

Ensuring Investments Comply with United Nations' Human Rights Standards

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This paper provides an introduction to the core international human rights standards for business – the UN Guiding Principles on Business and Human Rights - and their implications for investors and the businesses in which they invest.

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Please note this paper has been prepared in the author's personal capacity. From 2006 – 2011 she was a legal advisor to the Professor John Ruggie in his capacity as UN Special Representative on Business and Human Rights, the author of the UN Guiding Principles on Business and Human Rights. This paper draws heavily on the text of the UN Guiding Principles on Business and Human Rights and its Interpretive Guide.

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1. Introduction

This paper provides an introduction to the core international human rights standards for business – the [UN Guiding Principles on Business and Human Rights](#) (UNGPs) - and their implications for investors and the businesses in which they invest. The paper was prepared to inform the author's presentation at Superannuation – Beyond the Fringe and is only intended to provide an introduction to the topic. A number of designated, more detailed resources are now available for the investment community to assist it to better manage human rights risk – see Appendix 1.

2. What are the global standards on business and human rights?

(a) The business and human rights landscape

Human rights are the rights and freedoms we enjoy by virtue of being human beings without distinction based on our religion, race, gender or any other status. Human rights are enshrined in key international instruments including the [Universal Declaration of Human Rights](#). See Appendix 2 for an example of internationally recognized human rights.

Business helps to facilitate the realization of human rights including by contributing to economic development and support for the rule of law. However, it is also increasingly linked to a variety of human rights harms. The current business and human rights landscape highlights that businesses can impact on human rights, both positively and negatively regardless of sector or industry or whether they operate in developed or developing countries. It also shows that businesses may impact on nearly all internationally recognized human rights including civil, political, economic, social and cultural rights. Allegations of the most egregious abuses mainly occur in situations of heightened risk – i.e. conflict affected areas.

The [Business and Human Rights Resource Centre](#) provides information around human rights allegations made against companies and their responses. In any given week one might see a broad range of issues relating to a variety of industries – for example, a Telco company accused of interfering with the right to privacy by indiscriminately handing over phone records to a repressive government; a mining company alleged to have harmed the cultural rights of indigenous peoples by damaging a traditional burial site; an apparel company seen to be breaching labour rights through poor labour practices in its supply chain.

Investors as well as professional services' firms including law firms are increasingly caught up in the mix. They are expected to advise their business partners and clients to act responsibly as well as to understand and manage their own human rights risks.

(b) Consequences of failing to manage human rights risk

As set out further below there is now a clear responsibility for businesses to respect human rights – effectively to do no harm. Respecting human rights is the right thing to do and should be in line with any responsible company's values. However, there is also a strong business case for respecting rights and a variety of negative consequences for failing to do so. These include:

- **Loss of public advantages/funding opportunities:** e.g. suspension or rejection of support by an export credit agency for projects with negative human rights impacts; suspension of funds from international or regional financial institutions.
- **Criminal prosecutions of company and/or its officers or managers:** e.g. corporate criminal liability for complicity in international crimes under the Australian Commonwealth Criminal Code.
- **Civil law suits and administrative claims:** e.g. extraterritorial civil suits including those based on a parent company's own acts and omissions (see e.g. *Choc v HudBay Minerals Inc.* Note though recently restricted access to Alien Tort Claims Act for claims without a close connection to the US - *Kiobel v Shell*); complaints to National Human Rights Institutions (NHRIs). See the Business and Human Rights Resource Centre's [Legal Accountability Portal](#) for more detail.
- **Public campaigns:** e.g. internet and more targeted media campaigns. In recent years campaigns in Australia have tended to focus around labour rights issues in supply chains overseas and indigenous peoples' rights.
- **Divestment:** e.g. recent Norwegian Pension Fund divestment from companies where there is an unacceptable risk of the fund contributing to serious/systematic human rights violations or severe environmental damage.
- **Operational delays:** e.g. employee strikes; permitting disputes; community blockades.
- **Lost opportunities:** e.g. reputational damage may lead to lost opportunities if the company deemed irresponsible corporate citizen.
- **Employee dissatisfaction and recruitment challenges:** e.g. potential employees may increasingly ask about the company's reputation around social and environmental issues including human rights.

Conversely there are benefits to instituting robust policies and processes to respect human rights including increased funding opportunities, employee satisfaction, investor confidence and consumer support.

(c) The UNGPs

Developed by Harvard Professor John Ruggie in his capacity as [UN Special Representative of the Secretary-General on Business and Human Rights](#), the UNGPs provide a global reference point for governments, business and other actors to manage the risk of business-related human rights harm.

