or clinics, music or dance schools, independent schools, yoga ashrams or sports clubs.²⁰⁰ As such, the Royal Commission's findings have particular relevance for businesses whose employees have direct contact with children, and therefore, who use Working With Children Checks. Continued action to implement the recommendations of the Royal Commission and the National Principles for Child Safe Organisations is needed to ensure a robust approach to child safeguarding into the future. Working With Children Checks and the National Principles are discussed further below.

Working With Children Checks

Persons who intend to engage in child-related work in Australia are generally required to undergo Working With Children Checks (WWCC). In Australia, each State and Territory has its own scheme for these pre-employment screenings. However, the Royal Commission into Institutional Responses to Child Sexual Abuse raised serious concerns about this system.²⁰¹ It explained:²⁰²

Each state and territory has its own scheme, and each of the eight schemes operates independently of the others. They are inconsistent and complex, and there is unnecessary duplication across the schemes. There is no integration of the schemes, and there is inadequate information sharing and monitoring of WWCC cardholders. These problems create a number of weaknesses:

- Each scheme defines who needs a check differently, such that you might require a WWCC in one jurisdiction but not in another despite engaging in the same type of work.
- Aside from criminal history, there are no mechanisms to share information between jurisdictions for the purposes of assessing WWCC applications.
- People are able to 'forum shop', whereby a person with adverse records in one jurisdiction may be able to

¹⁹⁹ Australian Government, *Annual Progress Report 2018: the Implementation of the recommendations of the Final Report of the Royal Commission into Institutional Responses to Child Sexual Abuse* (2018) <<https://www.childabuseroyalcommissionresponse.gov.au/news-and-media/annual-progress-report-2018>>.

²⁰⁰ Royal Commission into Institutional Responses to Child Sexual Abuse, n 23, 12.

²⁰¹ Royal Commission into Institutional Responses to Child Sexual Abuse, *Working With Children Checks Report* (2015) <<http://www.childabuseroyalcommission.gov.au/getattachment/7ecd3db9-0b17-483e-9a0e-8fb247140f3e/Working-with-Children-Checks-Report>>.

²⁰² Ibid, 3-4.

obtain a clearance in another jurisdiction where the adverse records are not available.

- Screening agencies do not have the capacity to access WWCC decisions or the status of WWCC cardholders from other jurisdictions.
- Once a person holds a WWCC, the continuous monitoring does not include monitoring of national criminal history records.
- WWCCs are not portable across jurisdictional borders.
- People and organisations working across jurisdictional borders find it challenging to comply with the varied and complex schemes.

Combined, these problems mean that the system is not providing the protection to children that it otherwise could.

The majority of the recommendations in the Royal Commission's Working With Children Checks Report relate to the development of national standards to increase the consistency of approaches to working with children check screening across jurisdictions. It recommended specifically that a national system for WWCCs be developed 'by introducing consistent standards and establishing a centralised WWCC database to facilitate cross-border information sharing.'²⁰³

Regarding Working With Children Checks, the Australian Government response indicated that:²⁰⁴

The Australian Government is committed to working with States and Territory Governments to consider the recommendations of the Report. The Australian Government supports an approach that ensures greater national consistency of working with children check schemes in order to achieve greater protection of children.

In support of this, the Australian Government established, and chairs, a working group of State and Territory representatives with policy and operational responsibility for working with children checks.

...

Significant progress has been made through the Australian Government chaired working group. It is anticipated that the standards will be put to relevant State and Territory Ministers in 2018.

The objective of this working group is to develop a minimum benchmark for WWCCs nationally which will ensure an increased level of protection is being provided to children through the respective screening processes.

A key recommendation of the Royal Commission's Working With Children Check Report was for the Commonwealth to develop a centralised WWCC database to ensure outcome decisions are available to all jurisdictions. Following a scoping study, the Commonwealth has committed to developing this capability within the Australian Criminal Intelligence Commission and is working with the states and territories on the detailed business requirements and solution options.

National Principles for Child Safe Organisations

As a further response to the Royal Commission, and as an initiative under *Strategy 3 of the National Framework for Protecting Australia's Children 2009-2020: Third Action Plan*, the National Principles for Child Safe Organisations were developed as an initiative co-led by NSW Department of Family and Community Services and the Commonwealth Department of Social Services.²⁰⁵ The National Children's Commissioner was commissioned to draft the National Principles and to lead a national cross-sector engagement process.

The National Principles for Child Safe Organisations consist of 10 elements largely based on the 'Child Safe Standards' developed by the Royal Commission, but have been expanded to cover all potential harms to children.²⁰⁶ The National Principles 'aim to provide a nationally consistent approach to creating organisational

²⁰³ Ibid, 4-16.

²⁰⁴ Attorney-General's Department, *Australian Government Response - Part Two: Working with Children Checks Report* (2018) <<https://www.ag.gov.au/carcresponse>>.

²⁰⁵ Department of Social Services, *National Framework for Protecting Australia's Children 2009-2020 - Third Action Plan 2015-18* (2015) <https://www.dss.gov.au/sites/default/files/documents/12_2015/pdf_third_action_plan_for_protecting_australias_children.pdf> 12.

²⁰⁶ Australian Human Rights Commission, *National Statement of Principles for Child Safe Organisations Consultation Draft* (2017) <https://www.humanrights.gov.au/sites/default/files/AHRC_National_Statement_Principles_Child_Safe_Orgs_Consultation_Draft_2017.pdf>.

cultures that foster child safety and wellbeing'.²⁰⁷ Importantly, they are intended to apply to all organisations dealing with children, regardless of their location, sector or size, and includes businesses or organisations employing staff and/or volunteers providing services to and working with children and young people. However, the principles are not mandatory.²⁰⁸

In February 2019, the members of the Council of Australian Governments (COAG) endorsed the National Principles for Child Safe Organisations.²⁰⁹

As explained by the Australian Human Rights Commission:²¹⁰

The National Principles reflect ten child safe standards recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse, and are the vehicle for giving effect to recommendations relating to the standards. The National Principles have a broader scope that goes beyond child sexual abuse to cover other forms of potential harm to children and young people.

The National Principles are:

1. Child safety and wellbeing is embedded in organisational leadership, governance and culture.
2. Children and young people are informed about their rights, participate in decisions affecting them and are taken seriously.
3. Families and communities are informed and involved in promoting child safety and wellbeing.
4. Equity is upheld and diverse needs respected in policy and practice.
5. People working with children and young people are suitable and supported to reflect child safety and wellbeing values in practice.
6. Processes to respond to complaints and concerns are child focused.
7. Staff and volunteers are equipped with the knowledge, skills and awareness to keep children and young people safe through ongoing education and training.
8. Physical and online environments promote safety and wellbeing while minimising the opportunity for children and young people to be harmed.
9. Implementation of the national child safe principles is regularly reviewed and improved.
10. Policies and procedures document how the organisation is safe for children and young people.

The National Principles are:

- Underpinned by a child rights, strengths-based approach.
- Designed to allow for flexibility in implementation across all sectors engaging with children and young people, and in organisations of various sizes.
- Aligned with existing child safe approaches at the state and territory level.

The National Office for Child Safety within the Department of the Prime Minister and Cabinet is providing national leadership and coordination for the promotion and implementation of the National Principles across government and non-government sectors. The National Principles are accompanied by a suite of tools and resources to support all organisations to ensure children are kept safe and well. These resources are accessible via <https://pmc.gov.au/child-safety>. In addition, the National Children's Commissioner, some state-based Children's Commissioners²¹¹ and not-for-profit organisations such as the National Association for Prevention of Child Abuse and Neglect (NAPCAN)²¹² provide supportive resources to private entities for the development of child safeguarding policies.

²⁰⁷ Australian Human Rights Commission, n 69.

²⁰⁸ Ibid.

²⁰⁹ Department of the Prime Minister and Cabinet, n 110.

²¹⁰ Australian Human Rights Commission, n 69.

²¹¹ For example, Commission for Children and Young People, *Being a child safe organisation* <<https://ccyp.vic.gov.au/child-safety/being-a-child-safe-organisation/>>.

²¹² National Association for Prevention of Child Abuse and Neglect (NAPCAN), *Play your part – Businesses* (2015) <http://napcan.org.au/wordpress/wp-content/uploads/2013/08/NAPCAN_PYP_rolebased_factsheet_Businesses.dotx.pdf>.

Children in context: Online safety and protection from cyberbullying

Online safety generally

In 2015, some 11,000 online child exploitation reports were made to the Australian Federal Police. Further, INTERPOL's International Child Sexual Exploitation image database (ICSE) identified 194 Australian-based child victims and 102 Australian offenders as of 1 June 2016.²¹³

The Australian Government has indicated that combating child exploitation online is a priority issue for action. In March 2018, it announced the establishment of the Australian Centre to Counter Child Exploitation (ACCCE) using \$68.6 million from the 2018-19 Budget. The ACCCE is focused on combating child abuse and exploitation in Australia broadly (including online, and child sex offences overseas) and brings together the Australian Federal Police (AFP), relevant Commonwealth, State and Territory agencies, non-government organisations and industry to 'create a hub of expertise and specialist skills needed to disrupt, prevent and investigate exploitation'.²¹⁴

Over the years, various Australian Governments have adopted a range of measures in an attempt to keep people in Australia (including children) safe online, including:

- Establishing the eSafety Commissioner under the *Enhancing Online Safety Act 2015* (Cth);
- Introducing protections from online grooming; and
- Introducing laws to help address the non-consensual sharing of intimate images

Each of these will be discussed briefly below:

Establishing the eSafety Commissioner under the Enhancing Online Safety Act 2015 (Cth)

In 2015, the Australian Government appointed a world first eSafety Commissioner, which is still the only government agency in the world solely dedicated to leading and coordinating online safety efforts nationally, and to helping keep its citizens safer online. The eSafety Commissioner was established under the *Enhancing Online Safety Act 2015* (Cth) to enhance the online safety of children and young people. In the three and a half years since its establishment, the eSafety Commissioner's remit has expanded significantly and now encompasses a wide-range of functions, including regulation and powers under three complaints and reporting schemes; 1) serious cyberbullying (explained further below under 'Cyberbullying'); 2) image-based abuse (see further below under 'Introducing laws to help address the non-consensual sharing of intimate images'); and 3) offensive and illegal content online (including child sexual abuse material). Under the cyberbullying and image-based abuse schemes, the eSafety Commissioner can formally or informally request removal of material from social media services. Under the offensive and illegal content scheme, and through its membership in the International Association of Internet Hotlines (INHOPE), the eSafety Commissioner can effect takedown of child sexual abuse material. The office also produces research, best practice guidance, training and other resources help raise awareness and assists in the prevention of harm online for all Australians. Since June 2017, the eSafety Commissioner has been developing a Safety-by-Design framework to assist, support and harness industry's responsibility to safeguard its users. The framework is grounded in children's rights, set within an ethical and shared responsibility framework, and aims to provide a model template for organisations by setting out continuous and ongoing commitments to drive forward real change to better protect children.

Introducing protections from online grooming

The *Criminal Code Amendment (Protecting Minors Online) Act 2017* (Cth), better known as an 'evolved version of Carly's Law',²¹⁵ aims to better protect young Australians from online grooming. The Act amended the *Criminal*

²¹³ Anti-Slavery Australia, *Behind the Screen: Online Child Exploitation in Australia* (2017)

<<https://www.antislavery.org.au/images/behind%20the%20screen%20-%20report.pdf>> v and 10.

²¹⁴ The Hon Angus Taylor MP, Joint media release with the Hon Peter Dutton MP - Australian Centre to Counter Child Exploitation (Media Release 25 March 2018) <<http://minister.homeaffairs.gov.au/angustaylor/Pages/australian-centre-to-counter-child-exploitation.aspx>>.

²¹⁵ TimeBase, *Carly's Law Bill Passes Both Houses of Federal Parliament* (19 June 2017)

<<https://www.timebase.com.au/news/2017/AT04265-article.html>>. This law was introduced after 15 year old Carly Ryan was murdered by a

Code Act 1995 (Cth) by inserting a new offence at section 474.25C which criminalises acts done ‘using a carriage service to prepare or plan to cause harm to, engage in sexual activity with, or procure for sexual activity, persons under 16’. The conduct preparatory to causing harm to a child under the age of 16 years expressly includes a person misrepresenting their age online as part of his or her plan.²¹⁶ The amendments commenced on 23 June 2017 and the new offence carries a penalty of imprisonment for up to ten years. In addition, the Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017 aims to introduce new Commonwealth child sex offences and reform penalties for existing Commonwealth child sex offences, including new offences relating to ‘grooming’ and the provision of electronic services to facilitate dealings with child abuse material online.²¹⁷ As at April 2019 the bill was still before the Senate.²¹⁸

Introducing laws to help address the non-consensual sharing of intimate images

The Enhancing Online Safety (Non-Consensual Sharing of Intimate Images) Bill 2017 was passed in August 2018, establishing a civil penalty scheme for image-based abuse from 1 September 2018. The *Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Act 2018* (Cth) facilitates the quick removal of intimate images shared online without consent, and introduces both civil penalties for the non-consensual sharing of intimate images and aggravated criminal offences for the offensive use of a carriage service where the conduct involves private sexual material. The civil penalties can be pursued by a victim (including a person under 18 years) to hold the person responsible accountable, and apply to sharing any intimate images without the consent of the person depicted. Criminal penalties introduced to the *Criminal Code Act 1995* (Cth) apply to more serious instances of sharing of intimate images. The aggravated offences can be applied where the conduct involved private sexual material, and where three civil penalty orders have been made against an offender.

The effect of the law was explained by the Department of Communications and the Arts as follows:²¹⁹

The eSafety Commissioner can now issue 'removal notices' to perpetrators, websites, content hosts and social media providers, directing them to remove offending content within 48 hours.

Individuals may be subject to civil penalties of up to \$105,000 and corporations up to \$525,000 if they do not remove offending content when directed to by the Office of the eSafety Commissioner.

Perpetrators may also face imprisonment for up to five years, or seven years if they have received three civil penalty orders.

The legislation complements existing Commonwealth, state and territory laws and reinforces the Government's zero tolerance approach to the non-consensual sharing of intimate images.

As explained by the Supplementary Explanatory Memorandum ‘[t]he offences will only apply to the distribution of private sexual material depicting persons 18 years and over, ensuring no overlap with existing offences for distributing child pornography material, which carry significantly higher penalties.’²²⁰

Additionally, Commonwealth Criminal Code includes criminal offences that seek to protect children. However, the terminology ‘abuse’ is used in the Commonwealth Criminal Code rather than ‘exploitation’.

A 2017 report by Anti-Slavery Australia ‘Behind the Screen: Online Child Exploitation in Australia’ outlines Australia’s major Commonwealth, State and Territory laws regarding online abuse of children. It explains:²²¹

...Commonwealth legislation covers most aspects of online child exploitation offences....

50 year old man she met online. For further information, see The Carly Ryan Foundation, *Carly's Story* <http://carlyryanfoundation.com/carlys_story>.

²¹⁶ Parliament of the Commonwealth of Australia, House of Representatives, *Criminal Code Amendment (Protecting Minors Online) Bill 2017 – Explanatory Memorandum (2016-2017)* 2 <<https://www.legislation.gov.au/Details/C2017B00070/Explanatory%20Memorandum/Text>>.

²¹⁷ Parliament of the Commonwealth of Australia, Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017 <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5964>.

²¹⁸ Parliament of the Commonwealth of Australia, Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Bill 2017 <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5964>.

²¹⁹ Department of Communications and the Arts, *Stronger laws to stop image-based abuse* (6 September 2018) <<https://www.communications.gov.au/departamental-news/stronger-laws-stop-image-based-abuse>>.

²²⁰ Parliament of the Commonwealth of Australia, House of Representatives *Enhancing Online Safety (Non-Consensual Sharing of Intimate Images) Bill 2018 – Supplementary Explanatory Memorandum* <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/s1113_ems_b1b59aa1-3b69-453f-897f-b2121b9de09c/upload_pdf/680878.pdf;fileType=application/pdf>.

²²¹ Anti-Slavery Australia, n 213, 33-34.

The Criminal Code Act 1995 (Cth) ('the Criminal Code') is the key piece of Commonwealth legislation that deals with crimes of online child exploitation.

...

The Criminal Code includes a number of online exploitation offences, each involving the use of 'carriage services', being:

- The access, transmission, making available, publication, distribution, advertising or promotion, or solicitation of child pornography material or child abuse material through a carriage service;
- The possession, controlling, producing, supplying or obtaining of child pornography material or child abuse material through a carriage service;
- Using carriage services to procure a person under 16 years of age to engage in sexual activity or groom (intention to make it easier to procure); and
- Using carriage services to transmit indecent communications to a person under 16 years of age (references omitted).

As further explained, a range of state and territory laws also criminalise online child abuse:²²²

Online child exploitation offences are principally dealt with in the criminal codes of each State and Territory, namely:

- Crimes Act 1900 (NSW), within Division 10 ('Offences in the nature of rape, offences relating to other acts of sexual assault etc.');
- Crimes Act 1958 (Vic), within Part 1 ('Offences');
- Criminal Code Act 1899 (Qld), within Chapter 22 ('Offences Against Morality');
- Criminal Consolidation Act 1935 (SA), within Division 11A ('Child exploitation material and related offences');
- Crimes Act 1900 (ACT), within Part 3 ('Sexual Offences');
- Criminal Code Act Compilation Act 1913 (WA), within Chapter XIV ('Crimes Against Morality'); and
- Criminal Code Act (1983) (NT), within Schedule 1, Division 2, Subdivision 1 ('Child abuse material and indecent articles').

State and Territory legislation is largely consistent in scope although it varies considerably in terms of definitions, structure and wording and maximum penalties.

The Department of Home Affairs has policy responsibility for child sexual abuse offences in the Commonwealth Criminal Code. This includes child sexual abuse overseas, online or via the post. For example, this includes an offence for internet service providers and internet content hosts who do not report online child abuse to relevant Australian law enforcement when they become aware of it on their service.

Crimes that are associated with online child sex exploitation are generally investigated by the Australian Federal Police Child Protection Operations team (**CPO**). The CPO focuses on investigations into online child exploitation which occurs using a telecommunications service, grooming and procuring of children over the internet, and internet sites carrying child abuse material and operated from an internet service provider in Australia.²²³

As outlined above, the eSafety Commissioner administers the Online Content Scheme, which allows Australian residents and bodies corporate to report illegal and offensive online content—such as child sexual abuse material—to the eSafety Commissioner. The Commissioner has the authority to direct the relevant Australian content service provider to remove the content from their service and to take action on material it finds to be prohibited or potentially prohibited, as set out in Schedules 5 and 7 of the *Broadcasting Services Act 1992* (Cth). These prohibitions are backed by sanctions for non-compliance including criminal penalties for serious offences. The scheme provides important community safeguards, as well as dovetailing with the role of law enforcement and the international community of Internet Hotlines, known as INHOPE. The eSafety Commissioner prioritises

²²² Ibid, 40-41.

²²³ Australian Federal Police, *Online child sex exploitation* <<https://www.afp.gov.au/what-we-do/services/child-protection/online-child-sex-exploitation>>.

taking action on child sexual abuse material, working within a timeframe of two business days to have child abuse material removed in order to prevent the spread of child sexual abuse material and the re-victimisation of the children and young people who are the subject of these images.

Despite these efforts, numerous shortcomings with the legislative scheme have been reported. In the February 2019 *Report of the Statutory Review of the Enhancing Online Safety Act 2015 and the Review of Schedules 5 and 7 to the Broadcasting Services Act 1992 (Online Content Scheme)* for example, the Independent Reviewer, Lynelle Briggs AO, concluded that the online content scheme is not fit for purpose and recommended it be replaced.²²⁴ The Independent Reviewer observed ‘...linkage to content type and technology in the online content scheme was out of date and no longer fit for purpose, having failed to keep up with consumer preferences and technological developments over the last 15 years, and not being reviewed and updated regularly to ensure consistency and relevance...The online content scheme is a piecemeal regulatory scheme that lacks coherence and consistency with other offline media and broadcasting frameworks.’²²⁵ The Independent Reviewer further concluded:²²⁶

While it is apparent that efforts to develop community protections have delivered results, the online safety system remains fragmented and is relatively unco-ordinated. I found in these reviews that the current system of industry co-regulation is insufficient to address the threats of harm, and that the legislation governing the system is in need of overhaul. The time has passed for further incremental change to legislation and industry practice. Major change is required.

The practice to date has largely been one of retrofitting child protection safeguards into online services and products after harm emerges, or the damage is done. It is much more effective to protect users upfront. The change required to establish a more fit for purpose, proactive regulatory regime will necessarily involve increased levels of black letter law.

I found in these reviews that the existing out-of-date and inconsistent legislation should be replaced by a new Online Safety Act and a new single code of industry practice. The new legislation will need to be clear in its intent. It should target what the online industry does rather than how they do it. It will need to be technology and device neutral—embracing all relevant platforms, services, distribution access mechanisms and devices and the future state of online and digital communication as far as is possible.

The proposed new legislation will need to guarantee that the online industry goes beyond simple compliance with minimum safety standards and should establish a much higher new benchmark standard with which all industry must comply. The legislation should require industry to build online safety into its design arrangements and to proactively patrol, detect and remove harmful or illegal content at its source from their platforms, through the application of technology and greater human intervention. These proposed changes will need to be supported by a tougher and more interventionist enforcement regime involving law enforcement and the eSafety Commissioner working in partnership to collect information and data, detect misconduct, report compliance, and penalise wrongdoing.

...

I have therefore recommended that:

- the Government’s online safety policy be set out in new legislation that establishes a more proactive regulatory regime—the Online Safety Act;
- a new National Online Safety Plan be developed;
- mechanisms be put in place to correct for shortfalls in the effectiveness of the system;
- an eSafety Advisory Committee involving key stakeholders be established to meet at least quarterly to inform decisions, address duplication and overlaps, and propose online safety priorities and implementation strategy; and
- the eSafety Commissioner be the focal point for online safety nationally and for the regulation and co-ordination of online safety arrangements.

²²⁴ Report of the Statutory Review of the Enhancing Online Safety Act 2015 and the Review of Schedules 5 and 7 to the Broadcasting Services Act 1992 (Online Content Scheme), n 70, 11.

²²⁵ Ibid.

²²⁶ Ibid, 2-3.

Regarding codes of practice (i.e. The Content Services Code and the Internet Industry Codes of Practice—Internet and Mobile Content (consisting of three codes)) and industry standards, the Independent Reviewer also found (references omitted):²²⁷

Codes of practice have historically been a very important way for industry to develop effective co-regulatory arrangements in the Australian broadcasting and telecommunications sectors. There are currently four voluntary industry codes for the online content scheme, but the main codes operational in the online industry are the internet industry codes of practice for internet and mobile services which seek to ensure that restricted and prohibited content is not available to end-users. I am satisfied that the codes in the Schedules have harnessed industry attention on illegal and harmful content and have served to reduce the amount of such harmful content that would otherwise be available and, in their present form, provide a reasonably effective shield against inappropriate material.

However, I heard in this review that the overly prescriptive nature of Schedules 5 and 7 has prevented a meaningful overhaul by industry of the industry codes—because the codes cannot be changed unless associated parts of these Schedules, are changed first. As a result, the industry codes are either out of date or redundant, and reliant on changes to legislation to enable code review and rewriting. Moreover, Schedules 5 and 7 do not enable the eSafety Commissioner to unilaterally order a new code. Even if this was possible, any new code would simply import the deficiencies of the current legislation, rendering the industry still unable to comply owing to the prescriptive elements set out in each Schedule.

This means that the current take-down and filtering system is more reliant on individual company policies and the goodwill of industry players, than might usually be expected with an industry code, which suggests a fault in the co-regulatory framework.

...

I found that there should be a single new fit for purpose and technology-neutral code of practice. This single code would fulfil a wider purpose than the current codes—it would set the behaviour benchmarks and compliance requirements for industry around all aspects of online safety, covering all Australian end-users. Further, I consider that the legislation should empower the eSafety Commissioner to create an industry standard or standards, irrespective of code arrangements in order to provide her sufficient flexibility to respond quickly to emerging harmful activities.

...

In the circumstances, I recommend that compliance with industry codes be mandatory for all industry participants with online and digital activities in Australia (including overseas participants), in a framework to be administered by the eSafety Commissioner, with appropriate penalties for non-compliance. As these new code arrangements will be a significant new task for the eSafety Office, additional resources will be required.

Cyberbullying

The prevalence of cyberbullying – both among children and adults – is increasing in Australia. Since July 2015, the eSafety Commissioner has administered a ‘cyberbullying complaints scheme’ described as follows:²²⁸

In addition to its preventative education program, eSafety’s cyberbullying investigation function provides a mechanism for early intervention in situations where young people have experienced a harmful cyberbullying incident.

Since July 2015, eSafety has managed a complaints scheme for serious cyberbullying of Australian children. This scheme provides invaluable support and technical assistance to complaints [sic], including to Australian children and young people, their parents, carers and other adults who make complaints on their behalf. eSafety received and assessed a total of 900 cyberbullying complaints between July 2015 and 30 June 2018. There has been a significant year-on-year growth in the number of complaints we receive as awareness of eSafety’s cyberbullying role has increased, from 186 complaints received in 2015-6 to 305 in 2016-7 and 409 in 2017-8. Through our relationships, escalation pathways and formal powers, eSafety has been able to effect the rapid removal of serious cyberbullying material on social media services impacting on the mental health of young Australians (such as harmful comments, incitements to suicide and threats of violence) often within hours or a day.

²²⁷ Ibid, 13-14.

²²⁸ Julie Inman Grant, Office of the eSafety Commissioner, *Submission – Reviews of the Enhancing Online Safety Act 2015 and the Online Content Scheme* (1 August 2018) 35-36
<https://www.communications.gov.au/sites/default/files/submissions/office_of_the_esafety_commissioner.pdf>.

As of August 2018, the eSafety Commissioner reported she had received over 900 complaints about cyberbullying affecting Australian children since the introduction of the cyberbullying complaints scheme (July 2015).²²⁹

In its October 2017 submission to the Parliamentary inquiry into the adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying, the eSafety Commissioner has observed:²³⁰

The Office's research indicates that cyberbullying manifests itself in many forms, impacting both children and teenagers. In the 12 months to June 2016, 8% of children and 19% of teenagers were cyberbullied, and we saw a 63% increase in complaints about cyberbullying between 2015-16 and 2016-17.

Further, research indicates that girls are cyberbullied more frequently than boys, although an increasing number of boys were targets over 2016-17. The most common forms of cyberbullying are social exclusion, name-calling, and the spreading of lies and malicious rumours. Our experience shows that children and teens are predominantly bullied online by those in their own peer group.

In many instances, cyberbullying is an extension of bullying or conflict occurring within the school. In reports to eSafety about cyberbullying, victims often note that the harassment they experience online mirrors their experience at school. Further, the perpetrators are in many instances the same. Cyberbullying inevitably takes a personal toll on its targets. More than 40 per cent of young people surveyed by the Office told us they were adversely affected by experiencing negative conduct online. Emotions range from anger and fear, to feeling disempowered and socially isolated. In almost half of these cases, children and teens indicated that their self-esteem had also been affected.

At the February 2018 meeting of the Council of Australian Governments (COAG), Australian Governments considered the issue of bullying and cyberbullying as an issue of priority, and established a working group of senior officials from First Ministers', Education, Justice and Health departments to consider existing and potential initiatives to help combat bullying and cyberbullying and establish a work program to be led by the Education Council. It was also reported that the Education Council will report to COAG at its next meeting on tangible measures where there is an identified need.²³¹

Under Australian law, offences applying to conduct broadly known as 'cyberbullying' can be captured under the *Criminal Code Act 1995* (Cth) (particularly s 474.17) and may also be captured under state and territory criminal laws.²³² The Office of Communications Access and Cybercrime (OCAC) in Home Affairs has policy responsibility for online offences in the Commonwealth Criminal Code, including an offence which captures cyberbullying (section 474.17 of the Criminal Code).²³³ These laws are broad in their framing and do not explicitly state 'cyberbullying' per se. Rather, these laws are deliberately broad in their nature so as to be technologically neutral. In the parliamentary inquiry into the *Adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying* conducted over September 2017 to March 2018, the Attorney-General's Department explained the rationale for a broadly framed offence as follows:²³⁴

This approach is consistent with Commonwealth criminal law policy, which refers offences of general application over numerous slightly different offences of similar effect. General offences criminalising classes of conduct avoids the technical distinctions, loopholes and additional prosecution difficulty or appearance of incoherence that can be associated with multiple more specific offences. The existing offences in the Criminal Code are also technologically neutral, focusing on the harmful conduct of the perpetrator rather than any specific communications service or platform. This makes them applicable to the wide range of communications services and public platforms now in use as well as resistance to frequent rapid changes in communications technology.

²²⁹ Ibid, 7.

²³⁰ eSafety Commissioner, n 17.

²³¹ Council of Australian Governments, 'Meeting of the Council of Australian Governments' (Communique, 9 February 2018), <<https://www.coag.gov.au/sites/default/files/communique/coag-communique-february-2018.pdf>> 2.

²³² *Criminal Code 1995* (Cth) sch 1, pts 474.17, 474.19; *Criminal Code Compilation Act 1913* (WA) ss 338A, 338D; *Crimes Act 1938* (Vic) ss 21A, 31.

²³³ Department of Home Affairs, *Data Retention – Office of Communications Access and Cybercrime* <<https://www.homeaffairs.gov.au/about-us/our-portfolios/national-security/lawful-access-telecommunications/data-retention>>.

²³⁴ Harmer, Attorney-General's Department, Committee Hansard (7 March 2018) p. 48, as cited in Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying* (March 2018) [3.23]

<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Cyberbullying>.

Although there were different views about the adequacy of these laws to capture cyberbullying, the Committee concluded in its final report published in March 2018 that '[t]he committee accepts evidence that existing Commonwealth, state, and territory criminal offences adequately cover serious cyberbullying behaviours. In particular, section 474.17 of the Criminal Code Act 1995 (Criminal Code) is a broadly framed, technologically-neutral offence.'²³⁵

The Committee's view was that it 'agrees with the weight of evidence that both bullying and cyberbullying are, at their roots, social and public health issues' and that criminal offences 'should only be applied in the most serious cyberbullying cases'.²³⁶ However in its March 2018 report, the Committee recognised the serious problem of cyberbullying, and recommended that the Australian Government:²³⁷

- approach cyberbullying primarily as a social and public health issue;
- improve preventative and early intervention initiatives, including education;
- not increase penalties for cyberbullying offences committed by 'minors' (children);
- provide for increased public awareness;
- ensure that law enforcement authorities appropriately investigate and prosecute serious cyberbullying complaints;
- increase penalties for the use of a carriage service to menace, harass, or cause offence under the *Criminal Code Act 1995* (Cth);
- ensure consistency exists between state, territory and federal laws in relation to cyberbullying;
- ensure adequate resourcing of the Office of the eSafety Commissioner;
- take regulatory measures to require social media platforms to prevent and respond to cyberbullying, including to introduce a duty of care of platforms to ensure the safety of users, and through financial penalties where insufficient progress is achieved.

As at April 2019 the Australian Government is yet to respond to the inquiry report.

Awareness-raising and avenues for complaints/concerns regarding online activities

The Australian Government promotes the safety and protection of young people online through the eSafety Commissioner.²³⁸ Australian residents can make complaints to the eSafety CyberReport scheme about online content that may be offensive or illegal. The eSafety Commissioner prioritises complaints about content such as child sexual abuse material or content that promotes or incites crime or violence.²³⁹ A person can also make a complaint about online content to the Australian Communications and Media Authority, which will assess the complaint by reference to the 'National Classification Scheme'.²⁴⁰

In addition, the following services provide assistance to children and young people who have concerns with cyberbullying, sexting, trolling, and other issues relating to online media services:

- 000 (for emergencies);
- Kids Helpline²⁴¹;
- Youth Law Australia (legal information specifically to children and young people on cyberbullying²⁴²);
- headspace²⁴³, including eheadspace²⁴⁴; and

²³⁵ Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying* (March 2018) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Cyberbullying> [5.9].

²³⁶ *Ibid*, [5.5]-[5.15].

²³⁷ *Ibid*, vii-viii.

²³⁸ eSafety Commissioner <<https://esafety.gov.au/>>.

²³⁹ eSafety Commissioner, *Offensive and illegal content complaints* <<https://www.esafety.gov.au/complaints-and-reporting/offensive-and-illegal-content-complaints>>.

²⁴⁰ Australian Communications and Media Authority, *How to make a report or a complaint* <<https://www.acma.gov.au/theACMA/ACMAi/Complaints>>.

²⁴¹ Kids Helpline <<https://kidshelpline.com.au/>>.

²⁴² Youth Law Australia, *Cyber safety* <<https://yla.org.au/nsw/topics/internet-phones-and-technology/cyber-safety/>>.

- eSafety cyberbullying scheme or CyberReport.²⁴⁵

The eSafety Commissioner's website also provides a shortcut to the safety centres of a number of social media services.²⁴⁶

Recommendation 2 (i)

Continue to improve systems and business practices to keep children safe – in person and online

- a) Ensure the next iteration of a national plan to keep children safe (proceeding the conclusion of the *National Framework for Protecting Australia's Children* in 2020) includes measures that require the private sector to keep children safe and support them to do so. Specific measures should include:
 - strengthening the Working With Children Check system as recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse; and
 - supporting, expanding and building capacity in relation to the *National Principles for Child Safe Organisations* project including through ensuring oversight from an appropriate, independent institution resourced and equipped to help capacity build different sectors and business types.
- b) Implement the recommendations contained in the *Report of the Statutory Review of the Enhancing Online Safety Act 2015 and the Review of Schedules 5 and 7 to the Broadcasting Services Act 1992 (Online Content Scheme)* including a more proactive regulatory regime and a National Online Safety Plan.
- c) Implement the recommendations contained in the *Senate Standing Committee on Legal and Constitutional Affairs' inquiry into the Adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying*, including specifically to:
 - improve preventative and early intervention initiatives, including education;
 - ensure that law enforcement authorities appropriately investigate and prosecute serious cyberbullying complaints; and
 - take regulatory measures to require social media platforms to prevent and respond to cyberbullying, including to introduce a duty of care of platforms to ensure the safety of users, and through financial penalties where insufficient progress is achieved.

Children in context: Domestic and family violence in Australia

Australian Governments, community members and businesses have increasingly recognised that domestic and family violence is a significant and widespread problem in Australia.²⁴⁷ Family violence has been described as:

violent or threatening behaviour, or any other form of behaviour, that coerces or controls a family member or causes that family member to be fearful. Such behaviour may include but is not limited to:

- (a) physical violence;

²⁴³ headspace (National Youth Mental Health Foundation) <<https://headspace.org.au/>>.

²⁴⁴ Ibid.

²⁴⁵ eSafety Commissioner, *Report abuse to us* <<https://www.esafety.gov.au/complaints-and-reporting>>.

²⁴⁶ eSafety Commissioner, *Social media safety centre* <<https://www.esafety.gov.au/complaints-and-reporting/cyberbullying-complaints/social-media-services-safety-centres>>.

²⁴⁷ Department of Social Services, *The National Plan to Reduce Violence Against Women and their Children 2010-2022* (2011) <<https://www.dss.gov.au/women/programs-services/reducing-violence/the-national-plan-to-reduce-violence-against-women-and-their-children-2010-2022>> and Council of Australian Governments, 2016 National Summit – Reducing violence against women and their children, Brisbane (27-28 October 2016), *Outcomes and Reflections* <<https://pmc.gov.au/sites/default/files/publications/COAG-summit-outcomes.pdf>>.

- (b) sexual assault and other sexually abusive behaviour;
- (c) economic abuse;
- (d) emotional or psychological abuse;
- (e) stalking;
- (f) kidnapping or deprivation of liberty;
- (g) damage to property, irrespective of whether the victim owns the property;
- (h) causing injury or death to an animal irrespective of whether the victims owns the animal; and
- (i) behaviour by the person using the violence that causes a child to be exposed to the effects of behaviour referred to in (a)–(h) above²⁴⁸ (references omitted).

Children can be exposed to family violence through a range of means, including:²⁴⁹

- hearing the violence;
- being used as a physical weapon;
- being forced to watch or participate in assaults;
- being forced to spy on a parent;
- being informed that they are to blame for the violence because of their behaviour;
- being used as a hostage;
- defending a parent against the violence; and/or
- intervening to stop the violence.

In addition to experiencing family violence in these ways, the National Children’s Commissioner observed in 2015 that:²⁵⁰

Children living with family and domestic violence are also at an increased risk of experiencing emotional, physical and sexual abuse. In Australia there is no national data on the proportion of child protection notifications that relate to family and domestic violence. It is estimated, however, that family and domestic violence is present in 55% of physical abuses and 40% of sexual abuses against children.

Available data indicates that in 2016-17, emotional abuse, including exposure to family violence, was recorded as the primary abuse type recorded for the majority of child protection substantiations in Australia (30,745 or 48%).²⁵¹

The 2016 Personal Safety Survey conducted by the Australian Bureau of Statistics revealed a high prevalence of violence in Australian homes with 17% of women (1.6 million) and 6% of men (547,600) reporting that they had experienced physical and/or sexual violence by a partner since the age of 15 years. It also indicated that 1 in 4 women (23% or 2.2 million) and 1 in 6 men (16% or 1.4 million) experienced emotional abuse by a partner since the age of 15 years.²⁵² Of women who experience violence at the hands of a partner, approximately half have children in their care.²⁵³

²⁴⁸ Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010) <<https://www.alrc.gov.au/publications/family-violence-national-legal-response-alrc-report-114>> recommendations 5–1, 6–1, 6–4.

²⁴⁹ Kelly Richards, *Trends and Issues in Crime and Criminal Justice No. 419 - Children’s exposure to domestic violence in Australia*, Australian Institute of Criminology (June 2011) <<https://aic.gov.au/publications/tandi/tandi419>>.

²⁵⁰ Megan Mitchell, *2015 Children’s Rights Report* (2015) <<https://www.humanrights.gov.au/our-work/childrens-rights/publications/childrens-rights-report-2015>> 101.

²⁵¹ Australian Institute of Health and Welfare, *Child Protection Australia 2016-17* (2018) <<https://www.aihw.gov.au/reports/child-protection/child-protection-australia-2016-17/contents/table-of-contents-print-report>> 21-22.

²⁵² Australian Bureau of Statistics, *4906.0 - Personal Safety, Australia, 2016* (8 November 2017) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4906.0Main+Features12016?OpenDocument>>.

Further, in Australia it is estimated that around 1 in 3 women who experienced abuse before the age of 15 have also experienced partner violence as an adult (36% or 535,800). These women were nearly three times more likely to experience partner violence as an adult than women who had not experienced abuse before the age of 15 (36% compared to 13% or 989,400). Around 1 in 6 men who experienced abuse before the age of 15 experienced partner violence as an adult (15% or 152,600). Men who experienced abuse before the age of 15 were 3 times more likely to experience partner violence as an adult than men who had not experienced abuse before the age of 15 (15% compared to 4.7%).²⁵⁴

In 2014, Australia's then Sex Discrimination Commissioner, Elizabeth Broderick, observed '[d]omestic and family violence is a workplace issue'.²⁵⁵ It was further explained (references omitted):²⁵⁶

[w]hen an employee is living with domestic and family violence, there are often very real costs and negative impacts that flow to the workplace...Within the population of women who have experienced violence, or are currently experiencing violence, the Australian Bureau of Statistics estimates that between 55% and 70% are currently in the workforce – that is, approximately 800,000 women, or around one in six female workers. This means that a significant number of Australian workplaces will be impacted by women's experiences of domestic and family violence.

Some common costs and impacts include:

- Decreased staff performance and productivity
- Increased staff turnover and absenteeism
- Negative impact on the organisation's reputation and image.

Experiencing violence, including domestic and family violence has numerous detrimental impacts for the individuals affected, the majority of whom are women. One of these is increased financial risk and poverty, as well as disadvantages in the labour market.²⁵⁷ The Australian Council of Trade Unions (ACTU) has released research indicating that the leaving a violent relationship costs on average \$18,000 and 141 hours.²⁵⁸ The ACTU continues to advocate for the right for employees to be able to challenge a refusal by an employer to consider reasonable requests for altered hours, and enforceable rights to flexible work.²⁵⁹

At the same time, evidence has indicated that '[g]aining and maintaining paid work is pivotal in creating a secure financial future for both those who have experienced domestic violence and their families'.²⁶⁰ Because of this, workplace responses to domestic and family violence is an important issue for all community members in Australia, but particularly women and children.

However, there are currently very few safeguards for people experiencing family violence under Australia's workplace laws. In 2012, the Australian Law Reform Commission observed:²⁶¹

[i]n many cases, employers will grant employees access to forms of existing leave in circumstances where it may be required as a result of family violence. However, stakeholders suggest that frequently those experiencing

²⁵³ Australia's National Research Organisation for Women's Safety to Reduce Violence against Women and their Children, *Horizons Research Report - Violence against women: Additional analysis of the Australian Bureau of Statistics' Personal Safety Survey, 2012* (2015) <http://media.aomx.com/anrows.org.au/PSS_2016update.pdf>.

²⁵⁴ Australian Bureau of Statistics, n 252.

²⁵⁵ Australian Human Rights Commission, n 22, 1.

²⁵⁶ *Ibid*, 2.

²⁵⁷ Janet Phillips and Penny Vandenbroek, 'Domestic, family and sexual violence in Australia: an overview of the issues', Research Paper Series 2014-15, Parliamentary Library, Commonwealth of Australia (14 October 2014)

<https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1415/ViolenceAust#_Toc401045317>.

²⁵⁸ 'Cost of fleeing violent relationship is \$18,000 and 141 hours: ACTU', *SBS News* (13 November 2017)

<<https://www.sbs.com.au/news/cost-of-fleeing-violent-relationship-is-18-000-and-141-hours-actu>>.

²⁵⁹ See Australian Council of Trade Unions, *Domestic Violence* (13 July 2016) <<https://www.actu.org.au/our-work/policy-issues/domestic-violence>> and Dana McCauley, 'Employers forced to give detailed reasons for refusing flexible work' *Sydney Morning Herald* (25 September 2018) <<https://www.smh.com.au/politics/federal/employers-forced-to-give-detailed-reasons-for-refusing-flexible-work-20180925-p505xr.html>>.

²⁶⁰ Phillips and Vandenbroek, n 257.

²⁶¹ Australian Law Reform Commission, *Family Violence and Commonwealth Law: Improving Legal Frameworks*, Report No 117 (2012) <<https://www.alrc.gov.au/publications/17-national-employment-standards/family-violence-related-leave>>, [17.31].

violence exhaust their existing leave entitlements, particularly where the violence occurs over a prolonged period. In addition, there is currently a discretionary element associated with the granting of leave in cases of family violence. In light of this, the ALRC considers existing leave provisions provided for in the NES may not adequately provide for the needs of employees experiencing family violence (references omitted).

The Australian Law Reform Commission went on to conclude that, given the prevalence of family violence and its impact on employees, workplaces and productivity, a minimum statutory entitlement to family and domestic violence leave is necessary, and that it should be paid, flexible, easily accessible and introduced in the context of a range of initiatives aimed at addressing family violence in the workplace. It also indicated that the right to request flexible work arrangements due to family violence could play an important role in responding appropriately to family violence.²⁶²

The Australian Human Rights Commission concluded in October 2016 that '[t]he current entitlements in the FWA and the NES are inadequate to cater for the needs of family and domestic violence victims/survivors.'²⁶³

Leave for employees experiencing family violence

In July 2017, the Fair Work Commission rejected a claim of the Australian Council of Trade Unions to have an entitlement for employees to take 10 days of paid family and domestic violence leave included in all modern awards.²⁶⁴ However, the Fair Work Commission acknowledged the relevance of the issue and the need for action, acknowledging that domestic violence and family violence 'disproportionally affects women' and accepted that 'the provision of paid family and domestic violence leave would promote social inclusion'.²⁶⁵ The Full Bench also formed the preliminary view that 'all employees should have access to unpaid family and domestic violence leave', and 'should be able to access personal/carer's leave for the purpose of taking family and domestic violence leave'.²⁶⁶ In October 2017, the Fair Work Commission agreed to provide entitlements to unpaid leave if 'it is necessary to deal with the impact of the family and domestic violence and it is impractical for the employee to do so outside their ordinary hours of work'.²⁶⁷

Subsequently, the Fair Work Commission examined the issue of Family and Domestic Violence Leave in its 4 yearly review of modern awards in March 2018.²⁶⁸ In the Decision, the Full Bench decided to provide five days' unpaid leave per annum to all employees (including casuals) experiencing family and domestic violence. This decision provides an entitlement to employees covered by modern awards and comes in to effect from 1 August 2018. In making its decision, the Fair Work Commission concluded:²⁶⁹

[307] This decision takes a cautious regulatory response to this issue. We have decided to provide five days' unpaid leave to employees experiencing family and domestic violence, if the employee needs to do something to deal with the impact of that violence and it is impractical for them to do it outside their ordinary hours of work. We have decided to defer our consideration of whether employees should be able to access paid personal/carer's leave for the purpose of taking family and domestic violence leave.

[308] The extent to which the new entitlement to unpaid leave will be utilised is unknown, as is the impact of the new entitlement on business.

[309] We propose to revisit this issue in June 2021, after the model term has been in operation for three years. At that time we will consider whether any changes are needed to the unpaid leave model term, and whether to allow access to personal/carer's leave. At that time we will also revisit the question of whether provisions should

²⁶² Ibid, [17.9].

²⁶³ Australian Human Rights Commission, Submissions of the Australian Human Rights Commission, Fair Work Commission, Matter No. AM2015/1 – Four Yearly Review of Modern Awards – Family and Domestic Violence Clause (5 October 2016) <<https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/am2051-sub-ahrc-120516.pdf>> [61].

²⁶⁴ Fair Work Commission, *4 yearly review of modern awards—Family & Domestic Violence Leave Clause*, Decision [2017] FWCFB 3494 (3 July 2017) <<https://www.fwc.gov.au/documents/decisionssigned/html/2017fwcfb3494.htm>>.

²⁶⁵ Fair Work Commission, *4 yearly review of modern awards—Family & Domestic Violence Leave Clause*, Decision [2017] FWCFB 3494 (3 July 2017) <<https://www.fwc.gov.au/documents/decisionssigned/html/2017fwcfb3494.htm>> [49], [82].

²⁶⁶ Fair Work Commission, *4 yearly review of modern awards—Family & Domestic Violence Leave Clause*, Decision [2017] FWCFB 3494 (3 July 2017) <<https://www.fwc.gov.au/documents/decisionssigned/html/2017fwcfb3494.htm>> [6].

²⁶⁷ Fair Work Commission, *Family and Domestic Violence Leave Clause*, Statement [2017] FWC 5445 (20 October 2017) <<https://www.fwc.gov.au/documents/decisionssigned/html/2017fwc5445.htm>>.

²⁶⁸ Fair Work Commission, *4 yearly review of modern awards – Family and Domestic Violence Leave* (AM2015/1) [2018] FWCFB 1691 (28 March 2018) <https://www.fwc.gov.au/documents/decisionssigned/html/2018fwcfb1691.htm#P1294_106261>.

²⁶⁹ Fair Work Commission, *4 yearly review of modern awards – Family and Domestic Violence Leave* (AM2015/1) [2018] FWCFB 1691 (28 March 2018) <https://www.fwc.gov.au/documents/decisionssigned/html/2018fwcfb1691.htm#P1294_106261> [307]-[309].

be made for paid family and domestic violence leave.

After this decision of the FWC, the Australian Government announced that it would introduce an amendment to the *Fair Work Act 2009* (Cth) to extend the entitlement to unpaid family and domestic violence leave to all employees (and not just those covered by modern awards).²⁷⁰ Accordingly, the Parliament passed the *Fair Work Amendment (Family and Domestic Violence Leave) Act 2018* (Cth) in December 2018.²⁷¹ The Act inserts in to the National Employment Standards (contained in the *Fair Work Act 2009* (Cth)) an entitlement to five days of unpaid family and domestic violence leave in a 12-month period. As such Australian workers are now guaranteed access to five days of unpaid domestic violence leave per year.

All State and Territory Governments have also made provision for domestic violence leave for public sector employees. Dependent on the government, the paid leave entitlements for public servants who have experienced domestic and family violence varies between 5 to 20 days per calendar year.²⁷²

The Australian Human Rights Commission has also supported the introduction of paid domestic and family violence leave.²⁷³

Flexible work arrangements for employees experiencing family violence

Under the *Fair Work Act 2009* (Cth), employees can request flexible working arrangements in the following circumstances:²⁷⁴

- (a) the employee is the parent, or has responsibility for the care, of a child who is of school age or younger;
- (b) the employee is a carer (within the meaning of the Carer Recognition Act 2010);
- (c) the employee has a disability;
- (d) the employee is 55 or older;
- (e) the employee is experiencing violence from a member of the employee's family;
- (f) the employee provides care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing violence from the member's family.

²⁷⁰ The Hon Craig Laundy MP and The Hon Kelly O'Dwyer MP, *Government to extend family and domestic violence leave* (Media Release, 26 March 2018) <<https://ministers.jobs.gov.au/laundy/government-extend-family-and-domestic-violence-leave>>.

²⁷¹ Parliament of Australia, Bills of the current Parliament, *Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018* <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2F6181%22>>.

²⁷² ACT and Vic: 20 days; SA: 15 days; Qld, Tas and WA: 10 days; NSW: 5 days; NT: not specified

ACT Government, *Leave for Domestic Violence Purposes Advice in the ACT Public Service*

<http://www.cmd.act.gov.au/_data/assets/pdf_file/0010/912934/Leave-for-Domestic-Violence-Purposes-Advice.pdf>;

Fair Work Commission, *Victorian Public Service Enterprise Agreement 2016*, [2016] FWCA 2934 (11 May 2016)

<<https://www.fwc.gov.au/documents/agreements/fwa/ae418873.pdf>>; South Australian Department for Communities and Social Inclusion, *Paid leave to help break the cycle of domestic violence* (25 November 2015) <<https://www.dcsi.sa.gov.au/services/latest-news/media-releases-2015/paid-leave-to-help-break-the-cycle-of-domestic-violence>>; Public Service Commission, *Commission Chief Executive Directive: Support for employees affected by domestic and family violence*, Directive 4/15

<<https://www.forgov.qld.gov.au/system/files/documents/2015-04-support-for-employees-affected-by-domestic-and-family-violence.pdf?v=1450337881>>; Tasmanian Government, *Family Violence – Workplace Arrangements and Requirements*, Employment

Direction No. 28 (4 February 2013)

<http://www.dpac.tas.gov.au/_data/assets/pdf_file/0007/186055/ED28_FamilyViolence_WorkplaceArrangements_andRequirements.PDF>

and Tasmanian Industrial Commission, *Tasmanian State Service Award – No. 3 of 2017*

<http://www.tic.tas.gov.au/award_history/tasmanian_state_service>; Government of Western Australia, *Premier's Circular No. 2017/07* (18 August 2017)

<<https://www.dpc.wa.gov.au/Publications/AnnualReports/Documents/PC%20Circular%20201707%20Family%20and%20Domestic%20Violence.pdf>>; New South Wales Industrial Relations Commission (Industrial Gazette), *Crown Employees (Public Service Conditions of Employment) Reviewed Award 2009* (24 August 2016) <<http://www.irgazette.justice.nsw.gov.au/irc/ircgazette.nsf/webviewdate/C8621>>;

Northern Territory Government Office of the Commissioner for Public Employment, *Miscellaneous Leave* (by-law 18)

<https://ocpe.nt.gov.au/_data/assets/pdf_file/0009/245583/CPE-Guideline.pdf> and Northern Territory Government, *Northern Territory Public Sector 2017 – 2012 Enterprise Agreement* <https://ocpe.nt.gov.au/_data/assets/pdf_file/0010/460828/NTPS-2017-2021-Full-Enterprise-Agreement-Access-Period.pdf>.

²⁷³ Australian Human Rights Commission, Submissions of the Australian Human Rights Commission, Fair Work Commission, *Matter No. AM2015/1 – Four Yearly Review of Modern Awards – Family and Domestic Violence Clause* (5 October 2016)

<<https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/common/am2051-sub-ahrc-120516.pdf>> [3].

²⁷⁴ *Fair Work Act 2009* (Cth) s 65(1A).

As such, employees who are experiencing domestic violence are entitled to request changes for flexible working arrangements under the National Employment Standards.²⁷⁵ Employees can also request flexible working arrangements to provide care or support to a member of their household or immediate family because of family or domestic violence (see further **3.3.2 – Family-friendly employment**).

Employers must either approve or refuse an employee's request in writing within 21 days. If the request is refused, the employer must also include reasons for the refusal. It is a contravention of the *Fair Work Act 2009* (Cth) if an employer does not respond according to these requirements.

However, there is little right of appeal if an employee's request is denied by an employer.²⁷⁶ The Australian Human Rights Commission expressed concern in 2018 that (references omitted):²⁷⁷

there are currently no comprehensive coverage of workplace protections for employees who experience family and domestic violence (FDV). Women who experience FDV may face adverse treatment in the workplace that is specifically related to their experiences of violence. For example, they may be denied leave or flexible work arrangements to attend violence-related matters, such as moving into a shelter; they may have their employment terminated; or they may be transferred or demoted. This treatment can exacerbate the costs and consequences of FDV.

According to data on workplaces with 100 or more employees collected by the Workplace Gender Equality Agency over the 2016-17 reporting period:²⁷⁸

- 43.1% of Employers had a formal policy or strategy to support employees experiencing family or domestic violence.
- 81.9% of employers had some measure in place to support employees experiencing family or domestic violence:
 - 72.6% of these employees have an employee assistance program in place;
 - 14.2% offer specific training on family and domestic violence to HR or other staff;
 - 34.9% offer referrals to support service.
- 63.1% of employers offer some kind of leave for domestic and family violence:
 - 7.4% offer unpaid domestic violence leave.
 - 56.9% offer unpaid leave.
 - 17.1% of employers offer paid domestic violence leave.

A small number of employees also offer financial support (16.3%) and emergency accommodation assistance (6%).

It is significant that 17.1% of employers have voluntarily chosen to offer paid domestic violence leave, and this demonstrates the growing number of businesses that see employers as playing a role to better support victims and survivors of domestic violence. However, with employees covered by WGEA data comprising only 40% of the Australian workforce, and with these being the larger, better equipped workplaces to implement gender equality policies, it is clear that under current arrangements, a significant number of victims and survivors of domestic and family violence would not have access to paid leave.

Support for workplaces to work with employees experiencing domestic and family violence

In February 2011, the Council of Australian Governments established *The National Plan to Reduce Violence against Women and their Children 2010 – 2022*.²⁷⁹ The National Plan focuses on the two main types of violent

²⁷⁵ *Fair Work Act 2009* (Cth) pt 2.2 The National Employment Standards, div 4 – Requests for flexible working arrangements, ss 65(1A)(e), (f).

²⁷⁶ Australian Human Rights Commission, n 22, 6.

²⁷⁷ Australian Human Rights Commission, *Submission to the CEDAW Committee* (12 June 2018)

<https://tbineternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/AUS/INT_CEDAW_IFN_AUS_31439_E.pdf> [31].

²⁷⁸ Workplace Gender Equality Agency, *Data Explorer – Sex-based harassment and domestic violence*

<http://data.wgea.gov.au/industries/1#dv_content>.

²⁷⁹ Council of Australian Governments, *National Plan to Reduce Violence against Women and their Children 2010 – 2022* (2010)

<https://www.dss.gov.au/sites/default/files/documents/08_2014/national_plan1.pdf>.

crimes that have a major impact on women – domestic and family violence and sexual assault. It aims to achieve ‘a significant and sustained reduction in violence against women and their children’²⁸⁰ and is staged through four 3 year ‘Action Plans’ designed to build on each other over the course of the 12 year plan.

The Third Action Plan 2016-2019 outlines some strategies on how the Australian Government will engage with the corporate sector on such initiatives.²⁸¹ These include co-designing tools and resources with local governments to engage with business, sporting organisations and community groups to promote action against violence and embedding ‘gender equality in workplace culture and increase women’s workforce participation and economic security’. As part of this work, the Australian Government has committed to supporting ‘employers and employees when domestic and family violence impacts on workplaces by providing a “one-stop shop” for resources on effective workplace responses to violence against women and their children’.²⁸²

Consultations to inform the development of the Fourth Action Plan 2019-2022 were held in 2018, and it is due for release in 2019.²⁸³

More recently the outcomes of the COAG 2016 National Summit on Reducing violence against women and their children observed: ‘Organisations across all sectors, including government, business, and non-government can play a significant role in creating cultural change to ensure the safety of women and children and ending domestic and family violence.’²⁸⁴ The Summit roundtable suggested a number of actions relevant to Australian businesses, including:²⁸⁵

- Gender equity needs to be the foundation of any workplace responses to domestic and family violence;
- Domestic and family violence workplace policies are important as one component of a comprehensive workplace responses;
- Nationally-consistent standards and tools relating to workplace responses to domestic and family violence should be developed; and
- Information and resources should be shared to drive effective workplace responses to domestic and family violence.

Recommendation 2 (ii)

Help protect the economic security of workers experiencing domestic and family violence

Legislate a minimum statutory entitlement to 10 days’ paid domestic and family violence leave for employees, and promote guidance and support to workplaces on appropriate responses to domestic and family violence.

The safety and protection of children - Internationally

The Department of Foreign Affairs and Trade (DFAT) has in place a Child Protection Policy (2017) which articulates a zero tolerance of child exploitation and abuse.²⁸⁶ The policy defines abuse as including physical abuse, neglect, emotional abuse, sexual abuse and ill-treatment (or a child or children being present (hearing

²⁸⁰ Department of Social Services, *The National Plan to Reduce Violence against Women and their Children 2010-2022* <<https://www.dss.gov.au/women/programs-services/reducing-violence/the-national-plan-to-reduce-violence-against-women-and-their-children-2010-2022>>.

²⁸¹ Council of Australian Governments, *Third Action Plan 2016-2019 Of the National Plan to Reduce Violence against Women and their Children* (2016) <https://www.dss.gov.au/sites/default/files/documents/10_2016/third_action_plan.pdf>.

²⁸² Ibid, [1.2], [1.5] – [1.6].

²⁸³ Department of Social Services, n 280.

²⁸⁴ Council of Australian Governments, *2016 National Summit on Reducing violence against women and their children*, Brisbane (27-28 October 2016) <<https://pmc.gov.au/resource-centre/office-women/coag-2016-national-summit-reducing-violence-against-women-and-their-children>> 13.

²⁸⁵ Ibid, 13.

²⁸⁶ Department of Foreign Affairs and Trade, n 105, 3.

or seeing) while a parent or sibling is subjected to any such treatment), and child exploitation is defined as one or more of the following:²⁸⁷

- committing or coercing another person to commit an act or acts of abuse against a child;
- possessing, controlling, producing, distributing, obtaining or transmitting child exploitation material;
- committing or coercing another person to commit an act or acts of grooming or online grooming; and/or
- using a minor for profit, labour, sexual gratification, or some other personal or financial advantage.

This is a broad policy that applies to all DFAT business, including the activities of DFAT funded partners. These include:²⁸⁸

- Contractors;
- Consultants, advisers and contracted individuals;
- Non-Government Organisations (NGO), Civil society Organisations (CSO) and contractor organisations and their personnel;
- Downstream partners or organisations who are subcontracted by DFAT funded NGOs, CSOs, consultants, contractors or advisers and their respective personnel;
- Australian Volunteers program participants and host organisations;
- Recipients and awardees under the Australia Awards, Scholarships and Fellowships program; and
- DFAT grant recipients, including under the Australian NGO Cooperation Program (ANCP), Direct Aid Program (DAP) and Public Diplomacy programs.

The DFAT Child Protection Policy does not apply generally to Australian companies operating abroad.²⁸⁹

The policy states that it applies specific requirements to Australian Volunteers program, Australia Awards, Scholarships, Fellowships, Short Courses, and humanitarian preparedness and response activities.²⁹⁰

The DFAT Child Protection Policy provides a risk-based approach to the management of child protection risks in the delivery of DFAT business and requires DFAT funded partners to identify their level of contact and impact on children before developing a risk mitigation strategy. For example, DFAT funded partners are required to develop a child protection policy, identify their organisation's level of contact with and impact on children, develop a risk mitigation strategy, have reporting procedures, and have recruitment, screening and employment practices in place.²⁹¹ The following five policy principles are priorities under the DFAT Child Protection Policy:²⁹²

- Principle 1: Zero tolerance of child exploitation and abuse;
- Principle 2: Assess and manage child protection risk and impact;
- Principle 3: Sharing responsibility for child protection;
- Principle 4: Procedural fairness; and
- Principle 5: Recognition of the best interests of the child.

In support of the DFAT Child Protection Policy, DFAT frequently provides Child Protection Guidance Notes for DFAT staff members and partner organisations.²⁹³ For instance, the Private Enterprise Guidance Note advises on how to address the protection and wellbeing needs of children and young people in private enterprise programming²⁹⁴ whereas another DFAT Guidance Note assists in understanding where child protection risk exists.²⁹⁵

Beyond the issue of child protection however, the *2016 Joint Civil Society Statement on Implementing the UN Guiding Principles on Business and Human Rights in Australia* observed the need for measures to incorporate

²⁸⁷ Ibid.

²⁸⁸ Ibid, 21-2.

²⁸⁹ Ibid.

²⁹⁰ Ibid, 7.

²⁹¹ Ibid, 10-15.

²⁹² Ibid.

²⁹³ Department of Foreign Affairs and Trade, *DFAT Child Protection Guidance Notes* <<http://dfat.gov.au/about-us/publications/Pages/child-protection-policy.aspx>>.

²⁹⁴ Department of Foreign Affairs and Trade, *DFAT Child Protection Guidance Note – Private Enterprise* (January 2017) <<http://dfat.gov.au/international-relations/themes/child-protection/Documents/Private%20Enterprise.pdf>>.

²⁹⁵ Department of Foreign Affairs and Trade, *DFAT Child Protection Guidance Note – Establishing Child Protection Risk* (September 2017) <<http://dfat.gov.au/about-us/publications/Pages/child-protection-policy.aspx>>.

broader human rights considerations into Australia's aid and development projects that involve private sector partners. It stated:²⁹⁶

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. 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.

Aboriginal and Torres Strait Islander Peoples

Aboriginal and Torres Strait Islander peoples are the first peoples of Australia, and the oldest continuous culture on the planet.²⁹⁷ However, since British colonisation of Australia commencing in 1788, Aboriginal and Torres Strait Islander Peoples have experienced dispossession of land, discrimination, murder, forced labour, state-sanctioned removal of children, forced assimilation and loss of culture, family and language. These experiences have had significant and inter-generational impacts on the social, cultural, economic well-being of Aboriginal and Torres Strait Islander Peoples.²⁹⁸ These impacts have been extensively evidenced in recent decades by *Bringing Them Home*²⁹⁹, the *Royal Commission into Aboriginal Deaths in Custody*³⁰⁰, the *Royal Commission into the Protection and Detention of Children in the Northern Territory*³⁰¹, as well as parliamentary inquiries,³⁰² Government policies,³⁰³ coronial inquests³⁰⁴ and case law including *Mabo v Queensland [No. 2]*³⁰⁵.

In 2012, the UN Committee on the Rights of the Child raised specific concern about the impacts of discrimination on Aboriginal and Torres Strait Islander children, noting in particular:³⁰⁶

- (a) The serious and widespread discrimination faced by Aboriginal and Torres Strait Islander children, including in terms of provision of and accessibility to basic services and significant overrepresentation in the criminal

²⁹⁶ Implementing the UN Guiding Principles on Business and Human Rights in Australia – Joint Civil Society Statement, n 61, 13-4.

²⁹⁷ 'DNA confirms Aboriginal culture one of Earth's oldest', *Australian Geographic* (23 September 2011)

<<http://www.australiangeographic.com.au/news/2011/09/dna-confirms-aboriginal-culture-one-of-earths-oldest/>>.

²⁹⁸ Organisation for Economic Cooperation and Development, *OECD Economic Surveys: Australia* (2017) <https://www.keepeek.com/Digital-Asset-Management/oecd/economics/oecd-economic-surveys-australia-2017_eco_surveys-aus-2017-en#page21> 19.

²⁹⁹ Australian Human Rights Commission, *Bringing Them Home – National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997)

<https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf>.

³⁰⁰ *Royal Commission into Aboriginal Deaths in Custody* (1991) <<http://www.austlii.edu.au/au/other/IndigLRes/rciadic/>>.

³⁰¹ Australian Government, *Royal Commission into the Detention and Protection of Children in the Northern Territory* (2017)

<<https://www.royalcommission.gov.au/royal-commission-detention-and-protection-children-northern-territory>>.

³⁰² House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time- Time for Doing – Indigenous youth in the criminal justice system* (2011)

<https://www.aph.gov.au/Parliamentary_Business/Committees/Committees_Exposed/atsia/sentencing/report>.

³⁰³ Standing Committee of Attorneys-General Working Group on Indigenous Justice, *National Indigenous Law and Justice Framework 2009-2015* (2009) <<https://www.indigenousjustice.gov.au/wp-content/uploads/mp/files/resources/files/2009-national-indigenous-law-and-justice-framework.pdf>>.

³⁰⁴ Western Australia State Coroner, Record of Investigation into Death Inquest into the death of Ms Dhu (11020-14) (16 December 2016)

<<http://www.coronerscourt.wa.gov.au/files/dhu%20finding.pdf>>.

³⁰⁵ (1992) 175 CLR 1.

³⁰⁶ United Nations Committee on the Rights of the Child, n 130, [29].

justice system and in out-of-home care;

- (b) The absence of an independent evaluation of the effectiveness of programmes for the 'Closing the Gap' targets in the specific context of child protection, development and well-being;
- (c) The punitive nature of the State party's Northern Territory Emergency Response Bill (2007), including the student enrolment and attendance measure which allows for punitive reductions to welfare payments for parents whose children are truant...

Although the full exploration of these impacts is beyond the scope of this paper, Australia must, as a signatory to UNDRIP, the *Convention on the Elimination of Racial Discrimination* and the Children's Convention, seek to promote and realise the rights of Aboriginal and Torres Strait Islander children and adults, including in the context of regulating business activity. This must be borne in mind across all areas of policy and legislative development – including across social, economic and environmental issues.

There has been recognition by Australian Governments and others that there is an urgent need to improve the outcomes experienced by Aboriginal and Torres Strait Islander children, families and communities. As stated by the Department of Prime Minister and Cabinet: 'Indigenous Affairs remains a national priority for the Australian Government.'³⁰⁷

Initiatives introduced to help facilitate this in recent years have included:

- Constitutional Recognition of Aboriginal and Torres Strait Islander Australians³⁰⁸ – Which was recently considered by the Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples 2018 and which published its final report in November 2018.³⁰⁹ This followed extensive community consultations facilitated across 2016-2017 by the Referendum Council,³¹⁰ culminating in the *Uluru Statement from the Heart*.
- The *Closing the Gap* strategy – agreed to by the Council of Australian Governments in 2008, which outlined targets to close the gap in health, education and life expectancy outcomes experienced by Aboriginal and Torres Strait Islander Australians.³¹¹ As at April 2019, the *Closing the Gap* strategy was going through a 'refresh' process.³¹²
- Economic Development³¹³ – including through the *Indigenous Business Sector Strategy 2018 – 2028*.³¹⁴

At the federal level, the Aboriginal and Torres Strait Islander Social Justice Commissioner is a statutory officer of the Australian Human Rights Commission who plays an important role to protect and promote the rights of Aboriginal and Torres Strait Islander Australians, including children.³¹⁵ Currently, the role of Aboriginal and Torres Strait Islander Social Justice Commissioner is held by June Oscar AO. Ms Oscar is currently conducting the *Wiyi Yani U Thangani* (Women's Voices) Project through which she is seeking to elevate the voices of Indigenous

³⁰⁷ Department of Prime Minister and Cabinet, *Indigenous Affairs* <<https://www.pmc.gov.au/indigenous-affairs>>.

³⁰⁸ Department of Prime Minister and Cabinet, *Constitutional Recognition* <https://www.pmc.gov.au/indigenous-affairs/constitutional-recognition>.

³⁰⁹ Parliament of Australia, Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples 2018 (2018) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Constitutional_Recognition_2018>.

³¹⁰ Referendum Council, *Final Report of the Referendum Council* (30 June 2017) <https://www.referendumcouncil.org.au/sites/default/files/report_attachments/Referendum_Council_Final_Report.pdf>.

³¹¹ Dr John Gardiner-Garden, *Closing the Gap* Parliamentary Library Briefing Book (date unknown) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook44p/ClosingGap>.

³¹² See, for example, Department of the Prime Minister and Cabinet, *Closing the Gap* <<https://www.pmc.gov.au/indigenous-affairs/closing-gap>> and SBS News 'Refresh' of Closing the Gap targets gives Indigenous Australians a greater say: PM' (updated 15 February 2019) <<https://www.sbs.com.au/news/refresh-of-closing-the-gap-targets-gives-indigenous-australians-a-greater-say-pm?cid=inbody:refreshed-close-the-gap-targets-will-focus-on-progress-and-achievement>>.

³¹³ Department of Prime Minister and Cabinet, *Indigenous Affairs – Economic Development* <<https://www.pmc.gov.au/indigenous-affairs/economic-development>>.

³¹⁴ Department of Prime Minister and Cabinet, *Indigenous Business Strategy* (2018) <<https://www.pmc.gov.au/resource-centre/indigenous-affairs/indigenous-business-strategy>>.

³¹⁵ *Australian Human Rights Commission Act 1986* (Cth) s 46C(1).

women and girls (aged 12 – 17 years), to understand their aspirations and challenges, and to provide them the opportunity to improve their personal, socio-economic and cultural security.³¹⁶ The Australian Government, through the Department of the Prime Minister and Cabinet, is supporting Ms Oscar in the project.

A number of state and territory governments have also taken steps towards a treaty with Aboriginal Peoples in Victoria,³¹⁷ South Australia³¹⁸ and the Northern Territory,³¹⁹ establishing representative bodies, and measures to protect and recognise Aboriginal languages.³²⁰

With these issues high on the national agenda, using policy levers to achieve better outcomes for Aboriginal and Torres Strait Islander children and communities, including through measures to promote respect and support for Aboriginal and Torres Strait Islander Australians within the business community, is very important. Such could be supported through raising awareness of the United Nations Global Compact *Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples* which was developed to 'help business understand, respect, and support the rights of indigenous peoples by illustrating how these rights are relevant to business activities'.³²¹ Also, organisations, such as private businesses, governments, NGOs, educational institutions, and sport groups have been encouraged to develop a Reconciliation Action Plan (**RAP**) as part of their business/operational plan. A RAP is a strategic document that 'includes practical actions that will drive an organisation's contribution to reconciliation both internally and in the communities in which it operates'.³²²

There are many significant issues regarding the rights of Aboriginal and Torres Strait Islander peoples generally that are relevant to business operations and activities in Australia – and the policies and laws that shape them. These include, for example, native title rights and Free, Prior and Informed Consent, access to employment, and climate change and its particular impacts on Aboriginal and Torres Strait Islander Peoples. There is undoubtedly a need for greater examination of these issues. For the purpose of this paper, and the specific issues it examines, we have drawn attention to the issue of access to early childhood education and care for Aboriginal and Torres Strait Islander children under **3.3.6 – Access to services**.

Human Trafficking and Slavery

Since 2004, the Australian Government has made it a priority to respond to human trafficking and slavery on a whole of government basis, having established the *Action Plan to Eradicate Trafficking in Persons* in 2004, which was succeeded in 2014 by the *National Action Plan to Combat Human Trafficking and Slavery 2015–19*.³²³ As part of this work, the Australian Government convenes an Interdepartmental Committee on Human Trafficking and Slavery, and previously, the Supply Chains Working Group (see further **3.2.5 – Supply chains**). Most recently, the Assistant Minister for Home Affairs awarded \$0.5 million over 2018-19 to four NGOs to undertake a range of community-based projects to address the underlying causes of exploitation, strengthen the resilience of vulnerable groups, and increase public awareness.³²⁴ The Government has awarded more than \$5.8 million to support specialist NGOs working to combat human trafficking and slavery in Australia since 2008.³²⁵

In June 2018, the NSW Parliament also passed the *Modern Slavery Act 2018* (NSW) which requires commercial organisations with an annual turnover of \$50 million³²⁶ and employees in NSW to publish an annual modern slavery statement. Modern slavery statements are to outline the steps taken during the financial year to ensure

³¹⁶ Australian Human Rights Commission, *Wiyi Yani U Thangani (Women's Voices)* <<https://wiyiyaniuthangani.humanrights.gov.au/>>.

³¹⁷ For example in Victoria - Aboriginal Victoria <<https://www.vic.gov.au/aboriginalvictoria/treaty.html>>, including through the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic).

³¹⁸ Rhiannon Elston, 'Historic Buthera agreement first step towards Indigenous treaty in South Australia', *SBS News* (18 February 2018) <<https://www.sbs.com.au/news/historic-buthera-agreement-first-step-towards-indigenous-treaty-in-south-australia>>.

³¹⁹ Department of the Chief Minister, *Treaty in the Northern Territory* <<https://dcm.nt.gov.au/supporting-government/office-of-aboriginal-affairs/treaty/treaty-in-the-nt>>.

³²⁰ NSW Aboriginal Affairs, *Recognising and protecting NSW Aboriginal languages* <<https://www.aboriginalaffairs.nsw.gov.au/policy-reform/language-and-culture/languages-legislation/protecting-aboriginal-languages>>.

³²¹ United Nations Global Compact, *A Business Reference Guide – United Nations Declaration on the Rights of Indigenous Peoples* (2013) <https://www.unglobalcompact.org/docs/issues_doc/human_rights/IndigenousPeoples/BusinessGuide.pdf>.

³²² Reconciliation Australia, *Reconciliation Action Plans* <<https://www.reconciliation.org.au/reconciliation-action-plans/>>.

³²³ Department of Home Affairs, *Australia's response to human trafficking* <<https://www.homeaffairs.gov.au/about/crime/human-trafficking/australias-response>>.

³²⁴ The Hon Alex Hawke MP, Assistant Minister for Home Affairs, *Media Release – New funding for organisations combating modern slavery*, (Media Release, 30 July 2018).

³²⁵ Ibid.

³²⁶ The final turnover amount will be set by regulation, but, in accordance with s 24(1)(b), this will not be less than \$50 million.

that the organisation's goods and services are not a product supply chains in which 'modern slavery' is taking place.³²⁷ The Act also established the role of an Anti-Slavery Commissioner responsible for identifying and providing assistance and support to victims of modern slavery, amongst other things (see further **3.1.4 – Reporting**, **3.1.5 – Public Finance / Procurement / Privatisation** and **3.4.4 – Protection**).

In November 2018, the Australian Parliament passed the *Modern Slavery Act 2018* (Cth), developed after a comprehensive Parliamentary Inquiry and further consultation by the federal Attorney-General's Department (subsequently the Department of Home Affairs from December 2017). The Act introduced a mandatory reporting requirement regarding modern slavery (including the worst forms of child labour) (see further **3.1.4 – Reporting** and **3.2.1 – Prohibition of child labour**).

Youth employment

The Australian Government established various programmes under the 'Youth Employment Strategy'³²⁸ and 'Youth Employment Package'³²⁹ to provide training and employment opportunities for young people. For example, under the 'Empowering YOUTH Initiatives', part of the Government's 'Youth Employment Strategy', organisations deliver employment initiatives across Australia over two years to young people aged 15 to 24 years of age,³³⁰ whereas the 'Transition to Work' scheme offers pre-employment support for young people aged 15-21 years.³³¹ Another initiative provides support to early school leavers between 15 to 21 years of age who are seeking a job, provided they are in receipt of Youth Allowance and do not hold a Year 12 or Certificate III level qualification³³² (see further **3.3 – Decent work for young people / parents / caregivers**). An initiative being delivered under the Third Action Plan of the National Framework for Protecting Australia's Children is trialling ways of improving support to young people with the stated aim of 'breaking the cycle of disadvantage' including to find and keep a job³³³.

Climate change

The current position of the Australian Government with regard to climate change was described by the federal Department of Environment and Energy in December 2017 as follows:³³⁴

The Australian Government is committed to addressing climate change while at the same time ensuring we maintain energy security and affordability and the competitiveness of our industries. The Government recognises that in reducing emissions and meeting our international commitments there are economic impacts to be balanced. Through effective policies, ambitious and responsible targets, and careful management, Australia is playing its role in global efforts to reduce emissions, while maintaining a strong economy and realising the benefits of the transition to a lower-emissions future.

Climate change is a global issue that requires international action. Australia is a relatively small contributor to global emissions, accounting for 1.3 per cent of the total. This compares to China (with 23.7 per cent), the United States (12.9 per cent) and India (6.6 per cent). Emissions per person and the emissions intensity of the economy are at their lowest levels in 28 years. These falls are a result of the Government's policies, as well as changes in the economy.

Australia has a track record of participating in global emissions reduction agreements and meeting and beating emissions reduction targets while maintaining economic and population growth.

Australia's target in the first commitment period of the Kyoto Protocol was to limit emissions to 108 per cent of 1990 levels over the period 2008–2012. This target was beaten by 128 million tonnes of carbon dioxide

³²⁷ The information to be included in modern slavery statements under the *Modern Slavery Act 2018* (NSW) will be settled by regulation (s 24(3)).

³²⁸ Australian Government, *Budget 2015 – Youth Employment Strategy* <http://www.budget.gov.au/2015-16/content/glossy/sml_bus/html/sml_bus-14.htm>.

³²⁹ Australian Government, *Budget 2016 – Youth Employment Package* <http://www.budget.gov.au/2016-17/content/glossies/jobs-growth/downloads/FS/Youth_Employment.pdf>.

³³⁰ Department of Jobs and Small Business, *Empowering YOUTH Initiatives* <<https://www.jobs.gov.au/empowering-youth-initiatives>>.

³³¹ Department of Jobs and Small Business, *Transition to Work* <<https://www.jobs.gov.au/transition-work>>.

³³² Department of Jobs and Small Business, *Engaging Early School Leavers* <<https://www.jobs.gov.au/engaging-early-school-leavers>>.

³³³ Department of Social Services, *Third three-year action plan 2015-2018, National Framework for Protecting Australia's Children 2009-2020* (2015) <<https://www.dss.gov.au/families-and-children/programmes-services/children/protecting-children-is-everyones-business-national-framework-for-protecting-australias-children-2009-2020-third-action-plan-2015-2018>>.

³³⁴ Department of the Environment and Energy, *Review of Climate Change Policies* (2017) <<http://www.environment.gov.au/climate-change/publications/final-report-review-of-climate-change-policies-2017>> 5.

equivalent (Mt CO₂-e).

Australia is currently on track to over achieve the 2020 target of reducing emissions by 5 per cent below 2000 levels by 294 Mt CO₂-e, including Australia's over achievement against the Kyoto Protocol first commitment period.

The Government has ratified the Paris Agreement. Our target is to reduce emissions by 26 to 28 per cent below 2005 levels by 2030. The target is considered responsible and among the strongest of the major economies on a per capita and GDP intensity basis. We have a record of meeting and beating our emissions reduction targets and are on track to meet our 2030 target.

However, there is considerable debate about whether Australia is on track to meet its 2030 reduction commitments, with the United Nations Environment Program reporting in October 2018 that:³³⁵

Under its Cancun pledge, Australia proposed 3 targets for 2020 with different conditions: 5 percent, 15 percent and 25 percent below emission levels in 2000. The goal of 5 percent currently stands as Australia's unconditional pledge. In accordance with the Kyoto Protocol, Australia uses a carbon budget approach that accounts for cumulative emissions between 2013 and 2020 in order to assess progress against its pledge. For the budget period, Australia is on track to overachieve its 2020 target by 166 MtCO₂ e without including carry-over from the Kyoto Protocol's 1st commitment period and by 294 MtCO₂e with carry-over (Department of the Environment and Energy, 2017b). Independent studies consider the year 2020 in isolation and find Australia's current policy trajectory close to achieving its target.

In its NDC [Nationally Determined Contribution], Australia announced a 26–28 percent reduction below 2005 levels of GHG emissions by 2030 (UNFCCC, 2016). There has been no improvement in Australia's climate policy since 2017 and emission levels for 2030 are projected to be well above the NDC target. The latest projection published by the government shows that emissions would remain at high levels rather than reducing in line with the 2030 target (Department of the Environment and Energy, 2017a; CAT, 2018c). The Emissions Reduction Fund, which aims to purchase emissions reductions at the lowest available cost through auctions, and its safeguard mechanism are the main existing policies.

Key features of Australia's climate change policies include:

- Emissions Reduction Fund – Described as the 'centrepiece of the Government's policies since 2014, the fund is a domestic carbon offset market (activates that reduce and avoid emissions).³³⁶
- National Energy Productivity Plan – with the aim of improving energy productivity by 40 per cent over the period 2015 to 2030.³³⁷
- Clean Energy Finance Corporation – through which the Government provides finance for businesses to upgrade their fleets.³³⁸
- Australian Renewable Energy Agency – which supports investment in 'clean energy'.³³⁹
- Climate Change Authority – an independent authority established by the *Climate Change Authority Act 2011* (Cth) to provide independent, expert advice on climate change policy.

Previously, the Australian Government has also sought to introduce a 'National Energy Guarantee' (NEG). The NEG was concerned with the price of energy for consumers in Australia, and was said to 'ensure Australians have affordable electricity and a reliable 21st century energy system, while helping to meet Australia's international commitment to reduce emissions'.³⁴⁰ However, after changing of Australia's Prime Minister from Malcolm

³³⁵ United Nations Environment Program, *Emissions Gap Report 2018* (2018)

<http://wedocs.unep.org/bitstream/handle/20.500.11822/26895/EGR2018_FullReport_EN.pdf?sequence=1&isAllowed=y>, 12. See also Nick Kilvert, 'Australia not on track to hit Paris emissions goals, as UN warns global efforts must increase', *ABC News* (28 November 2018) <<https://www.abc.net.au/news/science/2018-11-28/climate-un-environment-report-australia-not-on-track-paris/10554058>>.

³³⁶ Department of the Environment and Energy, n 334, 6.

³³⁷ *Ibid.*

³³⁸ *Ibid.*

³³⁹ *Ibid.*, 37.

³⁴⁰ *Ibid.*, 23.

Turnbull to Scott Morrison in August 2018, Mr Morrison announced that the NEG would no longer be pursued.³⁴¹

Climate change policy has been a very contentious issue in Australian politics in recent years, and priorities, initiatives and commitments have been highly variable. As the Australian Parliamentary Library has observed however, '[t]he inconsistent nature of Australian climate policy cannot be fully explained by looking at which political party was in government at the time. Both Labor and Liberal Governments have advanced (and sometimes regressed) on climate change.'³⁴² It has also summarised the changing nature of Australia's approach to climate change as follows:³⁴³

Climate change is a long-term, global problem. Long-term problems generally require stable but flexible policy implementation over time. However, Australia's commitment to climate action over the past three decades could be seen as inconsistent and lacking in direction. At times Australia has been an early adopter, establishing the world's first government agency dedicated to reducing greenhouse gas emissions; signing on to global climate treaties the same day they are created; establishing the world's first emissions trading scheme (ETS) (albeit at a state level); and pioneering an innovative land-based carbon offset scheme. But at other times, and for many reasons, Australia has erratically altered course: disbanding the climate change government agency, creating a new one then disbanding that; refusing to ratify global treaties until the dying minute; and being the first nation in the world to undo legislated action on climate change, with the repeal of the Carbon Price Mechanism.

As noted above at **Limitations**, there is growing recognition of the unique risks to, and impacts on, children presented by climate change – both in Australia and internationally.³⁴⁴ This is an issue that many children and young people in Australia have expressed concern about, with thousands of students protesting a lack of action to address climate change in Australia in 2018 and 2019.³⁴⁵ Aboriginal and Torres Strait Islander young people are also taking action to seek action on climate change and measures to create a more sustainable world.³⁴⁶ Further research and analysis on this issue from a human rights perspective is undoubtedly required in order to comprehensively examine the Australian Government's response to climate change from the perspective of its obligations under the UN Guiding Principles on Business and Human Rights.

Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

In December 2017, the Australian Government announced the establishment of the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*.³⁴⁷ Although the terms of reference do not relate specifically to human rights, nor to the rights of children, they do reference community standards and the rights of consumers.³⁴⁸ In its Interim Report, the Royal Commission detailed practices attributed to '...greed – the pursuit of short term profit at the expense of basic standards of honesty.'³⁴⁹ These included

³⁴¹ 'Scott Morrison says national energy guarantee 'is dead'', *The Guardian* (8 September 2018) <<https://www.theguardian.com/australia-news/2018/sep/08/scott-morrison-says-national-energy-guarantee-is-dead>>.

³⁴² Anita Talberg, Simeon Hui and Kate Loynes Science, Technology, Environment and Resources Section, Parliamentary Library, *Australian climate change policy to 2015: a chronology* (Updated 5 May 2016)

<https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1516/Climate2015>.

³⁴³ Ibid.

³⁴⁴ See, for example, UNICEF, n 39.

³⁴⁵ 'Students strike for climate change protests, defying calls to stay in school' *ABC News* (1 December 2018)

<<https://www.abc.net.au/news/2018-11-30/australian-students-climate-change-protest-scott-morrison/10571168>>; 'Australian students defy PM with climate protests' *SBS News* (1 December 2018) <<https://www.sbs.com.au/news/australian-students-defy-pm-with-climate-protests>>; 'Climate change strikes across Australia see student protesters defy calls to stay in school' *ABC News* (15 March 2019)

<<https://www.abc.net.au/news/2019-03-15/students-walk-out-of-class-to-protest-climate-change/10901978>> and 'Student climate strikes around the world – in pictures', *The Guardian* (25 May 2019) <<https://www.theguardian.com/environment/gallery/2019/may/24/student-climate-strikes-around-the-world>>.

³⁴⁶ See, for example, Seed Indigenous Youth Climate Network and the Australian Youth Climate Coalition, *Seed* <<https://www.seedmob.org.au/>>.

³⁴⁷ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (2019)

<<https://financialservices.royalcommission.gov.au/Pages/default.aspx>>.

³⁴⁸ Letters Patent, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, signed 14 December 2017 <<https://financialservices.royalcommission.gov.au/Pages/Terms-of-reference.aspx>>.

³⁴⁹ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Interim Report – Executive Summary* (28 September 2018) <<https://financialservices.royalcommission.gov.au/Documents/interim-report/interim-report-exec-summary.pdf>>.

charging deceased customers for no services provided. The Royal Commission presented its Final Report on 1 February 2019.³⁵⁰

2.3 Company Initiatives

What high-level business-led projects and programs aim to contribute to the promotion and protection of children's rights (if any)?

