

Business and Human Rights: Setting the Agenda



Issue

In his landmark 2008 report the UN Special Representative on Business and Human Rights, Professor John Ruggie, noted that the globalisation of business *activity* has not been matched by a globalisation of business *regulation*.¹ He acknowledged that while corporations have the capacity to contribute to economic growth, poverty alleviation and human development, they can also harm the human rights of individuals and communities. The challenge for governments, business and civil society is to ensure more of the former and less of the latter.

To answer this challenge, Professor Ruggie proposed a global policy framework on business and human rights, which was unanimously endorsed by the UN Human Rights Council. The framework comprises three complementary pillars:

- the **State duty to protect** against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication;
- the **corporate responsibility to respect human rights**, including by developing corporate cultures of rights and acting with due diligence to avoid infringing the rights of others; and
- enhanced **access to judicial and non-judicial remedies** for corporate violations of human rights.²

Opportunity and Imperative for Action

In 2009, the Human Rights Council extended Professor Ruggie's mandate for three years to 'operationalise' the framework through 'practical recommendations' and 'concrete guidance'.

The further development and advancement of the business and human rights agenda presents a significant international opportunity and responsibility for Australia.³

Those factors which make it an opportunity include the following:

- There is increasing national and global recognition of the need for markets to have 'morals' and the imperative for international and domestic leadership on this issue.⁴
- Australia's commitment to the advancement of the business and human rights agenda would complement and build on recent Australian initiatives and leadership in the area of responsible business and investment practices.⁵
- The 'operationalisation' of the framework would contribute to a more stable, predictable, efficient, competitive, rules-based international business environment and address the current 'legal vacuum'.⁶
- While over 240 leading national and transnational companies have adopted human rights policy statements and expressed a commitment to human rights principles,⁷ many are also seeking guidance on the implications and implementation of such policies and would appreciate leadership from government in this regard.⁸
- Australia's adoption of the Special Representative's framework for regulation could become a centrepiece of our UN Security Council candidacy.⁹ We could also pursue the agenda through bodies such as the G20.
- Australia's highly evolved corporate laws and institutions could be showcased to the world.

- Australian human rights leadership on this issue would build international credibility and diplomatic capital.

Those factors which make it a responsibility include the following:

- The promotion of 'socially and environmentally sustainable business practices' is 'vital if we are to secure Australia's future prosperity and international competitiveness'.¹⁰
- There is an emerging view that international human rights law imposes a positive obligation on states to take legislative and regulatory action to protect people from corporate human rights violations, including in respect of extra-territorial activities.¹¹
- Australia is home to many leading and major multinational corporations. Many Australian companies, particularly mining companies, can have a severe impact on the human rights of communities throughout the world, including the rights to food, water, health and a clean environment.
- There is no clear framework of human rights obligations for Australian corporations operating transnationally. This is particularly problematic when Australian corporations operate in jurisdictions with lax or limited regulation or where local governments lack the capacity or will to monitor corporate conduct or enforce standards.

Recommendations for Action

A Comprehensive and Coordinated Approach to Human Rights and Business Responsibilities

1. As an overarching step, the Federal Government should develop a comprehensive, coherent, whole-of-government policy on business and human rights and adopt the Special Representative's framework as the basis for this strategy.¹² This policy should:
 - a. set out Australia's business and human rights objectives, both domestic and international, and detail the means by which the Government will comply with the state's duty to protect human rights and to support business in its obligation to respect human rights, both in Australia and transnationally; and
 - b. identify priorities for action and make concrete, measurable commitments across all areas of Australian business, trade and investment policy which impact on human rights.¹³ The measures set out in the policy should include both hard and soft power options, in line with the view that governments should not give 'undue priority to voluntary initiatives'.¹⁴
2. The Federal Government should appoint a senior minister, possibly the Minister for Finance, with responsibility for the business and human rights agenda across government.

International Action

Australia's work in the promotion of human rights and business responsibilities must have a global focus. As a major cross-party report tabled in the UK parliament in December 2009 stated, 'the impact of business on human rights is a global issue that ultimately requires a global solution'.¹⁵ The committee recommended that 'the UK play a leadership role in the global debate' on business and human rights.

The same is true for Australia. The committee called on the UK government to support the UN Special Representative, to 'encourage businesses and civil society to engage with his work' and to work on a 'regional level and globally to agree a consistent approach to business and human rights', including through the development of an international agreement.

