Encouraging Respect for Human Rights in the Offshore Operations of Australian Companies

An Analysis of the Roles of Directors' Duties and Disclosure

by

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Declaration

I certify that this thesis does not incorporate without acknowledgement any material previously submitted for a degree or diploma in any university; and that to the best of my knowledge and belief it does not contain any material previously published or written by another person except where due reference is made in the text.

Signed:  Date: 7 July 2020

Glenn Palmer

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Abstract

The complicity of companies in the violation of human rights around the world has a history, context and trajectory. In recent years, efforts have been made at an international level, brokered by the United Nations, to address violations. The most recent attempt has been the mandate of Professor John Ruggie, which achieved a degree of consensus and resulted in the publication of the Guiding Principles. This document built upon his Protect, Respect and Remedy Framework, which captured the role of states and businesses, with regard to preventing corporate complicity in the violation of human rights, within international law. With previous initiatives losing momentum or failing to be adopted due to a lack of consensus, this mandate was an important step in efforts to combat an issue that Ruggie himself described as the canary in the coalmine. However, in spite of the mandate's progress, transnational corporations continue to be implicated in the violation of human rights.

This masters research analyses the issue from an Australian perspective, highlighting the involvement of some companies domiciled in this country in the continued violation of human rights. Analysing the Guiding Principles, this thesis also considers the extent to which the Australian government could use elements of corporate law to address the negative impact of Australian companies in their global operations.

Case studies of overseas operations linked to Australian companies highlight the nature of the problem by demonstrating how their actions produced negative impacts on local communities and workers. Examining international human rights treaties will highlight how those impacts constituted a violation of human rights. Furthermore, analysing the relevant legislation and actions in the host state will shed light on its government's inability to protect human rights on these occasions. The case studies reveal corporate complicity in human rights violations in developing countries – namely the existence of weak and ineffective regulation, but also what has become the competing demands of protecting human rights versus attracting investment. This issue is key to the problem of businesses violating human rights. With strong and effective regulation of businesses required to protect human rights host states find themselves accepting the violation of rights as an inevitable price for development, and sometimes even relaxing the regulation of companies in order to attract investment. This research demonstrates that this race to the bottom is damaging to human rights and also to businesses who are implicated in rights violations. It also underscores one of the regulatory challenges in this area. With only the host

state of an operation obliged under international law to protect human rights, the problem can go unchallenged when the home state of the transnational corporation is not obliged to act.

The ongoing complicity of Australian companies in human rights abuses shows no sign of changing without regulatory intervention, underlining the need for preventative action. Without an obligation such action is dependent on political will, and the thesis sets out an argument in support of the Australian government taking action and consideration is given to what that action might be. While not rejecting any method of preventing the violation of human rights by businesses, the thesis focuses on the how directors' duties and disclosure could be used in Australia, in keeping with recommendations in the Guiding Principles. This research shapes and frames recommendations on action the Australian government could take.

The complicity of businesses in human rights violations is a key, current issue which is important not only for victims but for efficient functioning markets. This research is important as it examines a key global issue from an Australian perspective. Much has already been written about the SRSG's mandate and the impact Australian companies have on human rights in their offshore operations. However, to date there has not been an analysis of how recommendations in the Guiding Principles relating to directors' duties and disclosure may be applied in this country to prevent the complicity of Australian companies in human rights abuses overseas. By analysing how the overseas operations of Australian companies and their partners might be regulated from this country, the research contributes to the general discussion of the issue of business and human rights. Furthermore, it informs the reader of the extent to which corporate regulation in Australia is currently suitable tool for preventing rights violations, and therefore contributes to thinking on steps the Australian government must take.

Introduction

The complicity of big businesses in human rights violations is not a recent phenomenon.[1] Infamous examples from the last century included companies aiding the Nazi regime during the holocaust,[2] Shell's alleged complicity in a military crackdown in Nigeria, the Nike sweatshops, and the toxic gas leak at the Union Carbide plant in India.[3] The United Nations High Commissioner for Human Rights (UNHCHR) defined three types of corporate complicity in human rights violations: direct, indirect and silent. Direct complicity is when a company knowingly assists in violating human rights.[4] Indirect complicity is when a company benefits from a human rights violation committed by another party[5] and is not dependent upon proximity but rather on the company's web of activities and relationships.[6] A company may become indirectly complicit in a rights violation by entering into a relationship with a business partner that abuses human rights. This is still seen as indirect complicity even if the activities of the company itself does not make the violation of rights worse.[7] Silent complicity is when a company is aware of systematic or continuous human rights abuses but fails to exercise its influence by raising the problem with the appropriate authorities.[8]

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[1] For example, for reading on the slave trade see Nadia Bernaz, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap* (Routledge, 2017) 15-39.
[2] Ibid 62-75.
[3] For reading on these and other 'emblematic cases' see John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (W. W. Norton & Company Inc., 2013) 3-19.
[4] *Report of the United Nations High Commissioner for Human Rights*, GAOR, 56th sess, Supp No 36, UN Doc A/56/36 (28 September 2001) para 109; while this may often mean assisting a state in carrying out human rights violations Peter Muchlinski, 'Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation' *Business Ethics Quarterly* 22 1 (January 2012) 162 notes that a direct contribution [to human rights impacts] could involve a company inducing a supplier to abuse worker rights due to unreasonable time demands for an order. A company's knowledge of what will happen is key. In the same article, the author notes the rights holder may be employees of the company or its suppliers and distributors who may be exposed to violations of fundamental rights in the workplace, or it may be a local community directly affected by company actions.
[5] *Report of the United Nations High Commissioner for Human Rights*, UN Doc A/56/36 (n 4) para 110; see also Ruggie, *Just Business*, (n 3) 98 where the SRSG acknowledges that companies can no longer deny responsibility for what happens in their supply chains.
[6] John Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, UN Doc A/HRC/8/5 (7 April 2008) para 71 ('*Framework Report*'); John Ruggie, *Clarifying the Concepts of "Sphere of influence" and "Complicity"*, UN Doc A/HRC/8/16 (15 May 2008) para 15 ('*Clarifying the Concepts of "Sphere of influence" and "Complicity"*'). For companies that have contractual relationships with overseas suppliers, this means undertaking due diligence to better inform themselves of scenarios and risks they may encounter. While a company selling the finished product may have some leverage over the supply chain there is reliance on suppliers to respect human rights. It is this contractual relationship that finds the company at the top of the supply chain complicit in the violation.
[7] Muchlinski (n 4) 162.
[8] *Report of the United Nations High Commissioner for Human Rights*, UN Doc A/56/36 (n 4) para 111. The UNHCHR also noted that while silent complicity may or may not give rise to the finding of a breach of a

Recurring examples of corporate irresponsibility have contributed to an increased focus on the impact of businesses on human rights, and initiatives to tackle the problem.[9] The Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (SRSG) described the fostering of corporate cultures respectful of human rights as an urgent policy priority for governments.[10] Preventing corporate complicity in human rights violations through effective regulation is important for the victims and the efficient functioning of the markets, with the SRSG describing the complicity of businesses in rights abuses as 'the canary in the coal mine that all is not well.'[11] However, as the research in this thesis will highlight, the issue is complex and multiple factors lead to scenarios where businesses may become complicit in violating human rights, including the reach of businesses and the need for development in some countries. This thesis demonstrates that complicity is both more complex to define, and to track.

1 A Brief Introduction to Human Rights

Before analysing how the actions of some transnational corporations threaten the enjoyment of human rights, and the regulatory difficulties in preventing these occurrences, it is worth considering what we mean by human rights. A brief overview will outline the historical and philosophical roots of the modern human rights regime and will provide some background for the broader discussion on human rights throughout the thesis.

Human rights have been described as the rights one has by virtue of being a human being.[12] They are equal rights and 'universal rights, in the sense that today we consider all members of the species *Homo sapiens* "human beings" and thus holders of human rights.'[13] While on the surface the concept of human rights would appear to be a very positive and worthwhile position, it is not without its critiques. One line of criticism is that human rights are tied to western culture[14] with some scholars arguing that the concept of equal and inalienable rights were

binding legal obligation in a court of law, it 'has become increasingly clear that the moral dimension of corporate action (or inaction) has taken on significant importance.'

[9] Justine Nolan, 'The Relationship of Human Rights to Business' in Dorothée Baumann-Pauly and Justine Nolan (eds), *Business and Human Rights: From Principles to Practice* (Routledge, 2016) 1.

[10] *Framework Report*, UN Doc A/HRC/8/5 (n 6) para 27.

[11] Ibid para 2.

[12] Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, 3rd ed, 2013) 10.

[13] Ibid. See also David Boersma, *Philosophy of Human Rights: Theory and Practice* (Routledge, 2018).

[14] George G. Brenkert, 'Business Ethics and Human Rights: An Overview' (2016) 1(2) *Business and Human Rights Journal* 279.

missing in African, Asian and traditional Western societies.[15] At worst this has been interpreted as a form of imperialism with western countries imposing their ideas on all countries. This viewpoint is relevant to this thesis which looks at examples of human rights violations by Australian companies and their business partners in Africa and Asia, and argues that Australia should do more to prevent its companies violating human rights. Indeed, one of the arguments against Australian attempts to prevent the negative impact on rights of its companies overseas operations was that it imposed Australian values on other countries.[16]

Brenkert holds that the relativist view is now seen as a minority one,[17] noting that numerous human rights scholars have challenged it with arguments that "human rights are universal moral phenomena that hold across all societies and cultures as well as across all historical periods."[18] In addition, while there may be different moral views and moral judgments, this does not point to "different underlying ethics or morality."[19] Therefore, while differing interpretations might be a result of historical or economic views rather than different moral principles, the ethical roots remain the same. The universality of human rights is strengthened by the fact that while they are not drawn from one particular region or religion, ideas such as freedom, education and basic economic rights are drawn from many different doctrines.[20] This is underlined by Alston and Goodman with specific reference to the diverse historical origins of Economic, Social and Cultural Rights, whose violation by Australian companies and their business associates is the focus of this thesis.[21] Indeed, Ignatieff argues that rather than an imposition of European civilisation on the rest of the word, human rights are a warning not to replicate the mistakes of western nations.[22]

Even within the common ground of a universal view of human rights there are different interpretations, with Restrictivists objecting to economic and social rights on the grounds that it would be the beginning of no fixed limits to the number of rights that people might claim to possess.[23] The view of Expansivists is that human rights are not only a form of entitlement but

[15] Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29 *Human Rights Quarterly*. See also Donnelly (n 12) 75-112; Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press, 2002).
[16] See Conclusion.
[17] Brenkert (n 14) 280.
[18] Ibid.
[19] Ibid.
[20] Micheline R. Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (University of California Press, 2004) 40.
[21] Philip Alston and Ryan Goodman, *International Human Rights* (Oxford University Press, 2013) 278-9
[22] Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton University Press, 2001) 65.
[23] Brenkert (n 14) 281.

also desirable ends or ideals that are linked to the dignity of humans.[24] The UDHR appeals to this concept.[25]

Having outlined the history and philosophical roots of human rights it is important to now gain an understanding of how the growth in transnational business poses a risk to the enjoyment of rights, and why this is so difficult to regulate.

2 An Overview of the Challenges of Regulating Transnational Corporations

Economic globalisation and the embrace of foreign investment has emerged at an unprecedented rate,[26] increased by a range of factors including 'information and communications technology, lower transportation costs, and the international liberalisation of cross-border trade, investment and currency flows.'[27] This has been aided by dismantling barriers to trade through agreements, bilateral investment treaties, and domestic liberalisation.[28] This has led to global production and distribution networks with companies, unconstrained by national borders, operating through networks of subsidiaries, suppliers and distributors.[29] The result is companies seeking opportunities for expansion in developing countries which can bring positive benefits such as much-needed investment, but can pose a risk to human rights in the absence of strong, effective regulation.[30] However, regulating transnational corporations[31] (TNCs) to prevent their complicity in human rights violations is not straightforward. Understanding these issues provides a background to how they might be addressed. This area provides the focus of chapters two and three.