There are numerous company-based initiatives in Australia that seek to promote and support human rights, including the rights of children. Company-led initiatives that have attracted particular recognition for their good work are recognised annually in the 'Business Award' category of the Australian Human Rights Commission's Human Rights Awards.³⁵¹

2.4 Engagement with Regional and International Initiatives

With which (if any) regional and international initiatives on business and children's rights has the government engaged (e.g. UNICEF, Save the Children and UNGC Children's Rights and Business Principles, ILO Decent Work Initiative, UNGC Principles on child labour, UNICEF-ITU Child Online Protection Guidelines, Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism, International Code of Marketing Breast-milk Substitutes)?

See above at **1 – Legal and Policy Framework** and **2 – Initiatives and responses on Children's Rights**.

In July 2014, the Government indicated that did not have any government policies implementing the UN Guiding Principles on Business and Human Rights and had not actively engaged with initiatives on human rights in Australia more generally.³⁵² Although it remains the case that the Australian Government has not developed a National Action Plan on Business and Human Rights to implement the UN Guiding Principles on Business and Human Rights, the Australian Government has engaged with a number of regional and international initiatives which touch upon business and children's rights issues, including:

- Participated in the IV Global Conference on the Sustained Eradication of Child Labour in Buenos Aires in November 2017³⁵³ and agreed on the Buenos Aires Declaration on Child Labour, Forced Labour and Youth Employment.³⁵⁴ The Declaration sets out principles and commitments to take action in order to end child labour in all its forms by 2025 and forced labour by 2030. At the Conference the Australian Government also pledged to progress ratification of the Protocol of 2014 to the Forced Labour Convention and committed to establish a Modern Slavery in Supply Chains Reporting Requirement to address modern slavery in big business operations and supply chains³⁵⁵;
- In its role as Co-Chair of the Bali Process on People Smuggling and Trafficking in Persons and Related Transnational Crime alongside Indonesia, Australia co-hosted the Bali Process Government and Business Forum in Perth in August 2017 which focused on the role of the private sector to combat slavery and human trafficking;
- Co-sponsoring the resolution endorsing the UN Guiding Principles on Business and Human Rights at the Human Rights Council session in Geneva in 2011, and co-sponsoring other

³⁵⁰ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (1 February 2019) <<https://financialservices.royalcommission.gov.au/Pages/reports.aspx>>.

³⁵¹ See, for example, Australian Human Rights Commission, *2018 Human Rights Awards Finalists – Business Award* <<https://hrawards.humanrights.gov.au/winners-and-finalists-2018-human-rights-awards>> and Australian Human Rights Commission, *2017 Human Rights Awards Finalists – Business Award* <<https://hrawards.humanrights.gov.au/winners-and-finalists-2017-human-rights-awards>>.

³⁵² Office of the United Nations High Commissioner for Human Rights, *Questionnaire for States: National Action Plan on Business and Human Rights - Australian Response* (July 2014) <<http://www.ohchr.org/Documents/Issues/Business/ImplementationGP/Australia.doc>>.

³⁵³ Department of Jobs and Small Business, *International Labour Issues - IV Global Conference on the Sustained Eradication of Child Labour* <<https://www.employment.gov.au/international-labour-issues>>.

³⁵⁴ IV Global Conference on the Sustained Eradication of Child Labour, *Buenos Aires Declaration on Child Labour, Forced Labour and Youth Employment* (16 November 2017) <http://www.childlabour2017.org/sites/default/files/declaracion_bs_as-eng.pdf>.

³⁵⁵ Department of Jobs and Small Business, *Australia's pledge to progress ratification of the Forced Labour Protocol* (27 November 2017) <<https://docs.jobs.gov.au/documents/australias-pledge-progress-ratification-forced-labour-protocol>>.

resolutions of the Human Rights Council on business and human rights issues (including access to remedy³⁵⁶, and on human rights and transnational corporations and other business enterprises³⁵⁷);

- Participating in the UN Forums on Business and Human Rights in December 2012, December 2013, December 2014, November 2015, November 2016 (at which it hosted a workshop on ‘Modern slavery’³⁵⁸), November 2017 and November 2018;
- Endorsing the OECD Guidelines for Multinational Enterprises;
- Becoming a member of the Voluntary Principles Initiative on 27 February 2013; and
- Supporting the UN Human Rights Working Group on Business and Human Rights.³⁵⁹

³⁵⁶ Human Rights Council, Resolution adopted by the Human Rights Council on 6 July 2018 - 38/13. *Business and human rights: improving accountability and access to remedy*, UN Doc. A/HRC/RES/38/13, 38th sess (18 July 2018) and Human Rights Council, Resolution adopted by the Human Rights Council on 30 June 2016 - 32/10. *Business and human rights: improving accountability and access to remedy*, UN Doc. A/HRC/RES/32/10, 32nd sess (15 July 2016).

³⁵⁷ Human Rights Council, Resolution adopted by the Human Rights Council - 26/22 *Human rights and transnational corporations and other business enterprises*, UN Doc A/HRC/RES/26/22, 26th sess (15 July 2014).

³⁵⁸ Office of the High Commissioner for Human Rights, *2016 United Nations Forum on Business and Human Rights – Geneva 14-16 November – Programme* <<https://www.ohchr.org/Documents/Issues/Business/ForumSession5/PoW.pdf>>.

³⁵⁹ Office of the United Nations High Commissioner for Human Rights, n 352.

| 3. IMPLEMENTATION AREAS | |
|--|---|
| 3.1 General measures | |
| 3.1.1 Policy Commitment | Has an overall policy commitment been made to implementing children's rights with respect to the business sector by, for example, endorsing CRC General Comment No. 16 and/or the Children's Rights and Business Principles? |
| <p>The Australian Government has not indicated a specific policy commitment to protect and promote children's rights with respect to the business sector, for example, through explicitly endorsing the Committee on the Rights of the Child General Comment No. 16 and/or the Children's Rights and Business Principles.</p> <p>However, several federal government departments have published general information on businesses and children's rights issues. For example, the websites of the Attorney-General's Department and the Department of Foreign Affairs and Trade state that the Australian Government believes that 'business and human rights go hand in hand' and that it encourages 'businesses to apply the United Nations Guiding Principles on Business and Human Rights'.³⁶⁰ Additionally, the Government-run business portal on business.gov.au provides information for businesses on ways in which their operations can have an impact on children's rights, and provides resources to encourage good practices, including links to the <i>Children's Rights and Business Principles</i>.³⁶¹</p> | |
| 3.1.2 Due Diligence | To what extent and in what circumstances are businesses required or expected to undertake child rights due diligence or to consider children's rights as part of wider human rights due diligence? Could such measures be required under the duties imposed on company directors generally? |
| <p>Human rights due diligence/child rights due diligence</p> <p>In accordance with the UNGPs, a child rights due diligence broadly is a process of identifying and assessing actual or potential risks of adverse human rights impacts upon children in company operations and supply chains (not just in the first tier of relationships); prioritising responsive action to prevent or mitigate harm by reference to the scale and severity of harm; and acting on the findings so that responses are integrated management systems and practices.</p> <p>There is currently no Australian law that expressly requires businesses to undertake human rights due diligence, or a child rights due diligence. With regard to certain human rights abuses such as slavery and trafficking in particular, the Law Council of Australia observed in 2017 that: 'Australian businesses have no domestic legal obligation to conduct due diligence to identify and eliminate modern slavery risks in their supply chains.'³⁶²</p> <p>In August 2017, the Multi-Stakeholder Advisory Group on the Implementation of the UN Guiding Principles on Business and Human Rights recommended that the Australian Government:³⁶³</p> <p style="padding-left: 40px;">[c]onsider the development of legislation mandating human rights due diligence, considering the approaches in, for example, the Illegal Logging Prohibition Act and Regulations (2013) which prioritises at-risk sectors, or the French Corporate Duty of Vigilance Law 2017, which requires large French companies to identify and prevent adverse human rights (and environmental) impacts.</p> <p>Members of civil society have also encouraged the Australian Government to consider human rights due diligence requirements.³⁶⁴ In its December 2017 final report on establishing a modern slavery act in Australia,</p> | |

³⁶⁰ Attorney-General's Department, *Business and Human Rights*

<<https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Business-and-Human-Rights.aspx>> and Department of Foreign Affairs and Trade, *Business and Human Rights* <<http://dfat.gov.au/international-relations/themes/human-rights/business/Pages/default.aspx>>.

³⁶¹ Australian Government, n 107.

³⁶² Law Council of Australia, *Law Council Submission on Establishing a Modern Slavery Act in Australia* (April 2017)

<https://www.ag.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery/Submissions> Submission 60, [8].

³⁶³ Multi-Stakeholder Advisory Group on the Implementation of the UN Guiding Principles on Business and Human Rights, n 60, 3.

the Joint Standing Committee on Foreign Affairs, Defence and Trade also recommended ‘...that the operation of the prescribed reporting requirements, including possible escalation to prescribed full or stepped due diligence reporting, be considered as part of a legislated review after three years undertaken by the Independent Anti-Slavery Commissioner.’³⁶⁵

More recently, Shift, a US-based NGO comprised of many members of the team that worked with Professor John Ruggie who developed the UNGPs, published a statement on *Fulfilling the State Duty to Protect: A Statement on the Role of Mandatory Measures in a “Smart Mix”*.³⁶⁶ Observing that realising the UNGPs requires a mix of four aspects of measures (national mandatory, international mandatory, national voluntary and international voluntary), the statement outlines Shift’s perspective on the role of mandatory human rights due diligence. Observing that mandatory human rights due diligence is in line with the UNGPs, the statement explained:³⁶⁷

Measures that involve Mandatory Human Rights Due Diligence are in line with the UNGPs, and there are strong reasons for states to consider them.

While the UNGPs do not demand that states adopt legislation requiring companies to carry out **mandatory human rights due diligence (HRDD)**, clearly such legislation is entirely in line with the UNGPs.

Some elements of HRDD are already embedded in national laws, such as in health and safety regulations, environmental legislation, privacy laws or in some corporate reporting regimes. However, there are often strong reasons for states to also consider more comprehensive mandatory HRDD legislation.

Practical reasons to consider mandatory human rights due diligence can include:

- The powerful effect it can have in **driving top-level attention** to human rights in companies, as well as **engaging functions** across the business;
- **Leveling the playing field** across companies and sectors, including through engagement with business partners in a company’s **value chain**;
- Obliging companies to consider the **interests of stakeholders** other than shareholders;
- Incentivizing **collaborative approaches** to address systemic human rights risks; and
- **Enabling** (where civil liability is included) a clear cause of action for individuals who are harmed to pursue **remedy**.

To be effective, such legislation should take account of critical aspects of the responsibility to respect. These include that:

- It should **not undermine the scope** of the responsibility to respect, which extends throughout the value chain, even if liability is attached to a narrower set of relationships;
- HRDD is a standard of **conduct not result**, meaning that mandatory measures should allow consideration of the quality of a company’s efforts to respect human rights; and
- Meeting the responsibility to respect in practice will always involve **going beyond compliance** alone as good practice continues to evolve.

International comparisons: The French Corporate Duty of Vigilance Law and the approach to human rights due diligence outlined in the German National Action Plan on Business and Human Rights

French Corporate Duty of Vigilance Law

In 2017, France adopted a law which introduced for the first time a corporate duty of vigilance regarding severe violations of human rights and fundamental freedoms. The law applies to large limited companies that are headquartered in France that employ at least 5,000 employees worldwide (including subsidiaries), and to

³⁶⁴ See Implementing the UN Guiding Principles on Business and Human Rights in Australia – Joint Civil Society Statement, n 61; UNICEF Australia, *Submission to the Inquiry into establishing a modern slavery act in Australia* (2017) <<https://www.unicef.org.au/Upload/UNICEF/Media/Documents/Submissions/UNICEF-Australia-Submission-to-the-Inquiry-into-establishing-a-modern-slavery-act.pdf>>; Human Rights Law Centre, *Submission: Parliamentary Inquiry on Establishing a Modern Slavery Act* (2017) 20-21; and Oxfam Australia, *Eliminating Modern Slavery - Submission to the Inquiry into Establishing a Modern Slavery Act in Australia* (2017) 7-8.

³⁶⁵ Hidden in Plain Sight: An inquiry into establishing a Modern Slavery Act in Australia, n 100, [5.95].

³⁶⁶ Shift, *Fulfilling the State Duty to Protect: A Statement on the Role of Mandatory Measures in a “Smart Mix”* (21 February 2019) <<https://www.shiftproject.org/news/fulfilling-the-state-duty-to-protect-mandatory-measures-smart-mix/>>.

³⁶⁷ Ibid.

companies headquartered outside France, with French subsidiaries, with at least 10,000 employees globally (including subsidiaries). It requires companies to, in consultation with stakeholders, implement a vigilance plan to identify and prevent severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks resulting from the company's operations, and also the operations of subsidiaries, as well as subcontractors and suppliers where the company has an established commercial relationship. The vigilance plan must be published, reported against annually and include:³⁶⁸

- 1) A mapping of risks in which risks are identified, analysed and ranked;
- 2) A procedure to regularly assess subsidiaries, subcontractors and suppliers;
- 3) Appropriate actions to mitigate risks or prevent serious violations;
- 4) An alert mechanism for reporting of risks; and
- 5) A monitoring system.

The law initially included the imposition of civil penalties for failure to comply with the requirement to have a vigilance plan, however, this was struck down by the constitutional court. However, commentators have observed that '...companies could be subject to liability if individuals harmed by a company's failure to establish or implement a plan seek damages for corporate negligence'.³⁶⁹

The law has been welcomed development, with the European Coalition for Corporate Justice observing:³⁷⁰

The French corporate duty of vigilance law establishes a legally binding obligation for parent companies to identify and prevent adverse human rights and environmental impacts resulting from their own activities, from activities of companies they control, and from activities of their subcontractors and suppliers, with whom they have an established commercial relationship.

The companies covered by the law – it only applies to the largest companies established in France – will assess and address the risks of serious harms to people and the planet under annual, public vigilance plans. Liability would apply when companies default on their obligations, including the absence of a plan or faults in its implementation.

With this new law, interested parties – including affected people and communities – are empowered to hold companies accountable. They can require judicial authorities to order a company to establish, publish and implement a vigilance plan, or account for its absence. In addition to this order, the judge can impose a fine up to 10 million euros. Interested parties may also engage the company's liability through civil action and ask for compensation if the violation of the legal obligation has caused damages. In addition to the compensation, the judge can impose a fine of up to 30 million euros.

The law is an important step forward in a global context where achieving corporate accountability is hindered by the complexity, scale and reach of corporate structures; the absence of a level playing field; the legal and practical barriers faced by victims to access remedies; or the lack of enforcement of existing standards especially concerning transnational corporations with a myriad of subsidiaries and suppliers.

The duty of vigilance law will ensure better prevention of adverse impacts by companies, and it will also help victims of corporate abuse overcome some of the hurdles they face in achieving justice. The law requires companies to identify key risks of severe impacts, either linked to its activities or to those of business partners and take actions to prevent them. This makes it easier for victims to argue that a company could have influenced the production of harmful impacts, and that it should have taken appropriate measures to prevent them.

The law mandates companies to practice human rights due diligence, seen by the UN Guiding Principles on Business and Human Rights (UNGPs) as the main operational principle to put companies' responsibility to respect

³⁶⁸ *Loi n° 945 du 21 février 2017 PROPOSITION DE LOI relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, (France), 21 February 2017. English translation accessed from European Coalition for Corporate Justice, *French Duty of Vigilance Law* (14 December 2016), Business and Human Rights Resource Centre <<https://www.business-humanrights.org/en/french-duty-of-vigilance-bill-english-translation>>.

³⁶⁹ Sarah A. Altschuller and Amy K. Lehr, 'The French Duty of Vigilance Law: What you need to know' *Corporate Social Responsibility and the Law*, 3 August 2017 <<http://www.csrandthelaw.com/2017/08/03/the-french-duty-of-vigilance-law-what-you-need-to-know/>>.

³⁷⁰ European Coalition for Corporate Justice, *French Corporate Duty of Vigilance Law – Frequently Asked Questions*, 2 <<https://www.business-humanrights.org/sites/default/files/documents/French%20Corporate%20Duty%20of%20Vigilance%20Law%20FAQ.pdf>>.

human rights into practice.

Efficient human rights due diligence plans are key to more responsible business practices. They allow companies to identify and assess their existing and potential adverse impacts, to prevent or mitigate these impacts, and to track and report on the outcomes of their actions in a transparent way.

Making human rights due diligence mandatory for businesses could help gradually shift focus towards prioritising risks to people rather than risk to the company. While it could equally help companies get ahead of potential risks – which have legal, financial and reputational implications – and capture new opportunities.

Germany's National Action Plan on Business and Human Rights – Consideration of mandatory human rights due diligence

The German Government introduced its National Action Plan on Business and Human Rights in late 2016. In it, the Government outlined a novel approach to the issue of mandatory due diligence, signalling to the business community that it will consider introducing a mandatory human rights due diligence in the event that less than 50% of enterprises with more than 500 employees voluntarily adopt human rights due diligence by 2020. After setting out its expectations of the substance of a human rights due diligence, the NAP explains:³⁷¹

The Federal Government expects all enterprises to introduce the processes described above in a manner commensurate with their size, the sector in which they operate and their position in supply and value chains. Their compliance will be reviewed annually from 2018. In the absence of adequate compliance, the Federal Government will consider further action, which may culminate in legislative measures and in a widening of the circle of enterprises to be reviewed (see chapter VI below).

The National Corporate Social Responsibility (CSR) Forum of the Federal Government, comprising representatives of the political and business communities, trade unions, civil society and academic professions will draw up an intersectoral “CSR consensus” paper on corporate responsibility in value and supply chains and present it to the Federal Government as a recommendation. One element of that paper, among other things, is to reinforce the expectation of a responsible management of due diligence in the realm of human rights as described in the present chapter. Further information is made publicly accessible online at www.csr-in-deutschland.de. The possibility to join the “CSR consensus” is open to all enterprises that operate in Germany. The list of companies that have joined will be updated continuously and made publicly available at www.csr-in-deutschland.de.

The aim is that at least 50 % of all enterprises based in Germany with more than 500 employees will have incorporated the elements of human rights due diligence described in this chapter into their corporate processes by 2020. Enterprises which have not adopted particular procedures and measures should be able to explain why they have not done so (the ‘comply or explain’ mechanism). If fewer than 50 % of the enterprises defined above have incorporated the elements of human rights due diligence described in chapter III into their corporate processes by 2020 and the target is thus missed, the Federal Government will consider further action, which may culminate in legislative measures. In this context, the Federal Government will also examine, in consultation with the National Regulatory Control Council, the necessity of the corporate compliance costs arising from this plan and will consider a widening of the number of enterprises to be reviewed, in order to potentially include enterprises with fewer employees in future assessments and subsequent additional measures.

Recommendation 2 (iii)

Consider introducing mandatory human rights due diligence laws

Consider introducing legislation that mandates human rights due diligence as recommended by the Multi-Stakeholder Advisory Group on the Implementation of the UN Guiding Principles on Business and Human Rights.

³⁷¹ The Federal Government of Germany, *National Action Plan – Implementation of the UN Guiding Principles on Business and Human Rights 2016-2020* (September 2017) <<https://mk0globalnapshvllfq4.kinstacdn.com/wp-content/uploads/2018/04/germany-national-action-plan-business-and-human-rights.pdf>> 10.

Directors' duties

In the absence of an obligation in law for companies to conduct a mandatory human rights due diligence in Australia, it is particularly relevant to consider the scope of directors' duties and whether they may be breached in the event that a company fails to conduct a human rights due diligence, even in the absence of a legal requirement to do so (for example, if such a failure causes reputational harm, damages brand value and, with it, potentially stock price and shareholder value).

In Australia, directors are subject to duties at common law and statute under the *Corporations Act 2001* (Cth). These duties require directors to exercise reasonable care and diligence and to act in good faith in the best interests of the company.³⁷² This is understood to generally mean the financial benefit of shareholders. As such, directors are not expressly required to consider the impact, within or outside Australia, of a company's operations on non-shareholders or the impact of the company's subsidiaries, suppliers or business partners on non-shareholders.³⁷³

It could be argued though that there could exist a requirement on directors of Australian companies to consider human rights more generally as part of a company's due diligence as a result of this duty on company directors to act with reasonable care and diligence. Specifically, Australian parliamentary reports suggest that it can be in the best interests of a company for directors to consider broader social and environmental considerations, as otherwise shareholders' financial interests will be jeopardised.³⁷⁴ Referring to this as 'enlightened self-interest', the Parliamentary Joint Committee on Corporations and Financial Services explained in 2006:³⁷⁵

4.32 The enlightened self-interest interpretation of directors' duties acknowledges that investments in corporate responsibility and corporate philanthropy can contribute to the long term viability of a company even where they do not generate immediate profit. Under this interpretation directors may consider and act upon the legitimate interests of stakeholders to the extent that these interests are relevant to the corporation. Chapter 3 of this report included discussion of the factors that drive corporate responsibility, and some of these factors in particular clearly show how corporate responsibility can be in the interests of companies (and therefore well within the bounds of directors' duties). These driving factors demonstrate how forward thinking directors, motivated by an enlightened approach to the company's self-interest, can undertake activities which contribute to social wellbeing and environmental protection, and which are clearly in the best interests of the company from a commercial perspective. The key driving factors to note are:

4.33 Community license to operate: The concept of a 'community' or 'social' 'license to operate' by companies was raised in several submissions. By effectively engaging with the communities in which they operate, companies gain tacit permission to continue in operation.

4.34 Reputational factors: Enlightened self-interest takes into account reputational factors well beyond mere community license to operate. Appropriate corporate responsibility can lead to positive corporate reputations which can in themselves have value for the company (particularly in terms of intangibles such as goodwill).

4.35 Avoidance of regulation: Corporate responsibility serves enlightened self-interest because by taking voluntary action to improve corporate performance, corporations may forestall regulatory measures to control their conduct.

4.36 Attraction and retention of staff: A number of submitters and witnesses stated that an enlightened approach to corporate responsibility assisted them in their efforts to recruit and retain high quality staff, particularly in the currently-tight skilled labour market.

³⁷² *Corporations Act 2001* (Cth) ss 180-3.

³⁷³ Allens Arthur Robinson, *Corporate Law Project: Mandate of the Special Representative of the Secretary General (SRSG) on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, (September 2009) <<http://business-humanrights.org/sites/default/files/media/documents/ruggie/corp-law-tools-australia-allens-arthur-robinson-for-ruggie-sep-2009.pdf>> [11.1]. Although as noted, DFAT's Child Protection Policy requires DFAT funded partners to develop a child protection policy and risk mitigation strategy, including reporting procedures, and recruitment, screening, and employment practices (see further **2.2 – National Priorities 1. The safety and protection of children - Internationally**).

³⁷⁴ See Parliamentary Joint Committee on Corporations and Financial Services Report, *Corporate responsibility: Managing risk and creating value* (June 2006)

<https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2004-07/corporate_responsibility/report/index>; Corporations and Markets Advisory Committee Report, *The social responsibility of corporations* (December 2006) <[http://www.camac.gov.au/camac/camac.nsf/byheadline/pdfinal+reports+2006/\\$file/csr_report.pdf](http://www.camac.gov.au/camac/camac.nsf/byheadline/pdfinal+reports+2006/$file/csr_report.pdf)>. Also see Allens Arthur Robinson, n 373, [11.2].

³⁷⁵ Parliamentary Joint Committee on Corporations and Financial Services Report, n 374, [4.32]-[4.37].

4.37 Attraction of investment from ethical investment funds: The growth of ethical investment funds has been a key feature of the corporate responsibility environment in recent years, both in Australia and overseas. While these funds currently administer a relatively small proportion of the market, evidence before the committee was that their size is growing.

The Committee went on to conclude: '[t]he committee considers that the most appropriate perspective for directors to take is that of enlightened self-interest. Corporations and their directors should act in a socially and environmentally responsible manner at least in part because such conduct is likely to lead to the long term growth of their enterprise.'³⁷⁶

It has therefore been argued that the duty to exercise reasonable care and diligence could be breached if a director failed to prevent a legal risk associated with human rights concerns when that director had, or should have had, knowledge of that risk.³⁷⁷ Similarly, if a director failed to prevent reputational damage to a company by failing to address a human rights concern, it has been suggested that this could constitute a breach of the duty to act in good faith and in the best interests of the company.³⁷⁸ Professor Paul Redmond has described the position as follows (references omitted):³⁷⁹

[a]n 'unconfirmed regulatory consensus' exists in the Australian legal and regulatory community on the tolerable regard that directors may extend to stakeholder interests. This consensus rests on a very modest doctrinal foundation, little of recent origin; it is, however, a widely and confidently shared professional and regulatory opinion. The consensus is that directors may have regard for non-shareholder stakeholder interests within some uncertain limits, but not independently of consequential corporate benefit. This consensus is 'unconfirmed' since it does not rest on explicit legislative direction or authoritative judicial decision: these questions have simply not arisen directly in a modern case coming before an Australian court for decision. The case law on the directors' duty to act bona fide for the benefit of the company as a whole has been almost entirely concerned with the exercise of power by directors for corporate control manipulation or other self-interested motives or purposes. The scope of directors' discretion to consider and act by reference to social expectations or a stakeholder's interest, without personal benefit, has not been specifically addressed.

Whilst the position is not settled, it is possible that these principles could be extended to children's rights more specifically. The Multi-Stakeholder Advisory Group on the Implementation of the UN Guiding Principles on Business and Human Rights recommended that the Australian Government: ³⁸⁰

[r]eview Australian corporations law to clarify whether the duty to act in the best interests of the corporation contained in s.181(1) of the Corporations Act permits directors to give effect to business enterprises' responsibility to respect human rights if the company does not derive benefit from expenditure to meet this responsibility, that is, if the expenditure is profit-sacrificing. A safe harbour or other protection should be provided to directors and other corporate officers, for example by extending the protection of s.180(2) to s.181(1).

3.1.3 Impact Assessment

As a matter of law, policy, or practice, are officials and/or lawmakers required, expected, or encouraged to conduct child rights impact assessments or otherwise consider children's rights when adopting laws, drafting policies, issuing decrees or orders, and/or making administrative or financial decisions that relate to the business sector?

Commonwealth Parliament

In the federal context, the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) requires that all bills introduced to Federal Parliament to include a Statement of Compatibility with Human Rights (**Statement of Compatibility**) and be examined by the Parliamentary Joint Committee on Human Rights (**PJCHR**) for compatibility with internationally recognised human rights.³⁸¹ Human rights are defined under the Act to include rights under the

³⁷⁶ Ibid, [4.39].

³⁷⁷ *Corporations Act 2001* (Cth) ss 180-3; also Allens Arthur Robinson, n 373, [10.1] – [10.2].

³⁷⁸ Allens Arthur Robinson, n 373, [10.2].

³⁷⁹ Paul Redmond, 'Directors' Duties and Corporate Social Responsiveness' *UNSW Law Journal*, Vol 35(1) (2012) 317-340, 324.

³⁸⁰ Multi-Stakeholder Advisory Group on the Implementation of the UN Guiding Principles on Business and Human Rights, n 60, 4.

³⁸¹ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ss 7-9.

Children's Convention.³⁸² Where the PJCHR reports that a bill limits any human right, it may seek additional and further information about the Bill's compatibility with human rights. Where the information is not provided or the information provided is inadequate, the PJCHR will conclude its assessment based on its original analysis. Reports are tabled in both Houses of Parliament and can be found on the Committee Reports website.³⁸³

Failure to prepare a Statement of Compatibility for a bill that subsequently becomes an act however does not affect the validity, operation or enforcement of the act or any other provisions of the law of the Commonwealth.³⁸⁴

State and Territory Parliaments

Each State and Territory in Australia has its own provisions and policy regarding child rights/human rights impact assessments. Some of these policies and requirements of each jurisdiction are set out below.

Australian Capital Territory

Under the *Human Rights Act 2004* (ACT), each bill presented by a Minister to the ACT Legislative Assembly must contain a compatibility statement prepared by the Attorney-General outlining whether, in the Attorney-General's opinion, the bill is inconsistent with human rights and, if not consistent, how it is not consistent.³⁸⁵ Additionally, the relevant standing committee must also report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly.³⁸⁶ However, failure to comply with these requirements does not affect the validity, operation or enforcement of any Territory law.³⁸⁷

The ACT has also adopted a mandatory 'Triple Bottom Line' (TBL) assessment framework for policy development and decision making of certain policies and TBL summaries are to be attached to relevant Cabinet submissions.³⁸⁸ Impacts on child rights are considered in the wider context of social justice and rights issues.³⁸⁹ The ACT Children and Young People Commissioner has also issued guidelines and templates on 'Child Impact Assessments' for use within the TBL Assessment framework.³⁹⁰ Child Impact Assessments involve assessing proposed law, policy and decisions to determine likely impact on children and young people.

The ACT Government is also required to produce 'Regulatory Impact Statements' (RIS) which must include a general impact assessment on who is affected by a policy and any quantified costs and benefits that would be experienced by affected parties.³⁹¹ This is a general impact assessment and does not require specific attention to children's rights unless children are identified as a relevant stakeholder.

New South Wales

In New South Wales, all new and amending regulatory proposals must demonstrate that the 'Better Regulation Principles' (BRP) have been applied.³⁹² The BRPs require, among other things, consideration of the impacts of government action including the 'social impacts'.³⁹³ 'Social impacts' under the BRP is defined to include 'protecting human rights',³⁹⁴ although there is no reference to children's rights specifically.

³⁸² *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 3.

³⁸³ Australian Human Rights Commission, n 168, 41.

³⁸⁴ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 8(5).

³⁸⁵ *Human Rights Act 2004* (ACT) s 37.

³⁸⁶ *Human Rights Act 2004* (ACT) s 38.

³⁸⁷ *Human Rights Act 2004* (ACT) s 39.

³⁸⁸ ACT Government, *ACT Triple Bottom Line Assessment for the ACT Government: Framework and Templates* (July 2012)

<http://www.cmd.act.gov.au/__data/assets/pdf_file/0020/331373/TBL_Assessment_Framework.pdf>, adopted under ACT Government, *People, Places, Prosperity: The ACT's Sustainability Policy* (Canberra, 2009)

<http://www.cmd.act.gov.au/__data/assets/pdf_file/0003/119730/people_place_prosperity.pdf> 3.

³⁸⁹ ACT Government, *ACT Triple Bottom Line Assessment for the ACT Government: Framework and Templates* (July 2012)

<http://www.cmd.act.gov.au/__data/assets/pdf_file/0020/331373/TBL_Assessment_Framework.pdf> 3.

³⁹⁰ ACT Human Rights Commission, *Child Impact Assessments* <<http://hrc.act.gov.au/childrenyoungpeople/child-impact-assessments/>>.

³⁹¹ ACT Department of Treasury, *Best Practice Guide for Preparing Regulatory Impact Statements* (December 2003)

<http://www.treasury.act.gov.au/documents/regulatory_impact_statement_guide.pdf> 9.

³⁹² NSW Government, *Guide to Better Regulation* (2009)

<http://www.dpc.nsw.gov.au/__data/assets/pdf_file/0009/16848/01_Better_Regulation_eGuide_October_2009.pdf>.

³⁹³ *Ibid.*

³⁹⁴ *Ibid.*

A 'Better Regulation Statement' (**BRS**) (or a Regulatory impact Statement in lieu of a BRS) must be prepared and approved by the Minister for Regulatory Reform for significant regulatory proposals.³⁹⁵ These statements must demonstrate that the BRPs have been met. Accordingly, they involve an identification and analysis of impacts of the proposed regulation based on quantitative and qualitative analysis and must be published on a relevant agency's website after a bill has been introduced into Parliament.³⁹⁶ There is no specific requirement for a child rights impact assessment but such an analysis could fall within an assessment of the impact on human rights generally.

Northern Territory

The Northern Territory has adopted a 'Regulation-Making Framework' (RMF) which requires a Preliminary Regulation Impact Statement (PRIS) and, where impacts are deemed material, a Regulation Impact Statement must be prepared by the agency. A Regulation Impact Committee is responsible for independently assessing and certifying the PRIS and RIS, and the Committee is comprised of officers from the Department of Treasury, Department of the Chief Minister, Department of the Attorney-General and Justice, and the Department of Trade, Business and Innovation.³⁹⁷

This process is intended to identify the impacts that proposed regulation would have on competition, business and the community. The framework states that its aim is '[t]o reduce unnecessary impacts on business and the community of inefficient regulation, including excessive business red tape, unwarranted compliance burdens and restrictions on competition'.³⁹⁸ In terms of community and social impacts, these are described as 'those that generally impact on the wellbeing of individuals or groups, such as increased public safety'.³⁹⁹

The RMF provides guidance on identifying affected parties, stating for example that:⁴⁰⁰

- groups with different age, language, physical, cultural, gender, family or income and wealth characteristics; [and]
- within the consumer category, groups with different levels of information and abilities to process information.

It also sets out the principles of best practice for consultation with affected parties, including that the consultation should be accessible through means appropriate to those groups.⁴⁰¹

On its face, such guidance would serve to help assessing officers identify when children might be impacted, how those impacts might be different to others, and also devise a consultation process that should be inclusive of children and young people when appropriate.

Queensland

Government agencies in Queensland including statutory authorities are required to develop regulation under the 'Regulatory Impact Assessment' (**RIA**) system.⁴⁰² This requires consideration of a proposal's potential economic (including competition and complaints) impacts, social impacts and environmental impacts.⁴⁰³ Examples of social impacts include '[r]estricts basic community services and/or access to these services' and '[c]onstrains fundamental rights or freedoms of individuals'.⁴⁰⁴ For proposals identified to have potentially significant adverse impacts on some stakeholders, a Regulatory Impact Statement (**RIS**) should be prepared.⁴⁰⁵

³⁹⁵ NSW Government, *Regulatory Impact Assessment* (2010)

<http://www.dpc.nsw.gov.au/programs_and_services/better_regulation/regulatory_impact_assessment>.

³⁹⁶ Ibid.

³⁹⁷ Northern Territory Department of Treasury and Finance, *The Northern Territory Government Regulation-Making Framework – Version 2.0* (2017) <https://treasury.nt.gov.au/__data/assets/pdf_file/0020/490007/I-ECO-RMF.pdf>.

³⁹⁸ Ibid, 6.

³⁹⁹ Ibid, 14.

⁴⁰⁰ Ibid.

⁴⁰¹ Ibid, 15.

⁴⁰² Queensland Government, *The Queensland Government Guide to Better Regulation* (2016) <<https://s3.treasury.qld.gov.au/files/guide-to-better-regulation.pdf>>.

⁴⁰³ Ibid, 13.

⁴⁰⁴ Ibid, 14.

⁴⁰⁵ Queensland Productivity Commission, *Regulatory Review* <<https://www.qpc.qld.gov.au/regulatory-reviews/>>.

The RIS system applies to the development of primary, subordinate and quasi-regulation and requires effective consultation with key stakeholders at all stages of the regulatory cycle. While it does not specifically assess the impact of new regulation on children's rights, where relevant, this could be raised in the consultation stage.

Additionally, under the *Legislative Standards Act 1992* (Qld), one of the 'Fundamental Legislative Principles' of Queensland is that legislation must have sufficient regard to the rights and liberties of individuals and this is assessed as part of the impact assessment. There is no specific reference to impact assessments on children's rights, however these impacts could be considered where relevant. The Office of the Queensland Premier and Cabinet is required to advise in relation to this when legislation is drafted.⁴⁰⁶ Explanatory memorandums for bills and significant subordinate legislation must contain a brief assessment of the consistency of the legislation with fundamental legislative principles and, where it is inconsistent, reasons for the inconsistency.⁴⁰⁷

South Australia

The South Australian Cabinet require that all submissions to Cabinet on regulatory proposals are accompanied by a RIA prepared in accordance with the RIA process, unless the proposal falls within certain exemptions.⁴⁰⁸ A RIA is required where Cabinet is asked to make an initial decision regarding a regulatory proposal.⁴⁰⁹ As part of the impact assessment, the relevant government agency is required to consider impacts on family, society and the community or environment.⁴¹⁰ Although children's rights are not explicitly mentioned, many would likely fall within this assessment generally and specifically in the assessment regarding impact on families.

Tasmania

In the 'Legislation Impact Assessment Guidelines' the Tasmanian Government has outlined that the purpose of a legislative impact assessment is to ensure that 'all new and amending legislation is reviewed so that it does not impose unnecessary restrictions on competition or unnecessary additional regulatory costs on business.'⁴¹¹ The Economic Reform Unit situated within the Department of Treasury and Finance is said to be 'responsible for administering the gatekeeper processes for primary legislation and Treasury's functions under the Subordinate Legislation Act.'⁴¹² Although the Guidelines mention broadly benefits to the community, and basic community standards, there is little consideration of and requirement to consider social impacts on children and families integrated into the legislation impact assessment process in Tasmania.

Victoria

In Victoria, the responsible Minister for any legislative instrument must ensure that a human rights certificate is prepared in respect of a proposed legislative instrument and statutory rules unless a relevant exemption applies.⁴¹³ A human rights certificate must state, in the opinion of the Minister, whether the statutory rule or legislative instrument limits any human right set out in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and, where it does, the nature of the right limited, the importance/purpose of the limitation, the relationship between the limitation and its purpose and any less restrictive means reasonably available to serve the same purpose. Additionally, the Scrutiny of Acts and Regulations Committee must consider any bill introduced into Parliament and must report to the Parliament on whether the bill is incompatible with human rights.⁴¹⁴ Whilst this process does not require specific attention to child rights, there are some child rights that exist under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) that would be examined through this

⁴⁰⁶ *Legislative Standards Act 1992* (Qld) s 7.

⁴⁰⁷ *Legislative Standards Act 1992* (Qld) ss 23(1)(f) and 24(1)(f).

⁴⁰⁸ Government of South Australia, *Better Regulation Handbook: How to design and review regulation, and prepare a Regulatory Impact Statement* (January 2001) <<http://vivid.blob.core.windows.net/eoc-sitofinity/publications/4-impact-assessment-preventing-systemic-discrimination12384c5bde9f62fcb668ff0000be6566.pdf?sfvrsn=2>> 6.

⁴⁰⁹ *Ibid*, 4.

⁴¹⁰ *Ibid*, 39.

⁴¹¹ Government of Tasmania, *Legislation Impact Assessment Guidelines* (December 2016) <<http://www.treasury.tas.gov.au/Documents/Legislative-Impact-Assessment-Guidelines-2016.pdf>> 3.

⁴¹² *Ibid*.

⁴¹³ *Subordinate Legislation Act 1994* (Vic) ss 12A and 12D.

⁴¹⁴ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 30.

process.

Officials and law makers in Victoria are also required to undertake 'Regulation Impact Assessments' (RIA) for proposed statutory rules and legislative instruments unless a relevant exemption applies.⁴¹⁵ There is no specific impact analysis required for child rights but it could (where relevant) fall within an assessment of social impact as an element of a RIA.

Western Australia

The WA Commissioner for Children and Young People has issued Guidelines for assessing the impact of proposed legislation on children and young people.⁴¹⁶ Agencies may use these guidelines when undertaking other required regulatory impact assessments such as the Department of Treasury and Finance 'Regulatory Impact Assessment' (RIA) and the Equal Opportunity Commission 'Needs and Impact Assessments Tool'. However the use of the guidelines is not mandatory.

A RIA requires that all new and amended legislation and other regulatory proposals, most forms of subordinate legislation and quasi regulatory instruments such as codes of practice, are only implemented where there has been an impact assessment and cost/benefit analysis.⁴¹⁷ The Needs and Impacts Assessment is a tool for organisations to ensure existing services meet the needs of diverse communities in WA and to address any potential for discrimination.⁴¹⁸ However, it is not a mandatory impact assessment.

3.1.4 Reporting

Are companies required to report on or otherwise disclose information about their impact on children's rights, either in general or with regard to certain issues or contexts?

Reporting generally

Australian companies are subject to continuous disclosure obligations. These require companies to immediately disclose any information concerning it that a reasonable person would expect to have a material effect on the price or value of securities in the company.⁴¹⁹ This may include human rights impacts or more specifically, children's rights impacts. A breach of continuous disclosure obligations can not only result in reputational risks but also in criminal and/or civil penalties as failure to inform the market in a timely manner of a development may have a material impact on the price or value of a company's securities. This regime, which operates in conjunction with ASX Limited Listing Rule 3.1A, applies only to a small sub-set of companies, namely; ASX listed companies.

ASX listed companies are also required to produce and lodge with the Australian Securities and Investments Commission an annual report for shareholders covering the company's operations during that period.⁴²⁰ In the following circumstances, directors of listed companies are required to disclose impacts of the company's operations on non-shareholders:

- Section 292 of the *Corporations Act 2001* (Cth) and r 4.10.17 of the *ASX Listing Rules* require a review of operations; this could arguably include impacts of those operations on stakeholders.⁴²¹ Guidance Note 10 of the *ASX Listing Rules* refers companies seeking guidance

⁴¹⁵ *Subordinate Legislation Act 1994* (Vic) ss 7 and 12E; *Subordinate Legislation Act 1994 Guidelines* (Vic); Department of Treasury and Finance Victoria, *Victorian Guide to Regulation* (revised July 2014) <<http://www.dtf.vic.gov.au/Publications/Victoria-Economy-publications/Victorian-guide-to-regulation>> 7.

⁴¹⁶ Western Australian Commissioner for Children and Young People, *Improving legislation and policy for children and young people* (January 2013) <<http://www.ccp.wa.gov.au/media/1512/report-child-safe-improving-legislation-and-policy-for-children-and-young-people-january-2013.pdf>>.

⁴¹⁷ Department of Premier and Cabinet, *Regulatory Impact Assessment Guidelines for Western Australia* (2009) <<https://www.dpc.wa.gov.au/GuidelinesAndPolicies/PremiersCirculars/Pages/200906RegulatoryImpactAssessmentGuidelinesforWesternAustralia.aspx>>.

⁴¹⁸ Western Australian Equal Opportunity Commission, *Impact Assessment: preventing systemic discrimination - needs and impact assessment* <<http://vivid.blob.core.windows.net/eoc-sitefinity/publications/4-impact-assessment-preventing-systemic-discrimination12384c5bde9f62fcb668ff0000be6566.pdf?sfvrsn=2>>.

⁴¹⁹ *Corporations Act 2001* (Cth) s 674 'Publically Listed Companies', s 675(1) 'Unlisted Companies'; also see *ASX Listing Rules* r. 3.1 <<http://www.asx.com.au/regulation/rules/asx-listing-rules.htm>>.

⁴²⁰ *Corporations Act 2001* (Cth) s 292.

⁴²¹ Allens Arthur Robinson, *Corporate Law Project: Mandate of the Special Representative of the Secretary General (SRSG) on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, (September 2009) <[95](http://business-</p></div><div data-bbox=)

on this listing rule to the 'Guide to Review of Operations and Financial Conditions' published by the Group of 100 Incorporated (G100 Guide).⁴²² The G100 Guide is not binding however it recommends that companies report on non-financial matters as well financial matters, including social and environmental performance measures where relevant.⁴²³ This could include impacts on children where they exist;

- Companies are required to report on any matter or circumstance that significantly affects or could significantly affect the future of the company's operations, its results or state of affairs.⁴²⁴ This could require reporting on impacts on child rights where there is associated legal (and reputational) risk; and
- The annual report of companies must also contain enough information for shareholders to make an informed assessment of the company's operations, its financial position, business strategies and prospects for future financial years.⁴²⁵ The explanatory memorandum to the introduction of this section refers to the G100 Guide indicating that human rights considerations may be relevant.⁴²⁶

Also, as part of a company's annual report, listed companies are also required to disclose the extent to which they have followed the ASX 'Corporate Governance Principles and Recommendations'.⁴²⁷ These principles are voluntary for listed companies, however, if the entity has not followed a particular recommendation, it must state reasons for this either in its annual report or on its website.⁴²⁸ ASX Corporate Governance Principle 7 recommends that entities disclose whether they have any material exposure to economic, environmental and social sustainability risks and, if it does, how it proposes to manage these risks. 'Material exposure' means a real possibility that the risk could substantively impact the listed entity's ability to create or preserve value for security holders. 'Social sustainability' means the ability of the entity to continue operating in a manner that meets social norms and needs over the long term.⁴²⁹ Whilst there is no express requirement to consider or disclose an impact of children rights or general human rights, such impacts would be relevant as part of reporting under this Governance Principle.

Mandatory reporting on 'modern slavery' – NSW and Commonwealth modern slavery acts

Several parliamentary inquiries have been held in recent years which have indirectly considered children's rights and business issues through examining commercial exploitation and labour abuses in supply chains and potential reporting requirements.

In June 2018, the Parliament of NSW passed the *Modern Slavery Act 2018* (NSW). The first of its kind in Australia, the NSW Act requires commercial organisations with an annual turnover of at least \$50 million⁴³⁰ and employees in NSW to publish an annual modern slavery statement. Modern slavery statements outline the steps taken during the financial year to ensure that the organisation's goods and services are not a product supply chains in which 'modern slavery' is taking place.⁴³¹ The statement must include information prescribed by the relevant regulations that are yet to be developed, but the Act outlines that the regulations may require information

humanrights.org/sites/default/files/media/documents/ruggie/corp-law-tools-australia-allens-arthur-robinson-for-ruggie-sep-2009.pdf> [16.3].

⁴²² Australian Securities Exchange, *Guidance Note 10: Review of Operations and Activities: Listing Rule 4.10.17* (March 2003) <http://www.asx.com.au/documents/rules/gn10_operations.pdf>.

⁴²³ Ibid, 13.

⁴²⁴ *Corporations Act 2001* (Cth) s 299(1).

⁴²⁵ *Corporations Act 2001* (Cth) s 299A(1).

⁴²⁶ Allens Arthur Robinson, *Corporate Law Project: Mandate of the Special Representative of the Secretary General (SRSG) on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, (September 2009) <<http://business-humanrights.org/sites/default/files/media/documents/ruggie/corp-law-tools-australia-allens-arthur-robinson-for-ruggie-sep-2009.pdf>> [16.5].

⁴²⁷ *ASX Listing Rules* r 4.10 <<http://www.asx.com.au/regulation/rules/asx-listing-rules.htm>>.

⁴²⁸ *ASX Listing Rules* r 4.10 <<http://www.asx.com.au/regulation/rules/asx-listing-rules.htm>>.

⁴²⁹ CCH, *ASX Listing Rule 4.10 Commentary*, 7-535.

⁴³⁰ The final turnover amount will be set by regulation, but, in accordance with s 24(1)(b), this will not be less than \$50 million.

⁴³¹ The information to be included in modern slavery statements under the *Modern Slavery Act 2018* (NSW) will be settled by regulation (s 24(3)).

about:

- (a) the organisation's structure, its business and its supply chains,
- (b) its due diligence processes in relation to modern slavery in its business and supply chains,
- (c) the parts of its business and supply chains where there is a risk of modern slavery taking place, and the steps it has taken to assess and manage that risk,
- (d) the training about modern slavery available to its employees.

Modern slavery is defined in the *Modern Slavery Act 2018* (NSW) to include a range of offences including slavery, forced labour and trafficking and forced marriage. The Act also established the role of the NSW Anti-Slavery Commissioner, with the functions of identifying and providing assistance and support for victims of modern slavery, and providing public awareness about modern slavery, amongst other things.

The Act provides for penalties of up to \$1.1 million if a commercial organisation:

- Fails to prepare a modern slavery statement (s 24(2));
- Fails to publish its modern slavery statement in accordance with the requirements of the Regulations (s 24(6)); and
- Knowingly provides false and misleading information in a modern slavery statement (s 24(7)).

The NSW Act also establishes an Anti-Slavery Commissioner who is responsible for maintaining the public register of modern slavery statements, amongst other things (see further **3.4.4 – Protection**). The NSW Act also applies to NSW Government Procurement in certain respects (see further **3.1.5 – Public Finance / Procurement / Privatisation**).

At the Federal level and as outlined above **3.1.2 – Due Diligence** the Terms of Reference of the Joint Standing Committee on Foreign Affairs, Defence and Trade's (**JSCFADT**) *Inquiry into Establishing a Modern Slavery Act in Australia* required the Committee to have reference to the United Kingdom's *Modern Slavery Act 2015* and consider, amongst other things, '[t]he prevalence of modern slavery in the domestic and global supply chains of companies, businesses and organisations operating in Australia.'⁴³² In the Committee's final report, the Chair, Mr Chris Crewther summarised:⁴³³

Modern slavery is often 'hidden in plain sight'. These heinous crimes are present across a range of industries in Australia and in the global supply chains of businesses and organisations operating here. Latest estimates suggest that over 40 million people around the world, and 4 300 in Australia, are victims of some form of modern slavery, which includes human trafficking, slavery, debt bondage, forced labour and other slavery-like practices.

In November 2016, the Foreign Affairs and Aid Sub-Committee of the Joint Standing Committee on Foreign Affairs Defence and Trade (Committee) sought the referral of this inquiry to investigate measures to better combat modern slavery in Australia and around the world. The Committee was very pleased when the Australian Government, through the Attorney-General, approved and provided a referral for this inquiry in February 2017.

The inquiry particularly focussed on assessing the effectiveness of the United Kingdom's Modern Slavery Act 2015 (UK Act) and whether similar or improved measures could be introduced in Australia.

During the inquiry, the Committee received 225 submissions and held 10 public hearings. The Committee heard from a range of dedicated individuals, businesses and organisations with an interest in eradicating modern slavery, including from within global supply chains. The Committee applauds the work being undertaken by these groups to tackle these terrible crimes.

The Committee heard strong support for key elements of the UK Act, including from businesses. There was particular support for the establishment of the Independent Anti-Slavery Commissioner and the introduction of global supply chain reporting requirements. The Committee recommends that the Australian Government

⁴³² Parliament of the Commonwealth of Australia, Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into Establishing a Modern Slavery Act in Australia – Terms of Reference* <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery/Terms_of_Reference>.

⁴³³ Hidden in Plain Sight: An inquiry into establishing a Modern Slavery Act in Australia, n 100, ix-x.

introduce similar measures here, with a range of improvements as outlined in this report.

Connected to the work of the JSCFADT, the Australian Government also indicated in 2017 its intention of introducing a mandatory 'Modern Slavery in Supply Chains Reporting Requirement' to be established through a new Act of Parliament.⁴³⁴ To inform the development of this new law, consultations were conducted over 2017 to May 2018, initially by the Attorney-General's Department then the new Department of Home Affairs from December 2017.⁴³⁵

Subsequent to this consultation, the Australian Government introduced to Parliament in July 2018 the Modern Slavery Bill 2018. The objective of the bill is '...to assist the business community in Australia to take proactive and effective actions to address modern slavery. This will help mitigate the risk of modern slavery practices occurring in the supply chains of goods and services in the Australian market.'⁴³⁶

The Bill was passed both houses of Parliament in November 2018, and came in to force on 1 January 2019.

The Act '...establish[es] a Modern Slavery Reporting Requirement, requiring reporting entities to provide annual Modern Slavery Statements to the responsible Minister to be published online on a central register.'⁴³⁷ The Act defines 'modern slavery' broadly to include all forms of trafficking in persons, slavery and slavery-like practices, and the worst forms of child labour:⁴³⁸

modern slavery means conduct which would constitute:

- (a) an offence under Division 270 or 271 of the Criminal Code; or
- (b) an offence under either of those Divisions if the conduct took place in Australia; or
- (c) trafficking in persons, as defined in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, done at New York on 15 November 2000 ([2005] ATS 27); or
- (d) the worst forms of child labour, as defined in Article 3 of the ILO Convention (No. 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, done at Geneva on 17 June 1999 ([2007] ATS 38).

The reporting requirement applies to Australian entities and foreign entities carrying on business in Australia that have an annual revenue of at least AUD\$100 million, and the mandatory reporting criteria includes:

- the entity's structure, operations and supply chains;
- the potential modern slavery risks in the entity's operations and supply chains;
- actions the entity has taken to assess and address those risks, including due diligence and remediation processes; and
- how the entity assesses the effectiveness of those actions.

Notably as well, the Act:

- requires statements to be approved by an entity's board of directors or equivalent and signed by a director;
- applies to the Commonwealth (discussed below);
- provides an opt-in mechanism for entities below the reporting threshold;
- establishes a Government registry of statements;
- establishes a Business Engagement Unit (discussed below); and

⁴³⁴ Hon Michael Keenan MP, Minister for Justice, *Proposed new laws to help end modern slavery* (16 August 2017)

<<https://www.ministerforjustice.gov.au/Media/Pages/Proposed-new-laws-to-help-end-modern-slavery-16-August-2017.aspx>>.

⁴³⁵ Attorney-General's Department, *Modern Slavery in Supply Chains Reporting Requirement – Public Consultation*

<<https://www.ag.gov.au/Consultations/Pages/modern-slavery-in-supply-chains-reporting-requirement-public-consultation.aspx>> and Department of Home Affairs, *Modern Slavery Reporting Requirement – Public Consultation*

<<https://www.homeaffairs.gov.au/about/consultations/modern-slavery-supply-chains-reporting-requirement>>.

⁴³⁶ Modern Slavery Bill 2018 – Explanatory Memorandum, n 103, [2].

⁴³⁷ Ibid, [8].

⁴³⁸ *Modern Slavery Act 2018* (Cth) s 4.

- provides for a 3 year review.

Significantly as well, the reporting requirement applies to the Commonwealth itself. As outlined in the Explanatory Memorandum:⁴³⁹

Subsection 15(1) requires the Minister to prepare a Commonwealth Modern Slavery Statement for a reporting period. The relevant reporting period for the Commonwealth is the Australian financial year. The Commonwealth must prepare a consolidated annual Modern Slavery Statement on behalf of all non-corporate Commonwealth entities, as defined in the Public Governance, Performance and Accountability Act 2013 (Cth) (PGPA Act).

Corporate Commonwealth entities and Commonwealth companies are treated like any other entity. If those entities meet the revenue test in section 5, they are a 'reporting entity' and must comply with the Modern Slavery Reporting Requirement under section 13 or 14.

Requiring Modern Slavery Statements from the Commonwealth, corporate Commonwealth entities and Commonwealth companies helps to create a level playing field by covering as many entity types as practicable. It will also help ensure that potential modern slavery risks in Government procurement are assessed and addressed.

As part of these reforms, the Government established a Business Engagement Unit responsible for implementing the Act and providing general advice to assist entities covered by the law understand what they are required to do. The Explanatory Memorandum outlined the purpose of the Business Engagement Unit as follows:⁴⁴⁰

The Australian Government proposes to establish a new Modern Slavery Business Engagement Unit within the Department of Home Affairs to support the effective implementation of the proposed reporting requirement and strengthen the Australian Government's engagement with business on modern slavery issues more broadly.

The Australian Government has committed \$3.6 million through the 2018 Federal Budget to establish and run the Unit over January 2019 to June 2022.

The Unit's primary role will be to work with the business community to support the effective implementation of the reporting requirement. To achieve this, the Unit will:

- develop and maintain detailed official guidance for the business community about the reporting requirement
- provide objective, non-binding advice to up to 3,000 individual businesses to support
- their compliance with the reporting requirement
- monitor compliance with the reporting requirement, including by identifying and promoting best-practice trends and initiatives
- deliver targeted education, training and awareness-raising initiatives for business, civil society and consumers to raise the profile of modern slavery
- develop and administer the online central register of Modern Slavery Statements
- coordinate the Australian Government's annual Modern Slavery Statement
- lead broader work to address possible modern slavery risks in Government procurement, and
- support research into modern slavery risks in supply chains.

As at April 2019, the Business Engagement Unit was preparing guidance materials on the reporting requirements.⁴⁴¹

Currently, the Act does not currently contain any fines for failure to lodge a report, an omission that attracted criticism from some civil society groups and others.⁴⁴² Rather, the Act empowers the Minister to request an

⁴³⁹ Modern Slavery Bill 2018 – Explanatory Memorandum, n 103, [114]-[116].

⁴⁴⁰ Modern Slavery Bill 2018 – Explanatory Memorandum, n 103, [53]-[54].

⁴⁴¹ Department of Home Affairs, *Modern slavery reporting requirement – Consultation* <<https://www.homeaffairs.gov.au/help-and-support/how-to-engage-us/consultations/modern-slavery-reporting-requirement>>.

⁴⁴² See, for example, Melissa Clarke 'Modern slavery bill needs tougher penalties and oversight, says Law Council' *ABC News* (3 August 2018) <<https://www.abc.net.au/news/2018-08-03/modern-slavery-bill-needs-tougher-penalties-law-council/10068002>> and 'Modern slavery laws need fines, Labor says' *SBS News*, updated 12 September 2018 <<https://www.sbs.com.au/news/modern-slavery-laws-need-fines-labor-says>>.

explanation or remedial action for failure to report, and has the power to publish the details of a company that has failed to comply with such a request.⁴⁴³ This model has been described as a ‘consumer policing model’ which has implicit in its logic an assumption that consumers and investors will apply reputational pressures on businesses to comply, as opposed to regulatory intervention by governments directly.⁴⁴⁴

Additionally, in contrast to the UK model, the Australian legislation is limited to the establishment of the mandatory reporting requirement, and does not establish an Independent Anti-Slavery Commissioner as the UK Act did, and as was advocated for by many civil society stakeholders.

Despite its limitations, the introduction of the *Modern Slavery Act 2018* (Cth) was generally recognised to be a significant and positive development. As explained by Amy Sinclair and Professor Justine Nolan:⁴⁴⁵

[w]hilst not without its critics, the Act establishes a valuable model for change. By mandating reporting on human rights - albeit limited to those constituting ‘modern slavery’ - it codifies certain expectations of business as articulated by the UN Guiding Principles on Business and Human Rights. While the Act does not explicitly require businesses to conduct human rights due diligence, nor to remedy harm, its provisions on mandatory reporting criteria for modern slavery statements expressly refer, at section 16(1)(d), to both due diligence and remediation processes. This creates an expectation that entities will undertake these actions as part of their reporting process.

3.1.5 Public Finance / Procurement / Privatisation

What requirements, expectations, or guidelines are in place for officials to consider impact on children's rights in engaging in commercial relations or supporting or investing in business activity with public funds (e.g. public procurement, export credit, trade missions, and State pension/sovereign wealth funds)? When involving the private sector in the provision of essential services for children (e.g. health, education, and alternative care), what legal and administrative frameworks ensure the ongoing accessibility, affordability, equity, and quality of services provided?

Public Procurement

The Department of Finance is responsible for oversight of Commonwealth procurement, which it describes as follows:⁴⁴⁶

The Commonwealth is one of the largest operational entities in the southern hemisphere, and encompasses 177 different entities and companies and over 700 other governance relationships. The Commonwealth operates through a number of different organisational structures including departments of state, office holders, statutory authorities (including statutory corporations), companies and trusts.

The overarching and individual governance arrangements for Commonwealth entities and Commonwealth companies, sometimes referred to as corporate governance, are defining factors in the successful operation of government.

The Department of Finance has outlined the different types of Commonwealth entities and companies:⁴⁴⁷

Within the 16 portfolios, there are three high-level groupings of bodies:

- non-corporate Commonwealth entities
- corporate Commonwealth entities and
- Commonwealth companies.

⁴⁴³ *Modern Slavery Act 2018* (Cth) s 16A.

⁴⁴⁴ See UNICEF Australia, n 364, [80]-[85] and Dr. Jolyon Ford, ‘Can consumers and market actors ‘regulate’ corporate reporting on Modern Slavery risk?’ *Business and Human Rights Resource Centre*, 6 December 2018 <<https://www.business-humanrights.org/en/can-consumers-and-market-actors-%E2%80%98regulate%E2%80%99-corporate-reporting-on-modern-slavery-risk>>.

⁴⁴⁵ Amy Sinclair and Justine Nolan, ‘The Australian Modern Slavery Act 2018 – will it live up to expectations?’, *Business and Human Rights Resource Centre* (29 November 2018) <<https://www.business-humanrights.org/en/the-australian-modern-slavery-act-2018-%E2%80%93-will-it-live-up-to-expectations>>.

⁴⁴⁶ Department of Finance, *Governance structures in the public sector* <<https://www.finance.gov.au/resource-management/governance/overview/>>.

⁴⁴⁷ *Ibid.*

All Commonwealth entities and companies are established under power that comes from the Constitution, usually through legislation and the exercise of executive power. The PGPA Act [Public Governance, Performance and Accountability Act 2013 (Cth)] further clarifies the financial and corporate governance arrangements of Commonwealth entities.

As all Commonwealth entities and companies form part of the executive government, all these public sector entities are accountable to the Parliament.

The Department of Finance provides a list of the different Government bodies from time to time.⁴⁴⁸ As at August 2018, there were:

- 97 Non-corporate Commonwealth entities;
- 71 Corporate Commonwealth entities; and
- 18 Commonwealth companies.

Of these, 9 Corporate Commonwealth entities and Commonwealth companies are prescribed 'Government Business Enterprises' (GBE).⁴⁴⁹ These are:

Commonwealth entities:

- 1) the Australian Postal Corporation; and
- 2) Defence Housing Australia.

Commonwealth companies:

- 1) ASC Pty Limited (ACN 008 605 034);
- 2) Australian Rail Track Corporation Limited (ACN 081 455 754);
- 3) Moorebank Intermodal Company Limited (ACN 161 635 105);
- 4) NBN Co Limited (ACN 136 533 741);
- 5) Australian Naval Infrastructure Pty Ltd (ACN 051 762 639);
- 6) WSA Co Limited (ACN 618 989 272); and
- 7) Snowy Hydro Limited (ACN 090 574 431).

The unique nature of GBEs have been described as follows:⁴⁵⁰

The Australian Government's relationship to its GBEs is similar to the relationship between a holding company and its subsidiaries, features of which include:

- a strong interest in the performance and financial returns of the GBE
- reporting and accountability arrangements that facilitate active oversight by the shareholder
- action by the shareholder in relation to the strategic direction of its GBEs where it prefers a different direction from the one proposed
- management autonomy balanced with regular reporting of performance to shareholders and
- boards that are accountable to shareholders for GBE performance, and shareholders that are accountable to Parliament and the public.

To enable greater public accountability, GBEs are required to prepare a Statement of Corporate Intent (SCI) (or a publically facing Corporate Plan) in consultation with Shareholder Ministers. An SCI focuses on the purpose and corporate outlook of a GBE, and expresses the expectations of its management in relation to future financial and non-financial performance.

The Commonwealth Procurement Policy Framework articulates the Australian Government's procurement policy.⁴⁵¹ Non-corporate Commonwealth entities and prescribed corporate Commonwealth entities listed in

⁴⁴⁸ Department of Finance, *Flipchart of PGPA Act Commonwealth entities and companies (186)* (28 August 2018) <https://www.finance.gov.au/sites/default/files/Flipchart_28%20August.pdf>.

⁴⁴⁹ Public Governance, Performance and Accountability Rule 2014, r 5.

⁴⁵⁰ Department of Finance, *Government Business Enterprises (GBEs)* <<https://www.finance.gov.au/resource-management/governance/gbe/>>.

⁴⁵¹ *Public Governance, Performance and Accountability Act 2013* (Cth) s 105B(1); see Department of Finance, *Commonwealth Procurement Rules – Achieving value for money* (1 January 2018) <<https://www.finance.gov.au/procurement/procurement-policy-and-guidance/commonwealth-procurement-rules/>>.

section 30 of the Public Governance, Performance and Accountability Rule 2014 must comply with the Commonwealth Procurement Rules (CPRs) when performing duties related to procurement.

The Commonwealth Procurement Framework includes some measures to help reduce the chance of public funds being provided to suppliers or goods or services that may have involved adverse human rights impacts. These include:

- requiring officials to act ethically throughout a procurement and not benefit from supplier practices that may be dishonest, unethical or unsafe (see further below);⁴⁵²
- empowering officials to request information to assess the suitability of a potential supplier and exclude them from consideration if their practices may be dishonest, unethical or unsafe; and
- requiring officials to make reasonable efforts to check that suppliers satisfy regulatory frameworks in areas such including labour regulations, including ethical employment practices and Workplace Health & Safety.

Regarding the obligation on officials to ensure procurement is ethical, the CPRs provide:

6.6 In particular, officials undertaking procurement must act ethically throughout the procurement. Ethical behaviour includes:

- a. recognising and dealing with actual, potential and perceived conflicts of interest;
- b. dealing with potential suppliers, tenderers and suppliers equitably, including by
 - i. seeking appropriate internal or external advice when probity issues arise, and
 - ii. not accepting inappropriate gifts or hospitality;
- c. carefully considering the use of public resources; and
- d. complying with all directions, including relevant entity requirements, in relation to gifts or hospitality, the Australian Privacy Principles of the Privacy Act 1988 and the security provisions of the Crimes Act 1914.

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

The Department of Home Affairs' website provides information for procurement officers on ethical procurement, outlines Commonwealth criminal laws relating to labour exploitation, details steps to help combat labour exploitation, and identifies industries that are likely to have a higher incidence of labour exploitation.⁴⁵³

The Commonwealth Contracting Suite (CCS) is a suite of templates that is mandated for use in non-ICT procurements valued up to \$200,000 and can be used for contracts up to \$1 million. The CCS requires suppliers, along with their officers, employees, agents and subcontractors, comply with all relevant laws.

However, a number of organisations and individuals have expressed a concern that the current Commonwealth Procurement Framework does not adequately incorporate human rights considerations. These concerns were outlined in the *Inquiry into the Commonwealth Procurement Framework* conducted by the Joint Select Committee conducted over 2016-2017.⁴⁵⁴

In its submission to the Committee, the Australian Human Rights Commission concluded for example that:⁴⁵⁵

⁴⁵² Department of Finance, *Commonwealth Procurement Rules – Achieving value for money* (1 March 2017) r 6.7 <<https://www.finance.gov.au/sites/default/files/commonwealth-procurement-rules.pdf>>.

⁴⁵³ Department of Home Affairs, *Ethical Procurement* <<https://www.homeaffairs.gov.au/criminal-justice/files/human-trafficking-info-sheet-comm-gov-procurement-officers.pdf>>.

⁴⁵⁴ Parliament of Australia, *Inquiry into the Commonwealth Procurement Framework* (2017) <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Government_Procurement/CommProcurementFramework> ('Inquiry into the Commonwealth Procurement Framework').

⁴⁵⁵ Australian Human Rights Commission, Submission to the Joint Select Committee on Government Procurement – *Inquiry into the Commonwealth Procurement Framework* (5 April 2017) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Government_Procurement/CommProcurementFramework/Submissions>.

International research on public procurement suggests the Australian regulatory framework is insufficient to prevent human rights abuses from occurring in Commonwealth procurement. Current provisions of the Commonwealth Procurement Rules do not explicitly refer to human rights nor provide guidance to ensure that all relevant human rights are adequately considered.

There are a number of countries that have already incorporated human rights into their procurement processes, including, but not limited to the United States of America and the Netherlands. It is expected that more countries will follow suit as part of their national action plans on business and human rights. A good example of public procurement initiative focused on human rights is the Swedish county council's two year review of the human rights policies and due diligence of its IT contractor" (references omitted).

The AHRC went on to recommend, amongst other things:

- That guidance be developed to ensure the UNGP requirements regarding human rights due diligence in procurement are met through implementation of the Commonwealth Procurement Rules, and mandatory training delivered to all procurement officers.
- That the new clause 10.18 be broadened to reference all universally recognised human rights; and
- That existing materials on implementation of clause 10.18 be strengthened to provide more comprehensive guidance to procurement officers on mitigating human rights risks through procurement activities.

Similarly, UNICEF Australia outlined:⁴⁵⁶

International human rights law requires the Australian Government to protect individuals, children included, from adverse human rights impacts caused by businesses. This duty includes fully utilising public procurement frameworks to promote business respect for human rights through, for example, conditions of participation in tenders contingent on demonstrable business practice consistent with respect for human rights, the appropriate contract terms and ensuring that relevant service contracts outline expectations with regard to respect for human rights.

...

UNICEF Australia is concerned that the CPRs which commenced on 1 March 2017 do not fully or appropriately incorporate relevant human rights law and standards so as to achieve this in practice. Although there are some commendable elements of the CPR, such as the requirement to consider labour practices and environmental impacts, these requirements do not consider all relevant human rights issues. Additionally, the nature of the obligation on purchasers is permissive only. It is therefore insufficient to ensure that additional measures are adopted, such as compliance and audit measures, even in relation to the purchase of high risk goods and services. Rather, 'value for money' and reducing cost and 'red tape' appears to be the primary objective in all cases. Although achieving value for money is undoubtedly a legitimate aim for Government, this objective should not operate so as to diminish a requirement for an official to take or require additional measures in appropriate circumstances to ensure that public funds reward only contractors that are demonstrably respectful of human rights within their business operations and business relationships.

Specifically, UNICEF Australia's submission identified that:⁴⁵⁷

- 1) The Commonwealth Procurement Rules omit reference to relevant international human rights law and associated standards that should inform procurement practices;
- 2) The nature of the obligation required by paragraph 10.18 is not clear and not aligned with international good practice;
- 3) The CPRs, including conditions for participation, do not fully leverage state purchasing power to promote respect for human rights; and
- 4) Explanatory guidance is incomplete and, at times, seemingly inconsistent.

In its '*Buying into Future*' report published in June 2017 the Committee concluded:⁴⁵⁸

⁴⁵⁶ UNICEF Australia, Submission to the Joint Select Committee on Government Procurement – Inquiry into the Commonwealth Procurement Framework (31 March 2017) <<https://www.unicef.org.au/Upload/UNICEF/Media/Documents/Submissions/UNICEF-Australia-Submission-re-Commonwealth-Procurement-Framework.pdf>> [6] and [8].

⁴⁵⁷ Ibid, [21]-[36].

The Committee shares stakeholders' apprehension that human rights are not explicitly provided for in the CPRs. It sees scope for the introduction of a procurement connected policy targeting industries at high risk of breaching human rights, and requiring these suppliers to be audited or accredited if they are participating in Commonwealth procurement.

The Committee went on to recommend '...that the Attorney-General's Department oversee the introduction and application of a procurement connected policy requiring Commonwealth agencies to evaluate suppliers' compliance with human rights regulation'.⁴⁵⁹ In its response to the Committee Report, the Government stated:

The Commonwealth Procurement Framework requires appropriate consideration of ethical practices, whole-of-life costs and efficient processing. The Government does not support the introduction of additional regulatory burden on businesses or the Commonwealth through the introduction of onerous reporting requirements.⁴⁶⁰

Since the Committee report, the Australian Parliament passed the *Modern Slavery Act 2018* (Cth) which requires the Australian Government to report annually on actions to address modern slavery risks in Commonwealth procurement of all non-corporate Commonwealth entities. Under the Act, 'Corporate Commonwealth entities and Commonwealth companies are treated like any other entity. If those entities meet the revenue test in section 5, they are a 'reporting entity' and must comply with the Modern Slavery Reporting Requirement...'.⁴⁶¹ Modern slavery risks include (but are not limited to) any risks of child trafficking, or the worst forms of child labour. The Explanatory Memorandum explains:

The statement will focus on potential modern slavery risks in Commonwealth procurement at a whole-of-government level and the operations of the Australian Government, including its investments. Consistent with its strategic, whole-of-government focus, the statement will not necessarily refer to specific Commonwealth entities or provide entity-specific details about procurement.⁴⁶²

The Explanatory Memorandum explains the rationale for the application to government as follows:⁴⁶³

The Australian Government recognises that it needs to show leadership in combating modern slavery and that government procurement is not immune from modern slavery risks. This is why the Australian Government will publish an annual Modern Slavery Statement covering Commonwealth procurement. Corporate Commonwealth entities and Commonwealth companies will be required to publish separate Modern Slavery Statements if they meet the revenue threshold. This will complement existing requirements for Australian Government agencies to undertake due diligence under the Public Governance, Performance and Accountability Act 2013, including by ensuring procurements are ethically sourced. The Australian Government will also encourage Australian State and Territory Governments to publish Modern Slavery Statements.

For more information about the *Modern Slavery Act 2018* (Cth), see further above in **3.1.4 – Reporting**.

Additionally, although the *Modern Slavery Act 2018* (NSW) (discussed above at **3.1.4 – Reporting** and **3.4.4 – Protection**) does not require public agencies to comply with the reporting requirement, it does apply to public procurement in several ways. For example, the Act amends the *Public Works and Procurement Act 1912 No 45* (NSW) to allow the NSW Procurement Board to issue directions that reasonable steps that are to be taken to ensure that goods and services procured by and for government agencies are not the product of modern slavery within the meaning of the *Modern Slavery Act 2018* (NSW). The Act also provides that '[t]he [Anti-Slavery] Commissioner must regularly consult with the Auditor-General and the NSW Procurement Board to monitor the effectiveness of due diligence procedures in place to ensure that the procurement of goods and services by government agencies are not the product of modern slavery' (s 25). The Act further stipulates that the public register maintained by the Anti-Slavery Commissioner is to identify any government agency failing to comply with directions of the NSW Procurement Board (s 26(1)(c)). As such, the Act strengthens measures to help

⁴⁵⁸ Parliament of the Commonwealth of Australia – Joint Select Committee on Government Procurement, *Buying into our Future - Review of amendments to the Commonwealth Procurement Rules* (June 2017) <http://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024068/toc_pdf/BuyingintoourFuture.pdf;fileType=application%2Fpdf> [9.15].

⁴⁵⁹ Ibid, iii, recommendation 2.

⁴⁶⁰ Australian Government, *Australian Government response to the Joint Select Committee on Government Procurement report: Buying into our Future: Review of amendments to the Commonwealth Procurement Rules* (November 2017) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Government_Procurement/CommProcurementFramework/Government_Response>.

⁴⁶¹ Modern Slavery Bill 2018 – Explanatory Memorandum, n 103, [115].

⁴⁶² Ibid, [118].

⁴⁶³ Modern Slavery Bill 2018 – Explanatory Memorandum, n 103, 57.

ensure that the NSW Government does not procure goods and services produced using modern slavery, and includes an element of transparency regarding non-compliant government agencies through being named on the public registry.

Beyond the Commonwealth Procurement Framework, several other pieces of legislation governing the public sector and decisions made by officials seek to ensure high standards of ethical conduct, which may include consideration of risks to the rights of children and others in the community. For example, the *Australian Public Service Values* as outlined in the *Public Service Act 1999* (Cth) requires public service employees to be:⁴⁶⁴

- 'Ethical' - The APS demonstrates leadership, is trustworthy, and acts with integrity, in all that it does [and]
- Respectful' - The APS respects all people, including their rights and their heritage.

The APS Code of Conduct contained within the same act also provides that '[a]n APS employee must at all times behave in a way that upholds the APS Values.'⁴⁶⁵ A breach of the APS Code of Conduct can result in:⁴⁶⁶

- (a) termination of employment;
- (b) reduction in classification;
- (c) re assignment of duties;
- (d) reduction in salary;
- (e) deductions from salary, by way of fine;
- (f) a reprimand.

Additionally, the *Public Governance, Performance and Accountability Act 2013* (Cth) (**PGPA Act**) establishes duties on both officials and accountable authorities of Commonwealth entities. Commonwealth entities are defined as:⁴⁶⁷

- (a) a Department of State; or
- (b) a Parliamentary Department; or
- (c) a listed entity; or
- (d) a body corporate that is established by a law of the Commonwealth; or
- (e) a body corporate that:
 - (i) is established under a law of the Commonwealth (other than a Commonwealth company); and
 - (ii) is prescribed by an Act or the rules to be a Commonwealth entity.

The objects of the Act are: ⁴⁶⁸

- (a) to establish a coherent system of governance and accountability across Commonwealth entities; and
- (b) to establish a performance framework across Commonwealth entities; and
- (c) to require the Commonwealth and Commonwealth entities:
 - (i) to meet high standards of governance, performance and accountability; and
 - (ii) to provide meaningful information to the Parliament and the public; and
 - (iii) to use and manage public resources properly; and
 - (iv) to work cooperatively with others to achieve common objectives, where practicable; and
- (d) to require Commonwealth companies to meet high standards of governance, performance and accountability.

Under the *PGPA Act 2013* (Cth), the officials and accountable authorities (including those in Government Business Enterprises) are required to discharge the following duties:

General duties of all officials:⁴⁶⁹

- Duty of care and diligence
- Duty to act honestly, in good faith and for a proper purpose
- Duty in relation to use of position
- Duty in relation to use of information
- Duty to disclose interests

Accountable Authorities:⁴⁷⁰

⁴⁶⁴ *Public Service Act 1999* (Cth) s 10.

⁴⁶⁵ *Public Service Act 1999* (Cth) s 13.

⁴⁶⁶ *Public Service Act 1999* (Cth) s 15.

⁴⁶⁷ *Public Governance, Performance and Accountability Act 2013* (Cth) s 10.

⁴⁶⁸ *Public Governance, Performance and Accountability Act 2013* (Cth) s 5.

⁴⁶⁹ *Public Governance, Performance and Accountability Act 2013* (Cth) pt 2-2, div 2.

⁴⁷⁰ *Public Governance, Performance and Accountability Act 2013* (Cth) pt 2-2, div 2.

- Duty to govern the Commonwealth entity
- Duty to establish and maintain systems relating to risk and control
- Duty to encourage cooperation with others
- Duty in relation to requirements imposed on others
- Duty to keep responsible Minister and Finance Minister informed

These duties can exist alongside duties at common law, under enabling legislation and under the *Corporations Act 2001* (Cth).⁴⁷¹

Further guidance to directors of Government Business Enterprises contained in *The Role of Directors in Commonwealth Government Business Enterprises* explains:

A GBE as a government-owned entity has high levels of scrutiny, sensitivity and accountability. Whether a GBE utilises public resources or resources held in its own name, the operations and performance of a GBE, as a government-owned entity, can attract significant scrutiny within government and externally. A GBE has a Shareholder Minister or Ministers who are accountable to the Parliament. Shareholder Ministers have an oversight role which extends beyond that of a private sector company shareholder.⁴⁷²

...

A key responsibility of Directors is to effect proper oversight of a GBE. This obligation resembles the obligation of a director of a private company, with an overlay of stewardship of public assets which is distinctive to Commonwealth entities and companies. In exercising their powers in compliance with their fiduciary obligations, Directors should look at the underlying intent of the guidance and minimum requirements provided and not just technical compliance.⁴⁷³

Human rights considerations, including children's rights, may be captured by these requirements in certain circumstances, but such legislation does not mandate specifically how human rights considerations should factor into decisions, nor does it include a duty to uphold human rights. This is perhaps unsurprising given the absence of a human rights act in Australia (discussed above at **1.3 – National Standards**).

Export Credits

The Export Finance and Insurance Corporation (**Efic**) supports Australian export trade through the provision of financial services guaranteed by the Australian government.⁴⁷⁴ Efic has a policy regarding environmental and social review that requires all transactions to be screened for both environmental and social risk in terms of Australia's obligations under international agreements.⁴⁷⁵ The Efic 'Environmental and social review' policy states that Efic 'declines transactions if it determines that the environmental and/or social impacts do not satisfy relevant benchmarks'.⁴⁷⁶ The Policy also establishes that 'Efic will periodically engage an independent environmental and social expert to examine Efic's application of this policy and the procedure. The expert's report will be provided to Efic's Board and to the public'.⁴⁷⁷

Efic has also adopted the Equator Principles for determining, assessing and managing environmental and social risk in relevant projects.⁴⁷⁸ Equator Principle 2 requires that for certain financial products supporting new projects, environmental and social assessments must be carried out.

Trade Missions

The Australian Trade Commission (**AusTrade**) provides export grants for aspiring or current exporters under the

⁴⁷¹ Department of Finance, *The Role of Directors in Commonwealth Government Business Enterprises* <<http://edit.finance.gov.au/sites/all/themes/gbes/files/gbe-guide-november-2016.pdf>> 13.

⁴⁷² Ibid, 5.

⁴⁷³ Ibid, 13.

⁴⁷⁴ *Export Finance and Insurance Corporation Act 1991* (Cth).

⁴⁷⁵ Efic, Australian Government, *Finance for Australian Exporters Policy* <<http://www.efic.gov.au/about-efic/our-corporate-responsibility/transactions/environmental-and-social-review/policy/>>.

⁴⁷⁶ Efic, *Environmental and social review: Policy* (27 October 2016) <<https://www.efic.gov.au/about-efic/our-corporate-responsibility/transactions/environmental-and-social-review/policy/>>.

⁴⁷⁷ Ibid.

⁴⁷⁸ Efic, Australian Government, *Finance for Australian Exports: Equator Principles* <<http://www.efic.gov.au/about-efic/our-corporate-responsibility/transactions/environmental-and-social-review/equator-principles/>>. A current version of the *Equator Principles* (June 2013) is available at <http://www.equator-principles.com/resources/equator_principles_III.pdf>.

Export Market Development Grants (**EMDG**) scheme.⁴⁷⁹ The legislation that governs these EMDG scheme – the *Export Market Development Grants Act 1997* (Cth) - does not incorporate any specific requirements around eligibility or conditions regarding human rights. However, as a non-corporate Commonwealth entity under DFAT, Austrade comes under DFAT's Child Protection Framework and applies the DFAT Child Protection Policy, and benefits from DFAT-provided training and support in applying the policy.

State Pensions/Sovereign Wealth Funds

Australia's Sovereign Wealth Fund (**SWF**), the Future Fund, is invested by the Future Fund Board of Guardians (**FF Board**) with the support of the Future Fund Management Agency (**FF Agency**).⁴⁸⁰ The Board has determined that it must comply with the international standard 'Risk Management - Principles and Guidelines' (ISO 31000:2009).⁴⁸¹ The FF Board's Statement of Investment Policies outlines the FF Board's approach to exercising its ownership rights of the entities in which it invests, and the way in which it integrates environmental, social and governance risks into its investment decision making.⁴⁸² This does not specifically refer to child rights, however, impacts on children's rights could potentially be included under 'social risks'.

The Accountable Authority to the FF Agency also has a specific duty to establish and maintain systems relating to risk and control for the FF Agency, and the FF Agency is subject to the CPR (discussed above). The FF Agency must therefore comply with the Commonwealth Risk Management Policy (1 July 2014), issued by the Department of Finance. This Policy does not specifically cover risks associated with human rights or child rights, rather, it provides a framework for assessing and managing risk in general terms. Risk is defined broadly under the Policy as the 'effect of uncertainty on objectives' and risk management as the 'coordinated activities to direct and control an organisation with regard to risk'. The Policy requires that the FF Agency comply with the nine elements of the Policy that broadly cover the establishment of a risk management policy and framework, that these be implemented into business processes and that a positive risk culture be developed.

Privatisation

Since December 2014, the Australian Government has had a policy outlined in *Smaller Government - Towards a Sustainable Future*.⁴⁸³ This policy states '[t]he Government continues to deliver a comprehensive package of Smaller Government reforms, designed to cut waste and duplication, while improving the efficiency and focus of the Commonwealth public service'.⁴⁸⁴

These reforms have aimed to 'deliver a smaller government footprint'. Under this policy, the Australian Government has, for example, privatised Medibank Private in 2014, and sought to abolish and amalgamate government bodies. The Governance Policy outlined that:⁴⁸⁵

In rationalising and controlling the number of Australian Government bodies, the Government aims to:

- a. Improve the efficiency and effectiveness of government administration by reducing the number of bodies and the extent of coordination required for cross-departmental work;
- b. Reduce the number of points of entry to government, so that it is easier for the public to interact with government;
- c. Increase the use of departments rather than stand-alone entities, which allows for flexibility through the refocusing of work when required by the government of the day without requiring amendment of enabling legislation to change an entity;
- d. Increase employee flexibility and public sector career mobility, while reducing the costs associated with personnel transfers between different activities of government; and

⁴⁷⁹ Australian Trade and Investment Commission, *Export Market Development Grants* <<https://www.austrade.gov.au/Australian/Export/Export-Grants>>.

⁴⁸⁰ Future Fund, *About us* <<http://www.futurefund.gov.au/about-us>>. Also see *Nation-building Funds Act 2008* (Cth); *Disability Care Australia Fund Act 2013* (Cth); *Future Fund Act 2006* (Cth).

⁴⁸¹ Future Fund Board of Guardians, *Statement of Investment Policies* (February 2018) <<http://www.futurefund.gov.au/investment/how-we-invest/investment-policy-and-position-papers>> [6.4].

⁴⁸² *Ibid*, [9.1]-[9.28].

⁴⁸³ Senator the Honourable Mathias Cormann, Minister for Finance, *Smaller Government - Towards a Sustainable Future, Ministerial Paper* (December 2014) <<https://www.financeminister.gov.au/sites/default/files/publications/towards-a-sustainable-future.pdf>>.

⁴⁸⁴ *Ibid*, 1.

⁴⁸⁵ *Ibid*, 4.

e. Achieve savings through the reduction of overheads associated with separate governance arrangements and the oversight costs borne by departments.

The policy also provides an assessment methodology to consider the most appropriate governance structure of an activity, requiring analysis of the following:⁴⁸⁶

- 1) Can the Australian Government undertake the relevant activity?
- 2) Does the Australian Government need to conduct a particular activity?
- 3) Can the activity be pursued, in whole or in part, from within existing Commonwealth entity or Commonwealth Company?
- 4) It is a strong preference of the Government that new activities should, where appropriate, be undertaken by public service departments.
- 5) Special but limited circumstances may exist that demonstrate a particular need for an autonomous structure, even where it may not be the most efficient.
- 6) Where the activity requires the creation of a new body, an analysis of costs and benefits, risks and potential alternatives to the proposed governance structure will need to be undertaken, and brought forward to Cabinet for approval. The level of analysis will be contingent on materiality and risk.
- 7) The Prime Minister may approve a governance proposal, for example where a public announcement has or needs to be made.
- 8) As a general principle, where a new body is warranted, an appropriate sunset or reassessment date must be agreed.
- 9) Is legislation required?
- 10) Will the entity exercise regulatory or coercive powers?
- 11) Where an entity is to have a non-statutory basis, consideration will need to be given to whether it will perform primarily non-commercial and/or core policy functions of the Australian Government.
- 12) Finally, will it perform primarily commercial functions? This will normally mean a corporate Commonwealth entity under section 87 of the PGPA Act, or, in limited circumstances a Commonwealth company under the Corporations Act 2001 is more appropriate.

As part of these reforms the Department of Finance has conducted 'Scoping Studies' into the future ownership operations of a number of Government bodies and property divestment.⁴⁸⁷ The 2017-18 Budget Paper 4 states:⁴⁸⁸

The rationalisation phase of the Smaller Government agenda is now largely complete, following delivery of a comprehensive package of Smaller Government reforms. This phase, which has included consolidating, merging and abolishing bodies, is estimated to achieve \$1.5 billion in savings. To actively manage the size and shape of government going forward, the Commonwealth Governance Policy requires sunset or review dates to be set for the creation of new Commonwealth bodies.

Since 2011, the sale of a Government Business Enterprise (i.e. privatisation) requiring a legislative basis⁴⁸⁹ would be required to be accompanied by a Statement of Compatibility with Human Rights and be subject to scrutiny for its compatibility with human rights generally as required by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).⁴⁹⁰ Consideration of the impacts of privatisation could potentially fall within the impact assessment requirements of state and territory parliaments (see further **3.1.3 – Impact Assessment**).