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The UNGPs build on the Protect, Respect and Remedy Framework (PRR Framework), developed by Professor Ruggie to clarify the expectations of governments, business and other stakeholders to prevent and address business and human rights challenges. The PRR Framework represented the “what” and “why” in terms of clarifying the business and human rights space – the UNGPs represented the “how”.

The PRR Framework comprises:

- The **State duty to protect** against human rights abuses by third parties, including business, through appropriate policies, regulation and adjudication.
- The **business responsibility to respect human rights**, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved; and
- Greater access by victims to **effective remedy**, judicial and non-judicial.

The PRR Framework and the UNGPs were respectively welcomed and endorsed in 2008 and 2011 by the UN Human Rights Council. They were also supported by the UN General Assembly.

Since the UNGPs’ endorsement they have been incorporated into leading CSR initiatives including the [OECD Guidelines for Multinational Enterprises](#); the [OECD Common Approaches for Export Credit Agencies](#); the [Equator Principles](#); the [ISO 26000 Standard on Social Responsibility](#) (UNPRI); the [UN Global Compact](#); the [Global Reporting Initiative](#); the [UN Principles for Responsible Investment](#) and the [IFC Performance Standards on Environmental and Social Sustainability](#).

The investment community contributed to the UNGPs’ drafting process and is involved in their implementation. In 2011 investors representing \$2.7 trillion of assets under management and who participate in the UN Principles on Responsible Investment, [wrote](#) to the UN to support the UNGPs and the PRR Framework. The UN Principles for Responsible Investment has facilitated training on the UNGPs and recently announced a 2014 [collaborative engagement](#) with the extractive industry focused on the implementation of the UNGPs.

Governments, business and other stakeholders have also incorporated the UNGPs into their work. This includes governments launching national action plans on the UNGPs (see in particular [plans](#) from the UK and the Netherlands); businesses drafting [human rights policies](#), reporting on their human rights performance and conducting integrated and stand-alone human rights risk analysis and impact assessments; and civil society framing advocacy around the UNGPs (see e.g. the work of the [International Corporate Accountability Roundtable](#)). For their part the investor community has started to include references to the UNGPs in policies and processes; lobbied for human rights due diligence through shareholder proposals; and reported on business implementation of the UNGPs. Moreover, socially responsible investment indices such as the [Dow Jones Sustainability Index](#) and [FTSE4Good](#) include information around the

human rights due diligence process discussed in the UNGPs. See Part 3 and Appendix 1 for more detail.

Closer to home the Australian government was one of the key supporters of the UNGPs. It has engaged with business and other stakeholders around the UNGPs and related initiatives through various departments including Treasury, Foreign Affairs and Trade and the Attorney General. The Australian Human Rights Commission has published [general and industry-specific fact sheets](#) around the UNGPs and has highlighted their relevance to its casework including around workplace discrimination. Multi-stakeholder and business led forums exist for dialogue around the UNGPs and related initiatives including the Global Compact Network Australia's [Human Rights Leadership Group](#). There is a patchwork of legislation, some with extraterritorial application, around issues such as discrimination, privacy, workplace safety, native title, trafficking and forced labour which require businesses to respect various human rights. As noted in Appendix 1 investor research organizations have contributed human rights tools for Australian investors. And the ASX too has identified the relevance of human rights related disclosure through its diversity recommendations as well through a specific reference to the UN Global Compact (which includes human rights as part of its 10 core principles) in an initial draft of the 3rd edition of its [corporate governance principles and recommendations](#). The legal community has written about the role of Australian lawyers in implementing the UNGPs and is increasingly advising clients around effective human rights risk management using the UNGPs.

The result of all of the above is increasing convergence in the sustainability arena around human rights, making it easier for governments and business to meet expectations and for others to assess their actions. Accordingly while the UNGPs, as their name suggests, are guidance and do not amount to binding international law, they provide the foundation for effectively managing business related human rights risks. It is also important to recognise that they are slowly being incorporated into national law including [reporting regulations](#).

(d) Snapshot on the business responsibility to respect human rights

It is useful to understand all elements of the PRR Framework and their attending guidance in the UNGPs. However, it is the business responsibility to respect human rights that is likely to be the starting point for investors and the companies in which they invest.