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[24] Brenkert (n 14) 281.
[25] Brenkert (n 14) 282. For a more detailed analysis of this, see Roger Normand and Sarah Zaidi, *Human Rights at the UN: The Political History of Universal Justice*, (Indiana University Press, 2008).
[26] Geoffrey Chandler, 'The Evolution of the Business and Human Rights Debate' in Rory Sullivan (ed) Business and Human Rights: Dilemmas and Solutions (Greenleaf Publishing Limited, 2003) 22-23.
[27] Paul Redmond, 'Corporations and Human Rights in a Globalized Economy: Some Implications for the Discipline of Corporate Law' (2016) 31 *Australian Journal of Corporate Law* 5 ('*Corporations and Human Rights*').
[28] John Ruggie, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, UN Doc E/CN.4/2006/97 (22 February 2006) para 12 ('*2006 Report'*); Nolan (n 9) 2; for a discussion on the role of legal factors in the growth of TNCs see Peter T. Muchlinski, *Multinational Enterprises & the Law* (Oxford University Press, 2nd ed, 2007) 33-43.
[29] Redmond, *Corporations and Human Rights*, (n 27) 5.
[30] Chandler (n 26) 22-23. See also Judith Schrempf-Stirling, 'State Power: Rethinking the Role of the State in Political Corporate Social Responsibility' (2018) 150 *Journal of Business Ethics* 5-6.
[31] For a definition of a TNC, see Edwin C. Mujih, *Regulating Multinationals in Developing Countries: A Conceptual and Legal Framework for Corporate Social Responsibility* (Gower Publishing Limited, 2012) 65-68; Celia Wells and Juanita Elias, 'Corporate Complicity in Rights Violations' in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press, 2005) 148-150.

Under international law, states are duty-bearers with a responsibility to protect human rights[32] and the obligation to ensure respect for human rights rests with the host state.[33] However, the power and reach of corporations[34] has changed significantly since the Universal Declaration of Human Rights (UDHR) outlined the role of the state in the international human rights regime. The world's largest corporations now maintain greater financial strength than some countries and the economic reality is that many developing countries are not in a strong position to regulate TNCs.[35] In addition, with business enterprises operating across borders in search of the most cost-effective suppliers and location costs,[36] countries began to compete for the skills, technology and investment that foreign companies could bring.[37] This has been termed the "race to the bottom" with countries undercutting each other to attract investment 'by offering subsistence wages and less restrictive tax, environmental, and labour laws.'[38] The threat of investment flight to a lower cost jurisdiction is a constant concern for developing countries and to counter this movement, states might lower regulatory barriers including social protection.[39] This clamour for investment 'undermines the capacity and disposition of host states to enforce human rights protection since these impose costs for inbound capital.'[40] The result is that businesses now operate 'to a far greater extent in countries where human rights protection is subordinated to national economic development.'[41] Furthermore, even if a host state is willing

[32] *2006 Report*, UN Doc E/CN.4/2006/97 (n 28) para 9; Justine Nolan, 'Mapping the Movement: The Business and Human Rights Regulatory Framework' in Dorothée Baumann-Pauly and Justine Nolan (eds), *Business and Human Rights: From Principles to Practice* (Routledge, 2016) 32-33; Simon Baughen, 'Human Rights and Corporate Wrongs: Closing the Governance Gap' (Edward Elgar Publishing Limited, 2015) 7-13. For a definition of human rights see Juhana Mikael Salojärvi, *Human Rights Redefining Legal Thought A History of Human Rights Discourse in Finnish Legal Scholarship* (Springer, 2020) 4-7.
[33] The host state is the country where the business operations are located. Bernaz (n 1) 231-232; Surya Deva, 'Regulating Corporate Human Rights Violations: Humanizing Business' (Routledge, 2014) 152-153.
[34] For a general discussion on the transnational nature of corporations see Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006) 199-201.
[35] Wells and Elias (n 31) 141, 148.
[36] Redmond, *Corporations and Human Rights*, (n 27) 6; John Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, UN Doc A/HRC/8/5 (23 April 2008) Add. 1 para 56.
[37] Chandler (n 26) 22-23.
[38] Marcia L. Narine, 'Living in a Material World – From Naming and Shaming to Knowing and Showing: Will New Disclosure Regimes Finally Drive Corporate Accountability for Human Rights?' in Jena Martin and Karen E. Bravo (eds), *The Business and Human Rights Landscape: Moving Forward, Looking Back* (Cambridge University Press, 2015) 224; see also Thomas Raymen, 'The Enigma of Social Harm and the Barrier of Liberalism: Why Zemiology Needs a Theory of the Good' *Justice, Power and Resistance: The Journal of the European Group for the Study of Deviance and Social Control* (2019).
[39] Redmond, *Corporations and Human Rights*, (n 27) 6.
[40] Ibid.
[41] Ibid; Clapham (n 34) 238; Rory Sullivan, Business and Human Rights: Dilemmas and Solutions (Greenleaf Publishing Limited, 2003) 13; see also Thomas Raymen, 'Designing-in Crime by Designing-out the Social? Situational Crime Prevention and the Intensification of Harmful Substances' *British Journal of Criminology* 56(3) (2016) 497-514.

to regulate TNCs they may be unable due if legislation is outdated,[42] a scenario that is examined in chapter one. Therefore, when economic forces and government capacity are misaligned, the resulting governance gaps can lead to businesses violating human rights,[43] even if this is an unintended consequence.[44]

The reluctance or inability of the host state to effectively regulate TNCs highlights a limitation of the international human rights regime. While treaty bodies are increasingly encouraging home states to take greater steps to encourage 'their' TNCs[45] to respect human rights overseas,[46] a call echoed (albeit to a lesser extent) by the Guiding Principles,[47] the home state has no obligation to act. Additionally, home states may be unwilling to act for fear that any increased regulatory burden on companies may put TNCs domiciled in their country at a competitive disadvantage.[48] On occasion home state governments may even pressure the host country to respect the competitiveness of multinationals.[49] The reluctance of the home state to act contributes to the regulatory void that is detrimental to the protection of human rights. This has led to the adoption of various soft law codes and voluntary initiatives attempting to promote

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[42] Beth Stephens, 'The Amorality of Profit: Transnational Corporations and Human Rights' *Berkeley Journal of International Law* 20 (2002): 45, 57; Steven R. Ratner, 'Survey Article: Global Investment Rules as a Site for Moral Inquiry' *The Journal of Political Philosophy* 27 (1) (2019) 107.

[43] John Ruggie, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, UN Doc A/HRC/4/35 (19 February 2007) para 82 ('*2007 Report*'); Tania Penovic, 'Undermining Australia's International Standing: The Failure to Extend Human Rights Protection to Indigenous Peoples Affected by Australian Mining Companies' Ventures Abroad' *Australian Journal of Human Rights* 11 (1), 2005, 72-73; Sarah Labowitz and Dorothée Baumann-Pauly, *Business as Usual Is Not an Option: Supply Chains and Sourcing after Rana Plaza,* April 2014, <http://www.stern.nyu.edu/cons/groups/content/documents/webasset/con_047408.pdf>; Justine Nolan, 'From Principles to Practice – Implementing Corporate Responsibility for Human Rights' Jena Martin and Karen E. Bravo (eds), *The Business and Human Rights Landscape: Moving Forward, Looking Back* (Cambridge University Press, 2015) 387-413, 400 notes the limited capacity of many governments to stem rights violations.

[44] Narine (n 38) 224.

[45] John Ruggie, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Addendum, State Responsibilities to Regulate and Adjudicate Corporate Activities Under the United Nations Core Human Rights Treaties: An Overview of Treaty Body Commentaries*, UN Doc A/HRC/4/35/Add. 1 (13 February 2007) para 86 ('*State Responsibilities to Regulate*') defines 'their companies' as including privately owned companies under the state's jurisdiction.

[46] This will be analysed further in chapter two.

[47] John Ruggie, *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) Principle 2 ('*Guiding Principles*').

[48] This was cited as an objection to the Corporate Code of Conduct Bill – see Parliamentary Joint Statutory Committee on Corporations and Securities, Parliament of Australia, *Report on the Corporate Code of Conduct Bill 2000* (2001) [3.4], [3.137], [3.155]. For a counter argument see Surya Deva, 'Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should 'Bell the Cat'?' *Melbourne Journal of International Law* 5 (2004) 58-59.

[49] Clapham (n 34) 238; Muchlinski (n 4) 154; ibid 125-176 notes that regulation becomes more problematic due to separate legal personality which can insulate a parent company in the home country from liability for the actions of an overseas subsidiary. This will be analysed further in chapter three; see also Timothy D. Peters, 'Corporations, Sovereignty and the Religion of Neoliberalism' (2018) 29 *Law and Critique* 271-292 for a discussion on the power of corporations vs the state.

responsible corporate behaviour.[50] However, the continued complicity of TNCs in human rights violations, evidenced not least by the examples in this thesis, demonstrates that soft law alone is not a lasting solution to the governance gap created by a lack of state regulation.[51]

3 Overcoming the Regulatory Challenges: The Way Forward

This thesis argues that the Australian government must regulate to prevent the complicity of its companies in human rights violations overseas. To make such a case, this thesis will demonstrate that the complicity of Australian companies in human rights violations overseas is an ongoing problem which shows no sign of abating without regulation. Examples of Australian complicity in rights violations overseas will support this viewpoint, as will the presentation and investigation of three case studies in chapter one. The case studies will demonstrate the geographical reach and influence of Australian TNCs and pinpoint why, in some cases, host states are unable to effectively regulate to protect rights. Highlighting the historical and continued involvement of Australian companies in overseas human rights abuses through their subsidiaries and supply chains will underline that the reliance on host states to protect human rights is failing communities and workers. The thesis reveals why it is important and beneficial for the home state, namely Australia, to act to fill the void created by ineffective regulation in the host state. In chapter two there is an analysis of the permissibility of extraterritorial regulation in international law as a means to protect human rights. This focuses on specific measures in directors' duties and disclosure that the SRSG recommended in his mandate.[52] In chapter three, there is an investigation of these specific areas of corporate regulation in Australia. This will determine the extent to which these areas of corporate regulation fit with the SRSG's recommendations and how this course of action might have produced a different outcome in the case studies examined in chapter one.

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[50] *2006 Report*, UN Doc E/CN.4/2006/97 (n 28) paras 39-52 highlights the UN Global Compact, the OECD Guidelines for Multinational Enterprises and the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work; Nolan (n 43) 387, 396; see also David Kinley and Junko Tadaki, "From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law," *Virginia Journal of International Law* 44 (2003–2004): 931, 944 – 947.

[51] Judith Schrempf-Stirling, 'Beyond Guilty Verdicts: Human Rights Litigation and its Impacts on Corporations' Human Rights Policies' (2017) 145 *Journal of Business Ethics* 547.

[52] The SRSG defined extraterritorial jurisdiction thus: 'prescriptive extraterritorial jurisdiction involves a State regulating persons or activities outside its territory, usually through legislation. Prescriptive extraterritorial jurisdiction differs from other forms of extraterritorial jurisdiction, such as situations in private international law where a national court applies another nation's law, and executive (or enforcement) extraterritorial jurisdiction, where the State sends its organs, such as military, overseas': *State Responsibilities to Regulate*, UN Doc A/HRC/4/35/Add.1 (n 45) 34 fn 114.

Much has already been written about the SRSG's mandate and the impact Australian companies have on human rights in their offshore operations. However, to date there has not been an analysis of how recommendations in the Guiding Principles relating to directors' duties and disclosure may be applied in this country to prevent the complicity of Australian TNCs in human rights abuses overseas. The focus on corporate and securities regulation is particularly important in the promotion of increasing corporate respect for human rights as it 'shapes what companies do and how they do it.'[53] Yet as the SRSG observed, corporate law has greater potential to influence company behaviour towards respecting human rights than is currently being exercised and the two spheres of law, corporate and human rights, should be more closely connected.[54] Examining the relationship between corporate regulation and human rights is also important as 'reforms in corporate law and policy are largely domestic affairs [therefore] research and advocacy from human rights platforms can help advance the agenda.'[55] This thesis will contribute to the development of the relationships and scholarly dialogue between these two areas of law. Evaluating the involvement of Australian TNCs in extraterritorial human rights violations will highlight the need to fill the regulatory void – a need that this thesis will argue could be met by the government in this country.