There is some provision for the corporatisation of government bodies in Australia. In the Australian Capital

⁴⁸⁶ Ibid, 26 -27.

⁴⁸⁷ Department of Finance, *Scoping Studies* <<https://www.finance.gov.au/procurement/scoping-studies/>>.

⁴⁸⁸ Senator the Honourable Mathias Cormann, *Budget 2017-18 – Agency Resourcing Budget Paper No. 4 2017-18* (9 May 2017) <https://www.budget.gov.au/2017-18/content/bp4/download/Budget2017-18_BP4.pdf> 5.

⁴⁸⁹ For example, like the *Medibank Private Sale Act 2006* (Cth).

⁴⁹⁰ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ss 7-9.

Territory, Northern Territory, New South Wales, Queensland, Tasmania, Victoria and at the Commonwealth level, specific legislation has been enacted providing for the corporatisation of government bodies.⁴⁹¹ The relevant legislation allows a company to be vested with the rights, assets and liabilities of a government body and shares to be vested in the relevant government. These corporations are given a mandate to operate commercially but in some instances, specifically retain ongoing accessibility and affordability of community services if directed to by the relevant government to do so.⁴⁹² These government owned corporations may be entirely privatised through sale to the private sector through legislation which can contain legislative controls over the accessibility and affordability of services.⁴⁹³

There is also some specific legislation, for example, in the field of health services, for the regulation of privatised health services in order to ensure quality of services. For instance, the NSW Ministry of Health is the regulatory authority for privately owned and operated health facilities and oversees enforcement of licensing standards under the *Private Health Facilities Act 2007* (NSW) and *Private Health Facilities Regulation 2010* (NSW). The Act aims to maintain appropriate and consistent quality and standards of healthcare and professional services in private health facilities in the provision of comprehensive and co-ordinated health services throughout NSW. The Act and Regulations primarily set licensing requirements including minimum standards for staffing, equipment, design and construction of clinical areas and operational matters including administration and support services. There are equivalent legislation and regulations in all State and Territory jurisdictions, similarly providing for the licensing of private health facilities and approval of their licensees.⁴⁹⁴ However, this legislation does not generally consider accessibility, affordability or equity of privatised health services and does not provide any framework for the consideration of the impacts of privatisation of health services, in particular, on children.

Children in context: Australian civil society calls regarding state-owned and supported businesses, privatisation, government procurement, aid and development, trade and investment agreements

The UNGPs highlight the ‘state-business nexus’, outlining in Principle #4 that, as part of the State duty to protect, ‘States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.’⁴⁹⁵ Connected to this is the expectation outlined in the UNGPs that States ensure policy coherence, outlining in Principle #8 that ‘States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State’s human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.’⁴⁹⁶ Such policy coherence is important to ensure that human rights concerns are not siloed in particular departments and that other policies such as those relating to export credit assistance and corporate and securities law are not formed in isolation from, and in disregard of, the state duty to protect human rights.

In 2016, over 16 civil society organisations⁴⁹⁷ published a *Joint Civil Society Statement – Implementing the UN Guiding Principles on Business and Human Rights in Australia*.⁴⁹⁸ The Statement examines, amongst other things,

⁴⁹¹ *Territory Owned Corporations Act 1990* (ACT); *Government Owned Corporations Act 2001* (NT); *State Owned Corporations Act 1989* (NSW); *Government Owned Corporations Act 1993* (Qld); *Government Business Enterprises Act 1995* (Tas); *State Owned Enterprises Act 1992* (Vic); *Public Governance, Performance and Accountability Act 2013* (Cth).

⁴⁹² *Territory Owned Corporations Act 1990* (ACT) s 17(1); *Government Owned Corporations Act 2001* (NT) s 28; *State Owned Corporations Act 1989* (NSW) ss 11, 20N(1), 20N2; *Government Owned Corporations Act 1993* (Qld) ss 112-3; *Government Business Enterprises Act 1995* (Tas) s 7(1)(b); *State Owned Enterprises Act 1992* (Vic) ss 45(1), 72(1).

⁴⁹³ For example, *Government Business Enterprises (Sale) Act 2003* (Tas) s 7; *State Supply Commission Act 1991* (WA) pt 3A, s 26D.

⁴⁹⁴ ACT Department of Health, Housing and Community Care, *ACT Health Care Facilities Code of Practice 2001* (2001)

<<http://www.health.act.gov.au/sites/default/files/ACT%20Health%20Care%20Facilities%20-%20Code%20of%20Practice%202001.pdf>>; *Private Hospitals Act 1981* (NT); *Private Health Facilities Act 1999* (Qld); *Health Care Act 2008* (SA); *Health Service Establishments Act 2006* (Tas); *Health Services (Private Hospitals and Day Procedure Centres) Regulations 2002* (Vic); *Health Services (Supported Residential Services) Regulations 2001* (Vic); *Hospitals (Licensing and Conduct of Private Hospitals) Regulations 1987* (WA).

⁴⁹⁵ United Nations Guiding Principles on Business and Human Rights, n 3, 6.

⁴⁹⁶ *Ibid*, 10.

⁴⁹⁷ Amnesty International Australia, Australian Council of Trade Unions, Australian Human Rights Commission, Australian Human Rights Law Centre, University of New South Wales, Australian Lawyers for Human Rights, Castan Centre for Human Rights Law, Monash University,

this 'State-Business nexus' – where the Australian government owns or controls businesses, or otherwise provides support and services to business activities.⁴⁹⁹ An extract of the statement is as follows (references omitted):⁵⁰⁰

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. Further, it would be commendable for the government to endeavour to act as a role model and lead Australia's corporate sector by example.

(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. These additional steps may include requiring human rights due diligence. 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. 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. 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.

Catalyst Australia, Human Rights Council of Australia, Human Rights Law Centre, Jesuit Social Services, Jubilee Australia, Law Council of Australia, No Business in Abuse, Oxfam Australia, The Australia Institute, UNICEF Australia and the Uniting Church in Australia.

⁴⁹⁸ Implementing the UN Guiding Principles on Business and Human Rights in Australia – Joint Civil Society Statement, n 61.

⁴⁹⁹ United Nations Guiding Principles on Business and Human Rights, n 3, 7.

⁵⁰⁰ Implementing the UN Guiding Principles on Business and Human Rights in Australia – Joint Civil Society Statement, n 61, 11-14.

(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. 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'.

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. 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. 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);
- 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. 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;
- investigates and remedies, via the aid and development grievance mechanism, human rights abuse when it occurs.

The Civil Society Statement also went on to consider the issue of Australia's trade and investment agreements,

concluding:⁵⁰¹

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

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 (references omitted).

As outlined below at section **4.1 – International monitoring**, the UN Committee on the Rights of the Child has also indicated concern that Australia's current approach to trade agreements does not adequately take in to consideration human rights concerns, recommending that the Australian Government:⁵⁰²

Establish that human rights impact assessment, including child rights impact assessments, are conducted prior to the conclusion of trade agreements with a view to ensuring that measures are taken to prevent child rights violations from occurring and establish the mechanisms for the Export Credit Agency of Australia to deal with the risk of abuses to human rights before it provides insurance or guarantees to facilitate investments abroad.

Recommendation 2 (iv)

Fully leverage the Government's own business activities to promote and require respect for human rights, including children's rights

Incorporate explicit and specific human rights considerations (including human rights due diligence, where appropriate) into the following:

- public procurement (i.e. the Commonwealth Procurement Rules);
- privatisation processes;
- export credit provision;
- private sector delivery of aid programs;
- trade and investment agreements; and
- decision making by departments, agencies and state-owned or controlled entities (including Government Business Enterprises).

3.2 Child labour / young workers

3.2.1 Prohibition of child labour

Is there a clear legal prohibition of child labour, including the worst forms?

The worst forms of child labour

Australia ratified ILO Convention 182 on the Worst Forms of Child Labour on 19 December 2006, and numerous forms of labour covered by the convention (such as forced labour, slavery and trafficking) is prohibited by the *Criminal Code Act 1995* (Cth).⁵⁰³ Significantly, and, as outlined above at **3.1.4 – Reporting**, the modern slavery reporting requirement contained in the *Modern Slavery Act 2018* (Cth) includes the worst forms of child labour.

⁵⁰¹ Implementing the UN Guiding Principles on Business and Human Rights in Australia – Joint Civil Society Statement, n 61, 14-15.

⁵⁰² United Nations Committee on the Rights of the Child, n 130, [28].

⁵⁰³ *Criminal Code Act 1995* (Cth) divs 270 – 273.

The Act requires certain large companies and the Commonwealth to report on risks of the worst forms of child labour (amongst other things) in their operations and supply chains, as well as actions the entity has taken to assess and address those risks, including due diligence and remediation processes. The rationale behind including the worst forms of child labour in this significant piece of legislation was explained as follows:⁵⁰⁴

Item (d) defines ‘modern slavery’ in the Bill to include the worst forms of child labour, as defined in Article 3 of the International Labour Organization Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Worst Forms of Child Labour Convention). Article 3 defines the worst forms of child labour as:

- (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
- (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

Item (d) expands the definition of ‘modern slavery’ to encompass each of the forms of conduct specified in Article 3, occurring anywhere in the world. In some cases, the worst forms of child labour may already be covered by the trafficking in persons, slavery and slavery-like offences under items (a) and (b) above. However, specifically including the worst forms of child labour in the definition of ‘modern slavery’ sends a clear normative signal that this conduct is unacceptable. It also makes it clear that entities need to report on hazardous child work as defined in Article 3(d) of the Worst Forms of Child Labour Convention.

Australia ratified the Worst Forms of Child Labour Convention in 2006. The definition in Article 3 of the Worst Forms of Child Labour Convention is well understood and commonly used internationally.

Although not a prohibition per se, including the worst forms of child labour in the *Modern Slavery Act 2018* (Cth) was a significant development as it has the potential to sensitise businesses to the risks of the worst forms of child labour in their operations and supply chains, and to further encourage entities to take action to mitigate and prevent these through requiring entities to publicly report on these specific risks to children.

Child labour generally

As outlined above, Australia has not signed and ratified the ILO Convention No. 138 on the Minimum Age for Admission to Employment. This is the case despite a National Interest Analysis conducted in 2013 indicating overwhelmingly positive outcomes that would result, including to ‘...greatly enhance Australia’s standing in the international community and the ability to address labour rights issues authoritatively, particularly within the Asia-Pacific region where many children work.’⁵⁰⁵

Commonwealth

An exception in the *Fair Work Act 2009* (Cth) means that although federal law governs the employee/employer relationship generally, it does not cover issues relating to child labour.⁵⁰⁶ Rather, ‘child labour’ is largely dealt with under state and territory law.

States and Territories

At the state and territory level, there are few express prohibitions on child labour. Rather, various laws prescribe

⁵⁰⁴ Modern Slavery Bill 2018 – Explanatory Memorandum, n 103, [56]–[58].

⁵⁰⁵ National Interest Analysis [2013] ATNIA 2 with attachment on consultation International Labour Organization Convention No. 138: Convention concerning Minimum Age for Admission to Employment (Geneva, 26 June 1973) [2013] ATNIF 2, 6.

⁵⁰⁶ *Fair Work Act 2009* (Cth) s 27(2)(e).

employment age and provide restrictions aimed at protecting children in the conditions of their employment. Observing that state and territory law is 'piecemeal and inconsistent',⁵⁰⁷ Andrew Stewart and Natalie van der Waarden have concluded that:⁵⁰⁸

The approach adopted has, however, been fragmented and haphazard, especially in Australia. There are effectively no national standards in Australia, except in restricting the performance of work during school hours. There are also problems of integration and consistency. Some Australian businesses are required to comply with both federal and state labour laws when employing someone under the age of 18. It is questionable how widely such a requirement is understood or complied with, especially in small businesses.

The key provisions relating to working ages for children in each State and Territory are set out below:

Australian Capital Territory

There is no minimum age for employment, however children under the age of 15 years are restricted to 'light work', being defined as work that is not contrary to the best interests of the child,⁵⁰⁹ for a maximum of 10 hours per week unless the proposed employer has notified authorities in writing at least 7 days prior to employment commencing.⁵¹⁰ 'Light work' must be suitable for the physical, emotional or developmental capacity of the child or young person, adequately supervised, and done under appropriate work safety standards and declared by the regulations to be 'light work'.⁵¹¹ Additionally, the work must not be likely to prejudice a child's ability to benefit from educational instruction or otherwise harm the child's health, safety, personal or social development. The *Children and Young People Act 2008* (ACT) establishes offences of employing a child (otherwise than in the exceptions allowed) if they are under 15 years and provides maximum penalties of 50 penalty units (differentiated for individuals and corporates, which as at September 2016 was \$7,500 for individuals and \$37,500 for corporates⁵¹²), imprisonment for 6 months or both.⁵¹³ The legislation requires employers of children and young people to comply with the children and young people employment standards⁵¹⁴ which outline standards for employers to consider the developmental competency of an individual child, seek the child's consent and parental consent for children under 15 years, provide information to parents and uphold a specific duty of care (which has, for example, different requirements around supervision and varies according to different age groups).⁵¹⁵ It also provides in certain circumstances oversight of the Director-General, who can, for example, give permits for high risk employment⁵¹⁶ and prohibit employers from employing children.⁵¹⁷

New South Wales

There is a general requirement on certain employers to obtain authorisation to employ a child under the age of 15 years, unless the child is more than 10 years old and the employment is outside school hours and for no more than 10 hours per week.⁵¹⁸ It is an offence under the *Children and Young Persons (Care and Protection) Act 1998* (NSW) to allow a child to take part in any employment that would put at risk the child's physical or emotional wellbeing. Premises can be entered without a warrant in case of suspected employment of children.⁵¹⁹ Additionally, the *Industrial Relations (Child Employment Act) 2006* (NSW) provides for specific conditions of employment for persons under the age of 18 years.

⁵⁰⁷ Stewart and van der Waarden, n 75, 187.

⁵⁰⁸ Ibid, 186.

⁵⁰⁹ *Children and Young People Act 2008* (ACT) s 793.

⁵¹⁰ *Children and Young People Act 2008* (ACT) s 796.

⁵¹¹ See definition of 'light work' in the *Children and Young People (Employment) Standards 2011 (No 1)* (ACT) <<http://www.legislation.act.gov.au/di/2011-138/current/pdf/2011-138.pdf>>.

⁵¹² *Legislation Act 2001* (ACT) s 133.

⁵¹³ *Children and Young People Act 2008* (ACT) s 795(1).

⁵¹⁴ *Children and Young People Act 2008* (ACT) s 792.

⁵¹⁵ *Children and Young People (Employment) Standards 2011 (No 1)* (ACT) <<http://www.legislation.act.gov.au/di/2011-138/current/pdf/2011-138.pdf>>.

⁵¹⁶ *Children and Young People Act 2008* (ACT) ss 799 - 802.

⁵¹⁷ *Children and Young People Act 2008* (ACT) s 788.

⁵¹⁸ *Child and Young Persons (Care and Protection) Act 1998* (NSW).

⁵¹⁹ *Child and Young Persons (Care and Protection) Act 1998* (NSW) s 236A.

Northern Territory

There is no minimum age for employment, however, there are restrictions on working hours for children under the age of 15 years.⁵²⁰ For instance, children under the age of 18 years are not permitted to perform work that is harmful, or likely to be harmful, to the child's physical, mental or emotional wellbeing and children under the age of 15 years are not permitted to work between 10pm and 6am.

Queensland

Children under the age of 13 years are only permitted to do volunteer work or be employed in family businesses, the entertainment industry, and supervised employment such as deliveries and charitable collections.⁵²¹ An employer of a child under 13 years of age needs to make sure that the child does not leave the workplace unless the child is in the care of a parent or an authorised person. In addition, the employer 'must take reasonable steps to ensure the child is not subject to deliberate or unnecessary isolation or any behaviour likely to intimidate, threaten, frighten or humiliate the child', and ensure that the child is able to communicate with his or her parents at any time.⁵²² School-aged children who are under 16 years and required to be enrolled in a school, and young children not yet of compulsory school age, are not permitted to be employed without parental consent. School-aged children under 16 years must also be supervised by an adult and may not work more than 4 hours on the day and 12 hours during a school week. Children aged 11 or 12 years may not do delivery work between 6pm and 6am and children between 13 and 16 years may not work between 10pm and 6am.

South Australia

Although a Child Employment Bill was proposed in South Australia in 2011 it was never passed by the parliament. As such, there remains no comprehensive laws that outline the age that children can be employed, nor specific additional requirements to protect children who are employees. However, there are limitations on the nature and type of work permitted⁵²³ and there is a prohibition on employing children during school hours if they are of compulsory school age.⁵²⁴ The *Education Act 1972* (SA) makes employing a child of compulsory school age during school hours or in a way which is likely to render a child unable to participate in learning an offence attracting a maximum penalty of \$5,000.⁵²⁵ Significantly, there is no overarching legislative requirement regarding parental consent, no specific limitation on working hours, and no specific differentiation between light work and hazardous work, although some restrictions exist in industrial awards and regulations.⁵²⁶

Tasmania

There is no minimum age for employment but, apart from a few exceptions, there is a prohibition on employing children during hours when they are required to attend school, undertake home education, or participate in an individual education / approved learning program.⁵²⁷ Additionally, children under the age of 11 years are not allowed to sell goods in public places, and children between 11 and 14 years of age are restricted to trading hours between 5am and 9pm.⁵²⁸ These restrictions do not apply where the net proceeds are devoted to the benefit of a school or a charitable purpose.⁵²⁹

⁵²⁰ *Care and Protection of Children Act 2007* (NT).

⁵²¹ *Child Employment Act 2006* (Qld); *Child Employment Regulation 2016* (Qld).

⁵²² *Child Employment Regulation 2016* (Qld) ss 13-4.

⁵²³ *Education Act 1972* (SA) s 78 prohibits children between the age of 6 and 16 being employed during hours they are required to attend school.

⁵²⁴ *Education Act 1972* (SA) s 78.

⁵²⁵ *Education Act 1972* (SA) s 78.

⁵²⁶ Legal Services Commission of South Australia (LSCSA), *Law Handbook: Underpayment of Wages* (Last revised 28 November 2017)

<<http://www.lawhandbook.sa.gov.au/ch18s08.php>>; LSCSA, *Law Handbook: Young Workers* (Last revised 19 December 2016)

<<http://www.lawhandbook.sa.gov.au/ch18s12.php>>.

⁵²⁷ *Education Act 2016* (Tas) s 247.

⁵²⁸ *Children, Young Persons and Their Families Act 1997* (Tas) ss 94(1)-(2).

⁵²⁹ *Children, Young Persons and Their Families Act 1997* (Tas) s 94(3).

Victoria

To be employed without a permit, a child must be 15 years of age or older. Otherwise, a permit or parental consent is necessary (except in certain circumstances, such as employment in a family business).⁵³⁰ Children may work after the age of 11 years in limited circumstances (such as delivering newspapers) and 13 years in most others.⁵³¹ If a child is under 15 years, an employer must generally obtain specific permits and can only require a child to perform 'light work' (as defined in the *Child Employment Act 2003* (Vic)) that is unlikely to be harmful to the child's health, safety or moral/material welfare and does not prejudice the child's attendance at school or capacity to benefit from educational instruction. Further, controls on the working hours of children provide that children may only be employed between 6am or sunrise (whichever is later) and 9pm or sunset (whichever is later), but not during school hours, for a maximum of 3 hours per day during school term, or 6 hours per day and 30 hours per week outside of school term. In addition, children must receive a rest break of at least 30 minutes after every 3 hours of work.

Western Australia

Legislation restricts the type of employment for children under the age of 15 years, however, children of at least 13 years of age may work in a shop or retail outlet between the hours of 6am and 10pm with prior written parental consent.⁵³² Subject to certain exceptions, children are prohibited from being employed during school hours if they are of compulsory school age.⁵³³

Children in context: Child labour around the world, and in the Asia Pacific region

In 2017, the International Labour Organisation released new estimates of child labour globally. It estimated that on any given day in 2016, 152 million children were engaged in child labour, and 73 million of these were engaged in hazardous work.⁵³⁴ The prevalence of child labour is highest in Africa (19.6%), amounting to over 72 million children. In Asia Pacific, over 62 million children are engaged in child labour, with a prevalence rate of 7.4%. Of these 152 million children engaged in child labour, 48% were between the ages of 5 – 11 years of age, 58% were boys, and the sectors that account for child labour include agriculture (70.9%), services (17.2%) and industry (11.9%).⁵³⁵

UNICEF has observed:⁵³⁶

Millions of children around the world are trapped in child labour, depriving them of their childhood, their health and education, and condemning them to a life of poverty and want. Of course, there is work that children do to help their families in ways that are neither harmful nor exploitative. But many children are stuck in unacceptable work for children – a serious violation of their rights.

Recent global estimates based on data of UNICEF, the ILO and the World Bank indicate that 168 million children aged 5 to 17 are engaged in child labour. Millions of them suffer in the other worst forms of child labour, including slavery and slavery-like practices such as forced and bonded labour and child soldiering, sexual exploitation, or are used by adults in illicit activities, including drug trafficking.

Despite a steady decline in child labour, progress is far too slow. At current rates, more than 100 million children will still be trapped in child labour by 2020. The continuing persistence of child labour poses a threat to national economies and has severe negative short and long term consequences for the fulfillment of children's rights guaranteed by the United Nations Convention on the Rights of the Child (CRC) – including denial of education and frequent exposure to violence.

Child labour spans various sectors, including agriculture, manufacturing, quarrying and mining, and domestic service. Often, it is hidden from the public eye. For example, the estimated 15.5 million child domestic workers worldwide – mostly girls – are often hardly visible and face many hazards. Child labour is the combined product of many factors, such as poverty, social norms condoning it, lack of decent work

⁵³⁰ *Child Employment Act 2003* (Vic) pt 2.

⁵³¹ *Child Employment Act 2003* (Vic).

⁵³² *School Education Act 1999* (WA) s 29; *Child Welfare Act 1947* (WA) ss 107B and 108.

⁵³³ *School Education Act 1999* (WA) s 29(1).

⁵³⁴ International Labour Organisation, n 72, 5.

⁵³⁵ *Ibid*, 5.

⁵³⁶ UNICEF, *Child protection from violence, exploitation and abuse – Child labour*

<https://www.unicef.org/protection/57929_child_labour.html>.

opportunities for adults and adolescents, migration, and emergencies.

Child labour reinforces intergenerational cycles of poverty, undermines national economies and impedes achieving progress towards the Sustainable Development Goals (SDGs). It is not only a cause, but also a consequence of social inequities reinforced by discrimination. Children from indigenous groups or lower castes are more likely to drop out of school to work. Migrant children are also vulnerable to hidden and illicit labour.

Child labour is preventable, not inevitable. UNICEF believes that effective action against child labour requires children to be placed squarely at the centre of programmes designed to protect children's rights. Looking at child labour through a broader lens – addressing the full range of children's vulnerabilities and protection challenges – comes as a result of the recognition that these wider concerns are not always fully addressed in action against child labour. For more information on UNICEF's approach to tackling child labour, click here.

UNICEF supports the achievement of SDG Target 8.7 which provides that States take "immediate and effective measures to ... secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms". Target 8.7 is linked to several other targets, including target 16.2 aimed at ending abuse, exploitation, trafficking and all forms of violence against and torture of children, Goal 1 on poverty, Goal 4 on Education; and Goal 5 on ending violence against women and girls and gender equality, including harmful practices. To support the achievement of Target 8.7, UNICEF pursues a multisector approach to child labour, including legal reform, education, social protection, access to health services and the data collection, and supports partnerships with UN agencies and other key stakeholders to mount a sustained effort to accelerate child labour reduction across regions. UNICEF supports communities in changing their cultural acceptance of child labour, while supporting strategies and programming to provide alternative income to families, quality education, and protective services.

As outlined above, the *2030 Agenda for Sustainable Development – The Sustainable Development Goals* agreed to in 2015, includes a specific target made by governments with regard to child labour:⁵³⁷

8.7 Take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms.

This commitment, as well as the staggering numbers of children engaged in child labour globally, make it imperative that all governments, including the Australian Government, make concerted effort to reduce the risks of children being engaged in child labour, and to eliminate the worst forms of child labour. Despite this, the Australian Government's *Report on the Implementation of the Sustainable Development Goals* published in 2018 made no reference to any initiatives or efforts to specifically reduce the risk of child labour – either domestically, regionally or globally.⁵³⁸

Recommendation 2 (v)

Commit to preventing and addressing child labour

Support efforts to reduce the numbers of children involved in child labour through:

- a) signing and ratifying the *International Labour Organisation Convention No. 138 on the Minimum Age for Admission to Employment*; and
- b) working with State and Territory Governments to strengthen and coordinate legal protections against child labour across states and territories in Australia (particularly in South Australia and Tasmania), as well as ensure appropriate monitoring and enforcement.

⁵³⁷ The Sustainable Development Goals, n 47, 20.

⁵³⁸ Australian Government, n 48.

| | |
|---|---|
| 3.2.2 Education | What is the age for completion of compulsory education, if any, and is this equal to the minimum age for admission to employment? To what extent is a free, accessible, and quality public education system available for all children? |
| <p>Commonwealth</p> <p>There is no Commonwealth law that explicitly enshrines the right to education in Australian law.⁵³⁹ However, numerous laws exist at the Commonwealth level that relate to the right to education, such as the <i>Australian Education Act 2013</i> (Cth) which is the principal legislation for Australian Government funding to government and non-government schools.⁵⁴⁰ Additionally, the <i>Higher Education Support Act 2003</i> (Cth) and the <i>Higher Education Funding Act 1988</i> (Cth) are both relevant to tertiary education.</p> <p>States and Territories</p> <p>Currently, the right to education is only enshrined in two jurisdictions – the Australian Capital Territory, by virtue of s 27A of the <i>Human Rights Act 2004</i> (ACT) which outlines the right of every child to free school education appropriate to his or her needs and, more recently in Queensland, s 36 of the <i>Human Rights Acts 2019</i> (Qld) which states that every child has the right to have access to primary and secondary education appropriate to the child's needs. There are, however, laws in every state and territory make education compulsory generally from age 6 to 15 or 16. In effect, this means that education is largely available for children in Australia.</p> <p>The age for completion of compulsory education in Australia varies between states and territories as does the minimum age for admission to employment. The age for compulsory education in Australia does not specifically align with the minimum working age in any State or Territory. However, there are significant controls on the employment of children that are of school age in terms of prohibition of employment during school hours and the number of hours that school aged children may work (see 3.2.1 – Prohibition of child labour above).</p> <p>State and territory requirements regarding the compulsory education age for children are as follows:</p> <p>Australian Capital Territory</p> <p>Between the ages of 6 and either the age at which the child completed year 12 or when the child is 17 years old, whichever is earlier.⁵⁴¹</p> <p>New South Wales</p> <p>Between the ages of 6 and either the age at which the child completes year 10 of secondary education or reaches 17 years, whichever occurs first.⁵⁴² However, a child that completes year 10 prior to reaching 17 years is of compulsory school age unless they participate in full time approved education or training, or is above 15 years and engaged in full time paid work or a combination of approved education/training and paid work.⁵⁴³</p> <p>Northern Territory</p> <p>Between 1 January of the year in which at 30 June, the child is 6 years of age, and when the first of the following occurs:</p> <ul style="list-style-type: none"> • The child completes year 10 and participates in approved education as defined in the <i>Education Act 1979</i> (NT); • If the child is above 15 years of age, paid employment or a combination of approved education or training and paid employment; • The child completed year 10 and is exempt from participating in other eligible options as defined in | |

⁵³⁹ Attorney-General's Department, *Right to Education* <<https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Righttoeducation.aspx>>.

⁵⁴⁰ *Australian Education Act 2013* (Cth).

⁵⁴¹ *Education Act 2004* (ACT) s 9.

⁵⁴² *Education Act 1990* (NSW) s 21B(1).

⁵⁴³ *Education Act 1990* (NSW) s 21B(1).

the *Education Act 1979* (NT); or

- The child reaches 17 years of age.⁵⁴⁴

Queensland

Between the age of 6 years and 6 months and either when the child completes year 10 or reaches 16 years of age.⁵⁴⁵

South Australia

Between the age of 6 and 16 years.⁵⁴⁶

Tasmania

Between 5 years and until a child obtains a Year 12 completion certificate; or obtains a Certificate III qualification, within the meaning of the Australian Qualifications Framework; or attains the age of 18 years.⁵⁴⁷

Victoria

Between the age of 6 and 17 years.⁵⁴⁸

Western Australia

Between the age of 5 years and 6 months and either the end of the year in which the child reaches the age of 17 years and 6 months or when the child reaches 18 years, whichever is first.⁵⁴⁹

3.2.3 Birth registration

What are the requirements and expectations on birth registration, and is there an effective registration system in place to reach all children?

Birth registration in Australia is regulated by the states and territories and hence there is a separate registration system for each State and Territory.⁵⁵⁰ Although there are slight differences in each jurisdiction, these laws generally require:

- when a child is born in a hospital or brought to hospital within 24 hours of birth, the CEO of the hospital must give notification of the birth to the Registrar for Births, Deaths and Marriages.⁵⁵¹ The notification must include certain particulars, including the sex, date, time and place of birth, and the full name of the mother.⁵⁵² Penalties can apply for the failure to give notification of the birth of a child.⁵⁵³
- joint responsibility of the parents of a child born to register the birth of the child with the Registrar within a certain time frame – generally 60 days in most jurisdictions but 6 months in the ACT.⁵⁵⁴ The registration must include certain particulars, including details of each parent of the child.⁵⁵⁵ Penalties can apply for the failure to register the birth of a child.⁵⁵⁶

⁵⁴⁴ *Education Act 1979* (NT) s 38.

⁵⁴⁵ *Education (General Provisions) Act 2006* (Qld) s 9.

⁵⁴⁶ *Education Act 1972* (SA) s 5 'child of compulsory education age'.

⁵⁴⁷ *Education Act 2016* (Tas) ss 11 and 24.

⁵⁴⁸ *Education and Training Reform Act 2006* (Vic) s 1.1.3 'compulsory school age'.

⁵⁴⁹ *School Education Act 1999* (WA) s 6.

⁵⁵⁰ See, for example Australian Government, *Births, deaths and marriages registries* <<https://www.australia.gov.au/information-and-services/family-and-community/births-deaths-and-marriages-registries>> and Sonia Allan, 'Birth Registration' *Health Law Central* <<http://www.healthlawcentral.com/pregnancy-birth/birth-registration/>>.

⁵⁵¹ See, for example, *Births, Deaths and Marriages Registration Act 1995 No 62* (NSW) s 12.

⁵⁵² *Births, Deaths and Marriages Registration Regulation 2017* (NSW) s 4.

⁵⁵³ See, for example, *Births, Deaths and Marriages Registration Act 1995 No 62* (NSW) s 12.

⁵⁵⁴ See, for example, *Births, Deaths and Marriages Registration Act 1995 No 62* (NSW) pt 3, div 2.

⁵⁵⁵ *Births, Deaths and Marriages Registration Regulation 2017* (NSW) s 5.

⁵⁵⁶ See, for example, *Births, Deaths and Marriages Registration Act 1995 No 62* (NSW) s 16.

In theory, this system should reach all children. However, it has been argued that, while Australia enjoys high rates of birth registration, some people may experience barriers to birth registration as a result of, for example:⁵⁵⁷

- lack of understanding of procedures/support from authorities;
- language barriers;
- accessibility; and/or
- prescribed fees⁵⁵⁸.

It has been specifically argued that the cost could mean that some children are unable to receive birth certificates at the time of birth and subsequently face difficulty in proving their identities later in life.⁵⁵⁹

Programs have been run in recent years in some locations to assist Aboriginal and Torres Strait Islander people to obtain a birth certificate.⁵⁶⁰

3.2.4 Protection of young workers

Are there clear regulations and standards on working conditions for the lawful employment of persons under age 18, including a prohibition on the use of any form of violence, including physical punishment?

Working conditions are regulated at the federal level under the *Fair Work Act 2009* (Cth) which provides for the protection of employees from harassment (including sexual harassment) or bullying of employees. In Queensland, the *Industrial Relations Act 2016* (Qld) introduced complementary anti-bullying measures that protect all workers.⁵⁶¹ Unlawful harassment is also prohibited under Federal and State/Territory anti-discrimination. These protections are afforded to employees generally and will therefore cover young workers.

As outlined above, 'child labour' and the circumstances in which children can legally be engaged in employment is specifically regulated at the state and territory level in Australia. The applicable legislation often includes the protection of young workers. For example in NSW the *Children and Young Persons (Care and Protection (Child Employment) Regulation 2015* (NSW) provides that employers must comply with a Code of Practice which, amongst other things, prohibits corporal punishment or any other behaviour likely to humiliate or frighten the child, keep records of incidents and inform the NSW Children's Guardian within 72 hours.⁵⁶²

Additionally, work health and safety legislation exists across the Commonwealth, state and territory jurisdictions, to help keep all workers safe, including young workers.⁵⁶³ The laws are generally consistent across most jurisdictions as they are based upon the model work health and safety laws developed by Safe Work Australia. All jurisdictions except Victoria and Western Australia have implemented the model Workplace Health and Safety (WHS) laws (although Western Australia is currently consulting on options to implement elements of it).⁵⁶⁴ The model WHS laws provide, for example, that persons conducting a business or undertaking must, so far as is reasonably practicable, ensure the health and safety of workers engaged, or caused to be engaged by those persons. Offences and penalties are applicable for certain breaches of such duties.⁵⁶⁵

The primary duty of care to ensure the health and safety of persons in the workplace extends to protecting workers and others from the risk of being harassed or bullied in the workplace. Under the *Fair Work Act 2009* (Cth), workers who reasonably believe they have been bullied in the workplace may also be eligible to apply to

⁵⁵⁷ UNICEF Australia, *Birth Registration - Submission to the OHCHR* (November 2013) <<http://www.childrights.org.au/wp-content/uploads/2014/06/Birth-Registration-Submission-to-OHCHR-November-2013-UNICEF-Australia.pdf>>.

⁵⁵⁸ Fee waivers are available however, the Victorian Law Reform Commission has found that these are seldom granted, see Victorian Law Reform Commission, *Birth registration and birth certificates - Community Consultation Paper* (2012) <http://www.lawreform.vic.gov.au/sites/default/files/Birth%20registration%20and%20birth%20certificates_Conultation%20paper.pdf> 19.

⁵⁵⁹ Andy Gargett, Paula Gerber and Melissa Castan, 'A Right to Birth Registration in the Victorian Charter? Seek and You Shall not Find!' (2010) 36(3) *Monash University Law Review* 1 <<http://www.austlii.edu.au/au/journals/MonashULawRw/2010/25.html#fn10>>.

⁵⁶⁰ See, for example, pathfinders, *National Aboriginal Birth Certificate Program* <<http://www.pathfinders.ngo/projects/aboriginal-birth-certificate-project/>>.

⁵⁶¹ *Industrial Relations Act 2016* (Qld) ss 272-7.

⁵⁶² *Children and Young Persons (Care and Protection (Child Employment) Regulation 2015* (NSW) sch 1 Code of Practice.

⁵⁶³ Safe Work Australia, *The law in your state* <<https://www.safeworkaustralia.gov.au/law-and-regulation/law-your-state#new-south-wales-laws>>.

⁵⁶⁴ Ibid.

⁵⁶⁵ Safe Work Australia, *Model Work Health and Safety Act* <<https://www.safeworkaustralia.gov.au/doc/model-work-health-and-safety-act>>.

the Fair Work Commission for an order to prevent future workplace bullying.

The Commonwealth, State and Territory governments each have in place workers' compensation schemes to support employees who are injured at work, including young workers.⁵⁶⁶ While arrangements differ in each jurisdiction, there are similarities in the compensation available to assist injured workers to rehabilitate and return to work, including payment of medical expenses and income replacement.

Children and young people in employment are also generally protected by the minimum employee entitlements in the *Fair Work Act 2009* (Cth). There are 122 modern awards in total and whether an employee is covered by a modern award is dependent upon the industrial instrument that covers the employer's business the duties performed by the employee, their occupation and the industry in which their employer operates in. Under most modern awards, there are specific provisions dealing with young workers or school-based apprentices.

The Fair Work Ombudsman's compliance activities with respect to protections for young workers

The Fair Work Ombudsman (FWO) defines young workers as those aged between 15 to 25 years.⁵⁶⁷

The FWO has a specific focus on assisting young workers with concerns falling under the *Fair Work Act 2009* (Cth).⁵⁶⁸ In its 2016-17 Annual Report, the FWO identified young workers as one of its 5 compliance priorities,⁵⁶⁹ and its compliance activities have assisted young workers with respect to:

- underpayment of lawful wages and entitlements
- employers not meeting their payslip requirements
- unpaid work trials and unlawful internships
- apprentice and trainee exploitation and
- non-payment for all time worked.

As reported in the Fair Work Ombudsman's 2016/2017 annual report:⁵⁷⁰

...young workers were involved in 28% of the workplace disputes we assisted with. They are overrepresented in disputes, given workers under the age of 25 account for about 15% of the Australian working population. Similarly, young workers were involved in 44% of the court cases commenced. We recovered over \$1.4 million in underpayments for 723 young workers.

The FWO's focus on young workers is due to the inherent vulnerabilities which can be particular to this group.⁵⁷¹ These vulnerabilities can include inexperience in the workplace, eagerness to gain work, and relatively low levels of knowledge of workplace laws. Accordingly, the FWO's 'Compliance and enforcement policy'⁵⁷² and its 'Litigation policy'⁵⁷³ both identify the presence of a special vulnerability (i.e. such as involving young workers) as being a relevant public interest factor for consideration as it undertakes its work.

The FWO has a dedicated Young Workers team within its inspectorate. This team is responsible for leading investigations and inquiries predominantly involving the employment of apprentices, trainees and junior workers. Investigations are coordinated nationally with the deployment of activities in various geographical locations. During investigations, the FWO examines adherence to workplace laws and makes referrals to other agencies for suspected contraventions of laws that are not within the FWO's jurisdiction. The FWO has a long-standing formal referral process to the Australian Federal Police for the referral of matters that are considered to potentially involve criminal activity, including slavery or human trafficking.⁵⁷⁴

⁵⁶⁶ Safe Work Australia, *WHS compliance, injury reporting, licensing and compensation claims* <<https://www.safeworkaustralia.gov.au/>> and Safe Work Australia, *Comparing Australia's workers' compensation schemes* <<https://www.safeworkaustralia.gov.au/workers-compensation/comparing-australias-workers-compensation-schemes>>.

⁵⁶⁷ Fair Work Ombudsman, *Annual Report 2015-16 - Year in Review* (28 September 2016) <<https://www.fairwork.gov.au/annual-reports/annual-report-2015-16/year-in-review>>.

⁵⁶⁸ Fair Work Ombudsman, *Young workers and students* <<https://www.fairwork.gov.au/find-help-for/young-workers-and-students>>.

⁵⁶⁹ Fair Work Ombudsman, *Annual Report 2016-17 - Compliance priorities - Young workers* (date unknown) <<https://www.fairwork.gov.au/annual-reports/annual-report-2016-17/02-fwo-performance-report/compliance-priorities/young-workers>>.

⁵⁷⁰ Ibid.

⁵⁷¹ Fair Work Ombudsman, n 570.

⁵⁷² Fair Work Ombudsman, *Compliance and enforcement policy* <<https://www.fairwork.gov.au/about-us/our-vision/compliance-and-enforcement-policy>>.

⁵⁷³ Fair Work Ombudsman, *Our policies* <<https://www.fairwork.gov.au/about-us/our-policies>>.

⁵⁷⁴ Ibid.

The FWO also carries out proactive compliance and enforcement activities in industries and regions where intelligence indicates a concentration of compliance concerns. Young workers also prominently represented in these activities. For example, the 2016-17 Annual Report outlined that the FWO had:⁵⁷⁵

- Released the findings of our National Apprenticeship Campaign that checked the pay and employment records of 2266 apprentices. Businesses were selected based on FWO dispute data and data from the Department of Education and Training. Seventy eight per cent of the 822 businesses audited met record-keeping and pay slip requirements and 68% paid their apprentices correctly. The activity recovered \$339,433 in underpayments for 323 apprentices, with an average recovery of \$1051 per apprentice. Fifty four formal cautions, seven compliance notices and five infringement notices were also issued.
- Ran a National Apprenticeship Initiative in which we emailed and text messaged 2352 first-year hairdressing apprentices and 1794 of their employers a link to information on common workplace issues in the industry including pay rates, pay slips, hours of work, breaks and unpaid work. The initiative is ongoing and as new apprentices sign up they are sent these communications.
- Conducted compliance activities to gather data and address non-compliant workplace practices in Wollongong. Retail and hospitality businesses in the region were targeted following media reports of an alleged culture of underpaying students. In addition to audits of businesses and engagement with students, we engaged with the Illawarra Business Chamber to provide education on workplace rights and obligations.

The FWO further targets young workers through specific educational tools, guides and resources (such as the 'starting a new job checklist') which are actively promoted through the agency's social media channels. Campaigns in the last two financial years to 30 June 2018 have focused on addressing common workplace misconceptions for young workers, a 'Know the Warning Signs' campaign, and content specific to working within retail stores.⁵⁷⁶

In late 2017, the FWO also entered into a partnership with the Foundation of Young Australians (FYA) to create a new suite of education resources to help young workers and apprentices understand their rights and entitlements in the workplace.⁵⁷⁷

The FWO does not have jurisdiction to look into breaches of State and Territory laws relating to minimum working ages and minimum years of schooling. However, links to the relevant State and Territories' jurisdictions' web pages and related information are provided within the section in the Fair Work Ombudsman's website which is devoted to young workers.⁵⁷⁸

3.2.5 Supply chains

What measures are businesses required, expected, or encouraged to undertake to ensure the absence of child labour in their global supply chains (e.g. auditing, disclosure)? What efforts have been undertaken to raise awareness of these issues within the business community?

Australian businesses are not currently required under any government legislation or regulation to ensure the absence of child labour in their global supply chains, through due diligence, auditing or otherwise. However, as discussed above in sections **3.1.4 – Reporting** and **3.2.1 – Prohibition of child labour**, the *Modern Slavery Act 2018* (Cth) requires certain large companies and the Commonwealth to publish annually a 'Modern Slavery Statement' including information on the risks of modern slavery (including the worst forms of child labour) in their operations and, significantly, their supply chains, as well as actions the entity has taken to assess and address those risks, including due diligence and remediation processes, among other things.

The Minister for Justice has previously convened a Supply Chain Working Group over 2014 – 2015.⁵⁷⁹ The Supply Chain Working group sat under the National Roundtable on Human Trafficking and Slavery, which is comprised of members of the Interdepartmental Committee on Human Trafficking and Slavery (IDC) and representatives

⁵⁷⁵ Fair Work Ombudsman, n 571.

⁵⁷⁶ Fair Work Ombudsman, *4 Warning Signs* <<https://www.youtube.com/watch?v=9DdCc2qQeow>>.

⁵⁷⁷ Fair Work Ombudsman, *New tools empower young workers to stand up for their workplace rights* (13 November 2017) <<https://www.fairwork.gov.au/about-us/news-and-media-releases/2017-media-releases/november-2017/20171113-fya-resources-mr>>.

⁵⁷⁸ Fair Work Ombudsman, n 570.

⁵⁷⁹ Department of Home Affairs, n 323.

from civil society and the business community. The Supply Chain Working Group concluded its work in late 2015 and provided its final report to Government in early 2016.⁵⁸⁰ At the eighth meeting of the National Roundtable on Human Trafficking and Slavery held on 28 November 2016, the Government announced in response that it would:⁵⁸¹

- strengthen its response to human trafficking and slavery following recommendations made by the Australian Government's multi-stakeholder Supply Chains Working Group. Over the next 12 months, the Australian Government will work collaboratively with business and civil society to:
- create a suite of awareness-raising materials for business;
- further consider the feasibility of a model for large businesses in Australia to publicly report on their actions to address supply chain exploitation;
- examine options for an awards program for businesses that take action to address supply chain exploitation; and
- explore the feasibility of a non-regulatory, voluntary code of conduct for high risk industries.

The Government has not as yet made the report of the Supply Chains Working Group public.⁵⁸²

The National Roundtable on Human Trafficking and Slavery currently has one active working group, the Labour Exploitation Working Group, which will soon finalise its report and recommendations.⁵⁸³

In 2015, the Australian Human Rights Commission, in conjunction with the Australian Centre for Corporate Social Responsibility and the Global Compact Network Australia, published a report mapping the management of human rights in supply chains by Australian businesses with the aim of promoting positive businesses practices.⁵⁸⁴ Child labour was highlighted as an issue in this paper. Additionally, the Baptist World Aid Australia annual Ethical Fashion Report also examines company's efforts to address forced labour, child labour and exploitation.⁵⁸⁵

International comparisons: Approaches to reducing child labour – United States of America and the Netherlands

United States of America – Measures to reduce child labour, particularly forced or indentured child labour

The United States of America has adopted several measures to help reduce instances of child labour (particularly forced child labour – one form of child labour), including:

- 1) A prohibition on the importation of goods produced using forced or indentured labour (including forced child labour);
- 2) A requirement in federal government procurement regulations that contractors must certify they have made good faith effort to determine whether forced or indentured child labour was used to produce the goods; and
- 3) An Office of Child Labor, Forced Labor and Human Trafficking in the US Department of Labor

⁵⁸⁰ Ibid.

⁵⁸¹ The Hon Peter Dutton MP, Minister for Home Affairs, Joint Media Release - Working with business and civil society to target human trafficking and slavery (28 November 2016) <<https://minister.homeaffairs.gov.au/peterdutton/2016/Pages/target-human-trafficking-and-slavery.aspx>>.

⁵⁸² See Brynn O'Brien and Martijn Boersma, *Human Rights in the Supply Chain of Australian Businesses: Opportunities for Legislative Reform* Catalyst and the Australia Institute (1 September 2016) <<http://www.tai.org.au/content/human-rights-supply-chain-australian-businesses-opportunities-legislative-reform>>.

⁵⁸³ Australian Government, *Trafficking in Persons – The Australian Government Response – 1 July 2015 – 30 June 2016* <<https://www.homeaffairs.gov.au/crime/Documents/report-anti-people-trafficking-interdepartmental-committee-july-2015-june-2016.pdf>>. See also Parliament of Australia, Joint Committee on Law Enforcement, *Inquiry into Human Trafficking* (18 July 2017) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Law_Enforcement/Humantrafficking45/Report/c03> Chapter 3.

⁵⁸⁴ Australian Human Rights Commission, ACCSR and Global Compact Network Australia, *Human rights in supply chains: Promoting positive practice* (December 2015) <https://www.humanrights.gov.au/sites/default/files/document/publication/2015_AHRC_ACCSR_HR_in_supply_chains_0.pdf>.

⁵⁸⁵ Baptist World Aid Australia, *2019 Ethical Fashion Report* (2019) <<https://baptistworldaid.org.au/resources/2019-ethical-fashion-report/>>.

which, as part of its work, produces a List of Goods Produced by Child Labor or Forced Labor.

Since 1930, the United States Government has prohibited the importation of goods that are “mined, produced or manufactured wholly or in part” by convict, forced or indentured labour through the *Tariff Act of 1930*.⁵⁸⁶ However, there was an exception to the law regarding “consumptive demand” which allowed for goods made with forced labour to be imported if such goods were not produced “in such quantities in the United States as to meet the consumptive demands of the United States.”⁵⁸⁷ In 2015, this exception was abolished by the *Trade Facilitation and Trade Enforcement Act of 2015*. A person can notify the Customs and Border Protection if goods produced by forced labor are being imported to the US, which can trigger an enforcement action under the Tariff Act of 1930 – which can include exclusion and/or seizure of the goods, and potentially a criminal prosecution.⁵⁸⁸

In relation to federal government procurement, in 1999 President Bill Clinton introduced Executive Order 13126 “Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labour”. The procurement regulations that implement the executive order require contractors who supply the federal government with goods on the list published by the US Department of Labor to certify that they have made good faith efforts to determine whether the goods were produced using forced or indentured child labour. The Department of Labor has explained that the Executive Order is “...intended to ensure that U.S. federal agencies do not procure goods made by forced or indentured child labor.”⁵⁸⁹

Additionally, the US Department of Labor has a Bureau of International Labor Affairs (ILAB), including an Office of Child Labor, Forced Labor and Human Trafficking. As part of its work, the Office of Child Labor, Forced Labor and Human Trafficking publishes a List of Goods Produced by Child Labor or Forced Labor pursuant to the *Trafficking Victims Protection Reauthorization Act* of 2005. As explained by the Department, “the List primarily to raise public awareness about forced labor and child labor around the world and to promote efforts to combat them”.⁵⁹⁰ The report published in 2018 identified a total of 148 goods produced by child labour and/or forced labour in 76 countries.⁵⁹¹

The Netherlands - Law requiring due diligence regarding child labour

UNICEF Australia has previously outlined the notable approach of the proposed law to require due diligence regarding child labour on certain companies, explaining:⁵⁹²

In February 2017, the lower house of the Dutch Parliament passed a law proposing to mandate due diligence regarding child labour (‘Wet Zorgplicht Kinderarbeid’). The law has been described as follows:

Due diligence under this law means, first assessing whether one can reasonably presume child labour has contributed to this product or service... If one can reasonably presume child labour has contributed to this product or service, a company is expected to make a plan of action in line with international guidelines (UNGP or OECD) to prevent this contribution. The government can later determine some quality criteria for this plan of action. A company has to declare it has applied due diligence on child labour and send this declaration to the Supervisory Body (to be appointed), six month [sic] after this law enters into force (1 January 2020)...It is due

⁵⁸⁶ Section 307 of the *Tariff Act of 1930* 19 USC. § 1307. See also Claire Reade and Samuel Witten, *Understanding the US Ban on Importing Forced Labor Goods* (12 April 2017), Arnold & Porter <<https://www.arnoldporter.com/en/perspectives/publications/2017/04/understanding-the-us-ban-forced-labor-goods>>.

⁵⁸⁷ US Customs and Border Protection, ‘Trade Facilitation and Trade Enforcement Act of 2015 – Repeal of the Consumptive Demand Clause – Frequently Asked Questions’ <<https://www.cbp.gov/sites/default/files/assets/documents/2016-Apr/tftea-repeal-consumptive-demand-clause-faqs.pdf>>.

⁵⁸⁸ US Customs and Border Protection, ‘Forced Labor’ <<https://www.cbp.gov/trade/trade-community/programs-outreach/convict-importations>>.

⁵⁸⁹ US Department of Labor, *Frequently Asked Questions – Executive Order 13126 of 1999* (30 September 2013) <https://www.dol.gov/ilab/reports/pdf/2013eo_faq.pdf>.

⁵⁹⁰ US Department of Labor, *List of Goods Produced by Child Labor and Forced Labor* <<https://www.dol.gov/agencies/ilab/reports/child-labor/list-of-goods>>.

⁵⁹¹ US Department of Labor, *List of Goods Produced by Child Labor and Forced Labor* (2018) <<https://www.dol.gov/sites/default/files/documents/ilab/ListofGoods.pdf>> 7.

⁵⁹² See UNICEF Australia, n 364, 22.

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|--|--|
| <p>diligence that is compulsory, it is not a guarantee that a product is free from child labour, as this is impossible to enforce.⁵⁹³</p> <p>The law, if passed by the Senate, would be a significant development for children. The due diligence requirement would require meaningful action to prevent goods and services from being produced using child labour, which would include the worst forms of child labour.</p> <p>The Dutch Government also supports entrepreneurs to eliminate child labour within their supply chain through a subsidy from the Ministry of Foreign Affairs' Fund against Child Labour.⁵⁹⁴</p> <p>In May 2019, the law was passed by the Senate.⁵⁹⁵</p> | |
| 3.2.6 Sectors / groups | Which sectors of the economy present the highest risks for child labour, and what measures have been taken to address these risks? Are particular groups of children (e.g. girls, ethnic minorities, or Indigenous children) at heightened risk of exploitation? What measures have been taken to address child labour in the informal economy? |
| <p>The International Labour Organisation reported new global estimates of child labour in 2017, indicating that some 152 million children around the world were engaged in child labour over 2012-2016.⁵⁹⁶ Of these children, approximately 73 million are engaged in hazardous work and 43 million in forced labour (two of the worst forms of child labour).⁵⁹⁷ Most child labour takes place within the family unit, and it is most prevalent in low income countries.⁵⁹⁸ Children aged between 5 to 11 years of age form the largest share of children engaged in child labour, with 88 million boys and 64 million girls engaged in child labour. Of children engaged in child labour, 70.9% are engaged in agriculture, 17.2% in services and 11.9% in industry.⁵⁹⁹</p> <p>In Australia, reports in recent years have linked Australian companies with risks of child labour within seafood industry,⁶⁰⁰ retail goods⁶⁰¹ and apparel⁶⁰² - largely through global supply chains.</p> <p>Domestically, there is very little information available to indicate the risks of child labour within Australia, or to provide an estimate of prevalence. This is because most data sets capture information from the age of 15 years, when people are classed as belonging to the labour force.⁶⁰³</p> | |
| 3.2.7 Monitoring / enforcement | What mechanisms are in place for monitoring child labour (e.g. inspectorates)? How can children raise violations of their right to be protected from harmful labour? What are the possible sanctions, including criminal penalties that can be imposed on businesses found to be using child labour? What services are available to assist in the rehabilitation and reintegration of children found to be engaging in child labour? |
| <p>There is no specific government body in Australia that monitors the existence of child labour nationally. However, at the Federal level, the Fair Work Ombudsman plays a key role in ensuring compliance with the <i>Fair Work Act 2009</i> (Cth) (see above at 3.2.4 – Protection of young workers).</p> <p>Additionally, Safe Work Australia is a federal statutory body established in 2008 to develop national policy</p> | |

⁵⁹³ Liesbeth Unger, 'Due Diligence on child labour in the Netherlands; a new law', LinkedIn (13 February 2017) <https://www.linkedin.com/pulse/due-diligence-child-labour-netherlands-new-law-liesbeth-unger?trk=pulse_spock-articles>.

⁵⁹⁴ Netherlands Enterprise Agency, *Fund against Child Labour* <<http://english.rvo.nl/subsidies-programmes/fund-against-child-labour>>.

⁵⁹⁵ MVO Platform 'The Netherlands takes an historic step by adopting child labour due diligence law' (14 May 2019) <<https://www.mvoplatform.nl/en/the-netherlands-takes-a-historic-step-by-adopting-child-labour-due-diligence-law/>>.

⁵⁹⁶ Alliance 8.7, *Global Estimates of Child Labour – Executive Summary*, International Labour Organisation (2017) <http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_575541.pdf> 5.

⁵⁹⁷ Ibid.

⁵⁹⁸ Ibid.

⁵⁹⁹ Ibid, 11.

⁶⁰⁰ Sarah Danckert, 'Woolies, Coles, Aldi caught up in child labour scandal', *The Sydney Morning Herald* (15 December 2015) <<http://www.smh.com.au/business/consumer-affairs/woolies-coles-aldi-caught-up-in-child-labour-scandal-20151214-glmgx.html>>.

⁶⁰¹ Four Corners, 'Australian retailers Rivers, Coles, Target, Kmart linked to Bangladesh factory worker abuse', *ABC News* (24 June 2013) <<http://www.abc.net.au/news/2013-06-24/australian-retailers-linked-to-sweatshop-abuse/4773738>>.

⁶⁰² Baptist World Aid Australia, n 587.

⁶⁰³ Jennifer Baxter and Diana Warren, 'Teen employment experiences' *Longitudinal Study of Australia's Children – Annual Statistical Report 2016*, Commonwealth of Australia (2017) <<http://data.growingupinaustralia.gov.au/pubs/asr/2016/LSAC-ASR-2016-Book.pdf>> 35-36.

relating to workplace health and safety, and workers compensation.⁶⁰⁴ Further, the Australian Human Rights Commission monitors compliance of human rights generally in Australia, although the AHRC does not have the jurisdiction to hear complaints arising from breaches of state and territory law (such as child-related employment legislation). For businesses that fail to comply with the legislative working conditions for children and young people under the age of 18 years, the courts can impose criminal penalties including fines and imprisonment (see above at **3.2.4 – Protection of young workers**).

There are some state/territory-based schemes that provide a system of monitoring and enforcement. For example, the *Child Employment Act 2003* (Vic) establishes requirements of businesses that seek to employ children under the age of 15 years. Apart from children working in family businesses, employers need to either apply for an entertainment industry permit, or a permit for industries other than entertainment.⁶⁰⁵ While employing children, employers are required to keep some basic records and documents.⁶⁰⁶ The legislation also establishes the role of Child Employment Officers whose role it is to ensure compliance with the Act, among other things⁶⁰⁷ (see further **3.2 – Child labour / young workers** above regarding penalties etc.).

There are no specific services available for rehabilitation and reintegration of children found to be engaged in child labour however those children would have access to health care and social services ordinarily available at the state and territory level.

On the issue of slavery and forced labour specifically, advocates have outlined the need for a national compensation scheme and better access to services for all persons who are victims and survivors of slavery specifically, highlighting that current system is inadequate (see further **3.4.5 – Reparations / rehabilitation**).⁶⁰⁸

3.3 Decent work for young people / parents / caregivers

| | |
|--------------------------|---|
| 3.3.1 Living wage | What is the lawful minimum wage, if any, and what steps have been taken to ensure that this provides a living wage to young people, parents and caregivers? |
|--------------------------|---|

History of the minimum wage in Australia

The concept of a living wage has had a long history in Australia. In 1907, the ‘Harvester Decision’⁶⁰⁹ became the basis of the Australian minimum wage system. In the now famous case the Commonwealth Court of Conciliation and Arbitration found that 7 shillings a day or 42 shillings a week for an unskilled labourer was ‘fair and reasonable’ wages, having regard to ‘the normal needs of the average employee, regarded as a human being living in a civilised community’.⁶¹⁰ This figure was set to enable a male breadwinner, his wife and three children to live in frugal comfort relative to the time. Since then, access to the minimum wage for sub-populations has increased as formal discrimination against women and Aboriginal and Torres Strait Islander employees has been removed over time.⁶¹¹ Additionally, the minimum wage has generally increased over the decades.

⁶⁰⁴ Safe Work Australia, *About Us* <<https://www.safeworkaustralia.gov.au/about-us>>.

⁶⁰⁵ Business Victoria, *Child employment: Overview* <<http://www.business.vic.gov.au/hiring-and-managing-staff/employing-children/overview>>.

⁶⁰⁶ Business Australia, *Keep proper records of child employment* <<http://www.business.vic.gov.au/hiring-and-managing-staff/employing-children/record-keeping>>.

⁶⁰⁷ *Child Employment Act 2003* (Vic) s 37(2).

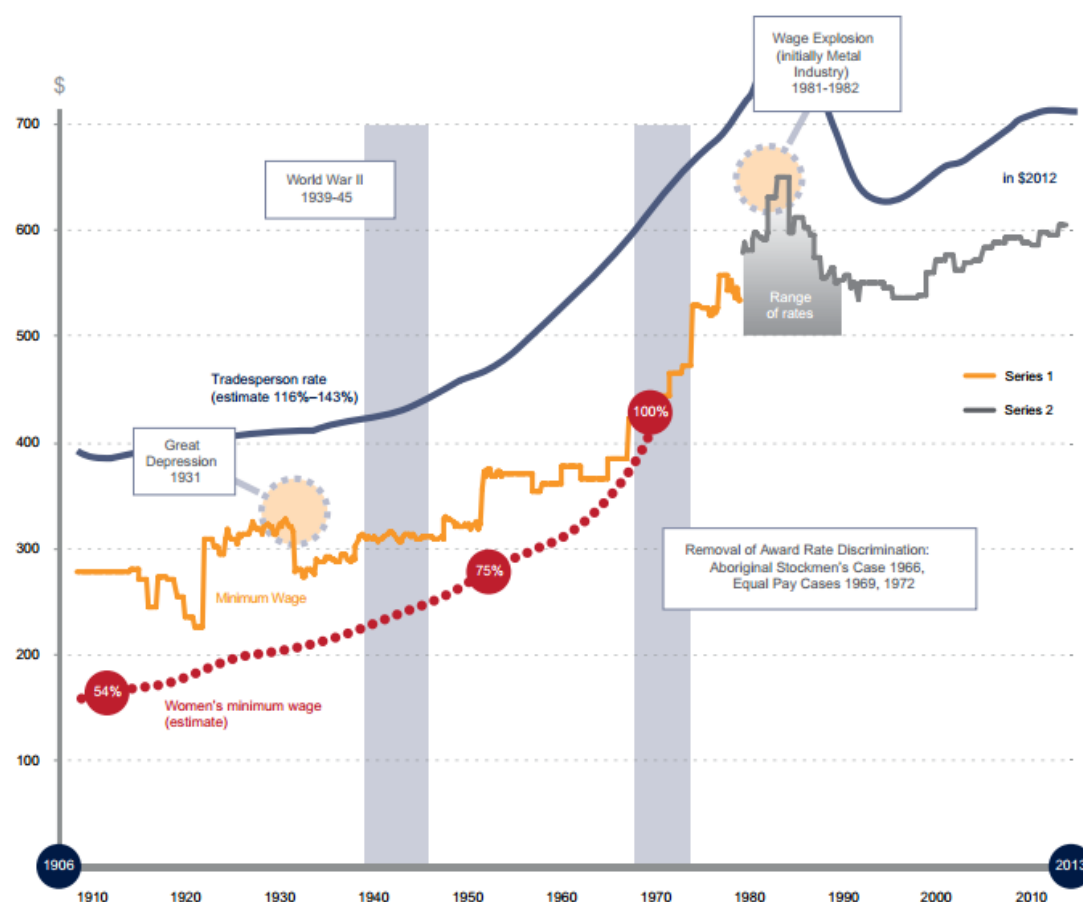
⁶⁰⁸ See, for example, Anti-Slavery Australia, Submission to the Joint Standing Committee on Foreign Affairs Defence and Trade, *Inquiry into Establishing a Modern Slavery Act in Australia* (2017) <<http://antislavery.org.au/images/pdf/Publications/2017%20-%20Submission%20to%20the%20JSCFAT%20on%20the%20Modern%20Slavery%20Act%20Inquiry.pdf>> and Law Council, *Submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade – Establishing a Modern Slavery Act in Australia* (28 April 2017) <<https://www.lawcouncil.asn.au/resources/submissions/establishing-a-modern-slavery-act-in-australia>>.

⁶⁰⁹ *Ex parte H.V. McKay* (1907) 2 CAR 1.

⁶¹⁰ The Hon. Reg Hamilton, *The history of the Australian Minimum Wage*, Fair Work Commission (2016) <<https://www.fwc.gov.au/waltzing-matilda-and-the-sunshine-harvester-factory/historical-material/methods-wage-adjustment-1>> 2.

⁶¹¹ *Ibid.*

Weekly minimum wage 1906–2013



Source: the Hon Reg Hamilton, using data from Attachment 1. Series 1 contains Court and Commission Basic Wage, National Wage Case, and Safety Net decisions only, while Series 2 includes metal industry agreements.

Source: The Hon. Reg Hamilton, *The history of the Australian Minimum Wage*, Fair Work Commission (2016)
<<https://www.fwc.gov.au/documents/documents/archives/exhibitions/minwage/exhibitionpaper-100yrsminwage.pdf>> 2.

Under Australian law today, employees are entitled to payment of at least the National Minimum Wage (**NMW**). Employers and employees cannot agree to a rate of pay which is less than the applicable minimum wage, even with the consent of both parties.⁶¹²

Employees also benefit from entitlements provided by the National Employment Standards (**NES**)⁶¹³ which stipulate maximum weekly hours of work, requests for flexible working arrangements, parental leave and related entitlements, annual leave, personal/carer's leave and compassionate leave, community service leave, long service leave, public holidays, notice of termination and redundancy pay and provision of a Fair Work Information Statement for all new employees (see further **3.3.2 – Family-friendly employment**).⁶¹⁴

⁶¹² See Fair Work Ombudsman, *Minimum wages* <<https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/minimum-workplace-entitlements/minimum-wages>>.

⁶¹³ *Fair Work Act 2009* (Cth) pt 2.2 The National Employment Standards.

⁶¹⁴ *Fair Work Act 2009* (Cth) pt 2.2 The National Employment Standards.

The NMW in Australia is set and varied annually by a specialist 'Minimum Wage Panel' of the Fair Work Commission (FWC) in accordance with Part 2-6 of the *Fair Work Act 2009* (Cth).⁶¹⁵ The FWC sets the NMW annually through the national minimum wage order. Employees who are not on awards or agreements are entitled to minimum wages as specified in the national minimum wage order, and employees covered by modern awards are entitled to the minimum wages specified in the award. Employees who are employed under enterprise agreements are entitled to a base rate of pay that is no less than the modern award rate or the national minimum wage order rate.⁶¹⁶ Under this system, different industries can have different minimum wages.

The *Fair Work Act 2009* (Cth) requires that, in setting the Australian minimum wage, the FWC must *establish and maintain a safety net of fair minimum wages, taking into account*:⁶¹⁷

- a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and
- b) promoting social inclusion through increased workforce participation; and
- c) relative living standards and the needs of the low paid; and
- d) the principle of equal remuneration for work of equal or comparable value; and
- e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.

In its 2018 Annual Wage Review, the FWC explained that the relative living standards and the needs of the low paid is just one of the relevant statutory considerations it must take into account when setting the national minimum wage. While accepting 'the proposition that it is reasonable for full time employees to expect a standard of living in excess of poverty',⁶¹⁸ the FWC reiterated the previous observations of the Full Court that:⁶¹⁹

[i]t is not legitimate to take one element in the overall suite of potentially relevant considerations to the discharge of the FWC's functions...and discern from that one matter of a Parliamentary intention that the scheme as a whole is to be construed with that end alone in mind.

As such, while the relative living standard of workers is one factor that informs the setting of Australia's minimum wage, and the changes that occur to it annually, this is just one of numerous factors that the FWC must consider.

From 1 July 2018, the national minimum wage for adults is \$18.93 per hour, or \$719.20 per week.⁶²⁰ This is inclusive of a 3.5% wage increase made in the 2018 Annual Wage Review of the FWC.⁶²¹

However, the national minimum wage is reduced for:

- 1) Adults with a disability, where their disability may affect productivity;
- 2) Employees aged under 21 years (explained further below);
- 3) Apprentices, who are paid an amount dependent on their years of experience; and
- 4) Trainees who are not apprentices for whom training arrangements apply, depending on their level of education.⁶²²

⁶¹⁵ Fair Work Commission, *Annual wage reviews* <<https://www.fwc.gov.au/awards-and-agreements/minimum-wages-conditions/annual-wage-reviews>>.

⁶¹⁶ *Fair Work Act 2009* (Cth) s 206. See also Fair Work Ombudsman, *Minimum Wages* <<https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/minimum-workplace-entitlements/minimum-wages>>.

⁶¹⁷ *Fair Work Act 2009* (Cth) s 284.

⁶¹⁸ Fair Work Commission, *National Minimum Wage Order 2018 (Appendix A) - Annual Wage Review 2017-18* (25 June 2018) <<https://www.fwc.gov.au/documents/sites/wagereview2018/decisions/2018fwcfb3500.pdf>> [26].

⁶¹⁹ Fair Work Commission, *National Minimum Wage Order 2018 (Appendix A) - Annual Wage Review 2017-18* (25 June 2018) <<https://www.fwc.gov.au/documents/sites/wagereview2018/decisions/2018fwcfb3500.pdf>> [26] citing *Penalty Rates Review decision* (2017) 350 ALR 592, [33].

⁶²⁰ Fair Work Commission, *National Minimum Wage Order 2018 (Appendix A) - Annual Wage Review 2017-18* (25 June 2018) <<https://www.fwc.gov.au/documents/sites/wagereview2018/decisions/c20181-order.pdf>>.

⁶²¹ Fair Work Commission, *National Minimum Wage Order 2018 (Appendix A) - Annual Wage Review 2017-18* (25 June 2018) <<https://www.fwc.gov.au/documents/sites/wagereview2018/decisions/c20181-order.pdf>> and Fair Work Ombudsman 'Get set for a 3.5% wage increase – 2018 Annual Wage Review' <<https://www.fairwork.gov.au/about-us/news-and-media-releases/website-news/get-set-for-a-3-5-wage-increase-2018-annual-wage-review>>.

Exemption to the minimum wage for children and young people under 21 years ('Junior Wages')

Although the differential treatment of sub-populations in respect of entitlement to the national minimum wage has been discontinued over the years⁶²³, children and young people under 21 years of age are not entitled to the NMW on equal terms as other workers. This is due to an exemption in the *Age Discrimination Act 2004* (Cth), section 25 of which provides:

Exemption for youth wages

(1) This Division does not make it unlawful for a person to discriminate against another person on the ground of the other person's age, in relation to youth wages:

- (a) in the arrangements made for the purpose of determining who should be offered work; or
- (b) in determining who should be offered work; or
- (c) in payment, or offer of payment, of remuneration for work.

(2) In this section: youth wages means remuneration for persons who are under 21.

In effect, this means that children and young people who are under the age of 21 years and who are in employment are only legally entitled to a percentage of the relevant minimum wage in their occupation or industry.⁶²⁴ As such, children and young people under 21 years legally receive a sub-minimal wage. This system is known as 'junior wages' or 'junior rates'. In the minimum wage order, this is known as the 'special minimum wage 3' and it applies to an award/agreement-free junior employee.⁶²⁵

Under the 2018 National Minimum Wage Order, an employee to whom 'special national minimum wage 3' applies (i.e. junior employees under 21 years whose minimum wage is based on a percentage of the national minimum wage)) must be paid as follows:⁶²⁶

| Age | % rate of pay of 'adult' minimum wage | Minimum weekly (38 ordinary hours) | Difference compared to National Minimum Wage (adult) |
|-----------------------|---------------------------------------|------------------------------------|--|
| Under 16 years of age | 36.8 | \$264.67 | -\$454.53 |
| At 16 years of age | 47.3 | \$340.18 | -\$379.02 |
| At 17 years of age | 57.8 | \$415.69 | -\$303.51 |
| At 18 years of age | 68.3 | \$491.21 | -\$299.99 |
| At 19 years of age | 82.5 | \$593.34 | -\$125.86 |
| At 20 years of age | 97.7 | \$702.66 | -\$16.54 |

In 2016, 415,100 people under 21 years were on junior wages in Australia.⁶²⁷ Young workers on junior wages received average earnings of \$219.30/week before tax (2016), with an average of \$679.60 received by full-time employees on junior rates of pay and \$188.70 for part-time employees on junior rates of pay.⁶²⁸

In 2000, the Australian Human Rights Commission observed that:⁶²⁹

⁶²² *Fair Work Act 2009* (Cth) s 294; Fair Work Commission, *Annual Wage Review 2016-17* (C2017/1, 26 June 2017) <<https://www.fwc.gov.au/documents/sites/wagereview2017/decisions/c20171-order.pdf>>.

⁶²³ Fair Work Commission, *Waltzing Matilda and the Sunshine Harvester Factory – Removal of discrimination in award rates* (20 December 2016) <<https://www.fwc.gov.au/waltzing-matilda-and-the-sunshine-harvester-factory/historical-material/methods-wage-adjustment-8>>.

⁶²⁴ Unless their award provides otherwise.

⁶²⁵ Fair Work Commission, *National Minimum Wage Order 2018 (Appendix A) - Annual Wage Review 2017-18* (25 June 2018) <<https://www.fwc.gov.au/documents/sites/wagereview2018/decisions/c20181-order.pdf>>.

⁶²⁶ Fair Work Commission, *National Minimum Wage Order 2018 (Appendix A) - Annual Wage Review 2017-18* (25 June 2018) <<https://www.fwc.gov.au/documents/sites/wagereview2018/decisions/c20181-order.pdf>>.

⁶²⁷ 6306.0 - Employee Earnings and Hours, Australia, n 21.

⁶²⁸ *Ibid.*

...Junior rates are determined solely on the basis of age and exclude the consideration of individual competency and responsibility levels that determine rates of pay for non-junior employees. Junior pay rates clearly constitute different treatment based on age...

It went on to conclude:⁶³⁰

The Commission does not consider that the maintenance of a permanent exemption for junior rates can be justified. Special measures of protection and assistance must be temporary and periodically reviewed.

The government should continue to investigate and monitor the effect of junior rates on the youth employment market, investigate the advantages and disadvantages of junior rates in certain industries by measures such as trials and develop alternatives for non-discriminatory employment of young people.

However, such a review has never been completed.⁶³¹ Despite this, some large companies in Australia have removed junior wages during the process of enterprise bargaining with the relevant trade union.⁶³²

In the civil society report on the 'Review of Australia Fifth Periodic Report under the International Covenant on Economic, Social and Cultural Rights', Australian NGOs found that junior wages were in 'breach of the right to equal pay for equal work for children and young people in employment in Australia', and criticised the general lack of just and favourable conditions of work for young people in Australia.⁶³³ Civil society organisations have recommended that the Australian Government:⁶³⁴

...initiate a comprehensive inquiry into the barriers faced by children and young people to the enjoyment of just and favourable conditions of work (including junior wages, social security arrangements and the impact of changes to penalty rates on children and young people, amongst other things) and to propose reforms to help overcome these through measures which respect the rights of children and young people, including the right to non-discrimination.

Children in context: Considering whether young workers in Australia receive a living wage

The number of young people reliant on the national minimum wage, or whose wages are affected by the NMW, is significant. As outlined by the Fair Work Commission in the *National Minimum Wage Order 2018*:⁶³⁵

[t]he number of employees who have their pay set by an award is estimated to be 2.3 million or 22.7 per cent of all employees. The proportion of employees that are paid at the adult NMW rate is estimated to be 1.9 per cent. Further, a significant number of employees are paid at junior or apprentice/trainee rates based on the NMW rate and modern award minimum wages. The Panel's decision will also affect employees paid close to the NMW and modern award minimum wages and those whose pay is set by a collective agreement which is linked to the outcomes of the review.

Determining whether the NMW in Australia is what could be deemed a 'living wage' is a significantly complex undertaking, not least because it requires an assessment of considerations of 'adequacy' and 'prevailing community standards'.⁶³⁶ Additionally, several variables contribute to the living standards of employees on the

⁶²⁹ Australian Human Rights Commission (previously Human Rights and Equal Opportunity Commission), *Age Matters: a report on age discrimination* (May 2000) <https://www.humanrights.gov.au/sites/default/files/content/pdf/human_rights/age_report_2000.pdf> 113.

⁶³⁰ Ibid, 113-5.

⁶³¹ See Lee Carnie, *Towards Fairness and equality for young workers: Youth wages and minimum shift lengths* (Centre for Employment & Labour Relations Law, Melbourne Law School, date unknown) <http://law.unimelb.edu.au/_data/assets/pdf_file/0008/1648871/Student-WP-No.-10-Final.pdf> 3.

⁶³² For example Coles and Woolworths, see Damian Oliver, 'Adults in all but pay: the case for increasing youth wages', *The Conversation* (15 July 2013) <<http://theconversation.com/adults-in-all-but-pay-the-case-for-increasing-youth-wages-16030>>; Ben Schneiders and Nick Toscano, 'Low-paying' deal for Coles supermarket staff faces landmark challenge', *The Sydney Morning Herald* (30 April 2016) <<http://www.smh.com.au/national/lowpaying-deal-for-coles-supermarket-staff-faces-landmark-challenge-20160430-goju60.html>>.

⁶³³ National Association of Community Legal Centres and Kingsford Legal Centre, *Review of Australia, Fifth Periodic Report under the International Covenant on Economic, Social and Cultural Rights - Australian NGO Coalition Submission* (May 2017) <<https://alhr.org.au/wp/wp-content/uploads/2017/05/ICESCR-Final-Submission-May17.pdf>> 53.

⁶³⁴ Ibid.

⁶³⁵ Fair Work Commission, *National Minimum Wage Order 2018 (Appendix A) - Annual Wage Review 2017-18* (25 June 2018) <<https://www.fwc.gov.au/documents/sites/wagereview2018/decisions/c20181-order.pdf>> [3].

⁶³⁶ Peter Saunders and Megan Bedford, 'New Estimates of the Costs of Children' *Family Matters 2018 No. 100* (2018) Australian Institute of Family Studies <<https://aifs.gov.au/publications/issue/new-estimates-costs-children>> 20.

NMW and award-reliant employees; namely ‘...the level of wages that they can earn, the hours they work, tax-transfer payments and the circumstances of the households in which they live.’⁶³⁷

The task is made particularly difficult when looking at the situation of young people in employment in Australia, due to:

- 1) The differential treatment of young people compared the general adult population, including with regard to:
 - a. The effect of junior wages – noting that young people generally receive a lower rate of pay when compared to the ‘adult’ labour force;
 - b. The social security payments that are available only to young people (such as Youth Allowance); and
- 2) An apparent lack of data and analysis on the specific earnings and living expenses of young people, with available analysis frequently focusing on the experiences of adult wage-earner, excluding from consideration the situation of young people, including young people on junior wages.⁶³⁸

However, the Australian Council of Trade Unions has suggested that, in light of the significant increases in the cost of living in Australia, the minimum wage is not sufficient to classify as a so-called ‘living wage’, and that ‘the minimum wage is leaving millions in poverty’.⁶³⁹ This situation would likely be compounded for young people, given that they earn generally less than the minimum wage.

The Australian economy has enjoyed relative prosperity in recent years, having experienced over 28 years of uninterrupted economic growth, marking an outperformance of other major ‘advanced’ economies.⁶⁴⁰ Additionally, aggregate labour force participation has been at all-time highs of around 65.7%.⁶⁴¹

However, the situation for young people aged 15-24 years is markedly different compared to the experiences of the labour force in total. For young people, labour force participation has decreased (in part, explained by the increase in young people studying full time).⁶⁴² Significantly also, the percentage of young people who are in long term unemployment has generally been increasing since 2009.⁶⁴³

At the same time, wage growth has been low⁶⁴⁴, and the cost of housing in particular has been deemed ‘severely unaffordable’⁶⁴⁵. This situation is compounded for young people, many of whom work in low paid and highly

⁶³⁷ Fair Work Commission, *National Minimum Wage Order 2018 (Appendix A) - Annual Wage Review 2017-18* (25 June 2018) <<https://www.fwc.gov.au/documents/sites/wagereview2018/decisions/c20181-order.pdf>> [6].

⁶³⁸ See, for example, the Australian Bureau of Statistics Selected Living Cost Index focuses on household types based on the principal source of household income and does not include figures looking at the experiences of young people aged 15-24 years. See Australian Bureau of Statistics, *6467.0 – Selected Living Costs Indexes, Australia, Mar 2018* (2 May 2018) <<https://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/6467.0Explanatory%20Notes1Mar%202018?OpenDocument>>.

⁶³⁹ See, for example, *ACTU calls for a Living Wage on the 110th Anniversary of the Harvester Decision* (2 November 2017) Australian Council of Trade Unions <<http://www.asu.asn.au/news/categories/minwage/171102-actu-living-wage-110-anniversary-harvester>>.

⁶⁴⁰ Edmund Tang, ‘Australia on course to celebrate 30 years of growth, says Oxford Economics’, Australian Trade and Investment Commission (5 April 2019) <<https://www.austrade.gov.au/news/economic-analysis/australia-on-course-to-celebrate-30-years-of-growth-says-oxford-economics>>.

⁶⁴¹ Australian Bureau of Statistics, *6202.0 – Labour Force, Australia, March 2018* ‘Labour force participation rate at all-time high’ (19 April 2018) <<http://www.abs.gov.au/ausstats/abs@.nsf/lookup/6202.0Media%20Release1Mar%202018>>.

⁶⁴² Analysis of the Reserve Bank of Australia observed: ‘The decrease in labour force participation and increased prevalence of part-time work for younger Australians is partly related to the increase in the share of 15–24 year olds who are studying full time. However, in recent years there has been a pronounced increase in the share of 20–24 year olds working part time who are not studying full time. This has been associated with a significant rise in the share of younger workers who are underemployed (that is, they want, and are available, to work additional hours). Furthermore, the share of 20–24 year olds that have become disengaged from either work or study has also increased over the past decade’ - Zoya Dhillon and Natasha Cassidy, *Labour Market Outcomes for Younger People – Bulletin June 2018* (2018) Reserve Bank of Australia, 2 <<https://www.rba.gov.au/publications/bulletin/2018/jun/labour-market-outcomes-for-younger-people.html>>.

⁶⁴³ Brotherhood of St Laurence, *Reality Bites – Australia’s Youth Unemployment in A Millennial Era* (December 2017) <http://library.bsl.org.au/jspui/bitstream/1/10341/1/BSL_Reality_bites_Australias_youth_unemployment_Dec2017.pdf> 4.

⁶⁴⁴ The Treasury, *Analysis of wage growth* (November 2017) <<https://static.treasury.gov.au/uploads/sites/1/2017/11/p2017-t237966.pdf>>.

⁶⁴⁵ Demographia, *14th Annual Demographia International Housing Affordability Survey: 2018* (2018) <<http://www.demographia.com/dhi2018.pdf>> 3.

casualised jobs. The most common occupations for students in higher education (aged 15 – 24 years) are sales assistants, waiters, cashiers and bar attendants.⁶⁴⁶ The retail sector for example provides employment for 1 in 3 young persons aged 24 or under,⁶⁴⁷ and these workers are more likely to be female.⁶⁴⁸ Although the minimum wage applying to many of those roles rose by 3.5% in 2018, the 2017 decision of the Fair Work Commission in its *4 yearly review of modern awards – Penalty Rates* was to decrease penalty rates for some permanent and casual employees working on Sundays and public holidays in the Hospitality, Restaurant, Fast Food, Retail and Pharmacy Awards started decreasing yearly from 1 July 2018.⁶⁴⁹ The full decision in relation to the decrease in Sunday penalty rates is being transitioned in annual instalments over three or four years.

Social security payments and welfare supports available for young people and carers of children

Some social security payments and welfare supports exist to help young people and parents when their incomes are low (for example, due to unemployment or under-employment). The most relevant forms of social security support for young people are Youth Allowance (for people aged between 16 and 24 years of age or younger who are studying, and people who are 16-21 years old and looking for work⁶⁵⁰) and Newstart Allowance (for persons older than 22 years⁶⁵¹).

However, many young people on Youth Allowance still experience financial hardship, and research indicates that these payments do not alleviate financial hardship totally.⁶⁵² Analysis from the Australian Council of Social Services and the Social Policy Research Centre found in 2017 that:⁶⁵³

For unemployed families receiving social security payments, disposable incomes are below the MIHL [Minimum Income for Healthy Living] standard in all cases, with the shortfall varying between \$47 and \$126 a week. These shortfalls cast serious doubt over the adequacy of existing social safety net provisions and suggest that increased payment levels are urgently needed, especially for those in receipt of NSA.

Additionally, significant concerns have been raised about the structure of specific types of social security payments and welfare supports, and their particular impacts on Aboriginal and Torres Strait Islander people and families. These include the 'Community Development Program' (CDP) and 'ParentsNext'.

The CDP has been summarised by the Senate Standing Committee on Finance and Public Administration as follows (references omitted):⁶⁵⁴

2.2 CDP is a remote-area Work for the Dole scheme with around 35 000 participants, about 84 per cent of whom are Aboriginal or Torres Strait Islander people, often living in discrete remote Indigenous communities or small outstations. There are currently 53 100 Aboriginal and Torres Strait Islander people in total (remote and non-remote) seeking work. As a result, this program is of particular significance to Aboriginal and Torres Strait Islander people.

2.3 CDP was introduced on 1 July 2015. It replaced the Remote Jobs and Communities Program (RJCP) which, in turn replaced the longstanding Community Development and Employment Projects (CDEP) and the universal employment services program, Job Services Australia.

⁶⁴⁶ Australian Bureau of Statistics, *2011 Census of Population and Housing* (25 July 2013)

<<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features20July+2013>>.

⁶⁴⁷ Fair Work Commission, *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 (23 February 2017) <<https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/2017fwcfb1001.pdf>> [1435].

⁶⁴⁸ Fair Work Commission, *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 (23 February 2017) <<https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/2017fwcfb1001.pdf>> [1435].

⁶⁴⁹ Fair Work Ombudsman, *Penalty rates changes 2017* <<https://www.fairwork.gov.au/pay/penalty-rates-and-allowances/penalty-rates-changes-2017>>.

⁶⁵⁰ Department of Human Services, *Youth Allowance* <<https://www.humanservices.gov.au/individuals/services/centrelink/youth-allowance>>.

⁶⁵¹ Department of Human Services, *Newstart Allowance* <<https://www.humanservices.gov.au/individuals/services/centrelink/newstart-allowance/who-can-get-it>>.

⁶⁵² Chris Ryan, 'Student income support and education and training participation in Australia' (Research Report No 62, Longitudinal Surveys of Australian Youth (2013) <https://www.ncver.edu.au/_data/assets/file/0029/8939/student-income-support-2611.pdf> 5.

⁶⁵³ Peter Saunders and Megan Bedford, *New Minimum Income for Healthy Living Budget Standards for Low Paid and Unemployed Australians*, Social Policy Research Centre and the Australian Council of Social Services (2017) <<http://unsworks.unsw.edu.au/fapi/datastream/unsworks:46140/binc76de784-a739-416b-9361-6ebb285882ea?view=true>> 3.

⁶⁵⁴ Senate Standing Committee on Finance and Public Administration, *Appropriateness and effectiveness of the objectives, design, implementation and evaluation of the Community Development Program (CDP)* (December 2017) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/CDP/Report>.

2.4 CDP requires job seekers aged 18–49 years to participate in work-like activities for five hours every weekday, for a total of 25 hours every week, for 46 weeks each year.

2.5 To be eligible, participants must live in a remote area, receive a Newstart Allowance, Parenting Payment or Youth Allowance, and meet mutual obligation requirements. In return, the jobseekers are to receive personalised support including access to skills development and training assisted by a program provider in their region. The CDP is delivered in 60 regions and more than 1 000 communities across Australia. The current CDP regions are shown in Figure 2.1.

2.6 Participants receive personalised assistance from providers who are contracted to assist participants with training opportunities, seeking work, and participating in activities that benefit their community while looking for work.

2.7 CDP is designed to support job seekers in remote Australia to build skills, address barriers to employment and contribute to their communities through a range of activities, and to address the 'unique social and labour market conditions found in remote Australia'.

It has been described by the Australian Government as follows:⁶⁵⁵

The Community Development Program (CDP) is our remote employment and community development service. CDP supports job seekers in remote Australia to build skills, address barriers and contribute to their communities through a range of flexible activities. It is designed around the unique social and labour market conditions in remote Australia and is an essential part of the Australian Government's agenda for increasing employment and breaking the cycle of welfare dependency.

