

Business, Human Rights and Responsibilities

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Executive Summary

The impact and influence of corporate activity is significant, widespread and increasing. Corporations have the capacity to foster economic well-being, development, technological improvement and wealth, as well as the capacity to impact harmfully on the human rights and lives of individuals and communities.

There is a strong public interest in the conduct of business and corporations to impact positively not only on relevant financial interests, but also on relevant human, social and environmental interests. Relevantly to the *Universal Declaration of Human Responsibilities* this requires that corporations treat all people in a humane way (art 1), have high ethical standards (art 3), protect the environment (art 7), promote sustainable development (art 9), address disadvantage and discrimination (art 10) and use property and wealth fairly and justly (art 11).

Despite this, there are significant governance and regulatory gaps at both the international and domestic levels between what corporations *do*, *can do* and *should do* about human rights and responsibilities. As the UN Special Representative on Business and Human Rights has recently identified, these gaps have been exacerbated by the globalisation of business without a correlate globalisation of laws and institutions. He concludes that 'the gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanction or reparation'.

This Paper proposes a normative value framework to promote, regulate and evaluate corporate social responsibility. It proposes a 'human rights and responsibilities' framework for business, informed by the *Universal Declaration of Human Responsibilities*, the *UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* and the *Protect, Respect and Remedy* framework proposed in April 2008 by the UN Special Representative on Business and Human Rights.

The Paper then discusses the domestic legislative and policy frameworks governing the conduct and behaviour of corporations in Australia and examines the ways in which these frameworks promote or constrain socially responsible corporate behaviour. Concluding that reform is needed to enable and incentivise corporations to respect human rights and responsibilities as a core aspect of 'doing business', the Paper discusses a range of domestic and international public policy initiatives – including in relation to directors' duties, reporting and disclosure requirements, government procurement, trade and investment agreements and institutional capacity building– to bridge the regulatory gaps between what corporations *do*, *can do* and *should do* about corporate social responsibility.

1. Introduction

1.1 Recent Developments in relation to Business, Human Rights and Responsibilities

The social responsibilities and human rights obligations of companies have been 'hot topics' in Australia and internationally in recent months and years.

In Australia, the trend towards companies engaging in, or at least being seen to engage in, socially responsible conduct was evident in the response of Australian businesses to the Indian Ocean tsunami on 26 December 2004. Many corporations made substantial contributions to support aid efforts and relief work in tsunami-affected areas. The trend has also been reflected in business performances in the Australian Corporate Responsibility Index, a voluntary measurement tool which assesses the performance of participating companies against a range of social and environmental criteria.¹

The trend has not, however, been universal or without controversy. Following the significant corporate response to the tsunami, the Australian Shareholders Association publicly questioned whether, in the context of the duty of directors to 'act in the best interests of the company's shareholders', such donations were appropriate or legal.² Similarly, while the overall performances of companies in the Corporate Responsibility Index have improved, participation rates remain very low; only about 2 per cent of ASX-listed companies participate in the annual survey.

The issue of corporate social responsibility has also recently been a subject of significant domestic policy analysis and consideration, including through a Corporations and Markets Advisory Committee inquiry into directors' duties and corporate responsibility,³ and a Parliamentary Joint Committee on Corporations and Financial Services inquiry into 'corporate responsibility and triple-bottom line reporting for incorporated entities in Australia'.⁴

At an international level, there have been significant recent attempts to develop legal frameworks regarding business and human rights, including through 'soft law' instruments such as the *United Nations Global Compact*,⁵ the *OECD Guidelines for Multinational Enterprises*,⁶ and the ILO *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*.⁷

¹ 'Special Report: Corporate Responsibility Index', *The Age* (Melbourne), 4 April 2005.

² Malcolm Maiden, 'Tsunami: The Backlash', *The Age* (Melbourne), 12 February 2005.

³ Corporations and Markets Advisory Committee, *The Social Responsibility of Corporations* (December 2006) at [http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/\\$file/CSR_Report.pdf](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2006/$file/CSR_Report.pdf).

⁴ See Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Responsibility: Managing Risk and Creating Value* (June 2006) at http://www.aph.gov.au/senate/committee/corporations_ctte/completed_inquiries/2004-07/corporate_responsibility/index.htm.

⁵ *UN Global Compact* (2000) at www.globalcompact.org. The *Global Compact* is a voluntary corporate citizenship initiative which encourages corporations to, among other things, support and respect the protection of human rights and ensure that they are not complicit in human rights violations.

⁶ Organization for Economic Co-operation and Development, *OECD Guidelines for Multinational Enterprises* (2000) 19 at www.oecd.org/dataoecd/56/36/1922428.pdf. The *Guidelines* contain recommendations to business concerning corporate conduct and affairs. Relevantly, the *Guidelines* recommend that corporations 'respect the human rights of those affected by their activities'.

In an attempt to move towards a binding instrument, in 2003, the UN Sub-Commission on the Promotion and Protection of Human Rights developed draft *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* ('Draft Norms').⁸ At the time, they were said to be the most 'comprehensive, clear and complete' standards developed in relation to socially responsible corporate behaviour.⁹ The *Draft Norms*, in essence, seek to impose on corporations the same typology of human rights obligations as those imposed on States (namely, a responsibility to *respect, protect and fulfil* human rights) in relation to certain human rights within their 'spheres of influence'.

The adoption of these *Draft Norms* encountered resistance both from business (concerned with the potential scope of the 'spheres of influence' concept and the obfuscation of the responsibilities of States and corporations) and civil society (concerned with the absence of adequate remedial and grievance mechanisms). The UN Special Representative on the Issue of Human Rights and Transnational Corporations and other Business Enterprises ('UN SR on Business and Human Rights'), Professor John Ruggie, was therefore appointed by the UN Secretary-General in 2005 to progress the debate and provide it with a focal point. In April 2008, after almost 3 years of research and consultations, the UN Special Representative released his report on business and human rights, entitled *Protect, Respect and Remedy: A Framework for Business and Human Rights*, to the UN Human Rights Council.¹⁰ The report, which was considered at the June session of the Council, proposes an international policy framework focused on:

- (a) the State's *duty to protect* against human rights abuses by third parties, including business;
- (b) the corporate *responsibility to respect* human rights; and
- (c) the need for more effective *access to remedies* for victims of corporate related human rights violations.

