

FOREWORD

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Responsibility for protecting and advancing respect for human rights has long been assumed to be the duty of the state. It is only relatively recently that discussion has shifted to focus on the human rights responsibilities of corporations themselves, and what that might entail. Such discussions incorporate contentious debate not only on the issue of precisely what standards should be met by companies, but also as to who should set such standards and how to manage compliance with those standards.

The adoption by the United Nations ('UN') Human Rights Council in 2011 of the Guiding Principles on Business and Human Rights ('Guiding Principles')¹ signalled acceptance of the concept that companies have a responsibility to respect human rights, and that this responsibility exists independent of, and as a complement to, states' duties to protect human rights. The Guiding Principles are the latest (and most authoritative) initiative to emerge from a long line of voluntary initiatives on business and human rights and have quickly become a 'common reference point in the area of business and human rights'.² The business and human rights field has developed rapidly in the last two decades. In the mid-1990s, many corporations were questioning the relevance of human rights to their businesses. But a combination of factors (including some high-profile disasters, such as the collapse of the Rana Plaza building in Bangladesh in 2013 killing more than 1100 workers), has brought more companies, along with human rights advocates, governments and academics, to this discussion. For many of them, the question now is *how* they can best address the human rights challenges that arise in a competitive business environment, rather than *why* human rights are relevant to business. This Issue will assist in further exploring and understanding this question.

The growth and interest in business and human rights issues over the last few decades have in part stemmed from recurring examples of corporate

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¹ John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, UN Doc A/HRC/17/31 (21 March 2011) annex.

² David Bilchitz and Surya Deva, 'The Human Rights Obligations of Business: A Critical Framework for the Future' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013) 2.

irresponsibility, but business can also be a transformative force for good. The role that corporations play in domestic and international economies is fundamental. Their impact on human rights is equally important, as they have the potential to make a direct and enduring impact on people's lives. Through commercial activity driven by corporations, jobs and wages are made available, goods and services are provided, and taxes are paid enabling governments to provide further goods and services. A globalised economy has generated millions of jobs over the last quarter century. It has lifted hundreds of millions of people out of extreme poverty.³ Thereby, directly or indirectly, a vast array of human rights may be supported – from rights to work, welfare, food and shelter, health and education, to freedoms involving speech, association and movement.

But some business practices have also eroded respect for, or simply disregarded, human rights. Corporations, both local and transnational, have been and continue to be minor and major abusers of human rights. Some corporations are guilty of treating workers badly – in terms of pay, conditions and working environments; some pollute the environment in ways that have dramatic and serious effects far beyond their immediate surroundings; some discriminate against Indigenous peoples, or certain ethnic or religious groups, or against women, or people with disabilities, or on grounds of sexuality; and some work alongside (or inside) governments that perpetrate gross human rights abuses.⁴

It is these challenges that this Issue addresses. The editors of this thematic Issue of the *University of New South Wales Law Journal* are to be commended for recognising both the centrality of business to our lives and the need to explore how negative impacts by business on human rights might be both countered and remedied and the role of the law in doing so. The articles in this Issue tackle these challenges from a number of different angles. Some consider the role of formal laws – whether domestic or international – and others focus on the efforts of grassroots advocacy and soft law to improve corporate respect for human rights.

Radha Ivory and Anna John hone in on the relevance of criminal laws to business and human rights issues. In particular, they examine the role that Australia's *Criminal Code 1995* (Cth) might play in holding corporations to account for international and transnational crimes that jeopardise human rights in global business operations. The vexed questions of how mechanisms for enforcing human rights might interact with basic principles of corporations law, such as companies possessing separate legal personality and limited liability, pose interesting dilemmas for corporate lawyers and human rights advocates alike. In addition, the challenges of enforcing laws extraterritorially complicate these issues further. Ivory and John consider how Australia's existing laws might be applied to hold corporations to account for human rights-related crimes.

³ World Bank Group, 'A Measured Approach to Ending Poverty and Boosting Shared Prosperity: Concepts, Data, and the Twin Goals' (Policy Research Report, 2015) 6; 'Towards the End of Poverty', *ViewsWire, The Economist* (London), 1 June 2013, 17.

⁴ See Beth Stephens, 'The Amoral of Profit: Transnational Corporations and Human Rights' (2002) 20 *Berkeley Journal of International Law* 45.