Analysis of the CDP has concluded that 'CDP participants have more onerous obligations than those on the mainstream program,...30,000 people in CDP receive more penalties than more than 700,000 in jobactive and across the country [and] Indigenous people are getting penalised more than anyone else'.⁶⁵⁶ The Senate Standing Committee on Finance and Public Administration inquired into *Appropriateness and effectiveness of the objectives, design, implementation and evaluation of the Community Development Program (CDP)* in 2017.⁶⁵⁷ Evidence before the Committee outlined a number of concerning impacts of the CDP on children and families, including families with children being cut off from income support,⁶⁵⁸ women and children going without food and basic facilities,⁶⁵⁹ parents having to leave their children behind with other family members while they go searching in other areas for money and support to live⁶⁶⁰ and young people engaging in the petty theft of food due to poverty and lack of supervision.⁶⁶¹ In response to these concerns, the Australian Government announced a series of reforms to the program that commenced on 1 March 2019. The reforms are intended to provide for greater community control (for example, through supporting community advisory boards and ensuring CDP is delivered by Indigenous organisations), and reduce participation up to 20 hours/week.⁶⁶²

The 'ParentsNext' program is compulsory for parents who:⁶⁶³

- have a child under 6 years of age
- haven't had paid work in the last 6 months

⁶⁵⁵ Department of the Prime Minister and Cabinet, *The Community Development Program (CDP)* <<https://www.pmc.gov.au/indigenous-affairs/employment/cdp>>.

⁶⁵⁶ The Fair Work and Strong Communities Alliance, *Key facts about CDP* <<https://www.fairworkstrongcommunities.org/key-facts-about-cdp>>.

⁶⁵⁷ Senate Standing Committee on Finance and Public Administration, n 656.

⁶⁵⁸ Ibid, [4.41] quoting Ms Vanessa Thomas, Director, Nurra Kurramunoo Aboriginal Corporation, Proof Hansard, Kalgoorlie (23 August 2017) 51–52.

⁶⁵⁹ Ibid, [4.53] quoting Mrs Christine Boase, Treasurer, Laverton Leonora Cross Cultural Association, Proof Hansard, Kalgoorlie (23 August 2017) 32.

⁶⁶⁰ Ibid, [4.59] quoting Superintendent Michael Bell, District Superintendent, Mid West-Gascoyne District, Western Australia Police Force, Proof Hansard, Kalgoorlie, (23 August 2017) 3.

⁶⁶¹ Ibid, [4.51] quoting Ms Victoria Baird, Regional Co-ordinator, East Kimberley, Save the Children Australia, Proof Hansard, Kalgoorlie (23 August 2017), 14, and [4.60] quoting Inspector Glen Willers, Assistant District Officer, Goldfields-Esperance District, Western Australia Police Force, Proof Hansard, Kalgoorlie (23 August 2017) 6.

⁶⁶² Department of the Prime Minister and Cabinet, *The Community Development Program (CDP)* <<https://www.pmc.gov.au/indigenous-affairs/employment/cdp>>.

⁶⁶³ Australian Government, *Guides to Social Policy Law – Social Security Guide – 3.5.1.167 ParentsNext Summary and Participation Requirements (PP)* <<http://guides.dss.gov.au/guide-social-security-law/3/5/1/167>>.

- have been getting Parenting Payment for the last 6 months; and
- meet at least one high risk/high priority criteria (for example, is an early school leaver).

Compulsory participants are generally required to undertake an activity to assist them to plan and prepare for employment, and progress towards their education and employment goal through engaging in certain activities. Such activities can be pre-vocational (for example, parenting course, financial management or confidence building courses) or vocational preparation activities (including training or education courses, part time work or voluntary work).⁶⁶⁴

SNAICC – National Voice for our Children, National Family Violence Prevention Legal Services and the Human Rights Law Centre recently conducted analysis in to ParentsNext, concluding that the program discriminates on the basis of sex and race. In a Joint submission to the Senate Community Affairs References Committee inquiry into ParentsNext in February 2019, they outlined:⁶⁶⁵

[d]ata obtained from the Department of Jobs and Small Business shows that as at 31 December 2018, 95% of ParentsNext participants are women. Aboriginal and Torres Strait Islander parents make up 19% of ParentsNext participants, in a context where Aboriginal and Torres Strait Islander people make up approximately 3% of the adult population nationwide. The data shows that, while there are more people participating in the targeted stream, people participating in the intensive stream (which targets Aboriginal and Torres Strait Islander parents) are having their payments suspended more often. Notably, Aboriginal and Torres Strait Islander parents make up 24% of the 16,025 payment suspensions, despite being 19% of participants – this is a concerning early trend.

The submission went on to highlight the impact on children of the program in potential contravention of article 26 of the *Convention on the Rights of the Child*, highlighting in particular that '[t]he punitive regime of sanctions will increase levels of emotional and financial stress in some families and leave parents without money for daily essentials, like nutritious food, necessary for positive child health and development.'⁶⁶⁶

As these examples demonstrate, there is considerable need for further reforms to ensure that social security payments and welfare supports are non-discriminatory, payments are of a sufficient level and do not have enforcement regimes that compromise the ability of people – particularly young people and carers of children – to maintain an adequate standard of living, including the ability to access essential goods and services. There is also need to ensure targeted government action to address the social and economic factors contributing to unemployment or underemployment, and well as structural barriers to employment faced by particular groups of people.

The need for further data and analysis

Although there are existing methods for determining a living wage or a level of minimum acceptable income,⁶⁶⁷ it has been recognised that further work is needed in order to determine a methodology of determining a living wage in the context of Australia.⁶⁶⁸

Further data and analysis is undoubtedly required on the experiences of young people specifically in order to determine if young people, particularly young people on junior wages, receive a 'living wage' and, more generally, are able to maintain an adequate standard of living and live free from poverty.

⁶⁶⁴ Ibid.

⁶⁶⁵ SNAICC – National Voice for our Children, National Family Violence Prevention Legal Services and the Human Rights Law Centre, *Putting single mothers last: the economic injustice of ParentsNext – Joint submission to the Senate Community Affairs References Committee inquiry into ParentsNext* (5 February 2019)

<<https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/5c5a46feeb3931523e32b565/1549420292771/HRLC+SNAICC+and+NFVPLS+submission+to+Parents+Next+inquiry.pdf>> [17].

⁶⁶⁶ Ibid, [51]-[56].

⁶⁶⁷ Such as the 'Anker Methodology' Deloitte Access Economics, *A Living Wage in Australia's Clothing Supply Chain* - Produced by Deloitte Access Economics for Oxfam Australia (20 September 2017) <<https://www2.deloitte.com/au/en/pages/economics/articles/living-wage-australias-clothing-supply-chain-oxfam.html>> 18.

⁶⁶⁸ Australian Council of Trade Unions, *Living up to the promise of Harvester: Time for a Living Wage* (2017) <<https://www.actu.org.au/media/1033485/living-up-to-the-promise-of-harvester.pdf>>.

Recommendation 2 (vi)

Ensure Australians, particularly young people and carers of children, can maintain an adequate standard of living

Adopt a comprehensive strategy to help ensure young people and carers of children can maintain an adequate standard of living. Specifically, the Australian Government should:

- a) resource and support government agencies (such as the Australian Institute of Health and Welfare and/or Australian Bureau of Statistics) to collect and analyse data on the experiences of young people so that their incomes (both through wages and social security payments), expenses and living arrangements can be benchmarked and tracked over time.
- b) establish a parliamentary inquiry to examine the ability of all people, including young people and carers of children, to maintain an adequate standard of living. The inquiry should examine, amongst other things;
 - i. the impact of junior wages on the incomes of young people, and its consistency with the human rights of young people;
 - ii. non-discriminatory options to help young people transition into employment;
 - iii. the feasibility and appropriateness of adopting a living wage in Australia; and
 - iv. the structure, conditions and level of welfare income, particularly for young people and carers of children who unemployed or underemployed.

3.3.2 Family-friendly employment

How are the needs and rights of parents and other employees with childcare responsibilities contemplated within laws and policies around working hours, rest periods, and holiday entitlements?

National Employment Standards

Australian law mandates minimum workplace entitlements through the National Employment Standards (NES) contained in the *Fair Work Act 2009* (Cth).⁶⁶⁹ These must be provided to all employees covered by the national workplace relations system, regardless of any award, agreement or contract. The NES include 10 minimum standards of employment covering:

- 1) the maximum weekly hours of work;
- 2) requests for flexible working arrangements;
- 3) parental leave and related entitlements;
- 4) annual leave;
- 5) personal/carer's leave and compassionate leave;
- 6) community service leave;
- 7) long service leave;
- 8) public holidays;

⁶⁶⁹ *Fair Work Act 2009* (Cth) pt 2.2 The National Employment Standards.

9) notice of termination and redundancy pay; and

10) a Fair Work Information Statement.⁶⁷⁰

Regarding hours of work, the NES provide that an employer must not request or require an employee to work more than 38 hours (for a full-time employee) in a week, unless the additional hours are reasonable. In determining whether additional hours are reasonable or unreasonable, a number of factors must be taken into account including the employee's personal circumstances such as family responsibilities.⁶⁷¹

Regarding leave entitlements, the NES provide generally for 4 weeks' paid annual leave for each year of service with an employer (apart from casual employees).⁶⁷²

The NES also specifically mandate entitlement to paid personal/carer's leave, requiring 10 days of paid personal/carer's leave for each year of service, with entitlements accruing progressively, and accumulating from year to year.⁶⁷³ Personal/carer's leave can be taken:⁶⁷⁴

(a) because the employee is not fit for work because of a personal illness, or personal injury, affecting the employee; or

(b) to provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because of:

(i) a personal illness, or personal injury, affecting the member; or

(ii) an unexpected emergency affecting the member.

Additionally, employees are entitled to 2 days of unpaid carer's leave for each occasion (a permissible occasion) when a member of the employee's immediate family, or a member of the employee's household, requires care or support because of:

(a) a personal illness, or personal injury, affecting the member; or

(b) an unexpected emergency affecting the member.⁶⁷⁵

'Immediate family' members are defined as meaning:

(a) a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the employee; or

(b) a child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the employee.

Accordingly, the NES provide minimum entitlements including for parents and caregivers to take either paid or unpaid leave to care for their children in certain circumstances. They also establish minimum entitlements in terms of annual leave and working hours.

Under the NES, parents and other employees with responsibilities to care for children may also be assisted by negotiating 'Flexible Working Arrangements' with employers (s 65).⁶⁷⁶ The *Fair Work Act 2009* (Cth) (**FWA**) provides permanent and some long-term casual employees with a legal right to request flexible working arrangements in a number of circumstances. Under the FWA an employee is entitled to request flexible working arrangements if he or she has worked for the employer for at least 12 months on a full-time or part-time basis, or on a casual basis with a reasonable expectation of ongoing employment, and the employee:

⁶⁷⁰ Ibid.

⁶⁷¹ Ibid, div 3.

⁶⁷² Ibid, div 6.

⁶⁷³ *Fair Work Act 2009* (Cth) pt 2.2 National Employment Standards, div 7 – Personal/carer's leave and compassionate leave.

⁶⁷⁴ Ibid, s 97.

⁶⁷⁵ Ibid, s 102.

⁶⁷⁶ *Fair Work Act 2009* (Cth) pt 2.2 National Employment Standards, div 4 – Requests for flexible working arrangements, s 65.

- is a parent, or has responsibility for the care of a child who is of school age or younger; or
- is a carer within the meaning of the *Carer Recognition Act 2010* (Cth).⁶⁷⁷

The NES also provide that an employee who:

- (a) is a parent, or has responsibility for the care, of a child; and
 - (b) is returning to work after taking leave in relation to the birth or adoption of the child;
- may request to work part time to assist the employee to care for the child.

Flexible working arrangements may include flexibility with start and finishing times, part-time work or job sharing, working additional hours to make up for time taken off, and working from home.⁶⁷⁸ The Fair Work Ombudsman provides template letters for employees to apply for flexible working arrangements.

Data collected by the Fair Work Commission indicate that the majority of employees with flexible work arrangements reached these on an informal basis, as opposed to a formal individual flexibility arrangement through the process set out in the FWA.⁶⁷⁹ Additionally, over the period 26 May 2012–25 May 2015, employers indicated that 90 per cent of cases of a formal request for flexible working arrangements were approved without change, while on 9 per cent of occasions, some elements of the requests were granted.⁶⁸⁰ Over the same period, employees reported that their formal requests for flexible work were granted more than 85 per cent of the time, with the request accepted with some changes a further 12 per cent of the time. They reported that 2 per cent of requests were refused.⁶⁸¹ At the same time however, the Fair Work Commission has accepted ‘[a] significant proportion of employees are not happy with their working arrangements but do not make a request for change (a group referred to as ‘discontented non-requestors’), for various reasons including that their work environment is openly hostile to flexibility’⁶⁸² (discussed further below).

The Fair Work Commission recently considered an application by the Australian Council of Trade Unions to vary modern awards to give employees the right to temporarily reduce their hours to accommodate their parenting and/or caring responsibilities. The Full Bench rejected this claim on 26 March 2018, agreeing with a submission from an employer representative party that ‘no coherent understanding of a fair or relevant minimum safety net could confer on an employee a unilateral right to determine their hours, regardless of the operational considerations of the employer’.⁶⁸³

At the same time, the Full Bench of the Fair Work Commission acknowledged that under the current law, employees lack an effective enforcement or appeal mechanism for an employer’s refusal to accommodate a request for flexible working arrangements.⁶⁸⁴ It also found:⁶⁸⁵

10. The utilisation of IFAs [individual flexibility arrangement] for family friendly working arrangements is very low. Only about 2 per cent of employees report having an IFA with their employer...

⁶⁷⁷ Ibid.

⁶⁷⁸ Fair Work Ombudsman, *The right to request flexible working arrangements* <<https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/best-practice-guides/the-right-to-request-flexible-working-arrangements>>.

⁶⁷⁹ Bernadette O’Neill, *General Manager’s report into the operation of the provisions of the National Employment Standards relating to requests for flexible working arrangements and extensions of unpaid parental leave under s.653 of the Fair Work Act 2009 (Cth), 2012–2015* (November 2015) <<https://www.fwc.gov.au/documents/sites/admingmreporting/gm-nes-2015.pdf>> vii.

⁶⁸⁰ Ibid.

⁶⁸¹ Ibid.

⁶⁸² [2018] FWCFB 1692 Fair Work Commission – Decision, Fair Work Act 2009 s.156–4 yearly review of modern awards, Family Friendly Working Arrangements (AM2015/2) (26 March 2018) <<https://www.fwc.gov.au/documents/decisionssigned/html/2018fwcfb1692.htm>> [392].

⁶⁸³ [2018] FWCFB 1692 Fair Work Commission – Decision, Fair Work Act 2009 s.156–4 yearly review of modern awards, Family Friendly Working Arrangements (AM2015/2) (26 March 2018) <<https://www.fwc.gov.au/documents/decisionssigned/html/2018fwcfb1692.htm>> [392].

⁶⁸⁴ [2018] FWCFB 1692 Fair Work Commission – Decision, Fair Work Act 2009 s.156–4 yearly review of modern awards, Family Friendly Working Arrangements (AM2015/2) (26 March 2018) <<https://www.fwc.gov.au/documents/decisionssigned/html/2018fwcfb1692.htm>> [392].

⁶⁸⁵ [2018] FWCFB 1692 Fair Work Commission – Decision, Fair Work Act 2009 s.156–4 yearly review of modern awards, Family Friendly Working Arrangements (AM2015/2) (26 March 2018) <<https://www.fwc.gov.au/documents/decisionssigned/html/2018fwcfb1692.htm>> [392].

11. The vast majority of requests for flexible working arrangements (both informal and those made pursuant to s.65) are approved in full, some requests are approved with amendments and small a proportion (about 10 per cent) are rejected outright.

12. Workplace culture and norms can play an important role in the treatment of requests for flexible working arrangements. Individual supervisor attitudes can be powerful barriers and enablers of flexibility.

...

14. A significant proportion of employees are not happy with their working arrangements but do not make a request for change (a group referred to as 'discontented non-requestors'), for various reasons including that their work environment is openly hostile to flexibility. Men are more likely to be discontented non-requestors than women.

...

16. The fact that a significant proportion of employees are 'discontented non-requestors' suggests that there is a significant unmet employee need for flexible working arrangements.

Although it went on to reject the submission of the ACTU, the FWC also indicated that its decision at that point in time did not conclude the matter.⁶⁸⁶

Later in that year, in September 2018, the Full Bench decided on a model term to be inserted into all modern awards that requires employer to:⁶⁸⁷

discuss the request with the employee and genuinely try to reach agreement on a change in working arrangements that will reasonably accommodate the employee's circumstances having regard to:

- (a) the needs of the employee arising from their circumstances;
- (b) the consequences for the employee if changes in working arrangements are not made; and
- (c) any reasonable business grounds for refusing the request.

The new term requires employers to genuinely try to reach agreement on an employee's request for flexible working arrangements by discussing the request and considering alternative arrangements.⁶⁸⁸ A request can still be rejected on reasonable business grounds but there is a review mechanism available if the employer does not follow the required process. If a request is refused, an employer must provide details of the reasons for the refusal, including the business ground or grounds for the refusal and how the ground or grounds apply.⁶⁸⁹ The new model clause also provides that '[d]isputes about whether the employer has discussed the request with the employee and responded to the request in the way required by clause X, can be dealt with under clause Y— Consultation and Dispute Resolution.'⁶⁹⁰ In deciding against an appeal mechanism, the FWC explained its decision as follows (references omitted):⁶⁹¹

[30] As noted at [4], the right to request in s.65 has been characterised as a 'soft' regulatory approach, insofar as the employee is denied any effective means of challenging the employer's refusal to grant their request. An incident of this approach is that the Commission is unable to deal with a dispute to the extent it is about whether an employer had reasonable business grounds under s.65(5) unless the parties have agreed in a contract of employment, enterprise agreement or other written agreement to the Commission dealing with the matter.

[31] The effect of the provisional model term in its current form would provide the Federal Court and the Federal Circuit Court with jurisdiction to deal with the type of matter which Parliament has specifically sought to prohibit (i.e. disputes about whether an employer had reasonable business grounds for refusal). As ACCL observes, such disputes would be determined by courts in circumstances where the Commission, the specialist industrial

⁶⁸⁶ [2018] FWCFB 1692 Fair Work Commission – Decision, Fair Work Act 2009, s.156–4 yearly review of modern awards, Family Friendly Working Arrangements (AM2015/2) (26 March 2018) <<https://www.fwc.gov.au/documents/decisionssigned/html/2018fwcfb1692.htm>> [413].

⁶⁸⁷ [2018] FWCFB 5753 Fair Work Commission – Decision, Fair Work Act 2009, s.156 - 4 yearly review of modern awards, Family Friendly Working Arrangements (AM2015/2) (25 September 2018) <<https://www.fwc.gov.au/documents/decisionssigned/html/pdf/2018fwcfb5753.pdf>> [64].

⁶⁸⁸ Ibid, [6].

⁶⁸⁹ Ibid, [64].

⁶⁹⁰ Ibid.

⁶⁹¹ Ibid, [30]–[32].

tribunal, has been excluded from such involvement, and where those courts themselves are prevented from determining reasonable business grounds disputes in the context of s.65 requests.

[32] Such a consequence was not within our contemplation when we framed the provisional model term; is at odds with the legislative framework; and, as we have noted, would be a substantial change. We are not persuaded that such a change is warranted on the basis of the material presently before us. In the circumstances, we think a more cautious regulatory response is appropriate. We propose to revisit this issue after the model term has been in operation for a reasonable period.

The new term applies to national system employees whose terms and conditions are set by a modern award and who are eligible to make a flexible work request under the National Employment Standards in the FWA, which includes parents and caregivers. The Commission said its model term will increase awareness of the right to request flexible working arrangements and empower more employees with parental and caring responsibilities to make flexible work requests.

The Fair Work Ombudsman has also explained more generally that under the *Fair Work Act 2009* (Cth):⁶⁹²

Employers must either approve or refuse an employee's request in writing within 21 days. If the request is refused, the employer must also include reasons for the refusal. It is a contravention of the Fair Work Act 2009 if an employer does not respond according to these requirements.

There is no requirement for an employer to agree to a request for flexible working arrangements. However, the Fair Work Act 2009 empowers the Fair Work Commission or some other person to deal with a dispute about whether an employer had reasonable business grounds for refusing a request. This generally only happens if the parties to the dispute have agreed in an employment contract, enterprise agreement or other written agreement for that to occur.

In addition, the Fair Work Act 2009 allows State and Territory laws to continue to apply to employees where they provide more beneficial entitlements than the NES in relation to flexible work arrangements. In Victoria, for example, provisions of the Equal Opportunity Act 1995 prohibit an unreasonable refusal to accommodate an employee's responsibilities as a parent or carer.

An employee may also have remedies under relevant discrimination legislation, including the discrimination provisions under the Fair Work Act 2009, if an employee considers they have been discriminated against by the employer's handling or refusal of their request.

However, the FWA prohibits the Fair Work Commission from hearing a dispute about a request under s 65. This means that employers can refuse an employee's request, and an employee is unable to have recourse to the FWC to challenge a decision to refuse an employee's request. Trade unions have raised concerns that this means that Australian employees with parenting and caring responsibilities do not have guaranteed or enforceable access to flexible working arrangements when needed, and have advocated for caregivers to have greater access to family-friendly flexible working conditions.⁶⁹³

The FWA also makes provision for an employee's family responsibilities to be considered when it comes to maximum weekly working hours. Under the FWA an employer must not request or require an employee to work more than a maximum number of hours in a week unless 'the additional hours are reasonable'. For a full time employee this is 38 hours and for an employee who is not full time, the lesser of 38 hours and the employee's ordinary hours of work in a week.⁶⁹⁴ To determine whether the additional hours are 'reasonable', the employee's personal circumstances, including family responsibilities, must be taken into account. Other factors to be taken into account include:

- any risk to employee health and safety from working the additional hours;
- any notice given by the employer of any request or requirement to work the additional hours;
- any notice given by the employee of his or her intention to refuse to work the additional hours;

⁶⁹² Fair Work Ombudsman, *Requests for flexible working arrangements* <<https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/minimum-workplace-entitlements/requests-for-flexible-working-arrangements#challenge-refusal>>.

⁶⁹³ The Australian Council of Trade Unions, *Closing Submissions of the Australian Council of Trade Union - Family Friendly Working Arrangements*, AM 2015/2 (19 December 2017) [3]-[4] and [46]-[47] <<https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am20152-sub-actu-191217.pdf>>.

⁶⁹⁴ *Fair Work Act 2009* (Cth) s 62.

- the nature of the employee's role, and the employee's level of responsibility; and
- any other relevant matter.⁶⁹⁵

Reporting under the *Workplace Gender Equality Act 2012 (Cth)* for private companies with 100 or more employees

The Workplace Gender Equality Agency (**WGEA**) is a statutory agency created by the *Workplace Gender Equality Act 2012 (Cth)*. As explained by the WGEA:⁶⁹⁶

The Agency is charged with promoting and improving gender equality in Australian workplaces.

We work collaboratively with employers providing advice, practical tools and education to help them improve their gender performance. Our staff are workplace gender equality specialists and provide industry-specific advice.

We also work with employers to help them comply with the reporting requirements under the Workplace Gender Equality Act 2012. This reporting framework aims to encourage measures that improve gender equality outcomes and has been designed to minimise the regulatory burden on business.

The Agency uses the reporting data to develop educational Competitor Analysis Benchmark Reports based on six gender equality indicators.

...

The Act outlines our functions as follows:

- advise and assist employers in promoting and improving gender equality in the workplace;
- develop, in consultation with relevant employers and employee organisations, benchmarks in relation to gender equality indicators;
- issue guidelines to assist relevant employers to achieve the purposes of the Act;
- review compliance with the Act by relevant employers, review public reports lodged by relevant employers and deal with those reports in accordance with the Act;
- collect and analyse information provided by relevant employers under the Act to assist the Agency to advise the Minister in relation to legislative instruments made under the Act;
- undertake research, educational programs and other programs for the purpose of promoting and improving gender equality in the workplace;
- work with employers to maximise the effectiveness of the administration of the Act, including by minimising the regulatory burden on employers;
- promote and contribute to understanding and acceptance, and public discussion, of gender equality in the workplace;
- review the effectiveness of the Act in achieving its purposes; and
- report to the Minister on such matters in relation to gender equality in the workplace as the Agency thinks fit.

A central part of the work of the WGEA is to receive annual reports by employers with 100 or more employees that must include information on the following standardised gender quality indicators (GEIs).⁶⁹⁷

GEI 1 - gender composition of the workforce

GEI 2 - gender composition of governing bodies of relevant employers

GEI 3 - equal remuneration between women and men

GEI 4 - availability and utility of employment terms, conditions and practices relating to flexible working arrangements for employees and to working arrangements supporting employees with family or caring responsibilities

GEI 5 - consultation with employees on issues concerning gender equality in the workplace

GEI 6 - any other matters specified by the Minister: sex-based harassment and discrimination

⁶⁹⁵ Ibid.

⁶⁹⁶ Workplace Gender Equality Agency, *Our Role* <<https://www.wgea.gov.au/about-wgea/our-role-0>>.

⁶⁹⁷ Workplace Gender Equality Agency, *Reporting Requirements* <<https://www.wgea.gov.au/about-legislation/reporting-requirements>>.

Workplaces with 100 or more employees represent 40% of Australian workforce.⁶⁹⁸ Every two years, the WGEA must report to the Minister on progress achieved in relation to the gender equality indicators.

Additionally, the WGEA oversees the Minimum Standards set by the Minister that apply to large workplaces with 500 or more employees. The Minimum Standards have been explained as follows:⁶⁹⁹

Minimum standards represent the standard expected to achieve a particular objective under a Gender Equality Indicator (GEI). They are additional compliance requirements for large businesses to better support gender equality and diversity in the workplace and represent the minimum an employer must do to demonstrate a commitment to gender equality in their workplace.

The Workplace Gender Equality (Minimum Standards) Instrument 2014 applied from 1 October 2014 and requires a relevant employer with 500 or more employees to have a formal policy or formal strategy in place that specifically supports gender equality in relation to one, or more, of the following:⁷⁰⁰

GEI 1 - gender composition of the workforce

GEI 3 - equal remuneration between women and men

GEI 4 - availability and utility of employment terms, conditions and practices relating to flexible working arrangements for employees and to working arrangements supporting employees with family or caring responsibilities

GEI 6 - any other matters specified by the Minister: sex-based harassment and discrimination

A formal policy or formal strategy is a written policy or strategy that has been approved by human resources and/or management. A formal policy is usually widely communicated and available to, and accessible by, all staff.

A formal strategy can also be widely communicated although it usually deals with the allocation and deployment of material and human resources and requires executive decision. A strategy may exist without a policy and vice versa but both may also coexist and support each other.

In the first progress report of the WGEA covering the period 2014-2016, the Agency reported the following progress achieved in relation to the GEIs:⁷⁰¹

Overall, there has been progress against most gender equality indicators. Progress is most noticeable in areas where organisations have the most direct influence on the outcome, such as the development of policies and/or strategies relating to gender equality. This demonstrates that improving gender equality remains an important focus for employers.

Improvement has also been seen in women's representation in leadership positions. Gender equality indicators that relate to deeply ingrained societal and cultural norms have been more resistant to change. This includes indicators relating to gender segregation by industry and occupation as well as indicators relating to parental leave and the role of women as the primary carers in society.

The gender pay gap reflects the difference between women and men's average remuneration. The causes are complex; such as women's underrepresentation in senior leadership, gender segregation across industries and occupations, time out of the workforce for caring responsibilities as well as direct and indirect discrimination. The improvement in the gender pay gap between 2013-14 and 2015-16 reflects improvements across some of these factors. However the full-time total remuneration gender pay gap of 23.1% in 2015-16 demonstrates that there is still considerable improvement required across many areas to fully address the economic inequality between women and men in Australia. Australian Bureau of Statistics (ABS) Average Weekly Earnings (AWE) data suggests the gender pay gap is a stubborn feature of the Australian workforce hovering between 15% and 19% over the past two decades. Please note, the difference in the gender pay gap calculated on ABS AWE data reflects the different scope of the dataset and the earnings measure used.

Monitoring and reporting on the progress of Australian workplaces against the six gender equality indicators is an important piece in driving cultural change and improving workplace gender equality.

⁶⁹⁸ Workplace Gender Equality Agency, *Progress Report 2014-16* (2017), Commonwealth of Australia <<https://www.wgea.gov.au/sites/default/files/wgea-progress-report-to-minister.pdf>> 5.

⁶⁹⁹ Workplace Gender Equality Agency, *What are minimum standards?* <<https://www.wgea.gov.au/minimum-standards/what-are-minimum-standards>>.

⁷⁰⁰ Ibid.

⁷⁰¹ Workplace Gender Equality Agency, n 700, 9.

Regarding access to flexible working conditions for carers, data collected by the WGEA in 2017 in relation to employers with 100 or more employees indicated that:⁷⁰²

- 49.5% of employers had a policy aimed at supporting employees with family or caring responsibilities; and
- 18.3% had a strategy aimed at supporting employees with family or caring responsibilities.

The data also indicates that over the same period:⁷⁰³

- 54.2% of employers (with 100 or more employees) had a flexible working arrangements policy;
- 23.2% had a flexible working arrangements strategy; and
- 92.8% offered formal carers leave.

That data also revealed that in the 2016-17 reporting period, 6.6% of employees on parental leave ceased employment: 8.6% of women on parental leave and 1.2% of men on parental leave.⁷⁰⁴

Support and resources for employers

The Workplace Gender Equality Agency has a suite of tools for employers on implementing a strategic approach to flexibility.⁷⁰⁵

A number of other Government agencies also offer support to workplaces regarding flexibility, including for carers. For example, the Fair Work Ombudsman offers a free online course on workplace flexibility and supporting information.⁷⁰⁶

Additionally, the Department of Human Services oversees activities relating to 'Child Support' through assessing, collecting and disbursing child support payments to help separated parents and their children.⁷⁰⁷ In the event that a parent refuses to pay child support, or refuses to agree to a suitable payment arrangement, the Department has the power to make an employer deduct amounts from that parent's salary or wage (through a garnishee notice), amongst other things.⁷⁰⁸ Through issuing garnishee notices to employers for deductions from salaries or wages for child support, the Department works with employers to ensure that children of separated parents can still access financial support from their parents where appropriate.⁷⁰⁹

3.3.3 Breastfeeding

What accommodations and other supportive measures, if any, must employers adopt to facilitate breastfeeding for working mothers?

Under Australian law, a person cannot discriminate against an employee for breastfeeding due to the *Sex Discrimination Act 1984* (Cth) (SDA). In the SDA, 'breastfeeding' includes the act of expressing milk, and includes an act of breastfeeding or breastfeeding over a period of time.⁷¹⁰

States and Territories also have anti-discrimination legislation which provides protections for breastfeeding mothers. In general, employers must not refuse to make arrangements to assist employees to breastfeed at work where an employee makes a reasonable request.⁷¹¹

The following may constitute discrimination:⁷¹²

⁷⁰² Workplace Gender Equality Agency, *WGEA Data Explorer - Support for carers & paid parental leave* http://data.wgea.gov.au/industries/1#carers_content.

⁷⁰³ Workplace Gender Equality Agency, *WGEA Data Explorer – Flexible working* http://data.wgea.gov.au/industries/1#work_flex_content.

⁷⁰⁴ Workplace Gender Equality Agency, n 704.

⁷⁰⁵ Workplace Gender Equality Agency, *Strategic approach to flexibility* <https://www.wgea.gov.au/lead/strategic-approach-flexibility>.

⁷⁰⁶ Fair Work Ombudsman, *Flexible working arrangements* <https://www.fairwork.gov.au/employee-entitlements/flexibility-in-the-workplace/flexible-working-arrangements>.

⁷⁰⁷ Department of Human Services, *Child Support* <https://www.humanservices.gov.au/individuals/child-support>.

⁷⁰⁸ Department of Human Services, *Recovering child support payments* <https://www.humanservices.gov.au/individuals/enablers/recovering-child-support-payments/29946>.

⁷⁰⁹ Department of Human Services, *Garnishee notice to employers for deductions from salaries or wages* <https://www.humanservices.gov.au/organisations/business/services/garnishee-notice-employers-deductions-from-salaries-or-wages#a4>.

⁷¹⁰ *Sex Discrimination Act 1984* (Cth) s 7AA.

⁷¹¹ Anti-Discrimination Board of NSW, *Factsheet: Pregnancy and breastfeeding discrimination* (2014)

<https://www.breastfeeding.asn.au/system/files/BFW%20Fact%20Sheet%20-%20Your%20rights%20at%20work%20V1%201214.pdf>.

⁷¹² Ibid.

- failing to provide suitable facilities for breastfeeding or expressing milk;
- prohibiting an employee from organising work breaks to breastfeed or express milk; and
- requiring an employee to work night shifts when other shifts are available that would allow the employee to continue breastfeeding.

3.3.4 Parental leave

What are the minimum legal entitlements for parental leave, both paid and unpaid?

Australia has a dual private/public system of parental leave, meaning that caregivers can potentially have access to a minimum statutory entitlement to both paid and unpaid leave (subject to eligibility requirements) and, in some cases, employees have access to additional leave entitlements when these are voluntarily provided by their employer (typically large companies).

Government provided paid parental leave

Australia's first ever national paid parental leave scheme commenced on 1 January 2011. Prior to this, Australia was one of only two high-income OECD nations without a paid parental leave scheme (alongside the United States).⁷¹³

There are two payments under the Government-funded scheme:⁷¹⁴

- Parental Leave Pay (PLP) which has been providing up to 18 weeks pay at the rate of the national minimum wage to eligible primary carers (usually mothers) since 1 January 2011.
- Dad and Partner Pay (DAPP) which provides up to two weeks pay at the rate of the national minimum wage to eligible dads or partners caring for a child born or adopted from 1 January 2013.

Under Australian (federal) law, a person is also entitled to at least 12 months' unpaid parental leave.

Through the *Paid Parental Leave Act 2010* (Cth), eligible parents are entitled to up to 18 weeks' Parental Leave Pay from the Australian Government. The Australian Government provides Parental Leave Pay at the national minimum wage for a maximum of 18 weeks.⁷¹⁵ In line with the national minimum wage, the current rate of Parental Leave Pay is \$719.35 per week before tax (from 1 July 2018).⁷¹⁶ To be eligible for Parental Leave Pay an employee must be the 'birth mother' of a new born or recently adopted child, have met the work test, meet the residency requirements, have an individual income of \$150,000 or less, and be on leave or not working from the time they become the child's primary carer until the end of their Parental Leave Pay period.⁷¹⁷ In certain circumstances, the birth mother or adoptive parent can transfer some or all of their Parental Leave Pay to another eligible person (i.e. who takes over as primary carer).⁷¹⁸ A person receiving Parental Leave Pay cannot work during the leave period.

Additionally, eligible fathers and partners can receive 'Dad and Partner Pay' for up to 2 weeks which means that a family can receive a total of up to 20 weeks financial support from the Australian Government.⁷¹⁹ 'Dad and Partner Pay' was introduced on 1 January 2013.

The *Paid Parental Leave Act 2010* (Cth) sets out the following objectives of the scheme and the payments it

⁷¹³ Bill Martin et al, *Paid Parental Leave Evaluation: Final Report*, Institute for Social Science Research, The University of Queensland (13 November 2014) <https://www.dss.gov.au/sites/default/files/documents/03_2015/finalphase4_report_6_march_2015_0.pdf>, 1, citing Ray et al (2010) (full reference not listed in source).

⁷¹⁴ Department of Social Services, *Review of the Paid Parental Leave Scheme* (June 2014) <<https://www.dss.gov.au/families-and-children/benefits-payments/paid-parental-leave-scheme/review-of-the-paid-parental-leave-scheme>> 11.

⁷¹⁵ Department of Human Services, n 77.

⁷¹⁶ Department of Human Services *Parental Leave Pay – Payment Rates* <<https://www.humanservices.gov.au/individuals/services/centrelink/parental-leave-pay/payment-rates>>.

⁷¹⁷ Organisation for Economic Cooperation and Development, n 18.

⁷¹⁸ Department of Human Services, *Parental Leave Pay – How Transferring works* <<https://www.humanservices.gov.au/individuals/services/centrelink/parental-leave-pay/eligibility/how-transferring-works>>.

⁷¹⁹ Australian Department of Human Services, *Dad and Partner Pay* <<https://www.humanservices.gov.au/individuals/services/centrelink/dad-and-partner-pay>>.

provides:

(1B) The objects of the paid parental leave scheme are to:

- (a) signal that taking time out of the paid workforce to care for a child is part of the usual course of life and work for both parents; and
- (b) promote equality between men and women and balance between work and family life.

(1) The object of parental leave pay is to provide financial support to primary carers (mainly birth mothers) of newborn and newly adopted children, in order to:

- (a) allow those carers to take time off work to care for the child after the child's birth or adoption; and
- (b) enhance the health and development of birth mothers and children; and
- (c) encourage women to continue to participate in the workforce.

(2) The object of dad and partner pay is to provide financial support to fathers and partners caring for newborn or newly adopted children, in order to:

- (a) increase the time that fathers and partners take off work around the time of birth or adoption; and
- (b) create further opportunities for fathers and partners to bond with the child; and
- (c) allow fathers and partners to take a greater share of caring responsibilities and to support mothers and partners from the beginning.

In 2015 after the scheme had been running for four years, an evaluation of it was published. It found overwhelmingly positive impacts towards most of the objectives of the scheme. For paid parental leave (PPL), the evaluation concluded:⁷²⁰

Phase 4 of the PPL evaluation focused on assessing the extent to which the PPL scheme is impacting the 'ultimate' outcomes. The evaluation assessed changes in mothers' labour force participation and labour supply, mothers' and babies' health and wellbeing, and gender equity and work-life balance.

The introduction of PPL allowed mothers to take additional time away from paid work following the birth of their babies. The main effects of the scheme arise from the additional time mothers were able to take, and the financial security that was provided by a guaranteed income for up to 18 weeks. Amongst the main effects were:

- PPL delayed mothers' return to work during the first six months following a birth, so that more mothers stayed at home for at least 18 weeks after the birth of their baby. PPL also slightly increased mothers' tendency to return to work in the longer-term, so that more mothers had returned to work by 12 months after the birth of their baby.
- The impact of PPL in delaying mothers' return to work was most pronounced amongst lower income mothers and those with lower formal education, including those on casual employment contracts.
- PPL had a large effect in extending self-employed mothers' time off work during the first six months.
- PPL increased employers' retention of mothers when they returned to work. This effect was most pronounced amongst mothers with lower levels of formal education.
- PPL produced small improvements in mothers' health, extended breastfeeding duration, and probably improved babies' health slightly.

⁷²⁰ Bill Martin et al, n 715, 9-10.

- The additional time and income security provided by PPL reduced the proportion of mothers who felt rushed and pressed for time, thus enhancing work-life balance.
- PPL produced no change in the household division of labour, or in mothers' treatment at work while pregnant. In both of these areas, it is likely cultural change over time would be required for improvements to occur.
- PPL was associated with a small improvement in mothers' perceptions of their career prospects on return to work.
- There was some evidence that PPL's impact on mothers' and babies' health and wellbeing and on work-life balance was concentrated amongst those for whom PPL made the most difference – mothers least likely to have access to employer paid parental leave, and those with least financial security due to their precarious employment.

While these effects were evident in the timeframe of the evaluation (focused on mothers who gave birth within the first year of the scheme's operation), further progress towards the wider PPL scheme's ultimate outcomes may occur in the future. Some outcomes (such as labour force effects and effects on child development) may not be evident until the scheme has been operational for a number of years, while achieving other objectives may depend on attitudinal change.

At the same time, the impact of the Dad and Partner Pay (DAPP) was evaluated, with the following findings:⁷²¹

- about 36 per cent of eligible fathers chose to take DAPP. Uptake was significantly higher amongst casually employed and self-employed fathers
- The introduction of DAPP was associated with a small, statistically significant increase in the average length of leave taken by all fathers during the first two months after a birth, though there was no change in the overall proportion of fathers who took leave.
- In-depth interview data suggested that DAPP also had a significant effect on the attitudes of fathers and employers to leave taking by fathers after a birth. The availability of DAPP appears to have made some fathers more willing to be assertive about taking leave following a birth, and some employers more inclined to see such leave as legitimate and a normal aspect of the leave taken by employees.
- The introduction of DAPP was associated with small but statistically significant increases in the extent of fathers' engagement with the new baby and help with domestic tasks in the first two months after the birth. These small changes are most likely explained by the small increase in the amount of leave after the birth that DAPP produced (see above).
- Insofar as the time fathers are able to spend with their newborns is central to bonding, DAPP does appear to have provided some new opportunities due to the small average increase in leave it produced (see above).

Unpaid parental leave

Under the *Fair Work Act 2009* (Cth) (**FWA**), there is a legal entitlement for each eligible parent to access unpaid parental leave of 12 months.⁷²² A parent may also apply for an additional 12 months of unpaid parental leave.⁷²³ An employee will be eligible for the additional 12 months if they do not have a partner who has taken 12 months of unpaid leave.⁷²⁴ The additional leave is not an entitlement but is subject to individual negotiation with an employer.⁷²⁵ Unpaid parental leave is only available to an employee who has or will have responsibility for the care of a child.⁷²⁶

⁷²¹ Ibid, 11-13.

⁷²² *Fair Work Act 2009* (Cth) s 70.

⁷²³ Ibid, s 76.

⁷²⁴ Ibid.

⁷²⁵ Ibid.

⁷²⁶ Fair Work Ombudsman, *Maternity & paternal leave* <<https://www.fairwork.gov.au/leave/maternity-and-parental-leave>>.

Under the FWA, an employee is eligible for unpaid parental leave if he or she has completed at least 12 months of continuous service with an employer. This includes casual employees who have been employed by the employer on a 'regular and systematic basis' for at least 12 months, and, had it not been for the birth/expected birth/adoption/expected adoption of a child, the employee would have had a reasonable expectation of continuing employment by the employer on a regular and systematic basis.⁷²⁷

Employer provided paid parental leave

An employee may also be entitled to paid parental leave that is voluntarily provided by their employer. The fact that an employer provides paid parental leave to an employee does not affect that employee's entitlement to the Australian Government's Parental Leave Pay scheme.⁷²⁸

According to the Workplace Gender Equality Agency's 2016-17 reporting data (regarding private sector employers with 100 or more employees):⁷²⁹

Access to paid parental leave varies

Fewer than half of employers offer paid parental leave in addition to the government scheme. Provision of paid parental leave varies significantly by industry and organisation size.

In 2016-17, 45.9% of employers offered paid parental leave for primary carers.

- Primary carer's leave is most commonly offered in Electricity, Gas, Water and Waste Services (78.7% of employers) and Education and Training (78.5%); and least commonly offered in Accommodation and Food Services (20.2%) and Retail Trade (20.4%).
- Primary carer's leave is most commonly available in large organisations: 67.2% of organisations with 5000+ employees offer it, compared with 39.7% of organisations with fewer than 250 employees.
- Average length of paid primary carer's leave offered is 10.1 weeks.
- Women utilised 95.3% of all primary carer's leave.

39.3% of employers offered paid parental leave for secondary carers.

- Average length of paid secondary carer's leave offered is 7.3 days.
- Men utilised 94.8% of all secondary carer's leave.

Overall, 74.3% of all periods of paid parental leave were utilised by women.

Women more likely to leave work during parental leave

Ceasing employment during parental leave declined for both women and men over the past year. Women were seven times as likely as men to leave the workplace during parental leave.

- 8.6% of women on parental leave ceased employment (down 1.2pp since 2015-16).
- 1.2% of men on parental leave ceased employment (down 0.8pp).

Mixed progress on support for caring

There is substantial growth in organisations reporting they have a formal policy and/or strategy to support employees with family and caring responsibilities (up 5.5pp to 62.0%).

However, for the second year in a row, the proportion of employers offering non-leave based measures to support employees with caring responsibilities has declined (down 4.4pp over two years to 51.9%).

- The most common non-leave based measures are breastfeeding facilities (32.9%) and referral services to support employees with family and/or caring responsibilities (24.7%).
- Just 3.4% of employers offer employer-subsidised childcare and 3.7% offer return to work bonuses on

⁷²⁷ Fair Work Act 2009 (Cth) s 67.

⁷²⁸ Fair Work Ombudsman, n 728.

⁷²⁹ Workplace Gender Equality Agency, *Australia's gender equality scorecard* (November 2017) <<https://www.wgea.gov.au/sites/default/files/2016-17-gender-equality-scorecard.pdf>>. See also Workplace Gender Equality Agency, *Support for carers & paid parental leave* <http://data.wgea.gov.au/industries/1#carers_content>.

return from parental leave.

International comparisons: Australia's statutory parental leave pay provision compared to OECD countries

The Organisation for Economic Cooperation and Development (OECD) examines and compares the public policies for families and children in its 35 member states. In 2016, OECD analysis across these member states indicated that mothers are generally entitled to 18 weeks of paid maternity leave, with some countries such as the United Kingdom providing for paid maternity leave of up to 9 months.⁷³⁰

However, a number of OECD countries also provide for 'Home care leave', also known as childcare or child raising leave. This is provided in addition to maternity and parental leave. Home care leave is described as: 'employment-protected leaves of absence that sometimes follow parental leave and that typically allow at least one parent to remain at home to provide care until the child is two or three years of age. Home care leaves are less common than the other three types of leave...'.⁷³¹ Of the 35 member states, some 27 OECD countries provide paid home care leave to mothers, and 14 OECD countries provide it for fathers.

Including the provision of paid home care leave, it becomes apparent that Australia's current provision of paid maternity/primary carer leave, and paid parental/Dad and partner leave is considerably less than OECD averages. Examining duration of leave alone (not the amount of pay provided), mothers and primary carers in Australia are entitled to 18 weeks' leave compared to an OECD total average of 55.2 weeks. Fathers/partners are entitled to 2 weeks' leave compared to an OECD total average of 8.2 weeks. This means that women and primary carers in Australia are entitled to 37.2 weeks less than their OECD counterparts in the early years of a child's life, and fathers/partners are entitled to 6.2 weeks less than their OECD counterparts. The amount of leave provided is another issue, with parental leave pay in Australia provided at the minimum wage, whereas many other countries provide a more generous rate of pay.

Maternity/Primary carer⁷³²

| | Maternity/primary carer leave | Home care leave (mothers) | Total paid leave available to mothers |
|---------------------|--------------------------------------|----------------------------------|--|
| Australia | 18 weeks | N/A | 18 weeks |
| OECD Average | 18 weeks | 37.2 weeks | 55.2 weeks |

Source: Organisation for Economic Cooperation and Development, *PF2.1: Key characteristics of parental leave systems*, Table PF2.1.A. Summary of paid leave entitlements available to mothers - Paid maternity, parental and home care leave available to mothers, in weeks, 2016
<www.oecd.org/els/soc/PF2_1_Parental_leave_systems.pdf>

Parental/Father/Partner

| | Parental leave | Home care leave (fathers/partners) | Total paid leave available to fathers/partners |
|---------------------|-----------------------|---|---|
| Australia | 2 weeks | N/A | 2 weeks |
| OECD Average | 1 weeks | 7.1 weeks | 8.2 weeks |

Source: Organisation for Economic Cooperation and Development, *PF2.1: Key characteristics of parental leave systems*, Table PF2.1.B. Summary of paid leave entitlements for fathers paid paternity leave and paid parental

⁷³⁰ Organisation for Economic Cooperation and Development, n 18, 2.

⁷³¹ Ibid.

⁷³² Ibid.

and home care leave reserved (or effectively reserved) for fathers, in weeks, 2016b
<www.oecd.org/els/soc/PF2_1_Parental_leave_systems.pdf>.

The Australian Human Rights Commission recommended in June 2018 that the Australian Government:⁷³³

- (i) Implement targeted measures to reduce gender segregation in Australian workplaces.
- (ii) Implement targeted strategies to address the gender pay gap and women's economic insecurity in retirement.
- (iii) Implement the relevant recommendations in the Supporting Working Parents: Pregnancy and Return to Work National Review Report.
- (iv) Provide for a minimum period of government-funded paid parental leave of 26 weeks, and an additional minimum of four weeks paid leave, which may only be taken by the supporting parent.
- (v) Provide superannuation entitlements as part of paid parental leave.
- (vi) Consider removing the 12 month qualifying period for parental leave, and allow for greater flexibility in how and when to take the paid leave.
- (vii) Commit to funding future editions of the ABS Time Use study, to collect accurate data concerning the extent and distribution of unpaid work and its intersection with paid work.
- (viii) Include family and domestic violence leave in the National Employment Standards and modern awards.
- (ix) Recognise family and domestic violence as a protected attribute within existing anti-discrimination legislation and federal employment laws.

In its Concluding Observations of July 2018, the United Nations Committee on the Elimination of Discrimination against Women Committee (**CEDAW Committee**) expressed concern about '[t]he lack of incentives for the reconciliation of work and family responsibilities, which results in only 15 per cent of infants being breastfed up to the age of five months [and] that parental leave is paid at the minimum wage, for only 18 weeks and is not counted towards superannuation benefits'.⁷³⁴ It went on to recommend that the Australian Government:⁷³⁵

implement the recommendations of the 2017 Inquiry into gender segregation in the workplace and:

- (a) Reinforce measures to address industrial and occupational segregation and establish a national policy framework to implement the principle of equal pay for work of equal value with a defined pay equity target date;
- (b) Implement the recommendations of the Supporting Working Parents: Pregnancy and Return to Work National Review, including by introducing a duty on employers to reasonably accommodate a request for flexible working arrangements;
- (c) Introduce a 'code of practice' on the legal obligations of employers with regard to pregnant employees and employees with family obligations, and raise awareness of employers about such obligations;
- (d) Guarantee a minimum of 26 weeks paid maternal leave, which should be remunerated at the actual revenue of the mother, introduce an additional minimal four week paid leave to be taken by the supporting parent, and count the entire period in superannuation benefits;
- (e) Conduct a gender-analysis of its superannuation system, taking into account disparities linked to women's

⁷³³ Australian Human Rights Commission, n 277.

⁷³⁴ United Nations Committee on the Elimination of Discrimination against Women, *Concluding observations on the eighth periodic report of Australia* (20 July 2018), UN Doc CEDAW/C/AUS/CO/8
<https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fAUS%2fCO%2f8&Lang=en> [43].

⁷³⁵ Ibid.

role in the provision of care, to eliminate the disadvantage affecting women.

In November 2018, the Australian Government announced reforms to Parental Leave Pay as part of its 'Women's Economic Security Statement'. The reforms are designed to provide greater flexibility for parents, with the Statement explaining:⁷³⁶

Parental Leave Pay (PLP)

Measures in the Package will allow parents more flexibility in accessing their Government-funded PLP and make it available to some women who have previously been excluded.

PLP Flexibility

Each year, about 2,300 people receiving PLP return to work before they have used all of their pay entitlement, which means they lose the unused portion. Changes will allow families to split their PLP entitlement into blocks of leave and to work in between, over a two year period. This will support women who are self-employed and small business owners who cannot afford to take time from work for 18 weeks straight.

Extending PLP

The current PLP work-test rules will be changed so that women who may previously have been excluded can now be eligible—this includes women who have irregular work, such as teachers on casual contracts, and women in hazardous jobs who have to leave their job early in their pregnancy, such as in mining and construction.

In recognition of the unparalleled period of brain development in early childhood, and the critical role of parents and caregivers and parents over this time, UNICEF has called for:⁷³⁷

- At least 6 months of paid parental leave;
- Breastfeeding facilities and paid breastfeeding breaks for women returning to work;
- Affordable, accessible and quality childcare services; and
- Child grants that support all families with children.

Nutrition, protection, stimulation

Ingredients of healthy early childhood development



Source: UNICEF, *Early Moments Matter for every child* (2017) 15
<https://www.unicef.org/media/files/UNICEF_Early_Moments_Matter_for_Every_Child_report.pdf>.

The Workplace Gender Equality Agency has also outlined the benefits of paid parental leave for parents of all kinds, including both women and men alike, as well as the national economy. In a 2017 paper, WGEA summarised some of the benefits as follows (references omitted):⁷³⁸

⁷³⁶ Department of the Prime Minister and Cabinet, *Women's Economic Security Statement* (November 2018)
<<https://www.pmc.gov.au/office-women/economic-security/wess?fbclid=IwAR2P2rGGx80v0Tlh85BSNj438hyTJQw4mI9Va7zm1A8cEHyJKec0QYUuNWto>>.

⁷³⁷ UNICEF, *Early Moments Matter* <<https://www.unicef.org/early-moments>>.

⁷³⁸ Workplace Gender Equality Agency, *Towards gender balanced parental leave* (11 October 2017) <<https://www.wgea.gov.au/data/wgea-research/towards-gender-balanced-parental-leave>>.

Paid parental leave and gender equality

Parental leave policies protect each parent's job for a period of time following the birth or adoption of a child. Paid parental leave policies that are available for each parent support shared responsibility for raising children. In 2014 a Swiss study showed that if parental leave policies are available to each parent, it enables a more equal division of work between women and men by fostering paternal involvement in the care for a child. Similarly, a 2015 study found that the Norwegian paid parental leave policy (46 weeks of parental leave at 100% of the salary and 10 weeks of leave reserved for the co-parent) contributes to a shortening of women's career interruptions and a more equal division of paid and unpaid work among parents. These studies show that the availability of paid parental leave for each parent fosters a more equal division of unpaid care and improves family work-life balance.

Paid parental leave and female workforce participation

Increasing women's workforce participation is linked to a country's overall economic performance. In 2014, the Australian Government committed to a G20 target of reducing the workforce participation gap between women and men by 25% by 2025 to boost global GDP. More recently some governments, such as Sweden, Norway and Germany, have introduced government-funded paid leave entitlements specifically for fathers to promote greater gender equality in paid and unpaid work.

Research suggests that government-funded paid parental leave contributes to an increase in women's workforce participation. For instance, the introduction of 12 months paid leave in Germany led to an increase in women's workforce participation once the child turned one year of age and an increase in the fertility rate. Similarly, Norway has increased women's workforce participation and the fertility rate by implementing policies that promote work-family life balance, such as paid parental leave, the right to work part-time and subsidised child-care.

Paid parental leave as a health and wellbeing policy

The health and wellbeing of new mothers and babies is one of the reasons governments and many employers choose to provide paid leave. It enables women to spend the first weeks of a child's life recovering from the birth and nurturing the baby. For this reason, the International Labour Organisation recommends no less than 14 weeks of maternity leave and the World Health Organization (WHO) recommends six months, or 26 weeks, of breastfeeding to achieve optimal health for the infant.

Paid adoption leave allows new parents and their adoptive child time to develop a relationship and adapt to a new environment.

Paid parental leave and financial security

Paid parental leave has a positive impact on the financial position of women and families. WGEA data shows that women's full-time total remuneration earnings are on average 23.1% (\$26,853) less than men's earnings across all industries and occupations. This gender pay gap affects most women in the workforce to some degree over the course of their working lives.

It is during the years when many women are balancing paid work with unpaid caring responsibilities in the home that the gender pay gap widens considerably. Research by KPMG has shown that 21% of the national gender pay gap is attributable to the years out of the workforce. During this time, the cumulative loss of earnings that women experience arguably becomes irreversible, regardless of their subsequent paid employment.

Economists have reported that raising children accounts for a 17% loss in lifetime wages for women. In addition, many women move into 'mother-friendly' occupations and/or return to work part-time following parental leave. The ABS estimates that 82% of mothers returning to work after childbirth work in part-time roles. The decisions to change jobs and work part-time following the addition of a new child often have a negative impact on women's financial situation and future career opportunities.

Gender balanced paid parental leave positively impacts on the financial security of women, relieving income pressure during the first months with a new child and supporting women's return to the workforce.

As such, there is compelling evidence about the benefit of paid parental leave for children, parents and society as a whole. With over 1 million Australian families with children aged 0 – 4 years having one or both parents in

employment at June 2017,⁷³⁹ expanding such family-friendly policies would positively impact the lives of many children and parents in Australia.

Recommendation 2 (vii)

Support the healthy development of children in their first thousand days through expanding family-friendly policies

Enhance access to parental leave pay to better support children and their carers in the early years of a child's life. Specifically, the Australian Government should adopt a strategy to progressively:

- a) increase the parental leave pay entitlement to at least 26 weeks (to allow for exclusive breastfeeding, amongst other things);
- b) increase the uptake of paid parental leave by fathers and partners through extending entitlement of paid parental leave to them (for example, through 'use it or lose it' leave entitlements);
- c) review the qualifying period for parental leave pay (i.e. 12 month service requirement); and
- d) provide superannuation entitlements as part of paid parental leave.

3.3.5 Non-discrimination

Are pregnant women and nursing mothers explicitly protected against discrimination in the workplace?

Under the *Sex Discrimination Act 1984* (Cth) (**SDA**), a person cannot discriminate against an employee for being pregnant, breastfeeding or for carer/family responsibilities.⁷⁴⁰ State and territory legislation also generally protects against such discrimination.⁷⁴¹ See above section **3.3.3 – Breastfeeding** in relation to discrimination against an employee for breastfeeding.

The *Fair Work Act 2009* (Cth) (**FWA**) provides additional protections, such as transfer to a safe job for pregnant employees and a prohibition against discriminatory terms in awards.⁷⁴²

Further, one of the objects of the *Workplace Gender Equality Act 2012* (Cth) is 'to promote, amongst employers, the elimination of discrimination on the basis of gender in relation to employment matters (including in relation to family and caring responsibilities).'

Accordingly, many of the activities of the Workplace Gender Equality Agency described above at **3.3.2 – Family-friendly employment** are aimed at eliminating discrimination on the basis of gender, including family and caring responsibilities.

The Australian Human Rights Commission concluded in its 2014 'Supporting Working Parents' report that discrimination against mothers during pregnancy, parental leave or return to work is 'pervasive' and 'a systemic and widespread issue that places an economic impost on employers and organisations and on the Australian economy'.⁷⁴³ It found that one in two mothers had experienced such discrimination: 27% of mothers

⁷³⁹ 6224.0.55.001 *Labour Force, Australia: Labour Force Status and Other Characteristics of Families*, n 16.

⁷⁴⁰ *Sex Discrimination Act 1984* (Cth) ss 7, 7AA and 7A.

⁷⁴¹ *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1996* (NT); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 2010* (Vic); *Equal Opportunity Act 1984* (WA).

⁷⁴² *Fair Work Act 2009* (Cth) ss 65, 81, 81A, 82A, and 153.

⁷⁴³ Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review – Report* (2014) Executive Summary and Recommendations

<https://www.humanrights.gov.au/sites/default/files/document/publication/SWP_Report_2014.pdf>.

experienced discrimination during pregnancy, 32% of mothers when requesting or on parental leave, and 36% of mothers on return to work.⁷⁴⁴ The Commission's 2014 'National Prevalence Survey' also found that 32% of all mothers who were discriminated against at some point went to look for another job or resigned.⁷⁴⁵

3.3.6 Access to services

What measures are taken to ensure working families' access to appropriate, affordable, and quality childcare, early childhood development programmes, and other relevant community services?

The Australian Government delivers a range of social security payments that support children and families broadly. These include the Family Tax Benefit to help eligible families with the cost of raising children,⁷⁴⁶ 'Special Benefit' in the event of severe financial hardship,⁷⁴⁷ and the Farm Household Allowance for farming families in financial hardship.⁷⁴⁸ Additionally, the Australian Government supports a range of other early childhood education and care (ECEC) services programs, for example, home learning programs (such as Families as First Teachers⁷⁴⁹) and playgroups.⁷⁵⁰

The Australian Government provides funding for universal access to preschool for four year olds through the National Partnership Agreement on Universal Access to Early Childhood Education.⁷⁵¹ The Australian Government committed \$870 million to continue Commonwealth support for preschool throughout 2018 and 2019 as part of the *National Partnership on Universal Access to Early Childhood Education – 2018 and 2019*.⁷⁵² Most recently in the 2019-2020 Budget announced in April 2019, the Federal Government committed \$453.1 million to extend this partnership to 2020. This funding is aimed at ensuring that every child has access to a quality preschool education for 600 hours (15 hours a week) in the year before school. The Australian Government has explained: '[t]his investment will benefit 350,000 children participating in more than 11,000 preschool services, bringing the total Commonwealth investment in preschool since 2008 to \$4.2 billion.'⁷⁵³

The Australian Government also provides other supports to assist families with access to childcare and early childhood development programs. Specifically, the *Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017* (Cth) introduced the 'New Child Care Package' that came into effect on 2 July 2018.⁷⁵⁴ Under this system, a 'Child Care Subsidy' (CCS) is paid directly to approved child care service providers in order to help families with the cost of child care. In order to be eligible to receive the CCS for a child, an individual must satisfy the following conditions:

- the child must be 13 years of age or under and not attending secondary school;
- use an approved child care service;
- be responsible for paying the child care fees;
- the child must meet immunisation requirements; and
- the individual, or their partner, must meet the residency requirements.

⁷⁴⁴ Ibid, 15-47.

⁷⁴⁵ Ibid.

⁷⁴⁶ Department of Social Services, *Family Tax Benefit* <<https://www.dss.gov.au/families-and-children/benefits-payments/family-tax-benefit>>.

⁷⁴⁷ Department of Human Services, *Special Benefit* <<https://www.humanservices.gov.au/individuals/services/centrelink/special-benefit>>.

⁷⁴⁸ Department of Human Services, *Farm Household Allowance* <<https://www.humanservices.gov.au/individuals/services/centrelink/farm-household-allowance>>.

⁷⁴⁹ Department of Education and Training, *What additional support will be provided to the Northern Territory* <<https://www.education.gov.au/what-additional-support-will-be-provided-northern-territory>>.

⁷⁵⁰ The Hon Paul Fletcher MP and The Hon Sarah Henderson MP, 'Morrison Government boosts funding for Playgroup Australia to support children with disability' (Media Release, 30 March 2019) <<https://ministers.dss.gov.au/media-releases/4756>>.

⁷⁵¹ Department of Education and Training, *National Partnership Agreements* <<https://www.education.gov.au/national-partnership-agreements>>.

⁷⁵² Council on Federal Financial Relations, *National Partnership on Universal Access to Early Childhood Education – 2018 and 2019* <<http://www.federalfinancialrelations.gov.au/content/npa/education.aspx>>.

⁷⁵³ Department of Education and Training, *Universal Access to Early Childhood Education* <<https://www.education.gov.au/universal-access-early-childhood-education>>.

⁷⁵⁴ Department of Education and Training, *New Child Care Package - families (from 2 July 2018)* <<https://www.education.gov.au/new-child-care-package-families-2-july-2018>>.

If eligible, a family's level of CCS will be determined by:

- 1) Combined annual family income;
- 2) Activity test – the activity level of both parents; and
- 3) Service Type – type of child care service.⁷⁵⁵

Under the Activity Test, the number of hours of subsidy per child is determined by the amount (in hours) of activity of the parent/s. For example, a child of a parent that can demonstrate 8 – 16 hours of activity is entitled to 36 hours of subsidised child care per fortnight, whereas a child of a parent that can demonstrate more than 48 hours of activity is entitled to 100 hours of subsidised child care per fortnight.⁷⁵⁶

There is an exemption to the Activity Test for 'low income families on \$66,958 or less a year who do not meet the activity test. These families can access 24 hours of subsidised care per child per fortnight without having to meet the activity test, as part of the 'Child Care Safety Net'.⁷⁵⁷ The 'Child Care Safety Net' is said to be aimed at giving the most vulnerable children a strong start, while supporting parents to work.⁷⁵⁸ The Child Care Safety Net is described as 'a top up payment in addition to the CCS which will provide targeted additional fee assistance to families and children facing barriers in accessing affordable child care'. Called the 'Additional Child Care Subsidy', there are four bases on which a child and their family might be eligible for the additional payment:⁷⁵⁹

- 1) 'Child Wellbeing' – additional payment to help families support their child's safety and wellbeing for up to 100 hours/fortnight. Eligible families are exempt from the Child Care Subsidy activity test.
- 2) 'Grandparents' – an additional payment to help grandparents on income support who are the principal carers of their grandchildren for up to 100 hours/fortnight;
- 3) 'Temporary Financial Hardship' – short-term increased child care assistance to families experiencing significant financial stress due to exceptional circumstances, to ensure continuity of care; and
- 4) 'Transition to Work' – for families who receive an income support payment, have an approved Job Plan (where one is required) and are engaged in a recognised work, study or training activity (amongst other things).⁷⁶⁰

Children in context: Access to early childhood education and care in Australia

In recent years, Australia has improved the quality of early childhood care and education by introducing a National Quality Standard and licensing and accreditation scheme.⁷⁶¹ Additionally, the National Partnership Agreement on Universal Access to Early Childhood Education introduced universal access to 15 hours/week of early childhood education (or a total of 600 hours) in the year before school.⁷⁶² Because of this, preschool enrolments increased from 12 per cent in 2008 to 91 per cent in 2015.⁷⁶³

Despite this progress, concerns exist regarding the extent to which children and families can access affordable and culturally appropriate early childhood care and education in practice. Specifically, concerns persist about levels of developmental vulnerability among children when they start school, comparatively low participation rates, affordability of ECEC services and the level of government subsidies, eligibility requirements

⁷⁵⁵ Department of Education and Training, *Child Care Subsidy* (2018) <<https://www.education.gov.au/child-care-subsidy-1>>.

⁷⁵⁶ Department of Education and Training, *Child Care Subsidy - activity test* (2018) <<https://www.education.gov.au/child-care-subsidy-activity-test-0>>.

⁷⁵⁷ Department of Education and Training, *Child Care Safety Net* <<https://www.education.gov.au/child-care-safety-net-2>>.

⁷⁵⁸ Department of Education and Training, n 765.

⁷⁵⁹ Department of Education and Training, *Additional Child Care Subsidy* <<https://www.education.gov.au/additional-child-care-subsidy-0>>.

⁷⁶⁰ Department of Education and Training, *Child Care Safety Net* <<https://www.education.gov.au/child-care-safety-net-2>>.

⁷⁶¹ Australian Child Rights Taskforce, *CRC25 Australian Child Rights Progress Report*, UNICEF Australia and National Children's and Youth Law Centre (2016) <<https://www.unicef.org.au/Upload/UNICEF/Media/Documents/CRC25-Australian-Progress-Report.pdf>> 25.

⁷⁶² Department of Education and Training, *Universal Access to Early Childhood Education* (2018) <<https://www.education.gov.au/universal-access-early-childhood-education>>.

⁷⁶³ Early Childhood Australia, *Early Learning: Everyone Benefits - State of early learning in Australia 2017*, citing Australian Government (2017) <<https://d3n8a8pro7vnmx.cloudfront.net/everyonebenefits/pages/73/attachments/original/1504689599/ELB-Report-web.pdf?1504689599>> 3.

and access to culturally competent services for Aboriginal and Torres Strait Islander children and families. Each of these issues will be discussed briefly below.

Limited access to subsidised early childhood care and education, as well as concerns about developmental vulnerability of children in Australia, is a child rights issue. This is the case not just for families who are participating in the workforce, but for all children and families. Under the Children's Convention all children have the right to survival and development, education and play. Given what recent brain science has demonstrated about the critical nature of learning and development in the first 1000 days of a child's life,⁷⁶⁴ and the principle that the best interests of the child should be a primary consideration in shaping policies and budgets that affecting children, access to such quality childhood education and care at this foundational period of human development should not be contingent on the actions or activities of a child's parents. In support of this, the Committee on the Rights of the Child has called on States parties such as Australia to '...ensure that all young children (and those with primary responsibility for their well-being) are guaranteed access to appropriate and effective services, including programmes of health, care and education specifically designed to promote their well-being.'⁷⁶⁵

Developmental vulnerability

In 2009, Australia commenced collecting data on the developmental health and wellbeing of children when they start their first year of school – becoming the first country in the world to do so.⁷⁶⁶ Called the Australian Early Development Census (AEDC), the important collection measures the developmental progress of children in five domains: 1) language and cognitive skills; 2) communication skills and general knowledge; 3) physical health and wellbeing; 4) social competence; and 5) emotional maturity.⁷⁶⁷ This important information is collected every three years, with the collection most recently occurring in 2018. Over the years that data has been collected, the AEDC has shown that although significant improvements have been made reducing developmental vulnerability when children start school (particularly with regard to language and cognitive skills), as at 2018, one in five children were developmentally vulnerable in at least one domain, and one in nine were developmentally vulnerable on two or more domains.⁷⁶⁸ In Australia, socioeconomic status is strongly correlated to vulnerability.⁷⁶⁹

Participation rates

Participation rates of children in Australia one year before the official age of primary school is comparatively low compared to other OECD countries. With a participation rate of 90.6% in 2015, Australia ranked 36 out of 41 OECD and/or European Union countries for participation in preschool (for at least one hour per week, one year before the official age of primary school entry).⁷⁷⁰

Affordability and the level of government subsidies

In line with the increased participation of women in Australian workplaces, demand for early childhood care and education for children is greater than supply.⁷⁷¹ Since 2009, the cost of child care in Australia has increased significantly, outpacing the rise in the consumer price index over this time.⁷⁷² However, Government spending to support families with these increasing costs is comparatively low. In a 2017 Report, the OECD ranked Australia at

⁷⁶⁴ Centre for Community Child Health, 'The First Thousand Days: Our Greatest Opportunity', Policy Brief No 28, Murdoch Children's Research Institute (28 March 2018) <<https://www.rch.org.au/uploadedFiles/Main/Content/ccchdev/1803-CCCH-Policy-Brief-28.pdf>>.

⁷⁶⁵ United Nations Committee on the Rights of the Child, *General Comment No 7: Implementing child rights in early childhood*, 40th sess, UN Doc CRC/C/GC/7/Rev. 1 (20 September 2006) [24].

<http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/GeneralComment7Rev1.pdf>

⁷⁶⁶ Australian Government, 'Australian Early Development Census, *AEDC National Report 2018* (2019) <<https://www.aedc.gov.au/resources/detail/2018-aedc-national-report>> 7.

⁷⁶⁷ *Ibid*, 7.

⁷⁶⁸ *Ibid*, 42.

⁷⁶⁹ Early Childhood Australia, n 765, 3. See also Centre for Community Child Health, n 766, 3.

⁷⁷⁰ UNICEF Office of Research – Innocenti, 'An Unfair Start: Inequality in Children's Education in Rich Countries', *Innocenti Report Card 15* (2018) <https://www.unicef-irc.org/publications/pdf/an-unfair-start-inequality-children-education_37049-RC15-EN-WEB.pdf>.

⁷⁷¹ Robert Breunig, 'FactCheck: has there been a massive increase in child care costs under the Coalition government?' *The Conversation* (18 March 2016) <<https://theconversation.com/factcheck-has-there-been-a-massive-increase-in-child-care-costs-under-the-coalition-government-55931>>.

⁷⁷² *Ibid*.

28 out of 33 countries in terms of spending levels on early childhood education and care as a percentage of GDP (in public and private settings (2013)).⁷⁷³ Another OECD report published in 2017 highlighted the need for more affordable child care in Australia, stating:⁷⁷⁴

Australian children are less likely than children in many other OECD countries to participate in formal childcare or pre-school, reflecting and limiting the extent to which Australian mothers engage in paid work...While not as expensive as in some other English-speaking countries, childcare costs in Australia are relatively high – the net cost of childcare for a two-child dual-earner Australian family on moderate earnings equals around 20% of disposable family income, compared to 13% on average across the OECD. Forthcoming reforms to childcare subsidies may help reduce net childcare costs for some families, especially low-income families, though the final impact on the amounts charged to parents remains to be seen.

Eligibility requirements

As described above the number of hours of subsidy per child is determined by the amount (in hours) of activity of the parent/s (in addition to other eligibility requirements such as income). This approach – which makes the provision of subsidised care generally contingent on the situation of a parent/s – has been raised as a concern by many, as such objectives relating to the parents are said to be placed above child development and early education requirements.⁷⁷⁵ Though reliable data are not yet available, services for Aboriginal and Torres Strait Islander children for example have reported that children are accessing fewer hours of early childhood education and care or dropping out because of challenges with the new system, including because of the activity test that excludes children based on their parents' circumstances.⁷⁷⁶

Additionally, there is concern about lacking policy coherence in Australia's approach to early childhood education and care. As explained in the *State of early learning in Australia 2017*:⁷⁷⁷

competing policy objectives create complexity for policy implementation. For example, the recently introduced Commonwealth Government's Jobs for Families Child Care Package, which centred on reform of the childcare subsidy scheme, has a focus on the workforce participation of parents, whereas the NQF focuses on improving early learning outcomes, and the National Partnership Agreement focuses on building participation in early learning. Unaligned policy objectives can result in tensions—such as between raising standards of care and ensuring child care is affordable—or deliver adverse policy outcomes; for example, when eligibility requirements for funding reduce access to early learning.

Access for three year olds

In 2016, enrolment rates of children aged 3 years in early childhood education and care services was at 69%. Compared to other OECD countries, this rate is low and placed Australia in the bottom third of countries ranked by the OECD. For example, Denmark had an enrolment rate of 96%, the United Kingdom was 84% and both Japan and Brazil had an enrolment rate of 81%.⁷⁷⁸ The *State of early learning in Australia 2017* summarised the situation as follows:⁷⁷⁹

The participation of three-year-olds in early learning in Australia is lagging behind the rest of the developed world. Research indicates that two years of a high quality preschool program delivers better outcomes than one year, especially for children who are developmentally vulnerable. Now is the time to not only continue the commitment to universal access for preschool programs in the year before school, but extend that access to high-quality, age-appropriate and play-based early education programs for three year-olds.

Some jurisdictions are introducing policies to help provide greater access for 3 year old children to pre-school.⁷⁸⁰

⁷⁷³ Organisation for Economic Cooperation and Development, *Starting Strong 2017: Key OECD indicators on early childhood education and care* (2017) <<http://www.oecd.org/edu/school/SS%20V%20Spending%20on%20early%20childhood%20education%20and%20care.png>>.

⁷⁷⁴ Organisation for Economic Cooperation and Development, *The Pursuit of Gender Equality: An Uphill Battle – How does Australia compare?* (2017) <<http://www.oecd.org/australia/Gender2017-AUS-en.pdf>>.

⁷⁷⁵ Australian Child Rights Taskforce, n 763, 24.

⁷⁷⁶ SNAICC – National Voice for our Children, n 81.

⁷⁷⁷ Early Childhood Australia, n 765, 4.

⁷⁷⁸ Ibid, citing OECD (2016).

⁷⁷⁹ Ibid.

⁷⁸⁰ See, for example, New South Wales Government, 'Families will save \$825 a year on average, as NSW becomes the first state in Australia to provide government subsidies for three-year-olds who attend two years of preschool' (22 June 2018) <<https://www.nsw.gov.au/news-and-events/news/preschool-subsidies-to-ease-cost-of-living/>>.

Access to community controlled and culturally competent services for Aboriginal and Torres Strait Islander children and families

There are also concerns that the new system will not address the gaps in access to early childhood education and care affecting Aboriginal and Torres Strait Islander children. In particular, SNAICC – National Voice for Our Children has raised the following concerns:⁷⁸¹

The activity test introduced in the new system reduces the minimum subsidised hours of child care available for some families on low incomes where either parent does not meet work or study requirements to just 12hrs per week, restricting access for children experiencing vulnerability who stand to benefit most from vital early learning. This will negatively impact developmental outcomes for our children, many of whom are already lagging behind.

The majority of centres set up under the Aboriginal Child and Family Centre (ACFC) initiative are not eligible to apply for key streams of funding under the new system. Without access to the necessary funding and supports these services face reducing their support for children and families experiencing high levels of vulnerability.

The new system does not provide the adequate commitment to address the 15,000 early learning place gap for Aboriginal and Torres Strait Islander children. There is a lack of targeted initiatives for Aboriginal and Torres Strait Islander families, and the new system places no requirement on mainstream services to demonstrate cultural competence. Additionally, there is no prioritisation of community-controlled services in the open round of the Community Child Care Fund, and no vision presented for supporting the development of new Aboriginal and Torres Strait Islander ECEC services.

Family Matters: Strong Communities. Strong Culture. Strong Children is a national campaign that aims to ‘ensure Aboriginal and Torres Strait Islander children and young people grow up safe and cared for in family, community and culture’.⁷⁸² *Family Matters* aims to ‘eliminate the over-representation of Aboriginal and Torres Strait Islander children in out-of-home care by 2040’. The campaign is led by SNAICC – National Voice for Our Children, and is supported by over 150 Aboriginal and Torres Strait Islander and non-Indigenous organisations, academics and educational institutions.⁷⁸³

As part of its work, *Family Matters* publishes reports to monitor progress towards these goals. One issue examined in these reports is the degree to which Aboriginal and Torres Strait Islander children have access to quality, culturally safe, universal and targeted services – including early childhood education and care. The below is an extract from *The Family Matters Report 2018* which examines this issue:⁷⁸⁴

FOCUS ON THE EARLY YEARS: LIFTING OUR GAME FOR ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN AND FAMILIES By guest author, Professor Deborah Brennan

Compelling evidence, as well as practical experience, tells us that children thrive most when they are supported in the context of their families, cultures and communities. SNAICC’s early years policy calls for a dedicated funding stream to support community-controlled and culturally appropriate early childhood services. Access to such services is a cornerstone of the Family Matters campaign.

A GROWING POLICY CONSENSUS

Lifting our Game, a report commissioned by all states and territories, brings together the latest evidence on the critical role of the early years in shaping children’s lifetime trajectories (Pascoe & Brennan, 2017). It shows that quality early education and care, together with support for parents and other family members, can play a vital role in giving all children a fair start in life. High-quality services can be both protective and enriching. The years before school are especially important because children’s brains are developing at an amazing rate at this time. The skills and behaviours acquired in the early years establish the foundations for future learning and life skills. All children benefit from high-quality programs but the benefits are particularly significant for children experiencing disadvantage and vulnerability. Lifting our Game recommends that every child receive two years of early education, and that additional targeted support and resources be provided to those who need them most. Research provides the encouraging message that the things parents and carers do, such as reading to children,

⁷⁸¹ SNAICC, *Ensuring a fair start for our children: The need for a dedicated funding stream for the Aboriginal and Torres Strait Islander early years sector* (19 October 2017) <<http://www.snaicc.org.au/ensuring-fair-start-children-need-dedicated-funding-stream-aboriginal-torres-strait-islander-early-years-sector/>>.

⁷⁸² SNAICC, *Family Matters – About Us* <<http://www.familymatters.org.au/about-us/>>.

⁷⁸³ Ibid.

⁷⁸⁴ SNAICC – National Voice for our Children, the University of Melbourne and Griffith University, n 80, 28 – 32, including Figures 2 – 6, extract of section by Professor Deborah Brennan.

and the experiences children have, such as attending preschool, can act as a powerful counterweight to poverty and low income (Levine, Pollack, & Comfort, 2001). The recommendations of Lifting our Game align well with SNAICC's advocacy for services that, rather than simply providing "child care", offer enriched opportunities for children and engage in supportive, respectful ways with families and communities. Lifting our Game has been endorsed by 36 Australian organisations, including SNAICC.

EARLY CHILDHOOD SERVICES

Many Aboriginal and Torres Strait Islander families and communities are strong, resilient and nurturing. They provide supportive, loving and positive environments for children, despite the history of dispossession and the continuing reality of child removal and trauma. It is important to bear these strengths in mind as we review Aboriginal and Torres Strait Islander children's access to early years services. First, the good news: Aboriginal and Torres Strait Islander children's attendance at preschool has increased sharply in recent years. In 2012, Aboriginal and Torres Strait Islander children were substantially less likely than their non-Indigenous peers to attend preschool. The National Partnership Agreement to achieve access to preschool for every child in the year before school prompted sustained effort and investment by governments, community organisations and providers (Council of Australian Governments [COAG], 2008). At the aggregate level, attendance by Aboriginal and Torres Strait Islander children is now on par with that of non-Indigenous children in the year before school (Figure 2) although there are substantial variations between jurisdictions (Figure 3). Attendance, however, is only part of the story. There are no reliable data about the duration and intensity of children's engagement with preschool but some evidence suggests that Aboriginal and Torres Strait Islander children participate in preschool for fewer hours per week, on average, than their non-Indigenous peers (Department of Families, Housing, Community Services and Indigenous Affairs [FaHCSIA], 2012).

FIGURE 2 Rate ratios comparing Aboriginal and Torres Strait Islander and non-Indigenous children aged 4 and 5 years attending a preschool program in the year before schooling (2012-2017)

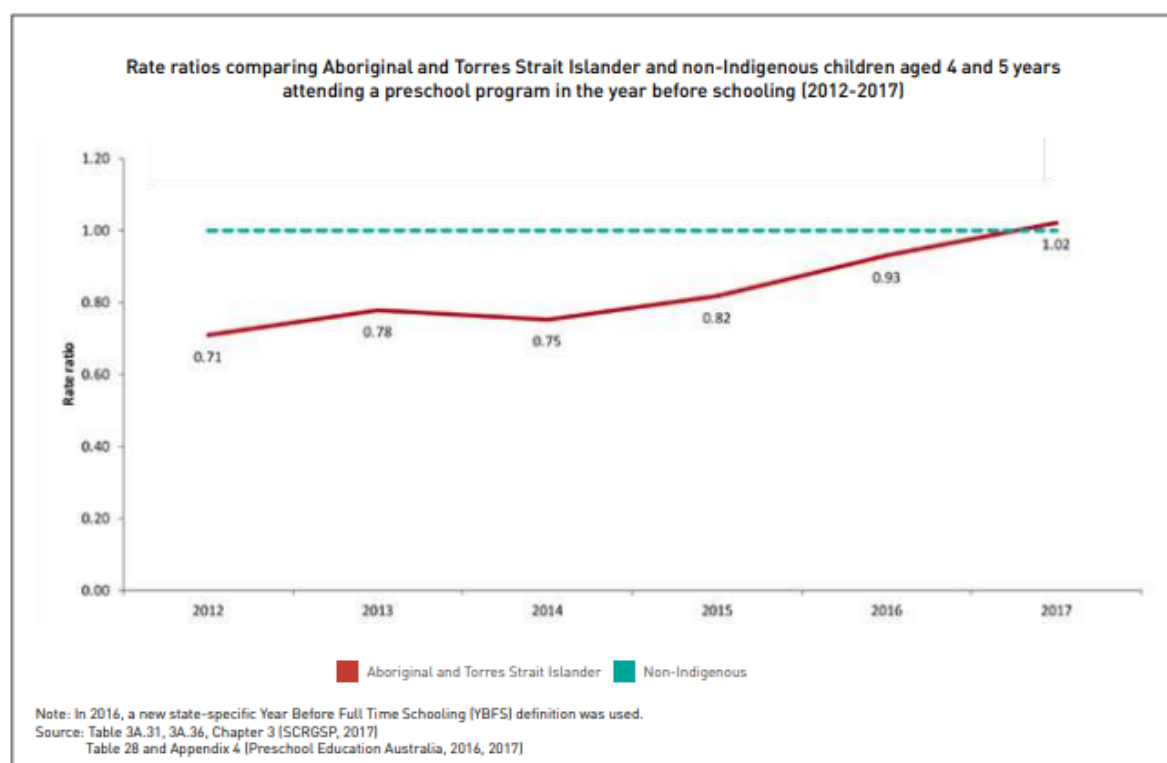


FIGURE 3 Rate ratios comparing Aboriginal and Torres Strait Islander and non-Indigenous children aged 4 and 5 years attending a preschool program in the year before schooling in 2017

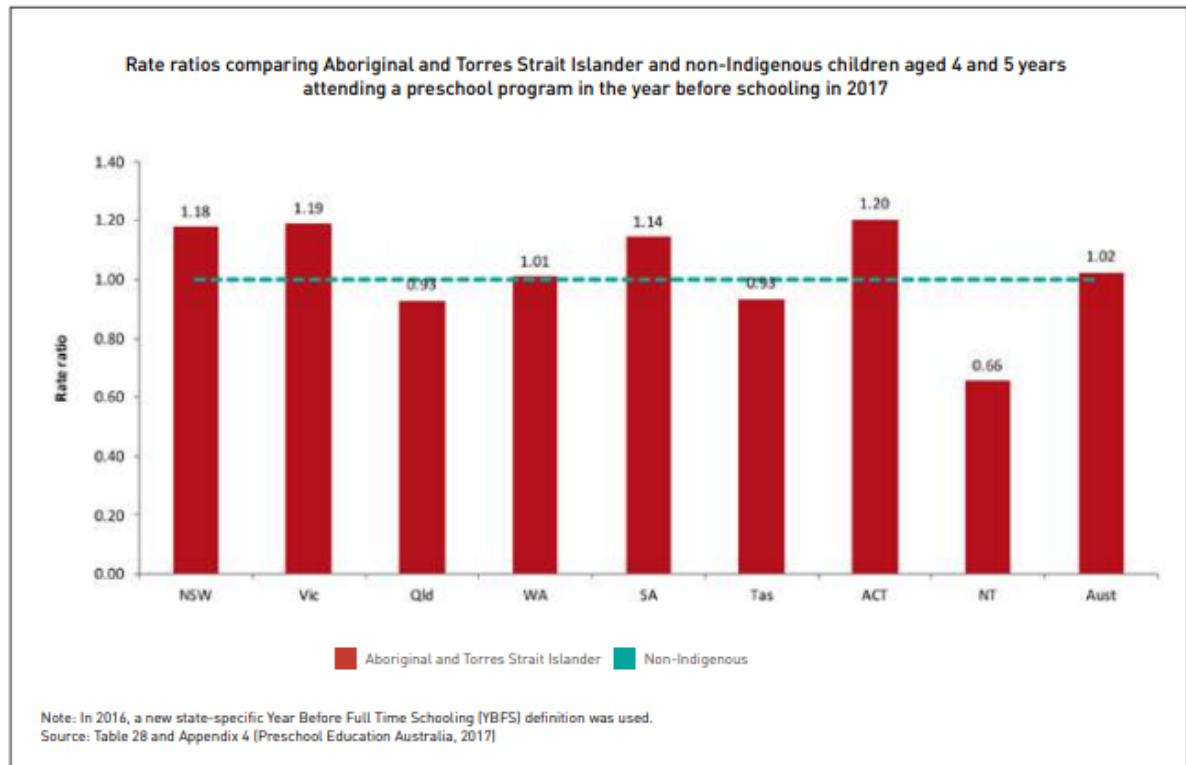


FIGURE 4 Rate ratios comparing Aboriginal and Torres Strait Islander and non-Indigenous children aged 0 to 5 attending Australian Government Child Care Benefit (CCB) approved child care services in 2017



Given that the duration and intensity of preschool participation are important for achieving positive outcomes, better data on this issue must be a priority. The gains in pre-school enrolment and participation to pre-school education in the year before school have not been matched by gains in access to other early childhood services.

There are striking disparities in access to Commonwealth funded services such as long day care, family day care and out of school hours care. Across Australia, Aboriginal and Torres Strait Islander children attend these services at less than half the rate (49 per cent) of their non-Indigenous peers (Figure 4). There are significant differences between the jurisdictions, however, with rates varying from 16 per cent in the Northern Territory to 62 per cent in Victoria.