4 The Ongoing Involvement of Australian TNCs in Human Rights Violations

One of the most troubling examples of complicity in human rights violations by an Australian TNC overseas was Anvil Mining's role in an attack by government troops in October 2004 on the town of Kilwa in the Democratic Republic of Congo (DRC).[56] The attack killed seventy-three men, women and boys, and there were also acts of rape and torture.[57] The trucks, leased planes, jeeps and rations that aided the attack were provided to the infantry by Anvil Mining, a copper and silver producer based in Perth and listed on the Australian Stock Exchange (ASX).[58] Anvil released a statement in June 2005 claiming the company had no option but to

[53] Mandate of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, *Summary Report: Expert Meeting on Corporate Law and Human Rights: Opportunities and Challenges of Using Corporate Law to Encourage Corporations to Respect Human Rights* (United Nations, 2009).
[54] Ibid.
[55] Ruggie, *Just Business*, (n 3) 192.
[56] Human Rights Law Centre, *Australian Mining Company in Prosecution Spotlight for Role in Congo Massacre* (4 August 2017) <https://www.hrlc.org.au/news/2017/8/4/australian-mining-company-in-prosecution-spotlight-for-role-in-congo-massacre>.
[57] Will Fitzgibbon, Martha Hamilton and Cécile Schilis-Gallego, 'Danger Under Ground', *Sydney Morning Herald*, 11 July 2015.
[58] Ibid.

agree to the military's request for access to air services and vehicles to facilitate troop movements. However, in the months immediately after the massacre, no company representative explicitly mentioned that the company was compelled to agree with the request for support, raising doubts as to whether Anvil's role was entirely involuntary. The company's role in the events led to attempts to bring class actions in Australia and Canada (which failed due to procedural and jurisdictional hurdles) and an investigation by the Australian Federal Police.[59] In 2017, the African Commission on Human Rights urged the Government of the DRC to re-open the criminal investigation into the role Anvil played in the massacre, highlighting the company's supply of logistical support to the military.[60]

Another miner is Aquarius Platinum, an Australian-listed company operating in South Africa, which has had the highest number of on-site fatalities among active Australian mining companies listed on the ASX.[61] The company had a poor safety record and despite studies showing that using contract workers in the mining industry increases the number of deaths and injuries, approximately eighty per cent of the company workforce was made up of contract labour.[62] During the company's operations, there were a total of thirty-eight deaths between 2004 and 2014 - more than all the deaths during the same period in Western Australia which had at least five times as many employees as Aquarius.[63] This suggests that the safety standards this company utilised were considerably lower in South Africa than in Australia. Indeed, Professor Michael Quinlan, Director of the Industrial Relations Research Centre at the University of NSW, observed that 'that sort of toll …would not be tolerated here.'[64] These are two examples of Australian mining companies violating human rights in Africa – Non-Government Organisation (NGO) reports suggest there are many more throughout the continent.[65] The Fatal Extraction report found that between 2004 and July 2015, Australian-listed companies were linked to 387 deaths in on-site accidents and off-site skirmishes in

[59] Ibid; Human Rights Law Centre (n 56). The attempts to hold the firm accountable in Australia and Canada, where it was listed on the Stock Exchange, followed what the Human Rights Law Centre called a 'deeply questionable' military trial in the DRC which found nobody accountable.
[60] Human Rights Law Centre (n 56).
[61] Eleanor Bell and Chris Zubak-Skees, 'Fatal Extraction: Australian Mining in Africa' The International Consortium of Investigative Journalists, 10 July 2015.
[62] Ibid.
[63] Ibid.
[64] Fitzgibbon, Hamilton and Schilis-Gallego (n 57); Bell and Zubak-Skees (n 61) note that investigations into a workplace death in Australia are more thorough than in Africa.
[65] Bell and Zubak-Skees (n 61) note Australian mining companies 'have been implicated in deaths, cases of alleged negligence, illegal licensing, unfair dismissal, forced displacement and environmental degradation' across Africa with thousands of people suing or filing grievances against companies or their subsidiaries.

Africa.[66] The implication of Australian mining companies in human rights violations is not restricted to Africa and includes high-profile incidents in Brazil,[67] Papua New Guinea[68] and Indonesia.[69] The Australian mining industry has a significant presence overseas[70] often in countries with weak regulatory frameworks which increases the risk of complicity in human rights violations.[71] These examples show that the risk to rights has frequently manifested into the violation of rights including significant loss of life. While Australian mining companies are an obvious example given their global presence, it should be noted that it is not the only industry where Australian companies violate human rights in the overseas activities.

Supply chains remain an area fraught with risk for Australian companies due to the lack of transparency and traceability[72] and this has become apparent across a broad range of industries including, but not limited to, food, clothing and electronics.[73] Three major grocery retailers in Australia – Woolworths, Coles and Aldi – have admitted to stocking seafood from Thai Union, a company accused of using slave labour.[74] Workers at a factory deployed to source food from a subsidiary of Thai Union, reported working sixteen hours a day and were threatened with violence for refusing to work, and were told they would be killed if they tried to escape.[75] The clothing supply chain is analysed in greater depth in the next chapter with a case study highlighting human rights violations in Bangladesh's garment industry and the risk this poses

[66] Ibid.
[67] In 2015 the Fundão dam collapse released 60 million cubic meters of waste into a local river. This flooded a nearby town killing 19 people and damaging the environment, homes and food supplies. The tailings dam was at a mine operated by Samarco, a joint venture between BHP and Brazilian iron ore miner Vale. See Sarah Joseph, *Business and Human Rights*, Castan Centre Human Rights Report 2016, Monash University, Australia 5.
[68] A decade-long armed conflict on Bougainville claimed up to 15,000 lives. The spark for the conflict was the dissatisfaction of local landowners at the environmental damage and lack of economic benefit from the Rio Tinto-owned Panguna copper mine. See Peter Prince, 'Bhopal, Bougainville and Ok Tedi: Why Australia's Forum Non Conveniens Approach is Better' (1998) 47 *International and Comparative Law Quarterly* 593-4; Antony Loewenstein, 'Bougainville Mine: Locals Who Oppose its Reopening Must Have a Voice', *The Guardian*, 19 December 2013.
[69] Joanna Kyriakakis, 'Freeport in West Papua: Bringing Corporations to Account for International Human Rights Abuses Under Australian Criminal and Tort Law' (2005) 31(1) *Monash University Law Review* 95-119 notes Rio Tinto was implicated in human rights abuses by security forces within the mining concession area.
[70] Fitzgibbon, Hamilton and Schilis-Gallego (n 57) note there were 183 Australian-owned mines in Africa in 2015 making it the single largest non-African owner of mines on the continent.
[71] Ruggie, *Just Business*, (n 3) 25.
[72] The issue of supply chains will be highlighted in a case study in chapter one.
[73] This includes companies with huge resources. Evidence to House Standing Committee on Foreign Affairs, Defence and Trade, Parliament of News South Wales, Sydney, 23 June 2017, 29, (Fiona Lawrie, Sustainability Manager, Wesfarmers) where Australia's largest private sector employer, Wesfarmers, acknowledged: 'that forms of forced labour and very real human rights [abuses are] occurring across global supply chains, and there is no doubt that there have been instances of unfair treatment of workers in our supply chain.'
[74] Associated Australian Press, 'Australian Supermarkets Admit Stocking Prawns Processed Using Slave Labour', *The Guardian*, 15 December 2015; Melissa Davey, 'Prawns Sold in Australia Linked to Alleged Slavery in Thai Fishing Industry', *The Guardian*, 12 June 2014.
[75] Associated Australian Press (n 74) notes workers at the factory included migrants and children.

to Australian companies. It is worth underlining that those risks are not limited to companies sourcing from Bangladesh. A Fairfax Media investigation revealed that Australian surf wear company Rip Curl had sold clothes manufactured in North Korea where workers are routinely exploited by being forced to work long hours with minimal or sometimes no pay, and are imprisoned in work camps for refusing to obey orders.[76] Rip Curl stated that a Chinese manufacturer they had been using had subcontracted the work to North Korea where workers' pay rates and health and safety standards were lower than in China.[77] The two other main Australian surf companies, Billabong and Quiksilver, came under the spotlight for not publishing the names and locations of factories they use,[78] amidst claims it was highly likely that other Australian companies were sourcing products from North Korea and that incorrect labelling was a longstanding practice.[79] Likewise, analysing the supply chains of electronics companies underlined the risk of complicity in human rights violations facing Australian TNCs. Companies are not actively ensuring a living wage for workers and while most companies had a code of conduct including the right to collective bargaining, only seven per cent could demonstrate that collective bargaining agreements were in place.[80] As with the garment industry, traceability is a challenge with little knowledge of sources or conditions beyond the final stage of production. It is in these areas further down the electronics supply chain where some of the worst human rights abuses occur, and 'if companies don't know or don't care who is producing their product then they cannot ensure that workers are not being exploited.'[81] This underlines the risk of complicity in human rights violations that Australian companies face in their supply chains when there is little or no traceability.

The extent of Australian complicity in human rights violations overseas was highlighted by the law firm Allens which was commissioned by the Australian government to undertake a stocktake on business and human rights in the country.[82] The Report drew attention to the

[76] Nick McKenzie and Richard Baker, 'Surf clothing label Rip Curl using 'slave labour' to manufacture clothes in North Korea', *The Sydney Morning Herald*, 20 February 2016.
[77] Ibid.
[78] Emma Reynolds, 'High price of cheap surfwear: What's North Korea making now?', 22 February 2016 accessed at <https://www.news.com.au/lifestyle/fashion/high-price-of-cheap-surfwear-whats-north-korea-making-now/news-story/9ae83ef8107afb9934e560c8b1a0d3c0>
[79] Calla Wahlquist, 'Rip Curl's use of North Korean factories leads to calls for industry transparency', *The Guardian*, 22 February 2016.
[80] Gershon Nimbalker, Jasmin Mawson and Haley Wrinkle, 'The Truth Behind the Barcode: Electronics Industry Trends', Baptist World Aid Australia, 9 February 2016, 3.
[81] Ibid.
[82] Allens Linklaters, *Stocktake on Business and Human Rights in Australia* (Report, April 2017) 4. This was primarily 'to identify the existing Australian laws, government policies and business practices relevant to the Guiding Principles.'

results of a survey where almost half of the ASX 50 companies that operate or conduct business overseas had been the subject of publicised allegations, reports or findings of human rights breaches overseas since 2000.[83] This emphasizes a pattern of behaviour that is ongoing and likely to continue without effective regulation and supports the argument that Australian TNCs need better regulation in their overseas operations. However, this does not address the fact that under international human rights law the obligation to protect lies with the host state.

In chapter three, analysis of international law will highlight that Australia could regulate extraterritorially. However, as this is not an obligation, it is important to set out an argument as to why the Australian government should act. This argument will demonstrate that the Australian government is in a stronger position to control its TNCs and that regulation would benefit Australian businesses. Regulating extraterritorially would also be better for the government and is in keeping with encouragement from UN treaty bodies. Furthermore, the government already utilises extraterritorial regulation to control the activities of Australians overseas.

5 Without an Obligation, Why Should Australia Act?

While a host state government might succeed in persuading a subsidiary to comply with the country's regulations, it may not have the same success with a more powerful parent company located in another country. 'The end result would be that parent corporations, which control key safety and environmental policy decisions of their subsidiaries, will remain outside the persuasion loop.'[84] This argument is reinforced when host state governments relax their regulation to attract foreign direct investment. Therefore, the Australian government is better placed to effectively regulate the overseas operation of its TNCs. Although this country's government expects companies operating overseas to act 'in accordance with internationally recognised standards for corporate social responsibility and human rights'[85] by abiding with local laws and standards,[86] this may not be enough to protect rights from violation by Australian TNCs. As the case studies in chapter one will demonstrate, local laws and standards are sometimes not capable of regulating a TNC. This is particularly relevant for the operations of

[83] Ibid 72.
[84] Deva (n 33) 188.
[85] Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, Australia, 17 February 2016, UN Doc CERD/C/AUS/18-20 para 44.
[86] Ibid.

Australian companies as only four of the ASX 50 said they apply an international standard if that affords greater protection than domestic law alone, but companies generally say they comply with local law.[87] Therefore, to meet the growing expectation from society that businesses respect human rights wherever they operate,[88] there is a need for the Australian government to help address 'the growing exposure of companies to social risks they clearly cannot manage adequately on their own.'[89] This would be beneficial on a number of levels.