The business responsibility to respect human rights is explained in UNGPs 11 – 24. In summary the UNGPs highlight that the responsibility to respect human rights applies to all businesses regardless of their size, sector, structure or place of operation. It applies to all internationally recognized human rights. And it necessitates attention not only to a business' own activities but to its potential involvement in human rights harm through its business relationships (e.g. suppliers, joint venture partners, security providers, clients etc). The responsibility to respect is essentially a 'do no harm' standard but this does not mean that positive action is not expected (i.e. having processes in place to actively guarantee safe and healthy working conditions).

To meet their responsibility to respect businesses are advised to have a **policy commitment** on human rights, engage in **human rights due diligence** and implement **remediation** processes. Human rights due diligence helps businesses to know and show that they respect human rights. It entails:

- **Identifying and assessing** the actual and potential adverse human rights impacts of company activities and associated relationships;
- **Integrating** the findings from human rights impact assessments across relevant internal functions and processes;
- **Tracking** company human rights performance to verify whether adverse human rights impacts are being effectively addressed; and
- **Communicating** publicly, where appropriate, on company responses to actual and potential human rights impacts.

According to the UNGPs human rights due diligence can be incorporated within broader enterprise risk management systems provided that it goes beyond simply identifying and managing material risks to the company itself, to include risks to rights holders. It is recognised that a company's approach to human rights due diligence may vary depending on its size, sector, operational context, ownership and structure as well as the severity of its human rights impacts. Severity is a relative concept and is based around the scale, scope and irremediable character of an impact. Importantly human rights due diligence should be ongoing – entailing a continuous assessment of human rights impacts and how they are being managed.

According to the UNGPs when businesses identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes. This may include establishing operational level grievance mechanisms run by the business or a third party.

For more detail on the business responsibility to respect see the [Interpretive Guide](#) to the UNGPs.

3. How should investors be considering these standards as part of their due diligence on new investments?

This section draws heavily on “[Investing the Rights Way](#)” (IHRB report), drafted by the Institute for Human Rights and Business, Calvert Investments and the Interfaith Centre on Corporate Responsibility in 2013. The IHRB report rightly notes that investors have been dealing with human rights issues for some time through their environmental, social and governance policies and processes. It also highlights that as owners of capital investors can have great influence on encouraging businesses as well as investment managers to better understand and act on their human rights risks. And given those risks, ensuring that businesses in which they invest respect human rights should also assist a fund to manage its own legal and reputational risks.

Indeed Professor Ruggie's [Corporate Law Tools Project](#) highlighted that in a number of jurisdictions around the world laws around fiduciary duties at the least permit, and in many cases effectively require, trustees to manage human rights-related risks linked to investments. The project involved surveying how corporate and securities law and policy in more than 35 jurisdictions encourages companies to respect human rights and included a section on the duties of pension fund trustees. The surveys indicated that a trustee would need to consider the impact on human rights of an investment if not doing so could expose the fund to legal or reputational risk. They also highlighted that there has been recent governmental encouragement for pension fund trustees to consider the impact on human rights of their investments and indeed to report on these considerations.

Set out below are the recommendations from the IHRB report for how a fund could consider the UNGPs as part of its due diligence on new and existing investments. At a minimum, the IHRB report notes that the aim is for investors to understand “whether the companies they have invested in have the appropriate policies and processes in place to assess and manage human rights impacts”. Note that the recommendations below are focused around general human rights due diligence – the IHRB report also points out that investors may want to develop targeted tools around specific issues of interest depending on the asset type and investment vehicle. For example investments in private equity infrastructure funds in emerging markets may necessitate greater scrutiny on issues such as land access and resettlement.

Recommendations from the IHRB report

- **Checking if a business has a publicly available human rights policy:** this is often the first step in understanding if the business is aware of its human rights responsibilities, has integrated them into existing management processes, has engaged with external stakeholders and has buy-in from the top.
- **Confirming that businesses are carrying out human rights due diligence:** asking a business to identify how it is performing human rights due diligence, whether through stand-alone or integrated processes, will show an investor that the business has identified its specific human rights risks and has an effective way to manage them. It will also highlight whether the business has adequately engaged with rights holders and other key external stakeholders. The IHRB report lists out specific questions investors can ask around the entire human rights due diligence process.
- **Remediation and operational level grievance mechanisms:** similarly the IHRB report provides questions investors may ask around a business' steps around remediation including operational level grievance mechanisms. Under the UNGPs it is important to understand how a business is addressing adverse human rights impacts that have already occurred. Visibility into a business' operational level grievance mechanisms may also help the investor to spot systemic human rights risks.