Consistent with these recommendations, Australia should:

1. actively engage with the work of the Special Representative, including by inviting him to undertake an official mission to Australia to meet with government, business, NGOs and other key stakeholders;
2. strongly support the mandate of the Special Representative, including through financial, logistical and diplomatic assistance;
3. conduct human rights impact assessments of proposed multilateral and bilateral trade and investment agreements and negotiate the inclusion of clauses to promote and protect human rights;
4. review and reform the Australian Export Finance and Insurance Corporation to ensure that it operates consistently with both the duty to respect and the duty to protect human rights;¹⁶
5. constructively engage with the development of the *Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies*, together with the Montreaux process regarding International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict; and
6. ratify the *UN Convention on the Rights of Migrant Workers*.

Domestic Action

Australia must also do more on business and human rights at home. There is a need for both regulation and innovation in this area, including the following:

1. The Federal Government, its agencies and public authorities should use public procurement to reinforce the responsibility of business to respect human rights and to promote socially and environmentally responsible governance. Among other approaches, the Federal Government should consider whether tenderers participate in initiatives such as the UN Global Compact and the Global Reporting Initiative and also consider any relevant findings by the OECD National Contact Point. As the UK committee said, 'government has immense power as a purchaser and should take responsibility for human rights impacts in its supply chain'.¹⁷
2. Governments and public authorities should conduct or require human rights impact assessments, particularly on large-scale projects. The UK committee recommended that this responsibility also apply to the private sector, including by amending the *Companies Act 2006* (UK) to require that companies undertake an annual human rights impact assessment as an aspect of their commitment to due diligence.
3. The Federal Government should amend s 181 of the *Corporations Act 2001* (Cth) to require (or at the very least explicitly permit) directors to consider human rights issues as an aspect of their duty to act in the best interests of the company. In the UK, the *Companies Act* was amended in 2006 to require that, in acting in the best interests of the company, a director must have regard to, among other things, 'the impact of the company's operations on the community and the environment' and 'the desirability of the company maintaining a reputation for high standards of business conduct'.¹⁸
4. The Federal Government should also consider amending the *Corporations Act 2001* (Cth) to require that directors exercise due diligence to respect human rights and to mandate business and human rights reporting.¹⁹
5. The Federal Government, its agencies and public authorities should promote ethical investment, including through their own investment approaches – which should comply with the UN Principles for

Responsible Investment – and by supporting socially responsible market indices, certification programs and reporting initiatives. As CPA Australia has identified, ‘market forces alone will not drive future improvements in this area. Unless regulators, standard setting bodies, the profession and stakeholders harness current business efforts and develop a sustainability reporting framework, Australia will lag behind global developments’.²⁰

6. Through measures such as endorsement, procurement and diplomatic support, the Federal Government should support industry-specific and business-wide initiatives which promote human rights and responsible business practices, such as the Extractive Industries Transparency Initiative and the Global Business Initiative on Human Rights. This would complement and strengthen the Government’s existing commitment to initiatives such as the UN Global Compact, the Global Reporting Initiative and Business for Millennium Development.
7. The Federal Government, in consultation with business, NGOs and the Australian Human Rights Commission, should develop national guidelines for business on how to act compatibly with human rights, both domestically and transnationally. The UK committee found that business lacks clear guidance on human rights issues and recommended that government work closely with key stakeholders, including national human rights institutions, to develop such guidelines.
8. The Federal Government should improve access to complaints mechanisms for victims of corporate human rights violations, including by promoting the development of company level grievance procedures. The Government should also strengthen existing external mechanisms, such as the National Contact Point under the OECD Guidelines for Multinational Enterprises, including by ensuring that it is adequately resourced, mandated and independent.
9. The Federal Government should mandate and resource the Australian Human Rights Commission to actively engage in the issue of business and human rights, including through research, education, guidance and promoting best practice.²¹
10. Given adequate funding, the Australian Human Rights Commission should establish a unit dedicated to promoting human rights within business.

About the Human Rights Law Resource Centre

The Human Rights Law Resource Centre is a leading national community legal centre. The Centre promotes and protects human rights in Australia. We contribute to the alleviation of poverty and disadvantage, and the promotion of equality and fair treatment.

The Centre undertakes a strategic combination of policy advocacy, litigation, education and capacity building. We work collaboratively with key partners, including commercial law firms and barristers, community legal centres, university law schools, and other human rights organisations.

¹ Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, UN Doc A/HRC/9/5 (2008).

² Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Business and Human Rights: Towards Operationalizing the 'Protect, Respect and Remedy' Framework*, UN Doc A/HRC/11/13 (2009).