Each of the contributions from Humberto Cantú Rivera and (together) Jolyon Ford and Claire Methven O'Brien address the divisive issue of the (potential) development of a business and human rights treaty, and if so developed, what such a treaty might look like. The push for a legally binding, comprehensive treaty on business and human rights began in the 1970s with an attempt at the UN to draft a code of conduct for transnational corporations.⁵ That push was revived in 2003 with the debate around the UN draft *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*.⁶ The acceptance by the UN Human Rights Council in June 2014 of a resolution to pursue a business and human rights treaty revived this prickly debate.⁷ Cantú Rivera provides an insider's view of the most recent debates around the development of a treaty and espouses a practical approach that wisely recognises that the legal issues of corporate accountability for human rights cannot be divorced from the social and political difficulties of implementing such a regime. Ford and O'Brien delve into the details of what such a treaty might look like and argue that a 'framework' convention, that endows individual states with a degree of flexibility in implementation, might be the most effective regulatory model for a treaty.

A business and human rights treaty (if developed) is not likely to ever stand alone as a 'silver-bullet' solution to redressing corporate rights violations. However, its discussion at the UN is an important evolution in the global business and human rights debates. While in many ways devotion to this mechanism harks back to an era before globalisation gathered force and when states were the pre-eminent enforcers of rights, the existence of an international legal framework could act in concert with and support the many other ongoing corporate responsibility initiatives that are currently in play around the world. The development of a business and human rights treaty should not be viewed as an either/or narrative but rather as an additional mechanism that could help clarify the legal responsibilities of businesses, be used to encourage the development of consistent national laws, and operate in conjunction with more practically focused industry-specific standards and metrics that are being developed from the ground up.

The articles from Martijn Boersma and (together) Sarah Rennie, Tim Connor, Annie Delaney and Shelley Marshall, specifically address some of the grassroots, 'bottom-up' initiatives that stand in contrast to, but complement, the push for a global treaty. Boersma discusses long-term efforts to eradicate child labour from

⁵ *Letter Dated 31 May 1990 from the Chairman of the Reconvened Special Session of the Commission on Transnational Corporations to the President of the Economic and Social Council*, UN ESCOR, UN Doc E/1990/94 (12 June 1990) annex ('*Proposed Text on the Draft Code of Conduct on Transnational Corporations*').

⁶ Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN ESCOR, 55th sess, 22nd mtg, Agenda Item 4, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003, adopted 13 August 2003).

⁷ *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, HRC Res 26/9, UN GAOR, 26th sess, 37th mtg, Agenda Item 3, A/HRC/RES/26/9 (14 July 2014, adopted 26 June 2014).

corporate supply chains. Global supply chains are ubiquitous in the global economy, and the UN Commission on Trade and Development estimated in 2013 that around 80 per cent of global trade flows through global supply chains linked to transnational corporations.⁸ The prevalence of child labour in global supply chains has long been recognised as a problem and is an issue that civil society advocates have been pursuing for decades. Boersma provides us with interesting insights into how advocacy and campaigning have evolved on this issue and how ‘regulating’ an issue such as child labour must necessarily involve a multiplicity of stakeholders. Rennie, Connor, Delaney and Marshall also consider regulation from the bottom up, specifically the role of trade unions in addressing business and human rights challenges. Their in-depth case study on Indonesian trade unions representing garment and footwear workers provides insights into both the potential of, and difficulties faced by, worker organisations in advocating respect for basic rights. Worker organisations are (or should be) central forces in developing improved corporate accountability for human rights and the (seemingly) endless quest for workplaces that respect fundamental rights will require a vigilant civil society comprised of worker organisations, acting as watchdogs, whistle-blowers, negotiators, organisers and citizens.

This Issue tackles a very contemporary challenge – assessing the strengths and limitations of legal approaches in regulating business with respect to human rights. In exploring the extent to which law is an effective means to encourage businesses to adopt a proactive and responsible approach to human rights, it is hard not to jump immediately to the seemingly obvious conclusion that the law has its limits. Multiple mechanisms and stakeholders have been involved in the decades long struggle to improve corporate respect for human rights. The acceptance by many companies in recent years of the relevance of human rights to business has been driven in part by campaigns involving unions, NGOs, consumers, investors and workers themselves. This push from the ‘ground up’ has caught the attention of companies, many of whom have been forced into the spotlight to defend or redress their practices. The increasing relevance of an international framework for business and human rights alongside emerging national laws (regulating, for example, child labour or modern slavery) illustrates that law can provide a ‘top-down’ set of standards that enunciates the rights that are to be respected and protected. The resonance of both national and international laws that reiterate such standards is crucial to developing an environment and business culture that values human rights and should not be underestimated. However, accepting that human rights must be respected by corporations, wherever in the world they operate, is one thing. Making it happen is quite another.

⁸ United Nations Conference on Trade and Development, *World Investment Report 2013: Global Value Chains: Investment and Trade for Development* (2013) xxii.