These issues may be raised in a variety of forums, from private dialogue with a business to more formal inclusion in a shareholder proposal. And when answers are not forthcoming or are unsatisfactory an investor may limit or stop its investment. Investors may also decide to join

together to try to collectively improve an industry or other group's approach to managing human rights risks. The IHRB report highlights these different forms of investor engagement with business and other stakeholders around the UNGPs:

- **Public advocacy:** e.g. before the London Olympics, a [coalition of US and UK based socially responsible investors](#) called on tourism companies to train staff and suppliers to recognise and avoid involvement in human trafficking and in doing so to look at their own supply chains and recruitment practices. Several investor groups have also inputted into discussions around mandatory sustainability reporting around the world. As the IHRB rightly states, the argument for involvement by investors in reporting debates is that “the quality of information that is publicly available directly affects their ability to assess whether companies are managing their human rights impacts soundly”.
- **Shareholder resolutions:** there has been a recent increase, particularly in North America, around inclusion of human rights issues in [shareholder proposals](#). Indeed in 2013 there were apparently [21 companies](#) with human rights focused shareholder resolutions. Traditionally proposals requested companies to draft human rights policies or set up internal committees but recently have focused more on assessment and management of risks. In Australia a new organization, the [Australian Centre for Corporate Responsibility](#), is working with shareholders to encourage proposals around social, environment and governance matters. Focus topics for this year include labour rights issues.
In many cases companies advise shareholders to reject the proposal based on existing activities. However, even if a proposal is not successful the very fact of a proposal around human rights may highlight that the company may not be, or be seen to be, effectively managing its human rights risks. Professor Ruggie's Corporate Law Project suggested that in the surveyed jurisdictions there are generally few substantive impediments to shareholders including human rights concerns in proposals for annual general meetings. There are, however, procedural barriers including those relating to amount/percentage of capital equity in order to put forward a proposal. These procedural rules may pose the most significant obstacles to shareholders raising human rights issues, particularly where larger investors may be less interested in discussing these matters.
- **Divestment:** in some situations investors may decide that a failure to effectively manage human rights risk necessitates divestment. Some investors are formalising divestment criteria around human rights, including the [Norwegian Pension Fund](#) as referred to above.
- **Benchmarking and ranking:** the investment community including investment research organizations may be particularly well placed to compare company performance around human rights and highlight to companies where they are not meeting expectations. Reports have been prepared around specific industries and socially responsible investment indices also enable benchmarking. See Appendix 1.
- **Tools development:** the IHRB notes the importance of tools for investors on how to engage with companies around human rights risk as well as other stakeholders. In addition to the IHRB report there are other examples of investors coming together to develop investor specific guidance in this space. This includes highlighting to other stakeholders such as business and government what investors are looking for when it comes to effective human rights risk management.

The bottom line is that investors have a role to play in improving business respect for human rights which should also tie into their own risk management.

4. Are super funds expected to comply with these standards themselves

Super funds fall within the definition of business enterprises provided in the UNGPs and therefore have a responsibility to respect human rights. This may mean incorporating human rights elements into environment, social and governance policies. It also entails assessing not only the risks of involvement in adverse human rights impacts through investment relationships but also how the fund itself is tracking on issues such as non-discrimination and other labour rights. Acting consistently with the UNGPs need not mean a new, stand-alone human rights process. Rather it could entail an integrated approach by bringing human rights considerations into existing processes. However, this will necessitate internal awareness around what human rights mean for the fund and how existing processes may help it to manage human rights risks.

5. What do the UNGPs mean for internal and external legal advisors?

Building awareness around human rights risk includes good advice from internal and external legal advisors. Simply put, the reasons why the UNGPs matter for Australian lawyers advising funds include:

- Most of the major superannuation funds have signed up to the UNPRI.¹ The UNGPs provide a framework for implementing the commitment those funds have made in becoming UNPRI signatories. As noted above, the UNPRI has incorporated the UNGPs into its work programme around human rights and is likely to increasingly look at signatories' policies and processes in this area.
- The UNGPs are gaining traction and are being referenced in mainstream documentation, including Australian government documentation.
- As human rights due diligence becomes more mainstream, conducting human rights due diligence on investments may become part of the legal standard-of-care which is expected from professional trustees when exercising their power to make investments.
- While further research is being done in this area it is increasingly recognised that a failure to manage human rights risks may detrimentally affect a company's share price, either as a consequence of a human-rights-related risk actually crystallising (i.e. through a legal action), or as a result of the market pre-emptively writing down the share price in light of the risk on

¹ These include UniSuper; Cbus; Hesta; Sunsuper; First State Super; Q Super; Local Government Super; Catholic Super; Care Super; Christian Super; Commonwealth Super (CSC); ESS Super; Good Super; Goldman Sachs Australia Super; Host Plus; and LUCRF.

one crystallising. If a superannuation fund invests in a company without conducting human rights due diligence, and investment losses are subsequently suffered as a consequence of human rights issues, a question may arise as to whether or not the trustee had discharged its duty to act in the best financial interests of members (especially if human rights due diligence has become orthodox amongst other professional trustees). See the Corporate Law Tools project referred to above for more detail.