ON TRACK FOR SCHOOL

The Australian Early Development Census provides a measure of children's development at the time they commence full-time schooling. Data are collected in five areas or domains: physical health and wellbeing; social competence; emotional maturity; language and cognitive skills; and communication skills and general knowledge. Most Aboriginal and Torres Strait Islander children start school on track for a positive educational experience, but a significant minority begin at a disadvantage. Overall, First Nations children are twice as likely to be vulnerable in one or more domains of development than are their non-Indigenous peers. Disturbingly, they are even more likely to be vulnerable on two or more domains. There has been only marginal improvement on these measures since 2009 (Figure 5). Again, the data reveal significant differences across jurisdictions, with the poorest developmental outcomes for Aboriginal and Torres Strait Islander children in the Northern Territory and Western Australia (Figure 6).

THE NEW CHILD CARE PACKAGE

As noted above, Aboriginal and Torres Strait Islander children currently have substantially less access to Commonwealth funded early childhood services than their non-Indigenous peers. The Jobs for Families Child Care Package, now renamed as the New Child Care Package, that commenced in July 2018 is likely to exacerbate this inequity. The new system requires both parents (or a sole parent) to be engaged in at least 8 hours of approved activity each fortnight as a condition of access to the Child Care Subsidy, although there are exemptions. Families earning below \$66,958 are not required to meet the activity test and there are special access provisions for children in the year before school who attend a preschool program in a centre-based service. However, the complicated rules that govern the package and the requirement to apply for Child Care Subsidy online are likely to discourage many families. International research and best practice point in the

FIGURE 5 Rate ratios comparing developmentally vulnerable Aboriginal and Torres Strait Islander and non-Indigenous children in their first year of full-time education

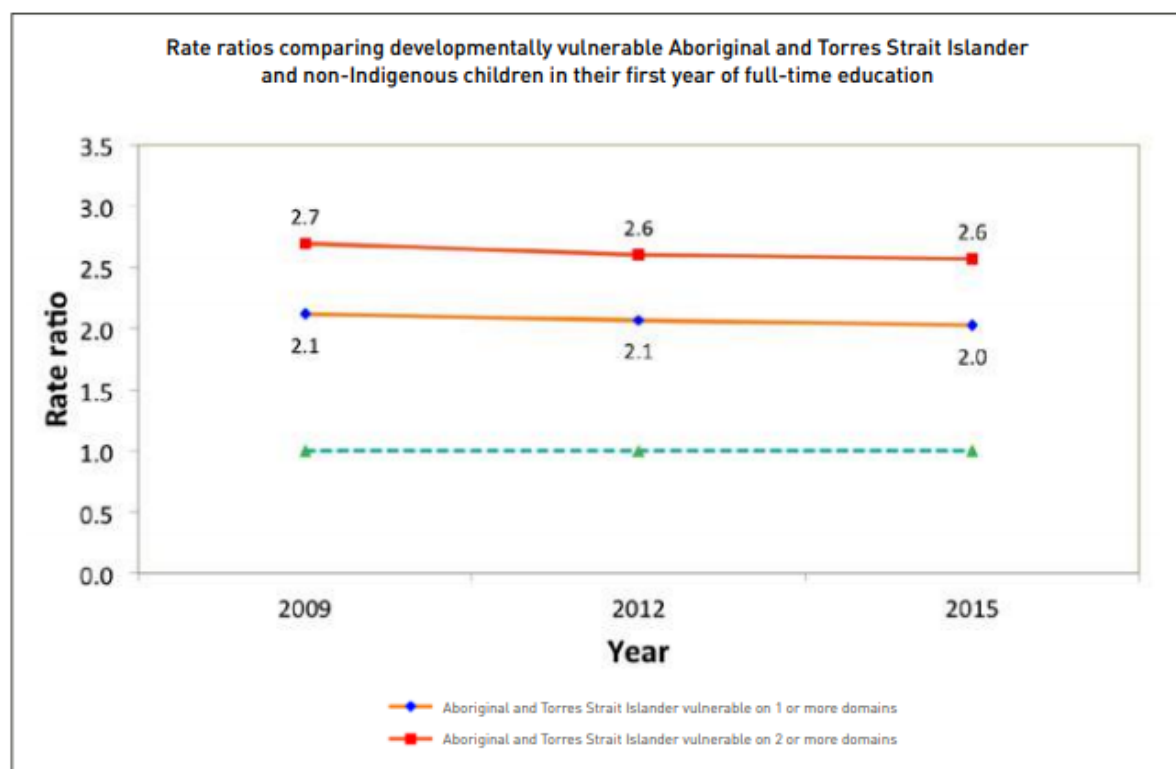
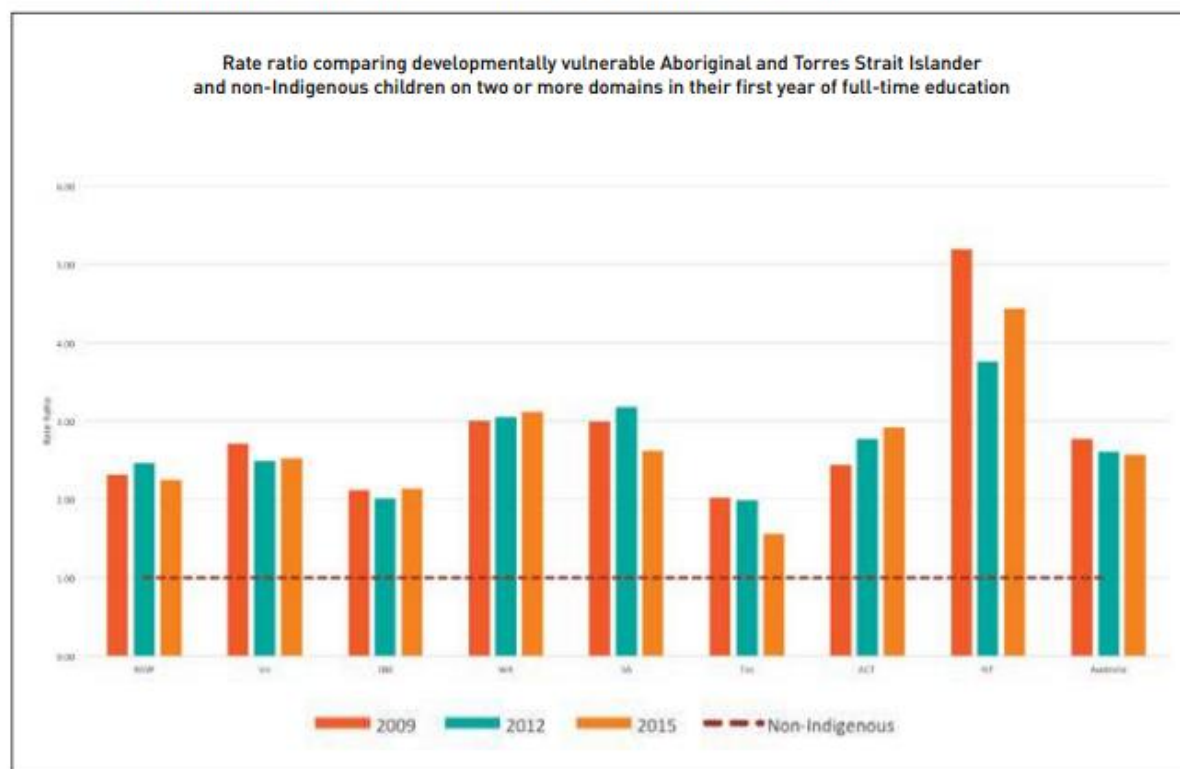


FIGURE 6 Rate ratio comparing developmentally vulnerable Aboriginal and Torres Strait Islander and non-Indigenous children on two or more domains in their first year of full-time education



opposite direction: towards free or very low-cost, easily accessible services that are focussed on the needs of the child, not the workforce participation of parents, and that offer a supportive environment to parents and community members (Gambaro et al., 2014). The new system brings to an end the priority of access guidelines that accorded some priority to Aboriginal and Torres Strait Islander families. Under the new arrangements, providers have the exclusive right to decide which children and families receive priority. Providers are asked to consider giving priority to children at serious risk of abuse or neglect and children of sole parents who satisfy the activity test through paid employment but they are not required to do so. No longer is there any priority given to Aboriginal and Torres Strait Islander children. Finally, for those exempted from the activity test who manage to secure a place in a service, access will be reduced from 48 hours to 24 hours per fortnight, or one full day of subsidised early learning and care per week. This low-level attendance is unlikely to enable the formation of secure, trusting relationships that are central to successful early learning. The Budget Based Funded (BBF) services funding stream also came to an end with the introduction of the new system. Some of the previous BBF services demonstrated excellent and innovative practice with Aboriginal and Torres Strait Islander children and families, attracting inspiring teachers, linking with local schools, and supporting workforce development, leadership and empowerment. The former BBF services are required to transition to a new system that offers only limited recognition of the critical role that culturally relevant, community-controlled services play in protecting Aboriginal and Torres Strait Islander families and children. Some funding is available to former BBF services under safety net provisions, but there is no guarantee that this funding will be sustained. If it is intended simply to help services transition into the new system – a system that is designed to support families with stable, predictable employment – then the families and communities that the BBF services were established to support will effectively be excluded. Further, not all services are eligible to apply for transitional funding. Most services funded under the Aboriginal Child and Family Centre (ACFC) initiative, for example, are not eligible. This issue needs to be urgently revisited so that these evidence-based models of practice and empowerment are not lost.

THE WAY FORWARD

Reducing the over-representation of Aboriginal and Torres Strait Islander children in out-of-home care requires a multi-faceted strategy. Recognition of the right of Aboriginal and Torres Strait Islander communities to design, develop and deliver services supported by adequate and sustainable funding – is an essential component of such a strategy. Access to culturally safe, high-quality programs can lay the foundations not only for educational attainment but also for broad life skills. Such services are essential to reduce the gap between Aboriginal and Torres Strait Islander and non-Indigenous people and to support success later in life.

The *Family Matters 2018* report goes on to outline recommendations to improve outcomes for Aboriginal and Torres Strait Islander children and families, including:⁷⁸⁵

A target and strategy to Close the Gap in developmental outcomes for Aboriginal and Torres Strait Islander children in the early years, and in access to vital preventive services in early childhood education and care (ECEC) and maternal and child health. This must include:

- a. Funding universal preschool access for 3 and 4 year olds, including additional funding to ensure a minimum 3 days per week access for Aboriginal and Torres Strait Islander children; and
- b. Investing in quality Aboriginal and Torres Strait Islander community-controlled integrated early years services through a specific program with targets to increase coverage in areas of high Aboriginal and Torres Strait Islander population and high levels of disadvantage.

Priority investment in service delivery by community-controlled organisations in line with self-determination, including through investment targets aligned to need and “Aboriginal and Torres Strait Islander first” procurement policies for services to Aboriginal and Torres Strait Islander families.

Establishment and resourcing of state-based and national commissioners, peak bodies and other representative bodies for Aboriginal and Torres Strait Islander children.

Early Childhood Australia and SNAICC – National Voice for our Children have examined the issue of access to culturally safe early education and care in *Discussion Paper: Ensuring equality for Aboriginal and Torres Strait Islander children in the early years*.⁷⁸⁶ In it, they outline strategies to improve access to early education and care for Aboriginal and Torres Strait Islander children, highlighting the critical importance of:

- 1) local ownership of programs;
- 2) employment of local Aboriginal and Torres Strait Islander peoples; and
- 3) incorporation of culture within services.

They concluded that ‘[t]hese have been found to be central to increasing access of culturally safe services, and therefore must be central to government policy affecting early education and care’, and went on to explain these in further detail:⁷⁸⁷

(a) Local ownership of programs

An important factor in program success is the extent to which the program is community controlled and endorsed (Bowes & Grace, 2014, p. 3). Aboriginal and Torres Strait Islander ownership of services has been identified as a key factor in improving service access and participation, redressing the trust issues many Aboriginal and Torres Strait Islander families have with early education and care services, and improving outcomes for both children and the broader community. As Hutchins, Martin, Saggars and Sims (2007) note: Indigenous communities all around Australia have very high expectations regarding their involvement and ownership of services and programs provided to improve and support their wellbeing. This relates to all levels of decision-making, policy development, processes and practices. Without this involvement there is no guarantee of participation (pp. 25–26). The role of both the MACS and ACFCs in reaching out to Aboriginal and Torres Strait Islander children who are not otherwise accessing early education and care services illustrates the positive impact of local ownership. According to Trudgett and Grace (2011), ‘the establishment of [MACS] centres is potentially the most important contributor to the decrease in the discrepancy between the rates of Indigenous and non-Indigenous enrolment in early childhood services’ (p. 18). Similarly, the evaluation of the New South Wales ACFCs in 2014 confirmed that, on average, 78 per cent of children attending child care through the ACFCs in NSW had not previously accessed early education and care (CIRCA, 2014). Programs that are initiated outside the local context may also secure the support and engagement of local leaders (Flaxman et al., 2009). In this case, genuine partnership is central, requiring significant time and appropriate governance structures (SNAICC, 2012d). Practical strategies that respond to the local context, like provision of transport, also flow from deeper understanding of the local context, local commitment and local ownership.

⁷⁸⁵ SNAICC – National Voice for our Children, the University of Melbourne and Griffith University, n 80, 7.

⁷⁸⁶ Emma Sydenham, *Discussion Paper: Ensuring equality for Aboriginal and Torres Strait Islander children in the early years*, SNAICC – National Voice for our Children and Early Childhood Australia (2019) <<https://www.snaicc.org.au/wp-content/uploads/2019/02/SNAICC-ECA-Discussion-Paper-Feb2019.pdf>>.

⁷⁸⁷ Ibid, 27-29.

(b) Employment of local Aboriginal and Torres Strait Islander peoples

Successful implementation of programs requires employment of local Aboriginal and Torres Strait Islander peoples to deliver services and work alongside those delivering programs: Innovative solutions and more intensive effort is needed to attract, retain and train Indigenous staff including flexible work arrangements, career start programs for Indigenous students in remote areas and vocational education and training (VET) and higher education courses that offer special learning environments for Indigenous students (SNAICC, 2012d p. 14). Non-Indigenous workers also require high quality ongoing cultural competence support, a commitment to connect with the community and value the trust and respect placed in them, and an ability to let go of rigid western notions of time (Bowes & Grace, 2014; Sims, 2011).

(c) Incorporation of culture

Evidence widely supports the importance of culturally secure models, which honour and incorporate Indigenous cultures, child rearing and other practices, and build positive cultural identities (SNAICC, 2012a; Ware, 2012). Many Aboriginal and Torres Strait Islander families see services with a contemporary western worldview of childhood as unsafe 'white fella' places (Kitson & Bowes, 2010). Whatever the culture specific to an Indigenous family, the ability of a childcare service to recognise and incorporate cultural practice into the way the child and family is dealt with was identified as the most important aspect of child care for Indigenous children (Australian Government, 2006, p. 8). Aboriginal and Torres Strait Islander community controlled services, which are grounded within and managed by the local community, have a unique ability to apply these three factors, and, many argue, are therefore best placed to deliver the most culturally appropriate care (Sims, 2011). They incorporate Indigenous child-rearing principles and practices, which strengthen and nurture Aboriginal and Torres Strait Islander children's cultural identity (SNAICC, 2012a). They provide a safe space to build cultural pride, confidence and resilience to support children to better respond to mainstream schools and racism that they may experience (SNAICC, 2012a). Community-controlled early education and care services that are equipped to build on the skills and strengths of their children, instead of emphasising their perceived 'deficits', provide a safe space for children to build confidence and learn, and ensure content is relevant and meaningful. These strategies can improve participation in early education and care, but also have a profoundly positive impact on child outcomes, given the importance of cultural identity, self-reliance and adaptive coping strategies in assisting Aboriginal and Torres Strait Islander children to achieve their goals (Armstrong et al., 2012; Brennan, 2013). A number of studies suggest that a range of Aboriginal and Torres Strait Islander practices could be implemented to improve the cultural safety of services (Ware, 2012). However, a lack of documented evidence regarding their effectiveness currently limits the ability of service providers to secure funding for them. Other promising principles and practices Other principles and practices identified as having the potential to overcome barriers in the absence of program evaluations (Hewitt & Walter, 2014; Kellard & Paddon, 2016; Ware, 2012) include:

- continuity of services and engagement with families from pre-pregnancy through to middle childhood within the one agency or location
- targeting Aboriginal and Torres Strait Islander engagement programs to families who have moved in recent times, who rely on government pensions and benefits, and whose children are in poorer health; and developing explicit programs that address the unique needs of these families
- providing services in a friendly setting, close to where Aboriginal and Torres Strait Islander clients live and conduct their daily activities
- providing transport, where relevant
- having a staff member within an agency who advocates for and promotes a program across one or more service providers
- long-term, stable funding and delivering longterm programs
- offering the choice of Aboriginal and Torres Strait Islander-specific and mainstream services
- reaching out to families and communities to build understanding of early education services and funding initiatives to encourage attendance
- policy frameworks and strategies specific to urban, regional, rural and remote areas to reflect unique barriers and opportunities.

Recommendation 2 (viii)

Ensure access to affordable, quality and culturally appropriate childcare and early learning opportunities for all children, especially Aboriginal and Torres Strait Islander children

- a) Ensure access to affordable, quality and culturally appropriate childcare and early learning

opportunities for all children, including children with working parents and caregivers.

- b) As recommended by *Family Matters*, ensure Aboriginal and Torres Strait Islander children have access to quality and culturally safe early childhood education and care through measures including:
- i. A target and strategy to Close the Gap in developmental outcomes for Aboriginal and Torres Strait Islander children in the early years, and in access to vital preventive services in early childhood education and care (ECEC) and maternal and child health. This must include:
 - Funding universal preschool access for 3 and 4 year olds, including additional funding to ensure a minimum 3 days per week access for Aboriginal and Torres Strait Islander children; and
 - Investing in quality Aboriginal and Torres Strait Islander community-controlled integrated early years services through a specific program with targets to increase coverage in areas of high Aboriginal and Torres Strait Islander population and high levels of disadvantage.
 - ii. Priority investment in service delivery by community-controlled organisations in line with self-determination, including through investment targets aligned to need and “Aboriginal and Torres Strait Islander first” procurement policies for services to Aboriginal and Torres Strait Islander families.
 - iii. Establishment and resourcing of state-based and national commissioners, peak bodies and other representative bodies for Aboriginal and Torres Strait Islander children.

3.3.7 Monitoring / enforcement

What mechanisms are in place for monitoring the working conditions of parents and caregivers (e.g. inspectorates)? How can parents and caregivers raise violations of their rights?

A number of independent statutory bodies are available in Australia that can potentially aid employees (including caregivers) with regard to working conditions and violations of rights, including:

- The Australian Human Rights Commission and state/territory-based anti-discrimination commissions;
- The Fair Work Ombudsman;
- The Fair Work Commission; and
- The Workplace Gender Equality Agency.

Each of these will be discussed briefly below.

The Australian Human Rights Commission and state/territory-based anti-discrimination commissions

For complaints of workplace discrimination, harassment or bullying on the basis of race, sex, age, sexual orientation, religion, disability or pregnancy, employees can lodge a complaint with the Australian Human Rights Commission which can seek to resolve complaints of discrimination through conciliation. In some circumstances, recourse to the Federal Court might be possible (see further below under **3.10 – Remedies**).

There are also state and territory-based anti-discrimination bodies that have similar dispute resolution mechanisms:

- Australian Capital Territory Human Rights Commission;
- New South Wales Anti-Discrimination Board;
- Northern Territory Anti-Discrimination Commission;
- Anti-Discrimination Commission Queensland;
- South Australian Equal Opportunity Commission;
- Tasmanian Office of the Anti-Discrimination Commissioner;
- Victorian Equal Opportunity & Human Rights Commission; and
- Western Australian Equal Opportunity Commission.

The Fair Work Ombudsman

The Fair Work Ombudsman (FWO) is a workplace regulator that monitors, conducts inquiries, investigates, and enforces compliance with Australia's workplace laws under the *Fair Work Act 2009* (Cth), as well as performs education and advisory functions. Because of this, the office is often referred to as a 'watchdog'. The functions of the FWO, include, amongst other things:⁷⁸⁸

- (a) to promote:
 - (i) harmonious, productive and cooperative workplace relations; and
 - (ii) compliance with [the Fair Work] Act and fair work instruments; including by providing education, assistance and advice to employees, employers, outworkers, outworker entities and organisations and producing best practice guides to workplace relations or workplace practices;
- (b) to monitor compliance with [the Fair Work] Act and fair work instruments;
- (c) to inquire into, and investigate, any act or practice that may be contrary to this Act, a fair work instrument or a safety net contractual entitlement;
- (d) to commence proceedings in a court, or to make applications to the FWC, to enforce [the Fair Work] Act, fair work instruments and safety net contractual entitlements.

The FWO has the power to appoint 'Fair Work Inspectors', and can be a Fair Work Inspector themselves. Fair Work Inspectors have compliance powers under the *Fair Work Act*, including (in certain circumstances), to enter premises, to interview, inspect work, processes or objects, interview any person, inspect documents and take samples.⁷⁸⁹

For further information on the FWO, see above under **3.2.4 – Protection of young workers**.

The Fair Work Commission

The Fair Work Commission (FWC) is an independent workplace relations tribunal that forms a central part of Australia's workplace system.⁷⁹⁰ The functions of the Fair Work Commission are set out in s 576 of the *Fair Work Act 2009* (Cth) as follows:⁷⁹¹

- (1) The FWC has the functions conferred by this Act in relation to the following subject matters:
 - (a) the National Employment Standards (Part 2-2);
 - (b) modern awards (Part 2-3);
 - (c) enterprise agreements (Part 2-4);
 - (d) workplace determinations (Part 2-5);
 - (e) minimum wages (Part 2-6);
 - (f) equal remuneration (Part 2-7);
 - (g) transfer of business (Part 2-8);
 - (h) general protections (Part 3-1);
 - (i) unfair dismissal (Part 3-2);
 - (j) industrial action (Part 3-3);
 - (k) right of entry (Part 3-4);
 - (l) stand down (Part 3-5);
 - (m) other rights and responsibilities (Part 3-6);
 - (n) the extension of the National Employment Standards entitlements (Part 6-3);
 - (na) transfer of business from a State public sector employer (Part 6-3A);
 - (o) unlawful termination protections (Part 6-4);

⁷⁸⁸ *Fair Work Act 2009* (Cth) s 682.

⁷⁸⁹ *Fair Work Act 2009* (Cth) pt 5-2, div 3, sub-div D.

⁷⁹⁰ For an explanation of the difference between the Fair Work Ombudsman and the Fair Work Commission, see Fair Work Ombudsman, *The Fair Work Commission and us - what's the difference?* <<https://www.fairwork.gov.au/about-us/our-role/the-fair-work-commission-and-us-whats-the-difference>>.

⁷⁹¹ *Fair Work Act 2009* (Cth) s 576.

- (p) special provisions about TCF outworkers (Part 6-4A);
- (q) workers bullied at work (Part 6-4B).

(2) The FWC also has the following functions:

- (aa) promoting cooperative and productive workplace relations and preventing disputes;
- (a) dealing with disputes as referred to in section 595;
- (b) providing assistance and advice about its functions and activities;
- (c) providing administrative support in accordance with an arrangement under section 650 or 653A;
- (ca) mediating any proceedings, part of proceedings or matter arising out of any proceedings that, under section 53A of the Federal Court of Australia Act 1976 or section 34 of the Federal Circuit Court of Australia Act 1999, have been referred by the Fair Work Division of the Federal Court or Federal Circuit Court to the FWC for mediation;
- (d) any other function conferred on the FWC by a law of the Commonwealth.

Particular functions of the FWC that might assist caregivers include those in relation to the National Employment Standards, unfair dismissal and workplace bullying.

The Workplace Gender Equality Agency

The *Workplace Gender Equality Act 2012* (Cth) established the Workplace Gender Equality Agency (WGEA) (discussed further above at **3.3.2 – Family-friendly employment**). Section 10 of the Act sets out the functions of the WGEA as follows:

(1) The functions of the Agency are:

- (a) to advise and assist employers in promoting and improving gender equality in the workplace; and
- (aa) to develop, in consultation with relevant employers and employee organisations, benchmarks in relation to gender equality indicators; and
- (b) to issue guidelines to assist relevant employers to achieve the purposes of this Act; and
- (c) to review compliance with this Act by relevant employers, to review public reports lodged by relevant employers and to deal with those reports in accordance with this Act; and
- (d) to collect and analyse information provided by relevant employers under this Act to assist the Agency to advise the Minister in relation to legislative instruments made under this Act; and
- (e) to undertake research, educational programs and other programs for the purpose of promoting and improving gender equality in the workplace; and
- (ea) to work with employers to maximise the effectiveness of the administration of this Act, including by minimising the regulatory burden on employers; and
- (f) to promote and contribute to understanding and acceptance, and public discussion, of gender equality in the workplace; and
- (g) to review the effectiveness of this Act in achieving its purposes; and
- (h) to report to the Minister on such matters in relation to gender equality in the workplace as the Agency thinks fit (including a review under paragraph (g)).

The objects of the Act are primarily addressed through the compulsory reporting requirements, with this function of the WGEA essentially ascribing a tracking and monitoring role regarding the status of actions to promote gender equality in the labour force. These functions also promote transparency on issues related to gender equality and discrimination. Any employers that are not compliant with the Act are placed on a non-compliant list which is read in Parliament and published online.

The Agency regularly analyses the reported data and produces statistics on the status of gender equality in the Australian labour force (private sector), including, but not limited to, the size of gender pay gaps and the gender composition of the labour force.

3.4 Trafficking and commercial sexual exploitation

3.4.1 Prohibition

Is there a clear criminal prohibition of activities related to child trafficking, the sale of children, the use of children in prostitution and the sale, creation, and possession of child pornography/child abuse material, including through digital and online media? Does criminal, civil, or administrative liability for these actions extend to legal persons, including business enterprises?

Australia ratified the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children* (Palermo Protocol) in 2005, supplementing the *Convention against Transnational Organized Crime* to

which it is also a party. Australia is also a party to the *Slavery Convention*, the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, the *Convention on the Rights of the Child* and has ratified the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*. As set out above, Australia has also ratified a number of International Labour Organisation (ILO) Conventions including the *Forced Labour Convention* and the *Worst Forms of Child Labour Convention*.

Child trafficking

Consistent with Australia's obligations under the Palermo Protocol, Divisions 270 and 271 of the *Criminal Code Act 1995* (Cth) (the **Criminal Code**) establish various offences for human trafficking, slavery and slavery-like offences, including servitude, forced labour, deceptive recruiting for labour or services, debt bondage and forced marriage. Slavery-like offences are aggravated where the victim is under 18 years.⁷⁹² Division 272 of the Criminal Code criminalises sex offences committed against children outside Australia.

The Australian Government has established a 'National Action Plan to Combat Human Trafficking and Slavery' (2015-2019).⁷⁹³ One of the key focus areas of the plan is to monitor the criminal investigations and enforcement of trafficking offences under the Criminal Code, including specifically to help ensure that the Criminal Code continues to provide specific offences and aggravated penalties for offences involving trafficked people who are classified as a 'minor' (child).⁷⁹⁴ The plan also states that the Government must '[e]nsure that the best interests of the child is the primary consideration when developing, implementing and monitoring policy, legislation and operational procedures and guidelines that relate to trafficked people who are minors'.⁷⁹⁵

In December 2015, the Joint Committee on Law Enforcement initiated an inquiry into human trafficking, slavery and slavery-like practices. In its final report, published in July 2017, the Committee recommended amongst other things amendments to the *Criminal Code Act 1995* (Cth) and the appointment of an Anti-Slavery and Trafficking Commissioner.⁷⁹⁶ The Government has not as yet responded to this Inquiry.

Sale of children

The 'sale of children' is not explicitly prohibited by state or federal law in Australia. However, most conceivable circumstances involving the sale of a child would be covered by laws prohibiting slavery, illegal adoption and laws prohibiting child abuse, prostitution and trafficking.

In its 2012 concluding observations, the UN Committee on the Rights of the Child urged the Australian Government to 'define and criminalize the sale of children, in accordance with the Optional Protocol, in particular the sale of children for the purpose of illegal adoption, engagement of the child in forced labour and transfer of organs of the child for profit'.⁷⁹⁷

Use of children in prostitution and possession of child pornography/child abuse material

Prostitution in Australia is governed by state and territory laws, which vary considerably. However, in all states and territories child prostitution is prohibited. Division 15 of the *Crimes Act 1900* (NSW) for example, prohibits promoting or engaging in acts of child prostitution, obtaining benefit from child prostitution or using premises for child prostitution. A 'child' is defined by section 91C of the *Crimes Act 1900* (NSW) as any person who is under the age of 18 years.

The *Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Act 2017* (Cth) aims to prevent

⁷⁹² *Criminal Code 1995* (Cth) div 270.8.

⁷⁹³ Australian Government, *National Action Plan to Combat Human Trafficking and Slavery (2015-19)*, Commonwealth of Australia (2014) <<https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/Trafficking-NationalActionPlanToCombatHumanTraffickingAndSlavery2015-19.pdf>>.

⁷⁹⁴ *Ibid.*

⁷⁹⁵ *Ibid.*

⁷⁹⁶ Parliament of the Commonwealth of Australia, Parliamentary Joint Committee of Law Enforcement Australia, *An inquiry into human trafficking, slavery and slavery-like practices*, Commonwealth of Australia (July 2017) <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Law_Enforcement/Humantrafficking45/Report>.

⁷⁹⁷ United Nations Committee on the Rights of the Child, *Concluding observations: Australia*, 60th sess, UN Doc CRC/C/OPSC/AUS/CO/1 (24 September 2012)

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fOPSC%2fAUS%2fCO%2f1&Lang=en> [25].

the sexual exploitation and sexual abuse of children in overseas countries through preventing Australians listed on a state or territory child sex offender register travelling overseas without permission.⁷⁹⁸ The law does so by providing the Minister for Foreign Affairs with the power to cancel the passport of, or deny a passport to, a registered child sex offender who has reporting responsibilities ('reportable offenders'), upon request by a state or territory competent authority. The Act also introduced a new offence in Division 271A of the *Criminal Code* for a reportable offender to travel, or attempt to travel, overseas without permission from a state or territory competent authority.

The UN Committee on the Rights of the Child recommended that the Government 'carry out research on the nature and extent of the sale of children, child prostitution and child pornography, in order to identify the root causes, the extent of the problems, and the existence of protection and prevention measures, and adopt targeted measures'.⁷⁹⁹

Sale, creation and possession of child pornography and child abuse material

The sale, creation and possession of child pornography and child abuse material is prohibited by a number of state, territory and federal laws regarding censorship, customs, crime and broadcasting legislation:

- **Criminal law:** Both Federal and state/territory laws prohibit child pornography and child abuse images. For example, Division 273 of the *Criminal Code Act 1995* (Cth) contains offences involving child pornography material or child abuse material outside Australia (see below at **3.7.4 – Online protection**).
- **Censorship law (Federal):** Under the *Classification (Publications, Films and Computer Games) Act 1995* (Cth), films, publications and computer games are refused classification (and therefore banned) if they 'describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not)'.⁸⁰⁰
- **Censorship law (State/Territory):** State and territory legislation sets out conditions for the public exhibition or demonstration, sale or advertising of films, publications or computer games. For example, the *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (NSW) makes it an offence to possess or copy refused classification-rated material (including child pornography), but only where possession is for the purpose of selling, exhibiting or demonstrating films, publications or computer games.
- **Censorship law and the Internet (Federal):** Under schedules 5 and 7 of the *Broadcasting Services Act 1992* (Cth), the Australian Federal Police (AFP) and any relevant internet service provider may be notified regarding content that has been refused classification or potentially would be refused classification. The AFP may then issue a take-down, service-cessation and/or link-deletion notice against the content provider.
- **Censorship law and the Internet (State/Territory):** Legislation in Victoria, Western Australia and the Northern Territory prohibits using online or computer services to publish or transmit objectionable material (which is defined to include child pornography).⁸⁰¹ For example, the *Crimes Amendment (Child Pornography and Other Matters) Act 2015* (Vic) makes it an offence to administer a child pornography website and to encourage use of a website to deal with child pornography.⁸⁰²
- **Customs legislation (Federal):** Section 233BAB of the *Customs Act 1901* (Cth) contains offences

⁷⁹⁸ Parliament of the Commonwealth of Australia, House of Representatives, *Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Bill 2017 – Explanatory Memorandum* (2016-2017)

<http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5909_ems_239d6e60-8ce8-4dc0-9b33-c776ce358c01/upload_pdf/635466.pdf;fileType=application%2Fpdf> 2.

⁷⁹⁹ United Nations Committee on the Rights of the Child, n 799, [21(b)].

⁸⁰⁰ *Classification (Publications, Films and Computer Games) Act 1995* (Cth) sch 'National Classification Code'.

⁸⁰¹ *Classification of Publications, Films and Computer Games (Enforcement) Act 1995* (Vic) s 57A; *Classification (Publications, Films and Computer Games) Enforcement Act 1995* (WA) ss 99-102; *Classification of Publications, Films and Computer Games Act 1985* (NT) ss 50X-50ZA.

⁸⁰² *Crimes Amendment (Child Pornography and Other Matters) Act 2015* (Vic) ss 70AAAB and 70AAAD.

for the importation and exportation of, amongst other things, child pornography and child abuse material in hard copy.

- **Telecommunications offences (Federal):** Section 474.19 of the *Criminal Code Act 1995* (Cth) makes it an offence to use a telecommunications carriage service with intent to access, transmit or cause to be transmitted, publish or distribute child pornography. Section 474.20 makes it an offence to prepare material for the purposes of a section 474.19 offence. The Criminal Code also contains an offence for internet content hosts and internet service providers for failing to report online child abuse or pornography material to law enforcement (s 474.25). Division 474 of the Commonwealth Criminal Code also contains a number of offences for the use of a carriage service to engage in sexual activity with a child.

Corporate liability for criminal offences

Corporations can be held criminally responsible for commonwealth criminal offences. Section 12.1 of the *Criminal Code Act 1995* (Cth) provides that in relation to offences found in the Code, 'A body corporate may be found guilty of any offence, including one punishable by imprisonment.' Under Division 12, a body corporate is liable for an offence committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, where the body corporate expressly, tacitly or impliedly authorised or permitted the commission of the offence. Such permission or authorisation can be established by proving that:⁸⁰³

- the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
- a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence (however, this does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission); or
- a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
- the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

Corporations may also be criminally responsible for offences committed by other corporations (related or otherwise) in instances where that company has aided, abetted, counselled or procured the commission of the offence.⁸⁰⁴

Corporations can also be held criminally responsible for criminal offences under state and territory law. Legislation varies between jurisdictions however it generally defines a 'person' to include a body politic or corporate.⁸⁰⁵

3.4.2 Extra-territoriality

Can jurisdiction be asserted over offences related to the commercial exploitation of children committed outside territorial boundaries and, if so, in what circumstances?

Division 15 of the *Criminal Code Act 1995* (Cth) provides that the following categories of offences have extended geographical jurisdiction:

- Category A - offences assigned to category A apply to:
 - conduct or the results of conduct occurring wholly or partly in Australia or on board an Australian aircraft or ship;

⁸⁰³ *Criminal Code Act 1995* (Cth) sch 1, div 12.

⁸⁰⁴ *Criminal Code Act 1995* (Cth) sch 1, div 11.2. A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly. 'Person' is defined under the Act to include bodies corporate.

⁸⁰⁵ See for example *Acts Interpretation Act* (Cth) s 2C; *Interpretation Act 1987* (NSW) s 21.

- where the person engaging in the conduct is an Australian citizen or body corporate; and
- where the alleged offence is an ancillary offence, conduct occurs wholly outside Australia, however, the conduct constituting the primary offence occurs wholly or partly in Australia or on board an Australian aircraft or ship.
- Category B - offences assigned to category B apply to offences under category A, as well as to residents of Australia.
- Category C - offences assigned to category C occur whether or not the conduct or the result of conduct occurs in Australia. Certain statutory defences apply.
- Category D - offences assigned to category D apply whether or not conduct or the result of conduct occurs in Australia. No statutory defences apply.

Offences regarding slavery, for example, have universal jurisdiction (extended geographical jurisdiction - category D) and therefore apply to conduct within or outside of Australia, and whether or not the offender was an Australian citizen, resident or body corporate. Slavery-like offences fall under extended geographical jurisdiction - category B and therefore apply if the conduct, or the result of the conduct, occurs wholly or partly in Australia, or if the conduct occurs outside Australia but the offender is an Australian citizen, resident, or body corporate.

Criminal responsibility for certain child sex offences (Division 272) and offences involving child pornography material or child abuse material (Division 273) applies to conduct occurring outside Australia where the offender was:⁸⁰⁶

- an Australian citizen;
- a resident of Australia;
- a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; or
- any other body corporate that carries on its activities principally in Australia.

Extended geographical jurisdiction - Category A - applies to the offences in Division 474 of the Criminal Code, including criminal offences for online child abuse, online child pornography, and sexual activity with a child via a carriage service.

During its Inquiry into establishing a Modern Slavery Act in Australia, the Joint Standing Committee on Foreign Affairs, Defence and Trade raised particular concern about 'orphanage tourism' and concluded that 'orphanage trafficking' be considered a form of modern slavery. It made a number of recommendations to help reduce the incidence of 'orphanage tourism', including through a national awareness campaign focused on education providers, the travel industry, with the Australian Charities and Not-For-Profit Commission and the Overseas Aid Gift Deduction Scheme, and a memorandum of understanding with businesses to discourage supporting overseas residential institutions that do not operate in compliance with Children's Convention, and the *United Nations Guidelines for the Alternative Care of Children*.⁸⁰⁷ Subsequent to the Inquiry, the Australian Government announced in March 2018 the commencement of the 'Smart Volunteering Campaign' with the aim of preventing 'Australians from inadvertently contributing to child exploitation through the practice of orphanage tourism, including by participating in misleading volunteer programs'.⁸⁰⁸

Additionally, the *Modern Slavery Act 2018* (Cth) (discussed above at **3.1.4 – Reporting**) requires certain large businesses in Australia to report annually on their actions to address modern slavery risks in their operations and supply chains, including risks in their operations or supply chains of child trafficking in overseas residential

⁸⁰⁶ *Criminal Code Act 1995* (Cth) s 272.6.

⁸⁰⁷ Hidden in Plain Sight: An inquiry into establishing a Modern Slavery Act in Australia, n 100, Chapter 8 and, especially, Recommendations 35 and 36.

⁸⁰⁸ Julie Bishop and Simon Birmingham, 'New campaign to tackle orphanage tourism' (Joint Media Release, 1 March 2018) <https://foreignminister.gov.au/releases/Pages/2018/jb_mr_180301.aspx>.

institutions, and, if so, report on their actions to address these risks. The Explanatory Memorandum of the Modern Slavery Bill 2018 also states that Criminal Code offences cover trafficking in the context of orphanages, explaining:⁸⁰⁹

The offences in Divisions 270 and 271 of the Criminal Code apply irrespective of the purpose for which a person is trafficked, or the industry or context in which they are exploited. For example, these offences could apply to exploitation in mining and agricultural contexts, as well as the trafficking and/or exploitation of children in orphanages.

However, Criminal Code offences covering human trafficking, slavery and slavery-like practices have not as yet been tested in court in the context of child exploitation in overseas residential institutions.

3.4.3 Non-discrimination

Do laws, policies and programs related to child trafficking and commercial sexual exploitation apply equally to girls and boys, and to all children under age 18?

Laws, policies and programs in Australia generally define a ‘child’, either expressly or impliedly, as any person who is under the age of 18 years.⁸¹⁰ That is, laws, policies and programs related to child trafficking and commercial sexual exploitation apply equally to girls and boys, and to all children (people under 18 years).

3.4.4 Protection

What measures are taken to ensure child victims of trafficking or commercial sexual exploitation are not viewed or treated as offenders?

There are no explicit measures in state or federal law that ensure that child victims of trafficking or commercial sexual exploitation are not viewed or treated as offenders. However, the focus of criminal laws prohibiting child prostitution and prostitution is generally on those who exploit children. In regard to the few offences that may operate to criminalise child victims, for example, laws prohibiting soliciting in a public place, it is a matter for prosecutor discretion whether the laws should be applied in the public interest, and the age or youth of a victim is a relevant factor in determining the public interest.⁸¹¹

The *National Action Plan to Combat Human Trafficking and Slavery* includes as a key action item the development of an ‘operational protocol for minors’ to ensure that all minors identified by Australian authorities as suspected victims of human trafficking or slavery are afforded appropriate protections and support in line with Australia’s international and domestic obligations.⁸¹² Part of achieving this goal is to ensure children are afforded additional protections in the investigation and prosecution process, including through the use of protections available for child witnesses, special witnesses and vulnerable witnesses.⁸¹³ The operational protocol has been developed by the Government’s Operational Working Group on Human Trafficking and Slavery. It will be included as an addendum to the Department of Social Services’ revised Support for Trafficked People Program Communications Manual, which, as at October 2018, was being finalised.

Several submissions to the Joint Standing Committee on Foreign Affairs, Defence and Trade (**JSCFADT**) Inquiry into establishing a Modern Slavery Act in Australia in 2017 highlighted shortcomings in Australia’s current approach to victims of trafficking and exploitation. For example, whilst acknowledging the Australian Government’s on-going commitment to the elimination of human trafficking and slavery, Anti-Slavery Australia highlighted several gaps in Australia’s approach, recommending, amongst other things, that the Australian Government:⁸¹⁴

- Improve the Support for Trafficked People Program – including through broadening the number of agencies that can make referrals to the Program and through de-linking the provision of support to the survivor’s participation in the criminal justice process and, instead, determining eligibility on

⁸⁰⁹ Modern Slavery Bill 2018 – Explanatory Memorandum, n 103, [50].

⁸¹⁰ See, for example, *Criminal Code Act 1995* (Cth) ss 270.8, 271.4, 271.7; *Crimes Act 1900* (NSW) s 91C. Also see, for example, *Crimes Act 1900* (NSW) ss 66EB and 91FB, which define a child as a person under the age of 16 years for the purposes of those sections.

⁸¹¹ Office of the Director of Public Prosecutions New South Wales, *Prosecution Guidelines* <<http://www.odpp.nsw.gov.au/prosecution-guidelines>> [3.17].

⁸¹² Australian Government, n 795.

⁸¹³ *Ibid.*

⁸¹⁴ Anti-Slavery Australia, Submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into Establishing a Modern Slavery Act in Australia* (2017) <<http://antislavery.org.au/images/pdf/Publications/2017%20-%20Submission%20to%20the%20JSCFAT%20on%20the%20Modern%20Slavery%20Act%20Inquiry.pdf>> 6-10.

an individual, case-by-case basis;

- Create provisions to facilitate the reunification of survivors with their families, prioritising survivors with dependent children;
- Introduce a comprehensive, national compensation scheme to address disparities between State and Territory victim's support schemes, and to ensure that all survivors of human trafficking and slavery in Australia have access to remedy; and
- Establish an office of the Australian Independent Anti-Slavery and Trafficking Ombudsman.

Many other organisations have also expressed support for measures including the establishment of an Independent Anti-Slavery Commissioner to improve the identification, experiences and supports for victims/survivors of trafficking and slavery (including children),⁸¹⁵ the extension of the reflection period and protection from prosecution for victims/survivors.

The JSCFADT subsequently recommended that:⁸¹⁶

...the Australian Government introduce a Modern Slavery Act in Australia. The Modern Slavery Act should include:

- referencing in one location Australia's existing modern slavery offences as outlined in Division 270 and 271 of the Criminal Code Act 1995, as well as offences relevant to combatting modern slavery such as withholding passports under section 21 of the Foreign Passports (Law Enforcement and Security) Act 2005, offences relating to sexual and labour exploitation and offences under the Migration Act 1958;
- provisions for an Independent Anti-Slavery Commissioner;
- provisions for a mandatory supply chain reporting requirement that requires certain entities to report on modern slavery risks in their supply chains;
- measures to support victims of modern slavery, including establishing a national compensation scheme;
- measures to improve criminal justice responses to modern slavery;
- measures to address orphanage trafficking and child exploitation in overseas residential institutions; and
- measures to address labour exploitation, including establishing a labour hire licensing scheme and making changes to Australia's visa framework.

As at April 2019 the Government had not tabled a response to this inquiry report.⁸¹⁷ However, the Australian Government subsequently introduced the Modern Slavery Bill to parliament in June 2018,⁸¹⁸ and provided a response to the inquiry into the Bill conducted by the Senate Committee on Legal and Constitutional Affairs.⁸¹⁹ The Act, discussed further above at **3.1.4 – Reporting**, focuses entirely on the reporting requirement on certain large entities. It does not currently include provision for an Independent Anti-Slavery Commissioner or measures to support victims of modern slavery, including establishing a national compensation scheme, as recommended by the JSCFADT. However, other non-legislative measures have since been announced (see below at section **3.4.5 – Reparations / rehabilitation**).

As outlined above at **3.1.4 – Reporting**, the *Modern Slavery Act 2018* (NSW) was passed by the NSW Parliament in June 2018. The NSW Act has the following objects (s 3):

- (a) to combat modern slavery,
- (b) to provide assistance and support for victims of modern slavery,
- (c) to provide for an Anti-slavery Commissioner,
- (d) to provide for detection and exposure of modern slavery that may have occurred or be occurring or that is likely to occur,
- (e) to raise community awareness of, and provide for education and training about, modern slavery,
- (f) to encourage collaborative action to combat modern slavery,
- (g) to provide for the assessment of the effectiveness and appropriateness of laws prohibiting modern slavery

⁸¹⁵ Australian Human Rights Commission et al, *Statement of Support for an Australian Modern Slavery Act* <https://www.humanrights.gov.au/sites/default/files/document/publication/2017_Statement_Australian_Modern_Slavery_Act8Nov2017.pdf>.

⁸¹⁶ Hidden in Plain Sight: An inquiry into establishing a Modern Slavery Act in Australia, n 100, [2.72].

⁸¹⁷ Ibid.

⁸¹⁸ Parliament of Australia, Modern Slavery Bill 2018

<https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6148>.

⁸¹⁹ Senate Standing Committee on Legal and Constitutional Affairs, Modern Slavery Bill 2018 [Provisions], 'Government Response' (14 November 2018)

<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/ModernSlavery/Government_Response>.

- and to improve the implementation and enforcement of such laws,
- (h) to provide for mandatory reporting of risks of modern slavery occurring in the supply chains of government agencies and commercial organisations,
- (i) to make forced marriage of a child and certain slavery and slavery-like conduct offences in New South Wales,
- (j) to further penalise involvement in cybersex trafficking by making it an offence to administer a digital platform for the purpose of child abuse material.

As such, the NSW Act has an explicit purpose to help improve assistance and support for victims of 'modern slavery', as well as increase detection and exposure of modern slavery. To these ends, the Act establishes the role of the NSW Anti-Slavery Commissioner, whose general functions are (s 9):

- (a) to advocate for and promote action to combat modern slavery,
- (b) to identify and provide assistance and support for victims of modern slavery,
- (c) to make recommendations and provide information, advice, education and training about action to prevent, detect, investigate and prosecute offences involving modern slavery,
- (d) to co-operate with or work jointly with government and non-government agencies and other bodies and persons to combat modern slavery and provide assistance and support to victims of modern slavery,
- (e) to monitor reporting concerning risks of modern slavery occurring in supply chains of government agencies and commercial organisations,
- (f) to monitor the effectiveness of legislation and governmental policies and action in combating modern slavery,
- (g) to raise community awareness of modern slavery,
- (h) to exercise such other functions as are conferred or imposed on the Commissioner by or under this or any other Act.

The Commissioner also has a role to promote public awareness of modern slavery, and to establish and maintain a hotline for the provision of advice and assistance to children and other persons who are, or may be, victims of modern slavery (s 12). The Commissioner must provide an annual report to the Minister each year, who must then provide it to both houses of Parliament (s 19).

The Act also establishes a new parliamentary Modern Slavery Committee (Schedule 1).

In these respects, the NSW Act has a broader purpose than the Commonwealth *Modern Slavery Act 2018* (Cth), which has a sole purpose of increasing transparency in supply chains through the modern slavery reporting requirement only.

3.4.5 Reparations / rehabilitation

What mechanisms can child victims of sexual exploitation use to obtain reparations from responsible parties, including business enterprises? What services are available to assist in the rehabilitation and reintegration of child victims of sexual exploitation?

Mechanisms to obtain reparations from responsible parties

Child victims of sexual exploitation, as is the case with victims of other crimes, may obtain reparations from criminally responsible parties in three ways:

- Through an award of compensation in civil proceedings (typically through a claim that a tort has been committed);
- Through an order that an offender pay restitution or reparation to the victim, as part of the offender's sentence; or
- Through a claim to a statutory compensation scheme in which orders are assessed and paid by the government. The government may then seek reimbursement from the offender.

The Law Council of Australia and Anti-Slavery Australia have previously recommended that the Australian Government introduce a National Compensation Scheme for Victims of Commonwealth Crime in order to help address current gaps in access to remedy for victims/survivors of human trafficking⁸²⁰ (see further below under **3.10 – Remedies**).

The Australian Government has also established a National Redress Scheme for people who have experienced

⁸²⁰ Law Council of Australia, Anti-Slavery Australia and University of Technology Sydney, *Report on Establishing a National Compensation Scheme for Victims of Commonwealth Crime* (2016) <<https://www.antislavery.org.au/images/FINAL%20REPORT%20-%20ASA%20-%20LCA%20The%20Case%20for%20a%20National%20Compensation%20Scheme.pdf>>.

institutional child sexual abuse building on the work of the *Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission)*.⁸²¹ The *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) outlines the Scheme, which provides three components of redress, including:⁸²²

- 1) access to counselling and psychological services;
- 2) a redress payment; and
- 3) a direct personal response (such as an apology) from the responsible institution.

Under the Scheme, redress is provided to people who were sexually abused as children before the commencement of the Scheme, where an institution that is participating in the Scheme is responsible. The Scheme began on 1 July 2018, and will run for 10 years.⁸²³ Every state and territory government is participating in the Scheme. Non-government institutions are also participating, with many major churches and charities on board and more organisations continue to join.⁸²⁴

The Scheme as established diverges from the recommendations of the Royal Commission, for example, by providing a capped payment of \$150,000 rather than the recommended sum of \$200,000. Some members of parliament have also expressed concern about this, in addition to restrictions on eligibility to participate in the Scheme - including a requirement that the person be a resident and the exclusion of people who have experienced sexual abuse but who have a criminal history⁸²⁵ (noting however the availability of a process of 'special assessment of applicants with serious criminal convictions'⁸²⁶). Some survivors have also expressed concern about limited services available in regional areas.⁸²⁷

Services to assist in rehabilitation and reintegration

Victims of child trafficking are able to access the Australian Government's Human Trafficking Visa Framework. They are also able to access the Support for Trafficked People Program (**STPP**) which is administered by the Department of Social Services and delivered nationally by the Australian Red Cross. The STPP is a key component of the Australian Government's National Action Plan to Combat Human Trafficking and Slavery. It has been explained as follows:⁸²⁸

The Support Program provides assistance to all victims of human trafficking, slavery and slavery-like practices, including forced marriage and forced labour, who meet the eligibility criteria.

The Support Program is administered by the Department of Social Services and delivered nationally by the Australian Red Cross. It aims to assist clients in meeting their safety, security, health and well-being needs, and to develop options for life after they leave the Support Program. Case managers are responsible for ensuring the appropriate delivery of support services to meet clients' individual needs, which may include

⁸²¹ Christian Porter and George Brandis, 'Commonwealth Redress Scheme for Survivors of Institutional Child Sexual Abuse' (Joint Media Release, 9 May 2017) <<https://formerministers.dss.gov.au/17376/commonwealth-redress-scheme-for-survivors-of-institutional-child-sexual-abuse/>>.

⁸²² Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 s 4
<http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6006_first-reps/toc_pdf/17252b01.pdf;fileType=application%2Fpdf>;
Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017
<https://www.aph.gov.au/Parliamentary_Business/Bills_LEgislation/Bills_Search_Results/Result?bld=r6007>.

⁸²³ Department of Social Services, *Commonwealth redress scheme for survivors of institutional child sexual abuse*
<<https://www.dss.gov.au/families-and-children/programs-services/children/commonwealth-redress-scheme-for-survivors-of-institutional-child-sexual-abuse>>.

⁸²⁴ See, for example, Catholic Religious Australia, *Catholic Church confirms entry into national redress scheme* (30 May 2018)
<<https://www.catholic.org.au/all-downloads/bishops-1/media-releases-1/2115-joint-statement-catholic-church-confirms-entry-into-national-redress-scheme/file>>.

⁸²⁵ See, for example, Senate Standing Committees on Community Affairs, *Report - National Redress Scheme for Institutional Child Sexual Abuse Bill 2018 and National Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2018* (June 2018)
<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/NationalRedressScheme/Report>.

⁸²⁶ *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) s 63.

⁸²⁷ Tara Cassidy, 'National redress scheme for sex abuse survivors 'out of touch' in regions', *ABC News – Tropical North* (12 June 2018)
<<http://www.abc.net.au/news/2018-06-11/abuse-survivor-says-redress-scheme-out-of-touch-in-regions/9853366>>.

⁸²⁸ Department of Social Services, *Women's Safety – Support for Trafficked People Program* <<https://www.dss.gov.au/women/programs-services/reducing-violence/anti-people-trafficking-strategy/support-for-trafficked-people-program>>.

- case management support
- suitable accommodation that meets the Australian Federal Police's (AFP) security and safety requirements
- medical treatment (through Medicare and the Pharmaceuticals Benefits Scheme, or as approved);
- counselling
- referral to legal and migration advice
- skills development training, including English-language classes and vocational guidance
- social support.

All suspected victims referred to the Support Program by the AFP are eligible to receive support for a minimum of 45 days, irrespective of whether they assist with the criminal justice process. A further 45 days is automatically available to children, and to other suspected victims willing but not able to assist the AFP (on a case by case basis). Ongoing support is provided to those assisting the criminal justice process until the investigation/matter is finalised. All victims also receive a 20 calendar day transition period.

The support program is available to victims of human trafficking, slavery and slavery-like practices, including forced marriage and forced labour (not 'sexual exploitation' per se, although these categories will likely cover many instances of sexual exploitation).

In February 2018, the Minister for Social Services and Assistant Minister for Home Affairs announced a 12-month trial (\$0.5 million over 2018-19) which allows people in, or at risk of, forced marriage to access up to 200 days of case managed support under the Support Program without being required to contribute to a criminal investigation or prosecution.⁸²⁹

While there is no integrated framework of services to assist in the rehabilitation and reintegration of child victims of sexual exploitation in Australia specifically, there are a number of support services that exist for victims of sexual assault. For example, the NSW Health's Sexual Assault Services provides free information, counselling, court support and forensic examinations for anyone who has been sexually assaulted. These services are based in certain hospitals and community health services across NSW and are open 24 hours a day. Additionally, the NSW Department of Family and Community Services may involve itself where rehabilitation and reintegration of a child is required following sexual exploitation by a family member or carer. Finally, Child and Adolescent Sexual Assault Counsellors, Rosie's Place and a number of helplines including the Kids Helpline, the Child Protection Helpline and 1800RESPECT provide referral and on-going counselling services.

3.5 Products

3.5.1 Safety and Protection

What measures (e.g. research and testing) are required to ensure that products likely to be used or consumed by children do not pose risks to children's health or safety? To what extent are there restrictions on children's access to harmful products on the public marketplace, recognizing children's right to freedom of expression and information?

General Consumer Products

Australia has general safety regulations that apply to general types of consumer products. They establish:

- bans and mandatory safety standards that apply to products that are particularly risky;
- voluntary standards that typically include safety elements;
- recalls (voluntary or compulsory) that apply to defective or unsafe products; and
- product liability laws.

The Australian Consumer Law (**ACL**) is the key legislation that regulates consumer goods and product related

⁸²⁹ The Hon Dan Tehan MP, Minister for Social Services and The Hon Alex Hawke MP, Assistant Minister for Home Affairs – Joint Media Release, 'Greater access to support for victims of Modern Slavery' (15 February 2018) <<https://formerministers.dss.gov.au/17984/greater-access-to-support-for-victims-of-modern-slavery/>>.

services. The protections under the ACL apply to all consumers, including children, and are not intended to apply differently to any class or group of consumers. However, the Australian Competition and Consumer Commission (ACCC) has elevated the protection and safety of children as a compliance, enforcement and product safety priority in several areas. Specifically, the ACCC has:

- identified vulnerable and disadvantaged consumers as an enduring priority to ensure their welfare and protection from unlawful trading practices.⁸³⁰ This would include children as a vulnerable class of consumers; and
- prioritised its efforts and resources at preventing harm to children from product safety incidents related to button batteries in toys, baby walkers and toppling furniture.⁸³¹

In addition, the Commonwealth Minister and the ACCC consider implications and conventions relating to the health and rights of children when developing legislative instruments such as mandatory safety standards.⁸³²

The ACL is contained in schedule 2 to the *Competition and Consumer Act 2010* (Cth) and it prohibits a person from supplying a consumer good or product related service that:

- does not comply with a mandatory safety standard;
- is covered by an interim or permanent ban; or
- does not comply with information standards.

There are often testing requirements in mandatory safety standards (see below). In relation to cots for example, the mandatory safety standard requires testing to ensure cots meet requirements for impact, strength, load, durability and stability. Businesses are legally required to comply with any testing and safety requirements in a mandatory safety standard and may face pecuniary penalties for non-compliance.

Even if a mandatory standard does not apply, testing can assist businesses to ensure their products meet consumer standards under the ACL or voluntary standards that may apply to their products. The ACCC recommended in its 2013 'Product Safety: A guide to testing' supplier guide that, where possible, suppliers use test laboratories that are accredited testers of the relevant product, are reliable and credible, are certified in standards for quality assurance and management systems, and are experienced.⁸³³

Mandatory safety standards

Under the ACL (and the former *Trade Practices Act 1974* (Cth)), the relevant Minister has the power to make mandatory safety standards that apply to particular goods and services. These standards are either prescribed by consumer protection notices, safety standards or regulations.

The mandatory safety standards impose the following kinds of requirements:

- warnings on labels regarding the risks or hazards the product may pose to children;
- child resistant attachments or products that must be fitted; and
- warnings regarding how a product must be assembled in order not to pose risks to children.

A range of mandatory safety standards apply to products that are generally used by children including aquatic toys, baby bath aids, baby dummies, baby walkers, child restraints for use in motor vehicles, folding cots,

⁸³⁰ Australian Competition and Consumer Commission, *Compliance & enforcement policy & priorities* (2018)

<<https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities>>.

⁸³¹ Australian Competition and Consumer Commission, *Product safety priorities* (2018) <<https://www.accc.gov.au/about-us/australian-competition-consumer-commission/product-safety-priorities>>.

⁸³² See for example 'Statement of Compatibility with Human Rights' in the Consumer Goods (Self-Balancing Scooters) Safety Standard 2016, <<https://www.legislation.gov.au/Details/F2016L01180/Explanatory%20Statement/Text>>.

⁸³³ Australian Competition and Consumer Commission, *Product Safety in Australia* (26 May 2016) <https://www.productsafety.gov.au/system/files/Product%20safety%20in%20Australia_0.pdf>.

prams and strollers, swimming and flotation aids, toys containing lead and other elements, toys containing magnets and toys for children up to and including 36 months of age.⁸³⁴

Recall notices

The ACL also requires suppliers to comply with the contents of recall notices and to follow particular steps when initiating a voluntary recall or when conducting a compulsory recall. The main objective of a recall is to stop the distribution and sale of the product as soon as possible and inform the public of the problem. The recall process does not require businesses to take any particular steps with respect to children's rights, but the safety and protection of consumers (including children) is implicit in this function.

Mandatory reporting

Businesses also have mandatory reporting requirements that apply to goods and product related services. A supplier must notify the relevant Minister if it becomes aware of a consumer good or product related service associated with the death or serious injury of a person.⁸³⁵

Voluntary standards

Many products have voluntary standards that provide good practice guidance to manufacturers and suppliers to assist them with ensuring their products are safe. Voluntary standards typically include safety elements and can provide guidance to industry on minimum safety requirements.

Voluntary standards do not form part of the law, so businesses can supply products in Australia that do not meet voluntary standards. However, it is against the law for a business to make a representation that a product meets a voluntary standard when it does not. Some industry associations and businesses require compliance with voluntary standards as a condition of membership, for example the Australian Food & Grocery Council, and the Australian Fashion Council.⁸³⁶

Voluntary standards are made by a number of bodies including Standards Australia. Standards Australia has developed thousands of voluntary standards called 'Australian Standards'.⁸³⁷

Consumer advocacy group CHOICE has however highlighted concerns with the voluntary standards applying to some children's products such as prams and strollers, calling for voluntary standards to be made mandatory.⁸³⁸

Consumer guarantees

The ACL also requires manufacturers and importers to comply with a number of consumer guarantees with respect to goods and services. The guarantees apply when businesses sell, hire or lease products or services that are under \$40,000 or that are over \$40,000 and normally bought for personal or household use. These guarantees include that goods are of an acceptable quality and are fit for any disclosed purpose.

The consumer guarantees do not specifically require goods targeted at children not to pose safety risks as these protections apply equally to all consumers. The consumer guarantee of acceptable quality requires that goods be 'safe' and would include those sold for use by children.⁸³⁹

Specific Products

There are a number of protections that apply in relation to specific consumer products. Some examples are explained below.

Therapeutic Goods

The Therapeutic Goods Administration regulates therapeutic goods in Australia. Therapeutic goods include a

⁸³⁴ See for example Australian Competition and Consumer Commission, *Mandatory Standards – Current mandatory standards* <<https://www.productsafety.gov.au/product-safety-laws/safety-standards-bans/mandatory-standards>>.

⁸³⁵ *Competition and Consumer Act 2010 (Cth)* ss 131, 132 and 202.

⁸³⁶ Australian Food & Grocery Council <<https://www.afgc.org.au/>>; Australian Fashion Council <<https://ausfashioncouncil.com/join/>>.

⁸³⁷ Standards Australia <<https://www.standards.org.au/>>.

⁸³⁸ CHOICE, *18 prams and strollers fail CHOICE safety test* (12 December 2018) <<https://www.choice.com.au/babies-and-kids/baby-transport/strollers-and-tricycles/articles/18-prams-fail-choice-test>>.

⁸³⁹ *Australian Consumer Law*, s 54(2)(d).

range of goods such as everyday products like sunscreen as well as prescription medicines, vaccines, blood products and surgical implants. Regulation occurs primarily through the *Therapeutic Goods Act 1989* (Cth), as well as regulations and orders made pursuant to that law.

Provisions within these take into account children's vulnerability with respect to therapeutic goods. For example, the Therapeutic Goods Order No. 80 - Child-Resistant Packaging Requirements for Medicines imposes requirements for the packaging of medicines that may present a significant risk of toxicity to children if accidentally ingested.

Food

The Australia New Zealand Food Standards Code (now contained in legislative instruments) imposes mandatory safety standards on food products.

The Code contains five mandatory food safety standards. Standard 3.3.1 (Food Safety Programs for Food Service to Vulnerable Persons) is aimed at protecting vulnerable consumers such as children. It requires child care centres that serve food to children to implement a food safety program. The Code also contains other standards imposing requirements on businesses in relation to food labelling. For example, standard 2.9.2 (Food for infants) imposes requirements regarding the composition of particular kinds of food for infants, the labelling of infant foods and representations and claims in relation to food for infants.

Motor vehicles

The *Motor Vehicle Standards Act 1989* (Cth) provides mandatory vehicle safety, emissions and anti-theft standards when new vehicles are supplied to the Australian market. These national standards are also called the Australian Design Rules and include rules that are aimed at protecting the safety of children. For example, Australian Design Rule 34/02 (Child Restraint Anchorages and Child Restraint Anchor Fittings) sets requirements for the child restraint anchorages on a vehicle to ensure a child capsule or seat can be fitted to a vehicle, so children who are too young to use an adult seatbelt can still be transported in a vehicle safely.

3.5.2 Non-discrimination

What protections exist to prevent discrimination against children as an age group or particular groups of children (e.g. ethnic minorities and children with disabilities) in the provision of products and services?

Section 28 of the *Age Discrimination Act 2004* (Cth) (ADA) prohibits a person, whether for payment or not, who provides goods or services, or makes facilities available, from discriminating against another person on the grounds of the person's age:

- by refusing to provide the other person with those goods or services or to make those facilities available to the other person; or
- in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or
- in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person.

However, the ADA also contains a number of general exemptions to the prohibition of age discrimination such as exemptions for positive discrimination (section 33) and exemptions relating to health goods or services or medical goods or services (section 42(3)). Positive discrimination provides an exemption when an act is done that is consistent with the purposes of the ADA, if the act:

- provides a bona fide benefit to persons of a particular age;
- is intended to meet a need that arises out of the age of persons of a particular age; or
- is intended to reduce a disadvantage experienced by people of a particular age.

Product safety regulation that applies only in relation to children or to children of a particular age may appear discriminatory on face value. However, regulation of that kind may be justified based on the purpose it serves, which usually relates to ensuring the health and safety of children.

| | |
|---------------------------------------|--|
| 3.5.3 Monitoring / enforcement | <p>What body, if any, is responsible for ensuring the application of product safety and liability standards? How can businesses be held responsible for the provision of unsafe products? To what extent do liability standards provide children and their families with effective remedies and suitable reparations following the purchase or use of a product or service found to be unsafe?</p> |
| | <p>In Australia, the product safety of general consumer products is primarily regulated by state and territory consumer product safety regulators as well as the Australian Competition and Consumer Commission (ACCC).</p> <p>There are also a number of government agencies that monitor and regulate the safety of specific kinds of products including chemicals, drugs/therapeutic goods, food, gas and electrical products.</p> <p>General Consumer Products</p> <p>The question of whether liability attaches to the manufacturer, importer or retailer is not always clear. In some cases, more than one business in the supply chain may be liable for a breach of a product safety law.</p> <p>Product safety - the Australian Consumer Law</p> <p>A person may bring an action against a manufacturer that supplies goods with a safety defect to recover loss or damage arising out of a safety defect. Subject to a few conditions, the person bringing the action must either be:</p> <ol style="list-style-type: none"> 1) an individual who has suffered an injury or, where the individual has died, their representative; 2) an individual who has suffered loss due to the injury or death of another person; 3) an individual who has suffered loss due to the damage or destruction by the product with the safety defect of another product; or 4) an individual who has suffered loss due to the damage or destruction by a defective product of land, buildings or fixtures. <p>A product has a 'safety defect' if it is not as safe as persons are generally entitled to expect. There are a number of circumstances that a Court must take into account in determining whether that standard is satisfied. The liability standard, which is not entirely clear, may cause issues for individuals, such as children and their families, when seeking a remedy in relation to a product that has safety issues.</p> <p>A breach of the ACL provisions with respect to information standards and the safety of consumer goods and product related services may result in the Court ordering a person (including a body corporate) to pay civil pecuniary penalties or be restrained by an injunction (for example to prevent it from engaging in further unlawful conduct).⁸⁴⁰ A person who suffers loss or damage or is likely to suffer loss or damage from the manufacturer's breach may potentially recover the amount of loss or damage suffered or obtain other compensatory orders from the Court.</p> <p>A supplier may also be found guilty of an offence if they supply goods or product related services that do not meet mandatory safety standards, are covered by a ban, do not meet information standards or do not comply with a recall notice.</p> <p>The ACCC also has a limited ability to bring a representative action on behalf of a person (or a group of people) who have suffered loss or damage.⁸⁴¹ It must have the consent of each person on whose behalf the application is made. For children who cannot commence an action either themselves or through a representative, a representative action by the regulator may be a means by which they can obtain a remedy for loss or damage suffered.</p> |

⁸⁴⁰ See generally, Australian Competition and Consumer Commission, *Fines & penalties* <<https://www.accc.gov.au/business/business-rights-protections/fines-penalties#australian-consumer-law>>.

⁸⁴¹ *Competition and Consumer Act 2010* (Cth) ss 87(1B) and 87(1BAA).

Consumer guarantees - the Australian Consumer Law

With the exception of one consumer guarantee regarding availability of spare parts and repair facilities,⁸⁴² a consumer can generally claim remedies from retailers whose products do not meet the consumer guarantees in the law. The action may be brought by a consumer who acquired the goods, a person who acquired the goods from the consumer (other than for the purpose of re-supply) or a person who derived title to the goods through or under the consumer.

Depending on the circumstances, the remedies that may be available are a repair, replacement or refund for the product or compensation for damages and loss. Businesses are not able to contract out of liability for a breach of a consumer guarantee. Therefore, the statutory provisions provide children and their families with effective remedies for product safety issues that constitute a breach of the consumer guarantees. Consumer guarantees are currently a focus of the ACCC.⁸⁴³

Similarly with the product safety provisions, the ACCC may bring a representative action on behalf of a person (or group of people) who have a right to bring an action for breach of the consumer guarantees (with their consent).⁸⁴⁴ This provides a further option for children or their families who for some reason may be unable to bring the action themselves.

Misleading or deceptive conduct - the Australian Consumer Law

The ACL also prohibits a person from engaging in misleading or deceptive conduct or conduct that is likely to mislead or deceive. A person who supplies an unsafe product may also be found liable for making a false or misleading representation with respect to the product's 'performance characteristics'.

A person who suffers or is likely to suffer loss or damage from the manufacturer's breach may recover the amount of loss or damage suffered or obtain other compensatory orders from the Court. Additionally, a contravention of the false and misleading representations provisions may lead to pecuniary penalties being ordered against the person that engaged in the conduct or a finding that the person committed an offence.

State and territory legislation

Each state and territory in Australia has its own statute regulating fair trade and/or consumer law. In addition to any specific laws that apply in each state and territory in Australia with respect to product safety, all of the states and territories have adopted the Australian Consumer Law (and therefore the provisions and remedies outlined in this section) as a law in force in those states and territories.

Negligence

A person who is owed a duty of care and suffers loss as a result of a breach of that duty may be able to bring a negligence action against a manufacturer or supplier seeking compensation for loss or damage.

The law provides a number of options for children and their families to seek remedies for losses suffered as a result of product safety breaches. However, these options are not targeted in particular at providing effective remedies for children, rather they apply to affected individuals more generally (see further **3.10 – Remedies**).

Specific Goods

As previously mentioned, a number of goods are regulated by specific government agencies at the Federal level or the State and Territory level. Some of these regulators are as follows:

- The Therapeutic Goods Administration of Australia monitors the regulation of therapeutic goods in Australia.
- Food Standards Australia New Zealand (FSANZ) develops food standards though the Australia

⁸⁴² A remedy from the retailer can be claimed if the products do not meet any one or more of the consumer guarantees, with the exception of availability of spare parts and repair facilities, see Australian Competition and Consumer Commission, *Consumer guarantees* <<https://www.accc.gov.au/consumers/consumer-rights-guarantees/consumer-guarantees>>.

⁸⁴³ Australian Competition and Consumer Commission, n 832.

⁸⁴⁴ *Competition and Consumer Act 2010* (Cth) ss 87(1B) and 87(1BAA); see also Australian Competition and Consumer Commission, *Consumer Guarantees – A guide for consumers* (2013) <https://www.accc.gov.au/system/files/Consumer%20Guarantees%20A%20guide%20for%20consumers_0.pdf> 18.

| | |
|--|--|
| <p>New Zealand Food Standards Code. The Code is enforced by state and territory and New Zealand agencies and the Department of Agriculture and Water Resources.</p> <ul style="list-style-type: none"> • State and territory regulators monitor the safe generation, supply and use of electricity and gas in Australia. For example, in Victoria the relevant regulator is Energy Safe Victoria. • The federal government monitors the safety of motor vehicles through the Department of Infrastructure, Transport, Regional Development and Local Government. • The Australian Pesticides and Veterinary Medicines Authority is responsible for the registration of insecticides and veterinary medicines in Australia. • The National Industrial Chemicals Notification and Assessment Scheme assesses the risks of industrial chemicals and provides information to promote their safe use. • The Australian Maritime Safety Authority regulates marine safety and the safety of vessels. | |
| 3.6 Marketing and advertising | |
| 3.6.1 General restrictions | <p>What, if any, are the legal restrictions and prohibitions on marketing and advertising to children? Which age groups are addressed, and which forms of marketing and advertising are covered?</p> |
| <p>The key federal laws that apply to marketing and advertising to children are contained within the Australian Consumer Law and the <i>Broadcasting Services Act 1992</i> (Cth) (BSA). This Act establishes program standards for children's programs and Australian Content.⁸⁴⁵ The BSA also expresses Parliament's intention that industry groups develop codes of practices applicable to broadcasting operations, in consultation with the Australian Communications and Media Authority (ACMA).⁸⁴⁶ Australia's approach to broadcast advertising is therefore referred to as 'co-regulatory system', in that 'industry groups take responsibility for the details of regulation in their own sector through the creation of industry codes of practice'.⁸⁴⁷ These codes are then required to be registered with ACMA, and, under the BSA, ACMA retains powers to determine program standards where codes of practice are found to not provide appropriate safeguards, or in the event that no code of practice is developed.⁸⁴⁸ There are also a number of industry self-regulatory codes that seek to put parameters around marketing and advertising to children generally, in specific media and/or for specific types of products – as discussed below.</p> <p>Laws relating to advertising through television</p> <p>Under the BSA, ACMA is required to publish standards by legislative instrument that relate to programs for children. These standards are binding on commercial television broadcasting licensees and are provided in the <i>Children's Television Standards 2009</i> (Cth) (CTS). Under the CTS, ACMA can classify programs as either for children ('C') or for pre-school children ('P'), and particular television broadcasters must broadcast a certain number of hours of programs classified with those ratings each year. 'Children' are defined as people younger than 14 years of age, while 'preschool children' are defined as children that have not yet started school. This means that protections, to the extent that they apply under the CTS, do not apply to adolescent children aged 15 – 17 years.</p> <p>Under the CTS, there are a number of requirements a program must satisfy in order to meet the C or P criteria. Generally to meet the C or P criteria, the program must be made specifically for children of a particular age; be entertaining; be well produced using sufficient resources to ensure a high standard of script, cast, direction, editing, shooting, sound and other production elements; enhance the understanding and experience of the children of a particular age group; and be appropriate for Australian children of that age group.⁸⁴⁹ Broadcasters</p> | |

⁸⁴⁵ *Broadcasting Services Act 1992* (Cth) s 122.

⁸⁴⁶ *Broadcasting Services Act 1992* (Cth) s 123.

⁸⁴⁷ Belinda Reeve, 'Self-Regulation of Food Advertising to Children: An Effective Tool for Improving the Food Marketing Environment?' (2016) *Monash University Law Review* 42(2), 419-457, 427.

⁸⁴⁸ *Broadcasting Services Act 1992* (Cth) ss 124-125.

⁸⁴⁹ The term 'Australian children' is used in the BSA, rather than children in Australia. The term is not defined and there is no guidance as to whether this phrasing is intended to refer to appropriateness for children in Australia generally or specifically children who are Australian

are required to nominate the times during which they will show programs to fulfil their quota; these are called C and P ‘periods’.

The CTS contain a number of restrictions in relation to advertising shown during C and P program periods including:

- That no advertisements can be broadcast during P periods, and that no prizes can be offered or given during a P program;⁸⁵⁰
- That advertisements for alcoholic drinks cannot be broadcast during a C period;⁸⁵¹
- A prohibition on broadcast material that:⁸⁵²
 - Is unsuitable;
 - Is misleading or deceptive advertising to children;
 - Is designed to put undue pressure on children to ask their parents or another person to purchase an advertised product or service;
 - Focuses on a premium instead of on the main product (a ‘premium’ being defined as ‘anything offered with or without additional cost that is intended to induce the purchase of an advertised product or service’ – such as free toys or competitions); and/or
 - Shows misleading or incorrect information about the nutritional value of a food product.

The CTS also stipulate maximum advertising time, providing generally that each 30 minutes of C period broadcast can contain no more than 5 minutes of advertising.⁸⁵³

Despite the approach to restrict marketing and advertising to children, the CTS have been criticised for being limited to things that are particularly aimed at children (allowing for advertising directed at parents and carers to avoid application of the CTS) and the lack of enforcement mechanisms.⁸⁵⁴

There are no substantive and specific restrictions on the marketing and advertising of food and beverages in the CTS applying in C periods. Rather, as outlined above, the only requirement in the CTS that applies specifically to food advertising is a requirement that the advertising ‘...not contain any misleading or incorrect information about the nutritional value of that product’, and that alcohol cannot be advertised.⁸⁵⁵

For an analysis of the effectiveness of the CTS, see below under **3.6.2 – Harmful products**.

Laws relating to advertising through media other than television

For media other than television such as the Internet, mobile applications, print publications, mail, cinema and theatre, there are no specific laws that aim to protect children in relation to advertising. Rather, there are laws that apply to trade and commerce generally, and to particular goods and services, but which are not targeted to particular media forms or to children. As mentioned below however, the Government recently introduced restrictions on gambling advertising during live coverage of sporting events through a range of channels, including broadcast, subscription and online platforms through the *Communications Legislation Amendment (Online Content Services and Other Measures) Act 2018* (Cth) in March 2018.

The ACL contains a number of prohibitions relating to the advertising of goods and services to consumers generally although not specifically in relation to children. These include a number of provisions the objective of which is to require information about goods and services to be truthful and not misleading. These include prohibitions of misleading or deceptive conduct, and false and misleading representations. States and Territories

citizens. Given that the phrase is not defined, it is likely that the criterion refers to the appropriateness for children in the Australian context generally.

⁸⁵⁰ *Children’s Television Standards 2009* (Cth) CTS 26 and 24.

⁸⁵¹ *Children’s Television Standards 2009* (Cth) CTS 36.

⁸⁵² *Children’s Television Standards 2009* (Cth) CTS 30, 31, 32(7) and 33.

⁸⁵³ *Children’s Television Standards 2009* (Cth) CTS 27.

⁸⁵⁴ Elizabeth Handsley et al, ‘A Children’s Rights Perspective on Food Advertising to Children’ (2014) 22 *International Journal of Children’s Rights* 93, 106-28.

⁸⁵⁵ *Children’s Television Standards 2009* (Cth) CTS 32(7) and 36.

also have fair trading laws that prohibit misleading or deceptive conduct, often through application of the ACL.

Co-regulatory and self-regulatory codes regarding children's exposure to advertising

Television and radio

Australian industries have established a number of codes that have a stated aim to limit children's exposure to advertising in certain circumstances, including the Commercial Television Industry Code of Practice 2015 (**Commercial TV Code**) and the Australian Subscription Television and Radio Association Codes of Practice (**ASTRA Code**). Both of these codes are registered with ACMA under the BSA, and are therefore described as 'co-regulatory'. The Commercial TV Code, for example, applies to broadcast content of commercial free-to-air television and creates restrictions in relation to television broadcasting at certain times of the day to limit children's exposure to content that is aimed at adult audiences. It also expressly requires that special care be taken in the use of material concerning a child's personal and private affairs (a child is defined as a person under the age of 15 years), and sets out restrictions regarding the advertising of alcohol and gambling.⁸⁵⁶ The ASTRA Code applies to subscription broadcast television and subscription narrowcast radio, and sets out restrictions including with regard to advertising of alcoholic beverages and betting or gambling.⁸⁵⁷

ACMA is responsible for enforcing the Commercial TV Code and the ASTRA Code. ACMA also deals with public complaints in relation to those Codes, but only after a member of the public has first complained to the broadcaster, and found the response unsatisfactory.

Advertising industry

Self-regulatory codes include the Australian Association of National Advertisers (**AANA**) Code for Advertising and Marketing Communications to Children (**AANA Code for Advertising to Children**). The AANA Code for Advertising to Children applies to all advertising and marketing communications (with certain exceptions) which are directed primarily to children 14 years of age or younger and are for goods, services and/or facilities which are targeted towards and have principal appeal to children. The AANA Code for Advertising to Children is not law, rather it is a form of self-regulation for persons and companies engaged in advertising and marketing. For a discussion of the effectiveness of the AANA Code for Advertising to Children, see further below under **3.6.2 – Harmful products**.

The AANA Code of Ethics also provides guidance to advertisers on prevailing community standards, factual representation, placement next to unsuitable editorial comment or program content, sexualisation, safety, social values, parental authority, qualifying statements, competitions, popular personalities, premiums, privacy and food and beverage products.

Food and beverage advertising

Self-regulatory codes specifically relating to food and beverage advertising include the AANA Food and Beverages Advertising and Marketing Communications Code (**AANA Food Code**), which includes certain provisions regarding children. The Australian Food and Grocery Council also developed the Responsible Children's Marketing Initiative (**RCMI**) (for packaged food) and the Quick Services Restaurant Industry Initiative for Responsible Advertising and Marketing to Children (**QSRI**) (for fast food). From 1 June 2019, Schedule 1 of the RCMI and Schedule 1 of the QSRI will be included in the AANA Food Code and therefore will apply to an advertiser regardless of whether the advertiser is a signatory to either the RCMI or the QSRI.⁸⁵⁸

For an outline of these codes and analysis of the effectiveness of the self-regulatory codes, as well as an outline of the approach with regard to the advertising of alcohol, see below under **3.6.2 – Harmful products**.

⁸⁵⁶ *Commercial Television Industry Code of Practice 2015* (2015)

<http://www.freetv.com.au/media/Code_of_Practice/Free_TV_Commercial_Television_Industry_Code_of_Practice_2015.pdf> [3.5.2].

⁸⁵⁷ Australian Subscription Television and Radio Association, *Subscription Television Code of Practice 2013* (2013)

<http://www.astra.org.au/pdf/news/ASTRA_Subscription_Broadcast_Television_Codes_of_Practice_2013_with_new_Appendix_A.pdf> and Australian Subscription Television and Radio Association, *Subscription Radio Code of Practice 2013* (2013)

<http://www.astra.org.au/pdf/news/ASTRA_Subscription_Narrowcast_Radio_Codes_of_Practice_2013_with_new_Appendix_A.pdf>.

⁸⁵⁸ Australian Association of National Advertisers (AANA), *Food and Beverages Advertising Practice Note – From 1 June 2019* (2019)

<http://aana.com.au/content/uploads/2018/11/AANA_FB-Code_Practice-Note_2019_FINAL.pdf> 8.

| | |
|-------------------------------|---|
| 3.6.2 Harmful products | Have targeted measures been adopted to prohibit or restrict the marketing and advertising of harmful, unhealthy and dangerous products and services to children (e.g. alcohol, tobacco, and unhealthy food/beverages)? Are there clear restrictions on the marketing of breast-milk substitute to the general public? |
|-------------------------------|---|

Food and beverages

Australia has taken some measures to restrict the marketing and advertising of unhealthy foods and beverages. However, as outlined above, that largely occurs through self-regulatory or co-regulatory approaches rather than laws.

The AANA Code for Advertising to Children provides that advertising or marketing communications to children regarding food or beverages must neither encourage nor promote an inactive lifestyle or unhealthy eating or drinking habits, and must comply with the AANA Food Code.

The AANA Food Code covers the advertising of food and beverages to children and requires that advertising and marketing communications must not:

- mislead or deceive children in relation to nutritional or health claims;
- exploit children's imaginations such that they could be regarded as having an intent to encourage children to consume excessive quantities of food and beverage products;
- imply that possession of a certain product will afford physical, social or psychological advantage over other children (or that non-possession would have the opposite effect);
- undermine the role of parents or carers in guiding diet and lifestyle choices;
- include any appeal to children to urge parents or other adults to buy particular food or beverage products; or
- feature ingredients or premiums unless they are an integral element of the product.

Both the RCMI and the QSRI are industry-developed frameworks with an objective to 'Reduce Advertising and Marketing Communications to Children for food and beverage products that do not represent healthier choices'.⁸⁵⁹ The RCMI and QSRI are said to be aimed at ensuring only healthy products are promoted to children.⁸⁶⁰ Schedule 1 of the RCMI includes the following core principle regarding advertising and marketing messages:⁸⁶¹

S1.1. Advertising and Marketing Communications to Children for food and/or beverages must:

- a. Represent healthier dietary choices, consistent with established scientific or Australian government standards, as detailed in Signatories' Company Action Plan; and
- b. Reference, or be in the context of, a healthy lifestyle, designed to appeal to Children through messaging that encourages:
 - i. Good dietary habits, consistent with established scientific or government standards; and
 - ii. Physical activity.

The QSRI contains a similar provision.⁸⁶² Both initiatives also provide that signatories must not engage in any advertising and marketing communications to children in Australian primary schools, preschools and day care centres, except where specifically requested by, or agreed with, the school administration for educational or informational purposes, or related to healthy lifestyle activities under the supervision of the school

⁸⁵⁹ Australian Food & Grocery Council, *Advertising to Children* <<https://www.afgc.org.au/our-expertise/health-nutrition-and-scientific-affairs/advertising-to-children/>>.

⁸⁶⁰ Australian Food & Grocery Council, *Responsible Children's Marketing Initiative and QSR Initiative for Responsible Advertising and Marketing to Children* <<https://www.afgc.org.au/our-expertise/health-nutrition-and-scientific-affairs/advertising-to-children/>>.

⁸⁶¹ Australian Food & Grocery Council, *Responsible Children's Marketing Initiative*, Schedule 1 <<https://www.afgc.org.au/our-expertise/health-nutrition-and-scientific-affairs/advertising-to-children/>>.

⁸⁶² Australian Food & Grocery Council, *Quick Service Restaurant Initiative for Responsible Advertising and Marketing to Children*, Schedule 1 <<https://www.afgc.org.au/our-expertise/health-nutrition-and-scientific-affairs/advertising-to-children/>>.

administration or appropriate adults.

Presently, the initiatives only apply to businesses that are signatories to them. As outlined above however, from 1 June 2019, Schedule 1 of the RCMI and Schedule 1 of the QSRI will be included in the AANA Food Code and therefore will apply to advertisers regardless of whether the advertiser is a signatory to either the RCMI or the QSRI.⁸⁶³ Both the QSRI and RCMI are limited to products that meet the industry's definition of what is considered as 'healthy choices'. Also, the RCMI defines children as persons under 12 years of age,⁸⁶⁴ and the QSRI only applies to children aged under 14 years.⁸⁶⁵ The effectiveness of these initiatives is examined below.