There are strong complementarities between aspects of this framework and aspects of the *Universal Declaration of Human Responsibilities* proposed by the InterAction Council in 1997. In particular, the corporate responsibility to respect human rights, which the UN SR on Business and Human Rights describes as 'essentially a responsibility not to infringe the rights of others – put

⁷ International Labour Organization, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (1977) at www.ilo.org/public/english/standards/norm/sources/mne.htm. The ILO *Declaration* provides guidance to corporations on labour-related aspects of workers' rights, but does not direct itself to other areas of human rights.

⁸ Commission on Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003). For the most authoritative exposition of the *Draft Norms*, see *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/Sub.2/2003/38/Rev.2 (2003).

⁹ UN Sub-Commission on the Promotion and Protection of Human Rights, *Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights*, [21], UN Doc E/CN.4/2005/91 (2005).

¹⁰ 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/8/5 (7 April 2008), [2] at www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf.

simply to do no harm’,¹¹ clearly overlaps with the *UDHR* ‘Golden Rule’ that ‘what you do not wish to be done to yourself, do not do to others’.¹²

1.2 Structure of this Paper

Part 2 of this Paper defines and discusses the term ‘corporate social responsibility’, with particular reference to the Australian context. Part 2 also discusses the public interest in socially responsible corporate behaviour and the value and importance of public policy frameworks and initiatives to promote corporate social responsibility.

Part 3 of the Paper proposes a normative value framework to promote, regulate and evaluate corporate social responsibility. It proposes a ‘human rights and responsibilities’ framework for business, informed by the *Universal Declaration of Human Responsibilities*, the *UN Draft Norms* and the *Protect, Respect and Remedy* framework proposed by the UN SR on Business and Human Rights.

Part 4 of the Paper then discusses the domestic legislative and policy frameworks, including the *Corporations Act*, governing the conduct and behaviour of corporations in Australia and examines the ways in which these frameworks promote or fetter socially responsible corporate behaviour.

Part 5 of the Paper discusses a range of domestic and international public policy initiatives designed to bridge the regulatory gaps between what corporations *do*, *can do* and *should do* about human rights and responsibilities.

The Paper concludes that a range of local, national and international initiatives, including of a legislative, regulatory and financial nature, are needed to ensure realisation of the public interest in corporations conducting their business and affairs in a way that promotes and protects human rights and responsibilities.

2. Why Promote ‘Corporate Social Responsibility’?

2.1 What is ‘Corporate Social Responsibility’?

There is no universally accepted definition of ‘corporate social responsibility’.

In its broadest and most common sense, the term ‘corporate social responsibility’ is used to describe corporate conduct which is ethical and has regard to social and environmental interests as well as financial considerations. Thus, for example, the World Business Council for Sustainable Development defines corporate social responsibility as the ‘commitment of business to contribute to sustainable economic development, working with employees, their families, the local community and society at large to improve their quality of life’.¹³ As discussed below, this definition is harmonious with a number of provisions of the *Universal Declaration of Human Responsibilities* which require that corporations treat all people in a humane way (art 1), have high ethical standards (art 3), protect the environment (art 7), promote sustainable development

¹¹ *Protect, Respect and Remedy: A Framework for Business and Human Rights*, above n 10, [24].

¹² *Universal Declaration of Human Responsibilities* 1997 art 4.

¹³ Richard Holme and Phil Watts (World Business Council for Sustainable Development), *Corporate Social Responsibility: Making Good Business Sense* (2000) 10. See also Phil Watts and Richard Holme (World Business Council for Sustainable Development), *Meeting Changing Expectations: Corporate Social Responsibility* (1999) 3.

(art 9), address disadvantage and discrimination (art 10) and use property and wealth fairly and justly (art 11).

Socially responsible corporate conduct is therefore ‘doing business’ in a way which recognises that corporations have relationships with, and impacts on, not only shareholders but also other stakeholders (including employees, their families, business partners, suppliers, creditors, consumers and local communities), the broader community and the environment. According to the Australian Corporate Responsibility Index, this requires that principles of corporate social responsibility inform the development of corporate strategy and values, be integrated into corporate decision-making and behaviour, form an integral component of management practice and stakeholder engagement, be reflected in corporate performance and impact, and be identified in corporate measurement, reporting and disclosure.¹⁴

Having regard to the above, for the purpose of this Paper, the term ‘corporate social responsibility’ is used to refer to corporate decision-making, management, practice, performance and reporting which: is ethical; sustainable; has regard to social, community and environmental interests as well as financial considerations; and is compatible with human rights and responsibilities.

2.2 The ‘Public Value’ and ‘Public Interest’ in Promoting Corporate Social Responsibility

In his reference to CAMAC in relation to directors’ duties and corporate social responsibility, the Hon Chris Pearce MP wrote:

In modern society, a great deal of business and other activities are conducted by corporate entities. Given the broad economic, social and environmental impact of these activities, there is an understandable interest in the legal framework in which corporations make decisions.¹⁵

The UN Special Representative on Business and Human Rights similarly wrote in his April 2008 report to the UN Human Rights Council that:

Business is the major source of investment and job creation, and markets can be highly efficient means for allocating scarce resources. They constitute powerful forces capable of generating economic growth, reducing poverty, and increasing demand for the rule of law, thereby contributing to the realisation of a broad spectrum of human rights. But markets themselves only work optimally if they are embedded within rules, customs and institutions.¹⁶

The impact and influence of corporate activity is significant, widespread and increasing. Developments in the areas of globalisation, privatisation, corporatisation and information technology mean that businesses have the potential and power to impact substantially on local, regional, national and even international communities and environments.¹⁷ Increasingly, corporations are involved directly in production and service delivery which impacts very directly

¹⁴ ‘Special Report: Corporate Responsibility Index’, *The Age* (Melbourne), 4 April 2005, 2.

¹⁵ Corporations and Markets Advisory Committee, ‘Reference in Relation to Directors’ Duties and Corporate Social Responsibility’ (March 2005) at <http://www.camac.gov.au/CAMAC/camac.nsf/byHeadline/Whats+NewDirectors%27+duties+and+corporate+social+responsibility?openDocument>.

¹⁶ *Protect, Respect and Remedy: A Framework for Business and Human Rights*, above n 10, [2].