- As shareholders, it is conceivable that superannuation funds will encounter shareholder resolutions being put forward to address human rights issues, more and more often. Superannuation funds will have to form a view as to whether they vote 'for' or 'against' those resolutions and will turn to their advisors for guidance. The UNGPs may assist in forming that view.

6. Conclusion

The Australian investment community has a key voice within the business and human rights discourse. It is important that it starts to ask for, and receives information, from businesses about their human rights risk management. It can also help improve the quality of this information by helping businesses to understand what information is most relevant to an investor trying to manage its own risks in this area. And investors need to have enough awareness around human rights to appreciate what risks they might have of adverse impacting human rights themselves. Investors too should be part of discussions with other stakeholders around the development of Australian government policy in this area.

Lawyers, within and external to investment organizations, can assist investors in the above dialogue by pointing out both hard and soft law implications of investment decisions that may adversely impact on human rights. This includes continuing to promote a long-term view of investments and helping to clarify that human rights risk management is part of core business.

Appendix 1

Targeted investor resources

Global

- Briefing paper prepared for Professor Ruggie by Fried Frank, "[Trends in the Use of Corporate Law and Shareholder Activism to Increase Corporate Responsibility and Accountability for Human Rights](#)" (2007); and appendix [Survey of social & environmental shareholder proposals](#)
- Briefing paper prepared for Professor Ruggie by Elizabeth Umlas, "[Human rights and socially responsible investment in North America, an overview](#)" (2009)
- Standard Life Investments report "[Business and Human Rights](#)" on implementation of the UNGPs by major mining companies (2011).
- Sustainalytics report "[Raising the Bar on Human Rights](#)" outlined what the UNGPs mean for investors. (2011)
- Professor Ruggie's [Corporate Law Tools Project](#). (2011)
- Institute for Human Rights and Business/Calvert Investments/Interfaith Center on Corporate Responsibility report "[Investing the Rights Way](#)" on the role of investors in implementing the UNGPs (2013).
- Shareholder Association for Research and Education (SHARE) report "[Resources, rights and respect](#)" on investor expectations of the human rights responsibilities of mining companies (2013).
- UNPRI [human rights resources](#).
- [Share action website](#) including information around investor engagement on human rights.
- [Interfaith Center on Corporate responsibility website](#).
- [Website](#) for the UN Working Group on Business and Human Rights (appointed to disseminate and implement the UNGPs following the end of Professor Ruggie's mandate in 2013).

Australian

- CAER/Netbalance Foundation report on "[Disclosures on Managing Human Rights Risks](#)" (2011).
- ACSI report on "[Supply Chain Labour and Human Rights](#)" (2011).
- Oxfam Australia/CAER report on "[The right to decide](#)" discussing disclosure by Australian companies around free, prior and informed consent (2013).
- See generally [Australian Centre for Corporate Responsibility](#) website.
- See generally [Global Compact Network Australia](#) website.

Note also the following resources for lawyers:

- [Lawyers for better business](#) (L4BB) website – L4BB is a network to help lawyers become champions of corporate responsibility.
- Advocates for International Development's guide "[The UN Guiding Principles on Business and Human Rights – a guide for the legal profession](#)" (2013).
- [International Bar Association](#) resources.

- [American Bar Association](#) resources.
- [Allens Linklaters](#) publications.
- [DLA Piper](#) publication.
- Shift Project [legal outreach initiative](#).

APPENDIX 2

Internationally recognized human rights include:

- Right to a fair trial
- Right to adequate food
- Right to adequate health
- Right to clean drinking water and sanitation
- Right to an adequate standard of living
- Right to education
- Right to family life
- Right to freedom from discrimination
- Right to freedom from forced labour and servitude
- Right to freedom from torture, or degrading treatment or punishment
- Right to freedom of assembly and collective bargaining
- Right to freedom of movement
- Right to freedom of opinion, expression, thought, and religion
- Right to intellectual property
- Right to life, liberty and security of person
- Right to own property
- Right to participate in cultural life
- Right to privacy

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- Right to take part in government
- Right to work and to just and favourable conditions at work