Business and Human Rights: Some Questions and Answers for Business Lawyers

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Introduction

Recently I was in Vienna at the International Bar Association annual conference, with around 6,000 other lawyers from all over the world. What was the conference session that generated the most interest with business lawyers? Not "Recent Developments in Cross-Border M&A". Not "Comparative Competition Law". No, it was the session on Business and Human Rights that was packed. Overflowing. Literally standing room only. Now that might have been because Kofi Annan was speaking. But the fact that the former United Nations Secretary-General was speaking at the session underscored why the session was important.

In my role as Chair of the Law Council of Australia's Business and Human Rights Working Group, and as Chair of the Law Council of Australia's Business Law Section, it has been apparent to me that awareness of Business and Human Rights as an emerging issue for lawyers and clients is very low, albeit with a few notable exceptions. The purpose of this note is to provide an overview and introduction of Business and Human Rights for business lawyers to try to address that lack of awareness.

Question 1

What is "Business and Human Rights" all about?

OK, good question. I have been asked that before on more than one occasion. Let me try to answer it in a number of different ways.

To begin with, most businesses of any substance will say that they try to respect human rights when conducting their business operations. You would be hard pressed to find a company that said that they do not want to respect human rights.

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But how would they know if they are? How would top management, or the board of directors, know what the company was actually doing?

Often the biggest issue is in the supply chain. The company has suppliers. Naturally, the company will try to get the lowest price from their suppliers. But what happens if the supplier is not in Australia but in a developing country with less robust laws concerning minimum labour standards, for example? Should you consider whether the supplier is using child labour? Or whether the supplier is exploiting its workforce, even if it is strictly complying with its local law – which might be weak, or weakly enforced, when it comes to labour standards or discrimination?

So someone – let's call them for the sake of argument Professor John Ruggie, who presented alongside Kofi Annan in Vienna at the IBA – came up with the idea of "human rights due diligence".

If you say you want to respect human rights, how do you know if you are doing so? The answer: you do human rights due diligence within your organisation. You investigate the human rights impacts of your operations, including your supply chain. Then you do something about it.

That is the essence of what "Business and Human Rights" is all about.

Another way to answer the basic question "what is "Business and Human Rights" all about?" relates to the UN Guiding Principles on Business and Human Rights.[1] These three-part principles, which I will refer to as the UN GPs, were developed by Professor Ruggie at the request of Kofi Annan and adopted by the UN Human Rights Council in 2011.[2]

The principles are not *legally* binding on States, citizens or corporations. They are intended to be, to use an expression apparently well known in international law, "soft law".[3] I must admit, as a business lawyer focused on M&A, equity capital markets and corporate governance, when I first came across the expression "soft law" without context, I was a little confused. In a private regulatory or contractual context "soft law" is a concept that appears devoid of any conceptual rigour – a business lawyer might say that something is either law, with legal consequences or it is not.

But what it means in the international law context (as I subsequently discovered) is that "soft law" creates norms or expectations, and non-compliance may have consequences, although not in the same way as "hard law". Indeed, as Professor Ruggie said in Vienna, "soft law may have hard consequences". I will return to this point a little later. But the UN GPs are not expressed as a "voluntary code" – the GPs are intended to create expectations, that is, they have a normative role, and perhaps will operate by force of moral suasion.[4]

The GPs themselves are essentially simple, with three "pillars" – Protect, Respect and Remedy:

[1] See http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.
[2] http://www.ohchr.org/EN/Issues/Business/Pages/BusinessIndex.aspx.
[3] It is also an expression used in the context of international arbitration and European Community law, and can mean guidance of various sorts. The closest immediate analogies that come to mind in the Australian business law context are ASIC Regulatory Guides, ATO Administrative Determinations (in contrast to rulings, which are binding), and Takeovers Panel decisions and Guidance Notes (as an administrative tribunal earlier decisions are not binding precedents but are persuasive). So if we started using the expression "soft law" in the Australian business law context, we would find that we had quite a bit of it already.
[4] This is perhaps why the IBA Guidance, discussed below, says that the GPs are not binding, but neither are they voluntary, an expression that also caused me some initial confusion.