¹⁷ See generally, Amnesty International, *Submission by Amnesty International under Decision 2004/116 on the ‘Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights’* (2004) 1 at www.ohchr.org/english/issues/globalization/business/docs/amnesty.doc.

on individual and community welfare, including in the areas of employment, occupational health and safety, transport, essential services such as energy and water, housing, food, education, health, communications, correctional services, community care, recreation, and environmental wellbeing and sustainability.¹⁸ As the UN Sub-Commission on the Promotion and Protection of Human Rights has recognised:

Corporations and other business enterprises have the capacity to foster economic well-being, development, technological improvement and wealth, as well as the capacity to cause harmful impacts on the human rights and lives of individuals through their core business practices and operations, including employment practices, environmental policies, relationships with suppliers and consumers, interactions with Governments and other activities.¹⁹

Recognising these impacts and spheres of activity and influence, particularly as they pertain to the realisation of fundamental human rights and responsibilities, there is a strong public interest and value in the conduct and regulation of business to impact positively on relevant human, social and environmental interests. Despite this, there are significant governance and regulatory gaps between what corporations *do*, *can do* and *should do* at both the international and domestic levels. According to the UN Special Representative on Business and Human Rights, these gaps ‘between the scope and impact of economic forces and actors, and the capacity of society to manage their adverse consequences’ have been significantly exacerbated by globalization and ‘provide the permissive environment for wrongful acts by companies of all kinds without adequate sanction or reparation’.²⁰

It is clear then that there is a significant and urgent need to bridge these gaps and develop the conceptual and regulatory frameworks to ensure that business promotes human rights and responsibilities.²¹

3. How Should Corporations be Regulated to Promote Human Rights and Responsibilities?

3.1 Overview

This Part of the Paper examines what corporations *should do* and *should be able to do* to promote human rights and responsibilities. Given that corporate conduct impacts significantly on social and environmental wellbeing, there is a need for a normative value framework to regulate and evaluate this conduct. The Paper proposes a ‘human rights and responsibilities’ approach,

¹⁸ See, eg, Adolfe Berle and Gardiner Means, *The Modern Corporation and Private Property* (2nd ed, 1967) 309-13.

¹⁹ *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003). See also UN Sub-Commission on the Promotion and Protection of Human Rights, *Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights*, [24], UN Doc E/CN.4/2005/91 (2005).

²⁰ *Protect, Respect and Remedy: A Framework for Business and Human Rights*, above n 10.

²¹ This is particularly the case in light of the research of the UN Special Representative on Business and Human Rights which demonstrates that (a) there has been an ‘escalation’ in the incidence of ‘corporate-related human rights abuses’ and (b) in addition to their being significant regulatory gaps at the international level, most domestic governments ‘take a narrow approach to managing the business and human rights agenda’: *Protect, Respect and Remedy: A Framework for Business and Human Rights*, above n 10, [1] – [16].

framed around the *Universal Declaration of Human Rights* and the *Universal Declaration of Human Responsibilities*, and operationalised by reference to the *UN Draft Norms* and the UN SR on Business and Human Rights *Protect, Respect and Remedy* report.

This approach has been chosen for four key reasons.

First, the ‘rights’ aspect of the framework is universal and founded on a set of agreed core minimum standards with respect to the conduct of governments, enterprises and individuals. As the United Nations Office of the High Commissioner for Human Rights has asserted:

The human rights approach offers an explicit normative framework — that of international human rights. Underpinned by universally recognized moral values and reinforced by legal obligations, international human rights provide a compelling normative framework for the formulation of national and international policies.²²

Second, both the ‘rights’ and ‘responsibilities’ aspects of the framework focus on basic enabling conditions, the realisation of which are necessary for people to live with human dignity and to participate in and contribute to civil, political, economic, social and cultural life. The framework also focuses attention on the various civil, political, economic, social and cultural impacts of corporations.

Third, the framework imposes clear obligations requiring that, through the discharge of responsibilities, rights are *respected* (that is, they are not interfered with by the State or other organs of society, including corporations), *protected* (that is, that the State takes steps and measures to prevent third parties, such as business, from interfering in any way with the enjoyment of human rights) and *fulfilled* (that is, that the State take positive steps to promote and support the realisation of human rights and responsibilities).

Fourth, the human rights and responsibilities approach enshrines important principles of good policy development and corporate governance and conduct, requiring that corporate programs and services be:

- fair and non-discriminatory — this requires that corporations and business enterprises ensure equality of opportunity and treatment;
- consultative, participatory and empowering — this requires that corporations consult with, and enable the participation of, stakeholders and individuals and communities affected by their business affairs and conduct; and
- transparent and accountable — this requires that corporations measure, report on and account for their social and environmental activities and impacts.²³

²² UN Office of the High Commissioner for Human Rights, *Human Rights and Poverty Reduction: A Conceptual Framework* (2004) 33. See also Ingrid Barnsley, (Centre for International and Public Law, Australian National University) cited in Parliamentary Joint Statutory Committee on Corporations and Securities, *Report on the Corporate Code of Conduct Bill 2000* (2001) 18-19.

²³ UN Office of the High Commissioner for Human Rights, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies* (2002) 2, 4–5. See also Geoff Mulgan and Andrea Lee, *Better Policy Delivery and Design: A Discussion Paper* (2001) and Mark Moore, *Creating Public Value: Strategic Management in Governance* (1995) 10.

3.2 International Legal Underpinnings of a Human Rights and Responsibilities Approach to Corporate Social Responsibility

As discussed above, the ‘human rights and responsibilities’ approach proposed by this Paper is framed around the *Universal Declaration of Human Rights* and the *Universal Declaration of Human Responsibilities*, and operationalised by reference to the *UN Draft Norms* and the UN SR on Business and Human Rights *Protect, Respect and Remedy* report.

These international legal instruments and norms are discussed below.

(a) *Universal Declaration of Human Responsibilities*

The *Universal Declaration of Human Responsibilities* was proposed by the InterAction Council in September 1997 to complement and strengthen the UN General Assembly’s 1948 *Universal Declaration of Human Rights*.

The *Universal Declaration of Human Responsibilities* enshrines a range of responsibilities relevant to the issue of corporate social responsibility and the impact of corporations on human rights, including that:

- Every person has a responsibility to treat all people in a humane way (art 1);
- All persons, groups and organisations are subject to ethical standards and have a responsibility to promote good and avoid evil in all things (art 3);
- All people must accept a responsibility to each and all; what you do not wish to be done to yourself, do not do to others (art 4);
- All people have a responsibility to protect the environment for present and future generations (art 7);
- All people should promote sustainable development and ‘lend support to the needy, the disadvantaged, the disabled and to the victims of discrimination’ (arts 9 and 10); and
- All property and wealth must be used responsibly in accordance with justice and for the advancement of the human race; economic and political power must be used ‘in the service of economic justice and of the social order’ (art 11).