6 How Respecting Human Rights Can Benefit Business

Respecting human rights is beneficial for businesses for a number of reasons. Complicity in rights abuses can damage a company's reputation which can ultimately be costly and take considerable effort to reverse.[90] The threat to human rights, and a company's reputation, is raised when guidance and regulation is lacking and so governments must not assume they are helping businesses by failing to regulate the human rights impact of their operations.[91] Conversely, respecting rights can benefit companies as a marketing and public relations tool.[92] The failure to mitigate risks (or even concerns) associated with a company's operations can extend beyond reputational damage. Disruptions related to strikes and protests can have negative financial impacts on company operations and complicity in human rights violations can result in consumer boycotts or lawsuits.[93]

Ensuring respect for human rights promotes fairness and competitiveness for companies both within Australia and globally. This is highlighted by Oxfam Australia's CEO Dr Helen Szoke who observed that 'companies such as Cotton On and Forever New are moving in this direction

[87] Allens Linklaters (n 82) 82; Tracey Davies, Head of Corporate Accountability, Center for Environmental Rights Law Clinic (quoted in n 46) noted that 'unfortunately, we don't hear any stories of really rigorous regulatory enforcement of multinational mining companies in Africa. There does seem to be a subset of companies, and a lot of them seem to be Australian, who are very happy to take advantage of that regulatory weakness, or slackness, or unwillingness.'
[88] Nolan (n 43) 387-413, 400.
[89] *Framework Report*, UN Doc A/HRC/8/5 (n 6) para 3.
[90] *Framework Report*, UN Doc A/HRC/8/5 (n 6) para 78. Claims of complicity can impose reputational costs and lead to divestment even without the establishment of legal liability; ibid para 75; *Clarifying the Concepts of "Sphere of influence" and "Complicity"*, UN Doc A/HRC/8/16 (n 6) paras 54 and 70.
[91] *Framework Report*, UN Doc A/HRC/8/5 (n 6) para 22.
[92] Susan Ariel Aaronson and Ian Higham, 'Putting the Blame on Governments: Why Firms and Governments Have Failed to Advance the Guiding Principles on Business and Human Rights' in Kurt Mills and David Jason Karp (eds) *Human Rights Protection in Global Politics: Responsibilities of States and Non-State Actors* (Palgrave Macmillan, 2015) 113, 134.
[93] John Ruggie, *Business and Human Rights: Further Steps Toward the Operationalization of the 'Protect, Respect and Remedy' Framework*, UN Doc A/HRC/14/27 (9 April 2010) paras 69-71 ('*2010 Report*').

[respecting human rights in their supply chain] and it's high time that Rip Curl caught up with the pack'.[94] While it may be assumed that the majority of companies would not knowingly violate human rights this is not the case for everyone. Stronger regulation would mean that Australian companies are all operating to the same standard of conduct without the option of seeking a short-term financial advantage that may come at the expense of human rights.[95] Regulation would also help Australian companies to be more competitive internationally as they have been found to lack human rights policies and reporting systems compared to European competitors.[96] Likewise encouraging Australian TNCs to adhere to the highest human rights standards in their overseas operations would carry benefits for the company. Firstly, it would ensure that the company was complying with the most stringent regulations regardless of location which means, for example, that products would meet standards for selling in any market and not just the host or home state.[97] This could prove to be a useful risk management strategy for businesses and would avoid having to consider different standards if operations started in a new country.[98]

Greater regulation from the Australian government could also ensure that companies' understanding of and engagement with human rights was consistent which is an issue highlighted as a problem by the Australian Dialogues on Business and Human Rights.[99] In addition, as with two of the case studies in chapter one, the host state might be in breach of its own human rights obligations if they are a shareholder in an operation that has contributed to rights abuses. Regulatory action from the Australian government would ensure that its companies were not in a position where they contributed to this scenario.

7 How Corporate Respect for Human Rights Benefits the Australian Government

Encouraging Australian companies to avoid complicity in human rights violations is also beneficial for the government. With involvement in an overseas project, whether as an insurer, procurer, or promoter, there is a risk of governments, 'being in the untenable position of indirectly contributing to overseas corporate abuse through its support for a firm that is

[94] McKenzie and Baker (n 76).
[95] For example, the failure to pay garment workers a living wage. This issue is discussed further in chapter one.
[96] Ibid 72; Aaronson and Higham (n 92) link this to the government's slow uptake of the Guiding Principles.
[97] Deva (n 33) 157.
[98] Ibid.
[99] Allens Linklaters (n 82) 71.

involved in such abuse.'[100] The Committee on Economic, Social and Cultural Rights (CESCR) has outlined that home states 'should not compromise the ability of the host state to protect, ensure and fulfil their human rights obligations.'[101] Government support for an overseas business project that contributes to a rights violation overseas 'may lead to domestic social pressure on the home state.'[102] Ensuring that Australian companies respect human rights throughout their operations would mitigate this risk. This is particularly relevant considering the support given by Federal and state governments for Australian mining operations in Africa, backing companies with grants and becoming major shareholders.[103] A further risk to the government is the accusation of double standards for turning a blind eye to the behaviour of an Australian company overseas that would not be tolerated in this country.[104] Therefore, acting to prevent the complicity of Australian TNCs in human rights violations overseas is beneficial to the home state whose own reputation may be at risk.[105]

This section has outlined the value of the Australian government acting to prevent the complicity of Australian TNCs in human rights violations overseas. This intervention enhances the reputation of both the government and companies. As will now be demonstrated, home state regulation has become increasingly encouraged by UN treaty bodies as a means of preventing corporate complicity in human rights violations.

8 Encouragement from the United Nations

While noting no definitive agreement on whether states must exercise extraterritorial jurisdiction to regulate business enterprises overseas, the SRSG highlighted a trend, with treaty bodies recommending that states influence the overseas actions of business enterprises over which they can exercise jurisdiction.[106] For example, the CESCR advised that 'where States

[100] Ruggie, *Just Business*, (n 3) 85.
[101] UN Committee on Economic, Social and Cultural Rights, *General Comment No 15: The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/2002/11 (20 January 2003) para 31 ('*General Comment No 15: The Right to Water*').
[102] John Ruggie, *Corporate Responsibility Under International Law and Issues in Extraterritorial Regulation: Summary of Legal Workshops*, UN Doc A/HRC/4/35/Add.2 (15 February 2007) para 28.
[103] Fitzgibbon, Hamilton and Schilis-Gallego (n 57).
[104] See Gavin M Mudd and Howard D Smith, *Comments on the Proposed Kayelekera Uranium Project Environmental Impact Assessment Report* (2006) 10 <http://users.monash.edu.au/~gmudd/files/Comments-Kayelekera-EIS-Draft-v3.pdf> for an example of how PAL's practices of PAL, examined in chapter one, would not have been allowed in Australia.
[105] *2010 Report*, UN Doc A/HRC/14/27 (n 93) para 50; *Guiding Principles*, UN Doc A/HRC/17/31 (n 47) Principle 2; Bell and Zubak-Skees (n 61) note that in some African countries there may be a business presence and not an Australian government one, so businesses may be seen as representing Australia.
[106] *State Responsibilities to Regulate*, UN Doc A/HRC/4/35/Add.1 (n 45) para 92.

parties can take steps to influence other third parties to respect the right [to water], through legal or political means, such steps can be taken in accordance with the Charter of the UN and applicable international law.'[107] Although the SRSG was non-committal in endorsing extraterritorial regulation in the Guiding Principles he acknowledged treaty body encouragement for states 'to regulate corporate acts both within and outside its borders.'[108] The encouragement for home states to act extraterritorially to prevent a violation of the right to water is particularly relevant for Australia, given the threat to this right posed by mining activities and the strong presence of Australian companies in that industry.[109] The CESCR's encouragement for home states to prevent their companies from violating economic, social and cultural rights overseas has specific relevance for Australia. In a list of issues in relation to Australia's fifth periodic report the CESCR questioned the government on what it is doing to prevent the violations of human rights by Australian companies operating overseas. The questions raised sit under the heading of the obligation to take steps to the maximum of available resources,[110] suggesting the level of importance the CESCR places on the issue. The Committee has continued to encourage the home states of TNCs to 'require corporations to deploy their best efforts to ensure that entities whose conduct those corporations may influence, such as subsidiaries (whether registered under the State party's laws or under the laws of another State) or business partners (including suppliers and subcontractors), respect Covenant rights.'[111] In chapter two, an analysis of international law will demonstrate that regulating extraterritorially is permissible and not in conflict with principles of non-intervention.

9 The Precedent of Regulating Extraterritorially to Protect the Vulnerable

This research demonstrates that Australia could regulate the operations of its TNCs overseas, as the government already has legislation with extraterritorial reach to regulate the behaviour of its nationals overseas. The *Crimes (Child Sex Tourism) Amendment Act 1994* (Cth) prohibits Australians from engaging in crimes overseas, such as 'sex tourism', and recognises a duty to protect victims. This followed broad community awareness of 'sex tours' by Australian

[107] *General Comment No 15: The Right to Water*, UN Doc E/C.12/2002/11 (n 101) para 33.
[108] *State Responsibilities to Regulate*, UN Doc A/HRC/4/35/Add.1 (n 45) para 87.
[109] This will be analysed further in the case studies in chapter one.
[110] UN Committee on Economic, Social and Cultural Rights, *List of Issues in Relation to the Fifth Periodic Report of Australia: Replies of Australia to the List of Issues* UN Doc E/C.12/AUS/Q/5/Add. 1. (23 June 2017).
[111] UN Committee on Economic, Social and Cultural Rights, *General Comment No 24 on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, UN Doc E/C.12/GC/24 (10 August 2017) para 33 ('*General Comment No 24 on State Obligations*').

nationals into Southeast Asia and the consensus to sanction this practice. Penovic suggests that the requisite degree of consensus has emerged to prevent Australian companies from violating human rights overseas.[112] Additionally, Australians are prohibited from bribing foreign officials[113] and yet there is no legal sanction in Australia for human rights violations resulting from, for example, a mining operation's environmental damage.

There is a value and imperative to regulate Australian TNCs overseas to prevent human rights violations. Supporting this argument is a presentation of the benefits to business and the government's precedent of using regulation to control the overseas behaviour of Australians. It is important to now set out how this thesis addresses the problem of Australian complicity in overseas human rights abuse overseas. This will be done through highlighting case studies, analysing international law and the Guiding Principles, and examining the directors' duties and disclosure elements of Australian corporate law.

10 Highlighting the Problem: Case Studies of Australian Complicity in Human Rights Violations

Three case studies in chapter one will highlight the risk of Australian companies becoming complicit in human rights violations in countries with weak and ineffective regulation. The analysis will underline the barriers to protecting human rights that these host state governments face when Australian TNCs are linked to operations in their country. Highlighting the unwillingness of the company to respect rights will also demonstrate that the conduct of Australian companies and their partners is an ongoing threat to human rights in their overseas operations.

Given the increased risk to human rights that is posed by the extractives industries, two of the case studies highlight the actions of the subsidiaries of Australian mining companies. As Australia has a significant mining presence in Africa the two case studies focus on that continent. The third case study highlights how Australian TNCs can become implicated in the abuse of human rights in the garment industry in Bangladesh through their supply chains.

Each case study highlights company actions and the resulting impact on local communities, in the case of the mining companies, and on workers in the case of the garment industry. Referring

[112] Penovic (n 43) 109.
[113] Furthermore, the Commonwealth Criminal Code allows for the prosecution in Australia of companies that have participated in war crimes, crimes against humanity or genocide anywhere in the world.

to human rights treaties, treaty body general comments, and reports from special rapporteurs, will demonstrate that the company actions in each scenario resulted in a violation of human rights. Analysis will show that the host state is obliged to protect human rights. Examining host state legislation that might have prevented the rights abuses will highlight why the regulation failed to protect rights on each occasion, pinpointing regulatory gaps such as weak or outdated legislation and the host state's lack of capacity. The analysis will also draw attention to any incidences where the TNC had power or influence over the host state government, or the host was in a weak position due to the need for investment. This will support the argument that there is a continued pattern of behaviour with Australian TNCs violating human rights overseas in developing countries who are not able to stop the abuse, and that Australia should act to help prevent the violations. This is particularly the case if companies are actively seeking business opportunities in countries where they know regulation is weak and they may be able to take advantage of their position of strength when the host state needs investment. Having demonstrated the need for greater regulation to prevent the complicity of Australian TNCs in human rights violations overseas, chapter two analyses the latest UN initiative addressing the issue of business and human rights and how this might be applied to Australian TNCs.