1. **Protect**: States have an obligation to protect human rights.

2. **Respect**: Businesses have a responsibility to respect human rights.

3. **Remedy**: States should take appropriate steps to provide access to effective remedy, both judicial and non-judicial, for those affected by business-related human rights abuses.

The GPs were developed by Professor Ruggie at the instigation of then UN Secretary-General Kofi Annan due to the impact of business on human rights in the context of so-called "globalisation"[5] and because it was evident that a binding multilateral treaty on business and human rights was unlikely to happen any time soon.[6]

But the GPs, while non-legally binding on companies, while "soft law", were developed with a deliberate regulatory intent as Professor Ruggie explained to us in Vienna, rather than something entirely voluntary.

Question 2:

So why should business be interested in this?

Apart from the simple reason that many people – because businesses are run by people, and are generally run ultimately for the benefit of people, either as shareholders or investors in pension funds or mutual funds[7] – want to do the right thing when it comes to human rights, there are good pragmatic business reasons to respect human rights.

First, a failure to respect human rights may present a business risk. Good corporate governance and the discharge of the duties of officers and directors[8] require proper management of material business risks. Whether it is a global mining company that is undertaking a project in a developing country, or a branded consumer goods company with a global supply chain, a human rights failure can have serious business consequences.

While in Vienna at the dinner for the IBA's Corporate Social Responsibility Committee, I was speaking to a Canadian academic, who recounted a Canadian example, where a publicly listed mining company acquired another mining company with foreign operations. The pre-acquisition due diligence apparently did not uncover some human rights abuses, which then continued under the new owner's watch. The listed company is now being sued for the actions of its former subsidiary in a landmark case for Canada. The listed company disposed of the subsidiary at a considerable loss, but retained liability for the human rights issues that had occurred during its ownership, and is facing a significant claim. Perhaps this could have been avoided if human rights due diligence had been top of mind at the time of the acquisition.

Geoff Healy, General Counsel of global mining company BHP-Billiton explained in Vienna in the panel session following Kofi Annan and John Ruggie's presentation, that his

[5] I say "so-called" because international trade, investment and communication on a global scale have been going on for some time. For example, Australia has been in electronic contact with the rest of the world since 1872 when the "Overland Telegraph" was completed, allowing Australia to be linked to Java and hence the rest of the world.
[6] But this may yet happen. See for example: http://business-humanrights.org/en/binding-treaty/latest-news-on-proposed-binding-treaty .
[7] You could argue that State Owned Enterprises are run for the benefit of the citizens of the relevant State, although this might be considered naïve in some cases.
[8] For companies in Australia, the Corporations Act 2001 imposes duties of care and diligence on directors and other officers – see section 180.

company takes human rights very seriously and has integrated human rights due diligence as part of its group-wide risk management framework. This makes perfect business sense from a governance point of view.

In the Australian context, it is quite conceivable that a failure to adequately manage a human rights risk that imposed liability or caused serious financial loss, could give rise to a breach of duty by an officer or director under the Corporations Act and consequent personal liability – or in some circumstances a civil penalty.[9]

Second – and this is the obverse of the first point – a human rights failure could inflict enormous brand damage on a company, particularly in these days of social media. A company's brand may be the most valuable asset of the company or at least one of them. And a brand can be damaged pretty quickly. One incident can now destroy trust in a brand, that can take years to rebuild, if it can be rebuilt at all.

Consumers make buying decisions on the basis of on a variety of factors, including the human rights (or environmental, or community engagement, etc.) record of the company, particularly where the brand is really trying to sell good feelings as part of their customer experience.

So it just makes business sense to be mindful of human rights issues, in order to protect or enhance corporate reputation and brand.