State and Territory Governments have a range of different policy measures in an attempt to curb rising rates of obesity and overweight. These include the introduction of a prohibition of unhealthy food advertising on Government-operated buses (ACT), mandatory menu labelling of kilojoule values or average daily energy intake (NSW, Queensland, South Australia, ACT and Victoria) and infrastructure support actions (such as a statutory health promotion agency (Victoria)).⁸⁶⁶ These measures, which extend beyond food promotion to areas including food labelling, food provision, food retail, leadership, governance, monitoring and intelligence, funding and resources, and support for communities, were evaluated by Australian Prevention Partnership Centre, Deakin University and Informas in 2017. Although this evaluation revealed a number of leading practices (such as the ACT policy of banning unhealthy food advertising⁸⁶⁷), it also identified significant gaps across those areas of action.⁸⁶⁸

Children in context: Children's exposure to marketing and advertising of unhealthy foods as a contributing factor to childhood obesity and overweight in Australia

The link between consumption patterns of children and marketing and advertising techniques

It is well recognised that children, particularly young children, do not have the cognitive ability to understand and critically assess advertising due to the stage of their brain development. This has been described as follows (references omitted):⁸⁶⁹

In order to properly comprehend and interpret advertising, children need to be able to distinguish between commercial and non-commercial content, understand that the purpose of advertising is to persuade, and interpret advertising critically with this in mind. These abilities develop over time as functions of cognitive growth and intellectual development. Studies have found that children younger than 4–5 years cannot distinguish between advertisements and programs on television. By about 4–5 years of age, most children develop the ability to make this distinction using perceptual cues (e.g. advertisements are short and programs are long), but **most children do not understand the persuasive intent of advertising until at least the age of eight. This means that they do not have the ability to effectively evaluate advertising claims and appeals, and tend to accept advertising as truthful, accurate and unbiased** (emphasis added).

UNICEF has illustrated this as follows:

⁸⁶³ Australian Association of National Advertisers (AANA), *Food and Beverages Advertising Practice Note – From 1 June 2019* (2019) <http://aana.com.au/content/uploads/2018/11/AANA_FB-Code_Practice-Note_2019_FINAL.pdf> 8.

⁸⁶⁴ Australian Food & Grocery Council, n 863, 3.

⁸⁶⁵ Australian Food & Grocery Council, n 864, 3.

⁸⁶⁶ Australian Institute of Health and Welfare, n 25, 40–42.

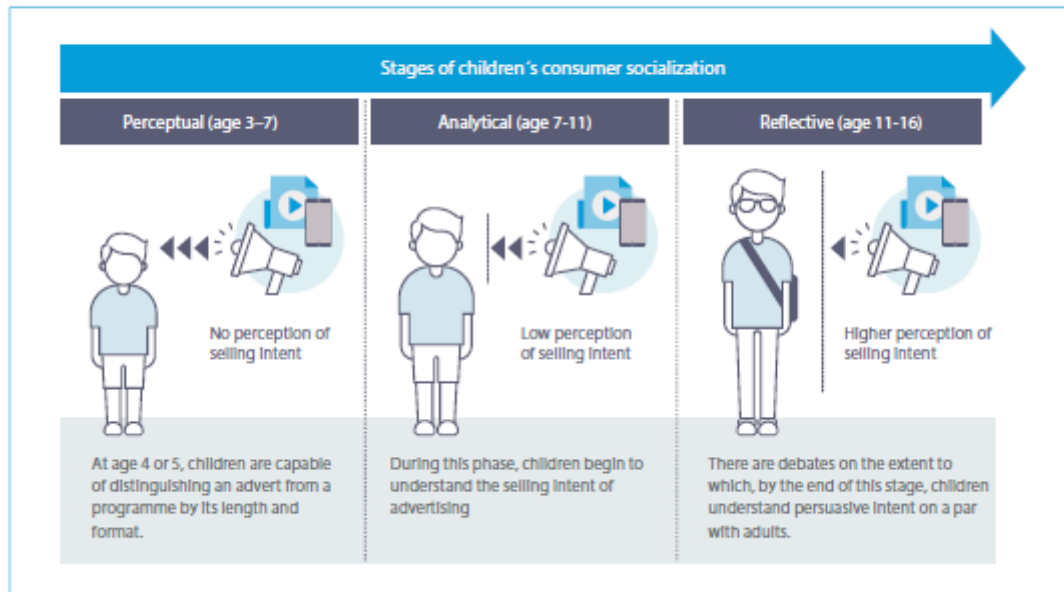
⁸⁶⁷ The Australian Prevention Partnership Centre, Deakin University and Informas, *Policies for tackling obesity and creating healthier food environments – Scorecard and priority recommendations for Australian Governments* (February 2017) <https://www.heartfoundation.org.au/images/uploads/publications/OVERALL_Food_EPI_Report_v3.pdf> 14.

⁸⁶⁸ Ibid.

⁸⁶⁹ S Livingstone, *New Research on advertising foods to children: An updated review of the Literature* (2006) as quoted in Obesity Policy Coalition, *Policy Brief: Evidence of Food Advertising effects on Children* (June 2016) <<http://www.opc.org.au/downloads/policy-briefs/evidence-food-advertising-effects-children.pdf>> 19.

Children become more aware of the selling intent of advertising as they grow older

FIG. 6: Stages of children's consumer socialization



Source: UNICEF, *A child rights-based approach to food Marketing: A guide for policy makers* (April 2018) 18 <https://www.unicef.org/csr/files/A_Child_Rights-Based_Approach_to_Food_Marketing_Report.pdf>.

Children are therefore particularly vulnerable to being influenced by exposure to marketing and advertising techniques, including those used to market unhealthy foods.⁸⁷⁰

Today, children and adolescents can be exposed to a range of marketing and advertising, including through:⁸⁷¹

- broadcast media;
- digital marketing;
- sponsorship of major sports and cultural events;
- in-store promotions; and
- outdoor advertising, including on public transport.

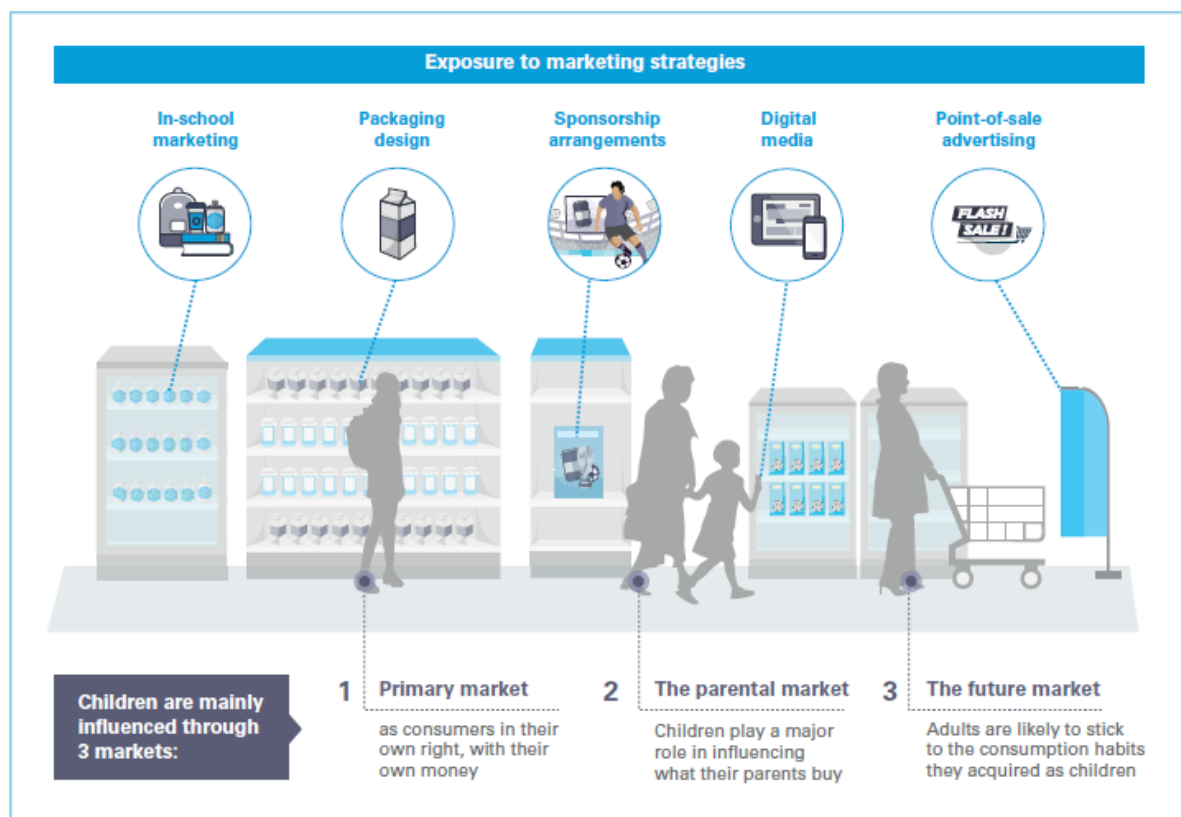
⁸⁷⁰ 'Unhealthy food' is used to refer to nutritiously poor foods and non-alcoholic beverages that are high in fats, sugar or salt.

⁸⁷¹ UNICEF, *A child rights-based approach to food Marketing: A guide for policy makers* (April 2018)

<https://www.unicef.org/csr/files/A_Child_Rights-Based_Approach_to_Food_Marketing_Report.pdf> 14.

New marketing channels and techniques have a powerful effect on children

FIG. 4: Factors that influence children's consumption.



Source: UNICEF, *A child rights-based approach to food Marketing: A guide for policy makers* (April 2018) <https://www.unicef.org/csr/files/A_Child_Rights-Based_Approach_to_Food_Marketing_Report.pdf> 14.

Increasingly, children can be exposed to sophisticated digital food marketing techniques that have been incorporated into and expanded with online and digital technologies – including contextual advertising, online behavioural marketing and facial emotion analysis. These technologies have revolutionised marketing strategies and broadened their influence.⁸⁷² These techniques can be challenging for parents, caregivers and children alike to be aware of and respond to, as awareness of how and where such techniques are used can be limited.

UNICEF has observed (references omitted):⁸⁷³

Online marketing has become an integral component of the marketing mix for food brands: It has not replaced other forms of more traditional food marketing, but has been added to them to increase brand presence across a larger, more diverse range of media. This includes search engines, social networking, photo-sharing and other user-generated content sites. On one social media channel, for example, food companies had the third highest number of sponsored posts in September 2016.

One survey of 130 food company websites found that 48 per cent had designated children's areas, featuring a variety of marketing techniques including 'advergaming', interactive programmes, branded spokes-characters and tie-ins to other products. Among companies with child-oriented sites, 87 per cent promoted unhealthy food.

Digital technologies have revolutionized marketing by making it possible for marketers to access much more specific audiences than in the broadcast era, gathering information and adapting their marketing strategies to target each potential customer as individually and effectively as possible. Technology provides an invisible,

⁸⁷² Ibid, 15.

⁸⁷³ Ibid.

automatic means of collecting and analysing personal data to construct detailed consumer profiles. As described in the *Journal of Consumer Marketing*, “Most consumers do not realize that their information is being collected and used to construct profiles. Most have not consented to divulge the information nor to be the target of promotion.”

Through the collection and analysis of highly detailed user data, marketing can be tailored to the content that a user is viewing on a website (contextual advertising) or to characteristics and preferences of each individual user (online behavioural marketing). The increasing use of such targeted marketing, coupled with geolocation technology, personalizes the connection between a brand and customers. Companies that collect mobile phone numbers from their interactive websites, for example, can customize their messages on the basis of users’ interests. Smartphone applications further increase the opportunities for marketing, including unhealthy food marketing to children.

In addition, neuroscience techniques such as functional magnetic resonance imaging and facial emotion analysis are used to record viewers’ responses to content – happiness, surprise, anger, disgust, fear or sadness – and analysed to optimize both the content and placement of advertising. The use of these highly sophisticated tools in the development of marketing campaigns raises questions regarding the ethics of increased identification and targeting of vulnerable consumers, particularly children and adolescents.

A study in Australia conducted by Mehta, Coveney, Ward and Handsley in 2014 examined ‘parents and children’s perceptions of the ethics of marketing energy-dense nutrient-poor foods on the Internet’.⁸⁷⁴ It found that:

Parents were particularly concerned about marketing on the Internet, through advergames, viral marketing and the mining of personal information, importantly, because it was happening in children’s private space and therefore below parental supervision or radar.⁸⁷⁵

...

The lack of explicitness and visibility of Internet marketing tactics were salient issues for parents and children in this study. Their concerns concur with public health researchers who have identified particular problematic aspects of Internet food marketing; these include: product placement, implicit persuasion and BRM [‘below-the-radar marketing’] (Moore and Rideout, 2007; Nairn and Dew, 2007; Martin and Smith, 2008). Many of the marketing techniques used on the Internet fall into the category of stealth marketing, which has been labelled unethical because withholding the identity of the sponsor, or not disclosing to a child that they are being marketed to, is fundamentally deceitful and fails the ethical tests of (i) consent to be engaged in a commercial interaction and (ii) making an informed consumer decision (Rogers, 2008). By withholding persuasion knowledge and agent knowledge, stealth marketing comes in ‘below children’s cognitive radar’. It can also be intrusive into their personal space, for example intruding into their game playing or surfing the net for leisure, and exploitative of personal relationships, by suggesting to or encouraging children to send on marketing messages or promote products to their friends or family (Martin and Smith, 2008). Stealth marketing violates industry’s own codes of practice of transparency and honesty in marketing (Martin and Smith, 2008).

Product placement and advergames were particular concerns for parents and children in this study. Product placement is a marketing strategy that breaches the ethical requirement of separation of advertising from editorial content, so that children know that they are being advertised to, and in that way can make informed choices as consumers (Schmitt et al., 2007; Rogers, 2008). In failing to separate marketing from entertainment or editorial content, product placement has the potential to subvert childrens’ [sic] scepticism, and thereby increase their vulnerability to marketing persuasion (Moore, 2004; Lee et al., 2009). Children are known to have difficulty separating commercial and entertainment content on the Internet (Lindstrom and Seybold, 2004; Fielder et al., 2007; Brady et al., 2008), and product placement has been shown to positively influence children’s food choices, with persuasion effects being augmented by prior and repeated exposure (albeit in a study involving product placement in a movie) (Auty and Lewis, 2004, p. 712). The high degree of repetitious playing of computer games would put children at particular risk of implicit persuasion by marketing embedded in.

Both parents and children considered food marketing on the Internet to constitute BRM...⁸⁷⁶.

Strong evidence identifies unhealthy food marketing as an important factor contributing to growing rates of overweight and obesity.⁸⁷⁷ Several studies have examined the effect of advertising on children – by the World

⁸⁷⁴ K. P. Mehta, J. Coveney, P. Ward and E. Handsley, ‘Parents and Children’s Perceptions of the Ethics of Marketing Energy-Dense Nutrient-Poor foods on the Internet’ (April 2014) *Public Health Ethics*, 7(1), 21-34.

⁸⁷⁵ Ibid, 26.

⁸⁷⁶ Ibid, 28.

⁸⁷⁷ See for example: Hastings, Gerard, et al., Review of Research on the Effects of Food Promotion to Children (final report), University of Strathclyde (22 September 2003); EJ Boyland et al., “Food Commercials Increase Preference for Energy-Dense Foods, Particularly in Children

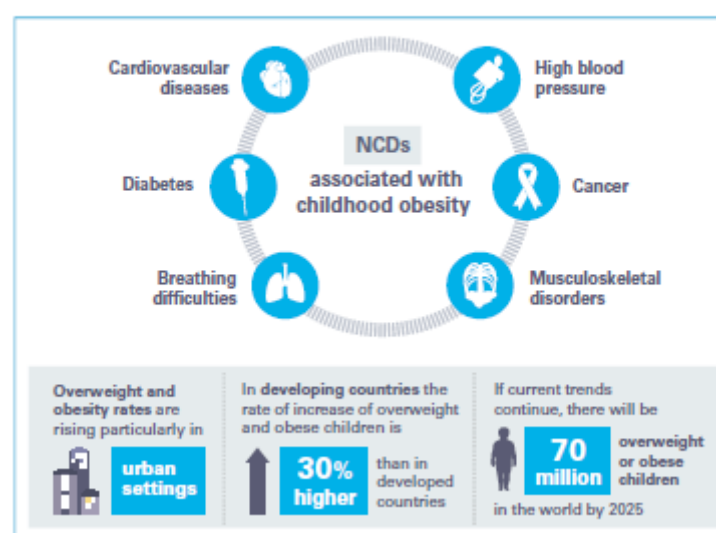
Health Organisation, the OfCom (UK) and the Institute of Medicine of the National Academies at the request of the United States Center for Disease Control and Prevention. In the OfCom study, Livingstone concluded '[n]early all research published in the past few years supports the hypothesis that food promotion, especially television advertising, contributes to the unhealthy food preferences, poor diet and consequently, growing obesity among children in Western societies.'⁸⁷⁸ Similarly, the WHO Commission on Ending Childhood Obesity concluded in 2016 that '[t]here is unequivocal evidence that the marketing of unhealthy foods and sugar-sweetened beverages is related to childhood obesity.'⁸⁷⁹

The consequences of obesity and overweight

For individuals affected by obesity and overweight, the consequences on their health and wellbeing can be very serious. UNICEF has observed '[d]uring the past 20 years, it has become one of the most pressing global public health concerns.'⁸⁸⁰ The direct health impacts can include:

Overweight and obesity can affect a child's health, education attainment and quality of life.

FIG. 1: Effects of obesity on children's health



Source: UNICEF, *A child rights-based approach to food Marketing: A guide for policy makers* (April 2018) 8 <https://www.unicef.org/csr/files/A_Child_Rights-Based_Approach_to_Food_Marketing_Report.pdf>

The Obesity Policy Coalition⁸⁸¹ has explained these impacts further:⁸⁸²

- A shorter lifespan - A recent Australian study conservatively estimated that the life expectancy of an obese person aged 20 years is likely to be around 4 years less than a person with normal body mass, and the lifespan of an overweight person is likely to be 1 year less than a person with normal body mass.
- A range of medical conditions and health complications - Overweight and obese children are at a significantly

Who Watch More Television" (2011) 128(1) *Pediatrics* e93; Cairns, Georgina, Kathryn Angus and Gerard Hastings, *The Extent, Nature and Effects of Food Promotion to Children: A review of the evidence to December 2008*, World Health Organization (December 2009) <www.who.int/dietphysicalactivity/Evidence_Update_2009.pdf>; and Cairns, Georgina, et al., 'Systematic Reviews of the Evidence on the Nature, Extent and Effects of Food Marketing to Children: A retrospective summary', *Appetite*, vol. 62 (1 March 2013), 209–215. See also generally World Health Organisation, *Noncommunicable diseases and their risk factors* <<http://www.who.int/ncds/prevention/en/>>.

⁸⁷⁸ S. Livingstone, n 871, 19.

⁸⁷⁹ World Health Organisation, *Report of the Commission on Ending Childhood Obesity* (2016) <http://apps.who.int/iris/bitstream/handle/10665/204176/9789241510066_eng.pdf;jsessionid=7C9DEAA9038E1B1A0AD8D43BADCE42F3?sequence=1> 18, citing Hastings G, Stead M, McDermott L, Forsyth A, MacKintosh AM, Rayner M, et al. Review of research on the effects of food promotion to children – final report. Report to the Food Standards Agency. Glasgow: University of Strathclyde, Centre for Social Marketing (2003). McGinnis JM, Gootman JA, Kraak VI. Food marketing to children and youth. Threat or opportunity? Washington, DC: Institute of Medicine, National Academies Press (2006).

⁸⁸⁰ UNICEF, n 873, 18.

⁸⁸¹ A coalition established by the Cancer Council Victoria, Diabetes Victoria, VicHealth and The Global Obesity Centre at Deakin University. See further <<http://www.opc.org.au/who-we-are>>.

⁸⁸² S Livingstone, n 871, 10.

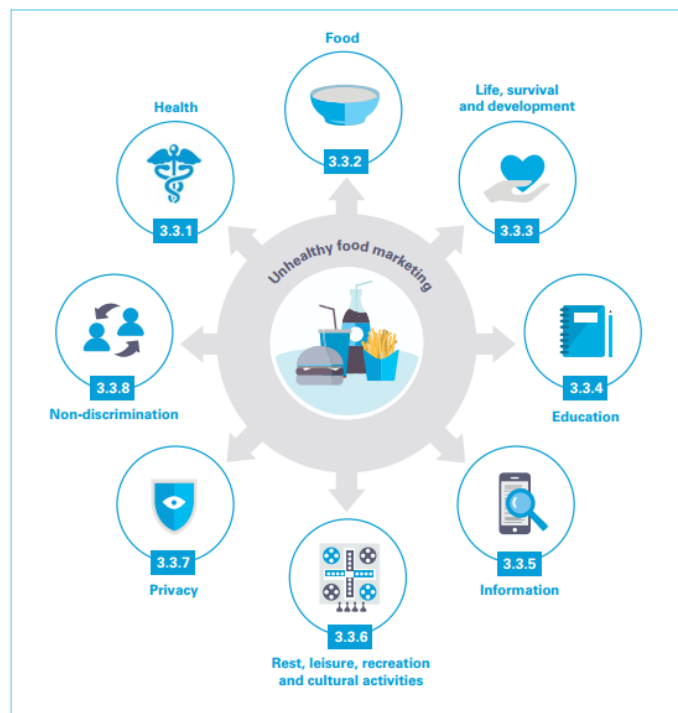
higher risk of cardiovascular disease risk factors, high blood pressure, type 2 diabetes, inappropriately fast growth and development, hepatic and gastric complications, abnormal glucose metabolism, orthopaedic complications, asthma and sleep apnoea.

- Poor psychological and social wellbeing - Obese and overweight children are more likely to suffer poor self-esteem, negative self-image, social difficulties, bullying, anxiety, sadness, loneliness and depression. Research in the US found that more stigma is attached to obesity in children than any physical disability, across all socio-economic and ethnic groups.
- Overweight and obesity in adulthood - Obese children have a 25–50% chance of becoming obese adults, and this chance increases to 78% for older obese adolescents. It is well known that adult obesity carries an increased risk of a broad range of diseases, including diabetes and cancers of the colorectum, kidney, pancreas, oesophagus, endometrium and breast (in post-menopausal women), as well as other health and psychological problems.

The direct health impacts are just one aspect of how food marketing can adversely impact children. UNICEF has identified that food marketing and advertising (and its associated techniques) can impact a range of children's rights including:

Food marketing can have an impact on several children's rights

FIG. 7: Overview of children's rights impacted by food marketing



Source: UNICEF, *A child rights-based approach to food Marketing: A guide for policy makers* (April 2018) 18 <https://www.unicef.org/csr/files/A_Child_Rights-Based_Approach_to_Food_Marketing_Report.pdf>

The impacts of obesity extend well beyond individual children to society more broadly, particularly due to the growing numbers of children, adolescents and adults affected. For example, research undertaken by PwC in 2015 determined that if no further action is taken by Government and other stakeholders to curb growing rates of obesity in Australia, 'there will be a total of \$87.7 billion in additional direct and indirect costs to Australia accumulated across the 10 years to 2025.'⁸⁸³

⁸⁸³ PwC, n 28, iii.

Childhood obesity globally and in Australia – A growing concern

In recent decades, the global prevalence of obesity and overweight has increased at an alarming rate.⁸⁸⁴ As of 2016, there were 41 million overweight or obese infants and young children (aged 0 – 5) globally and, if current trends continue, this number will increase to 70 million by 2025.⁸⁸⁵ The Australian Bureau of Statistics has reported '[a]lmost one quarter (24.9%) of children aged 5-17 years were overweight or obese in 2017-18 (17% overweight and 8.1% obese). The rates were similar for boys and girls and this has remained stable over the previous ten years.'⁸⁸⁶ The Australian Institute of Health and Welfare (AIHW) has referred to overweight and obesity as a 'major public health issue in Australia'.⁸⁸⁷ In 2011-12 alone, it was estimated that obesity cost the Australian economy \$8.6 billion.⁸⁸⁸

The growing concern about childhood obesity has been recognised by the Council of Australian Governments (COAG) Health Council in 2016.⁸⁸⁹ A Communique from a meeting of the COAG Health Council held on 2 August 2018 also outlined:⁸⁹⁰

Obesity – limiting the impact of unhealthy food and drinks on children

The Queensland Minister led a discussion on a suite of actions to improve children's diets and prevent child obesity with a focus on health care settings, schools, children's sport and recreation, food promotion and food regulation.

The development of cross-sectoral initiatives with education and sport and recreation sectors was noted. Health departments were tasked with developing national minimum nutrition standards for food and drink supply in public health care facilities. The Queensland Minister presented a national interim guide for reducing children's exposure to unhealthy food and drink marketing. This guide was endorsed by Ministers, noting that the guide is for voluntary use by governments.

Health Ministers noted the voluntary pledge made by the Australian Beverages Council Limited to reduce sugar across their portfolio of products by 20% on average by 2025.

More recently, the COAG Health Council agreed in October 2018 to devise a national strategy on obesity 'with a strong focus on the primary and secondary prevention measures, social determinants of health, especially in relation to early childhood and rural and regional issues'.⁸⁹¹

The effectiveness of Australia's approach to regulating children's exposure to marketing and advertising of unhealthy foods

In 2016, an expert panel constituted as part of the Food Policy Index assessed the level of implementation of key policies at both the Federal and State/Territory level for tackling obesity and creating healthier food environments. It concluded that Australia's implementation of measures regarding food promotion to be very low, with very little, if any, restrictions on the promotion of unhealthy food in children's settings and in non-broadcast media, as well as low implementation of restrictions in the broadcast media.⁸⁹²

Analysis conducted by academics and child-rights advocates, as well as medical practitioners and public health professionals has also highlighted numerous shortcomings in Australia's current approach to regulating children's exposure to marketing and advertising of unhealthy food. These are summarised in the

⁸⁸⁴ World Health Organisation, n 82.

⁸⁸⁵ World Health Organisation, n 83.

⁸⁸⁶ National Health Survey – First Results – Australia 2017-18, n 20, 70.

⁸⁸⁷ Australian Institute of Health and Welfare, n 25, vi.

⁸⁸⁸ Ibid, vii.

⁸⁸⁹ COAG Health Council incorporating the Australian Health Workforce Ministerial Council, *Communique* (7 October 2016)

<https://www.coaghealthcouncil.gov.au/Portals/0/CHC%207%20October%202016_Meeting%20Communique_1.pdf>.

⁸⁹⁰ COAG Health Council, *Communique* (2 August 2018)

<https://www.coaghealthcouncil.gov.au/Portals/0/CHC%20Communique%20020818_1.pdf> 3-4.

⁸⁹¹ COAG Health Council, *Communique* (12 October 2018)

<<https://www.coaghealthcouncil.gov.au/Portals/0/CHC%20Communique%20121018.pdf>> 4.

⁸⁹² Global Obesity Centre at Deakin University (supported by The Australian Prevention Partnership Centre) and INFORMAS *Policies for tackling obesity and creating healthier food environments Scorecard and priority recommendations for Australian governments: Food Policy Index – Australian Governments* (February 2017) <<http://www.opc.org.au/downloads/food-policy-index/AUST-summary-food-epi-report.pdf>> 9.

following sections.

Government regulation

As outlined above at **3.6.1 – General restrictions**, the Australian Government has sought to regulate aspects of broadcasting through the *Children’s Television Standards 2009 (CTS)* – a regulatory instrument under the *Broadcasting Services Act 1992* (Cth). As described by the Australian Communications and Media Authority, the CTS ‘ensure children have access to a variety of quality television programs made specifically for them, including Australian drama and non-drama programs, and provide for the protection of children from possible harmful effects of television. The CTS seek to balance the viewing needs of children, the commercial needs of industry and community interests.’⁸⁹³ The CTS are the only federal government regulations dealing specifically with advertising to children, and they apply only to free-to-air television advertising during certain children’s programs by virtue of being a licence condition for all free-to-air television broadcasters.⁸⁹⁴ The CTS provide that no advertisements can be broadcast during P periods, and stipulate that no prizes can be offered or given during a P program.⁸⁹⁵

However, concerns with the CTS in terms of their ability to restrict children’s exposure to unhealthy food marketing specifically have been summarised as follows (references omitted):⁸⁹⁶

The Children’s Television Standards include some general restrictions on the content of advertising to children, and some restrictions on the amount of advertising that may be shown during certain ‘children’s viewing periods’, but only one provision dealing specifically with advertisements for food. This provision prohibits advertisements that contain any misleading or incorrect information about the nutritional value of foods or beverages. Clearly, this provision does not deal adequately with all the problems associated with television advertising of unhealthy food to children. The advertising restrictions in the Children’s Television Standards do not adequately restrict the amount of advertising of unhealthy food to which children are exposed on television, or the range of techniques that advertisers use to influence children to consume unhealthy foods.

In addition, a major problem with the Children’s Television Standards is that they do not apply during the time periods and programs when children are most likely to watch television. The restrictions on the content of advertising in the Children’s Television Standards only apply to advertisements broadcast during, and immediately before and after, ‘P programs’ (programs classified by ACMA as suitable for pre-school children) and ‘C programs’ (programs classified by ACMA as suitable for children younger than 14 years of age). P and C programs attract very low ratings among child viewers compared with other programs that are popular with children.

Additionally, compliance with the CTS is not monitored. Rather, enforcement depends on viewers proactively lodging complaints; a process that has been described as complex, difficult and taking a long time to resolve.⁸⁹⁷

Co-regulation

The *Commercial Television Industry Code of Practice (CTICP)* is prepared by the industry and is registered by ACMA under the *Broadcasting Services Act 1992* (Cth), and in this respect is co-regulation. The CTICP establishes restrictions on the volume of advertisements and when they can be shown, as well as a classification scheme applying to both programs and advertisements.⁸⁹⁸ The Obesity Policy Coalition has

⁸⁹³ Australian Communications and Media Authority, *Children’s television standards 2009* (2009) <<https://www.acma.gov.au/theacma/childrens-television-standards-2009-childrens-tv-i-acma>>.

⁸⁹⁴ Obesity Policy Coalition, *Policy Brief – Food Advertising Regulation in Australia* (January 2018) <<https://www.opc.org.au/downloads/policy-briefs/food-advertising-regulation-in-australia.pdf>>.

⁸⁹⁵ *Children’s Television Standards 2009* (Cth) CTS 26 and 24.

⁸⁹⁶ MacKay S, Antonopulos N, Martin J, Swinburn B. *A comprehensive approach to protecting children from unhealthy food advertising and promotion* Obesity Policy Coalition (2011) <<http://www.opc.org.au/downloads/submissions/protecting-children-unhealthy-food-advertising-promotion.pdf>> 22-23.

⁸⁹⁷ *Ibid*, 22-23.

⁸⁹⁸ Elizabeth Handsley and Belinda Reeve, n 88, 22.

observed however that the CTICP does ‘...not contain any provisions dealing with food and beverage advertising to children or restrictions on the volume of advertising to children’.⁸⁹⁹ Instead, CTICP stipulate that television advertisers are expected to comply with a number of industry self-regulation codes, including the AANA Food and Beverages Advertising and Marketing Communications Code (discussed below).⁹⁰⁰

Industry self-regulation

Advertising industry

As outlined above, the Australian Association of National Advertisers’ have the AANA Code for Advertising & Marketing Communications to Children (**CAMCC**), and the AANA Food & Beverages Advertising & Marketing Communications Code (**FBAMCC**). The CTICP state at clause 5.7 that television advertisers are also required to adhere to these Codes (both described above). These codes have been criticised for being limited as follows:⁹⁰¹

The advertising codes might have broad application, but they rarely restrict marketing of unhealthy food to children in any meaningful way. This is because both the wording and the interpretation of the rules are narrow and of little practical effect. The advertising codes’ key restrictions purport to ban advertisements that promote or encourage unhealthy eating habits, undermine healthy or active lifestyles or encourage excess consumption.

These restrictions are almost meaningless in practice, as it is nearly impossible to establish that an advertisement promotes or encourages unhealthy eating habits.

The Advertising Standards Panel, often without referring to evidence, says:

- An advertisement for a particular unhealthy product, regardless of its nutritional profile, does not, of itself, undermine the importance of healthy or active lifestyles.
- There is no community standard that means products with a particular nutritional profile cannot be advertised.

Advertisers are also able to successfully argue that they are promoting the unhealthy food as a snack or as a treat as part of a balanced diet, so that the advertisement does not promote unhealthy eating habits.

Food industry

As outlined above, the Responsible Children's Marketing Initiative (**RCMI**) and the Quick Services Restaurant Industry Initiative for Responsible Advertising and Marketing to Children (**QSRI**) are the most relevant food industry initiatives. An evaluation conducted by Belinda Reeve against criteria for effective self-regulation found shortcomings in the RCMI and the QSRI as follows:

*Substantive terms*⁹⁰²

- Objectives – Focus on advertising that directly targets children, as opposed to reducing children’s overall exposure to unhealthy food marketing.
- Definition of ‘children’ – Is limited to persons under 12 years (RCMI) and 14 years (QSRI).
- Application to media – Applies to media ‘directed primarily to children’, as opposed to ‘the vast majority of television food advertising that takes place in general audience programming’.
- Advertising content – Must be ‘directed primarily to children’ which is very narrowly interpreted.
- Marketing techniques covered – The initiatives do not restrict ‘...a number of persuasive techniques that children find particularly appealing (and which are widely used in food

⁸⁹⁹ Hickey K, Mandelbaum J, Bloom K, Martin J, *Overbranded, Underprotected: How industry self-regulation is failing to protect children from unhealthy food marketing*. Obesity Policy Coalition (2018) <<http://www.opc.org.au/downloads/overbranded/overbranded-underprotected.pdf>> 25.

⁹⁰⁰ Commercial Television Industry Code of Practice, section 5.7.1 (2018)

<http://www.freetv.com.au/media/Code_of_Practice/Free_TV_Commercial_Television_Industry_Code_of_Practice_2018.pdf>.

⁹⁰¹ Hickey, Mandelbaum, Bloom and Martin, n 901, 19.

⁹⁰² Reeve, n 849, 435-444.

marketing), including popular personalities, third-party licensed characters, and premium offers, i.e. offering a free gift or toy with the purchase of a food product'.⁹⁰³ The initiatives also permit the use of proprietary characters developed and owned by food advertisers, and known to encourage brand loyalty with children. This has been described as a 'critical loophole'.⁹⁰⁴

- Media channels covered – Includes Internet sites, as well as television, radio, print and cinema, but excludes others.⁹⁰⁵ For example, the initiatives do not cover sports sponsorship, nor in-store promotions, competitions and giveaways.⁹⁰⁶
- Nutrient criteria – Under the RCMI, companies can use their own company-developed model to identify what classifies as healthier choices, although the QSRI contains one nutrient profiling scheme that applies to all signatories.

*Regulatory process and enforcement*⁹⁰⁷

- Administration and monitoring – The initiatives are overseen by an Initiative Administration Committee. However it has been observed that 'industry representatives comprise the majority of the Committee's membership, meaning that external stakeholders are likely to be overruled in any attempt to act against industry interests', whereas the two external stakeholders are advisory only and have been described as 'tokenistic'.⁹⁰⁸ Additionally, '[a]lthough monitoring lends the scheme a degree of transparency, the monitoring mechanism is entirely industry based (i.e. there is no formal monitoring by an independent, external body), and it is 'narrow and selective' in its reporting criteria.'
- Public complaints – Public complaints under the RCMI and QSRI can be made to Ad Standards (formerly the Advertising Standards Bureau). This is said to open up self-regulation to a degree of external scrutiny, and an independent complaints-handling mechanism is a strong element of the scheme, particularly given its absence in food industry pledges in other jurisdictions. However, the complexity of advertising self-regulation is said to undermine the role of the complaints mechanism in enhancing the transparency and accountability of the scheme.
- Enforcement – The initiatives do not include sanctions, but instead rely on Ad Standards as the main enforcement mechanism. Although Ad Standards can order the withdrawal or modification of an advertisement if it determines that an advertisement breaches the initiatives, it does not have means of enforcing its orders in the event that a company does not comply. The advertising industry argues that these outcomes can have significant reputational and financial repercussions, and Ad Standards reports almost total compliance with its determinations.
- Review – An independent review was commissioned in 2012 which resulted in some revisions to the Code. However, recommendations that would have involved significant reforms were avoided.

Additionally, a recent study by Wendy L Watson, Vivien Lau, Lyndal Wellard and Clare Hughes Kathryn Chapman evaluated the efficacy of the RCMI and QSRI, both introduced in 2014. The study concluded that children in Australia were exposed to an estimated 3 advertisements for unhealthy foods every hour (in 2015).⁹⁰⁹ Examining the frequency of unhealthy food advertising over 2011 to 2015, the study found:⁹¹⁰

[t]otal food advertising rates for the three channels increased from 5.5/h in 2011 to 7.3/h in 2015, due to an increase of 0.8/h for both core and miscellaneous foods. The rate of non-core food advertisements in 2015 (3.1/h) was similar to 2011 (3.0/h). The youth-oriented channel had fewer total food advertisements (3.7/h

⁹⁰³ Ibid, 440.

⁹⁰⁴ Ibid.

⁹⁰⁵ Ibid, 441.

⁹⁰⁶ Hickey, Mandelbaum, Bloom and Martin, n 901, 9-10.

⁹⁰⁷ Reeve, n 849, 444-449.

⁹⁰⁸ Ibid, 445.

⁹⁰⁹ Watson, Lau, Wellard, Hughes and Chapman, n 15.

⁹¹⁰ Ibid, 787.

versus 7.3/h) but similar fast-food advertisement rates (1.3/h versus 1.3/h).

On that basis they concluded: '[t]here was no change in the rate of unhealthy food advertising since 2011, suggesting minimal impact of the current food industry initiatives on reducing children's exposure to unhealthy food advertising.'⁹¹¹

Regarding digital marketing in particular, the Obesity Policy Coalition has concluded:⁹¹²

[t]he present self-regulatory industry codes are ineffective to control the exposure of children to digital marketing. They are particularly ill-suited to address social media marketing, online marketing, apps and advergames – allowing a large volume of unhealthy food marketing to reach children. The Obesity Policy Coalition believes that the Australian Government must act in line with the WHO recommendations and impose legislative, regulatory or strong co-regulatory measures to reduce the volume of food marketing reaching children under 16, particularly from digital media.

Reflecting overall on the 'co-regulatory' nature of Australia's approach in the Children's Television Standards 2009 (CTS) and the Commercial Television Industry Code of Practice (CTICP), Handsley and Reeve have observed that it is 'drawn up by industry but approved and registered by the government regulator' (the Australian Communications and Media Authority).⁹¹³ Regarding other self-regulatory codes such as the QSRI and RCMI, the Obesity Policy Coalition has highlighted that inherent in these schemes is an 'irresolvable conflict between food advertisers' commercial interest (to advertise to children in a manner that is effective to sell unhealthy products) and the public interest (to protect children from such advertising).'⁹¹⁴

These shortcomings have led many to conclude that the measures Australia currently has in place regarding the regulation of marketing and advertising of unhealthy foods are 'ineffective'⁹¹⁵ and 'clearly not drafted with a view to limiting the amount or type of food advertising to which children are exposed'⁹¹⁶. Additionally, despite the co-regulatory and self-regulatory codes outlined above, the number of children and adults experiencing obesity and overweight – and the associated health concerns – have increased in recent decades – with a 50% increase in children who are overweight or obese since 1980.⁹¹⁷ A growing number of medical and health practitioners, public health professionals, academics and civil society organisations have sought to bring attention to this growing and major public health issue, drawing to attention significant shortcomings of Australia's approach to curbing obesity, including in relation to Australia's approach to the regulation of marketing and advertising of unhealthy foods.⁹¹⁸

A way forward: A child rights-based approach to food marketing

Children have the right to have their best interests taken as a primary consideration in decisions that affect them. This includes when policy-makers are setting regulatory environments for businesses, including the setting of standards and restrictions relating to marketing and advertising techniques and channels. The Committee on the Rights of the Child has explained:

The concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child...The full application of the concept of the child's best interests requires the development of a rights-based approach, engaging all actors, to secure the holistic physical, psychological, moral and spiritual integrity of the child and promote his or her human dignity.⁹¹⁹

The principle of taking the best interests of the child is a three-fold concept:⁹²⁰

⁹¹¹ Ibid.

⁹¹² Obesity Policy Coalition, *Australian Competition & Consumer Commission – Digital Platforms Inquiry – Submission from the Obesity Policy Coalition* (3 April 2018) <<https://www.accc.gov.au/system/files/Obesity%20Policy%20Coalition%20%28April%202018%29.pdf>> 10.

⁹¹³ Handsley and Reeve, n 88, 21.

⁹¹⁴ MacKay, Antonopoulos, Martin and Swinburn, n 898, 24.

⁹¹⁵ Handsley and Reeve, n 88, 22.

⁹¹⁶ Ibid, 21.

⁹¹⁷ Ibid, 2.

⁹¹⁸ See, for example, 'Tipping the Scales', *Four Corners* (ABC), <<https://www.abc.net.au/4corners/tipping-the-scales/9712342>> and Reeve, n 849, 421.

⁹¹⁹ Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para 1), 62nd sess, UN Doc CRC/C/GC/14 [4]-[5] (29 May 2013).

⁹²⁰ Ibid.

(a) A substantive right: The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general. Article 3, paragraph 1, creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court.

(b) A fundamental, interpretative legal principle: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen. The rights enshrined in the Convention and its Optional Protocols provide the framework for interpretation.

(c) A rule of procedure: Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases.

When examining the issue of the appropriate form of regulating the marketing and advertising of unhealthy foods and beverages, the best interests of children must be protected in these ways by policy makers.

Internationally, the World Health Organisation outlined as recently as September 2018 the urgent need for governments to take action on childhood obesity, calling it 'one of the most serious global public health challenges of the 21st century'.⁹²¹ It reiterated amongst other things that '[c]hildren need to be supported by food environments where the healthy choice is an easy and affordable choice, and they need to be protected from exposure to powerful marketing of foods and beverages.'⁹²² Standards and recommendations developed by the World Health Organisation to assist governments to do this in practice include:

- *Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children* (2010);⁹²³
- *Framework for Implementing the Set of Recommendations on the marketing of foods and non-alcoholic beverages to children* (2012);⁹²⁴
- *Global Action Plan for the Prevention and Control of non-communicable diseases (NCDs) 2013-2020* (2013);⁹²⁵ and
- *Recommendations of the WHO Commission on Ending Childhood Obesity* (2016).⁹²⁶

Domestically as well, numerous organisations with an interest in public health have devised and called for more effective policy measures to help curb the increasing rates of children in Australia who are obese or overweight, including by improving the approach of regulating marketing and advertising of unhealthy foods. To reduce children's exposure to unhealthy food marketing specifically, the Obesity Policy Coalition has for example recommended that the Australian Government provide for a scheme that:⁹²⁷

- 1) Applies to all food companies and fast food chains;

⁹²¹ World Health Organisation, *Taking Action on Childhood Obesity* (September 2018)

<<http://apps.who.int/iris/bitstream/handle/10665/274792/WHO-NMH-PND-ECHO-18.1-eng.pdf>> 1.

⁹²² Ibid, 1.

⁹²³ World Health Organisation, *Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children* (2010)

<http://apps.who.int/iris/bitstream/handle/10665/44416/9789241500210_eng.pdf?sequence=1>. Resolution WHA63.14.

⁹²⁴ World Health Organisation, *Framework for Implementing the Set of Recommendations on the marketing of foods and non-alcoholic beverages to children* (2012) <<http://www.who.int/dietphysicalactivity/MarketingFramework2012.pdf>>.

⁹²⁵ World Health Organisation, *Global Action Plan for the Prevention and Control of Noncommunicable Diseases 2013-2020* (2013) <http://apps.who.int/iris/bitstream/handle/10665/94384/9789241506236_eng.pdf;jsessionid=1B160287AEEACB91030A4AE5B15EE8E?sequence=1>.

⁹²⁶ World Health Organisation, *Report of the Commission on Ending Childhood Obesity* (2016)

<http://apps.who.int/iris/bitstream/handle/10665/204176/9789241510066_eng.pdf;jsessionid=7C9DEAA9038E1B1A0AD8D43BADCE42F3?sequence=1> 18.

⁹²⁷ Hickey, Mandelbaum, Bloom and Martin, n 901, 5.

- 2) Applies to all forms of advertising, marketing and promotion and all forms of media;
- 3) Restricts advertising that appeals to children in either its content or placement (including a restriction on free-to-air television at times when the greatest number of children are likely to be watching: Weekdays 6am to 9am and 4pm to 9pm and weekends 6am to 12pm and 4pm to 9pm);
- 4) Effectively restricts marketing in other forms of media, in particular, digital marketing;
- 5) Clearly defines 'unhealthy food' by reference to an appropriate nutrient profiling model;
- 6) Applies to children up to 16 years old, as a minimum;
- 7) Is administered and enforced by an independent agency; and
- 8) Imposes meaningful disincentives and sanctions for breach to content creators, publishers and broadcasters.

Research conducted by Reeve has also suggested numerous ways in which the system of self-regulation can be improved, if it is to be retained.⁹²⁸

Beyond improving the regulation of marketing and advertising of unhealthy foods, the Global Obesity Centre at Deakin University (supported by The Australian Prevention Partnership Centre) and INFORMAS have made a range of recommendations to help address obesity and create healthier food environments more holistically, including by policy and legislative measures covering food prices, food composition, food labelling and food provision.⁹²⁹ The Australian Institute of Health and Welfare has also outlined a range of strategies (some already existing) to reduce overweight and obesity, including through laws and regulations, tax and price interventions (for example, taxes on less healthy foods and drinks (such as energy-dense, nutrient-poor foods)), community-based interventions, and social marketing.⁹³⁰ The *Four Corners* episode on 'Tipping the Scales' that aired on 30 April 2018 also includes a consensus of actions to prevent obesity.⁹³¹ More recently as well the Senate Select Committee into the Obesity Epidemic in Australia published its final report in December 2018 in which it made a series of recommendations to strengthen Australia's response to obesity.⁹³²

Recommendation 2 (ix)

Curb rising childhood obesity through a national strategy that includes measures to reduce children's exposure to marketing and advertising of unhealthy foods and beverages

Ensure that the 'national strategy on obesity' as announced by the COAG Health Council in October 2018:

- a) is informed by the *Convention on the Rights of the Child* and specifically the right to health;
- b) has a stated objective of reducing children's exposure to the marketing of food high in saturated fats, trans-fatty acids, free sugars and salt (HFSS) in line with the World Health Organisation's 'Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children' and the 'Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-alcoholic Beverages to Children'.
- c) includes measures (including legislative measures) to strengthen the regulation of marketing and advertising of unhealthy foods in line with recommendations of public health experts, including mandatory time-based restrictions of unhealthy food and beverage advertising on broadcast media

⁹²⁸ Reeve, n 849, 449-455.

⁹²⁹ Global Obesity Centre at Deakin University (supported by The Australian Prevention Partnership Centre) and INFORMAS *Policies for tackling obesity and creating healthier food environments Scorecard and priority recommendations for Australian governments: Food Policy Index – Australian Governments* (February 2017) <<http://www.opc.org.au/downloads/food-policy-index/AUST-summary-food-epi-report.pdf>> 4.

⁹³⁰ Australian Institute of Health and Welfare, n 25, 33-36.

⁹³¹ Australian Broadcasting Company, *Four Corners* 'Tipping the Scales' (30 April 2018) <<https://www.abc.net.au/4corners/tipping-the-scales/9712342>>.

⁹³² Parliament of Australia – Select Committee into the Obesity Epidemic in Australia, *Obesity epidemic in Australia* (5 December 2018) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Obesity_epidemic_in_Australia/Obesity/Final_Report>.

(television and radio), defining and addressing digital food marketing and providing for independent monitoring and enforcement.

Alcohol

Broadcasting and radio

As a legislative instrument enacted under the *Broadcasting Services Act 1992* (Cth) (**BSA**), the Children's Television Standards (discussed above) prohibit the advertising of alcohol during children's and preschool children's broadcasting program time periods.

As outlined above, the BSA also creates a co-regulatory arrangement whereby industries create codes of practice applying to their activities, and these codes are then registered with the Australian Communications and Media Authority.⁹³³ The Commercial Television Industry Code of Practice (**CTICP**) allows for the broadcasting of alcoholic drinks in the following circumstances:⁹³⁴

A Commercial for Alcoholic Drinks may be broadcast at any of the following times:

- a) in the M and MA15+ classification zones set out in Section 2 (except between 5.00 am and 6.00 am, and 7.30 pm and 8.30 pm); and
- b) as an accompaniment to a Sports Program on a Weekend or a Public Holiday; and
- c) as an accompaniment to the broadcast of a Live Sporting Event broadcast simultaneously across more than one licence area, if one of subclauses (a) or (b) is satisfied for:
 - i. the licence area in which the Live Sporting Event being broadcast is held, for an event taking place in Australia;
 - ii. the majority of metropolitan licence areas in which the Live Sporting Event is shown, for an event taking place overseas.

The ASTRA Codes applying to subscription broadcast television and subscription narrowcast radio set out restrictions including with regard to advertising of alcoholic beverages and betting or gambling.⁹³⁵

Reeve has concluded that the effect of the CTICP is as follows:⁹³⁶

The effect of these provisions is that commercials for alcoholic drinks can only be broadcast between 8.30pm and 5:00am and 12:00 to 3:00pm on school days, and between 8.30pm and 5:00am on weekends and public holidays, except where broadcast during a sports program on a weekend or public holiday, or during a televised live sports event (at any time). This exemption for sports programs and live sports events significantly limits the efficacy of these restrictions. One study found that a quarter of all alcohol advertising broadcast on television was shown during sports television programming; and during the day, the majority of alcohol advertisements were broadcast in sports (87 per cent) rather than non-sports programming (13 per cent). This loophole leaves thousands of children and adolescents vulnerable to exposure to a large number of alcohol advertisements, particularly given the large number of children who watch televised sports events and sports programs (references omitted).

Advertising

The Alcohol Beverages Advertising Code (**ABAC**) is a self-regulatory scheme of the alcohol industry that was introduced in 1997. It defines a 'minor' as someone who is under 18 years of age (the legal drinking age in

⁹³³ Belinda Reeve, 'Regulation of Alcohol Advertising in Australia: Does the ABAC Scheme adequately protect young people from marketing of alcoholic beverages?' (November 2018) *QUT Law Review*, 18(1), 96-123, 105.

⁹³⁴ Commercial Television Industry Code of Practice, section 6.2 (2018)

<http://www.freetv.com.au/media/Code_of_Practice/Free_TV_Commercial_Television_Industry_Code_of_Practice_2018.pdf>.

⁹³⁵ Commercial Television Industry Code of Practice 2015

<http://www.freetv.com.au/media/Code_of_Practice/Free_TV_Commercial_Television_Industry_Code_of_Practice_2015.pdf>; Australian Subscription Television and Radio Association, *Subscription Television Code of Practice 2013*

<http://www.astra.org.au/pdf/news/ASTRA_Subscription_Broadcast_Television_Codes_of_Practice_2013_with_new_Appendix_A.pdf> and Australian Subscription Television and Radio Association, *Subscription Radio Code of Practice 2013*

<http://www.astra.org.au/pdf/news/ASTRA_Subscription_Narrowcast_Radio_Codes_of_Practice_2013_with_new_Appendix_A.pdf>.

⁹³⁶ Reeve, n 935, 106.

Australia). The ABAC provides that a 'marketing communication' must not:

- have a 'strong or evident appeal to minors' as defined in the Code (this includes, among other things, where it is specifically targeted at minors, usages imagery, animations or cartoon characters that are likely to strongly appeal to minors or create confusion with confectionary or soft drinks);
- depict a person who is or appears to be a minor unless they are shown in an incidental role in a natural situation and where there is no implication they will consume or serve alcohol; or
- depict an adult who is under 25 years of age and appears to be an adult unless they are not visually prominent, or not a paid model or actor and are shown in a marketing communication that has been placed within an 'Age Restricted Environment' (as defined in the Code).

A marketing communication includes packaging, brand advertising, advertorials, marketing collateral (e.g. gifts with purchases, competition prizes, branded merchandise etc.), digital communications such as social media, point of sale materials and competitions.

Significant concerns have been raised about the effectiveness of the scheme with regard to the extent to which it protects young people from exposure to marketing of alcoholic products. An examination of ABAC scheme against effectiveness criteria for self-regulation conducted in 2018 concluded:⁹³⁷

the substantive rules found in the ABAC contain a number of significant loopholes, including a failure to adequately restrict the placement of alcohol promotions or to regulate alcohol industry sponsorship. Further, the ABAC Scheme lacks independent administration, systematic monitoring, or meaningful sanctions for responding to non-compliance. Accordingly, regulatory processes lack transparency and accountability, undermining the credibility and efficacy of the Scheme.

The permitted forms of alcohol advertising under the Commercial Television Industry Code of Practice and the limitations of the ABAC scheme leave serious questions about the effectiveness of Australia's approach to limiting children's exposure to the marketing and advertising of alcoholic beverages.

The AANA Code for Advertising to Children provides that advertising or marketing communications to children must not be for, or relate in any way to, alcohol products or draw any association with companies that supply alcohol products.

Tobacco

The *Tobacco Advertising Prohibition Act 1992* (Cth) creates a general ban on the advertising of tobacco products in Australia. Additionally, the *Tobacco Plain Packaging Act 2011* (Cth) regulates the retail packaging and appearance of tobacco products in order to reduce their appeal to consumers, increase the effectiveness of health warnings on packaging, and reduce the ability of the retail packaging of tobacco to mislead consumers about the harmful effects of smoking or using tobacco products. These laws aim to limit the exposure of all people to tobacco advertising and retail packaging, not just children.

The Australian Government has successfully defended numerous legal challenges to the regime, including before the Australian High Court, an arbitration panel as part of an investor-state dispute brought against Australia by Philip Morris Asia, and a World Trade Organisation dispute settlement body.⁹³⁸

Australia was the first country in the world to mandate plain packaged cigarettes. Evidence indicates the intervention has effectively reduced the attractiveness and appeal of tobacco products, including among young people, and has increased rates of quitting and attempts to quit among adult smokers.⁹³⁹ Not only are rates of smoking comparatively low in Australia compared to other jurisdictions,⁹⁴⁰ but recent evidence indicates that fewer young people are taking up smoking.⁹⁴¹ The World Health Organisation considers this world-first measure

⁹³⁷ Ibid, 96.

⁹³⁸ Attorney-General's Department, *Tobacco plain packaging – investor-state arbitration* <<https://www.ag.gov.au/Internationalrelations/InternationalLaw/Pages/Tobacoplainpackaging.aspx>>.

⁹³⁹ World Health Organisation, n 93, 10-11.

⁹⁴⁰ World Health Organisation, n 94.

⁹⁴¹ Australian Institute of Health and Welfare, n 95, 23.

to be ‘an effective public health intervention’⁹⁴² and, in response to the evidence of the positive effect of this measure, numerous other countries have since introduced a similar plain packaging law, or are in the process of doing so.⁹⁴³

Gambling

Similarly to alcohol, a number of self-regulatory industry codes place limitations on the advertising of betting and gambling. For example, the CTICP and the ASTRA Codes applying to subscription broadcast television and subscription narrowcast radio set out restrictions including with regard to betting or gambling.⁹⁴⁴ The CTICP for example states:⁹⁴⁵

6.5 Betting and gambling

6.5.1 A Commercial relating to betting or gambling must not be broadcast:

a) in any Program classified G or lower between:

- i. 6.00 am and 8.30 am; and
- ii. 4.00 pm and 7.00 pm; and

b) during any Program that is broadcast between 5.00 am and 8.30 pm and principally directed to Children.

6.5.2 For the avoidance of doubt, the restrictions in clause 6.5.1 do not apply during news, Current Affairs or Sports Programs.

6.5.3 The restrictions at clause 6.5.1 do not apply to the following:

- a) a Commercial relating to such things as Government lotteries, lotto, keno or contests;
- b) a Commercial relating to entertainment or dining facilities at places where betting or gambling take place, or a tourism Commercial which incidentally depicts betting or gambling, provided in each case that the contents do not draw attention to betting or gambling in a manner calculated to directly promote their use.

In terms of government regulation, gambling has traditionally been the responsibility of State and Territory Governments.⁹⁴⁶ A recent Australian Parliamentary inquiry explained: ‘[s]tate and territory governments regulate and provide gambling services, and collect the ensuing revenue.’⁹⁴⁷ More recently though, successive Federal Governments have become involved in the regulation of gambling due to the adoption of new technologies by the gambling industry including the online gaming via the internet.⁹⁴⁸ For example, the Federal

⁹⁴² World Health Organisation, n 93, 18.

⁹⁴³ Ibid, 1.

⁹⁴⁴ *Commercial Television Industry Code of Practice 2018* (2018)

<http://www.free.tv.com.au/media/Code_of_Practice/Free_TV_Commercial_Television_Industry_Code_of_Practice_2018.pdf>; Australian Subscription Television and Radio Association, *Subscription Television Code of Practice 2013* (2013)

<http://www.astra.org.au/pdf/news/ASTRA_Subscription_Broadcast_Television_Codes_of_Practice_2013_with_new_Appendix_A.pdf> and Australian Subscription Television and Radio Association, *Subscription Radio Code of Practice 2013* (2013)

<http://www.astra.org.au/pdf/news/ASTRA_Subscription_Narrowcast_Radio_Codes_of_Practice_2013_with_new_Appendix_A.pdf>.

⁹⁴⁵ *Commercial Television Industry Code of Practice 2018* (2018) section 6.5

<http://www.free.tv.com.au/media/Code_of_Practice/Free_TV_Commercial_Television_Industry_Code_of_Practice_2018.pdf>.

⁹⁴⁶ Australian Institute of Family Studies – Australian Gambling Research Centre, *Policy and regulation*

<<https://aifs.gov.au/agrc/resources/policy-and-regulation>>.

⁹⁴⁷ Parliament of Australia, Senate Standing Committees on Environment and Communications, *Gaming Micro-Transactions for Chance-Based Items* (27 November 2018)

<https://www.aph.gov.au/parliamentary_business/committees/senate/environment_and_communications/gamingmicro-transactions/report> [2.4].

⁹⁴⁸ See, for example, Dr Kim Jackson, Analysis and Policy, Social Policy Group, Parliamentary Library, *Gambling Policy and Regulation*, Parliament of Australia

<https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/gamblingbrief> and Parliament of Australia, Senate Standing Committees on Environment and Communications, *Gaming Micro-Transactions for Chance-Based Items* (27 November 2018)

<https://www.aph.gov.au/parliamentary_business/committees/senate/environment_and_communications/gamingmicro-transactions/report> [2.4].

and State and Territory Governments launched in November 2018 the *National Consumer Protection Framework for Online Wagering* that must be adhered to by all online wagering providers.⁹⁴⁹

Earlier, in May 2017, the Federal Government also announced a 'Broadcast and Content Reform Package' that proposed reforms to the advertising of gambling specifically. The *Communications Legislation Amendment (Online Content Services and Other Measures) Act 2018* (Cth) passed Parliament in March 2018 as part of this package. It introduced a prohibition on gambling promotions from five minutes before the scheduled start of a sporting event, during the event and until five minutes after the conclusion of a sporting event, for events occurring between the hours of 5:00am and 8:30pm.⁹⁵⁰

Although the Government's efforts to minimise children's exposure to gambling advertising have generally been welcomed, a number of organisations have encouraged the restrictions to go further in view of the potential risks and harms associated with problem gambling.⁹⁵¹ In calling for greater restrictions on children's exposure to gambling advertising, the Manager of the Australian Gambling Research Centre (**AGRC**), Dr Rebecca Jenkinson, observed that:⁹⁵²

There is strong community concern about the harm gambling advertising is doing to children as advertising and marketing strategies continue to normalise gambling within sport [and] [r]ecent research in the field indicates that 75 per cent of children perceive that sports betting is a normal part of sport and 77 per cent can correctly identify at least one AFL club sponsor.

Research published by the AGRC has suggested that 'gambling advertising should not be permitted in connection with sporting broadcasts during times when children are likely to be watching, whether free to air, via subscriptions or online.'⁹⁵³

Therapeutic goods

Advertisements of therapeutic goods are regulated by the *Therapeutic Goods Act 1989* (Cth) (**TGA**), the *Therapeutic Goods Regulations 1990* (Cth) and the Therapeutic Goods Advertising Code 2015. The TGA contains a number of general prohibitions in relation to the advertising of therapeutic goods.

Breast-milk substitutes

The *International Code of Marketing Breastmilk Substitutes* was developed by the World Health Organisation in 1981 and aims to contribute to the provision of safe and adequate nutrition for infants by the protection and promotion of breastfeeding, and by ensuring the proper use of breastmilk substitutes, when these are necessary, on the basis of adequate information and through appropriate marketing and distribution.

In Australia the 'Marketing in Australia of Infant Formulas: Manufacturers and Importers Agreement' (**MAIF Agreement**) seeks to give effect to the principles of the *International Code of Marketing Breastmilk Substitutes*. The MAIF Agreement is a self-regulatory agreement between infant formula manufacturers and importers that are signatories. It is overseen by the Department of Health. The MAIF Agreement regulates the marketing of infant formulas when such products are marketed or otherwise represented to be suitable, with or without modification, for use as a partial or total replacement of breast milk. For example, the MAIF Agreement imposes requirements to provide information and educational materials relating to infant formula, and provides that manufacturers and importers of infant formulas should not advertise or in any other way promote infant

⁹⁴⁹ Department of Social Services, *Communities and Vulnerable People* 'National Consumer Protection Framework for Online Wagering' (30 November 2018) <<https://www.dss.gov.au/communities-and-vulnerable-people-programs-services-gambling/national-consumer-protection-framework-for-online-wagering>>.

⁹⁵⁰ Communications Legislation Amendment (Online Content Services and Other Measures) Bill 2017 sch 8.

⁹⁵¹ UNICEF Australia, *Inquiry into the Communications Legislation Amendment (Online Content Services and Other Measures) Bill 2017 - Submission to the Senate Environment and Communications Legislation Committee* (15 January 2018) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/CommsOnlineContentBill/Submissions> Submission 13.

⁹⁵² Australian Institute of Family Studies – Australian Gambling Research Centre, 'Restrict Children's Exposure to Gambling Advertising' (26 July 2018) <https://aifs.gov.au/sites/default/files/targeting_children_restricting_gambling_promotions_media_release.pdf>.

⁹⁵³ Ibid.

formulas to the general public. Complaints alleging a breach of the MAIF Agreement can be lodged with the Department of Health.⁹⁵⁴

3.6.3 Channels / locations

Which communication channels, including digital media, and physical settings, including schools and other places where children are likely to spend time, are contemplated in restrictions on advertising and marketing to children?

Television

As outlined above, the BSA, the Children's Television Standards, the Commercial TV Code and the ASTRA Code restrict television advertising and regulate the broadcasting of some children's programs.

Other communication channels

Other laws and codes generally regulate advertising with respect to particular goods and services rather than advertising with respect to particular communication channels. However, most of the restrictions appear broad enough to apply in relation to most communication channels. For example, the ACL is broad in its coverage so as to cover online marketing and advertising and representations that are made on social media, provided these take place in the context of trade or commerce.

Further, the AANA Code for Advertising to Children applies to all advertising or marketing communications materials that are published or broadcast using any medium or any activity which is undertaken by, or on behalf of an advertiser or marketer, and over which the advertiser or marketer has a reasonable degree of control, and that draws the attention of the public in a manner calculated to promote or oppose the product, service, person, organisation or line of conduct. Under the AANA Code for Advertising to Children a 'medium' includes any medium whatsoever including cinema, internet, outdoor media, print, radio, television, telecommunications, or other direct-to-consumer media including new and emerging technologies.

The AANA Code for Advertising to Children does, however, exclude some forms of marketing and advertising from its remit, such as labels or packaging for products, public relations communications and related activities and, in the case of broadcast media, any material which promotes a program or programs to be broadcast on that same channel or station.

Schools and day care centres

Apart from self-regulation, there are very few legal restrictions on advertising and marketing to children near schools and day care centres. One exception to this exists in Victoria, where it is prohibited to display gambling advertising on public transport and within 150 metres of the perimeter of a school.⁹⁵⁵ In 2015, the ACT Government introduced changes to the 'ACTION buses' advertising policy to prohibit the promotion of alcohol, unhealthy food and gambling on ACTION buses.⁹⁵⁶

In view of the limitations of self-regulation, the Alcohol Advertising Review Board has called on other State and Territory Governments to remove alcohol advertising from public transport.⁹⁵⁷ In addition, some organisations have called for a ban to outdoor alcohol advertising within a certain radius (of at least 700 metres) of schools.⁹⁵⁸ As outlined above, the Victorian Government introduced a ban on alcohol advertising within 150 metres of all Victorian schools in March 2018.⁹⁵⁹ In order to prevent increasing childhood obesity, civil society groups and

⁹⁵⁴ Department of Health, *Information for lodging complaints of alleged breaches of the MAIF Agreement*

<<http://www.health.gov.au/internet/main/publishing.nsf/Content/health-pubhlth-publicat-document-brfeed-complaints.htm>>.

⁹⁵⁵ *Gambling Legislation Amendment Bill 2017* (Vic).

⁹⁵⁶ Transport Canberra, *Advertising on an ACTION bus* <<https://www.transport.act.gov.au/about/policy/media-and-advertising/advertise-on-a-bus>>.

⁹⁵⁷ Alcohol Advertising Review Board, *No way to ignore it: The case for removing alcohol ads from public transport* (2016)

<<https://www.alcoholadreview.com.au/resources/AARB-Public-transport-report-FINAL.pdf>>.

⁹⁵⁸ See Submission of the Alcohol Policy Commission to the Victorian Government regarding the Review of the *Liquor Control Reform Act 1998* (Vic) (23 December 2016) <<http://www.alcoholpolicycoalition.org.au/downloads/submissions/2016-lcra-review-submission.pdf>>. 77 percent of the respondents to the Victorian Health Promotion Foundation's 'Community Attitudes to Alcohol Policy Survey 2010' agreed that alcohol advertising on billboards should be banned within one kilometre of schools.

⁹⁵⁹ Marlene Kairouz, 'New Laws To Protect Minors From Alcohol Harm' (Media Release, 25 March 2018)

<<https://www.premier.vic.gov.au/new-laws-to-protect-minors-from-alcohol-harm/>>.

parents have urged the Australian Federal and State/Territory Governments to restrict unhealthy food sponsorships for sport clubs and to prohibit outdoor advertising of unhealthy foods near settings where children gather, such as schools.⁹⁶⁰ In 2015, respondents to the 'Community Consultation on Food and Drink Marketing in the ACT' suggested that the government should establish 'unhealthy food and drink marketing exclusion zones (of at least 200 metres) near children's settings' as well as introduce policies which ensure that the promotion of unhealthy food and drinks is not perpetuated through schools.⁹⁶¹

The Outdoor Media Association (**OMA**) represents most of Australia's traditional and digital outdoor media display companies and production facilities, as well as some media display asset owners. The OMA has developed the 'OMA Alcohol Advertising Guidelines', which requires all members of the OMA to ensure alcohol advertising is not placed on fixed signs that are located within a 150 metre sight line of a primary or secondary school. However, the policy does not apply to some locations near schools such as where the school is in the vicinity of a club, pub, bottle shop or other venue that sells alcohol. Further, the policy does not apply to transit advertising on buses and taxis.

Questions regarding the effectiveness of existing arrangements for the regulation of billboard and outdoor advertising were examined in the inquiry of the Standing Committee on Social Policy and Legal Affairs in 2011.⁹⁶² The Committee concluded that the 'self-regulatory system has its advantages and is not unworkable' but emphasised that this is the industry's last chance to prove that self-regulation works.⁹⁶³ However, most of the Committee's recommendations were rejected or only noted by the Australian Government.⁹⁶⁴

3.6.4 Techniques

Are there restrictions on the use of particular techniques that may appeal to children, such as the use of cartoon characters?

As outlined in the sections above, some regulation of advertising and marketing specifically restricts the use of marketing or advertising that may appeal to children. For example, the ABAC Alcohol Code provides that a marketing communication must not have strong or evident appeal to minors.

The Children's Television Standards prohibit advertisements during, or immediately before or after, children's and pre-school children's program periods from containing endorsements by popular children's characters. These include a principal personality or character from a C or P program; a popular program character or popular movie character; a popular cartoon, animated or computer generated character; a popular personality; a licensed character; or a proprietary character. A 'popular personality' includes well known sporting and music personalities. A 'licensed character' means a character used, under licence from the owner of the character, in the promotion or advertising of products or services and a 'proprietary character' means a character used by its owner in the promotion or advertising of products or services. Such characters may include characters from fiction or movies.

The AANA Code for Advertising to Children provides that advertising or marketing communications to children

⁹⁶⁰ Obesity Policy Coalition, *The harmful impacts of unhealthy food sponsorship in children's sporting settings: the need for action* (2014) <<http://www.opc.org.au/downloads/policy-briefs/sport-sponsorship.pdf>>; MacKay, Antonopoulos, Martin and Swinburn, n 898; ABC Radio Adelaide, 'Marion council in South Australia investigates banning junk food advertising near schools', *ABC News* (30 September 2015) <<http://www.abc.net.au/news/2015-09-30/marion-council-investigates-banning-junk-food-advertising/6815358>>; Megan Doherty, 'Nearly 80 per cent of ACT parents want companies to stop advertising "unhealthy" foods to children, new Heart Foundation survey finds', *The Sydney Morning Herald* (15 November 2015) <<http://www.smh.com.au/act-news/nearly-80-per-cent-of-act-parents-want-companies-to-stop-advertising-unhealthy-foods-to-children-new-heart-foundation-survey-finds-20151113-gky7gq.html>>.

⁹⁶¹ ACT Government, *Community consultation on food and drink marketing in the ACT – Key findings* (2015) <https://www.act.gov.au/__data/assets/pdf_file/0005/860837/Food-and-Drink-key-findings.pdf> 7.

⁹⁶² House of Representatives Committee on Social Policy and Legal Affairs, *Inquiry into the regulation of billboard and outdoor advertising* (2011) <https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=spla/outdoor%20advertising/report.htm>.

⁹⁶³ House of Representatives Committee on Social Policy and Legal Affairs, *Reclaiming Public Space - Inquiry into the regulation of billboard and outdoor advertising* (July 2011) <https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=spla/outdoor%20advertising/report.htm> [3.135] and [3.138].

⁹⁶⁴ Australian Government, *Government Response to the House of Representatives Standing Committee on Social Policy and Legal Affairs – Inquiry into billboard and outdoor advertising* (date unknown) <<https://www.ag.gov.au/Consultations/Documents/AusGovResponsetotheHouseofRepsStandingCommitteeonSocialPolicyandLegalAffairs/Governmentresponse-HouseofRepsBillboardsInquiry.pdf>>.

must not use popular personalities or celebrities (live or animated) to endorse, recommend, promote or advertise or market products or premiums in a manner that obscures the distinction between commercial promotions and programs or editorial content.

For an analysis of the effectiveness of the self-regulatory codes, see above under **3.6.2 – Harmful products**.

3.6.5 Consumer information

Are there requirements for product labelling to display relevant information about publicly available goods and services in a clear, truthful, and easy-to-understand fashion that is accessible and known to children and families?

Food and beverages

In Australia and New Zealand have established a joint food regulation system aimed at ensuring food safety. The system is described as follows:⁹⁶⁵

The Australian and New Zealand joint food regulation system is a strong system, based on scientific evidence and expertise, that protects the health and safety of consumers. It is a complex system that involves all levels of the Australian and New Zealand governments. Different roles are met by local, state and national government, and international obligations are respected. The rigorous system reflects the many businesses and stakeholders in the food supply chain, providing a firm platform on which our food industries can operate, and enables choice for consumers.

The overriding aims of the system are to:⁹⁶⁶

- protect the health and safety of consumers by reducing food-related risks
- help consumers make informed choices about food by making sure they have information they need and are not misled
- support public health by promoting healthy food choices; maintaining and enhancing the nutritional qualities of food and responding to specific public health concerns
- support a strong, sustainable food industry that offers a diverse, affordable food supply that also benefits the Australian and New Zealand economies

Food Standards Australia New Zealand develops and administers the Australia New Zealand Food Standards Code (**Food Standards Code**) in accordance with the overarching food policy set by ministers responsible for food regulation who convene through the Australia and New Zealand Ministerial Forum on Food Regulation, and the *Food Standards Australia New Zealand Act 1991* (Cth). The Food Standards Code sets standards for food additives, food safety, labelling (including nutrition and ingredient) and foods that need pre-approval such as GM foods. The Food Standards Code is enforced by State and Territory authorities (usually health or human services departments) or, in some cases, local government.⁹⁶⁷ The State and Territory laws supporting the Food Standards Code, such as the *Food Act 1984* (Vic), prohibit certain kinds of misleading and deceptive conduct in relation to the advertising, labelling and packaging of food.

In addition, the Australian Consumer Law also requires that information about food cannot be misleading (see further above at **3.5.3 – Monitoring / enforcement**).

Commencing from June 2014, Australia introduced the 'Health Star Rating System' which is a front-of-pack system that can be voluntarily adopted by food manufacturers and retailers.⁹⁶⁸ This system is described as '...a front-of-pack labelling system that rates the overall nutritional profile of packaged food and assigns it a rating from ½ a star to 5 stars. It provides a quick, easy, standard way to compare similar packaged foods. The more stars, the healthier the choice.'⁹⁶⁹ Under the voluntary system, food manufacturers and retailers are responsible for correct and accurate use of the labelling.

⁹⁶⁵ Food Regulation Secretariat, Department of Health (Australia), *Food Regulation – System Overview* <<http://foodregulation.gov.au/internet/fr/publishing.nsf/Content/system-overview-1>>.

⁹⁶⁶ Food Regulation Secretariat, Department of Health (Australia), *Aims and Objectives* <<http://foodregulation.gov.au/internet/fr/publishing.nsf/Content/system-aims-and-objectives>>.

⁹⁶⁷ See further Food Standards Australia New Zealand, *Food enforcement contacts* <<http://www.foodstandards.gov.au/about/foodenforcementcontacts/pages/default.aspx>>.

⁹⁶⁸ Commonwealth of Australia, *Health Star Rating System* <<http://healthstarrating.gov.au/internet/healthstarrating/publishing.nsf/content/about-health-stars>>.

⁹⁶⁹ Ibid.

The system has been criticised over the years for the following reasons:⁹⁷⁰

- The system is not mandatory;
- Packaged products are rated based on how they measure up against other products in their food group without considering overall health factors;
- The system does not reflect the level of processing of a food, or whether the food is a whole food; The nutritional algorithm does not differentiate between intrinsic and added sugars; and
- The food industry is represented in the Advisory Committee.

Some experts suggest that the system should be better aligned with the Australian Dietary Guidelines which is a food based model that takes the inter-relationships between nutrients, foods, food groups and whole diets into consideration instead of looking at nutrients in isolation.⁹⁷¹

In 2016, the Health Star Rating Advisory Committee commenced planning the five year review of the system (June 2014 – June 2019).⁹⁷² Over both 2017 and 2018, public consultations were conducted.⁹⁷³ In relation to the wellbeing of children, respondents suggested that the system should ‘focus on food directed at children’ and ‘ensure that nutrient definitions do not allow the addition of ingredients with negligible health benefit’ to children’s snack foods.⁹⁷⁴ The following feedback was given on ways to improve the system, algorithm and resultant scoring:⁹⁷⁵

- in relation to the system and categories generally:
 - use a scaling system that provides a score based on the ingredient, then weight that score based on percentage of the ingredient within one serving
 - create more categories for foods so that they are appropriately compared to other foods that are similar to them
 - create more categories with individualised algorithms (for example, include separate categories for vegetable products with reduced reliance on protein and flavourings)
 - place non-core foods in a separate category to core cereals, fruit, protein and vegetables
 - reduce the weighting of protein in the Calculator
 - introduce star rating caps on discretionary foods (or foods with high amounts of risk nutrients)
 - introduce caps on sugar, saturated fat and sodium, and
 - adjust the algorithm in each category so that the rating achieved represents the same level of healthiness across all categories.
- ...
- in relation to fruit, vegetables and juices:
 - fruit and vegetable juices should not be eligible for V points in the HSR Calculator in the same way that fruit and vegetables are (i.e. 100% fruit juices should not be able to get a 5 star rating). Whole fruit or fruit puree are the only ingredients that should count towards FVNL % (fruit, vegetables, nuts and legumes), as juice does not provide the same fibre or satiety as whole fruit
 - change the FVNL % scoring criteria for foods comprising 100% FVNL to allow for all nuts, vegetables and fruit to score 5 stars, and
 - ensure nutrient definitions do not allow addition of ingredients with negligible health benefit, for example only apply FVNL to ‘intact’ FVNL, preventing the inclusion of inulin powder in fibre points, or soy

⁹⁷⁰ mpconsulting, *Report on submissions to the Five Year Review of the Health Star Rating System - Report prepared for the Department of Health* (October 2017)

<[http://healthstarrating.gov.au/internet/healthstarrating/publishing.nsf/Content/D1562AA78A574853CA2581BD00828751/\\$File/Report%20on%20Submissions%20to%20the%20Five%20Year%20Review%20of%20the%20Health%20Star%20Rating.pdf](http://healthstarrating.gov.au/internet/healthstarrating/publishing.nsf/Content/D1562AA78A574853CA2581BD00828751/$File/Report%20on%20Submissions%20to%20the%20Five%20Year%20Review%20of%20the%20Health%20Star%20Rating.pdf)> (‘Report on submissions to the Five Year Review of the Health Star Rating System - Report prepared for the Department of Health’); see also Mark Lawrence and Christina Pollard, ‘A year on, Australia’s health star food-rating system is showing cracks’, *The Conversation* (online) 13 July 2015 <<https://theconversation.com/a-year-on-australias-health-star-food-rating-system-is-showing-cracks-42911>>.

⁹⁷¹ Report on submissions to the Five Year Review of the Health Star Rating System - Report prepared for the Department of Health, n 972, 6, 8 and 21.

⁹⁷² Health Star Rating System, *Formal review of the system after five years of implementation* (June 2014 – June 2019)

<<http://healthstarrating.gov.au/internet/healthstarrating/publishing.nsf/Content/formal-review-of-the-system-after-five-years>>.

⁹⁷³ Report on submissions to the Five Year Review of the Health Star Rating System - Report prepared for the Department of Health, n 972, and Commonwealth of Australia, *Health Star Rating System*, ‘Formal review of the system after five years of implementation (June 2014 to June 2019)’ (27 February 2019) <<http://healthstarrating.gov.au/internet/healthstarrating/publishing.nsf/content/formal-review-of-the-system-after-five-years>>.

⁹⁷⁴ Report on submissions to the Five Year Review of the Health Star Rating System - Report prepared for the Department of Health, n 972, 11-12.

⁹⁷⁵ Ibid.

isolate or gluten for protein points, and preventing ingredients such as fruit juice concentrates, coconut 'flour' or coconut 'sugar' being added to breakfast cereals, muesli bars, children's snack foods and various discretionary products to garner extra stars.

...

- in relation to sugar:
 - discriminate between added sugars and intrinsic sugars (include 'free' sugar in the algorithm and to better accord with the WHO recommendations)
 - use the WHO definition of added sugars (monosaccharides, disaccharides added to foods and drinks by the manufacturer, cook or consumer, and sugars naturally present in honey, syrups, fruit juices and fruit juice concentrates)
 - introduce a sugar multiplier based on the percentage of sugars, and
 - amend the baseline points so that higher baseline points are given at a lower free sugar content (leading to a greater penalty for sugar).

The final review report will be presented at the Australia and New Zealand Ministerial Forum on Food Regulation in 2019.

Other products

The prohibitions on false and misleading representations contained in the ACL apply in connection with the supply of goods and services broadly (in addition to food and beverage). The provisions apply to, for example, representations on labels, including in relation to price, the standard of goods, testimonials, and benefits of the goods. The provisions do not specifically relate to the supply of goods or services to children.

The ACL provides for the creation of mandatory information standards in relation to particular goods. Some goods that are currently subject to mandatory information standards include:

- tobacco products that must contain particular health warnings;
- cosmetic products that must contain particular ingredient labels;
- clothing and textiles that must contain particular care labels; and
- a number of baby and children's products, such as dummies, baby bath aids and baby walkers that must contain certain safety labels.

3.6.6 Use of children

What restrictions and protections are in place on the use of children in advertising campaigns, including as brand ambassadors?

Children employed in entertainment are protected by some state and territory legislation including:

- New South Wales: The *Children and Young Persons (Care and Protection) Act 1998* (NSW) governs the employment of children under 15 years of age for entertainment, exhibition or still photography, and under 16 years of age for any type of modelling.⁹⁷⁶
- Queensland: The *Child Employment Act 2006* (Qld) and the *Child Employment Regulation 2016* (Qld) exclude children working in the entertainment industry from some restrictions, for example, from the minimum age provisions.⁹⁷⁷ However, Part 3 of the *Child Employment Regulation 2016* (Qld) ensures protection for children employed in this industry and regulates specific working hours and supervisory conditions.
- Tasmania: Under the *Children Young Persons and Their Families Act 1997* (Tas), the Minister has discretion to declare any public entertainment as restricted in respect of children who have not attained the age of 14 years.⁹⁷⁸
- Western Australia: The *Children and Community Services Act 2004* (WA) excludes children working in in a dramatic or musical performance or other form of entertainment or in the making of an

⁹⁷⁶ *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 221(1)(b), 223(1)(a)-(b) and 224(1)-(b).

⁹⁷⁷ *Child Employment Act 2006* (Qld) s 8A(2); *Child Employment Regulation 2016* (Qld) ss 4(2), 6(a) and 12(b).

⁹⁷⁸ *Children Young Persons and Their Families Act 1997* (Tas) s 93.

advertisement from the minimum age requirement which means that children under 15 years can be employed in entertainment.⁹⁷⁹ However, it is a crime to employ a child to perform in an indecent, obscene or pornographic manner in the course of participating in an entertainment or exhibition or in the making of an advertisement.⁹⁸⁰

There are also a number of State and Territory criminal laws that prohibit the taking and use of certain kinds of images of children. For example, filming for indecent purposes,⁹⁸¹ making indecent visual images of a child under the age of 16⁹⁸² and child pornography offences.⁹⁸³ Criminal laws can therefore also contribute to protecting children from certain kinds of images being used in advertising (see further **3.4.1 – Prohibition**).

3.6.7 Monitoring / enforcement

What body is responsible for monitoring and clearing commercial advertisements? How can businesses that violate advertising and marketing standards be sanctioned?

The Australian Competition and Consumer Commission (**ACCC**) monitors compliance with the ACL and mandatory information standards that are required under the ACL. The ACCC has power to bring enforcement proceedings against businesses for alleged breaches of the ACL. Certain breaches of the ACL, such as breaches of the false or misleading conduct provisions and various product safety provisions, attract pecuniary penalties. These can include maximum penalties of up to \$10 million for corporations and \$500,000 for individuals.⁹⁸⁴ The ACCC can also issue infringement notices through which it can obtain penalties if it has reasonable grounds to believe a person has breached the false or misleading conduct provisions or certain product safety provisions. The ACCC may also seek court enforceable undertakings from the business, as well as substantiation notices, injunctions and damages.

Most commercial advertisements do not need to be 'cleared' before their release. However, there are some exceptions to this. Advertisements for medicines that appear on television, radio, newspapers, consumer magazines, billboards and cinema films must be approved before publication. The Therapeutic Goods Administration (**TGA**) is the primary regulator in relation to the advertising of therapeutic goods. The *Therapeutic Goods Act 1989* (Cth) creates a number of offences in relation to the publication and broadcast of advertisements of therapeutic goods.⁹⁸⁵ It also creates offences where a person publishes or broadcasts generic information about a therapeutic good that does not comply with the principles in the part of the Therapeutic Goods Advertising Code that is contained in the *Therapeutic Goods Regulations 1990* (Cth).⁹⁸⁶ Organisations that breach laws relating to the advertising of therapeutic goods may be subject to financial penalties. Advertisements for therapeutic goods are also subject to the ACL.

Voluntary codes are monitored by specific industry associations such as Medicines Australia (for prescription medicines) and the Australian Self Medication Industry and the Complementary Healthcare Council of Australia (for non-prescription medicines).

Food Standards Australia New Zealand (**FSANZ**) is the independent statutory agency that develops the Australia and New Zealand Food Standards Code (discussed above). FSANZ does not enforce the Food Standards Code. Rather, enforcement is the responsibility of state or territory government agencies and the federal Department of Agriculture and Water Resources (for imports).⁹⁸⁷ For example, in Victoria local councils and the Department of Health & Human Services administer the *Food Act 1984* (Vic). The *Food Act 1984* (Vic) sets out offences including, for example, an offence for a person, for the purpose of effective or promoting the sale of any food in the course of carrying on a food business, to cause food to be advertised, packaged or labelled in a way that falsely describes the food. Penalties of \$40,000 apply in the case of an individual and \$200,000 in the case of a corporation.

⁹⁷⁹ *Children and Community Services Act 2004* (WA) s 191(2).

⁹⁸⁰ *Children and Community Services Act 2004* (WA) s 192.

⁹⁸¹ See for example, *Summary Offences Act 1988* (NSW) pt 3B.

⁹⁸² See for example, *Criminal Code* (Qld) s 210(1)(f).

⁹⁸³ See for example, *Crimes Act 1958* (Vic) pt 1, div 13; *Criminal Code Act 1924* (Tas) ss 130–130G.

⁹⁸⁴ Australian Competition and Consumer Commission, *Fines and Penalties* <<https://www.accc.gov.au/business/business-rights-protections/fines-penalties>>.

⁹⁸⁵ *Therapeutic Goods Act 1989* (Cth) s 42C.

⁹⁸⁶ *Therapeutic Goods Act 1989* (Cth) ss 42DL and 42DM.

⁹⁸⁷ Food Regulation, *How our system works* <<http://foodregulation.gov.au/internet/fr/publishing.nsf/Content/How-our-system-works>>.

The Australian Communications and Media Authority (**ACMA**) is the independent adjudicator that hears complaints relating to breaches of broadcast industry codes of practice that are registered with it (for example, the Commercial Television Industry Code of Practice). Individuals can complain to ACMA if they think a broadcaster (other than Australian Broadcasting Corporation (ABC) or the Special Broadcasting Service (SBS)) has breached a particular rule, including the ban against broadcasting tobacco advertisements, the requirement for certain therapeutic goods advertisements to be approved and the Children's Television Standards (**CTS**). Complaints under the CTS, other standards or a licence condition can be lodged directly with ACMA, whereas complaints regarding a breach of a code must first be lodged with the broadcaster before a complaint can be lodged with ACMA. Where a breach of a standard is found to have occurred, ACMA may vary or revoke a licence condition, impose an additional licence condition, suspend or cancel a licence, pursue a civil penalty in the Federal Court, or refer the matter to the Director of Public Prosecutions.⁹⁸⁸ However, ACMA cannot fine or prosecute a broadcaster for breaching a code.

Ad Standards (until 2018, known as the Advertising Standards Bureau), 'manages the complaint resolution process of the advertising self-regulation system'.⁹⁸⁹ It accepts complaints from consumers about the following codes and initiatives administered by it:

- AANA Code of Ethics;
- AANA Food & Beverages Code;
- AANA Code for Advertising & Marketing Communications to Children;
- FCAI Motor Vehicle Code;
- AFGC Responsible Children's Marketing Initiative (RCMI);
- AFGC Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children (QSRI);
- AANA Environmental Claims Code; and
- AANA Wagering Advertising & Marketing Communications Code.