Although the Declaration does not explicitly apply to corporations or contain a definition of ‘person’, its Preamble does recognise that the values and standards therein, ‘can only be realised by agreed values and standards applying to all people and institutions at all times’, thereby arguably extending its application to corporations in certain respects. This is particularly the case as corporations are increasingly regarded as ‘organs of society’.²⁴

(b) *Protect, Respect and Remedy Framework*

As discussed above, in April 2008, the UN Special Representative on Business and Human Rights released a report which proposed a framework for international and domestic regulation and action to promote corporate social responsibility and human rights. The *Protect, Respect, Remedy* framework comprises:

- a duty on States to *protect* against human rights abuses by third parties, including business;

²⁴ *Protect, Respect and Remedy: A Framework for Business and Human Rights*, above n 10, [54].

- a corporate responsibility to *respect* human rights; and
- a responsibility on the part of both States and corporations to develop more effective and accessible grievance and *remedial* mechanisms for victims of corporate-related human rights violations.

The State Duty to Protect from Human Rights Violations

The State duty to protect from human rights violations is described by the UN SR as requiring both regulation and adjudication of corporate activities with regard to human rights. The UN SR proposes that governments take further steps to foster corporate cultures in which respecting rights is an integral part of 'doing business',²⁵ and that this may include the use of 'corporate culture' in determining corporate liability, as is the case under Australian criminal law.²⁶ The report also proposes that States move towards alignment of their international human rights obligations, business regulation and trade and investment policy;²⁷ and that States particularly address the human rights related issues and exposures faced by corporations operating in conflict zones overseas.²⁸

Corporate Responsibility to Respect Human Rights

On the second limb of the proposed framework, the corporate responsibility to respect human rights, the UN Special Representative cites the recognition of this principle in soft law instruments such as the *OECD Guidelines for Multinational Enterprises* and by numerous multinational organisations in their policies and practices. The report quotes the International Organisation of Employers' statement that companies 'are expected to obey the law, even if it is not enforced, and to respect the principles of relevant international instruments when national law is absent'.²⁹ The UN Special Representative concludes that the corporate duty to respect human rights 'essentially means not to infringe on the rights of others – put simply, to do no harm'.³⁰

The report identifies a process of due diligence that corporations may undertake to assist in discharging their responsibility to respect human rights. This process involves:

- adopting a human rights policy,
- undertaking human rights impact assessments in respect of proposed activities that may affect human rights,
- integrating human rights policies throughout their operations, and
- monitoring and auditing human rights impact and performance.³¹

The Special Representative notes that the corporate responsibility to respect human rights includes avoiding complicity by companies in human rights abuses where the actual harm is committed by another party, including government and non-state actors.³²

²⁵ Ibid [29].

²⁶ Ibid [31].

²⁷ Ibid [33] – [42].

²⁸ Ibid [47] – [49].

²⁹ Ibid [23].

³⁰ Ibid [24].

³¹ Ibid [56] – [59].

The types of corporate activities that have to date typically been the subject of such allegations have involved corporate arrangements with public and private security forces, resettlement of persons for project activities and financing of projects with identified environmental or social risk. Due diligence is proposed as a means of minimising such exposure.

Access to Grievance Mechanisms

The report discusses the increasing expectations on States and business to take concrete steps to adjudicate corporate-related human rights violations. Commentary is provided on the gaps in existing grievance mechanisms and improvements are proposed in respect of judicial mechanisms, non-judicial grievance mechanisms, company level grievance mechanisms, state based non-judicial mechanisms, multi stakeholder or industry initiatives and financier grievance mechanisms.³³

(c) Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights

The *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*³⁴ were adopted by the UN Sub-Commission on the Promotion and Protection of Human Rights in 2003. They seek to impose corporate responsibility in relation to the realisation of certain human rights within a corporation's 'spheres of activity and influence', including: the right to equal opportunity and non-discriminatory treatment (art 2); the right to security of persons (arts 3 and 4); the rights of workers and their families (arts 5-9); consumer rights and protections (art 13); and environmental rights and standards (art 14). The *Draft Norms* also require corporations to recognise and respect the 'public interest', 'development objectives' and principles of 'transparency and accountability' (art 10).

In relation to implementation, art 1 of the *Draft Norms* provides that:

Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights.

A corporation's spheres of activity and influence will vary depending upon its size. However the spheres are clearly envisaged to have contractual, economic and geographic dimensions,³⁵ and to include shareholders, workers, unions, consumers, business partners, suppliers, creditors and individuals or groups directly or indirectly affected by a corporation's activities, including host communities and neighbouring communities.³⁶

Importantly, the *Draft Norms* are not intended in any way to displace or detract from the primary responsibility of states to promote, protect and fulfil human rights. In this respect, art 17 of the

³² Ibid [73] – [81].

³³ Ibid [82] – [103].

³⁴ *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

³⁵ UN Sub-Commission on the Promotion and Protection of Human Rights, *Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights*, [37]–[38], UN Doc E/CN.4/2005/91 (2005).

³⁶ *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, art 22.

Draft Norms imposes on states the obligation to ‘establish and reinforce the necessary legal and administrative framework for ensuring that the Norms and other relevant national and international laws are implemented by transnational corporations and other business enterprises’.

There are three significant differences between the framework proposed by the *Draft Norms* and the *Protect, Respect and Remedy* framework more recently proposed by the UN SR on Business and Human Rights. First, the *Draft Norms* enshrine only a limited list of rights in respect of which corporations have responsibility, whereas the *Protect, Respect and Remedy* framework recognises that corporate activity ‘can affect virtually all internationally recognised rights’.³⁷

Second, the *Draft Norms* seek to impose the same implementation responsibilities on corporations as on States, arguably obfuscating responsibility and failing to recognise that corporations, as ‘economic actors, have unique responsibilities’.³⁸

Third, the concept of ‘sphere of influence’ incorporated in the *Draft Norms* has been critiqued as vague and uncertain, with the *Protect, Respect and Remedy* framework proposing that corporations have responsibilities so far as their activities and conduct *impact* on correlate rights.