11 Identifying the Solutions - International Guidance on Regulation

The SRSG's mandate produced two significant pieces of work. The 'Protect, Respect and Remedy' Framework (the Framework) re-affirmed the role of the state as protector of human rights and confirmed that businesses have a responsibility to respect human rights.[114] The Guiding Principles provided guidance on how the Framework should be operationalised.[115] Despite criticism of the mandate,[116] it is important to this field as it remains the latest global initiative attempting to prevent corporate complicity in rights violations. The mandate is described as 'perhaps the most comprehensive discussion to date of the relationship between corporations and human rights'[117] and 'the most advanced conceptual elaboration on business and human rights carried out in an international governmental organisation to date.'[118] The

[114] *Framework Report*, UN Doc A/HRC/8/5 (n 6).
[115] *Guiding* Principles, UN Doc A/HRC/17/31 (n 47).
[116] See chapter two.
[117] Muchlinski (n 4) 146.
[118] Radu Mares, 'Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress' in Radu Mares (ed.), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff Publishers, Leiden, Boston 2012) 9.

unanimous endorsement of the Guiding Principles was the first time the UN member states adopted a common position which set out standards of expected behaviour from businesses with regard to human rights.[119] This level of agreement not only demonstrated the consensus achieved, but also enabled the Guiding Principles to become a common global platform for action which can be built upon.[120] Therefore, they are at the forefront of a global norm change for TNCs,[121] 'likely to frame the business and human rights discussion for years to come'[122] and key to identifying how states should be curbing human rights abuses by businesses.

While recognising the usefulness of sector-specific initiatives[123] in attempting to prevent corporate-related human rights violations, the Guiding Principles transcend industries and locations in keeping with the case studies analysed in chapter one. The contribution of the Guiding Principles has been to elaborate the implications of existing standards and practices for states and businesses[124] which is important for addressing corporate complicity in human rights violations in the short term. Analysing the Guiding Principles will address the issue of what steps the government might take, specifically in relation to directors' duties and disclosure. Addressing the issue of extraterritorial jurisdiction will demonstrate that Australia would not be contravening international law by regulating corporate activity beyond its borders. Examining the Guiding Principles will identify how states can prevent human rights violations through directors' duties and disclosure. This will provide context to chapter three and the consideration of whether or not the SRSG's recommendations fit with corporate regulation in Australia, or if it is necessary to amend how businesses are regulated. Demonstrating the role of corporate regulation in preventing businesses from violating human rights will now highlight its importance to this thesis.

[119] Ibid 1.
[120] *Guiding* Principles, UN Doc A/HRC/17/31 (n 47) para 13.
[121] Patricia Illingworth, 'Global Need: Rethinking Business Norms' in Jena Martin and Karen E. Bravo (eds), *The Business and Human Rights Landscape: Moving Forward, Looking Back* (Cambridge University Press, 2015) 175, 178-179.
[122] Anthony Ewing, 'What Executives Need to Know (and Do) About Human Rights' (2013) 1, 8.
[123] For example, the Extractive Industries Transparency Initiative, The Kimberley Process, and the Accord on Fire and Building Safety in Bangladesh.
[124] *Guiding* Principles, UN Doc A/HRC/17/31 (n 47) para 14; Mares (n 118) 24.

12 Applying the Guidance to Australian TNCs

In the absence of a legally-binding treaty compelling businesses to respect human rights, states remain responsible for ensuring that rights are respected. How this is done is challenging.[125] At present there is no legislation requiring Australian TNCs to respect human rights throughout their operations, so this study focuses on areas of corporate law that may foster increased corporate respect for human rights.

The SRSG highlighted corporate law as one of the most important areas that shapes business practice, yet one which operates in isolation from human rights.[126] Noting that the understanding of linkages between corporate law and human rights was too underdeveloped,[127] he stressed the need 'to have a systematic conversation at the global level regarding the relationship between these bodies of law [corporate and securities law] and policy to business and human rights.'[128] This underlines the importance of considering corporate regulation as a means of increasing business respect for human rights,[129] particularly given continued corporate complicity in human rights violations.[130] While noting the argument that specific legislation targeted at addressing human rights abuses would be more appropriate than corporate law,[131] it nevertheless remains an option in the short term in the absence of such legislation. Furthermore, it was highlighted by the SRSG as an area that shapes corporate cultures and may serve to promote respect for human rights throughout a company's operations. Examining how corporate respect for human rights can be promoted by directors'

[125] Ewing (n 122) 8.
[126] Ruggie, *Just Business*, (n 3) 182. The case studies in chapter one highlights the impact on human rights when legislation is not effectively enforced in a host state in need of investment. Bribery and corruption of foreign officials could have negative impacts on human rights if laws protecting the environment or workers' rights are not enforced. As such, *Criminal Code Act 1995* (Cth) s 70.2 may have a role in preventing corporate complicity in human rights violations overseas but it is beyond the scope of this thesis to consider the impact of bribery and corruption of foreign officials on human rights.
[127] Ibid.
[128] Ibid.
[129] Radha Ivory and Anna John, 'Holding Companies Responsible? The Criminal Liability of Australian Corporations for Extraterritorial Human Rights Violations' (2017) 40 (3) *UNSW Law Journal*, 1177 and 1186-1194 note that while the *Criminal Code Act 1995* (Cth) gives effect to Australia's obligation to prevent international crimes committed by bodies corporate, it does not expressly regulate the transmission of criminal responsibility between companies within international corporate 'families' and therefore lacks the connection in corporate law between the errant human actors and the holding company itself.
[130] Redmond, *Corporations and Human Rights*, (n 27) 23-4.
[131] JA Purcell and JA Loftus, "Corporate Social Responsibility: Expanding Directors' Duties or Enhancing Corporate Disclosure" (2007) 21 *Australian Journal of Corporate Law* 135, 148, argue that a formal duty to consider social and environmental outcomes might introduce uncertainty into the law; Senate Standing Committee on Legal and Constitutional Affairs (1989) 'Company Directors' Duties: Report on the Social and Fiduciary Duties and Obligations of Company Directors' Australian Government Printing Service, Canberra 98.

duties and disclosure, 'two engines slowly aligning corporate governance with CSR objectives,'[132] will demonstrate their importance to the subject of business and human rights.

Directors' decisions not only impact their company but also employees, consumers or the local community where a company operates.[133] Chapter two will reveal how these decisions subsequently impact the human rights of these stakeholders, underlining the link between directors' duties and a company's potential to impact rights. Corporate law stipulates that directors must act in the best interests of the company and with reasonable care and diligence.[134] This provides a window to consider the company's human rights impacts. Analysing how directors' duties are being interpreted will show the extent to which consideration of a company's impact on rights is allowed in the decision-making process.

Disclosure and transparency can encourage responsible corporate behaviour[135] by improving the identification of risks, reporting on steps taken to mitigate them,[136] and engaging with stakeholders. Reporting can also serve as a deterrent to complicity in human rights violations if companies wish to avoid the negative publicity that can result from being linked to human rights violations. In addition, disclosure enables the comparison of performance within and across industries.[137] As companies report on what measures they are taking to prevent human rights violations associated with their conduct, or reporting that they have no such processes in place, so their accountability to the likes of stock exchanges and societal expectations increases. This blurs the lines 'between the strictly voluntary and mandatory spheres for participants'[138] and so has the potential to foster greater corporate respect for human rights.

Directors' duties and disclosure are key elements of corporate regulation to encourage respect for human rights. In the absence of targeted legislation to prevent businesses from violating human rights overseas they remain a useful first step in Australia as they sit within an existing framework. This means that fostering greater corporate respect for human rights might be

[132] Mares (n 118) 19.
[133] *Corporations Act 2001* (Cth) s 198A.
[134] *Corporations Act 2001* (Cth) s 181.
[135] Paul von Nessen, 'Australian Efforts to Promote Corporate Social Responsibility: Can Disclosure Alone Suffice?' (2009) 27.1 *Pacific Basin Law Journal* 29.
[136] This connects to disclosure as the SRSG highlighted the importance of transparency to due diligence - to know and to show that rights are being respected. See *2010 Report*, UN Doc A/HRC/14/27 (n 93) para 84; *Guiding* Principles, UN Doc A/HRC/17/31 (n 47) Principle 21.
[137] Mandate of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, *Summary Report: Expert Meeting on Corporate Law and Human Rights: Opportunities and Challenges of Using Corporate Law to Encourage Corporations to Respect Human Rights* (United Nations, 2009) 8.
[138] *2007 Report*, UN Doc A/HRC/4/35 (n 43) para 61.

advanced in the short term without extensive new regulation, advancing rights protection in a more expedient fashion. Considering how directors' duties and disclosure may have prevented the violations examined in chapter one will inform recommendations in the conclusion.

13 The Importance of this Thesis and its Findings

The conclusion of this research tethers and combines the findings from the chapters of this thesis. Through this alignment, the research reveals that Australia would not be contravening international law by regulating corporate conduct extraterritorially, and that directors' duties and disclosure allows consideration of and reporting on a company's human rights impacts. However, corporate regulation remains an area that requires further clarity and guidance for businesses if it is to fulfil the potential of fostering corporate respect for human rights envisaged by the SRSG. Recommendations of what the government should do in this respect will focus on increasing clarity and overcoming separate legal personality to enable the extraterritorial reach of Australian regulation.

The violation of human rights by businesses is an issue that impacts us all, whether as consumers, shareholders or pension fund holders.[139] It is also important as the site of new legal challenges, with the traditional view of protecting human rights from violation by states becoming increasingly overshadowed by the impact of TNCs on rights.[140] While corporate complicity in human rights violations can occur in Australia, it is a functioning democracy with a strong legal system in place. When Australian TNCs have been complicit in the most serious human rights violations it has occurred overseas in countries where regulatory safeguards have been lacking. Therefore, the threat to human rights from Australian TNCs is greater overseas as demonstrated by the litany of violations and case studies.

The list of violations in this introduction underlined the damaging impact on human rights that some Australian TNCs have had during their offshore operations. The next chapter analyses three case studies implicating Australian companies in overseas rights abuses. The examples

[139] For a discussion on the importance of responsible corporate behaviour to investors see Leonardo Becchetti, Rocco Ciciretti, and Pierluigi Conzo 'Legal Origins and Corporate Social Responsibility' (2020) 12 *Sustainability* 1-2. The article notes that in Australia, socially responsible investments account for 63% of total assets under management in Australia and New Zealand.

[140] Daniel Augenstein and David Kinley, 'When Human Rights 'Responsibilities' Become 'Duties': The Extra-territorial Obligations of States that Bind Corporations' in Surya Deva and David Bilchitz (eds) 'Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?' (Cambridge University Press, 2013) 271.

are typical of corporate complicity in rights violations as they highlight locations, industries and stakeholders that are among the most likely to experience human rights violations.[141] The examples also underline the impact on rights when the host state is unable to effectively regulate businesses.

[141] Ruggie, *Just Business*, (n 3) 23.

Chapter One: Australian Transnational Corporations and Human Rights

The violation of human rights by businesses is a problem in and for Australia. It is an issue facing businesses, from the retailers and banks on the high streets to the mining giants amassing mineral wealth from operations in Australia and beyond. Australian multinationals have been complicit in human rights violations overseas – some innocently, some not. Addressing the issue first requires understanding how and why these violations continue. Particularly important is a strong understanding of the regulatory problems facing both the host state and well-intentioned companies. This research will highlight the pitfalls of the international human rights regime when reliance is on local implementation, and the consequences for rights holders when the system fails them.

This chapter summons and analyses three case studies where the operations of Australian companies have led to the violation of human rights in developing countries with weak and ineffective regulation. This investigation will support the position of this thesis that the overseas operations of Australian TNCs have and continue to pose a risk to human rights. The analysis will highlight how a governance gap is created when a host state is unable to effectively regulate the actions of a TNC and its local partners, and how this can lead to the violation of human rights. The role of this chapter in the arc of this research is clear. These cases demonstrate that home state governments, in this case Australia, must act to protect human rights.