Ad Standards acts as secretariat for the Ad Standards Community Panel and the Ad Standards Industry Jury.⁹⁹⁰

If a complaint is received by a consumer it is assessed and then provided to the Ad Standards Community Panel, which is described as including 'people from a broad range of age groups and backgrounds and is gender balanced, and as far as possible representative of the diversity of Australian society. Individual Community Panel members do not represent any particular interest group and are individually and collectively clearly independent of the industry'.⁹⁹¹ The Community Panel considers a case and can either uphold a complaint (if it determines there is a breach of a Code or Initiative) or dismiss a complaint (if the Community Panel determines there is no breach of a Code or Initiative). In the event that a complaint is upheld the following occurs:⁹⁹²

the advertiser is notified of the decision and provided with a draft case report. The advertiser is requested to remove or amend the offending advertisement as soon as possible.

The advertiser then has five business days to respond to the Community Panel's decision and confirm that the advertisement has been or will be removed. The Community Panel's decision and the final case report, incorporating the advertiser's advice that the advertisement has been removed, is usually provided to

⁹⁸⁸ Australian Communications and Media Authority, *Broadcasting rules & complaints* <<https://www.acma.gov.au/theACMA/ACMAi/Complaints/Broadcast-complaints/faqs-broadcasting-rules-and-complaints-acma-1#31>> [31]-[32].

⁹⁸⁹ Ad Standards, *Ad Standards* <<https://adstandards.com.au/about/ad-standards>>.

⁹⁹⁰ Ad Standards, *Fact sheet – The advertising complaint process* (26 March 2018) <https://adstandards.com.au/sites/default/files/files/fact_sheet_complaints_process_0318_0.pdf> and Ad Standards, *The advertising complaints process* <<https://adstandards.com.au/about/advertising-complaints-process>>.

⁹⁹¹ Ad Standards, *Fact sheet – The advertising complaint process* (26 March 2018) <https://adstandards.com.au/sites/default/files/files/fact_sheet_complaints_process_0318_0.pdf>.

⁹⁹² *Ibid.*

complainants and the public within 10 business days of the Community Panel's decision.

Competitors are also allowed to make complaints about a competitor's advertising, in which case it is heard by the Ad Standards Industry Jury which is comprised of a panel of lawyers appointed on a case-by-case basis.⁹⁹³

In 2017, Ad Standards received 6,472 complaints and of these, 66% (approx. 4,272) were determined within scope of the codes and were considered by the Community Panel. Of these, 15.98% (approx. 683) were upheld and 84.02% (approx. 3,589) were dismissed.⁹⁹⁴

3.7 Media

3.7.1 Privacy

Do children have a recognized right to privacy under the law, including the right to not have data or information electronically stored or made publicly available? Are media outlets prohibited from identifying child victims, children involved in court proceedings, or children in otherwise vulnerable situations?

The right to privacy and children

Australian legislation does not expressly recognise or protect a right to privacy specifically for children, although general protections can apply to the benefit of children and adults alike.

The right to privacy under Australian law

The *Privacy Act 1988* (Cth) (**Privacy Act**) operates to protect the privacy of individuals, and to balance that protection with the interests of entities carrying out their functions.⁹⁹⁵

The Privacy Act regulates the collection, use and disclosure of personal information. Under the Act, the definition of 'personal information' extends to images of people in which their identity is apparent or can be reasonably ascertained.⁹⁹⁶ The Act makes no distinction between the regulation of the personal information of adults and children. Additionally, it only applies to government agencies, private sector entities with annual turnover of more than \$3 million, and some smaller private sector entities such as health service providers.

There is no general prohibition on the publication of images of children. Rather, entities subject to the Privacy Act are subject to obligations and restrictions about how they can handle images which constitute personal information. Additionally, the Privacy Act does not apply to, and so does not prohibit, the publication of images of children by individuals acting in a personal capacity or small private sector entities.

However, there may be common law remedies available following publication of images of children. Australian common law and law of equity provide a range of avenues for individuals to seek redress for interferences with their privacy. This includes well-established common law torts such as trespass, negligence, nuisance and defamation. The equitable obligation of confidence also protects individuals from the unauthorised use of their information if it has the necessary quality of confidence and is imparted in circumstances importing an obligation of confidence. Beyond these common law protections, the High Court of Australia has held that a tort for the invasion of privacy could develop under the common law of Australia.⁹⁹⁷

The Australian Government has established the Office of the Australian Information Commissioner (OAIC) through the *Australian Information Commissioner Act 2010* (Cth). The OAIC is responsible for:

- 1) Freedom of information;

⁹⁹³ Ibid and Ad Standards, *The advertising complaints process* <<https://adstandards.com.au/about/advertising-complaints-process>>.

⁹⁹⁴ Ad Standards, *Review of Operations 2017 – Summary* <https://adstandards.com.au/sites/default/files/ad_standards_review_of_ops_summary_2017_final.pdf> 2-3.

⁹⁹⁵ *Privacy Act 1988* (Cth) s 2A.

⁹⁹⁶ Ibid, s 6.

⁹⁹⁷ *Australian Broadcasting Commission v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199. See further Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (DP 80) (March 2014) <https://www.alrc.gov.au/publications/3-overview-current-law/common-law-action-breach-privacy-australia#_ftn84>.

- 2) Privacy; and
- 3) Information policy.⁹⁹⁸

The *Charter of Human Rights and Responsibilities Act 2006* (Vic), the *Human Rights Act 2004* (ACT) and the *Human Rights Act 2019* (Qld) also provide that a person has a right not to have his/her privacy, family, home or correspondence unlawfully or arbitrarily interfered with.⁹⁹⁹

Right to privacy for children

Under the Privacy Act an image of a child that would enable the child to be identified (for example, showing their name or in school uniform) cannot be published without the consent of the child and their parent or guardian.¹⁰⁰⁰

Several key bodies in Australia (e.g. Council of Australian Governments (COAG) and the National Childcare Accreditation Council) have acknowledged that children require privacy. The National Children's Commissioner has also emphasised the importance of children's right to privacy in her annual reports, has provided resources on privacy to teachers and carers, held consultations with children and youth on privacy, and provided input to the Australian Law Reform Commission's Inquiry into Serious Invasions of Privacy in the Digital Era. However, to date it does not appear that an express legal protection of a child's right to privacy, distinct from the general protections in the Privacy Act, exists.

The right to not have data or information electronically stored or made publicly available

Unlike the European Union,¹⁰⁰¹ Australian law does not expressly create the right to request the deletion of information about a person that has been electronically stored.

The United Nations Human Rights Committee raised the issue of metadata retention in Australia's review in December 2017, concluding:¹⁰⁰²

While noting the availability of administrative oversight mechanisms concerning access to metadata retained by telecommunications providers for two years, the Committee is concerned about the lack of judicial authorization for access to such metadata and its extensive use in national security, including counter-terrorism, and criminal investigations (art. 17).

The State party should strengthen the safeguards against arbitrary interference with the privacy of individuals with regard to accessing metadata by introducing judicial control over such access.

Child victims, children involved in court proceedings, and children in vulnerable situations

At the federal level, child witnesses are entitled to vulnerable witness protections contained in Part IAD of the *Crimes Act 1914* (Cth).

States and Territory laws largely prohibit the publication of material that identifies children who are involved in court proceedings or child protection proceedings. For example in New South Wales, it is an offence to publish the name of a child or young person who is involved in any capacity in court or any aspect of non-court care proceedings.¹⁰⁰³

However, the Northern Territory has no prohibition on the publication of names of youth in criminal proceedings. Rather, the court has discretion to order that information relating to proceedings in the court, or the result of proceedings, will not be published.¹⁰⁰⁴ The *Royal Commission into the Protection and Detention of*

⁹⁹⁸ Office of the Australian Information Commissioner, n 101.

⁹⁹⁹ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13(a); *Human Rights Act 2004* (ACT) s 12(a) and the *Human Rights Act 2019* (Qld) s 25.

¹⁰⁰⁰ *Privacy Act 1988* (Cth) s 6; Australian Institute of Family Studies, *Images of children and young people online* (April 2015) <<https://aifs.gov.au/cfca/publications/images-children-and-young-people-online>>.

¹⁰⁰¹ European Commission, *Factsheet on the 'Right to be Forgotten'*, ruling (C-131/12) <https://www.inforights.im/media/1186/cl_eu_commission_factsheet_right_to_be-forgotten.pdf> [93].

¹⁰⁰² Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) [45]-[46].

¹⁰⁰³ *Children (Criminal Proceedings) Act 1987* (NSW) s 15A.

¹⁰⁰⁴ *Youth Justice Act 2005* (NT) ss 50-1.

Children in the Northern Territory found that '[c]ontrary to the Beijing Rules to which Australia is a party, proceedings in the Youth Justice Court are open to the public and identifying material about youth involved in proceedings may be published.'¹⁰⁰⁵ The Royal Commission went on to recommend that: '[p]roceedings under the *Youth Justice Act* (NT) should be heard in closed court, similar to child protection proceedings under the *Care and Protection of Children Act* (NT). The court should retain a discretion to publish all or part of a proceeding upon application.'¹⁰⁰⁶

3.7.2 Access

What measures have been taken to ensure that all children have access to digital and online media services in an equitable, non-discriminatory manner?

In 2009, NBN Co Limited was established by the Australian Government 'to design, build and operate Australia's new high-speed broadband network – the National Broadband Network'.¹⁰⁰⁷ It remains wholly owned by the Commonwealth of Australia, and it is a Government Business Enterprise (GBE). It is incorporated under the *Corporations Act 2001* (Cth) and is operated in accordance with the *Public Governance, Performance and Accountability Act 2013* (Cth).¹⁰⁰⁸ The Government's Statement of Expectations, issued on 24 August 2016, states the following policy objective behind the national broadband network (**nbn**):¹⁰⁰⁹

The Government is committed to completing the network and ensuring that all Australians have access to very fast broadband as soon as possible, at affordable prices, and at least cost to taxpayers. The Government expects the network will provide peak wholesale download data rates (and proportionate upload rates) of at least 25 megabits per second to all premises, and at least 50 megabits per second to 90 per cent of fixed line premises as soon as possible. nbn should ensure that its wholesale services enable retail service providers to supply services that meet the needs of end users.

The nbn is considered a piece of technological infrastructure of national significance due to its ability to provide internet services to individuals and communities across Australia. When the rollout is complete Australia will be the first continent and first country of its size and population density that has ensured all premises have access to wholesale broadband download speeds of at least 25 megabits per second.

On 22 June 2017, the Australian Government introduced to Parliament the Telecommunications Reform Package aimed at directly benefiting remote and rural communities by establishing:¹⁰¹⁰

- Statutory Infrastructure Provider reforms, which will create a legal obligation that all people living in Australia must be able to access super-fast broadband regardless of where they live and work;¹⁰¹¹ and
- The Regional Broadband Scheme (RBS), which will secure a long-term funding mechanism for the NBN fixed wireless and satellite networks, which predominantly provides internet access to regional Australia.¹⁰¹²

Later that year, on 20 December 2017, the Australian Government announced the Universal Service Guarantee (**USG**) to 'ensure that all Australians have access to voice and broadband services, regardless of where they live.'¹⁰¹³ The USG outlines, amongst other things, a guarantee regarding broadband services that:¹⁰¹⁴

¹⁰⁰⁵ Northern Territory, Royal Commission into the Protection and Detention of Children in the Northern Territory, *Findings and Recommendations* (2017) <<https://childdetentionnt.royalcommission.gov.au/Documents/Royal-Commission-NT-Findings-and-Recommendations.pdf>> 21.

¹⁰⁰⁶ Ibid, 44 (Recommendation 25.25).

¹⁰⁰⁷ Parliament of Australia, Joint Standing Committee on the National Broadband Network, *The rollout of the National Broadband Network, 1st Report of the 45th Parliament*, Commonwealth of Australia (September 2017) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Broadband_Network/NBN/First_report> [1.8]-[1.9].

¹⁰⁰⁸ See further NBN, *About nbn* <<https://www.nbnco.com.au/corporate-information/about-nbn-co.html>>.

¹⁰⁰⁹ Department of Communications and the Arts, *Statement of Expectations* (24 August 2016) <<https://www.communications.gov.au/publications/nbnstatementofexpectations>>.

¹⁰¹⁰ Department of Communications and the Arts, *Telecommunication Reform Package* <<https://www.communications.gov.au/what-we-do/internet/telecommunication-reform-package#regional-broadband-scheme>>.

¹⁰¹¹ Telecommunications Legislation Amendment (Competition and Consumer) Bill 2018 <<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22legislation/billhome/r5923%22;src1=sm1>>.

¹⁰¹² Telecommunications (Regional Broadband Scheme) Charge Bill 2018 <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5916>.

- NBN Co is providing broadband across Australia to all premises using fixed line (92% of premises), fixed wireless (5%) and satellite technologies (3%).
- NBN Co has prioritised the rollout to premises with poor broadband services, most of which are located in regional and rural areas. Over 98% of premises outside major urban areas can order an NBN service or have construction underway.
- New statutory service provider (SIP) obligations are being enacted, requiring NBN Co (and other SIPs) to make broadband services available to all premises.

The nbn includes two state of the art satellites to deliver broadband access to homes and businesses in regional and remote Australia, a service known as 'Sky Muster'.¹⁰¹⁵ The Government has worked with NBN Co to develop a special product using nbn Sky Muster satellites so distance education students and schools in the satellite footprint could have additional data they need to get the most out of their studies. As of 22 March 2019, 863 primary and secondary school students across regional Australia were benefiting from the Sky Muster product.¹⁰¹⁶ The distance education product provides 25/5 megabits per second (Mbps) service, separate from the standard home service, with a monthly download limit of 50 gigabytes (GB) per student for up to three students at the same site. Additionally, NBN Co's public interest premises (PIP) policy for Sky Muster customers is available to educational facilities such as schools. A data allowance of up to 300GB per month is provided and can apply to individual school buildings which allows additional installations. As at 22 March 2019, 117 primary and secondary schools are currently using the school PIP product.¹⁰¹⁷

NBN Co has sought to develop services for classes of Sky Muster users with specific product needs. For example, on 29 January 2018 NBN Co announced a trial of multicast technology over the Sky Muster service for 15 distance education schools across the Northern Territory. Multicast technology provides students the ability to share large files and to take part in 'virtual classrooms' from home without interfering with their standard broadband connection. It means the school will only need to send the data once to one place, and then nbn distributes it to students listening (instead of having it distributed one to one many times over). Multicast does not consume regular data quotas – it is in addition to the children's normal service. Pending the results of the trial, nbn plans to roll out the technology to various remote and regional locations across the country from mid-2018.

Additionally, nbn co announced in November 2018 the development of 'Sky Muster Plus', meaning once monthly data allowance is exhausted, 'wholesale download speeds will not be slowed down for regular web activities like accessing emails or internet banking.'¹⁰¹⁸ Sky Muster Plus is scheduled to be launched in mid-2019.¹⁰¹⁹

The Department of Communications and the Arts has reported that the nbn is on track to deliver peak wholesale download speeds of at least 25 Megabits per second (Mbps) to all Australian homes and businesses by 2020. As at April 2019, the network reaches three-quarters of the homes and businesses across Australia, and there are over 5 million active services on the NBN. 90 per cent of Australian premises on the fixed line network will be able to access speeds of 50 Mbps or higher by 2020.¹⁰²⁰

The long process of establishing the NBN has been a contentious one, with the project attracting criticisms about

¹⁰¹³ Senator the Hon Mitch Fifield, Minister for Communications and Minister for the Arts, 'Turnbull Government to improve regional telecoms delivery with new Universal Service Guarantee' (Media Release, 20 December 2017) <<https://www.minister.communications.gov.au/minister/mitch-fifield/news/turnbull-government-improve-regional-telecoms-delivery-new-universal>>.

¹⁰¹⁴ Department of Communications and the Arts, *Universal Service Guarantee – fact sheet* (5 December 2018)

<<https://www.communications.gov.au/documents/universal-service-guarantee-fact-sheet>>.

¹⁰¹⁵ nbn, *nbn Sky Muster satellite explained* <<https://www.nbnco.com.au/residential/learn/network-technology/sky-muster-explained>>.

¹⁰¹⁶ Figure provided by the Department of Communications and the Arts (12 April 2019).

¹⁰¹⁷ Ibid.

¹⁰¹⁸ Stephen Rue, *Sky Muster Plus to bring data relief to regional Australians*, nbn (12 November 2018)

<<https://www.nbnco.com.au/blog/the-nbn-project/sky-muster-plus-to-bring-data-relief-to-regional-australians>>.

¹⁰¹⁹ Information provided by the Department of Communications and the Arts (12 April 2019).

¹⁰²⁰ Ibid.

quality of service, transparency and equity of roll-out, and the use of technology (i.e. fibre-to-premises versus multi-technology-mix) amongst other things.¹⁰²¹ However, as at July 2018, nbn announced that Australia is projected to reach the top 10 OECD countries for internet equality by 2021 (assuming all other OECD countries hold constant at their 2016 figures).¹⁰²² It was explained: '[t]hanks to the early prioritisation of the rollout in regional areas, the digital divide between the city and the bush is shrinking, with new research revealing Australia now ranks 17th among OECD countries (up from 29th in 2012) in terms of equality of internet speed and proportion of people without internet access.'

An inquiry by the Joint Standing Committee on the National Broadband Network recently examined the issue of the rollout of the NBN in rural and regional areas specifically. In its report of November 2018, the Committee concluded.¹⁰²³

4.1 The NBN is vital to the economic development and social participation of Australians living in rural and regional communities. For those communities, the NBN provides the digital connectivity necessary to allow them to engage in education, access government services and participate in the global marketplace.

4.2 The rollout of the NBN in non-metropolitan areas is now 80 per cent complete and, in the committee's view, the last 12 months has seen an improvement in some aspects of NBN services in rural and regional Australia and new challenges emerge in other areas. However ongoing issues with the reliability of satellite and congestion in fixed wireless services is also a concern.

4.3 It is also a concern that there has been less deployment of the faster and more reliable FTTC fixed line technology in regional Australia, with FTTC deployment being concentrated in metropolitan areas.

4.4 The challenges of the nbn rollout in rural and regional Australia include the high costs required to meet geographical distribution of premises. Evidence was provided that nbn is expected to incur losses of around \$9.8 billion (net present value) out to 2040, or between \$700 to \$800 million per annum. The Department of Communications and the Arts undertook this modelling in 2015.

4.5 Increased data caps on Sky Muster satellite services have contributed to better consumer experiences.

4.6 While these are all important markers of progress, it is not to deny that there is still work to be done to provide communities in rural and regional Australia with very fast broadband at affordable prices. On this point, the committee notes ongoing community concerns that some consumers in regional Australia have the option of purchasing multiple services to meet their connectivity needs but this raises their broadband costs compared to consumers in the fixed line footprint.

¹⁰²¹ See Parliament of Australia, Joint Standing Committee on the National Broadband Network, *The rollout of the National Broadband Network, 1st Report of the 45th Parliament* Commonwealth of Australia (September 2017) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Broadband_Network/NBN/First_report> [8.65]-[8.67] and Tooran Alizadeh, 'The NBN: how a national infrastructure dream fell short', *The Conversation* (Media Release, 5 June 2017) <<https://theconversation.com/the-nbn-how-a-national-infrastructure-dream-fell-short-77780>>.

¹⁰²² nbn, 'Regional nbn network rollout on the home stretch' (2 July 2018) <<https://www1.nbnco.com.au/corporate-information/media-centre/media-statements/regional-nbn-rollout-on-the-home-stretch>>.

¹⁰²³ Joint Standing Committee on the National Broadband Network, *The rollout of the NBN in rural and regional areas, 2nd Report of the 45th Parliament* (November 2018) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Broadband_Network/Ruralandregionalrollout/Second_Report>.

| | |
|--|---|
| 3.7.3 Protection | Are there legal frameworks in place to protect children from exposure to material that is harmful to their wellbeing while recognizing children's right to information and to freedom of expression? What measures have been taken to develop and promote digital literacy for children and families, including an understanding of both the benefits and risks of online activities? |
| <p>The legal framework for protecting children in relation to advertising is discussed above in 3.6.1 – General restrictions.</p> <p>In terms of movies, television series and computer games, a classification scheme is set out in the <i>Classification (Publications, Films and Computer Games) Act 1995</i> (Cth) and, in case of online content, the <i>Broadcasting Services Act 1992</i> (Cth) seeks to protect children from harmful content.</p> <p>In relation to digital literacy, ‘Digital Technologies’ has been developed as one of the learning areas of the Australian Curriculum for all students from Foundation to Year 10.¹⁰²⁴ Under the ‘Inspiring all Australians in Digital Literacy and Science, Technology, Engineering and Mathematics’ (STEM) measures, the Australian Government is investing \$14 million over four years from 2016-17 to promote positive learning experiences for children aged three to five years.¹⁰²⁵ The Government also supports digital literacy activities for children, such as the Code Club Australia.¹⁰²⁶ The Office of the eSafety Commissioner has facilitated access to a number of online programs that educate people, particularly children and young people, on internet basics and staying safe online. Examples are ‘Hector’s World’,¹⁰²⁷ the ‘Cybersafety Help Button’¹⁰²⁸ and ‘Internet’¹⁰²⁹ (see further 3.7.4 – Online protection below).</p> <p>The Department of Education, Employment and Workplace Relations has also funded the eSmart Schools pilot project in 2010, is an initiative of The Alannah and Madeline Foundation that supports schools to embrace the benefits of technology and ensure they are doing everything possible to reduce students’ exposure to cyber-risks.¹⁰³⁰ In 2017, the Victorian Government made this framework available to all government schools and 300 Catholic and independent schools at no charge,¹⁰³¹ and announced the establishment of ten ‘Tech Schools’.¹⁰³²</p> | |
| 3.7.4 Online protection | What legal frameworks exist, including under criminal law, to protect children from online exploitation and harassment? What mechanisms are available for reporting and removing illegal content on the Internet? How have safe environments on the Internet for children been cultivated and encouraged? |
| <p>Issues regarding online protection of children are discussed above under 2.2 – National Priorities – 1) The safety and protection of children – Children in context: Online safety and protection from cyberbullying.</p> | |

¹⁰²⁴ Australian Government, *Digital Literacy Activities* <<https://www.literacyandnumeracy.gov.au/digital-literacy-activities>>.

¹⁰²⁵ Australian Department of Education and Training, *Support for Science, Technology, Engineering and Mathematics* <<https://www.education.gov.au/support-science-technology-engineering-and-mathematics>>.

¹⁰²⁶ Code Club Australia <<https://codeclubau.org/>>.

¹⁰²⁷ Australian Government, Office of the eSafety Commissioner, *Hector’s World* <<https://www.esafety.gov.au/education-resources/classroom-resources/hectors-world>>.

¹⁰²⁸ Australian Government, Office of the eSafety Commissioner <<https://esafety.gov.au/>>.

¹⁰²⁹ Department of Communications, *Internet* <<https://www.communications.gov.au/what-we-do/internet>>.

¹⁰³⁰ Alannah & Madeline Foundation, *What is eSmart Schools* <<https://www.esmart.org.au/esmart-schools/what-is-esmart-schools/>>.

¹⁰³¹ State Government of Victoria, Victorian Department of Education and Training, *eSmart – Helping schools improve cybersafety and deal with cyberbullying* <<http://www.education.vic.gov.au/about/programs/bullystoppers/Pages/esmart.aspx>>.

¹⁰³² State Government of Victoria, Victorian Department of Education and Training, *About Tech Schools* <<http://www.education.vic.gov.au/about/programs/learningdev/techschools/Pages/abouttechschools.aspx>>.

| 3.8 Security | |
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| 3.8.1 Recruitment of children | Is there a clear prohibition of the recruitment and use of children by public and private security providers? |
| <p>Public security providers</p> <p>As mentioned above in Section 1, Australia is a party to the <i>Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict</i>.</p> <p>The Australian Defence Force (ADF) has a minimum voluntary recruitment age of 17 years, provided that those volunteering have the written informed consent of their parents or guardians. According to the ADF¹⁰³³:</p> <p style="padding-left: 40px;">[t]he ADF abides by the spirit and intent of the Optional Protocol on the Rights of the Child on Involvement of Children in Armed Conflict. That means we will take all feasible measures to ensure that minors do not participate in hostilities; however there will be times when they may have to.</p> <p>The ADF's Military Personnel Policy Manual (MILPERSMAN) also addresses the 'Management and Administration of Defence Members under 18 Years of Age'. It outlines the ADF's domestic and international obligations regarding members who are under the age of 18 and the ADF's policies for compliance including the ADF's management and deployment policies.¹⁰³⁴</p> <p>The UN Committee on the Rights of the Child has encouraged the Australian Government to 'raise the minimum age of voluntary recruitment into the ADF to 18 years of age' and recommended that it further 'amend the criminal code to explicitly prohibit and criminalize the recruitment and use of children under the age of 18 years by the armed forces and armed groups'.¹⁰³⁵</p> <p>The State/Territory and Federal Police Forces impose a minimum age requirement of 18 years for employment.¹⁰³⁶</p> <p>Private security providers</p> <p>Any person who conducts a business or is employed in a security-related field within Australia is required to be licensed. Licensing is dealt with by state and territory legislation. In all states and territories, the granting of a licence to those under the age of 18 is prohibited. For example, section 15 of the <i>Security Industry Act 1997</i> (NSW) prohibits the granting of a licence to an applicant if the Commissioner of Police is not satisfied that the applicant is of or above the age of 18 years.</p> <p>Furthermore, the Australian Government is a member of the International Code of Conduct Association which provides for the prohibition of the worst forms of child labour in its Code of Conduct for Private Security Service Providers.¹⁰³⁷</p> | |

¹⁰³³ Australian Defence Force, *Defence Recruitment Centre: Age & Gender* <<http://www.defencejobs.gov.au/recruitment-centre/can-i-join/age-gender/>>.

¹⁰³⁴ Australian Government Department of Defence, *Military Personnel Policy Manual* (15 December 2017) ch 5 <<http://www.defence.gov.au/PayAndConditions/ADF/Resources/MILPERSMAN.pdf>>.

¹⁰³⁵ United Nations Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 8, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict - Concluding Observations: Australia*, 60th sess, UN Doc CRC/C/OPAC/AUS/CO/1 (11 July 2012) <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/OPAC/AUS/CO/1&Lang=En> [18] and [23(a)].

¹⁰³⁶ See, for example, NSW Government, NSW Police Recruitment, *Am I Eligible?*

<http://www.police.nsw.gov.au/recruitment/eligibility_quiz>.

¹⁰³⁷ Schweizerische Eidgenossenschaft, *International Code of Conduct for Private Security Service Providers* (9 November 2010)

<https://www.icoca.ch/sites/all/themes/icoca/assets/icoc_english3.pdf> [22] and [41].

| | |
|---------------------------------------|---|
| 3.8.2 Security | To what extent are public and private security providers required to consider and respect children's rights in operations and activities to protect business interests? |
| | <p>There are no laws expressly requiring security providers to consider and respect children's rights in operations and activities. However, security providers operating in Australia must comply with the applicable state and federal laws (which extend to the rights of children).¹⁰³⁸ For example, there are laws in force concerning criminal offences (i.e. the <i>Criminal Code 1995</i> (Cth) and State and Territory criminal laws).¹⁰³⁹ In NSW and Qld, persons will be automatically disqualified from getting or holding a security licence if they have committed an offence in Australia or overseas relating to terrorism.¹⁰⁴⁰</p> <p>Some state legislation provides for a broad and general form of protection of rights such as the <i>Security and Investigation Agents Act 1995</i> (SA), which states that '[a] license does not confer on an agent power or authority to act in contravention of, or in disregard of, law or rights or privileges arising under or protected by law.'¹⁰⁴¹</p> <p>The Australian Government has made a commitment to addressing these issues through being a participant in the Voluntary Principles on Security and Human Rights (VPs) since February 2013. Established in 2000, the VPs are a set of principles designed to guide companies in maintaining the safety and security of their operations within an operating framework that encourages respect for human rights.¹⁰⁴² The VPs provide guidance on, for example, 'Responses to Human Rights Abuses' regarding how companies should monitor, record and report such abuses, and these could be relevant to the rights of children.¹⁰⁴³</p> <p>As a part of its commitment to the VPs, the Australian Government provides annual reports to the initiative and has also drafted a National Action Plan on the VPs. Australia's involvement has also led to the Department of Foreign Affairs and Trade (DFAT) partnering with Global Compact Network Australia and the Australia-Africa Mining Investment Group to hold round table discussions with industry associations (including security companies) on an Australian VPs community of practice.¹⁰⁴⁴</p> <p>As a signatory to the <i>Rome Statute of the International Criminal Court</i>,¹⁰⁴⁵ Australian security providers are also subject to the jurisdiction of the International Criminal Court (the ICC). This includes jurisdiction over war crimes which, for example, includes the use or conscription of child soldiers.</p> |
| 3.8.3 Monitoring / enforcement | What sanctions may be sought against businesses that use or recruit children in the provision of security? |
| | <p>Corporations or individuals that provide unlicensed security staff in the relevant jurisdiction will be in breach of the relevant State or Territory legislation, as will the unlicensed individual. For example, under sub-section 7(1) of the <i>Security Industry Act 1997</i> (NSW) a corporation providing unlicensed persons to carry on security activities will be subject to a maximum penalty of a \$110,000, while an individual providing unlicensed persons will be subject to a maximum penalty of \$55,000 or imprisonment for 2 years, or both. Sub-section 7(2) of the <i>Security Industry Act 1997</i> (NSW) provides that a person carrying on a security activity without a licence is subject to a maximum penalty of \$55,000 or imprisonment for 2 years, or both.</p> |

¹⁰³⁸ Tim Prenzler and Rick Sarre, 'The Evolution of Security industry regulation in Australia: A Critique' (2012) 1(1) *International Journal for Crime and Justice* <<https://www.crimejusticejournal.com/article/view/674>> 38-51, 39.

¹⁰³⁹ Rick Sarre, 'Private Security in Australia: Some Legal Musings' (2010) 3 *Journal of the Australasian Law Teachers Association* 45.

¹⁰⁴⁰ *Security Industry Regulation 2016* (NSW) s 15(1)(k); Qld Government, *Disqualifying offences for security licences* <<https://www.qld.gov.au/law/laws-regulated-industries-and-accountability/queensland-laws-and-regulations/regulated-industries-and-licensing/regulated-industries-licensing-and-legislation/security-industry-regulation/legal-requirements-for-the-security-industry/disqualifying-offences-for-security-licences>>.

¹⁰⁴¹ *Security and Investigation Agents Act 1995* (SA) s 15(1).

¹⁰⁴² Voluntary Principles on Security and Human Rights, *Home* <<http://www.voluntaryprinciples.org/>>.

¹⁰⁴³ Voluntary Principles on Security and Human Rights <<http://www.voluntaryprinciples.org/what-are-the-voluntary-principles/>>.

¹⁰⁴⁴ Government of Australia, *Annual Report to the Voluntary Principles on Security and Human Rights Initiative 2014* (2015) <<http://www.voluntaryprinciples.org/wp-content/uploads/2015/04/Government-of-Australia-Public-Report-April-2015.pdf>>.

¹⁰⁴⁵ *Rome Statute of the International Criminal Court* UNTS 2187 (signed 17 July 1998, entered into force 1 July 2002) 3 <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&clang=_en>.

| 3.9 Conflict zones and situations of emergency | |
|---|---|
| 3.9.1 Emergency responses | When businesses are invited to participate in emergency response efforts, what measures are undertaken to protect against violations of children's rights including forced labour, trafficking, and other forms of exploitation? |
| <p>International humanitarian response</p> <p>As outlined above at 2.2 – National Priorities 1) The safety and protection of children - Internationally, the Department of Foreign Affairs and Trade (DFAT) has in place a Child Protection Policy (2017) which articulates a zero tolerance of child exploitation and abuse.¹⁰⁴⁶ The policy applies all DFAT funded partners (including private entities),¹⁰⁴⁷ and it applies to both development programs, and to humanitarian/emergency response.¹⁰⁴⁸</p> <p>Domestic emergency response</p> <p>There is no standard practice in domestic emergency response planning in Australia that focuses on the unique needs of children.¹⁰⁴⁹ For example, a 2013 survey of 239 local, State and Territory emergency management plans found that 15% (37 out of 239) of local plans analysed made no mention of children, infants or young people, and if children are named in emergency management plans it is a cursory mention.¹⁰⁵⁰</p> | |
| 3.9.2 Due diligence | What, if any, additional measures are businesses that operate in conflict zones, emergencies or other situations of high risk to children's rights required, expected or encouraged to undertake to mitigate potential negative impact? |
| <p>As outlined above in 3.9.1 – Emergency responses, private entities receiving DFAT funding are required to assess and manage child protection risk and impact under the DFAT Child Protection Policy. However, this only applies to DFAT funded private entities, and it would not apply generally to private entities conducting usual business operations in conflict zones or emergency situations. See above at 3.1 – General measures and 3.9.1 – Emergency responses.</p> <p>There does not appear to be additional State, Territory or Federal laws or policy frameworks that specifically relate to businesses that operate in conflict zones, emergencies or other situations of high risk to children's rights (apart from the Voluntary Principles on Security and Human Rights applying to extractive companies, mentioned above at 3.8 – Security).</p> | |
| 3.10 Remedies | |
| 3.10.1 Mechanisms | What mechanisms are available for children to bring complaints about business-related violations (e.g. courts, national human rights institutions ('NHRIs'), and children's ombudspersons)? |
| <p>While there are some mechanisms through which children are able to raise complaints about business-related human rights violations, children in Australia, along with children throughout the world, face significant practical and legal barriers to enforcing their rights. A 2011 report published by UNICEF concluded globally that:¹⁰⁵¹</p> <p>...children have very limited options to obtain remedy for corporate violations of their rights and those options which are available often prove illusory in reality. Despite the plethora of possibilities, the existing framework for</p> | |

¹⁰⁴⁶ Department of Foreign Affairs and Trade, *DFAT Child Protection Policy 2017* (2018) <<http://dfat.gov.au/international-relations/themes/child-protection/Documents/child-protection-policy.pdf>> 3.

¹⁰⁴⁷ Ibid, 21-22.

¹⁰⁴⁸ Ibid, 7.

¹⁰⁴⁹ Save the Children Australia, *Don't leave me alone: Protecting Children in Australian Disasters and Emergencies* (2013) <https://resourcecentre.savethechildren.net/node/8288/pdf/301013_dont_leave_me_alone.pdf>.

¹⁰⁵⁰ Ibid, 10.

¹⁰⁵¹ Frances Sheahan, *Effective Remedy and Corporate Violations of Children's Rights*, UNICEF (October 2011) <<http://accessfacility.org/sites/default/files/UNICEF%20-%20Effective%20Remedy%20and%20Corporate%20Violations%20of%20Children%27s%20Rights.pdf>> 4.

holding companies accountable for violations of children's rights does not serve children well.

The report noted the following general obstacles that children around the world face when trying to accessing judicial remedies:¹⁰⁵²

- Legal standing of children;
- Lack of knowledge and understanding of rights and remedies;
- Costs of bringing cases;
- Statutes of limitation;
- Impact of out of court settlements; and
- Lack of class actions.

In addition, children and families affected by the operations and actions of Australian businesses outside of Australia face acute challenges to accessing a remedy for human rights violations. In particular, the issues identified above are exacerbated due to:¹⁰⁵³

- Complex rules governing applicable law and restricted interpretations of court jurisdiction; and
- Determining liable parties.

This means that remedies are, with rare exceptions, generally confined to those available under local law and in practice, are rarely efficacious. Only exceptionally will a child (or adult) victim of business-related human rights abuse have a remedy against the parent company of the perpetrator or the brand retailer the execution of whose supply order causes the harm. Other factors such as corruption and a lack of protection for child and adult human rights defenders can also make them vulnerable to reprisals and victimisation, and can inhibit access to remedy even if it is technically available.¹⁰⁵⁴

Children in Australia and internationally face these and other barriers to justice when seeking remedy for business-related human rights abuses. This section will first consider children's access to justice generally, then seek to outline children's access to justice for business-related human rights abuses specifically.

Children's access to justice - General

In terms of access to justice generally, many observations of the Australian Law Reform Commission in the 1997 report *Seen and Heard: Priority for Children in the Legal Process* remain current, although undoubtedly significant improvements have occurred in some contexts. In 2016, the Australian Child Rights Taskforce summarised major findings of the ALRC report as follows:¹⁰⁵⁵

- Consistent failure to consult with and listen to children in matters affecting them;
- Lack of coordination in the delivery of services to children, particularly due to issues of jurisdictional divisions between different agencies and levels of government;
- A concentration of specialist services and programs in metropolitan areas, disadvantaging children in rural and remote areas; and
- Court processes which are bewildering and intimidating for children.

In 2014, Child Rights International Network (CRIN) ranked Australia at 37 out of 197 countries in terms of children's access to justice generally.¹⁰⁵⁶ As for all aggrieved people, engagement with informal mechanisms, such as a state-based Ombudsman, may be easier and more accessible than pursuing a cause of action in the court system even though the powers to enforce remedies through these informal mechanisms are limited.

Also in 2014, the Australian Productivity Commission noted with regard to civil law in Australia that:¹⁰⁵⁷

¹⁰⁵² Ibid, 9-12.

¹⁰⁵³ UNICEF and the International Commission of Jurists, n 6, 46-47.

¹⁰⁵⁴ Ibid.

¹⁰⁵⁵ Australian Child Rights Taskforce, n 763, 72.

¹⁰⁵⁶ Child Rights International Network, *Access to Justice for Children: Global Ranking* <<https://www.crin.org/en/access-justice-children-global-ranking>>.

¹⁰⁵⁷ Productivity Commission, *Access to Justice Arrangements – Productivity Commission Inquiry Report No. 72* (5 September 2014) <<https://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-overview.pdf>> 2.

There are widespread concerns that Australia's civil justice system is too slow, too expensive and too adversarial. But the notion of a civil justice 'system' is misleading. Parties can resolve their disputes in many ways, including through courts, tribunals and ombudsmen. Each differs in its formality, cost and timeliness. Such a complex system resists both a single diagnosis and remedy.

The Productivity Commission went on to find the gap in independent lawyer services for children 'especially worrying.'¹⁰⁵⁸ It recommended that Australian governments needed to provide an additional \$200 million/year to address these shortcomings and barriers to justice.¹⁰⁵⁹

In order to improve children's access to justice generally, the Australian Child Rights Taskforce recommended in 2016 that the Australian Government, and State and Territory Governments, work together to:¹⁰⁶⁰

1. Establish youth specific legal centres in jurisdictions that currently do not have them (Tasmania and the Northern Territory) to ensure young people have access to legal services tailored to their specific needs.
2. Make a concerted effort to provide means by which children and others advocating on their behalf are supported to navigate complex legal systems, including funding culturally competent legal services delivered by Aboriginal and Torres Strait Islander community-controlled organisations.
3. Provide children with appropriate child-friendly complaint and reporting mechanisms to ensure more effective access to justice for children across the justice system.
4. Examine how the national curriculum might be also engaged to educate children about their help seeking options.
5. Adequately fund and support Community Legal Centres (CLC), Legal Aid Commissions and Aboriginal and Torres Strait Islander Legal Services (ATSILS) to engage with young people, and make their services more accessible to young people. An appropriate approach could reflect the findings of the Law and Justice Foundation: providing legal assistance to disadvantaged people needs to be targeted to those most in need, joined-up with other services (non-legal and legal), and timely, to minimise the impact of problems and maximise utility of the service (Plesance 2014).

Children's access to justice - Business-related human rights abuses

As set out above in **1.3 – National Standards**, there is a fundamental gap in the protection of human rights in Australia because there is no federal statutory charter or a constitutional bill of rights. Rather, specific and ad hoc rights are contained in the key federal anti-discrimination acts (sex, race, disability and age) and other legislation. Additionally, there is no legislation which specifically incorporates children's rights as outlined in the Children's Convention into domestic law.

In part because of this, there does not appear to be a domestic mechanism for a child to raise a complaint against a company where the company has breached a human right provided for by an international human rights instrument such as the Children's Convention and seek effective remedies, except in circumstances where a right has been specifically incorporated into domestic Australian legislation or it otherwise exists at common law. For example, children can bring a civil claim against a company for assault, personal injury or false imprisonment, provided they have a litigation guardian in the proceedings. Also, companies that breach federal anti-discrimination law can be subject to a complaint to the AHRC and, in some circumstances, a complaint can be progressed to the Federal Court which has powers to order a range of remedies if discrimination under these laws is found to have occurred (discussed further below).

The 2016 Joint Civil Society Statement on *Implementing the UN Guiding Principles on Business and Human Rights in Australia* observed the following barriers to justice facing all people regarding business-related human rights

¹⁰⁵⁸ Ibid, 30.

¹⁰⁵⁹ Ibid, 63.

¹⁰⁶⁰ Australian Child Rights Taskforce, n 763, 73.

abuses:¹⁰⁶¹

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.

It went on to recommend that the Australian Government:¹⁰⁶²

- explores options for reducing existing barriers that prevent victims of corporate human rights abuse from obtaining effective remedy;
- explores options for developing and strengthening alternative remedy mechanisms that provide an alternative to the 'traditional' judicial system;
- 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.

More recently, the Multi-Stakeholder Advisory Group on the Implementation of the UN Guiding Principles on Business and Human Rights recommended that the Australian Government '[e]stablish an inquiry to consider how to reduce the procedural and substantive barriers to accessing remedy through judicial and administrative mechanisms for domestic and overseas business-related human rights abuses.'¹⁰⁶³

Focusing specifically on the issue of 'Child rights and the business sector', the Committee on the Rights of the Child recommended in 2012 that Australia:¹⁰⁶⁴

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

A report published by the Human Rights Law Centre in December 2018 also chronicled numerous human rights abuses occurring overseas regarding which affected communities – including children – have rarely had access to justice. The report summarised:¹⁰⁶⁵

In most cases, communities' attempts to seek justice locally have been thwarted by corruption, poverty or lack of effective law enforcement. Local authorities have in some cases been directly complicit in the violations or compromised by their financial dependence on the business operation.

Attempts by communities to take legal action through the Australian courts have likewise faced enormous legal, procedural and cost hurdles and have rarely succeeded.

Australia's criminal laws for extraterritorial corporate human rights violations have never been used, and its only non-judicial grievance body, the Australian OECD National Contact Point (ANCP), is barely resourced and dysfunctional.

¹⁰⁶¹ Implementing the UN Guiding Principles on Business and Human Rights in Australia – Joint Civil Society Statement, n 61, 18.

¹⁰⁶² Ibid, 18-9.

¹⁰⁶³ Multi-Stakeholder Advisory Group on the Implementation of the UN Guiding Principles on Business and Human Rights, n 60, 5.

¹⁰⁶⁴ United Nations Committee on the Rights of the Child, n 130, [28].

¹⁰⁶⁵ Human Rights Law Centre, *No Where to Turn* (2018)

<<https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/5c1aa50a8a922db8f09e5c1b/1545250097352/Nowhere+to+Turn.pdf>> 4.

As such, there is acknowledgement that the mechanisms available in Australia, and laws that might provide a cause of action, do not provide accessible and readily available avenues for redress for children and other members of the community who have experienced business-related human rights abuses in all cases; whether they occurred within Australia or internationally by Australian companies operating abroad.¹⁰⁶⁶

While acknowledging this, the below section outlines some mechanisms that a child (or their guardian) may use to pursue a claim or complaint in certain circumstances.

Australian Human Rights Commission

The President of the AHRC has power to receive and investigate complaints from children in relation to three types of complaints:

1. **Category 1:** discrimination, harassment and bullying that is based on a child's sex, disability, race or age (as provided under federal anti-discrimination law);¹⁰⁶⁷
2. **Category 2:** discrimination, harassment and bullying in the context of employment based on a child's criminal record, trade union activity, political opinion, religion or social origin (as provided under the AHRC Act);¹⁰⁶⁸ and
3. **Category 3:** breaches of a child's human rights by the Commonwealth or its agencies as contained under specific international human rights instruments (e.g. the Children's Convention).¹⁰⁶⁹

Only complaints arising from category 1 and 2 can be brought against a private corporation.

Children and young people, like adults, have the right to complain to the AHRC when they believe their rights have been breached as outlined above. In order to be accepted, the complaint must:¹⁰⁷⁰

- be in writing;
- be lodged by a person aggrieved by alleged unlawful discrimination or by a person on behalf of one or more other people aggrieved by the alleged unlawful discrimination;
- allege acts, omissions or practices and it must be reasonably arguable that the alleged acts, omissions or practices are unlawful discrimination; and
- set out, as fully as practicable, the details of the alleged acts, omissions or practices.

The President of the AHRC must undertake an initial assessment of the complaint, and must terminate the complaint where the President is satisfied that:

- the complaint is trivial, vexatious, misconceived or lacking in substance; or
- there is no reasonable prospect of the matter being settled by conciliation;¹⁰⁷¹ or
- there would be no reasonable prospect that the Federal Court or the Federal Circuit Court would be satisfied that the alleged acts, omissions or practices are unlawful discrimination.¹⁰⁷²

The President has the discretion to terminate a complaint in certain circumstances, including where satisfied that in all the circumstances, an inquiry, or a continuation of an inquiry, is not warranted, or the President is

¹⁰⁶⁶ See, for example, Human Rights Law Centre, n 1067; ActionAid Australia, *South African Women Arrive in Australia to Hold Mining Company South32 to Account for Rights Violations*, 9 November 2018 <<https://actionaid.org.au/resources/south-african-women-arrive-in-australia/>>; 'Women's rights group urge South32 to address South African coal mine impacts', *Resources Review* (29 October 2018) <https://www.nationalresourcesreview.com.au/news_article/womens-rights-group-urge-south32-to-address-south-african-coal-mine-impacts/>.

¹⁰⁶⁷ Australian Human Rights Commission, *The Complaint Process for complaints about sex, race, disability and age discrimination* <<https://www.humanrights.gov.au/sites/default/files/UD%20Complaint%20Process%20-April%202017.pdf>>.

¹⁰⁶⁸ Australian Human Rights Commission, *The Complaint Process for complaints about discrimination in employment based on religion, criminal record, trade union activity, political opinion and social origin* <https://www.humanrights.gov.au/sites/default/files/ILO%20Complaint%20Process%20-%20April%202017_0.pdf>.

¹⁰⁶⁹ Australian Human Rights Commission, *The Complaint Process for complaints about breaches of human rights by the Commonwealth*, <https://www.humanrights.gov.au/sites/default/files/HR%20Complaint%20Process%20-%20April%202017_1.pdf>.

¹⁰⁷⁰ *Australian Human Rights Commission Act 1986* (Cth) s 46P.

¹⁰⁷¹ *Ibid*, s 46PH(1B).

¹⁰⁷² *Australian Human Rights Commission Act 1986* (Cth) s 46PH(1C).

satisfied that the alleged acts, omissions or practices are not unlawful discrimination.¹⁰⁷³

The AHRC provides an online resource that is specifically dedicated to young people, entitled 'Help for young people: don't cop discrimination.'¹⁰⁷⁴ The complaint service is free of charge, is accessible for all applicants online and can be made in any language.

The AHRC generally seeks to resolve complaints through conciliation. This process also enables people involved in a complaint to talk through the issues with help of someone impartial and seeks to allow complainants and respondents to conciliate the matter how the parties prefer.¹⁰⁷⁵

For category 1 complaints where the President of the AHRC is satisfied that the complaint cannot be resolved through the conciliation process, the President of the AHRC will terminate the complaint. Following this, a child can make an application to the Federal Court or Federal Circuit Court in certain circumstances (see below).¹⁰⁷⁶

For category 2 complaints, if the complaint is not resolved or otherwise discontinued, the President of the AHRC will determine whether there has been unlawful discrimination under the AHRC Act. If the President is satisfied that there has been unlawful discrimination, the President will report the matter to the Federal Attorney-General and can, among other things, recommend compensation for loss or injury suffered. The report must be tabled in Parliament.¹⁰⁷⁷

For category 3 complaints (against the Commonwealth or one of its agencies) if the complaint is not resolved or otherwise discontinued, the President of the AHRC will determine whether there has been a breach of human rights under the relevant international human rights instrument. If the President is satisfied that there has been a breach of human rights, the President will report the matter to the Federal Attorney-General and can, among other things, recommend compensation for loss or injury suffered. The report must be tabled in Parliament.¹⁰⁷⁸ There is no obligation on the Federal Attorney-General to act on the President's recommendation contained in a report.

The AHRC has reported that over 2016-17, 7% (12) complaints were received that related to the Children's Convention¹⁰⁷⁹ and, over 2015-16, 10% (30) related to the Children's Convention.¹⁰⁸⁰ Of all complaints received by the AHRC, the majority were made in the context of employment, followed by the provision of goods, services and facilities.¹⁰⁸¹ This indicates that the businesses are involved in a significant number of complaints before the Commission.

Courts

At the outset, it is important to note that civil proceedings to protect the rights and interests of a child are

¹⁰⁷³ Ibid, s 46PH(1).

¹⁰⁷⁴ Australian Human Rights Commission, *Complaints information for young people* <<http://www.humanrights.gov.au/complaints-information-young-people>>.

¹⁰⁷⁵ Australian Human Rights Commission, *Conciliation – how it works* <<https://www.humanrights.gov.au/complaints/complaint-guides/conciliation-how-it-works>>.

¹⁰⁷⁶ Australian Human Rights Commission, *The Complaint Process: for complaints about sex, race, disability and age discrimination* <https://www.humanrights.gov.au/sites/default/files/UD%20Complaint%20Process%20-April%202017_.pdf>.

¹⁰⁷⁷ Australian Human Rights Commission, *The Complaint Process: for complaints about discrimination in employment based on religion, criminal record, trade union activity, political opinion and social origin* <https://www.humanrights.gov.au/sites/default/files/UD%20Complaint%20Process%20-%20April%202017_0.pdf>.

¹⁰⁷⁸ Australian Human Rights Commission, *The Complaint Process: for complaints about breaches of human rights by the Commonwealth*, <https://www.humanrights.gov.au/sites/default/files/HR%20Complaint%20Process%20-%20April%202017_1.pdf>.

¹⁰⁷⁹ Australian Human Rights Commission, *2016 - 2017 Complaint statistics*

<https://www.humanrights.gov.au/sites/default/files/Complaints_AR_Stats_Tables%202016-2017.pdf>.

¹⁰⁸⁰ Ibid.

¹⁰⁸¹ The Commission reported that over 2016-2017, 'Complaints about employment made up 78% of complaints under the Sex Discrimination Act, 58% of complaints under the Age Discrimination Act, 33% of complaints under the Disability Discrimination Act and 26% of complaints under the Racial Discrimination Act. The provision of goods, services and facilities was the other main area of complaint making up 33% of complaints under the Disability Discrimination Act, 25% of complaints under the Age Discrimination Act, 20% of complaints under the Racial Discrimination Act and 13% of complaints under the Sex Discrimination Act.' Australian Human Rights Commission, *2016 - 2017 Complaint statistics* <https://www.humanrights.gov.au/sites/default/files/Complaints_AR_Stats_Tables%202016-2017.pdf>.

primarily commenced on the child's behalf by a legal guardian/legal representative (see the section on **3.10.2 – Standing** below for further information on the legal status of children).

As explained above, one option to pursue a complaint under federal anti-discrimination law in court arises under s 46PO of the *Australian Human Rights Commission Act 1986* (Cth) where a complaint lodged with the AHRC is terminated by the President of the Commission. If the court grants leave, and if other requirements are met (i.e. the complaint involves an issue of public importance that should be considered by the Federal Court or the Federal Circuit Court (and was terminated under section 46PH(1)(h)) or that there is no reasonable prospect of the matter being settled by conciliation (and was terminated under paragraph 46PH(1B)(b))¹⁰⁸² it is possible for an applicant to apply to have the matter heard in the Federal Court of Australia or the Federal Circuit Court of Australia. An applicant has 60 days after notice that their complaint lodged with the AHRC has been terminated to apply to the Federal Court/Federal Circuit Court (or within such further time as the court allows). If the Court is satisfied that there has been unlawful discrimination, the court may make such orders as it sees fit.¹⁰⁸³

Children (through their legal guardian/representative) can also bring cases in domestic courts to challenge violations of their rights where there is a cause of action established by legislation or the common law. These proceedings can be commenced for civil claims (e.g. tort or consumer claims).¹⁰⁸⁴ In contrast, a child cannot commence proceedings in court for criminal offences committed by companies (e.g. corporate liability offences as discussed earlier in this report). Rather such prosecutions must be brought against a company by the relevant Director of Public Prosecutions. Directors of Public Prosecutions are generally required to consider the public interest in deciding whether or not to proceed with a prosecution, and the age or youth of a victim is a relevant factor in determining the public interest.¹⁰⁸⁵

State/Territory human rights legislation

As mentioned at **1.3 – National Standards**, human rights charters exist in the Australian Capital Territory (ACT), Queensland and Victoria. These laws set out a number of human rights that will be recognised by the courts in these jurisdictions including some that are specific to children.

Section 40 of the *Human Rights Act 2004* (ACT) allows for proceedings to be commenced against a 'public authority' that has failed to give proper consideration to a human right or has acted in a manner that is incompatible with a human right. There is (very) limited scope/potential for a corporation to fit within the definition of 'public authority'. The only seemingly possible scope arises from the way in which 'territory instrumentality', which is one limb of the 'public authority' definition, has previously been considered in ACT Supreme Court. Burns J in *Stewart v Wreck Bay Aboriginal Community Council*¹⁰⁸⁶ defined a 'territory instrumentality' as the following:¹⁰⁸⁷

The third limb of the definition of public authority in s 40 of the HRA relied upon by the plaintiffs is that the body is 'a territory instrumentality'. This term is also not defined in the HRA but is defined in the Dictionary to the Legislation Act as meaning a corporation that is established under an Act or statutory instrument [i.e. by an ACT statutory instrument], or under the Corporations Act 2001 (Cth) (the **Corporations Act**), and is a territory instrumentality under the [Public Sector Management Act 1994 (ACT) (**PSMA**)]. A 'territory instrumentality' under the PSMA is defined as meaning a body corporate that is established by or under an Act, or under the Corporations Act, and—

(a) is comprised of people, or has a governing body comprised of people, a majority of whom are appointed by a Minister or an agent or instrumentality of the Territory; or

¹⁰⁸² Those requirements are outlined in *Australian Human Rights Commission Act 1986* (Cth) s 46PO. i.e. that the complaint was terminated under paragraph 46PH(1)(h); or that the complaint was terminated under paragraph 46PH(1B)(b).

¹⁰⁸³ *Australian Human Rights Commission Act 1986* (Cth) s 46PO.

¹⁰⁸⁴ Child Rights International Network, *Access to Justice for Children: Australia* (2015) <https://www.crin.org/sites/default/files/australia_access_to_justice_-_updated_aug_2015.pdf>.

¹⁰⁸⁵ Office of the Director of Public Prosecutions New South Wales, n 813, [3.17].

¹⁰⁸⁶ *Stewart v Wreck Bay Aboriginal Community Council* (2014) ACTSC 334.

¹⁰⁸⁷ *Stewart v Wreck Bay Aboriginal Community Council* (2014) ACTSC 334 at [75].

- (b) is subject to control or direction by a Minister; or
- (c) is declared under section 3A to be a territory instrumentality; but does not include—
- (d) at administrative unit; or
- (e) a body declared under section 3A not to be a territory instrumentality.

There are a limited notifiable instruments made under the PSMA which indicate the types of bodies that may or will be declared to be/not be a 'territory instrumentality' under section 3A.

Beyond a body that is deemed to be a 'public authority', under section s 40D of the *Human Rights Act 2004* (ACT), a corporation may be subjected to the obligations of a 'public authority' where it voluntarily elects for this to be the case by virtue of s 40D(1) of the *Human Rights Act 2004* (ACT).

In the case of Victoria, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) also provides that certain obligations must be upheld by 'public authorities'. Similarly to the ACT however, the ability of a child to commence a proceeding against a company is extremely, if not entirely, limited by the fact that causes of action can only be brought against entities that fall within the definition of a 'public authority'. Unlike the *Human Rights Act 2004* (ACT), the Victorian Charter does not have an opt-in equivalent for corporations.

Children's Commissioners

The National Children's Commissioner is the key advocate for children in Australia. Whilst the work of the National Children's Commissioner has included issues relating to business and children's rights, this statutory office does not have the power to make complaints on behalf of children (although the Australian Human Rights Commission can intervene as *amicus curiae*)¹⁰⁸⁸ (see further **1.3 – National Standards**).

As mentioned above at **1.3 – National Standards**, States and Territories across Australia also have one or more statutory offices of children's commissioners/advocates and/or guardians empowered to protect the rights of children in certain circumstances and in different ways.¹⁰⁸⁹ In general, a children's commissioner works to improve and ensure better services for all children, whereas a children's guardian works solely to help improve the services for children in the care of a government department.¹⁰⁹⁰ Several of these offices play a significant role with regard to the administration of the Working With Children Checks and issues relating to the employment of children.

However, the powers of these roles to raise complaints on behalf of children do not specifically extend to issues specific to children's rights and business concerns. For example, in Queensland and Northern Territory, the Public Guardian can assist children and young people to raise complaints (although there is no explicit role with respect to complaints against companies).¹⁰⁹¹

¹⁰⁸⁸ Australian Human Rights Commission, *About the National Children's Commissioner*

<<https://www.humanrights.gov.au/publications/childrens-rights-report-2013/about-national-children-s-commissioner>>.

¹⁰⁸⁹ Australian Capital Territory: Children and Young People Commissioner; New South Wales: NSW Advocate for Children and Young People, NSW Office of the Children's Guardian; Northern Territory: Children's Commissioner; Queensland: Queensland Family and Child Commission, Office of the Public Guardian; South Australia: Commissioner for Children and Young People, Guardian for Children and Young People, Council for the Care of Children, Tasmania: Commissioner for Children and Young People; Victoria: Principal Commissioner for Children and Young People, Commissioner for Aboriginal Children and Young People; and Western Australia: Commissioner for Children and Young People.

¹⁰⁹⁰ Australian Institute of Family Studies, *Children's commissioners and guardians* (November 2016)

<<https://aifs.gov.au/cfca/publications/childrens-commissioners-and-guardians>>.

¹⁰⁹¹ Ibid.

Ombudsmen

Most States and Territories in Australia have Ombudsmen with powers enabling them to consider the rights of children.¹⁰⁹² The focus of these roles is however on public administration, and to monitor and investigate government agencies responsible for child welfare and to protect the most vulnerable children in Australia. For example in NSW, the Ombudsman's role includes investigating complaints made by young people regarding government schools, police, and accommodation services or similar institutions that provide services to young people.¹⁰⁹³ As such, the ability of these offices to provide a meaningful avenue for business-related human rights abuses is very limited.

Consumer Protection Agencies

The Australian Competition and Consumer Commission (ACCC) (also discussed above under **3.5 – Products**) is empowered by law to take action to improve consumer welfare, protect competition, stop conduct that is anti-competitive or harmful to consumers, and promote the proper functioning of Australian markets.¹⁰⁹⁴ If a consumer (including a child) cannot resolve a problem with a business, they can contact the ACCC for information about the consumer's rights and obligations. However, the ACCC does not resolve individual complaints,¹⁰⁹⁵ although it may in certain circumstances be able to commence a representative action on behalf of a person or group of people (see **3.5.3 – Monitoring / enforcement**).

Where the complaint relates to a consumer issue, similarly to adults, children can potentially complain to state and territory consumer protection agencies:

- ACT Office of Fair Trading;
- Consumer Affairs Victoria;
- NSW Fair Trading;
- NT Consumer Affairs;
- Office of Fair Trading Queensland;
- SA Office of Consumer and Business Services;
- Tasmanian Consumer Affairs and Fair Trading; and
- WA Department of Commerce.

Freedom of Information

In Australia, the freedom of information regime is an important mechanism available for individuals in defending their rights and understanding the role and actions of government agencies. In particular, obtaining information regarding investigations conducted by government bodies can inform individuals whether to pursue legal proceedings or other avenues.

Under the *Freedom of Information Act 1982* (Cth) 'every person' is able to make an application. 'Person' is not limited to adults, therefore children are able to use the freedom of information regime.¹⁰⁹⁶ In Queensland, Western Australia and the Northern Territory, there are specific provisions for applications to be made on behalf of children.

¹⁰⁹² Australian Capital Territory: ACT Ombudsman <<http://www.ombudsman.act.gov.au/>> New South Wales: Ombudsman New South Wales <<https://www.ombo.nsw.gov.au/>>; Northern Territory: Northern Territory Ombudsman <<http://www.omb-hcsc.nt.gov.au/>>; Queensland: Queensland Ombudsman: <<https://www.ombudsman.qld.gov.au/>>; South Australia: South Australian Ombudsman: <<http://www.ombudsman.sa.gov.au/>>; Tasmania: Tasmanian Ombudsman: <<http://www.ombudsman.tas.gov.au/>>; Victoria: Victorian Ombudsman: <<http://www.ombudsman.vic.gov.au/>>; and Western Australia: Western Australian Parliamentary Commissioner for Administrative Investigations: <<http://www.ombudsman.wa.gov.au/>>.

¹⁰⁹³ For example, see Ombudsman New South Wales, *Information and resources for young people: What does the Ombudsman do?* <<https://ombo.nsw.gov.au/what-we-do/youth>>.

¹⁰⁹⁴ Australian Competition and Consumer Commission, *About the ACCC – Our role* <<https://www.accc.gov.au/about-us/australian-competition-consumer-commission/about-the-accc#our-purpose>>.

¹⁰⁹⁵ Australian Competition and Consumer Commission, *Where to go for consumer help* <<https://www.accc.gov.au/consumers/consumer-protection/where-to-go-for-consumer-help#the-accc>>.

¹⁰⁹⁶ LexisNexis, *Halsbury's Laws of Australia*, (at 23 March 2016) 10 Administrative Law, '(A) Universal Access' [10-504].

However, companies are not directly subject to the *Freedom of Information Act 1982* (Cth) and section 47G of the Act provides for a disclosure exemption if a document contains information concerning a person's business or professional affairs. In certain circumstances, information on companies that may be relevant to the commencement of litigation can be obtained through a pre-action application for discovery.

Australian National Contact Point for the OECD Guidelines for Multinational Enterprises

The Organisation for Economic Co-operation and Development (OECD) *Decision of the Council on the OECD Guidelines for Multinational Enterprises* (OECD Guidelines) have been described as 'are recommendations addressed by governments to multinational enterprises operating in or from adhering countries'.¹⁰⁹⁷ Chapter 4 of the Guidelines is on human rights, and the Guidelines state that this chapter 'draws upon the United Nations Framework for Business and Human Rights 'Protect, Respect and Remedy' and is in line with the Guiding Principles for its Implementation'.¹⁰⁹⁸ States that are part of the OECD must establish a 'National Contact Point' as a forum 'to further the effectiveness of the Guidelines by undertaking promotional activities, [handle] enquiries and [contribute] to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances, taking account of the attached procedural guidance.'¹⁰⁹⁹

The OECD has explained:¹¹⁰⁰

The grievance mechanism provided for in the Guidelines is one of the few government-based, nonjudicial mechanisms with such an effective and broad application. The problem solving focus of NCPs is attractive to the participating parties because it allows them to exercise a better level of control over the process of reaching an agreement than more formal processes in which a third unrelated party makes a final binding decision. NCPs offer, and with the agreement of the parties involved, facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to help them dealing with the issues. This offer can be significantly more expeditious and a cost saving alternative to more formal or legal procedures.

NCPs are one of very few State-based non-judicial mechanism that '...provide a means by which concerns about business-related human rights abuses in other jurisdictions can be raised and mediated'.¹¹⁰¹ The Guidelines contain procedures which allow 'any interested party' to lodge a complaint about a company's alleged breach of the Guidelines with an NCP. Only if mediation fails will an NCP examine the complaint and publish its decision and recommendations to the company. However, NCPs cannot place legally binding obligations on enterprises and are described as 'supplemental' to domestic law.¹¹⁰² Rather, NCPs are non-judicial grievance mechanisms, described as 'mediation-type mechanisms with limited formal investigative powers of their own, and rely for their effectiveness on the cooperation of the business enterprises concerned'.¹¹⁰³ It's therefore been recognised that such a model has inherent limitations in terms of providing victims of human rights abuses caused by corporations, as '[s]pecific instances are not legal cases and NCPs are not judicial bodies. The type of remedy that the NCP mechanism can provide is not unlimited. In some cases, remedy may be partial or not possible.'¹¹⁰⁴

¹⁰⁹⁷ AusNCP, *OECD Guidelines* <<https://ausnccp.gov.au/oecd-guidelines/>>.

¹⁰⁹⁸ Organisation for Economic Co-operation and Development, *OECD Guidelines for Multinational Enterprises* (2011) ('Guidelines for Multinational Enterprises') <<http://www.oecd.org/daf/inv/mne/48004323.pdf>> 31.

¹⁰⁹⁹ Ibid.

¹¹⁰⁰ Cristina Tebar Less and Tihana Bule, *National Contact Points: An Overview*, Global Forum on Responsible Business Conduct, Organisation for Economic Co-Operation and Development (18-19 June 2015) <<https://mneguidelines.oecd.org/global-forum/2015GFRBC-National-Contact-Points-Overview.pdf>> 7.

¹¹⁰¹ Human Rights Council, *Improving accountability and access to remedy for victims of business-related human rights abuse through State-based non-judicial mechanisms - Report of the United Nations High Commissioner for Human Rights*, 38th Sess UN Doc. A/HRC/38/20 (14 May 2018) <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/132/70/PDF/G1813270.pdf?OpenElement>> [24].

¹¹⁰² AusNCP, *OECD Guidelines* <<https://ausnccp.gov.au/oecd-guidelines/>>.

¹¹⁰³ Human Rights Council, n 1103.

¹¹⁰⁴ Tebar Less and Bule, n 1102.

The Australian National Contact Point (**ANCP**) was established in 2000-01 by the Australian Government in accordance with its legal obligations under the OECD *Decision of the Council on the OECD Guidelines for Multinational Enterprises*.¹¹⁰⁵ The ANCP in Australia is an officer of the Treasury.

The ANCP has been the subject of significant criticism by civil society groups,¹¹⁰⁶ professional organisations,¹¹⁰⁷ academia¹¹⁰⁸ and trade unions.¹¹⁰⁹ They have indicated that the ANCP has not provided an avenue for victims of business-related human rights abuses to raise a complaint, noting in particular a lack of independence and adequate resourcing as particular concerns.¹¹¹⁰ Additionally, the Chair of the OECD Working Party on Responsible Business Conduct indicated that the ANCP was among the ‘...poorest performing NCPs internationally’.¹¹¹¹ The 2016 Joint Civil Society Statement on *Implementing the UN Guiding Principles on Business and Human Rights in Australia* recommended, amongst other things, that the Australian Government restructure the ANCP to ensure independence from government, take steps to increase its visibility, accessibility and effectiveness, develop a mechanism to ensure that recommendations of the ANCP are taken into account by government authorities (for example, in public procurement) and provide adequate resourcing for the ANCP to discharge its function effectively.¹¹¹²

Research conducted in 2016 by Dr Kate McDonald found that of the 13 cases filed with the ANCP since 2005:¹¹¹³

- Almost all cases are transferred out of the country with little to no follow up; or
- Rejected on the basis that one of the parties is unwilling to negotiate; or
- Rejected due to national security sensitivity.

Dr McDonald concluded with the observation that (references omitted):¹¹¹⁴

The Australian NCP would be far more effective and authoritative if it improved its independence, leverage, cross-government coordination, advocacy for greater respect of human rights in business practices, and improved coordination with host governments. Most critically, there are significant opportunities for the Australian NCP to exert greater leverage by preventing or enabling access to government support – for example, import or export licenses, government subsidies, qualification for government procurement, and export credit and trade financing support. The Canadian NCP recently took this approach for the first time by linking non-participation in NCP processes to qualification for export credit. This could be extended to provide consequences for negative determinations, and/or failure to follow-up in implementing recommendations.

The Australian NCP, as with NCPs across the OECD, was not designed and should not be thought of or used as a substitute for judicial remedies in cases of serious human rights violations. However, with appropriate reforms it could better ‘supplement judicial systems’ to help resolve disputes and provide access to a remedy for those affected by the human rights violations of companies overseas.

¹¹⁰⁵ *Decision of the Council on the OECD Guidelines for Multinational Enterprises* (27 June 2000, amended 25 May 2011) (OECD Council’s Decision): C(2000)96/FINAL.

¹¹⁰⁶ *Implementing the UN Guiding Principles on Business and Human Rights in Australia – Joint Civil Society Statement*, n 61; Oxfam Australia, *Submission to the Review of the Australian National Contact Point (ANCP)* (17 July 2017) <<https://cdn.tspace.gov.au/uploads/sites/112/2018/07/Oxfam-submission-REDACTED.pdf>> 19-20.

¹¹⁰⁷ Law Council of Australia, *Australian National Contact Point 2017 Review* (25 July 2017) <<https://www.lawcouncil.asn.au/resources/submissions/australian-national-contact-point-2017-review->>>.

¹¹⁰⁸ Adjunct Professor Holly Cullen (The University of Western Australia), *Submission to the Review of the Australian National Contact Point for the OECD Guidelines for Multinational Enterprises* (20 June 2017) <<https://cdn.tspace.gov.au/uploads/sites/112/2018/02/Prof-Holly-Cullen.pdf>>.

¹¹⁰⁹ Tony Maher, *Review of the Australian National Contact - Joint submission with Australian Council of Trade Unions*, CFMEU (19 July 2017) <<https://cdn.tspace.gov.au/uploads/sites/112/2018/02/CFMEU-and-ACTU.pdf>>.

¹¹¹⁰ *Implementing the UN Guiding Principles on Business and Human Rights in Australia – Joint Civil Society Statement*, n 61; Law Council of Australia, *Australian National Contact Point 2017 Review* (25 July 2017) <<https://www.lawcouncil.asn.au/resources/submissions/australian-national-contact-point-2017-review->>> 19-20.

¹¹¹¹ Alex Newton, n 90, 14. See also Anthony Crockett, *Australia Failing to properly police compliance with the OECD Guidelines* (13 December 2017) <<https://www.herbertysmithfreehills.com/latest-thinking/australia-failing-to-properly-police-compliance-with-the-oecd-guidelines>>.

¹¹¹² *Implementing the UN Guiding Principles on Business and Human Rights in Australia – Joint Civil Society Statement*, n 61, 20.

¹¹¹³ Dr Kate MacDonald et al, *Redress for Transnational Business-Related Human Rights Abuses in Australia* (2016)

<<http://corporateaccountabilityresearch.net/njm-report-iii-redress-in-australia/>> 29.

¹¹¹⁴ *Ibid*, 31.

In November 2017, OECD Watch (in collaboration with the Human Rights Law Centre (HRLC) and Rights and Accountability in Development (RAID)) lodged a complaint about the ANCP to the OECD Investment Committee regarding the ANCP's handling of a matter.¹¹¹⁵ In the complaint, OECD Watch explained its position as follows:¹¹¹⁶

OECD Watch contends that the ANCP's rejection of the complaint misapplied the criteria for initial assessment in the Procedural Guidance to the Guidelines and in some respects directly contradicted the Guidelines. Of greatest concern, the ANCP incorrectly conflated the responsibilities of the company with those of the state under the Guidelines. Companies are not exempt from the application of the Guidelines on the basis that their activities are consistent with domestic law and policy.

Over 2017 the ANCP was independently reviewed by Alex Newton and the outcomes of this review were published in September 2017. The Independent Review concluded that the ANCP was 'significantly lacking' against each of the thirteen criteria it was assessed against, including the OECD's core criteria of visibility, accessibility, transparency and accountability.¹¹¹⁷ The 2017 Independent Review may be used to inform the OECD National Contact Point Peer Review, a voluntary process in which Australia is currently scheduled to participate in 2019.¹¹¹⁸

In November 2018, Treasury published a response to the 2017 Independent Review.¹¹¹⁹ It outlined initiatives that had or will be introduced to improve the ANCP, including:

- i. Introducing an independent expert examiner for specific instances;
- ii. A new advisory body;
- iii. Improved procedural guidance;
- iv. Resource commitment; and
- v. Improving outreach and promotion.

Many aspects of the new procedures have been welcomed by civil society groups, including the broadened interpretation of the definition of an Australian multinational enterprise, and the clarification of '...the OECD Guidelines' "material and substantiated" admissibility criteria as accommodating complaints showing a plausible issue and a plausible link to an enterprise'.¹¹²⁰ However, the same groups have expressed concern about a 'lack of mandatory commitment by the NCP to issue determinations of compliance for companies that refuse to participate meaningfully in the complaint process' and the 10 day time limit to lodge an appeal, amongst other things.¹¹²¹

Children in context: Specific instances before the Australian National Contact Point regarding businesses involved in Australia's immigration system

Successive Australian Governments have had a policy of mandatory immigration detention of all 'unlawful non-

¹¹¹⁵ See Human Rights Law Centre, *International Complaint lodged over Australia's failure to investigate abuses by Manus contractor* (27 November 2017) <<https://www.hrlc.org.au/news/2017/11/27/international-complaint-lodged-over-australias-failure-to-investigate-abuses-by-manus-contractor>>.

¹¹¹⁶ OECD Watch, Letter to Dr. Manfred Schekulin, Chair of the Investment Committee Organisation for Economic Co-operation and Development and Dr. Roel Nieuwenkamp, Chair of the Working Party on Responsible Business Conduct, Organisation for Economic Co-operation and Development, *Substantiated submission regarding the Australian National Contact Point's failure to fulfil its responsibilities in a specific instance* (27 November 2017) <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/5a1b417353450a9c545a8a7d/1511735669130/Cover+letter_OECD+Watch+substantiated+submission+re+Australia_27+November+2017.pdf>.

¹¹¹⁷ Alex Newton, n 90, 4.

¹¹¹⁸ Australian National Contact Point, *2017 Review* <http://www.ausncp.gov.au/content/Content.aspx?doc=2017_review.htm>.

¹¹¹⁹ Australian National Contact Point, *Treasury response to the 2017 AusNCP Independent Review* (November 2018) <<https://ausncp.gov.au/contactpoint/2017-review/2017-review-response/>>.

¹¹²⁰ OECD Watch, *The Australian NCP's new rules of procedure: concerns remain despite improvements* (10 August 2018); Human Rights Law Centre et al, letter to the Australian National Contact Point, *Re: Revised Specific Instance Procedures* (6 August 2018) <<https://www.oecdwatch.org/news-en/the-australian-ncp2019s-new-procedures-concerns-remain-despite-improvements>> 1-2.

¹¹²¹ *Ibid*, 2-3.

citizens' (persons in Australia who do not have a valid visa) and 'offshore processing' where asylum seekers are transferred to Nauru or Manus Island in Papua New Guinea.¹¹²² Many nation states¹¹²³, United Nations Treaty Bodies¹¹²⁴, United Nations Special Rapporteurs¹¹²⁵, the Australian Human Rights Commission¹¹²⁶, medical professionals¹¹²⁷, legal professionals¹¹²⁸, children's advocates¹¹²⁹, community groups¹¹³⁰ and children and adults themselves detained¹¹³¹ have raised deep and consistent concerns about the negative impact of these policies on children and adults seeking asylum who are affected by them. A 2016 report by UNICEF Australia and Save The Children Australia outlined the associated human costs of this policy as follows:¹¹³²

- Harm caused by prolonged detention;
- Deterioration of mental health, self-harm and suicide;
- Exposure to violence, abuse and exploitation;
- Significant barriers to access to quality education;
- Significant barriers to access to healthcare;
- Extended periods of family separation;
- Harm to parents and erosion of parenting capabilities;
- Statelessness;
- Impact on identity and minority rights;
- Lack of transparency and access to remedies for rights violations; and
- Other human rights violations of children, including the principle of 'best interests of the child', the principle of 'non-refoulement', the rights of separated and unaccompanied children, the potential for cruel, inhuman or degrading treatment or children, restrictions on freedom of movement, interference with the right to privacy.

The role of private sector entities in Australia's system of immigration detention and offshore processing have been raised in a number of 'specific instances' lodged with the Australian National Contact Point. The 2017 Independent Review considered several of the shortcomings faced by complainants in these and other cases, concluding as follows (references omitted):¹¹³³

¹¹²² For explanations, see UNSW Andrew & Renata Kaldor Centre for International Refugee Law, *Immigration detention* (7 October 2015) <<http://www.kaldorcentre.unsw.edu.au/publication/immigration-detention>>; and UNSW Andrew & Renata Kaldor Centre for International Refugee Law, *Offshore processing: an overview* (9 May 2017) <<http://www.kaldorcentre.unsw.edu.au/publication/offshore-processing-overview>>.

¹¹²³ Human Rights Council, *Report of the Working Group on the Universal Periodic Review Australia*, 31st sess, Universal periodic review, UN Doc A/HRC/31/14 (13 January 2016) including Fiji, Ghana, Guatemala, Iceland, Islamic Republic of Iran, Slovakia, Italy, Luxembourg, Germany, Maldives, Japan, Norway, Paraguay, The Philippines, The Republic of Korea, Rwanda, Sierra Leone, Sweden, Ukraine, The United States of America, Algeria, Bahrain, Brazil, China, Democratic People's Republic of Korea, Belarus, India, Greece, Pakistan, Djibouti, Mexico, Holy See, Indonesia, Slovenia, France, Bangladesh, Honduras, Spain, Switzerland, Uruguay, Kenya, Argentina, Nigeria and Turkey.

¹¹²⁴ United Nations Committee on the Rights of the Child, n 130, [80]-[81]; United Nations Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, UN Doc CCPR/C/AUS/CO/6 (1 December 2017)

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/AUS/CO/6&Lang=En> [37]-[38]; United Nations Committee Against Torture, *Concluding observations on the combined fourth and fifth periodic reports of Australia*, UN Doc. CAT/C/AUS/CO/4-5 (23 December 2014)

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/AUS/CO/4-5&Lang=En> [16]-[18].

¹¹²⁵ For example, see Human Rights Council, *UN Special Rapporteur on the human rights of migrants concludes his official visit to Australia* (18 November 2016) <<http://un.org.au/files/2016/11/16.11-SRM-Australia-End-of-mission-Statement.pdf>>.

¹¹²⁶ Australian Human Rights Commission, *The Forgotten Children – National Inquiry into Children in Immigration Detention* (2014) <https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf>.

¹¹²⁷ Professor Elizabeth Elliott and Dr Hasantha Gunasekera, *The health and well-being of children in immigration detention - Report to the Australian Human Rights Commission Monitoring Visit to Wickham Point Detention Centre, Darwin, NT Australian Medical Association, October 16th-18th 2015* (2016) <<https://www.humanrights.gov.au/sites/default/files/document/publication/Health%20and%20well-being%20of%20children%20in%20immigration%20detention%20report.pdf>>; Australian Medical Association, *AMA Position Statement on the Health Care of Asylum Seekers and Refugees* (23 December 2015) <<https://ama.com.au/media/get-children-out-detention-centres>>.

¹¹²⁸ Law Council of Australia, *Legal profession calls for immediate removal of asylum seeker children from Nauru* (18 October 2018) <<https://www.lawcouncil.asn.au/media/media-releases/legal-profession-calls-for-immediate-removal-of-asylum-seeker-children-from-nauru>>.

¹¹²⁹ UNICEF Australia and Save the Children Australia, *At What Cost? The Human, Economic and Strategic Cost of Australia's Asylum Seeker Policies and the Alternatives* (2016) <<https://www.unicef.org.au/Upload/UNICEF/Media/Documents/At-What-Cost-Report.pdf>> 21-29.

¹¹³⁰ Grandmothers Against Detention of Refugee Children, *Why we are involved* <<http://gadrc.org/what-we-do/>>.

¹¹³¹ Behrouz Bouchani, *No Friend But The Mountains: Writing from Manus Prison* (2018), Pan Macmillan Australia.

¹¹³² UNICEF Australia and Save the Children Australia, n 1134, 3 and 21-29.

¹¹³³ Alex Newton, n 90, 25-27.

The perceived partiality of the ANCP was repeatedly raised as a concern throughout the Review's consultation process by NGOs, academics and corporate stakeholders. These concerns are based on both the structure and the location of the ANCP within Treasury.

First, in terms of the ANCP's structure: until the appointment of the current ANCP, Ms Victoria Anderson, in early 2017, the ANCP role was held by the General Manager (or Division Head) of the Foreign Investment Division. This senior executive concurrently held the position of the Executive Member of the Foreign Investment Review Board (FIRB). Given FIRB's role in advising the Treasurer and Government on foreign investment policy and applications to Australia, this has been perceived by many outside of government to be a conflict of interest with the ANCP role, and is of particular concern to complainants in specific instances. Treasury acknowledges these perceptions, but maintains that there have not been any actual conflicts of interest in the way the ANCP's role has been undertaken. Further, the Independent Reviewer is not aware of any actual conflicts of interest between the ANCP and FIRB roles in specific instances to date.

Another structural issue that potentially compromises the ANCP's independence (or its perceived independence), is the ANCP's role as the Chair of the Oversight Committee. As noted above, the Oversight Committee oversees and monitors the effectiveness of the ANCP, and can consider requests for review of specific instance decisions based on procedural grounds. There appears to be a logical inconsistency with the ANCP herself heading the body that monitors the effectiveness of the NCP function. Further, in the event of a procedural review of a specific instance decision occurring, the ANCP's closeness to the process as Chair of the Oversight Committee is highly problematic, even taking into account paragraphs 28 and 29 of the Review Procedure (Impartiality of Committee Members) –which disqualifies a Committee Member who has participated in the decision-making process of a complaint from participating in the Review Panel.

Second, in terms of the ANCP's location in Treasury: many stakeholders consulted by the Review – particularly from the NGO sector, but also from the corporate sector – consider that Treasury's strong ties with business render it an inappropriate location to house the ANCP. Several participants gave examples where they allege that business was treated more favourably by Treasury in the context of specific instance complaints in comparison to the complainants involved. Without further information from the corporations involved, and from Treasury, the Independent Reviewer cannot test the veracity of these claims.

In relation to impartiality, the Australian Lawyers for Human Rights' submission to the Independent Review stated:

The current structure of the ANCP does not lend itself to impartial handling of complaints. Commentators including Professor John Ruggie (author of the UNGPs), have pointed to the potential conflict of interest that arises where NCPs are located solely within government agencies, especially agencies relating to the promotion of business and trade.

In addition to concerns about the ANCP's perceived partiality in favour of business, stakeholders consulted by the Review also raised their concerns about the ANCP's handling of complaints where there is a conflict of interest with Australian Government policy. This is not only a problem for the ANCP, but potentially for all NCPs located within governments which are asked to determine specific instance cases involving multinational corporations contracting with their home governments.

In the Australian context, this problem has been most salient in complaints regarding multinational enterprises contracted by the Australian Government to provide services to Australian immigration detention centres. To date, the issue has arisen in several specific instance complaints to the ANCP, including the following:

- (i) in 2005/6 in the complaint against GSL brought by the Human Rights Council of Australia and others;
- (ii) in 2014/15 in the complaint against G4S brought by the Human Rights Law Centre and Rights & Action in Development; and
- (iii) in a 2015 complaint against SERCO Group brought by Professor Ben Saul, University of Sydney.

In the ANCP's Final Statement in the SERCO complaint, published on 10 August 2017, the ANCP stated, 'Although the issues raised could be material and substantive, weight has been given to whether the consideration of the Specific Instance will contribute to the purposes and effectiveness of the OECD Guidelines.'

It also states that: 'A range of complex policy and national security considerations underpin this arrangement.'

As no other reasons are provided for why the ANCP considers that the purposes and effectiveness of the Guidelines would not be furthered by proceeding to a full assessment of this complaint, the underlying rationale for the decision is unclear to the Independent Review. It is possible that the reference to complex policy and national security considerations may underscore a fundamental reason for the complaint's rejection, despite the ANCP's acknowledgement that the issues it raises may be material and substantive.

Likewise, in the complaint brought against G4S, the ANCP explained its rejection of the complaint by commenting that:

'G4S as a service provider is not accountable for government policy and other mechanisms exist for review and scrutiny of policy. The ANCP is not the most appropriate vehicle for resolution of such matters. It is not the role of the ANCP to issue commentary, whether intended or otherwise, on government policies or law.'

Notably, Professor Roel Nieuwenkamp, Chair of the OECD Working Party on Responsible Business, has observed:

'The ANCP tried not to get involved in a specific instance where there may be a link with Australian Government policy. In avoiding to get involved in these cases, the ANCP was basically implying it was not impartial, which is a legally binding criteria for NCPs.'

In each of the three cases above, the ANCP's refusal to accept complaints (either in full or in part) where there was a conflict with Australian Government policy, underscores the ANCP structure's intrinsic limitations in handling specific instances of this kind. This should not be interpreted in any way to be a criticism of the government officials managing these specific instances (or of the ANCP herself). Instead, it demonstrates the imperative for restructuring the ANCP to an independent decision-making structure while maintaining its linkage to government.

Overall, for the reasons outlined, the Review concludes that the ANCP's current structure and location in Treasury's Foreign Investment Division undermines its independence. Moving to an independent decision-making structure comprised of a panel of experts, supported by a government-based secretariat, would address many of the issues identified above. This recommendation is widely supported by corporate and NGO stakeholders consulted by the Review, the majority of whom indicated their preference for an independent NCP, either outside of government or with a government-located secretariat. However, if the function were to stay within Government, stakeholders broadly support the involvement of multi-stakeholder actors (business, NGOs, trade unions and academics) in either an advisory, decision-making, oversight or review capacity.

Export Finance and Insurance Corporation Complaints Mechanism

The Export Finance and Insurance Corporation (**Efic**) has established a formal complaints mechanism. The Efic website explains that any client or individual, group, community, entity or other party concerned about, affected or likely to be affected by Efic's activities, including any project supported by one of Efic's transactions, can lodge a complaint with Efic's General Council. Complaints are reported to the Efic Board Audit Committee periodically.¹¹³⁴

UN mechanisms - Individual communications procedure

A number of human rights treaties contain provisions to allow individuals to complain to the relevant treaty body (Committee) about alleged violations of the treaty by a State party. A complaint (generally known as an 'individual communication') can be submitted to a treaty body where a state has ratified the relevant treaty and is also a party to the optional protocol that provides for the operation of the communication procedures or has made a declaration recognising the procedure under a specific article of a treaty. Additionally, all domestic remedies must be exhausted by the complainant prior to the submission of an individual communication to a committee.¹¹³⁵ See **1.1 – International Standards** above for the relevant conventions and optional protocols that the Australian Government has ratified.

¹¹³⁴ Efic, *Complaints Mechanism* <<https://www.efic.gov.au/about-efic/our-organisation/complaints-mechanism/>>.

¹¹³⁵ United Nations Office of the High Commissioner for Human Rights, *Human Rights Treaty Bodies - Individual Communications* <<http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx#againstwhom>>.