Despite these critiques, the mechanisms proposed by the *Draft Norms* to operationalise and enforce corporate responsibility for human rights are useful and instructive. These mechanisms include that:

- corporations develop and implement operating procedures that are compliant with the *Draft Norms* and engage in business only with other corporations, entities and natural persons that comply with the *Draft Norms* (art 15);
- corporations apply and incorporate the *Draft Norms* into contracts and other arrangements with other corporations, entities and natural persons (art 15);
- corporations consult with stakeholders and communities about their activities, influence and impact (art 16); and
- corporations report at least annually on their activities, operation and performance in relation to implementation of the *Draft Norms* and social and environmental impacts (art 15).

Article 16 of the *Draft Norms* proposes further monitoring by the United Nations and relevant international and national mechanisms in relation to implementation and application.³⁹

3.3 Moving Forward: Business, Human Rights and Responsibilities

Corporations have the capacity and responsibility to contribute to a fair, just and peaceful social order, both internationally and domestically. Relevantly to the *Universal Declaration of Human Responsibilities* this requires that corporations treat all people in a humane way (art 1), have high ethical standards (art 3), protect the environment (art 7), promote sustainable development (art 9), address disadvantage and discrimination (art 10) and use property and wealth fairly and justly (art 11). The *Protect, Respect and Remedy* framework proposed by the UN SR on Business and

³⁷ *Protect, Respect and Remedy: A Framework for Business and Human Rights*, above n 10, [6].

³⁸ *Ibid.*

³⁹ *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, art 16, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

Human Rights, together with the mechanisms proposed by the *Draft Norms*, constitute significant steps at the international level towards legal elaboration, entrenchment and operationalisation of these responsibilities.⁴⁰

It is within domestic legal systems, however, that significant further work needs to be undertaken. As the Castan Centre for Human Rights at Monash University has identified:

The domestic arena is the most appropriate and likely place for the [human rights responsibilities of corporations] to obtain substantial legal effect (either before or after the Norms acquire international legal status) through the enactment of domestic law that incorporates the Norms, thereby bringing TNCs and other business enterprises within a national human rights framework.⁴¹

This Paper therefore now focuses on the Australian legal, regulatory and policy environment and proposes a range of reforms to promote corporate social responsibility.

4. What Can Australian Corporations Do About Human Rights and Responsibilities?

4.1 Introduction

This Part discusses the legislative and policy frameworks, particularly the *Corporations Act*, that govern the conduct and behaviour of corporations in Australia. It also examines the ways in which these frameworks promote or fetter socially and environmentally responsible corporate behaviour.

4.2 The *Corporations Act* and the Obligation to Act in the Best Financial Interests of Shareholders

The powers and duties of directors and, by extension, of corporations derive from both the common law and the *Corporations Act*.

Section 181(1) of the *Corporations Act* codifies the duty of directors to act:

- (a) in good faith in the best interests of the corporation; and
- (b) for a proper purpose.

It is well established that the term ‘the best interests of the corporation’ primarily means the financial interests of the company’s shareholders as a general body.⁴² There is some authority for the proposition that the interests of the company may include interests that are reasonably incidental to, and within the reasonable scope of carrying on, the business of the corporation (such as employees⁴³ and creditors⁴⁴); however, shareholder interests remain paramount.⁴⁵

⁴⁰ Indeed, on 18 June 2008, the UN Human Rights Council resolved to extend the mandate of the Special Representative for a further three years and tasked him with the further elaboration and operationalisation of the framework during this period.

⁴¹ Rachel Chambers, David Kinley and Sarah Joseph (Castan Centre for Human Rights), *Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights: Submission from the Castan Centre for Human Rights Law, Monash University* (2004) 8, [35].

⁴² Harold Ford, R P Austin and Ian Ramsay, *Ford's Principles of Corporations Law* (12th ed, 2005) 341.

⁴³ See, eg, *Parke v Daily News* [1962] Ch 927 in the context of United Kingdom corporations law; and *Teck Corporation v Millar* (1973) 33 DLR (3d) 288 in the context of Canadian corporations law.

The question as to what constitutes the exercise of a power ‘for a proper purpose’ requires consideration of the nature and purpose of the power conferred and whether the actual exercise of that power was, at least, substantially for that purpose.⁴⁶ A duty will not be considered to have been exercised for a proper purpose where it was exercised for a purpose collateral to that for which the power was primarily conferred and would not have been exercised ‘but for’ that improper or collateral purpose.⁴⁷

Having regard to the above, it is likely that the *Corporations Act* as currently interpreted and applied only permits corporations to have regard to, and act in the interests of, social, environmental and broader community interests in so far as those interests are related to, or likely to bear on, the financial interests of shareholders. There is certainly no *responsibility* on the part of directors or corporations to take into account the interests of a broader class of stakeholders or the community.⁴⁸ This is an example of what the UN Special Representative on Business and Human Rights refers to as ‘domestic policy incoherence’, whereby international human rights responsibilities assumed by governments are not implemented or where domestic laws work at cross purposes with international human rights and responsibilities.⁴⁹

4.3 Lack of Incentives and Absence of Disincentives

The restrictions imposed by the *Corporations Act* are compounded by the lack of incentives to socially and environmentally responsible corporate conduct and the absence of disincentives to short-term profit maximising conduct that may have deleterious social and environmental impacts and outcomes. Commenting on this, the Chief Executive Officer of ANZ Bank, John McFarlane, has said:

When I meet with some investors, it’s surprisingly unfashionable to take a platform advocating sustainability, social responsibility and community engagement. In fact, there is an argument that the pressure for short-term performance created by fund managers, competition and shrinking product lifecycles has never been greater.⁵⁰

As there is a clear need for amendment of the *Corporations Act* to enable socially and environmentally responsible corporate conduct, there is also a clear need to create incentives to such action and disincentives to inconsistent behaviours.

⁴⁴ *Walker v Wimborne* (1976) 137 CLR 1; *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 32 NSWLR 50; *Sycotex Pty Ltd v Baseler* (1993) 13 ACSR 766; *Linton v Telnet Pty Ltd* (1999) 30 ACSR 465, 473–4.

⁴⁵ *Parke v Daily News* [1962] Ch 927.

⁴⁶ *Kokotovich Constructions Pty Ltd v Wallington* (1995) 17 ACSR 478; *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821; *Hogg v Cramphorn Ltd* [1976] Ch 254.