Three case studies implicating Australian TNCs in rights abuses in developing countries will show how human rights were violated. The analysis will look at the actions of the company, the impact on the local community or workers, how this constituted a violation of human rights and why the host state failed to protect rights in these instances. These examples will underline the threat to rights posed by the overseas operations of Australian TNCs in countries where regulation is ineffective.[142]

Research has shown that extractives industries are most likely to violate human rights[143] so it is important to consider how Australian mining companies have impacted human rights in

[142] Although Australian TNCs have been complicit in human rights violations in conflict-affected areas, the examples in this chapter focus on countries where war has not compromised the host state's ability to regulate.
[143] John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (W. W. Norton & Company Inc., 2013) 25.

Africa, where they have a considerable presence.[144] The first two case studies highlight the impact of subsidiaries of Australian companies on communities living close to mining operations in Malawi and Madagascar. It should be noted that subsidiaries are only subject to the laws of the country in which they are incorporated. This creates legal challenges in controlling overseas subsidiaries with Australian regulation. How these challenges might be overcome will be discussed in chapter three. The third case study analyses the garment industry in Bangladesh, highlighting the risk of complicity in human rights violations facing Australian fashion retailers. This will inform consideration in chapter three of how disclosure might reduce the risk of Australian companies contributing to human rights abuses in their supply chains.

1 Background to the Kayelekera Uranium Mine

The Kayelekera Uranium Mine (KUM) is one of several mining sites along the shores and tributaries of Lake Malawi,[145] a source of livelihood for more than 1.5 million people.[146] Previous studies on the KUM have focused on how stronger mining regulations could boost development in Malawi,[147] and compared the country's uranium mining regulation with other countries.[148] This chapter will show how an Australian TNC was complicit in violating the human rights of a community living close to the mine. The analysis will highlight specific risks with uranium mining operations, how the operation at KUM impacted the environment leading to a violation of the right to water, and why the Malawi government's regulation was ineffective in protecting the right.

The KUM is wholly owned by Paladin (Africa) Limited (PAL), a subsidiary of Australian mining company Paladin Energy. The mine was Malawi's biggest foreign investment[149] and

[144] Will Fitzgibbon, Martha Hamilton and Cécile Schilis-Gallego, 'Danger Under Ground', *Sydney Morning Herald*, 11 July 2015.
[145] Santorri Chamley, 'On the Shores of Malawi's Lake of Stars, Activists Raise Uranium Fears', *The Guardian* (online), 3 June 2015 <https://www.theguardian.com/global-development/2015/jun/03/lake-malawi-activists-uranium-fears-paladin>.
[146] Human Rights Watch, *'They Destroyed Everything': Mining and Human Rights in Malawi* (Human Rights Watch, 2016) 22.
[147] Paul Justice Kamlongera, 'The Mining Boom in Malawi: Implications for Community Development' (2013) 48(3) *Community Development Journal* 377.
[148] Mary Kachale, 'The Efficacy of International Regulation of Uranium Mining: Malawi As a Case Study' (2010) 36(4) *Commonwealth Law Bulletin* 653.
[149] Chamley (n 4).

the first to tap into Malawi's uranium deposits.[150] Under the terms of a development agreement signed in 2007 the Government of Malawi held fifteen per cent equity in PAL.[151] The agreement required the company to comply with the country's environmental laws[152] and report on relevant company activities.[153] It also stated that the government would undertake regular monitoring of the project in its implementation phase, including compliance with the Environmental Management Plan and any Malawian environmental standards relevant to uranium mining.[154] Although the International Atomic Energy Agency (IAEA) voiced concern at the inadequacy of Malawi's regulatory infrastructure the government authorised the commencement of operations.[155]

2 The Increased Risks Associated with Uranium Mining

Before analysing the KUM's impacts, it is important to note the additional risks that uranium mining poses to communities living close to a mine. Uranium mining produces radioactive and chemically toxic waste[156] with tailings[157] retaining radioactive elements and heavy metals.[158] This can impact the water quality for communities in the vicinity of a mining operation with radiation released into water supplies through overflows caused by heavy rains and contaminants leaching into groundwater from tailings ponds.[159] While the focus of this case study is the mining operation's impact on the right to water it is also important to note that uranium mining also threatens the right to the highest attainable standard of health.[160] Areas with high uranium concentration in the rocks are generally exposed to higher than usual

[150] Anica Niepraschk, 'Uranium Mining Companies in Africa: The Case of Paladin Energy in Malawi', *Nuclear Monitor*, Issue 807, 2015.
[151] Paladin (Africa) Limited, *Project Update Kayelekera Mine (On Care & Maintenance)* (PAL, 2015) 1.
[152] Development Agreement Between the Government of the Republic of Malawi, Paladin (Africa) Limited and Paladin Energy Minerals NL on the Kayelekera Uranium Project, 22 February 2007 para 18.1(a).
[153] Ibid para 18.1(c); para 18.10 required the company to clear any area of excess contamination and compensate those adversely affected if it failed to comply with relevant environmental standards or laws.
[154] Ibid para 18.11(a) and (c).
[155] International Atomic Energy Agency, *Executive Summary: Roundtable Meeting on the Upsurge of the Uranium Mining and Production Industry* (2008) <http://www-ns.iaea.org/downloads/rw/waste-safety/uranium-mining-gc2008-roundtable.pdf>.
[156] Nuclear Energy Agency (NEA), Organisation for Economic Co-operation and Development (OECD), *Managing Environmental and Health Impacts of Uranium Mining* (NEA, 2014) 18 <https://www.oecd-nea.org/ndd/pubs/2014/7062-mehium.pdf> pp. 22, 79.
[157] Tailings are finely crushed rock resulting from mining and can be significant sources of long-term pollution.
[158] NEA and OECD (n 15) pp. 22, 79.
[159] NEA and OECD (n 15) pp. 79-80.
[160] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 12 ('*ICESCR*').

radiation doses and the extraction process increases the local population's exposure to ionising radiation.[161] Indeed, the community close to the KUM raised concerns about the risks to their health due to mining-related pollution.[162] The increased risk of uranium mining therefore means strong regulations are essential to protect the human rights of local communities.

3 The Mine's Impact on the Local Community

The risks associated with uranium mining raised concerns among the community living close to the KUM.[163] Due to a lack of information from PAL and the government, a consortium of local NGOs[164] enlisted the help of an expert to monitor the mine and present findings to the local community. Bruno Chareyron[165] tested water sources in Kayelekera in 2012 and warned that the mine was impacting water due to spillage, discharges and the contamination of underground water resources.[166] This was a danger to the local community which relied on the nearby Sere River for fishing[167] and irrigating crops.[168] Water from the river was also used for human consumption[169] and cooking[170] so pollution of this source could impact the health of the local community. Monitoring carried out by Chareyron for the Commission for Independent Research and Information about Radiation (CRIIRAD) found that uranium levels in some sections of the Sere River was above the World Health Organization's (WHO) recommended standard for drinking water.[171] Results also showed much higher uranium

[161] Bruno Chareyron, *Impact of the Kayelekera Uranium Mine, Malawi* (Report No 21, EJOLT, February 2015) 9, uranium mining usually increases uranium levels in surface and/or underground water, and solid waste (eg waste rocks and tailings) and liquid effluents can contaminate water if not confined properly. ('*Report No 21*')
[162] Human Rights Watch (n 5) 9-10.
[163] NEA and OECD (n 15) 36–7; Bruno Chareyron, L Živčič, T Tkalec and M Conde, *Uranium Mining: Unveiling the Impacts of the Nuclear Industry* (Report No 15, EJOLT, 2014) 15. ('*Report No 15*').
[164] The consortium is known as the Natural Resources Justice Network (NRJN).
[165] Bruno Chareyron is an engineer in energetic and nuclear physics and director of the French NGO the Commission for Independent Research and Information about Radiation. He has conducted global studies about the impact of uranium mines, supported initiatives for the independent monitoring of nuclear contamination, and received an award for his commitment to exposing disinformation from the industry and increasing public understanding. https://www.european-environment-foundation.eu/en-n/environetwork/profiles/chareyron-bruno.
[166] Chareyron, *Report No 21*, (n 20) 61-62.
[167] Human Rights Watch (n 5) 35 notes fish caught supplemented the diet of the local community as well as their income with some of the catch being sold at local markets.
[168] Chamley (n 4); Kachale (n 7) 671 notes the importance of the river to the community for domestic use and irrigation.
[169] Chareyron, *Report No 21*, (n 20) 34.
[170] Human Rights Watch (n 5) 62.
[171] The WHO's standard is 30 micrograms per litre (µg/l) but this is contested. In Chamley (n 4), Chareyron states that, 'in the case of a chronic discharge, for some living species – a safe limit may be 0.3 mg/l'. Chareyron, *Report No 15*, (n 22), 34 notes that, with the suggestion that a safe level for all species is much lower than 30 mg/l, any traces of uranium at this level would still pose a threat to wildlife in the water. Tests measured a uranium concentration of 42.8 mg/l at the confluence with the Champanji River.

activity sulphates[172] than was recorded in a 1990 environmental impact assessment (EIA) prior to the commissioning of the mine, suggesting an impact from mining activities.[173] CRIIRAD's figures highlight increased and unsafe levels of chemicals and radioactive materials in the local water resources. While this data is the only available source to judge the mine's impact on the water supply, it is reasonable to assume that if PAL had data showing lower levels of uranium this would have been made available given the criticism levelled against it.

Since CRIIRAD's monitoring began, the water supply's safety was compromised on more than one occasion. Spills were recorded in March 2013 when runoff water from waste rock dumps entered the environment,[174] and in January 2015 a storm saw up to 50 litres overspill from a containment vessel. Despite acknowledging the events PAL provided no detailed information about the degree of radiological and chemical pollution of the waters located downstream.[175] In 2015, PAL began discharging water from one of its tailing ponds into the river system[176] and while company representatives said the water had been treated prior to discharge to ensure uranium levels were below the WHO's guidelines for drinking water,[177] this claim was refuted by CRIIRAD.[178] Highlighting the impact of these events on the local community will demonstrate how it constituted a violation of their right to water.

The local community raised concerns over what happened to the supply of drinking water, noting changes in colour, taste, and smell.[179] Many reported gastrointestinal illnesses and skin rashes and believe the number of issues since the commencement of operations demonstrates a link to the mine.[180] It should be noted that the local hospital in Karonga which serves more than 200,000 residents lacks the diagnostic equipment necessary to determine if patients might have become ill due to the mine. This makes a definitive link between the mining operation

[172] Chareyron, *Report No 21*, (n 20) 66 notes that regarding discharge limits for sulphates, PAL indicates a value of 800 mg/l. This value is high considering the impact of sulphates in the aquatic environment.
[173] Ibid 35.
[174] Paladin Sustainability Report (2013).
[175] Chareyron, *Report No 21*, (n 20) 14 notes that in January 2013 a report published by PAL gave no details of the degree of radiological and chemical pollution of the stream and rivers located downstream. In January 2015 PAL provided no information other than announcing that no measurable contamination had occurred.
[176] Contradicting the 2006 EIA report.
[177] Human Rights Watch (n 5) 63.
[178] Chamley (n 4); Chareyron, *Report No 21*, (n 20) 28 notes the evaluation of doses to the consumer of the water is strongly underestimated in Paladin EIA. See Gavin M Mudd and Howard D Smith, *Comments on the Proposed Kayelekera Uranium Project Environmental Impact Assessment Report* (2006) 10 <http://users.monash.edu.au/~gmudd/files/Comments-Kayelekera-EIS-Draft-v3.pdf> 10 which notes the legally acceptable levels of arsenic, cadmium, chromium, lead and nickel in Malawi's water are significantly higher than those recommended elsewhere, despite PAL stating they are similar to other international standards.
[179] Human Rights Watch (n 5) 62.
[180] Ibid 66.

and the failing health of the local community difficult to establish, meaning that health problems may be wrongly attributed to the mining operations. Conversely, it can also mean failing to perceive a link between the mine and poor health which does exist.[181] The result is a community scared to use the river for their water supply,[182] preferring to walk several kilometres multiple times a day 'to access what they believe to be safer, less contaminated water.'[183] The local community's uncertainty about the safety of the water was exacerbated by an ongoing lack of information. From the outset of operations at KUM there was a lack of engagement from PAL including a failure to provide scoping documents to local community organisations – a requirement under Malawi's environmental laws.[184] PAL did not provide sufficient information about the radiological characteristics of the water to be treated at its water treatment facility, or the residual contamination of water discharged in the Sere River.[185] When the local community approached the government, they were told the data belongs to the company.[186] This lack of information meant that the local population was unable to determine if regulators were ensuring the company's compliance with legal responsibilities, or if the mine's impact on the water supply was harmful to nearby communities.[187]

While it is difficult to demonstrate the exact causes of every ailment reported by the local community since operations at KUM commenced, this section has highlighted an increase in the reporting of the symptoms of poor health, such as gastrointestinal problems and skin rashes related to the impact of mining activities in that time. This is in tandem with negative impacts on the local water supply and a lack of information from the government or company about levels of pollution in the water supply. Drawing on human rights treaties, treaty body general comments[188] and their interpretation, there follows a discussion on how the company's actions violated human rights and how Malawi's government could have prevented those violations.