Third, there is an increasing trend for companies to have an explicit obligations to report on its human rights impacts. For example, in Europe there is a directive requiring human rights reporting by certain companies.[10] This needs to be implemented into domestic law by the end of 2016. In England, for example, this has been done by regulations amending the Companies Act.[11]

In Australia, mandatory reporting is not expressly required, but the ASX Corporate Governance Council's Recommendation 7.4, in effect for financial years commencing on or after 1 July 2014, requires consideration of "social sustainability" risks, which would likely include human rights impacts.

Recommendation 7.4 is as follows:

> *A listed entity should disclose whether it has any material exposure to economic, environmental and social sustainability risks and, if it does, how it manages or intends to manage those risks.*[12] *[My emphasis]*

In this context "social sustainability" means "the ability of a listed entity to continue operating in a manner that meets accepted social norms and needs over the long term".[13]

It seems reasonably evident to me that a "soft law" responsibility or expectation to respect human rights created by the UN GPs would fall within the category of "accepted social norms", certainly as awareness of the UN GPs increases and they gain wider acceptance, or that the human rights impacts of the business could give rise to material economic risks

[9] Or disqualification as a director under Part 2D.6 of the Corporations Act.
[10] See http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0095&from=EN. For explanation, see http://ec.europa.eu/finance/company-reporting/non-financial_reporting/index_en.htm.
[11] The Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013. See http://www.legislation.gov.uk/uksi/2013/1970/pdfs/uksi_20131970_en.pdf. Section 414C(7) of the Companies Act as inserted by those regulations provide "In the case of a quoted company the strategic report must, to the extent necessary for an understanding of the development, performance or position of the company's business, include— … (b) information about— … (iii) social, community and human rights issues".
[12] See http://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-3rd-edn.pdf.
[13] See the glossary of the ASX Corporate Governance Council Principles and Recommendations.

for the reasons discussed above. On that analysis, Australian listed companies may already have, or may in future become subject to, a "comply or explain" style obligation to consider and report on human rights risks.[14] An investor might well have a reasonable expectation that a listed issuer would report on material human rights risks facing its business, if those risks could have a material impact on the company and if it says nothing, it is reasonable to assume that any risk is immaterial. It would follow that a failure to make adequate disclosure in response to ASXCGC Recommendation 7.4 could potentially form the basis for an investor class action in the event that material loss was suffered as a result of a human rights issue.[15]

But there is a more general point, at least in the Australian context, or, more correctly, two points. First, Australian listed entities have legally enforceable continuous disclosure obligations.[16] Material information – information that would influence investment decisions – needs to be disclosed to the ASX. A significant human rights risk could well be material to investors for the reasons outlined above.[17] A failure to make disclosure could lead to liability, including by way of investor class action. And officers and directors can be potentially personally liable as accessories, subject to a due diligence defence.[18] Moreover, it is conceivable that ASIC would allege a breach of the care and diligence duty on the part of officers or directors in the event of a disclosure failure that inflicted harm on the company.[19] Second, entities that issue a prospectus also need to disclose material information to investors,[20] and risks disclosure is routinely included in prospectuses. However, while I have not done a survey, human rights risk disclosure would be relatively rare in my experience. But as a matter of logic, if human rights may be a material business risk, should not part of the capital raising process include human rights due diligence, at the least to establish that there are no material human rights risks from a business point of view? A failure to do HRDD could mean that the due diligence defence available to the directors and officers[21] might not be available in the event of a significant adverse human rights issue arising after the capital raising.

To paraphrase Professor Ruggie: soft law, with some potentially hard consequences for individuals.

The fourth – and somewhat related reason – why this matters is that investors also care about human rights, sometimes for selfish and rational economic reasons (see the discussion above in relation to risks) and sometimes due to so-called "ethical investment". Some investment funds, for example those associated with educational institutions, make investment choices based on non-economic factors, for example, avoiding tobacco, gaming or defence investments. Why would such "ethical investors" not wish to have regard to whether a company is diligent about minimising its human rights impacts?