⁴⁷ *Kokotovich Constructions Pty Ltd v Wallington* (1995) 17 ACSR 478, 490; *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285.

⁴⁸ See generally, D F Jackson QC, *Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation* (2004).

⁴⁹ *Protect, Respect and Remedy: A Framework for Business and Human Rights*, above n 10, [33].

⁵⁰ John McFarlane, cited in ‘Follow the Leaders’ in ‘Special Report: Corporate Responsibility Index’, *The Age* (Melbourne), 4 April 2005, 2.

5. Bridging The Gap Between What Corporations Can And Should Do About Human Rights and Responsibilities

5.1 Overview

This Part of the Paper discusses a range of domestic and international public policy initiatives to bridge the gaps between, on the one hand, desirable corporate conduct and, on the other hand permissible and often prevailing corporate conduct. Each initiative is analysed in the context of its potential to authorise and incentivise companies to engage in socially and environmentally responsible conduct that seeks to promote and protect human rights and responsibilities.

5.2 Domestic Regulatory Reform

(a) Permissive Regulation – A Minimalist Approach

A minimalist approach to policy and law reform to better enable corporate social responsibility would involve amending s 181 of the *Corporations Act* to *permit* directors to consider the interests of stakeholders other than mere shareholders in the management and operation of the company.

For example, s 181 could be amended to permit consideration of the interests of employees, consumers and local communities in any exercise of corporate power or, alternatively, consideration of social and environmental interests and human rights norms. Alternatively, Peter Henley has suggested that s 181 could be amended to enable directors to have regard to the interests of stakeholders, defined as ‘a person or organisation (other than a shareholder) with whom the company has or is likely to have a business or employment relationship, or who is or may become directly affected by the business of the company’.⁵¹

Such an approach is, however, likely to be deficient for two key reasons.

First, experience suggests that compliance with voluntary or permissive legislation or codes of conduct is likely to be limited, particularly where compliance may occasion some form of financial detriment (regardless of social or environmental outcomes) and among reticent corporations.⁵²

Permissive legislation tends to work best for already well-intentioned actors. As the Australian Graduate School of Management has concluded, there is a need for regulatory intervention to respond to the situation whereby:

Organisations guilty of ethical breaches, wrecking the environment and trampling on human rights might damage their reputations but they might not necessarily find any consumer mandate for them to do the right thing.⁵³

Second, where a director may be permitted, but is not required, to consider the interests of a stakeholder other than a shareholder, it is unclear whether, how and by whom such consideration could be assured or enforced.⁵⁴

(b) Proscriptive Regulation – A Middle Approach

⁵¹ Peter Henley, ‘Were Corporate Tsunami Donations Made Legally? Some Thoughts on What Directors Can and Should be Able to Do About Corporate Social Responsibilities’ (2005) 30(4) *Alternative Law Journal*.

⁵² Amnesty International, *The UN Human Rights Norms for Business: Towards Legal Accountability* (2004) 12.

⁵³ Leon Gettler, ‘Consumers Can Be Less Than Caring’ in ‘Special Report: Corporate Responsibility Index’, *The Age* (Melbourne), 4 April 2005, 4.

⁵⁴ See, eg, Harold Ford et al, above n 42, 346.

An alternative approach to policy and law reform would involve amending s 181 of the *Corporations Act* to *require* directors to consider stakeholder interests or social, environmental and human rights concerns in the exercise of directors' duties.

Such enactment would have normative, educative and promotional effects in relation to human rights-consistent corporate conduct. Importantly, it would also act as a deterrent to inconsistent conduct, particularly if s 184 of the *Corporations Act* was concurrently amended to impose criminal liability in respect of reckless or dishonest conduct (as is currently the case in respect of obligations to act in the best financial interests of shareholders).

Such an approach to directors' duties has recently been adopted in the United Kingdom, where the *Companies Act 2006* (UK) includes a statement of directors' duties 'which reflects modern business needs and wider expectations of responsible business behaviour'.⁵⁵ It does this by providing, in essence, that:

the basic goal for directors should be the success of the company for the benefits of its members as a whole, but that in achieving this goal, directors must take a 'properly balanced view of the implications of decisions over time and foster effective relationships with employees, customers and suppliers, and the community more widely'.⁵⁶

Accordingly, pursuant to s 171(1)(d) of the Act, directors must consider such matters as 'the impact of the company's operations on the community and the environment'.

This approach is consistent with the concept of 'enlightened shareholder value', which recognises that 'long-term company performance and overall competitiveness and wealth and welfare' are most likely to be maximised by socially and environmentally responsible and sustainable corporate conduct.⁵⁷ In fact, there is an emerging body of evidence demonstrating a positive correlation between corporate social responsibility and shareholder value. A recent Australian-based study undertaken by AMP Capital Investors, for example, found that companies with a higher corporate social responsibility rating on the Corporate Responsibility Index outperformed the market by, on average, three per cent per annum over both four and ten year periods.⁵⁸ Similarly, in the European context, research demonstrates that corporate social responsibility is an 'independent return-driving factor that can exert a positive influence on the shareholder value'⁵⁹ while a major US study found that there is a strong positive correlation between the social and financial performance of companies.⁶⁰

This positive correlation seems to be attributable to two primary factors.

First, socially and environmentally responsible corporate conduct is likely to enhance corporate reputation and goodwill, both of which are 'key business assets'.⁶¹ This is particularly the case as

⁵⁵ Department of Trade and Industry (UK), *Company Law Reform* (2005) 20 at www.dti.gov.uk/cld/WhitePaper.htm.

⁵⁶ *Ibid.*

⁵⁷ *Ibid* 20–1.

⁵⁸ Michael Anderson and Matthew Rey (AMP Capital Investors), 'Many Good Returns' in 'Special Report: Corporate Responsibility Index', *The Age* (Melbourne), 4 April 2005, 3.

⁵⁹ Hendrik Garz, Claudia Volk and Martin Gilles, *More Gain than Pain: Sustainability Pays Off* (2002) 16.

⁶⁰ J D Margolis and J P Walsh, *People and Profits: The Search between a Company's Social and Financial Performance* (2001).