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[181] Ibid 54-55 makes a definitive link between the mining operation and the failing health of the local community difficult to establish, meaning that health problems may be wrongly attributed to the mining operations and, conversely, failing to perceive a link between the mine and poor health which exists.
[182] Ibid 63.
[183] Ibid 65 notes that for those incapable of walking long distances, the river remains their only source of water.
[184] Rafiq Hajat, 'Kayelekera and the Uranium Mining Saga in Malawi' in *Towards the Consolidation of Malawi's Democracy: Essays in Honour of the Work of Albert Gisy* (Konrad-Adenauer-Stiftung, 2008) 75, 82.
[185] Chareyron, *Report No 21*, (n 20) 66
[186] Ibid 55; PAL's 2012 and 2013 sustainability reports give no information about the results of the environmental monitoring performed in Kayelekera. The Bench Marks Foundation, 'Corporate Social Responsibility and the Mining Sector in Southern Africa: A Focus on Mining in Malawi, South Africa and Zambia' (South Africa, June 2008) 11 notes the exclusion of some of the local community by only publishing documents in English.
[187] Human Rights Watch (n 5) 10.
[188] General comments (or general recommendations) are each human rights treaty body's interpretation of the provisions of its respective treaty and are an influential tool for UN human rights treaty bodies. They address

4 How the Mining Operation Violated Human Rights

The right to safe, clean drinking water for present and future generations[189] was recognised by the UN in Resolution 64/292 as it is essential for the full enjoyment of all human rights.[190] It is derived from the right to an adequate standard of living and is inextricably related to the right to the highest attainable standard of health which requires safe and potable water.[191] As a signatory of the International Covenant on Economic, Social and Cultural Rights (ICESCR)[192] Malawi has an obligation to protect and fulfil the right to water. Fulfilment of this right requires three factors that must apply in all circumstances: availability, quality and accessibility.[193] In the next section there will be a discussion on steps that the CESCR expects states parties to take to protect the right to water, but first it is important to demonstrate how the mining operation at KUM led to the violation of this right.

Operations at KUM had a negative impact on the quality and accessibility of water. An acceptable quality of water must be 'free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person's health'.[194] Accessibility includes 'the right to seek, receive and impart information concerning water issues',[195] which means 'individuals and groups should be given full and equal access to information concerning water, water services and the environment, held by public authorities or third parties.'[196] The UN has not only underlined the importance of clean, safe water and defined what this means, but also identified threats to the right to water. Pollution through industrial activities is among the most

state parties as a whole and, although they carry no formal authority to bind state parties, the status of each committee under the covenant gives them a special claim for attention. See for example, Henry J Steiner, 'Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?' in Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, 2000) 15, 22 and 52.

[189] *The Human Right to Safe Drinking Water and Sanitation*, Human Rights Council Resolution 27/7, UN HRC, 27th sess, 39th meeting, UN Doc A/HRC/27/L.11/Rev.1 (25 September 2014) para 2.

[190] UN Committee on Economic, Social and Cultural Rights, *General Comment No 15: The Right to Water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/2002/11 (20 January 2003) para 1 ('*General Comment No 15: The Right to Water*').

[191] UN Committee on Economic, Social and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health*, UN Doc /E/C.12/2000/4 (11 August 2000) ('*General Comment No 14: The Right to the Highest Attainable Standard of Health*'); *ICESCR* (n 19) art 12 para 1.

[192] Malawi ratified the ICESCR on 22 December 1993.

[193] *General Comment No 15: The Right to Water*, UN Doc E/C.12/2002/11 (n 49).

[194] Ibid para 12(b).

[195] Ibid para 12(c)(iv); Principle 10 of the *Rio Declaration on Environment and Development* emphasises that individuals should have access to information about the environment including hazardous materials.

[196] *General Comment No 15: The Right to Water*, UN Doc E/C.12/2002/11 (n 49) paras 48 and 56; Catarina de Albuquerque, 'Monitoring Compliance with the Human Rights to Water and Sanitation' (2014), 8. The 1992 UN Conference on Environment and Development recognised access to environmental information as an important pillar of sustainable development.

commonly identified threat to realising the right to water.[197] Water pollution and accumulations of hazardous wastes prevent many people from securing the minimum requirements for health and survival[198] with water contamination described as one of several contributing factors exacerbating existing poverty.[199] Indeed, 'no other resource is affected by the extent and level of degradation of quality and quantity due to unsound management of waste from extractive industries than water'.[200] The commissioning of the KUM saw a significant increase in the levels of uranium concentration in local streams and rivers that exceeded WHO guidelines. This violated the local community's right to water and the lack of information on the risks posed by the mining operation undermined accessibility to water.

The analysis has shown how the right to water was denied by the operations at KUM, contravening the right to the highest attainable standard of health.[201] Focus now turns to how Malawi's government could have protected the right. This will inform an analysis of the regulatory action taken by the government and why it failed. Underlining the host state's inability to protect the right supports the argument that Australia might act in such scenarios.

5 The Host State's Role in Protecting the Right to Water

Host states party to the ICESCR must facilitate the realisation of the right to water by taking steps to ensure individuals in their country can access adequate water.[202] Protecting the right requires, inter alia, effective legislation to restrain third parties[203] from contaminating water

[197] Catarina de Albuquerque, *Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation*, UN Doc A/HRC/27/55 (30 June 2014) para 20.
[198] Sub-Commission on the Promotion and Protection of Human Rights Working Group on Indigenous Populations, *Report of the Workshop on Indigenous Peoples, Private Sector Natural Resource, Energy and Mining Companies and Human Rights*, UN Doc E/CN.4/Sub.2/AC.4/2002/3 (5–7 December 2001) para 93, states that human rights depend on access to a healthy, safe environment.
[199] *General Comment No 15: The Right to Water*, UN Doc E/C.12/2002/11 (n 49) para 1.
[200] Calin Georgescu, *Report of the Special Rapporteur on the Human Rights Obligations Related to Environmentally Sound Management and Disposal of Hazardous Substances and Waste*, UN Doc A/HRC/21/48 (2 July 2012) para 39.
[201] *ICESCR* (n 19) art 12; *General Comment No 14: The Right to the Highest Attainable Standard of Health*, UN Doc /E/C.12/2000/4 (n 50) para 4.
[202] *General Comment No 15: The Right to Water*, UN Doc E/C.12/2002/11 (n 49) paras 23, 25.
[203] Ibid paras 23, 42, 43, 44(b), 52; Human Rights Council Resolution on the Human Right to Safe Drinking Water and Sanitation, UN Doc A/HRC/RES/27/7 (2 October 2014) para 12; UN Committee on Economic, Social and Cultural Rights, *General Comment No 12: The Right to Adequate Food*, UN Doc E/C.12/1999/5 (12 May 1999) paras 15, 19, 27 ('*General Comment No 12: The Right to Adequate Food*'); *General Comment No 14: The Right to the Highest Attainable Standard of Health*, UN Doc /E/C.12/2000/4 (n 50) paras 50, 51.

resources[204] with harmful substances,[205] such as radiation and harmful chemicals,[206] and making businesses aware of the importance of the right to water.[207] Legislation and policies should be compatible with obligations arising from the right to water[208] and states parties must monitor the realisation of the right.[209] Failing to regulate third parties by enacting or enforcing laws to prevent water contamination[210] can enable violations of the right even if this was an unintended consequence.[211] Governments must also ensure communities are kept informed with full and equal access to information held by public authorities or third parties concerning water, water services and the environment.[212] Furthermore, states have an obligation to promote transparency by disclosing environmental and social assessments and monitoring results.[213] Failure to provide access to information compromises the ability of states parties to meet human rights obligations and can lead to other violations by not facilitating participation,[214] as was the scenario at the KUM.[215]

This section has highlighted how the events at the KUM constituted a violation of the right to water and identified the steps Malawi should have taken to protect the right. It should also be noted that not only did Malawi fail to prevent a third party from violating the right to water, but as a part owner of the mining operation the state was also guilty of violating the covenant

[204] *General Comment No 15: The Right to Water*, UN Doc E/C.12/2002/11 (n 49) para 23; Catarina de Albuquerque (n 56) para 25.
[205] Ibid para 8; Albuquerque (n 56) para 3.
[206] *General Comment No 15: The Right to Water*, UN Doc E/C.12/2002/11 (n 49) para 28.
[207] Ibid para 49.
[208] Ibid para 46 they should be repealed, amended or changed if inconsistent with Covenant requirements.
[209] Ibid para 52; Albuquerque (n 55) 10 describes this as an obligation.
[210] Ibid para 44 (b); Albuquerque (n 56) paras 26 and 29.
[211] Albuquerque (n 56) para 82; UN Committee on Economic, Social and Cultural Rights, *General Comment No 24 on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, UN Doc E/C.12/GC/24 (10 August 2017) para 18 ('*General Comment No 24 on State Obligations*').
[212] *General Comment No 15: The Right to Water*, UN Doc E/C.12/2002/11 (n 49) para 48.
[213] Georgescu (n 59) para 69(i). For further reading on the importance of information to the enjoyment of human rights and how this may be achieved, see Baskut Tuncak, *Report of the Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes*, UN Doc A/HRC/30/40 (27 August 2014).
[214] Albuquerque (n 56) para 68. The exclusion of local communities that resulted from the lack of engagement also denied them the right to free and meaningful participation in public affairs, as enshrined in ICCPR art 25(a). The importance of information has been highlighted further: Albuquerque (n 56) para 83. Georgescu (n 59) para 69(c) advises states to recognise the right of access to information and avoid using the privilege of confidential business information to shield health and safety information.
[215] Kachale (n 7) 669–70 notes that the lack of consultation and public participation has been highlighted as contributing to the poor quality of the EIA process in Malawi despite international law placing great emphasis on public participation as fundamental to the process.

right it should have been protecting.[216] Analysing how the mining operation was regulated will highlight why the relevant legislation was ineffective in protecting the right to water.

6 The Host State's Failure to Protect the Right to Water

When the development agreement between the Malawi government and PAL was signed the *Mines and Minerals Act 1981* (MMA) was the overarching method of regulation for mining in Malawi, and one of the oldest pieces of mining legislation in sub-Saharan Africa.[217] The IAEA noted that the MMA was not updated in keeping with mining developments in Malawi and observed a lack of legislation setting out standards for the design of mines or acceptable levels of radiation.[218] There was no legislation to regulate the safe disposal of radioactive waste, to set acceptable levels of radionuclides in the water,[219] or to set standards for operating conditions of components, systems or equipment.[220] The MMA predated environmental protection legislation with which it should have been harmonised,[221] so while there was a requirement for PAL to submit an EIA there were inconsistencies between the MMA and the environmental legislation.[222] This undermined effective monitoring and the enforcement of environmental safeguards that might have protected the right to water.[223] The result was legislation with 'no fundamental, substantive changes made to reflect new developments and realities'[224] such as Malawi's ratification of the ICESCR (and the resulting obligation to protect the right to water) and the beginning of uranium mining in the country. This led to a governance gap which failed to protect the human rights Malawi had undertaken to fulfil pursuant to its ratification of the ICESCR. It is also important to consider how discretionary loopholes and a lack of clarity within the legislation failed to protect the right to water.