³ See, eg, Senator Nick Sherry, Minister for Superannuation and Corporate Law, 'Closing Keynote Address to Australian Centre for Corporate Social Responsibility', 3rd Annual Conference, Sydney, 5 February 2009, in which the Minister recognised that 'socially and environmentally sustainable business practices' are 'vital if we are to secure Australia's future prosperity and international competitiveness'.

⁴ See, eg, the comments of UK Prime Minister Gordon Brown at the G20 in March 2009: 'Markets Need "Family Values" – PM', *BBC News Online*, 31 March 2009.

⁵ Over the last 3 years, Australian Government initiatives in this regard include the establishment of national focal points for the UN Global Compact and the Global Reporting Initiative, the funding of a Responsible Investment Academy, and active membership of the International Advisory Board to the Global Reporting Initiative.

⁶ See, eg, evidence of UK Institute of Directors to Joint Parliamentary Committee on Human Rights, *Any of Our Business: Human Rights and the UN Private Sector*, First Report of Session 2009/10 (Dec 2009), [29].

⁷ According to the Business and Human Rights Resource Centre, at least 247 major companies have adopted explicit human rights policy statements, including leading Australian companies such as ANZ Bank, Westpac, Rio Tinto, BHP Billiton, Cadbury Schweppes and PriceWaterhouseCoopers.

⁸ UK Joint Parliamentary Committee on Human Rights, *Any of Our Business: Human Rights and the UN Private Sector*, First Report of Session 2009/10 (Dec 2009).

⁹ A commitment to 'business and human rights' would complement and give substance to key pillars of Australia's 2013-14 Security Council candidacy, including its commitments to: 'respect human rights'; 'protect the environment'; 'help eradicate poverty'; and 'improve economic and social well-being' (see <http://www.dfat.gov.au/un/unga.html>).

¹⁰ Senator Nick Sherry, Minister for Superannuation and Corporate Law, 'Closing Keynote Address to Australian Centre for Corporate Social Responsibility', 3rd Annual Conference, Sydney, 5 February 2009.

¹¹ See, eg, UN Committee on the Elimination of Racial Discrimination, *Concluding Observations for Canada*, UN Doc CERD/C/CAN/CO/18, [17]

¹² See Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, *Business and Human Rights: Towards Operationalizing the 'Protect, Respect and Remedy' Framework*, UN Doc A/HRC/11/13 (2009), [18] for a discussion of the challenges of 'policy incoherence' to the discharge of the state duty to protect.

¹³ See, eg, Norwegian Council of State (Ministry of Foreign Affairs), *White Paper on Corporate Social Responsibility in a Global Economy* (2009), which aims to 'clarify the authorities' expectations of the private sector, and to discuss the respective roles and responsibilities of the authorities, the private sector and other actors. It is also designed to boost Norwegian companies' motivation and ability to exercise social responsibility, by strengthening guidance and advisory measures, and increasing openness, dialogue and exchange of experience between the authorities and the private sector.'

¹⁴ UK Joint Parliamentary Committee on Human Rights, *Any of Our Business: Human Rights and the UN Private Sector*, First Report of Session 2009/10 (Dec 2009).

¹⁵ UK Joint Parliamentary Committee on Human Rights, *Any of Our Business: Human Rights and the UN Private Sector*, First Report of Session 2009/10 (Dec 2009).

¹⁶ According to a recent major report, the 'case for reforming EFIC is strong: it is secretive, with no disclosure policy, and it does not adequately incorporate environmental, social and human rights considerations into its funding decisions': see Jubilee Australia, *Risky Business: Shining a Spotlight on Australia's Export Credit Agency* (2009).

¹⁷ This potential has been recognised in Victoria where panel members on the Government's Legal Services Panel are required to 'commit to the furtherance of equal opportunity in their work practices and in briefing barristers', 'comply with model litigant principles when acting on behalf of Government Clients', and 'commit to provide pro bono services of at least 5 per cent of the value of the legal fees they derive under the panel arrangements'.

¹⁸ *Companies Act 2006* (UK), ss 172(1)(d) and (e).

¹⁹ For example, Denmark's *Social Responsibility for Large Business Law 2009* requires that large companies report on (1) their existing CSR policies, guidelines, standards and principles; (2) implementation of these policies, including systems and procedures; and (3) achievements and implications for the business.

²⁰ CPA Australia, 'Inconsistent Sustainability Reporting Fails Australian Companies, Investors and the Public Says CPA Australia', Media Release, 8 August 2005.

²¹ The work of the Danish Institute for Human Rights is recognised as leading the world in this area.