⁶¹ Phil Watts and Richard Holme (World Business Council for Sustainable Development), *Meeting Changing Expectations: Corporate Social Responsibility* (1999) 9.

societal expectations of corporations trend towards ethical and responsible behaviours and outputs. As Peter Henley concludes, 'such programs use a standard business model of investment and return, and can be justified by directors as being both in the interests of the company and for a proper purpose'.⁶²

Second, socially and environmentally responsible corporate conduct necessarily involves building relationships and maintaining a dialogue with a range of stakeholders — including, among others, employees, consumers, suppliers, business partners, and host and neighbouring communities — that can influence and impact upon the performance of the company. These stakeholders have a range of social and environmental interests and concerns that need to be taken into account if their engagement with, and influence and impact on, the company is to be positive.⁶³ On this view, corporate social responsibility is authorised by, and likely to enhance value for, shareholders in so far as it promotes a sustainable business model.

Other justifications posited for corporate social responsibility and its positive impact on shareholder value include:

- the identification of new commercial opportunities through stakeholder consultation and relationships;
- the contribution of corporate social responsibility to the building of social capital and stronger, more prosperous communities and hence consumers;⁶⁴
- improved employee satisfaction and output;
- the avoidance of negative publicity and brand damage;⁶⁵ and
- the development of more sustainable, and hence efficient and profitable, social and environmental practices.⁶⁶

(c) Legislative Incorporation of Business Human Rights Responsibilities – The Preferable Approach

The state responsibility to *protect* from corporate related human rights harm and promote socially responsible corporate conduct could most effectively be discharged by legislative enactment of the corporate responsibility to *respect* human rights.

This would involve legislative enactment of the 'doing no harm principle' which, as the Special Representative on Business and Human Rights points out, 'is not merely a passive responsibility for firms but may entail positive steps – for example, a workplace anti-discrimination program might require the company to adopt specific recruitment and training programmes'.⁶⁷

⁶² Peter Henley, above n 51.

⁶³ Phil Watts and Richard Holme, above n 61, 9.

⁶⁴ UN High Commissioner for Human Rights, *Business and Human Rights: A Progress Report* (2000) at www.unhcr.ch/business.htm.

⁶⁵ David Kinley and Junko Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44 *Virginia Journal of International Law* 931, 953.

⁶⁶ See generally Richard Holme and Phil Watts (World Business Council for Sustainable Development), *Corporate Social Responsibility: Making Good Business Sense* (2000) and Phil Watts and Richard Holme, above n 61.

⁶⁷ *Protect, Respect and Remedy: A Framework for Business and Human Rights*, above n 10, [53].

Such an approach would be consistent with federal and state legislative approaches to similar areas of interest and potential impact and concern, including occupational health and safety;⁶⁸ discrimination and equal opportunity in employment and the provision of goods and services;⁶⁹ and environmental impact.⁷⁰ Each of these laws articulate minimum standards of conduct and enshrine certain rights in clear and accessible terms, with civil, and sometimes criminal, penalties associated with failure to adhere to the requisite standards. The observation of the SR on Business and Human Rights that ‘corporate culture’ – ascertained by reference to policies, rules and practices – is increasingly being used as a basis for corporate criminal liability or punishment in some jurisdictions is apposite in this respect.⁷¹

5.3 Reporting and Disclosure Requirements

It is well established that mandatory measurement and disclosure requirements enhance corporate governance and conduct by ensuring a level of transparency and accountability. It is also well recognised that full disclosure and informed consumer participation is essential to the informed and fair functioning of the market. Recognising this, the ASX Listing Rules require continuous and detailed disclosure of material financial information.⁷² All incorporated associations are required to report at least annually on their financial affairs.

As discussed above, art 15 of the *Draft Norms* requires corporations to report at least annually on their activities, operation and performance in relation to implementation of the *Draft Norms* and social and environmental impacts. Under Australian law there are, however, no requirements for companies to report on or disclose their social, environmental or human rights-affecting activities or impacts.⁷³ This can be contrasted with the position in South Africa where, for example, the JSE Securities Exchange ‘Code of Corporate Practices and Conduct’ requires all publicly listed companies to report in accordance with the Global Reporting Initiative Sustainability Reporting Guidelines.⁷⁴ The Guidelines require performance assessment and disclosure of economic, environmental and social policies, activities and impacts.⁷⁵ Sweden similarly requires ‘independently assured sustainability reports using the Global Reporting Initiative Sustainability Reporting Guidelines for its state owned enterprises.’⁷⁶

⁶⁸ See, for example, *Occupational Health and Safety Act 2004* (Vic).

⁶⁹ See, for example, *Equal Opportunity Act 1995* (Vic) Part 3, Divisions 1, 2 and 4; *Age Discrimination Act 2004* (Cth) Part 4; *Disability Discrimination Act 1992* (Cth) Part 2, Division 1 and s 24; *Racial Discrimination Act 1975* (Cth) ss 13 and 15; *Sex Discrimination Act 1984* (Cth) Part 2, Division 1 and s 22.

⁷⁰ *Environment Protection and Biodiversity Conservation Act 1999* (Vic).

⁷¹ *Protect, Respect and Remedy: A Framework for Business and Human Rights*, above n 10, [29] – [32].

⁷² *ASX Listing Rules* (2004) at www.asx.com.au/supervision/rules/listing/index.htm.

⁷³ See David Kinley and Junko Tadaki, above n 65, 942 for a discussion of various failed corporate social responsibility bills introduced to legislatures in the US, the UK and Australia. Each of the draft bills, if enacted, would have imposed mandatory corporate social and environmental responsibility disclosure and reporting requirements.

⁷⁴ *Ibid* 957. See also Halina Ward, *Legal Issues in Corporate Citizenship* (2003) 3-5. In contrast, the non-mandatory ASX Corporate Governance Council, *Principles of Good Corporate Governance and Best Practice Recommendations* (2003) do not contain any principles or recommendations in relation to management or disclosure having regard to social, environmental or human rights issues or impacts.

⁷⁵ See Global Reporting Initiative, ‘GRI Reporting Framework’ at www.globalreporting.org/guidelines/framework.asp.

⁷⁶ *Protect, Respect and Remedy: A Framework for Business and Human Rights*, above n 10, [30].

Having regard to the above, the *Corporations Act* and, at the very least, the ASX Listing Rules should be amended to require that companies report annually under a ‘comply or explain’ system on the human rights, ethical, social and environmental impact of their operations. The adopted reporting framework could be based on the Global Reporting Initiative.

Furthermore, consistently with art 16 of the *Draft Norms*, which proposes monitoring by relevant national mechanisms in relation to business compliance with human rights and responsibilities, the Australian Securities and Investment Commission should be empowered to monitor and enforce such reporting and disclosure.