[14] The ASX Corporate Governance Council Principles and Recommendations are not binding. However, a listed entity that does not comply, must explain why they are not complying.
[15] The basis for the claim would be that a failure to make disclosure of the nature and extent of the human rights risk was misleading or deceptive conduct under provisions such as section 1041H of the Corporations Act or section 12DA of the Australian Securities and Investments Commission Act 1989.
[16] See section 674 of the Corporations Act 2001.
[17] While there remains some debate about exactly what the test of materiality is for continuous disclosure purposes, there is little doubt that information about material business risks would be material to a rational investor who was investing having regard to fundamental valuation principles, which is the correct test, in my view, of materiality, and the one adopted by the ASX in its Guidance Note on the subject. See ASX Guidance Note 8, at paragraph 4.2, page 10, text corresponding to footnote 22.
[18] See section 674(2A) (accessorial liability) and section 674(2B) (defence).
[19] Under section 180 of the Corporations Act 2001, referred to in footnote 8 above.
[20] Section 710 of the Corporations Act 2001 sets out the disclosure test for an IPO prospectus – all information that investors and their advisers would reasonably expect and reasonably require for the purpose of making an informed assessment of the assets, liabilities, profits and prospects of the issuer. A failure to comply with this obligation can lead to criminal and civil liability see sections 728 and 729 of the Corporations Act 2001 respectively.
[21] See section 729 of the Corporations Act 2001 for the due diligence defence.

Indeed, there are currently 1437 signatories to the UN Principles for Responsible Investment, which require environmental, social and corporate governance issues to be taken into account in investment analysis and decision making and ownership policies and practices[22] including a number from Australia.[23]

Question 3:

And what do the UN GPs mean for business?

In essence they mean being diligent about human rights. They mean that the company needs to be mindful of human rights. And mindfulness, when it comes to a company, means something being in the mind of the board of directors and top management, as well as executives throughout the company who have decision-making responsibility.[24]

That requires a statement of commitment from the top, a corporate policy, undertaking human rights due diligence to understand the company's human rights impacts, taking active steps to avoid adverse impacts – and doing something about adverse impacts, if despite your diligent efforts, adverse impacts occur.

This all sounds simple if you say it quickly, but may be difficult to implement in a company with a wide and multi-level supply chain, when regard is had to the human rights impacts of the company's suppliers. For example, I understand one well-known brand of fast moving consumer goods has 12,000 different suppliers around the world. That would have required an enormous due diligence exercise.

Question 4:

So how is this relevant to lawyers?

First, there is scope for lawyers to advise clients on how to implement the GPs, specifically advising on or assisting with "HRDD" and implementing contractual provisions in supply contracts to address human rights risks in the supply chain.

Second, there are the corporate and securities law issues noted above, with risk management and disclosure issues that may need to be integrated into corporate lawyers' day-to-day practice.

Third, law firms may be suppliers to businesses that are implementing the UN GPs, and clients may be asking law firms about their own human rights impacts and policies for that reason, just as law firms are regularly asked by their multinational client about other things, like diversity policies.

Fourth, law firms are business enterprises too, although in the minds of many, a special kind of business enterprise, with professional and ethical obligations that set the law firm apart from the purely profit maximising firm of classical economic theory or business school case studies.

Law firms need to consider how they might implement the GPs themselves, having regard to the special role of lawyers and law firms as part of the justice system, which itself is an

[22] See http://www.unpri.org/. Figure is correct as at 14 December 2015 based on the specified website.
[23] http://www.unpri.org/signatories/signatories/ .
[24] Compare the concept of "high managerial agent" in section 12.3 of the Commonwealth Criminal Code.

essential part of upholding human rights. The right to a fair trial, and the inextricably linked right to representation, are fundamental human rights, a point that I will return to below.