The most relevant instrument that could provide a child with a communication mechanism is the *Optional Protocol to the Convention on the Rights of the Child on a communications procedure*. This Optional Protocol provides for children to have direct communication to the United Nations Committee on the Rights of the Child when domestic remedies have been exhausted (or are otherwise ineffective or unreasonably prolonged)¹¹³⁶, and the matter relates to the rights of the child as outlined in the Children's Convention and its optional protocols.¹¹³⁷ However, as outlined above, Australia has not ratified this Optional Protocol. As Australia is not a party to this Optional Protocol to the Children's Convention, children in Australia cannot access the communications procedures (i.e. the Individual Communications Procedure, Inter-State Communications Procedure and the Inquiry Procedure).

Given that the individual communications procedure is only available for alleged violations of relevant treaties by a State party, the utility of these mechanisms for children who seek to make complaints in relation to corporations is limited. Nonetheless, the individual communications procedure may be relevant where there is evidence that the Australia Government, through its policies, laws and practices, has facilitated, participated or is complicit in human rights abuses by Australian businesses, or where it otherwise failed to protect children from rights abuses caused by business.

Within its mandate, the UN Working Group on Business and Human Rights receives information on alleged human rights abuses or violations and tries to intervene directly with States, business enterprises and others on such allegations.¹¹³⁸

State and Territory Anti-Discrimination bodies

A child may also seek recourse to the State and Territory anti-discrimination agencies mentioned in **1.3 – National Standards** in certain circumstances.

Children in context: Victims and survivors of Commonwealth crime

As discussed above at **3.4.5 – Reparations / rehabilitation** the Law Council of Australia and Anti-Slavery Australia have observed numerous limitations of existing State and Territory schemes; namely, that they are not designed to specifically address Commonwealth offences such as human trafficking and slavery, and significant differences regarding eligibility and limitation periods.¹¹³⁹ Anti-Slavery Australia has also observed:¹¹⁴⁰

[c]ivil actions are unrealistic options in practically all cases of human trafficking and slavery, and so the establishment of a national compensation scheme for trafficked and enslaved people is necessary to ensure that victims of serious human rights abuses, such as human trafficking and slavery, have a real opportunity of a remedy.

They have therefore recommended that the Australian Government establish a national compensation scheme for survivors of human trafficking, slavery and slavery-like practices.¹¹⁴¹

The need for a national compensation scheme for victims and survivors of Commonwealth Crime has been explained further in the 2016 *Report on Establishing a National Compensation Scheme for Victims of Commonwealth Crime* published by the Law Council of Australia, Anti-Slavery Australia and University of Technology Sydney (references omitted).¹¹⁴²

¹¹³⁶ *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, GA Res 66/138, UN Doc A/RES/66/138 (19 December 2011, adopted 14 April 2014) art 7.

¹¹³⁷ *Ibid*, art 5.

¹¹³⁸ United Nations Office of the High Commissioner for Human Rights, *Communications procedure* <<http://www.ohchr.org/EN/Issues/Business/Pages/Submittingcomplaints.aspx>>.

¹¹³⁹ Anti-Slavery Australia, *Inquiry into Establishing a modern slavery act in Australia - Submission to the Joint Standing Committee on Foreign Affairs Defence and Trade* (2017), Part E – Redress for Survivors of Human Trafficking and Slavery <<http://www.antislavery.org.au/images/pdf/Publications/2017%20-%20Submission%20to%20the%20JSCFAT%20on%20the%20Modern%20Slavery%20Act%20Inquiry.pdf>>.

¹¹⁴⁰ *Ibid*.

¹¹⁴¹ Law Council of Australia, Anti-Slavery Australia and University of Technology Sydney, n 822.

¹¹⁴² *Ibid*, 4.

The inadequacy of the current framework

Currently in Australia, statutory victims' compensation schemes are provided by each of the eight States and Territories, and trafficked people may, in limited circumstances, have access to these schemes. However, these schemes are not designed to provide a remedy to victims of Federal offences against the person. The LCA and ASA therefore consider that these schemes are an inadequate form of redress for trafficked people.

State and Territory schemes differ in respect of categories of harm, time limits and levels of award. Under the existing schemes, the amount of compensation available to trafficked people in Australia varies, such that a victim could receive less than \$10,000 as a recognition payment in certain jurisdictions, but up to \$100,000 in other jurisdictions, including payments additional to the general recognition payment, depending on the State or Territory in which the offence(s) takes place and the type of offence(s).

Trafficked people who have been moved between State and Territory can only apply for compensation relating to the harm that they suffered whilst in a specific State or Territory. The consequence is that victims of crime in multiple States or Territories will be required to make multiple applications for statutory compensation. State or Territory schemes fail to recognise the offences of forced labour, forced marriage and debt bondage, leaving victims of these crimes without access to statutory victims' compensation schemes.

Inconsistencies between the State and Territory compensation frameworks, and the lack of a coordinated Federal approach to compensation, is an impediment to trafficked people obtaining fair, effective and timely access to justice, and departs from international best practice.

International law

Australia has obligations under various international instruments to ensure the availability of compensation for survivors of trafficking and other human rights abuses. These include:

- the United Nations Convention Against Transnational Organized Crime, which requires State parties to 'establish appropriate procedures to provide access to compensation and reparation for victims';
- the United Nations Convention against torture and other cruel, inhuman or degrading treatment or punishment, which requires State parties to ensure victims of torture are able 'to obtain redress and [have] an enforceable right to fair and adequate compensation';
- the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, which requires States to ensure that victims of trafficking have the 'possibility of obtaining compensation for damage suffered';
- the United Nations (UN) Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (the Declaration), which urges Member States to ensure that 'when compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation.' The Declaration extends obligations of compensation toward family members of persons who have died or become incapacitated due to victimisation. It further encourages States to pursue the 'establishment, strengthening and expansion of national funds for compensation';
- the International Covenant on Civil and Political Rights outlines that where the violation of an individual's rights occurs, the victim has a human right to an 'effective remedy'; and
- the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which requires that States take all measures to suppress all forms of trafficking in women. In its concluding observations regarding Australia in 2010, the CEDAW Committee specifically requested Australia to 'include in its next report information on civil proceedings for provision of access to compensation for victims, the number of cases and the amount of compensation awarded'. The Australian Government's follow-up report to the CEDAW Committee noted that the amendments to the Commonwealth Criminal Code would 'improve the ability of all individuals, including women, to access reparations where they are

the victims of a Commonwealth offence such as people trafficking and slavery’.

The report also highlighted the recommendations of the former UN Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, that the Australian Government ‘[e]stablish, at the federal level, a comprehensive compensation scheme for survivors of trafficking’.¹¹⁴³

In its final report relating to the Inquiry into establishing a Modern Slavery Act in Australia, the Joint Standing Committee on Foreign Affairs, Defence and Trade recommended that the Australian Government establish a national compensation scheme for victims of modern slavery in Australia, modelled on existing victim compensation schemes administered by the Commonwealth.¹¹⁴⁴ However, the Australian Government has not as yet committed to establishing such a scheme.

Recommendation 2 (x)

Ensure access to remedy for children harmed by business activities and operations – both domestically and extraterritorially

Improve and establish avenues to remedies for children who have experienced business-related human rights abuses, including where abuses have occurred outside Australia. Specifically, the Australian Government should:

- a) as recommended by the UN Committee on the Rights of the Child ‘[e]xamine and adapt its legislative framework (civil, criminal and administrative) to ensure the legal accountability of Australian companies and their subsidiaries regarding abuses to human rights, especially child rights, committed in the territory of the State party or overseas and establish monitoring mechanisms, investigation, and redress of such abuses, with a view to improving accountability, transparency and prevention of violations’;
- b) ensure legal aid commissions and community legal centres are established and funded to ensure specialist children’s legal services are available to advise and represent children in every jurisdiction (state/territory and federal);
- c) ensure access to community legal services that are culturally safe and ideally Aboriginal and Torres Strait Islander-led for Aboriginal and Torres Strait Islander children;
- d) implement all of the reforms recommended in the 2017 Independent Review of the Australian National Contact Point;
- e) establish a national compensation scheme for victims/survivors of Commonwealth crimes (including trafficking and slavery); and
- f) sign and ratify the *Optional Protocol to the Convention on the Rights of the Child on a communications procedure*.

3.10.2 Standing

Are children permitted to file complaints and initiate legal proceedings in their own name and without the need for official authorization or parental approval?

A child may commence proceedings through a legal guardian/litigation representative (and it is also possible for children to bring proceedings in their own names in some instances, as outlined below). However, it is important to note that there are many practical barriers to a child pursuing this course of action in reality (see further

¹¹⁴³ Joy Ngozi Ezeilo, Special Rapporteur, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, UN Doc A/HRC/20/18 (18 May 2012) [64].

¹¹⁴⁴ Hidden in Plain Sight: An inquiry into establishing a Modern Slavery Act in Australia, n 100, Recommendation 23, xli.

3.10.1 – Mechanisms above).

A child (who is a minor) is capable of suing and being sued in civil proceedings.¹¹⁴⁵ In the Federal jurisdiction, a 'minor' who, under the *Federal Court Rules 2011* (Cth), is a person under the age of 18 is also defined as a person under 'legal incapacity'. A person under 'legal incapacity' may start or defend a proceeding only by the person's 'litigation representative'. A 'litigation representative' means a person who has been appointed for a proceeding as a litigation representative for a person under a legal incapacity.¹¹⁴⁶ State and Territory rules largely mirror the requirements of the *Federal Court Rules 2011* (Cth).¹¹⁴⁷ For example, in NSW, the *Uniform Civil Procedure Rules 2005* (NSW) treat a child as a 'person under legal incapacity' who may not commence or carry on proceedings except by his or her 'tutor' (i.e. a next friend or *guardian ad litem*).¹¹⁴⁸

If a legally incapacitated party such as a child sues without a litigation guardian, the proceeding will not be null and void but instead will be considered irregular only¹¹⁴⁹ and the proceeding may continue. If the defendant objects, the originating process may be set aside and the child's lawyers will be required to pay the costs of doing so (if applicable).¹¹⁵⁰

If a child successfully pursues legal proceedings without a litigation guardian, the child will not be bound by the judgment. This means that the child could sue for the same wrong again, and, because they did not have legal capacity in the first proceeding, they would not be prevented from arguing the same issues again by the doctrine of *res judicata* (which prevents parties rearguing the same case so that litigation and court proceedings are final). It is potentially undesirable for children to pursue legal proceedings without a litigation guardian as the child may be unable to legally enforce any orders that are made, resulting in a lack of finality to the litigation.¹¹⁵¹

Children's courts

In the Children's Court in some jurisdictions, a judge must not proceed to hear any application involving a child unless the child has their own legal representation.¹¹⁵² In New South Wales and Queensland, the Children's court may appoint separate legal representation for a child.¹¹⁵³ In Victoria, a court may adjourn the hearing to enable a child to obtain legal representation at any stage of a proceeding involving a child.¹¹⁵⁴ It is unlikely, however, that a proceeding concerning business-related human rights abuses would be commenced before a Children's Court, as the jurisdictions of these courts are generally limited to consider issues relating to the care and protection of children, and the application of the criminal law to children.

3.10.3 Time limits

Are deadlines for bringing cases related to rights violations that occur during childhood extended so that time periods do not begin running until children reach the age of majority?

Civil claims

Time limitations for civil matters involving children is a complex matter. Generally, statutory limitation periods

¹¹⁴⁵ *Surrey Insurance Co Ltd v Nagy* [1968] SASR 437; *Dey v Victorian Railways Cmrs* (1949) 78 CLR 62; *Haines v Leves* (1987) 8 NSWLR 442; *Re New South Wales Corporal Punishment in Schools Case; Determination on Preliminary Matters* (1986) EOC at [92] - [160].

¹¹⁴⁶ See *Federal Court Rules 2011* (Cth) r 9.61, sch 1. Also see *Chien v Minister for Immigration* [2013] FCCA 218 at [35].

¹¹⁴⁷ Child Rights International Network, n 1086, 4.

¹¹⁴⁸ *Uniform Civil Procedure Rules 2005* (NSW) r 7.14.

¹¹⁴⁹ Or 'voidable'. See: *Forster & Forster* (No. 3) [2012] FAMCAFC 214; *Mewburn v Mewburn* (1934) 51 WN (NSW) 170 as cited in Bernard Cairns, *Australian Civil Procedure* (Thomson Reuters, 10th ed., 2013) 323.

¹¹⁵⁰ *Satori v Macleod* (1897) 22 VLR 498; *Ex parte Shearer* [1949] QWN 41 as cited in Bernard Cairns, *Australian Civil Procedure* (Thomson Reuters, 10th ed, 2013) 323.

¹¹⁵¹ *Ibid*.

¹¹⁵² *Children and Young Persons (Care and Protection) Act 1998* (NSW) s. 3 (Children's Court of New South Wales); *Child Protection Act 1999* (Qld) sch 3 (Children's Court of Queensland); *Children's Protection Act 1993* (SA) s 6 (Youth Court of South Australia); *Children, Young Persons and Their Families Act 1997* (Tas) s 3 (Magistrates' Court (Children's Division)); *Children, Youth and Families Act 2005* (Vic) s 504 (Children's Court of Victoria); *Children's Court of Western Australia Act 1998* (WA) (Children's Court of Western Australia).

¹¹⁵³ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 99(1); *Child Protection Act 1999* (Qld) s 110(1).

¹¹⁵⁴ *Children, Youth and Families Act 2005* (Vic) s 524(1). With the leave of the court, a child may be represented by a person in the Family Division who is neither a legal practitioner nor a parent of the child (s 524(8)).

for children to bring claims are extended so that they commence from the date that a person ceases to be under a legal incapacity as defined by the applicable law (i.e., when a child reaches legal age of majority).¹¹⁵⁵ For example, under the *Limitation Act 1969* (NSW), the limitation period is suspended while a person is deemed to have a disability under s 11(3) and s 52(1)(d).

However, this has not always been the case for all areas of law and time limits have previously presented major barriers to children commencing proceedings in court. For example, time limitation legislation in Victoria was seen to previously discourage child abuse victims from bringing their claims for compensation to court as the expiration of a limitation period could be used against them in negotiations in order to reduce the settlement amount offered. However, in 2015 the Victorian Government introduced the *Limitation of Actions Amendment (Child Abuse) Act 2015* (Vic), which abolished all time limitations in child abuse cases (for both past and future cases), including child sexual abuse. It also abolished time restrictions in relation to claims made by dependants of a deceased victim.¹¹⁵⁶ Consistent with the Victorian reform, in 2016 the Parliament of NSW passed the *Limitation Amendment (Child Abuse) Act 2016* (NSW) that removed the limitation period for child abuse compensation claims and applies retrospectively, including child sexual abuse.¹¹⁵⁷ Previously, guidelines with a similar aim have also been adopted in NSW in respect of child abuse proceedings.¹¹⁵⁸ Other jurisdictions are also amending legislation to remove similar limitation periods.¹¹⁵⁹

Australian Human Rights Commission

The AHRC has explained time limits applying to its complaints process as follows:¹¹⁶⁰

There is no specific time frame in which a complaint must be lodged with the Commission. However, the President can now terminate a complaint if the complaint was lodged more than 6 months after the alleged act or practice took place. This change only applies to acts or practices that take place after 13 April 2017 (the date of the amendment). Prior to this amendment, the President had the power to terminate a complaint lodged more than 12 months after the alleged events.

UN treaty bodies

Complaints to UN committees are required to be made as soon as possible after the exhaustion of domestic remedies. In some cases, submission after a protracted delay may result in the case being considered inadmissible.¹¹⁶¹ In the case of the Children's Convention, a communication will be inadmissible when '(a) it is not submitted within one year after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit.'¹¹⁶² As noted above however, Australia is yet to sign or ratify Optional Protocol to the Convention on the Rights of the Child on a communications procedure that would enable children to have access to the UN Committee on the Rights of the Child to raise specific concerns.

¹¹⁵⁵ See, for example, *Limitation of Actions Act 1958* (Vic) s 23.

¹¹⁵⁶ Victorian Attorney-General, *Time Limitations for Child Abuse Cases Abolished* (24 February 2015) <<http://www.premier.vic.gov.au/time-limitations-for-child-abuse-cases-abolished/>>.

¹¹⁵⁷ *Limitation of Actions Amendment (Child Abuse) Act 2015* (NSW) ss 9-10.

¹¹⁵⁸ NSW Government, *NSW Government Guiding Principles for Government Agencies Responding to Civil Claims for Child Sexual Abuse*, (2014) <<http://www.justice.nsw.gov.au/Documents/Media%20Releases/2014/NSW%20Gov%20GuidIng%20Principles.pdf>>.

¹¹⁵⁹ *Limitation Amendment (Child Abuse) Act 2017* (NT); Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Bill 2017 (WA).

¹¹⁶⁰ Australian Human Rights Commission, *Fact sheet - Changes made to the Australian Human Rights Commission Act 1986* (April 2017) <<https://www.humanrights.gov.au/sites/default/files/Fact%20sheet%20-%20Changes%20to%20the%20AHRC%20%28April%202017%29.pdf>>.

¹¹⁶¹ United Nations Office of the High Commissioner for Human Rights, n 1137.

¹¹⁶² *United Nations Optional Protocol to the Convention on the Rights of the Child*, opened for signature 19 December 2011, UN Doc A/RES/66/138 (entered into force 14 April 2014) art 7(h) <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPICCRC.aspx>>.

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|--------------------------------|--|
| 3.10.4 Legal assistance | To what extent is free and child-friendly legal advice and assistance available to child victims of business-related violations considering remedial options or wishing to pursue a complaint, including through official legal aid programs, NHRIs, NGOs, university-based legal aid clinics and pro bono arrangements? |
|--------------------------------|--|

Australian Human Rights Commission

People lodging complaints with the AHRC do not need lawyers to participate in the complaint process, and it is free for any person to commence and pursue a complaint through the AHRC process. As mentioned above, where a child or young person seeks to commence a complaint on the basis of discrimination, the specialist AHRC conciliators seek to aid the parties to conciliate the matter confidentially, 'seek to ensure the process is fair and...help both sides discuss and negotiate an outcome. The conciliator can also provide information about the law and how it has been interpreted.'¹¹⁶³ However, conciliators do not provide independent legal advice to the participants in a complaint process.

Legal Aid

Legal aid is provided by State and Territory Governments across Australia, largely enabled by funding provided by the Federal Government through the *National Partnership Agreement on Legal Assistance Services* (NPALAS).¹¹⁶⁴ However, there are different eligibility requirements across these jurisdictions. For example, in NSW legal aid is available to applicants subject to a means test to determine financial eligibility, and a merit test that looks at the likelihood of success, and benefit to the public, amongst other things.¹¹⁶⁵ In Victoria, it must be determined that the applicant is unable to afford the full cost of obtaining legal services from a private lawyer.¹¹⁶⁶

If a business has impacted the rights of a child, for example, by causing injury or harm, or acting in a discriminatory manner towards a child, a child's eligibility for legal aid in matters is generally determined in accordance with the same eligibility criteria that applies for an adult. However, an applicant's age might be relevant in some circumstances. For example, Legal Aid NSW classifies child applicants in civil matters to be at a 'special disadvantage'.¹¹⁶⁷ However, due to funding issues and competing priorities, 'Legal Aid NSW has determined that from 6 May 2013 until further notice, funds are not available under this policy for State matters'.¹¹⁶⁸

Legal Aid Specialist Children's/Youth advice

Specialist children's legal aid services are provided in some circumstances by some State and Territory governments. However, such advice and representation is generally only provided in connection with criminal matters. For example in NSW, the Legal Aid NSW Children Legal Service (CLS) advises and represents children and young people under 18 involved in criminal cases and Apprehended Violence Order applications in the Children's Courts.¹¹⁶⁹ The CLS also provides education regarding issues beyond criminal matters, which could extend to discrimination and/or human rights related issues. Legal advice and information regarding criminal matters and process is also available via the Legal Aid NSW 'Youth Hotline'.¹¹⁷⁰ Other legal aid services in South

¹¹⁶³ Australian Human Rights Commission, *Information for people making complaints* <<https://www.humanrights.gov.au/information-people-making-complaints>>.

¹¹⁶⁴ Jaan Murphy and Michele Brennan, *Legal aid and legal assistance services – Budget Review 2017-18 Index*, Parliament of Australia <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201718/LegalAid>.

¹¹⁶⁵ *Legal Aid Commission Act 1979* (NSW) pt 3.

¹¹⁶⁶ *Legal Aid Act 1978* (Vic) s 24.

¹¹⁶⁷ Legal Aid NSW, *Policies, Civil law matters - when legal aid is available*, policy 6.25 <<http://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/6.-civil-law-matters-when-legal-aid-is-available/6.25.-applications-for-legal-aid-in-civil-matters-when-the-applicant-is-at-special-disadvantage>>.

¹¹⁶⁸ *Ibid*.

¹¹⁶⁹ Legal Aid NSW, *Children's Legal Service* <<https://www.legalaid.nsw.gov.au/what-we-do/criminal-law/children-and-young-people>>.

¹¹⁷⁰ Legal Aid NSW, *Youth Hotline* <<http://www.legalaid.nsw.gov.au/what-we-do/criminal-law/youth-hotline>>.

Australia, Western Australia, Victoria, Australian Capital Territory also provide specialist youth law services, which also primarily focus on representation in criminal law matters.¹¹⁷¹

As outlined above at **3.10.1 – Mechanisms – Children’s access to justice - General**, the Australian Child Rights Taskforce has recommended that Australian Governments ‘[e]stablish youth specific legal centres in jurisdictions that currently do not have them (Tasmania and the Northern Territory)’¹¹⁷² and ‘[a]dequately fund and support Community Legal Centres (CLC), Legal Aid Commissions and Aboriginal and Torres Strait Islander Legal Services (ATSILS) to engage with young people, and make their services more accessible to young people.’¹¹⁷³

Legal Aid Human Rights speciality services

In some jurisdictions, specialist services advising on human rights matters can also be made available through legal aid commissions. For example, the Legal Aid NSW Human Rights Committee is a group of voluntary experts that helps Legal Aid NSW assess cases involving potential breaches of human rights for their potential to have a greater impact in the community. The committee considers any type of matter provided it involves an important question affecting people’s human rights. As such, matters affecting the human rights of children would come within its remit. Applications must be made under the ‘Public Interest Human Rights Policy’, and legal aid will be made available for public interest human rights matter where a case:¹¹⁷⁴

- 1) has a significant wider public interest; and
- 2) raises significant human rights issues.

The Committee also provides an information booklet entitled ‘*Human Rights for Everyday Life*’, which may assist in informing children and young people of the extent of their rights that are protected by law, and how they can be violated.¹¹⁷⁵

Community Legal Centres

Youth Law Australia (YLA) (formerly the National Children’s and Youth Law Centre) is a Community Legal Centre (CLC) that represents the rights and interests of children and young people nationally.¹¹⁷⁶ Some issues children and young people approach YLA for advice on relate to business activities in some way. For example, in 2016-17 YLA provided advice on 109 employment matters and 72 consumer law matters.¹¹⁷⁷

In addition, CLCs that specialise in advising children and young people exist in most, but not all, States and Territories around Australia. Some youth law centres also provide resources for running campaigns to promote important reforms to laws and policies that impact upon children and young people. While advice can be available in relation to some limited matters (for example, discrimination), legal representation is not readily available for violations of human rights more broadly. The situation is similar for all State and Territory youth law services, with resources for legal representation and advocacy primarily assigned to criminal matters and in relation to apprehended violence orders.

The following youth law centres exist around Australia:

- Australian Capital Territory: unclear whether another service beyond the Legal Aid ACT Youth Law Centre is available;¹¹⁷⁸
- New South Wales: Shopfront Youth Legal Centre¹¹⁷⁹, Marrickville Legal Centre¹¹⁸⁰ and YFS Legal;¹¹⁸¹

¹¹⁷¹ See, for example, Legal Aid WA, *Youth Law Team* <<http://www.legalaid.wa.gov.au/LegalAidServices/specialist/Pages/Youthlaw.aspx>>.

¹¹⁷² Australian Child Rights Taskforce, n 763, 73.

¹¹⁷³ Ibid.

¹¹⁷⁴ Legal Aid NSW, *Connecting human rights to everyday life* <<https://www.legalaid.nsw.gov.au/publications/factsheets-and-resources/human-rights-for-everyday-life>>.

¹¹⁷⁵ Ibid.

¹¹⁷⁶ Youth Law Australia <<https://yla.org.au/contact-us/>>.

¹¹⁷⁷ Youth Law Australia, *National Children’s and Youth Law Centre’s (NCYLC) Progress Report to the Commonwealth Attorney-General’s Department – 1 July 2016 to 30 June 2017*, 9.

¹¹⁷⁸ Youth Law Centre ACT, *Youth Law Centre* <<http://www.youthlawact.org.au/>>.

¹¹⁷⁹ Shopfront Youth Legal Centre, *What we can do for you* <<http://www.theshopfront.org/5.html>>.

¹¹⁸⁰ Marrickville Legal Centre <<http://www.mlc.org.au/youth>>.

- Queensland: Youth Advocacy Centre.¹¹⁸²
- South Australia: Children's and Youth Law Service of SA;¹¹⁸³
- Western Australia: Youth Legal Service;¹¹⁸⁴ and
- Victoria: Youthlaw Young People's Legal Rights Centre Inc.¹¹⁸⁵ and WEstjustice - Sunshine Youth Office.¹¹⁸⁶

It appears that there is no community legal centre specialising in advising children and young people available in the ACT nor the Northern Territory.

In addition to the youth law centres mentioned, various other NGOs provide free legal services to socially disadvantaged and/or marginalised persons (including children and young people), for example:

- Public Interest Advocacy Centre;¹¹⁸⁷ and
- Justice Connect (formerly known as the Public Interest Law Clearing House).¹¹⁸⁸

Some legal centres and university student unions also offer free legal advice to enrolled students, such as the Redfern Legal Centre,¹¹⁸⁹ the University of Melbourne Student Union,¹¹⁹⁰ and the Arc Legal and Advocacy Department at the University of NSW.¹¹⁹¹

As outlined above at **3.10.1 – Mechanisms – Children's access to justice - General**, the Australian Productivity Commission found in 2014 the gap in the availability of independent lawyer services for children 'especially worrying'¹¹⁹² and recommended that Australian governments provide an additional \$200 million/year to address these shortcomings.¹¹⁹³

Aboriginal and Torres Strait Islander Legal Services

There are also specialist Aboriginal and Torres Strait Islander Legal Services that have historically been funded through the Indigenous Legal Assistance Program (ILAP) as follows:¹¹⁹⁴

- Aboriginal and Torres Strait Islander Legal Services Qld Limited (Queensland, including Torres Strait);
- Aboriginal Legal Rights Movement Incorporated (South Australia);
- Aboriginal Legal Service of Western Australia Incorporated (Western Australia);
- Aboriginal Legal Service (NSW/ACT) Limited (New South Wales and Australian Capital Territory);
- North Australian Aboriginal Justice Agency Limited (Northern Territory north and south zone);
- Tasmanian Aboriginal Community Legal Service (Tasmania); and
- Victorian Aboriginal Legal Service Co-operative Limited (Victoria).

A Review of ILAP published in February 2019 found that:¹¹⁹⁵

- the ILAP provides essential funding that enables the delivery of unique and specialised legal assistance

¹¹⁸¹ YFS Legal <<http://www.yfs.org.au/yfs-legal/>>.

¹¹⁸² Youth Advocacy Centre <<http://www.yac.net.au/>>.

¹¹⁸³ Uniting Communities, *Youth Services* <<http://www.unitingcommunities.org/find-a-service/youth-services/>>.

¹¹⁸⁴ Youth Legal Services, *Legal Services* <<http://youthlegalserviceinc.com.au/legal-assistance/>>.

¹¹⁸⁵ Youthlaw, *Services* <<http://youthlaw.asn.au/services/>>.

¹¹⁸⁶ WEstjustice <<http://www.westjustice.org.au/>>.

¹¹⁸⁷ Public Interest Advocacy Interest LTD <<https://www.piac.asn.au/>>.

¹¹⁸⁸ Justice Connect <<https://www.justiceconnect.org.au/>>.

¹¹⁸⁹ Redfern Legal Centre, *International Students* <<https://rlc.org.au/our-services/international-students>>.

¹¹⁹⁰ University of Melbourne Student Union, *UMSU Legal Service* <<https://umsu.unimelb.edu.au/support/legal/>>.

¹¹⁹¹ Arc, *Help* <<https://www.arc.unsw.edu.au/help>>.

¹¹⁹² Productivity Commission, *Access to Justice Arrangements – Productivity Commission Inquiry Report No. 72* (5 September 2014) <<https://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-overview.pdf>> 30.

¹¹⁹³ *Ibid*, 63.

¹¹⁹⁴ Attorney-General's Department, *Indigenous Legal Assistance Program*

<<https://www.ag.gov.au/LegalSystem/Legalaidprogrammes/Pages/Indigenous-Legal-Assistance-Program.aspx>>.

¹¹⁹⁵ Cox Inall Ridgeway, *Review of the Indigenous Legal Assistance Program (ILAP) 2015-2020 – Final Report, February 2019 – Prepared for the Attorney-General's Department* (February 2019) <<https://www.ag.gov.au/LegalSystem/Legalaidprogrammes/Documents/Review-of-the-ILAP.PDF>> 8.

| | |
|--------------------------------|--|
| | <p>services for Aboriginal and Torres Strait Islander peoples,</p> <ul style="list-style-type: none"> the services delivered by ATSILSs with the support of ILAP funding are cost effective, high quality, culturally appropriate and accessible, to the extent possible within available resources, consistent with the objectives and outcomes of the ILAP, the current focus on the delivery of criminal law services by ATSILSs is consistent with the objectives, outcomes and service delivery principles of the ILAP, and there are opportunities to improve the ILAP, to strengthen the delivery of legal assistance services to Aboriginal and Torres Strait Islander peoples. <p>Despite this, the Australian Government indicated in the April 2019 Budget that it would be disbanding the ILAP, and establish a single funding mechanism covering funding for Aboriginal and Torres Strait Islander Legal Services, legal aid services and community legal centres. Aboriginal and Torres Strait Islander Legal Services have indicated that such a move threatens self-determination and cultural safety for clients that rely on these services.¹¹⁹⁶</p> |
| 3.10.5 Group litigation | <p>Are collective complaints, class action lawsuits and other forms of group litigation authorized to address multiple and similar violations of children's rights? If so, does this require the identification and involvement of individual children?</p> |
| | <p>Representative actions, group proceedings and collective litigation, all now referred to as 'class actions' are jurisdictionally regulated in Australia, but class actions procedure and requirements are similar across all jurisdictions. In the Federal Court of Australia (the court that hears class actions involving federal legislation) and Victoria the regulations are identical. Members may commence proceedings if seven or more persons have claims against the same person; the claims all arise from the same, similar or related circumstances; and the claims of all members give rise to a substantial common question of law or fact.</p> <p>In class actions, consent generally is not required to be a member of the group bringing the action.¹¹⁹⁷ This system is known as 'opt-out', because all persons meeting the requirements of being a class member (including children, if applicable) are joined unless they choose to opt out of the proceeding.¹¹⁹⁸</p> <p>In Victoria, there are specific provisions for children (termed as 'persons under disability') about participating in a class action. Nonetheless, '[i]t is not necessary for a person under a disability to have a litigation guardian merely in order to be a group member.'¹¹⁹⁹ In practice, this means that a child will stand to benefit from any award made in the class action if it proceeds to judgment (unless he or she opts out which is unlikely). However, if the class action settles before judgment, as they commonly do, the child will need to give instructions to accept or reject any settlement offer before Court approval of the settlement is sought. In those circumstances, the child will need to have a litigation guardian, as 'a group member who is a person under disability may only take a step in the group proceeding, or conduct part of the proceeding, by the group member's litigation guardian.'¹²⁰⁰</p> |
| 3.10.6 Resolution | <p>To what extent are legal proceedings involving children prioritized within the justice system?</p> |
| | <p>Children's Courts are the specialist courts in Australia that have primary jurisdiction to hear cases involving children. These Courts generally have jurisdiction only in relation to criminal matters and care and protection matters but it varies between States and Territories. For example in NSW, the Children's Court can also hear applications for apprehended violence orders and applications for compulsory schooling orders.¹²⁰¹ Each Court has different legislation, regulations, guidelines and practice notes that govern their operations and procedure but seemingly no Children's Court has specific jurisdiction to hear matters involving a complaint by a child</p> |

¹¹⁹⁶ Aboriginal Legal Services of Western Australia Limited, *Abandoning standalone Commonwealth Indigenous Legal Assistance Program after 50 year long commitment threatens self-determination and cultural safety* (3 April 2019) <<https://www.als.org.au/natsils-media-release-abandoning-standalone-commonwealth-indigenous-legal-assistance-program/>>.

¹¹⁹⁷ *Supreme Court Act 1986* (Vic) s 33E.

¹¹⁹⁸ *Ibid*, s 33J.

¹¹⁹⁹ *Ibid*, s 33F(1).

¹²⁰⁰ *Ibid*, s 33F(2).

¹²⁰¹ The Children's Court of New South Wales <<http://www.childrenscourt.justice.nsw.gov.au/>>.

against a business for a case alleging human rights abuses.

Where Children's Courts are exercising jurisdiction, they are generally required to ensure that proceedings are expeditious. For example, Practice Notes indicate that proceedings are to progress 'as expeditiously as possible'.¹²⁰² Legislation can also provide for a similar requirement. For example in the NSW Children's Courts, care matters must proceed as expeditiously as possible and therefore a Children's Court Magistrate should avoid granting adjournments unless it is in the best interest of the young person or there is some other cogent or substantial reason to do so.¹²⁰³ In Victoria, the Children's Court must not order a conciliation conference in a case that appears to be able to be resolved expeditiously because of the length of time that conciliations usually take and involve a child. Further, all conciliation conferences must be held as early as possible in proceedings in order to facilitate the early resolution of applications for children.¹²⁰⁴

¹²⁰² Children's Court of New South Wales, *Practice Note No. 12 – Criminal proceedings in the Children's Court* (commenced 18 May 2018) <<http://www.childrenscourt.justice.nsw.gov.au/Documents/PN%2012%20Childrens%20Court%20Practice%20Note.pdf>> [5.1].

¹²⁰³ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 94(4).

¹²⁰⁴ Children's Court of Victoria, *Guidelines for Conciliation Conferences* (March 2016)

<http://www.childrenscourt.vic.gov.au/sites/default/files/ccv_files/Guidelines%20for%20Conciliation%20Conferences%20-%201%20March%202016_0.pdf>.

| 4. CONTEXT | | |
|---|--------------------------|---|
| 4.1 | International monitoring | What recommendations on children's rights and business have the Committee on the Rights of the Child, other United Nations treaty bodies, and the Universal Periodic Review process issued to the government? What statistics, information, and guidance relevant to children's rights and business in the national context have been produced by international and regional organizations, including UNICEF and the ILO? |
| <p>United Nations Treaty Bodies</p> <p>The Concluding Observations made by the UN Committee on the Rights of the Child provide the most direct recommendations on business and children's rights in Australia.</p> <p>United Nations Committee on the Rights of the Child</p> <p><i>Concluding Observations: Australia (28 August 2012)</i></p> <p>In its 2012 Concluding Observations regarding child rights and the business sector in Australia (in consideration of reports submitted by States parties under article 44 of the Children's Convention), the Committee raised concerns in relation to 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, where children have been victims of evictions, land dispossession and killings.'¹²⁰⁵ Further, the Committee raised concern in relation to reports of child labour and conditions of work of children that are in contravention of international standards in fishing industry enterprises in Thailand.¹²⁰⁶</p> <p>In relation to Australian mining companies and their conduct overseas the Committee noted with regard to the 'Enduring Values' initiative of the Minerals Council of Australia: 'the inadequacy of this in preventing direct and/or indirect human rights violations by Australian mining enterprises.'¹²⁰⁷</p> <p>As a result of the above observations, the Committee on the Rights of the Child recommended in 2012 that Australia (Concluding Observation 28):¹²⁰⁸</p> <ul style="list-style-type: none"> a) Examine and adapt its legislative framework (civil, criminal and administrative) to ensure the legal accountability of Australian companies and their subsidiaries regarding abuses to human rights, especially child rights, committed in the territory of the State party or overseas and establish monitoring mechanisms, investigation, and redress of such abuses, with a view to improving accountability, transparency and prevention of violations; b) Take measures to strengthen cooperation with countries in which Australian companies or their subsidiaries operate to ensure respect for child rights, prevention and protection against abuses and accountability; c) Establish that human rights impact assessment, including child rights impact assessments, are conducted prior to the conclusion of trade agreements with a view to ensuring that measures are taken to prevent child rights violations from occurring and establish the mechanisms for the Export Credit Agency of Australia to deal with the risk of abuses to human rights before it provides insurance or guarantees to facilitate investments abroad. <p>Australia will again appear before the Committee on the Rights of the Child in 2019 (Reporting Cycle V-VI). In preparation for this, the Australian Government submitted its State Party report in January 2018.¹²⁰⁹ The State Party Report includes a section that considers 'Child rights and the business sector (Art 4)' (Concluding Observation 28, 2012 – extracted above) which states (references omitted):¹²¹⁰</p> | | |

¹²⁰⁵ United Nations Committee on the Rights of the Child, n 130.

¹²⁰⁶ Ibid.

¹²⁰⁷ Ibid.

¹²⁰⁸ Ibid, [28].

¹²⁰⁹ Office of the High Commissioner for Human Rights, *Ratification, Reporting and Documentation for Australia* <https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx>.

¹²¹⁰ Committee on the Rights of the Child, *Combined fifth and sixth periodic reports submitted by Australia under article 44 of the Convention, due in 2018* [date received 15 January 2018] (22 November 2018), UN Doc. CRC/C/AUS/5-6, [54]-[60]. See also Attorney-General's

Businesses must comply with all Australian laws, including those in place to implement our international human rights obligations. The Australian Government supports responsible business conduct, including through domestic anti-discrimination, privacy and employment laws and criminal offences for conduct such as forced labour, slavery and torture.

The Australian Government continues to encourage businesses to apply the United Nations Guiding Principles on Business and Human Rights in their operations. The Guiding Principles acknowledge that 'States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction'.

The Australian Human Rights Commission has made business and human rights a priority. The Commission encourages discussion with business about how to implement the Guiding Principles through its Business and Human Rights Network and by convening national dialogues with business, government and civil society.

The Australian Government has endorsed the OECD Guidelines for Multinational Enterprises. It has established the Australian National Contact Point (ANCP) to manage complaints of misconduct under the Guidelines. The Australian Government commissioned an independent review of the ANCP and is considering how to improve its operation.

Trade Agreements

The Australian Government consults a wide range of stakeholders, including peak industry bodies, companies, academics, unions, consumer groups, special interest groups and civil society when negotiating trade agreements. The Parliamentary Joint Committee on Human Rights reviews implementing legislation for any trade agreement for compatibility with human rights.

Australia has included specific labour commitments, including protections for children, in several free trade agreements (FTAs), including the Korea-Australia FTA, the Australia-US FTA and the Trans-Pacific Partnership Agreement (not yet in force). These commitments require Australia and its relevant trading partner to uphold internationally recognised labour principles, including labour protections for children and the elimination of child labour. Australia's FTA commitments on labour standards establish cooperation and compliance mechanisms and allow reciprocal consultations to address concerns about compliance.

The Export Credit Agency of Australia is the Export Finance and Insurance Corporation (Efic). Efic's Board adopted a Human Rights Statement to explain how it identifies and manages its interaction with human rights, and a Policy and Procedure that further explain how human rights are considered during due diligence processes.

The Committee's concluding observations for Australia under Reporting Cycle V-VI are expected in late 2019.

The Australian Human Rights Commission's report to the UN Committee on the Rights of the Child considered the issue of child rights and the business sector, outlining:¹²¹¹

In 2015, the NCC undertook research on the rights of children as consumers of goods and services, focusing on the issue of online consumption. The research explored the adequacy of regulatory regimes, consumer and privacy laws, and the responsibilities of business in relation to children. In response to her work, the Australian Government has developed new guidance content on children's rights for its business.gov.au resource.

In early 2016, the Australian Government committed to progress national consultations on the implementation of the UN Guiding Principles (UNGPs) on Business and Human Rights in Australia. As part of this process, a stocktake of business and human rights was undertaken and a Multi-Stakeholder Advisory Group convened to provide expert advice on the implementation of the UNGPs.

In its final report, the Multi-Stakeholder Advisory Group recommended that the Australian Government develop a National Action Plan on Business and Human Rights which sets out the concrete steps it will take to implement the UNGPs, including its expectations of business and other stakeholders regarding their conduct in Australia and abroad, and what support it will provide in helping them meet those expectations. It is essential that children's rights are reflected in this National Action Plan and children participate in its development.

Department, *Treaty body reporting* <<https://www.ag.gov.au/RightsAndProtections/HumanRights/United-Nations-Human-Rights-Reporting/Pages/Treaty-Body-Reporting.aspx>>.

¹²¹¹ Australian Human Rights Commission, *Information relating to Australia's joint fifth and sixth report under the Convention on the Rights of the Child, second report on the Optional Protocol on the sale of children, child prostitution and child pornography, and second report on the Optional Protocol on the involvement of children in armed conflict, Submission to the Committee on the Rights of the Child* (1 November 2018) <<https://www.humanrights.gov.au/our-work/childrens-rights/publications/report-un-committee-rights-child-2018>> [54]-[56].

Recommendation 13: The Australian Government develops a National Action Plan on Business and Human Rights, in consultation with key stakeholders, and that it includes measures addressing children's rights particularly exploitation and trafficking in supply chains.

Concluding Observations: Australia (24 September 2012)¹²¹²

In September 2012, the Committee published its Concluding Observations on Australia in consideration of reports submitted by States parties under article 12, paragraph 1, of the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*. It welcomed the positive initiative 'Tomorrow's Children: Australia's National Plan of Action against the Commercial Sexual Exploitation of Children' as relevant to the implementation of the Optional Protocol.¹²¹³ In addition to this, the Committee noted the National Plan of Action to Combat Trafficking in Persons, and Australia's policing strategy in relation to combating trafficking in persons (2011-2013).

At the same time the Committee was concerned that:

- a) Australian domestic legislation does not fully incorporate all offences under the Optional Protocol and is not harmonized as regards to the prohibition and criminalization of these crimes; and
- b) Australia's National Action Plan, and other similar initiatives, do not provide 'timetables, indicators, key activities and concrete measures...' ¹²¹⁴ to monitor the implementation of the Optional Protocol.

The Committee made recommendations in relation to these primary concerns.

UN Committee on Economic, Social and Cultural Rights

In its Concluding Observations on Australia issued in July 2017, the UN Committee on Economic, Social and Cultural Rights (CESCR) recommended that Australia introduce clear regulation and legal liability on businesses regarding breaches of economic, social and cultural rights.¹²¹⁵

UN Committee on the Elimination of Discrimination against Women

Australia appeared before the United Nations Committee on the Elimination of Discrimination against Women (**CEDAW Committee**) in July 2018. In its Concluding Observations, the Committee raised the following issues in connection to businesses:¹²¹⁶

Extraterritorial obligations; Extractive industries and Climate Change

29. The Committee is concerned at:

- (a) The gendered social and environmental impact of the State party's extractive industry projects, which is due to displacement, loss of livelihoods and social services for local women, result in their discrimination, exclusion and marginalisation, and fuel conflict and related gender-based violence against women;
- (b) Corporations of the extractive industries, which are registered or domiciled within the State party and receive public financial subsidies, carrying out major projects in Papua New Guinea and South Africa without landowner identification, consultation of women on the management of mines and benefit-sharing, and in the absence of the prior informed consent of local women;
- (c) The lack of a human rights perspective on climate change taking into consideration the most vulnerable women, including those in the State party, at the State party's greenhouse gas emissions of 1.4 per cent of global emissions, without the emissions imbedded in export, at those emissions being high in relation to its population of 0.3 per cent of the world's population and partially related to the continuous dependency on coal for domestic use and exports, and at the limited impact of the State party's

¹²¹² United Nations Committee on the Rights of the Child, n 799.

¹²¹³ Ibid.

¹²¹⁴ Ibid.

¹²¹⁵ United Nations Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia*, UN Doc E/C.12/AUS/CO/5 (11 July 2017)

<http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fAUS%2fCO%2f5&Lang=en>.

¹²¹⁶ United Nations Committee on the Elimination of Discrimination against Women, n 736.

humanitarian assistance on surrounding Small Island States.

30. In line with its general recommendations No. 37 (2018) on the gender-related dimensions of disaster risk reduction in the context of climate change and No. 30 (2013) on women in conflict prevention, conflict and post-conflict situations, the Committee recommends that the State party:

- (a) Develop a National Action Plan on Business and Human Rights incorporating a gender perspective, in light of the 2030 agenda and in line with the commitment undertaken at the second cycle of its Universal Periodic Review (A/HRC/31/14, 136.212), and ensure that all large scale development and extractive projects are implemented with the prior informed consent of locally affected women, reflect adequate benefit-sharing arrangements and is preceded by a thorough gender impact assessment involving rural and indigenous women, recognizing their leadership in these processes, in line with General recommendation No. 34 (2016) on the rights of rural women;
- (b) Establish a specialized mechanism to investigate violations of women's human rights by corporations which are based or registered within the State party or receive subsidies from it, bring perpetrators to justice and expeditiously ensure compensation and rehabilitation for women victims, including to the victims of the Bougainville conflict, in line with General recommendation No. 28 (2010) on the core obligations of States parties under article 2 of the Convention;
- (c) Adopt a human rights-based approach in the development of climate change responses, make women the central force for the development and implementation of its activities linked to climate change at the local, national, regional and international levels, further reduce its greenhouse gas emissions, notably those resulting from coal consumption and export, and reinforce its support to gender-sensitive disaster risk reduction and climate change adaption within the State party and in surrounding Small Island States.

Trafficking and exploitation of prostitution

31. The Committee welcomes the State party's leadership in the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime. It is concerned, however, at:

- (a) The lack of gender perspective in the reports issued by the Interdepartmental Committee on Human Trafficking and Slavery;
- (b) The high vulnerability threshold preventing victims of trafficking from accessing Status Resolution Support Services and exposing them to a risk of re-trafficking;
- (c) The very short reflection period of 45 days and the conditions of access to visas and compensation schemes based on the cooperation of trafficking victims with the prosecution authorities;
- (d) Insufficient compensation schemes for victims of trafficking and the lack of harmonization in this regard;
- (e) Prevailing attitudes among the judiciary and law enforcement officials considering victims of trafficking as offenders and irregular migrants rather than victims, which constitutes an obstacle to reporting, early identification and referral of trafficking victims to the appropriate social and legal services;
- (f) The low prosecution rate in trafficking cases;
- (g) The delay in the adoption of the Modern Slavery Act.

32. The Committee recommends that the State party:

- (a) Integrate the Office for Women in its Interdepartmental Committee on Human Trafficking and Slavery and ensure that it issues gender-sensitive recommendations;
- (b) Lower the vulnerability threshold for women to access Status Resolution Support Services;
- (c) Extend the reflection period to at least 90 days and ensure access for all victims of trafficking, irrespective of their willingness or unwillingness to cooperate with the prosecution authorities, to the Human Trafficking Visa Framework;
- (d) Establish a federal compensation scheme for survivors of trafficking that grants appropriate reparations, and de-link victims' access to compensation from their cooperation in criminal proceedings;
- (e) Encourage reporting by raising awareness on the risks of trafficking among vulnerable communities, and train judges and law enforcement officials on early identification of trafficking victims and referral to appropriate social and legal services, as well as on gender-sensitive investigation methods;
- (f) Ensure that traffickers are prosecuted and adequately punished;

- (g) Expedite the adoption of the Modern Slavery Act;
- (h) Intensify international, regional and bilateral cooperation with countries of origin, transit and destination, in particular with countries in the region, including by exchanging information and harmonizing legal procedures for prosecuting traffickers, to prevent trafficking.

...

Employment

43. The Committee welcomes initiatives to work with businesses to increase women's participation in leadership positions. However, the Committee notes with concern:

- (a) That industrial and occupational segregation together account for 30 per cent of the 15.3 per cent gender pay gap;
- (b) The lack of obligations on employers regarding flexible working arrangements, which contributes to the overrepresentation of women in part-time work and lower paid sectors;
- (c) The lack of incentives for the reconciliation of work and family responsibilities, which results in only 15 per cent of infants being breastfed up to the age of five months;
- (d) That parental leave is paid at the minimum wage and only for 18 weeks, and that it is not counted towards superannuation benefits;
- (e) That men's average superannuation balance is 37 per cent higher than women's, which leads to women's high risk of poverty and homelessness in old age.

44. The Committee recommends that the State party implement the recommendations of the 2017 Inquiry into gender segregation in the workplace and:

- (a) Reinforce measures to address industrial and occupational segregation and establish a national policy framework to implement the principle of equal pay for work of equal value with a defined pay equity target date;
- (b) Implement the recommendations of the Supporting Working Parents: Pregnancy and Return to Work National Review, including by introducing a duty on employers to reasonably accommodate a request for flexible working arrangements;
- (c) Introduce a 'code of practice' on the legal obligations of employers with regard to pregnant employees and employees with family obligations, and raise awareness of employers about such obligations;
- (d) Guarantee a minimum of 26 weeks paid maternal leave, which should be remunerated at the actual revenue of the mother, introduce an additional minimal four week paid leave to be taken by the supporting parent, and count the entire period in superannuation benefits;
- (e) Conduct a gender-analysis of its superannuation system, taking into account disparities linked to women's role in the provision of care, to eliminate the disadvantage affecting women.

Universal Periodic Review

Report of the Working Group on the Universal Periodic Review (November 2015)¹²¹⁷

Australia underwent its second Universal Periodic Review (UPR) process in November 2015. During the appearance, Member States put forward recommendations that Australia to 'adopt a National Action Plan to implement the Guiding Principles on Business and Human Rights' (Netherlands), and 'begin a consultative process towards adoption of a National Action Plan on business and human rights' (Norway).¹²¹⁸ It was also recommended that Australia '[s]trengthen the normative framework for the protection of human rights, including the monitoring, investigation and reparation for human rights violations committed by Australian enterprises in their territories and in third States' (Ecuador).¹²¹⁹ The review also provided insight on a plethora of other issues regarding children's rights.

¹²¹⁷ United Nations Human Rights Council, *Report for the Working Group on the Universal Periodic Review: Australia*, 31st sess, agenda item 6, UN Doc A/HRC/31/14, (13 January 2016) <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/004/89/PDF/G1600489.pdf?OpenElement>>.

¹²¹⁸ Ibid, [136.212] and [136.213].

¹²¹⁹ Ibid, [136.214].

INTERNATIONAL AND REGIONAL ORGANISATIONS - INFORMATION AND GUIDANCE

International Labour Organisation - *Study on Labour Inspection Sanctions and Remedies: The Case of Australia*¹²²⁰

This report describes the mechanisms for the enforcement of minimum employment standards and occupational health and safety in Australia. It also considers the extent of child labour regulation in Australia in or around 2008.¹²²¹

4.2 Civil society

What campaigns related to children's rights and business in the national context have been launched? What relevant information has been published by local, national, regional, and international civil society organizations (e.g. Business and Human Rights Resource Centre – Business and Children Portal; Child Rights International Network)?

There has been concerted advocacy by civil society in Australia for the development of an Australian National Action Plan on Business and Human Rights.¹²²² In August 2016 a joint civil society statement on Australia's implementation of the UN Guiding Principles on Business and Human Rights was supported by over 16 major NGOs and the Australian Human Rights Commission.¹²²³ Individual organisations such as the Human Rights Law Centre¹²²⁴ and Australian Lawyers for Human Rights¹²²⁵ have also advocated for a NAP.

Additional civil society activities regarding children and young people and the impact of the business sector have focused on:

- **Child labour** – For example, Fair Trade Australia/New Zealand launched the campaign 'The Cleanest Uniform in Australia' that aims at encouraging schools to switch to child labour free uniforms.¹²²⁶
- **Labour exploitation** – For example, with regard to the treatment of young workers in franchises by the Young Workers Centre,¹²²⁷ and also 'wage theft' affecting young 'backpackers', migrant workers and international students.¹²²⁸
- **Climate change and environment** - for example, regarding the health, climate and economic risks of the proposed Carmichael coalmine,¹²²⁹ and the impact of climate change on Aboriginal and Torres Strait Islander Australians.¹²³⁰ Many children themselves have also protested against a lack of action by Australian policy makers to help address climate change.¹²³¹

¹²²⁰ John Howe, Nicole Yazbek and Sean Cooney, *LAB / ADMIN - Study on Labour Inspection Sanctions and Remedies: The case of Australia*, Working Document No. 14, International Labour Office (March 2011) <http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/publication/wcms_154066.pdf>.

¹²²¹ Ibid.

¹²²² Implementing the UN Guiding Principles on Business and Human Rights in Australia – Joint Civil Society Statement, n 61.

¹²²³ Ibid.

¹²²⁴ Human Rights Law Centre, *An Australian National Action Plan for the Implementation of the UN Guiding Principles on Business and Human Rights – Background Paper* (24 April 2014)

<<https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/5850bba96b8f5b777d5f09ca/1481685932041/National+Action+Plan+on+Business+and+Human+Rights+-+background+paper.pdf>>.

¹²²⁵ Australian Lawyers for Human Rights, *Policy Paper on an Australian National Action Plan to implement the UN Guiding Principles on Business and Human Rights* (19 February 2016) <<http://alhr.org.au/wp/wp-content/uploads/2016/03/NAP-Policy-Paper.pdf>>.

¹²²⁶ Fairtrade Australia/New Zealand, *The Cleanest Uniform in Australia* <<http://fairtrade.com.au/Get-Involved/Our-Campaigns/thecleanestuniform>>.

¹²²⁷ Young Workers Centre, *Campaigns* <http://www.youngworkers.org.au/get_involved>.

¹²²⁸ Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia – Findings of the National Temporary Migrant Work Survey* (November 2017) <<http://apo.org.au/system/files/120406/apo-nid120406-483146.pdf>>.

¹²²⁹ Climate Council, *Risky Business: Health, Climate and Economic Risks of the Carmichael Coalmine* (2017) <<https://www.climatecouncil.org.au/uploads/0806fecbd0f2e78389a998d8403ac2bc.pdf>>.

¹²³⁰ SEED – Australia's Indigenous Youth Climate Network and a branch of the Australian Youth Climate Coalition, *About Seed* <https://www.seedmob.org.au/about_seed>.

Other campaigns around business and human rights issues that are not specific to children but that seek to have a broad positive impact including for the rights of children, include:

- **Access to remedy** – A number of civil society organisations are engaged in advocacy to help obtain access to justice for communities overseas affected by the activities of Australian businesses.¹²³²
- **Immigration detention** – for example, the GetUp campaign in conjunction with No Business in Abuse (NBIA) that has focused on preventing corporate complicity in abuses within the Australian immigration system.¹²³³
- **Fashion and apparel** – For example, Baptist World Aid Australia publishes an annual Ethical Fashion Report that assesses companies' efforts to mitigate the risks of forced labour, child labour and worker exploitation in their supply chains.¹²³⁴ Ethical Clothing Australia accredits Australian businesses that manufacture locally and publishes information on their supply chains.¹²³⁵
- **Slavery** – For example, the work of NGOs such as Anti-Slavery Australia and The Freedom Partnership to End Modern Slavery regarding slavery and labour exploitation in supply chains and commercial operations. In addition, over 200 submissions to the parliamentary inquiry into establishing a Modern Slavery Act in Australia were made by individuals, groups, businesses and non-government organisations.¹²³⁶
- **Public procurement and supply chain issues** – Numerous civil society organisations have made recommendations to the Australian Government regarding the need to improve its procurement approach to integrate human rights considerations.¹²³⁷ In addition, others have conducted advocacy in relation to the procurement of medical goods.¹²³⁸

Australian Child Rights Taskforce (CRTF)

As mentioned earlier in the report, the CRTF is Australia's peak child rights network, made up of more than 100 organisations advocating for the protection, promotion and fulfilment of the rights of children in Australia. The Taskforce is convened by UNICEF Australia. Its website provides information about child rights and the business sector in Australia. It also provides information about the Children's Convention and the concluding observations of the UN Committee on the Rights of the Child (mentioned above) in regard to the participation and complicity of Australian companies in violations of human rights.¹²³⁹

The report of the Child Rights Taskforce to the UN Committee on the Rights of the Child submitted in November 2018 also recommended that Australia develop a National Action Plan on Business and Human Rights, and ratify ILO 138 Convention concerning Minimum Age for Admission to Employment and the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure.¹²⁴⁰

¹²³¹ 'Students strike for climate change protests, defying calls to stay in school', *ABC News* (1 December 2018)

<<https://www.abc.net.au/news/2018-11-30/australian-students-climate-change-protest-scott-morrison/10571168>>.

¹²³² See, for example, Human Rights Law Centre, n 1067; and Jubilee Australia, *Justice* <<https://www.jubileeaustralia.org/projects/justice>>.

¹²³³ GetUp!, *No Business in Abuse* <<https://www.nobusinessinabuse.org/site/info>>.

¹²³⁴ Baptist World Aid Australia, n 587.

¹²³⁵ Ethical Clothing Australia <<http://ethicalclothingaustralia.org.au/>>.

¹²³⁶ See *Hidden in Plain Sight: An inquiry into establishing a Modern Slavery Act in Australia*, n 100.

¹²³⁷ See *Inquiry into the Commonwealth Procurement Framework*, n 455.

¹²³⁸ Martijn Boersma, *Procurement of Medical Goods by Australian Companies and Government*, Australian Nursing and Midwifery Federation and The Australia Institute (March 2017) <http://www.anmf.org.au/documents/Do_No_Harm_Report.pdf>.

¹²³⁹ Australian Child Rights Taskforce, *Child Rights and the Business Sector* <<http://www.childrights.org.au/reportcard/child-rights-business-sector/>>.

¹²⁴⁰ UNICEF Australia and the Australian Child Rights Taskforce, *The Children's Report – Australia's NGO coalition report to the United Nations Committee on the Rights of the Child (2018)* <<https://www.unicef.org.au/Upload/UNICEF/Media/Documents/Child-Rights-Taskforce-NGO-Coalition-Report-For-UNCRC-LR.pdf>> 10.

In 2016, the CRTF published a report which marked 25 years of the Children's Convention in Australia. The report included numerous recommendations, including that state, territory and Commonwealth governments conduct a baseline assessment for the implementation of the UN Guiding Principles on Business and Human Rights, and commit to a National Action Plan on Business and Human Rights.¹²⁴¹

Business & Human Rights Resource Centre

The Business and Human Rights Resource Centre is a not-for-profit organisation that works to advance business respect for human rights.¹²⁴² It has 18 regional researchers, conducts briefings and analysis and is a global hub for resources and guidance for businesses. In 2017 the BHRRC has established for the first time a post covering Australia, New Zealand and the Pacific region.¹²⁴³ On the page of its website regarding Australia, the BHRRC provides information on Australian companies, as well as relevant domestic information, reports and news on policy, legislative and other developments relating to business and human rights issues. The material covers a large range of issues, some of which extend to children's rights. For example, reports such as 'Community development agreements between natural resource firms & stakeholders - brief on good practice', provides guidance on how the Community Development Agreement (CDA) is a vital mechanism for ensuring that local communities benefit from large-scale agreements between investor and a project-affected community.¹²⁴⁴ The BHRRC also provides general information on how countries can best implement the Children's Rights & Business Principles.¹²⁴⁵ The Department for Foreign Affairs and Trade provides funding for, and works closely with, the BHRRC in Australasia.¹²⁴⁶

Global Compact Network Australia (GCNA)

The Global Compact Network Australia (GCNA) is the Australian, business-led network of the UN Global Compact. It brings together signatories to the UN Global compact in Australia 'to advance corporate sustainability and the private sector's contribution to sustainable development'¹²⁴⁷. It does so through learning, dialogue and influence.

GCNA provides information and resources in relation to the Children's Rights and Business Principles.¹²⁴⁸ The GCNA website also provides general information on the above mentioned annually held Australian Dialogue on Business and Human Rights.

Australasian Centre for Corporate Responsibility (ACCR)

The Australasian Centre for Corporate Responsibility (ACCR) conducts research on social, environmental and governance issues and impacts of corporations, and assists shareholders to engage with companies on these issues.¹²⁴⁹ As part of its work, the ACCR publishes an annual 'Human rights and Australian listed companies' benchmarking report that assesses Australian companies' responses to human rights risks, including child labour. In the 2017 report, the ACCR identified an average overall score of 31.91% for Australian companies. Based on its assessment, the ACCR found that a 'significant number of large listed Australian companies lag far

¹²⁴¹ Australian Child Rights Taskforce, n 763, 6.

¹²⁴² Business & Human Rights Resource Centre, *About us* <<https://www.business-humanrights.org/en/about-us>>.

¹²⁴³ Business & Human Rights Resource Centre, *Business & Human Rights Resource Centre launches new post covering Australia, New Zealand & the Pacific region* <<https://business-humanrights.org/en/business-human-rights-resource-centre-launches-in-australasia-with-new-post-covering-australia-new-zealand-the-pacific-region>>.

¹²⁴⁴ Jennifer Loutit, Jacqueline Mandelbaum and Sam Szoke-Burke, *Community development agreements between nature resource firms & stakeholders - brief on good practice*, Columbia Centre on Sustainable Investment, USA (17 March 2016) <<http://business-humanrights.org/en/community-development-agreements-between-natural-resource-firms-stakeholders-brief-on-good-practices>>.

¹²⁴⁵ Business & Human Rights Resource Centre, *Implementation* <<http://business-humanrights.org/en/implementation>>.

¹²⁴⁶ Department of Foreign Affairs and Trade, *Partnership with Business & Human Rights Resource Centre* <<http://dfat.gov.au/international-relations/themes/human-rights/business/Pages/default.aspx>> and Business and Human Rights Resource Centre, *Partners & endorsements* <<https://www.business-humanrights.org/en/about-us/partners-endorsements>>.

¹²⁴⁷ Global Compact Network Australia, *About* <<http://www.unglobalcompact.org.au/about/gcna>>.

¹²⁴⁸ Global Compact Network Australia, *Children's Rights* <<http://www.unglobalcompact.org.au/issues/social-sustainability/childrens-rights/>>.

¹²⁴⁹ Australasian Centre for Corporate Responsibility, *What ACCR does* <<http://www.accr.org.au/what>>.

behind their peers in their response to human rights issues’ and ‘significant improvements can be made with regards to utilising best practice human rights policies, due diligence, grievance mechanisms and performance’.¹²⁵⁰

Child Rights International Network (CRIN)

CRIN provides reports on individual countries in relation to the ability of children to access justice. The CRIN report concerning Australia looks into the legal status of the Children’s Convention in this jurisdiction and the extent to which the principles provided in the Children’s Convention are/can be incorporated into, or even take precedence over, national law. The reports also covers the legal status of children and the ability for children to obtain redress/compensation for human rights violations. All mechanisms are relevant to the ability of children to protect themselves against the human rights violations of businesses in Australia.¹²⁵¹ As mentioned above, CRIN ranked Australia at 37 out of 197 countries in terms of children’s access to justice generally.¹²⁵²

In terms of the impact of the business sector on children, CRIN and the International Commission of Jurists published a guide for NGOs on how to use the United Nations Committee on the Rights of the Child’s 16th General Comment.¹²⁵³

Corporate Human Rights Benchmark (CHRB) and KnowTheChain

CHRB and KnowTheChain evaluate companies from high-risk industries, including Australian companies, against human rights indicators and publish their findings.¹²⁵⁴ By benchmarking companies, CHRB and KnowTheChain provide an overview of leading practices and gaps in each sector, but also important information on Australian companies.

Baptist World Aid Australia

Baptist World Aid Australia publishes a number of industry reports as part of its ‘Behind the Barcode project’. These include the Ethical Fashion Report and the Electronics Industry Trends Report – both of which seek to aid Australians to shop ethically. These reports assess over 500 brands regarding their approach to protect workers in their supply chain from exploitation, forced labour and child labour.¹²⁵⁵

¹²⁵⁰ Australasian Centre for Corporate Responsibility, *Human rights and Australian listed companies – Benchmarking report* (October 2017) <https://d3n8a8pro7vhmx.cloudfront.net/accr/pages/547/attachments/original/1507265999/ACCR_Human_Rights_Report_102017.pdf?1507265999>.

¹²⁵¹ Child Rights International Network, n 1086.

¹²⁵² Child Rights International Network, *Access to Justice for Children: Global Ranking* <<https://www.crin.org/en/access-justice-children-global-ranking>>.

¹²⁵³ Child Rights International Network and International Commission of Jurists, *State obligations regarding the impact of the business sector on children’s rights – A practical guide for non-governmental organisations on how to use the United Nations Committee on the Rights of the Child’s General Comment no. 16* (2015) <https://www.crin.org/sites/default/files/guide_download/guide_gc_16_2016-03_web_version1.pdf>.

¹²⁵⁴ Corporate Human Rights Benchmarking <<https://www.corporatebenchmark.org/>>; KnowTheChain <<https://knowthechain.org/>>.

¹²⁵⁵ Baptist World Aid, *Behind the Barcode* <<https://baptistworldaid.org.au/faith-in-action/behind-the-barcode/>>.

4.3 Media

What coverage have issues relevant to children's rights and business received in the local, national, and international media?

Children's rights and business issues in Australia have received increased media coverage since the topic started to receive increased attention from the international community from around 2011. These reports have drawn attention to specific sectors that pose the greatest risk to children's rights (such as fashion retail and mining sectors), as well as the linkage of Australian companies in human rights abuses occurring overseas (such as in the Philippines and Thailand).

Examples of media coverage has included:

- 'Australian fashion brands must improve on workers' rights, report says' – The Guardian (11 April 2019);¹²⁵⁶
- 'Australia's equal-pay reckoning: Why public naming and shaming will light a fire' – Smart Company (7 May 2019);¹²⁵⁷
- 'Employers Who Talk Up Gender Equity, but Silence Harassment Victims' – The New York Times (1 May 2019);¹²⁵⁸
- 'Facial recognition is about to end your privacy. How do you feel about that?' – Financial Review (8 February 2019);¹²⁵⁹
- 'Sexual Harassment at work is on the rise in Australia, the Human Rights Commission says' – ABC News (13 September 2018);¹²⁶⁰
- 'Dirty deeds: how to stop Australian miners abroad being linked to death and destruction' – The Conversation (21 January 2019);¹²⁶¹
- 'Businesses Urged to Show Leadership on Stamping Out Modern Slavery' – Pro Bono News (4 December 2018);¹²⁶²
- 'ANZ failed to meet human rights standards: government report' – The Sydney Morning Herald (11 October 2018);¹²⁶³
- 'Indigenous group takes anti-Adani fight to the United Nations claiming human rights violation' – ABC News (3 August 2018);¹²⁶⁴
- 'Australian superannuation funds can wield their financial muscle responsibly' – ABC News (1 June 2018);¹²⁶⁵
- 'FWO targets Businesses in Melbourne's inner eastern suburbs' – Business Franchise Australia and New Zealand (19 November 2017);¹²⁶⁶
- 'The Cleanest Uniform in Australia asks schools to switch to Fairtrade uniforms' – news.com.au (7 November 2017);¹²⁶⁷
- 'Australian governments warned they could be buying supplies made by slave labour' – The Guardian (18 October 2017);¹²⁶⁸
- 'How labour hire villains make millions from Australia's 'modern slavery' market' – ABC News (1 November 2017);¹²⁶⁹
- 'Almost 2500 Australia Children admitted to hospital every year from poisoning, report reveals' - The Sydney Morning Herald (23 March 2016);¹²⁷⁰
- 'Australia ranked on children's access to justice' - The Sydney Morning Herald (15 February 2016)¹²⁷¹
- 'Australian Businesses Struggle with Human Rights' - Pro Bono Australia (2 December 2015);¹²⁷²
- 'Surf clothing label Rip Curl using 'slave labour' to manufacture clothes in North Korea' - The Sydney Morning Herald (21 February 2016);¹²⁷³
- 'UK companies poised to act on forced labour, but Australia lags behind' - The Conversation (17 February 2016).¹²⁷⁴

¹²⁵⁶ 'Australian fashion brands must improve on workers' rights, report says', *The Guardian* (11 April 2019)

<<https://www.theguardian.com/australia-news/2019/apr/11/australian-fashion-brands-must-improve-on-workers-rights-report-says>>.

¹²⁵⁷ 'Australia's equal-pay reckoning: Why public naming and shaming will light a fire', *Smart Company* (7 May 2019)

<<https://www.smartcompany.com.au/people-human-resources/australia-equal-pay-reckoning/>>.

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- ¹²⁵⁸ Emily Steel, 'Employers Who Talk Up Gender Equity, but Silence Harassment Victims', *The New York Times* (1 May 2019) <<https://www.nytimes.com/2019/05/01/business/australia-sexual-harassment-nondisclosure-agreement.html>>.
- ¹²⁵⁹ Mark White, 'Facial recognition is about to end your privacy. How do you feel about that?', *Financial Review* (8 February 2019) <<https://www.afr.com/technology/your-face-is-about-to-end-your-privacy-how-do-you-feel-about-that-20190130-h1anyv>>.
- ¹²⁶⁰ Patrick Wood, 'Sexual Harassment at work is on the rise in Australia, the Human Rights Commission says', *ABC News* (13 September 2018) <<https://www.abc.net.au/news/2018-09-12/human-rights-commission-report-reveals-sexual-harassment-at-work/10231480>>.
- ¹²⁶¹ Julia Dehm, 'Dirty deeds: how to stop Australian miners abroad being linked to death and destruction', *The Conversation* (21 January 2019) <<https://theconversation.com/dirty-deeds-how-to-stop-australian-miners-abroad-being-linked-to-death-and-destruction-109407>>.
- ¹²⁶² Luke Michael, 'Businesses Urged to Show Leadership on Stamping Out Modern Slavery', *Pro Bono News* (4 December 2018) <<https://probonoaustralia.com.au/news/2018/12/businesses-urged-show-leadership-stamping-modern-slavery/>>.
- ¹²⁶³ Richard Baker and Nick McKenzie, 'ANZ failed to meet human rights standards: government report', *The Sydney Morning Herald* (11 October 2018) <<https://www.smh.com.au/business/banking-and-finance/anz-failed-to-meet-human-rights-standards-in-cambodia-government-report-20181011-p508z2.html>>.
- ¹²⁶⁴ Josh Robertson, 'Indigenous group takes anti-Adani fight to the United Nations claiming human rights violation', *ABC News* (3 August 2018) <<https://www.abc.net.au/news/2018-08-03/anti-adani-campaign-by-indigenous-group-goes-to-the-un/10065240>>.
- ¹²⁶⁵ Simon O'Connor, 'Australian superannuation funds can wield their financial muscle responsibly', *ABC News* (1 June 2018) <<https://www.abc.net.au/news/2018-06-01/australian-superannuation-can-wield-financial-muscle-responsibly/9815630>>.
- ¹²⁶⁶ Business Franchise Australia and New Zealand, *FWO targets businesses in Melbourne's inner eastern suburbs* (19 November 2017) <<http://www.businessfranchiseaustralia.com.au/latest-news/fwo-targets-businesses-melbourne%E2%80%99s-inner-eastern-suburbs>>.
- ¹²⁶⁷ Abigail Dawson, 'The Cleanest Uniform in Australia asks schools to switch to Fairtrade uniforms', *news.com.au* (7 November 2017) <<https://mumbrella.com.au/australian-schools-encouraged-wear-fairtrade-cotton-uniforms-482462>>.
- ¹²⁶⁸ Michael McGowan, 'Australian governments warned they could be buying supplies made by slave labour', *The Guardian* (18 October 2017) <<https://www.theguardian.com/world/2017/oct/18/australian-governments-warned-they-could-by-buying-supplies-made-by-slave-labour>>.
- ¹²⁶⁹ Sarina Locke, 'How labour hire villains make millions from Australia's 'modern slavery' market', *ABC News* (1 November 2017) <<http://www.abc.net.au/news/rural/2017-11-01/exploitation-or-slavery-of-tongans-malaysians-in-horticulture/9102676>>.
- ¹²⁷⁰ Lucy Cormack, 'Almost 2,500 Australian Children admitted to hospital every year from poisoning, report reveals', *The Sydney Morning Herald* (23 March 2016) <<http://www.smh.com.au/business/consumer-affairs/almost-2500-australian-children-admitted-to-hospital-every-year-from-poisoning-report-reveals-20160323-gnpq2w.html>>.
- ¹²⁷¹ Alexandra Back, 'Australia ranked on children's access to justice', *The Sydney Morning Herald* (15 February 2016) <<http://www.smh.com.au/national/australia-ranked-on-childrens-access-to-justice-20160215-gmu734.html>>.
- ¹²⁷² Ellie Cooper, 'Australian Businesses Struggle with Human Rights', *PRObono Australia* (2 December 2015) <<http://probonoaustralia.com.au/news/2015/12/australian-businesses-struggle-with-human-rights/>>.
- ¹²⁷³ Nick McKenzie and Richard Baker, 'Surf clothing label Rip Curl using 'slave labour' to manufacture clothes in North Korea', *The Sydney Morning Herald* (21 February 2016) <<http://www.smh.com.au/business/surf-clothing-label-rip-curl-using-slave-labour-to-manufacture-clothes-in-north-korea-20160219-gmz375.html>>.
- ¹²⁷⁴ Ingrid Landau, 'UK companies poised to act on forced labour, but Australia lags behind', *The Conversation* (17 February 2016) <<http://theconversation.com/uk-companies-poised-to-act-on-forced-labour-but-australia-lags-behind-54723>>.

GLOSSARY

For the purpose of this report, the following definitions apply (unless indicated otherwise):

ACCC – See Australian Competition and Consumer Commission.

ACMA – See Australian Communications and Media Authority.

AHRC – See Australian Human Rights Commission.

AIHW – See Australian Institute of Health and Welfare.

ANCP – See Australian National Contact Point.

ASX – See Australian Securities Exchange.

Australian Communications and Media Authority (ACMA) – Is a federal statutory authority responsible for most elements of legislation and regulation relating to broadcasting, the internet, radio-communications and telecommunications.

Australian Competition and Consumer Commission (ACCC) – Is a federal statutory authority that enforces the *Competition and Consumer Act 2010* (Cth) (including the Australian Consumer Law) and a range of additional legislation. It also promotes competition and fair trading, and accepts consumer complaints.

Australian Human Rights Commission (AHRC) – Is Australia’s national human rights institution that has ‘A’ status under the United Nations Paris Principles relating to the status of national institutions. Established by the *Australian Human Rights Commission Act 1986* (Cth), the AHRC has the function of promoting and protecting the human rights of people in Australia.

Australian Institute of Health and Welfare (AIHW) – A federal statutory agency established by the *Australian Institute of Health and Welfare Act 1987* (Cth). It is the leading health and welfare statistics agency in Australia, releasing over 180 publications a year on a range of topics including expenditure, hospitals, disease, injury, mental health, ageing, homelessness, housing, disability, child protection, and the needs of Aboriginal and Torres Strait Islander people.

Australian National Contact Point (ANCP) – The National Contact Point is located in the federal Department of Treasury. The ANCP was established by the Australian Government in accordance with its obligations under the Decision of the Council on the OECD Guidelines for Multinational Enterprises. See also National Contact Point.

Australian Securities and Investments Commission – A federal statutory authority established by the *Australian Securities and Investments Commission Act 2001* (Cth). ASIC is Australia’s corporate, markets and financial services regulator.

Australian Securities Exchange (ASX) – is the financial market exchange of Australia.

Caregiver/s – caregivers includes parents, legal guardians or any other person who has the care of a child (a person under 18 years of age).

Child – A person under 18 years of age.

Child labour - work that deprives children of their childhood, their potential and their dignity, and that is harmful to physical and mental development as defined in *ILO Convention 138 on the minimum age for admission to employment and work*. This includes work that is mentally, physically, socially or morally dangerous and harmful to children; work that interferes with their schooling; and engaging in work children who are under the minimum working age(s) set by national legislation or international standards.

Child rights due diligence – building on the concept of human rights due diligence as outlined in the United Nations Guiding Principles on Business and Human Rights, child rights due diligence is the process of assessing actual and potential business impacts on children specifically, integrating and acting on those findings, tracking progress and communicating how impacts have been addressed.

Children's Convention – See Convention on the Rights of the Child.

Children's Rights and Business Principles – Ten principles designed to guide companies on the full range of actions they can take in the workplace, marketplace and community to respect and support children's rights. The Children's Rights and Business Principles provide a framework for understanding the impact of business on the rights and well-being of children and were developed by UNICEF, Save the Children and the United Nations Global Compact in 2012.

Children's Rights National Baseline Assessment Template – Contained in the guide *Children's Rights in National Action Plans on Business and Human Rights* published by UNICEF, the Danish Institute for Human Rights and the International Corporate Accountability Roundtable (2015). A thematic supplement to the 2014 NAP Toolkit, the Children's Rights National Baseline Assessment Template provides a template to help highlight gaps in the implementation of the UNGPs specifically relating to the benefit and protection of children.

COAG – See Council of Australian Governments.

Concluding Observations – Following the review of a State Party report, a treaty body issues a set of 'concluding observations' that contain its assessment of the State's record and recommendations for improvement.

Convention on the Rights of the Child – An international human rights treaty with the purpose of protecting and advancing the rights of children. It outlines rights to survival and development, health services, participation, education and the right of children to have their best interests as a primary consideration when decisions are made that affect them. Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entered into force in 1990.

Council of Australian Governments (COAG) – The peak intergovernmental forum in Australia, comprised of the Prime Minister, Premiers and Chief Ministers from each State and Territory, and the Australian Local Government Association.

Decent Work – Opportunities for work that are productive and deliver a fair income. Decent work should provide security in the workplace and social protection for families, rights at work, social dialogue, and better prospects for personal development and social integration.

Efic – See Export Finance and Insurance Corporation.

eSafety Commissioner – A federal independent statutory office established by the *Enhancing Online Safety for Children Act 2015* (Cth). The eSafety Commissioner is responsible for promoting online safety for all Australians and has a broad list of functions, outlined in section 15 of the Act, that enables the Commissioner to lead, coordinate and advise on online safety issues to help Australians have safer, more positive and empowering experiences online. The eSafety Commissioner has three complaints and reporting schemes for serious cyberbullying, image-based abuse and offensive and illegal content online.

Export Finance and Insurance Corporation (Efic) – Is Australia's export credit agency that supports Australian export trade through the provision of financial services guaranteed by the Australian government.

Fair Work Commission – A federal national workplace relations tribunal that carries out a range of functions under the *Fair Work Act 2009* (Cth). It provides a grievance mechanism to help employers and employees to solve workplace disputes or disagreements.

Fair Work Ombudsman – A federal statutory office that carries out functions under the *Fair Work Act 2009* (Cth) and works closely with the Fair Work Commission. The FWO provides free information and guidance to all workers and employers in Australia as well as conducts a range of enforcement activities.

General Comment – A treaty body's interpretation of a provision or provisions of a human rights treaty.

Human Rights Due Diligence – As outlined by the United Nations Guiding Principles on Business and Human Rights, human rights due diligence is an ongoing risk management process to identify, prevent, mitigate and account for how a company addresses its adverse human rights impacts.

ILO – See International Labour Organisation.

International Labour Organisation (ILO) – A specialised agency of the United Nations that promotes international labour rights by formulating international standards on the freedom to associate, collective bargaining, the abolition of forced labour, and equality of opportunity and treatment.

Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT) – A Parliamentary Committee of the Australian Parliament comprised of members of the House of Representatives and Senate. A sub-committee of the JSCFADT, the Foreign Affairs and Aid Sub-Committee, conducted the *Inquiry into establishing a Modern Slavery Act in Australia*, with its final report published in December 2017.

JSCFADT – See Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT).

Junior Pay Rates – Reduced minimum pay rates that can apply to employees under the age of 21 years in Australia due to s 25 of the *Age Discrimination Act 2004* (Cth).

Living wage – A wage that is required to cover a worker’s cost of living, including gas, electricity, health and housing costs.

Minimum Wage – The minimum wage is a safety net specifying the minimum rate of pay that employees must be paid. Employers and employees cannot agree to a rate of pay which is less than the applicable minimum wage. In Australia, the Fair Work Commission sets the minimum wage in accordance with the *Fair Work Act 2009* (Cth).

Minor – A person under the age of 18 years, also defined as a person under ‘legal incapacity’.

Modern slavery – The United Nations Office of the High Commissioner for Human Rights has outlined that modern slavery includes traditional slavery; debt bondage; serfdom; forced labour; sale of children and the worst forms of child labour; sexual slavery; forced or early marriage; and other forms of slavery. The Australian *Modern Slavery Act 2018* (Cth) defines ‘modern slavery’ as conduct which would constitute:

- (a) an offence under Division 270 or 271 of the Criminal Code; or
- (b) an offence under either of those Divisions if the conduct took place in Australia; or
- (c) trafficking in persons, as defined in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, done at New York on 15 November 2000 ([2005] ATS 27); or
- (d) the worst forms of child labour, as defined in Article 3 of the ILO Convention (No. 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, done at Geneva on 17 June 1999 ([2007] ATS 38).

Note however that the *Modern Slavery Act 2018* (NSW) adopts a slightly different definition of modern slavery.

MSAG – See Multi-Stakeholder Advisory Group on the Implementation of the UN Guiding Principles on Business and Human Rights.

Multi-Stakeholder Advisory Group on the Implementation of the UN Guiding Principles on Business and Human Rights (MSAG) – Established by the Australian Government in June 2017 and comprised of experts from civil society, business, unions, academia, and independent consultancy. The MSAG provided to the Australian Government ‘Advice on the prioritisation of issues and actions to implement the UN Guiding Principles on Business and Human Rights’ and was dissolved in late 2017.

NAP – See National Action Plan on Business and Human Rights.

National Action Plan on Business and Human Rights (NAP) – An evolving policy strategy developed by a State to protect against adverse human rights impacts by business enterprises in conformity with the UN Guiding Principles on Business and Human Rights.

National Baseline Assessment (NBA) – The Danish Institute for Human Rights and the International Corporate Accountability Roundtable have explained that a National Baseline Assessment has the ‘primary objective of assessing the current level of implementation of the UNGPs in a given state. It brings together an analysis of the legal and policy gaps in UNGP implementation with an overview of the adverse human rights impacts of business to identify the most salient human rights issues in a given context. In this way, it serves to inform the formulation and prioritisation of actions in a NAP.’

National Children’s Commissioner – A federal statutory role located in the Australian Human Rights Commission with the function of promoting the rights, wellbeing and development of children and young people in Australia.

National Contact Point (NCP) – The role of a National Contact Point is to further the effectiveness of the OECD Guidelines for Multinational Enterprises through promotional activities, handling enquiries, and contributing to the resolution of ‘specific instances’ (complaints). Member states of the Organisation for Economic Co-Operation and Development are required by the Decision of the Council on the OECD Guidelines for Multinational Enterprises to establish a NCP.

NBA – See National Baseline Assessment.

OECD – See Organisation for Economic Co-operation and Development.

OECD Guidelines for Multinational Enterprises – Are recommendations by governments of the OECD directed towards multinational enterprises. They outline voluntary standards and principles for responsible business conduct. First adopted in 1976 and revised in 2011, the OECD Guidelines include chapter on human rights that conforms to the UN Guiding Principles on Business and Human Rights.

Optional Protocol to the Convention on the Rights of the Child on a communication procedure - This Optional Protocol, often referred to as OP3, allows a child or their representative to lodge a communication to the Committee on the Rights of the Child regarding alleged violations of the rights of children as outlined in the Convention. Opened for signature 28 February 2012, entered into force 14 April 2014.

Organisation for Economic Co-operation and Development (OECD) – Is an inter-governmental forum with the purpose of promoting policies that will improve the economic and social well-being of people around the world. The OECD is comprised of 36 member countries.

Protect, Respect and Remedy Framework – Developed by the United Nations Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Professor John Ruggie, and unanimously approved by the Human Rights Council in 2008. The framework outlines three pillars: the state duty to protect against human rights abuses committed by third parties, including business; the corporate responsibility to respect human rights; and the need to provide effective access to remedies for victims of corporate human rights abuses.

SDGs – See Sustainable Development Goals.

Sustainable Development Goals (SDGs) – Agreed to in 2015 by the 193 member states of the United Nations General Assembly, *the 2030 Agenda for Sustainable Development – The Sustainable Development Goals* (SDGs) set out a plan of ‘bold and transformative’ action which aims to wipe out poverty by placing the world on a more sustainable path; economically, socially and environmentally. The SDGs are comprised of 17 goals and 169 targets, and seek to end poverty, protect the planet and ensure prosperity for all by 2030.

United Nations Committee on the Rights of the Child – A treaty body established by the Convention on the Rights of the Child and comprised of international experts in children’s rights.

United Nations Global Compact – A voluntary corporate sustainability initiative based on CEO commitments to implement the ten universal principles outlined in the Global Compact. These principles are derived from the Universal Declaration of Human Rights, the International Labour Organisation’s Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention Against Corruption.

United Nations Guiding Principles on Business and Human Rights (UNGPs) – An authoritative global standard based on the ‘Protect, Respect and Remedy Framework’. The UNGPs were unanimously endorsed by the United Nations Human Rights Council in 2011 and are aimed at preventing and addressing the risk of adverse human rights impacts linked to business activity.

UN – See United Nations.

UNGPs – See United Nations Guiding Principles on Business and Human Rights.

UNICEF – UNICEF is the United Nations Children’s Fund which was established in 1946 to promote the rights and wellbeing of all children throughout the world. UNICEF works to uphold the Convention on the Rights of the Child in over 190 countries.

United Nations (UN) – An international organisation founded in 1945 to maintain international peace and security, develop friendly relations among nations, achieve international cooperation in solving problems of an economic, social, cultural or humanitarian character, and promote respect for human rights and fundamental freedoms. It is currently made up of 193 Member States.

United Nations Working Group on Business and Human Rights – Established by the Human Rights Council in 2011 with a mandate to promote the effective and comprehensive dissemination and implementation of the United Nations Guiding Principles on Business and Human Rights.

Universal Periodic Review (UPR) – A process to periodically review the human rights record of all UN Member States and which is conducted by the Universal Periodic Review Working Group (comprised of the members of the Human Rights Council).

WGEA – See Workplace Gender Equality Agency.

WHO – See World Health Organisation.

Workplace Gender Equality Agency (WGEA) – A federal statutory agency responsible for promoting and improving gender equality in Australian workplaces in accordance with the *Workplace Gender Equality Act 2012* (Cth).

World Health Organisation (WHO) – Is a specialised agency of the United Nations, tasked with directing and coordinating international health within the United Nations system. The objective of WHO is the attainment by all peoples of the highest possible level of health.

Young people – Definitions of young people vary. For the purposes of this report, the definition of young people includes persons aged between 15 and 24 years, unless indicated otherwise.