5.4 Market Indices and Certification Programs

The efficacy and utility of reporting and disclosure requirements, together with the social and environmental pressures that can be exerted by stakeholders (especially consumers), can be enhanced by market indices and certification programs which transmit information about social and environmental corporate conduct in a fast, accessible, market-friendly way.

Recognising this, together with increased consumer interest in responsible and sustainable investment, share market sustainability indices have been developed in both the UK and the US. In the UK, the FTSE4Good Index measures the performance of companies that meet globally recognised corporate responsibility standards and thereby encourages investment in those companies.⁷⁷ Similarly, in the US, the Dow Jones Sustainability Indexes identify, measure, set benchmarks and report on corporations with respect to economic, environmental and social factors.⁷⁸

While sustainability indices are principally directed towards investors, a number of certification schemes have been developed by industries, organisations and the non-government sector to provide ‘shorthand’ information to consumers about the social and environmental responsibility practices of businesses. For example, the SA8000, a standards and verification scheme based on international human rights standards, provides certification to retailers and suppliers that maintain ‘just and decent working conditions throughout the supply chain’.⁷⁹ Similarly, the ‘Worldwide Responsible Apparel Production’ program (‘WRAP’) is a certification program for the clothing and textile industries requiring manufacturers to comply with a range of labour rights and workplace standards.⁸⁰

Government has an important role to play in resourcing and promoting market indices and certification programs based on human, social and environmental measures, including, at the very least, by considering such indices and programs in its own procurement policy and practice.⁸¹

5.5 Governmental Incentives to Corporate Social Responsibility

Article 15 of the *Draft Norms* proposes that businesses only engage with other corporations, entities and natural persons that comply with the *Draft Norms*. It further proposes that

⁷⁷ See FTSE, ‘FTSE4Good Index Series’ at www.ftse.com/ftse4good/index.jsp.

⁷⁸ See Dow Jones, ‘Dow Jones Sustainability Indexes’ at www.sustainability-indexes.com.

⁷⁹ See Social Accountability International, ‘Overview of SA8000’ at www.cepaa.org/SA8000/SA8000.htm.

⁸⁰ See Worldwide Responsible Apparel Production at www.wrapapparel.org.

⁸¹ Rachel Chambers, David Kinley and Sarah Joseph, above n 41, [38].

corporations apply and incorporate the *Draft Norms* into contracts and other arrangements with other corporations, entities and natural persons. The *Protect, Respect and Remedy* framework similarly recognises that ‘the corporate responsibility to respect human rights involves avoiding complicity’, being indirect corporate involvement in human rights abuses.⁸²

There is considerable scope for local, state and national governments and enterprises to use their significant ‘purchasing power’ to promote and even require ethical and socially and environmentally responsible and sustainable conduct. This potential has been recognised and harnessed to some degree in the state of Victoria, where panel members on the Government’s Legal Services Panel are contractually required to:

- ‘commit to the furtherance of equal opportunity in their work practices (including work allocation) 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’.⁸³

These arrangements now generate over \$40 million of free legal services for disadvantaged individuals and groups each year. As part of ‘doing business’, governmental procurement should require that suppliers’ conduct and outputs be compatible with human rights and responsibilities.

5.6 Bilateral Trade and Investment Agreements

Another area of widespread ‘domestic policy incoherence’ identified by the Special Representative on Business and Human Rights is that of bilateral investment and trade agreements, many of which contain significant and expansive protections for investors and free trade ‘with little regard’ to human rights and responsibilities, ‘skewing the balance between the two’.⁸⁴

It is imperative that human rights and responsibilities, principles of responsible business conduct, environment and social protections, and duties of disclosure be included in all newly negotiated bilateral trade and investment agreements.

5.7 International Assistance and Cooperation

The Report of the Special Representative on Business and Human Rights identifies that the greatest risk of corporate-related human rights harm arises in developing and emerging economies, and conflict zones with potentially weak regulatory environments and vulnerable workers and communities. Recognising this, he suggests that:

States...share information about challenges and best practices, thus promoting more consistent approaches and perhaps increasing their expectations of each other for protecting rights against corporate abuse...

⁸² *Protect, Respect and Remedy: A Framework for Business and Human Rights*, above n 10, [73] – [81].

⁸³ Department of Justice Victoria, ‘Government Legal Services’ at www.justice.vic.gov.au/CA2569020010922A/page/Business+Units-Government+Legal+Services?OpenDocument&1=0-Business+Units~&2=0-Government+Legal+Services~&3=~.

⁸⁴ *Protect, Respect and Remedy: A Framework for Business and Human Rights*, above n 10, [34] – [38].

Where States lack the technical or financial resources to effectively regulate companies and monitor their compliance, assistance from other States with the relevant knowledge and experience offers an important means to strengthen the enforcement of human rights standards.⁸⁵

This proposal is supported by arts 9, 10 and 11 of the *Universal Declaration of Human Responsibilities* which, in essence, commit people, states and organs of society to promote sustainable development, address poverty and disadvantage, and use power, wealth and property justly and fairly.

Consonantly with this, and together with its commitment to international human rights leadership and middle-power diplomacy, Australia should commit to building institutional capacity and resources at the domestic, regional and international levels to effectively regulate and monitor socially responsible corporate conduct.

6. Conclusion

Corporations have the potential and capacity to, on the one hand, contribute significantly to, and on the other hand, substantially diminish human rights in local, regional and even international communities and environments.

Despite this, there are significant governance and regulatory gaps at both the international and domestic levels between what corporations *do*, *can do* and *should do* about human rights and responsibilities. As the UN Special Representative on Business and Human Rights has recently identified, 'these gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanction or reparation'.

Reform is needed to require and incentivise corporations to respect human rights and responsibilities as a core aspect of 'doing business'. This reform should be informed by a 'human rights and responsibilities' approach to business, framed around the *Universal Declaration of Human Responsibilities*, the *UN Draft Norms* and the *Protect, Respect and Remedy* framework proposed by the UN SR on Business and Human Rights.

A range of domestic and international public policy initiatives are proposed – including in relation to directors' duties, reporting and disclosure requirements, government procurement, trade and investment agreements and institutional capacity building– to bridge the regulatory gaps between what corporations *do*, *can do* and *should do* about human rights and responsibilities.

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⁸⁵ Ibid [44] – [45].