Fifth, lawyers' representative groups – law societies and bar associations – are a form of enterprise and need to think about what they should do about the UN GPs.

The American Bar Association passed a resolution in 2012 endorsing the UN GPs.[25] The Law Society of England and Wales is active in promoting Business and Human Rights to its members.[26] The Law Council of Australia has established a Working Group (which I Chair partly in consequence of my former role as Chair of the Business Law Section of the Law Council), which, at this point, is working to raise awareness of Business and Human Rights in Australia within the legal profession and business.

But perhaps most significantly the IBA, at its Council meeting in Vienna on 8 October 2015, approved a document providing guidance to its law society and bar association members on what they can do in relation to the UN GPs. It is now up to law societies and bar associations around the world, including the various Australian law societies and bar associations, to decide what to do about Business and Human Rights. I assume the first step will involve raising awareness within the legal profession.

The IBA also plans to issue guidance for business lawyers, to be considered at its next Council meeting in Barcelona in May 2016.[27] The process of developing this guidance has been somewhat controversial, with some difficult issues about what a lawyer should do when confronted with a client's human rights impacts, and whether a lawyer is to be affected by actions of their clients, and whether a lawyer should proffer advice on human rights issues because a failure to give advice might lead to a negative human rights impact. These are difficult questions, and I will be interested to see how they, and others, are resolved.

My own view is that we need to allow business lawyers to make personal ethical choices, and live with the moral consequences of their own actions. I might wish, for example, as a cancer survivor, that my firm would not represent a tobacco company – or I might think that even a tobacco company deserves representation against the Commonwealth of Australia when there is a constitutional issue about compulsory acquisition of property without compensation. The right to property – and not have it taken away by the state – is a fundamental right, both human and economic. One might take the view that anyone undertaking a lawful activity deserves representation against the state in relation to an arguable attempt to confiscate property.[28]

Some might say that a society should be judged by how it treats it weakest members. That is true but a society is also judged by how it treats those who are unpopular. True it is that companies are not human, and have no human rights as such. But companies are run by people and ultimately for the benefit of people, and it is those people who deserve representation. If lawyer declines to act on the grounds of that a client has infringed human rights, the client may be denied effective representation. That cannot be right.

Applying the Business and Human Rights framework of the UN GPs to lawyers and law firms raises difficult issues. As awareness of Business and Human Rights, and its

[25] See http://www.americanbar.org/content/dam/aba/administrative/human_rights/hod_midyear_109.authcheckdam.pdf.
[26] See http://communities.lawsociety.org.uk/human-rights/what-we-do/business-and-human-rights/.
[27] The IBA guidance can be accessed here: http://www.ibanet.org/Legal_Projects_Team/Business_and_Human_Rights_for_the_Legal_Profession.aspx.
[28] The Commonwealth of Australia was successful in arguing that requiring tobacco products to be sold in "plain packaging" was not an expropriation of property without just compensation for the purpose of the Australian Constitution: *JT International SA v Commonwealth of Australia* [2012] HCA 43.

implications becomes more widespread, these issues with be more fully discussed and debated.

Question 5:

What should I do now?

You should let your clients and colleagues know that Business and Human Rights is an emerging issue, presenting, as they say, both challenges and opportunities, both for clients and for lawyers.

You should also think about how Business and Human Rights might affect your law firm, as a business.

It will take time for Business and Human Rights to get traction. I daresay that many business people and many lawyers have still never heard of it. But once it becomes more widely known, and some of the implications discussed above are more widely appreciated and understood, Business and Human Rights will undoubtedly gain momentum within the legal profession in Australia.

It may be, with the benefit of hindsight, that the IBA conference in Vienna this year was the turning point for Business and Human Rights. If so, significant credit will be due to the IBA, its President David Rivkin and all the others who have been involved in the IBA Business and Human Rights initiative.

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