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[216] *General Comment No 14: The Right to the Highest Attainable Standard of Health*, UN Doc /E/C.12/2000/4 (n 50) para 34; Malawi has not reported to the UN on the KUM's human rights impact.
[217] Mark Curtis and Rafiq Hajat, 'Malawi's Mining Opportunity: Increasing Revenues, Improving Legislation' (Norwegian Church Aid, 2013) 33. Kachale (n 7) 671 notes the MMA had not been updated since 1983.
[218] IAEA, *Management of Radioactive Waste from the Mining and Milling of Ores: Safety Guide* (IAEA, 1995) <https://www-pub.iaea.org/MTCD/Publications/PDF/Pub1134_scr.pdf>. These concerns were shared by the World Bank: see World Bank, *Malawi Mineral Sector Review: Source of Economic Growth and Development* (2009) 7, 38; and NGOs and local communities who mounted a legal challenge to PAL's mining licence. See also Kachale (n 7) 671–2; Kamlongera (n 6) 384.
[219] Kachale (n 7) 671; Kamlongera (n 6) 384.
[220] Kachale (n 7) 672.
[221] Curtis and Hajat (n 76) 33.
[222] Ibid 40.
[223] Ibid.
[224] The Bench Marks Foundation (n 45) 8.

Under the MMA, the Minister is required to consider the need to conserve natural resources[225] when deciding whether to grant a mining licence. However, the MMA allows Ministerial discretion to decide if an EIA is required[226] and there is no requirement to assess social impacts.[227] The MMA also enables the Minister to require an assessment of the feasibility of the proposed mining operations but this is also discretionary.[228] This loophole in the legislation means a mining operation could be granted approval with no assessment of how it might impact the environment or local communities. The process also allows the Minister to grant mining licences without consulting other stakeholders such as Parliament[229] or affected communities, vesting wide-ranging discretionary powers in one person. In addition this lack of consultation meant that the development agreement between the government and PAL[230] lacked clear definitions,[231] left loopholes and put the company in a position of strength.[232] The World Bank noted in a 2009 report that, unlike this case in Malawi, most modern mining legislation limits the scope for discretionary powers and, where required, makes the exercise of discretion subject to clear criteria, including advice from a statutory body.[233] A failure to undertake these measures often results in a lack of consistency and/or transparent decision-making. In Malawi, the discretionary approach to regulation and monitoring rendered the few key safeguards that existed largely ineffectual.[234] Likewise, the *Environmental Management Act 1996* (EMA)[235] lacked clarity and fostered ambiguity by not specifying how environmental impacts might be measured or the frequency and content of audits to be conducted by the Director of Environmental Affairs.[236] This lack of clarity and transparency hindered the potential for legislation to safeguard the right to water.

[225] MMA s 94(1).
[226] Kachale (n 7) 669.
[227] Human Rights Watch (n 5) 13.
[228] MMA ss 38(3), 94(3). Section 95(1) is discretionary in that conditions may be included in a Mineral Right with respect to: (a) the prevention, limitation or treatment of pollution; and (b) the minimisation of the effects of mining on adjoining or neighbouring areas and their inhabitants.
[229] MMA s 10.
[230] Human Rights Watch (n 5) 38.
[231] MMA s 18.4 empowers the Minister to propose amendments to the Environmental Management Plan if a project poses a material danger to public health and safety but does not define material danger.
[232] The government cannot impose changes to the Environmental Management Plan but can only make a proposal. If the company opposes it, a binding decision is made by an independent expert. Para 18.16(c) states that the company will assist the government to monitor the effects arising from uranium mining. Para 18.9 allows the company to participate in discussions on prospective changes to environmental laws.
[233] World Bank, *Malawi Mineral Sector Review: Source of Economic Growth and Development* (2009) 7, 38.
[234] Human Rights Watch (n 5) 30. Kamlongera (n 6) 386 notes that PAL allegedly provided per diems for government officers.
[235] It should be noted that while the EMA was updated in 2017 and an Access to Information Bill became law in 2017, this analysis focuses on the legislation at the time of the spills.
[236] *Environmental Management Act 1996* s 27(1).

The MMA contained provisions rendering information shared with the government for mining-related activities confidential.[237] Likewise section 52(3) of the EMA contained a confidentiality provision on the publication or disclosure of information about the environment.[238] This meant that data relating to water pollution could be kept from the local communities. Rather than enabling access to information, highlighted by the UN as necessary for access to water, the government used legislation to justify its discreet approach to agreements.[239] Even the unsuccessful Mines and Minerals Bill (2015) contained a broad confidentiality provision that essentially would have prevented communities from accessing information about mining risks.[240]

The analysis has shown that the Malawi government was unable to protect the right to water of its citizens due to legislation that was not amended in keeping with the country's human rights obligations. The need for investment and the government's share in the mine did not serve as an incentive to regulate the operation effectively. This case study now highlights that the government lacked the technical expertise to ensure the KUM was not polluting water which was detrimental to protecting the community's right to water.

7 Behind the Failure to Protect the Right to Water

Malawi's lack of technical knowledge about radioactive substances was detrimental to the EIA process[241] and led to a reliance on PAL to gauge acceptable practice.[242] Water testing was infrequent[243] and inspections of the KUM were often limited to observing working conditions and safety equipment.[244] This meant the government's attempts to prevent the mining

[237] MMA s 7.
[238] This is despite section 37 of the Malawi constitution setting out the right to information.
[239] Interview with Commissioner for Mines, 2011, cited in Kamlongera (n 6) 385: 'by law it is not allowed to disclose the contents of the agreements made with incoming companies, so only if the law can be changed then the public can freely access such documents.' Kamlongera argues such a position is informed by the language of archaic regulations, which contain clauses for non-disclosure, implemented during the country's period of autocratic rule.
[240] Human Rights Watch (n 5) 13. Subsequent legislative attempts to promote transparency saw a draft Access to Information Bill in February 2016. However, disclosure was limited to documents created after the adoption of the law with the Minister of Information stating in a 2016 interview with Human Rights Watch (n 5) 74 that 'every government has something to hide and applying the law retroactively would create a lot of problems.' Attempts to access documents would be curtailed further by giving the Minister the power to determine fees payable for processing information requests, limiting the ability of some members of the community to access documents.
[241] Kachale (n 7) 672.
[242] Ibid; Curtis and Hajat (n 76) 42 notes understaffing and lack of expertise; Kachale (n 7) 671–2.
[243] Human Rights Watch (n 5) 53.
[244] Ibid 52.

operation from polluting the Sere River were ineffective and insufficient. Indeed, Ministry officials admitted to relying on PAL's test results.[245] This not only undermines the independence of monitoring but contravenes Malawi's obligation to protect the right to water.[246] The reliance on PAL also suggests a relationship where the company was in a position of strength over the government. This is underlined by officials stating in interviews that they would receive financial or transportation support from Australian mining companies and travel to mines in company-owned vehicles.[247] At the very least, this would increase mistrust in the community and raise doubts as to the independence of the monitoring results.

This case study has demonstrated that legislation to regulate uranium mining in Malawi was ineffective and outdated. Relevant acts that might have protected the environment and communities from harm were undermined by affording the Minister considerable discretionary powers. While the legislation failed to protect the right to water it did succeed in denying the population access to information, a key element of access to water. The legislation enabled the company to operate unhindered and the presence of Paladin in a country with weak and ineffective mining regulation was no coincidence.[248] Legislation gave mining companies very little impetus to adhere to good environmental practices[249] and with Malawi's need for investment[250] the government had little incentive to strengthen regulation in case the country became less attractive to companies. This not only highlights the inability of Malawi to protect the right to water but also underlines the difficult choice facing developing countries who want to attract foreign direct investment. This supports the argument that in this scenario the home state government, in this case Australia, can ensure that overseas subsidiaries act responsibly and respect human rights – a view supported by the IAEA.[251]

Human rights advocates in Africa have noted the perception that Australian mining companies 'take advantage of regulatory and compliance monitoring weaknesses, and the huge disparity

[245] Ibid 53.
[246] *General Comment No 15: The Right to Water*, UN Doc E/C.12/2002/11 (n 49) paras 24, 28, 52-53.
[247] Human Rights Watch (n 5) 53.
[248] Kamlongera (n 6) 378; see also Anica Niepraschk, 'Australian Uranium Mining in Africa – Our Responsibility?' (2015) 5 *Mining Monitor* 15, who quotes a 2006 interview with PAL's then-Chief Executive Officer and Executive Director, John Borshoff, stating: 'the Australians and Canadians have become over-sophisticated in their environmental and social concerns over uranium mining, the future is in Africa'.
[249] Kamlongera (n 6) 379.
[250] Selim Jahan, 'Human Development Report 2016: Human Development for Everyone' (United Nations Development Programme, New York, 2016) 218 notes that 70.9% of the population are living on $1.90per day (the survey in Malawi was conducted in 2013/14); ibid 228 notes rates of 42.4% child malnutrition; ibid 236 notes GDP was $1,113 per capita.
[251] IAEA, *Management of Radioactive Waste*, (n 77).

in power between themselves and affected communities and aim to get away with things they wouldn't even think of trying in Australia.'[252] Therefore, it is relevant to analyse the actions of another Australian mining company on that continent.

8 Rio Tinto-Owned Mining Operation in Fort Dauphin, Madagascar

The focus of this case study is an ilmenite[253] mine in Fort Dauphin, Madagascar. The company operating the mine, QIT Madagascar Minerals (QMM), is eighty per cent owned by Rio Tinto[254] with the Malagasy government owning twenty per cent.[255] At the time, the project was 'the first in a series of natural resource extraction projects that the country is developing together with the international mining sector and the World Bank.'[256] Previous studies have analysed the impacts of the mine on the local environment and the merits of the biodiversity offset program.[257] This case study will highlight how the presence of the mining operation was detrimental to the local community's physical and economic ability to access food, violating their right to an adequate standard of living.[258] As a signatory of the ICESCR[259] Madagascar is obliged to protect its citizens from violations of the covenant rights. The study will underline steps that the Malagasy government should have taken to ensure access to food and why the government's regulation failed. This further underlines the risk to human rights when Australian companies operate in a country in need of investment but with weak regulation, and supports the argument put forward in this thesis that the Australian government can do more to protect human rights in such scenarios.

[252] 'Australian Miners Linked to Hundreds of Deaths, Injuries in Africa', *Sydney Morning Herald*, 11 July 2015, quoting Tracey Davies, an attorney with the Centre for Environmental Rights in Cape Town, South Africa; Kachale (n 7) 664 notes the argument of Malawian NGOs that Paladin's EIA would not have been approved in Australia. See *Centre for Human Rights and Rehabilitation (CHRR) v Attorney General (AG) and Paladin (Africa) Ltd*, Civil Cause No 457 of 2007, High Court of Malawi, Lilongwe Registry (unreported).
[253] Ilmenite contains titanium dioxide, the white pigment found in paint and plastic.
[254] Rio Tinto is listed on the ASX and London Stock Exchange and has headquarters in Melbourne and London.
[255] http://www.riotinto.com/energyandminerals/about-qit-madagascar-minerals-15376.aspx
[256] Rod Harbinson, 'Development Recast: A Review of the Impact of the Rio Tinto Ilmenite Mine in Southern Madagascar' (Panos, London, 2007) 7.
[257] Harbinson (n 115), Jutta Kill and Giulia Franchi, 'Rio Tinto in Madagascar: A mine destroying the unique biodiversity of the littoral zone of Fort Dauphin' (May 2016). Caroline Seagle, 'The Mining-Conservation Nexus: Rio Tinto, Development 'Gifts' and Contested Compensation in Madagascar' (The Land Deal Politics Initiative, April 2011).
[258] *ICESCR* (n 19) art 11.
[259] Madagascar ratified the treaty on 22 September 1971.

9 Importance of the Land to the Local Population

QMM began dredging for ilmenite in Fort Dauphin, Madagascar in 2008.[260] The mining operation would destroy approximately 1,650 hectares of littoral forest[261] and to offset this loss Rio Tinto sought to conserve approximately 6,687 hectares of forest.[262] The area identified for this offset was home to about 6,000 people[263] who relied on the land to cultivate food. With approximately seventy per cent of Madagascar's population living in a rural environment[264] and a similar number of people living below the poverty line,[265] the ability to cultivate land is vital to ensuring the rural population's food security. Subsistence farming is also a main source of income.[266] Close to seventy-five per cent 'of all Malagasy people derive primary support from agriculture, growing rice, maize, manioc and vegetables and rearing livestock for home consumption [and] for sale in domestic markets'[267] The chapter now examines how access to this land was reduced and analyses attempts to offset this loss.

10 The Mining Operation's Impact on Farmers

In 2003, the Malagasy government presented a *dina*[268] to local communities close to the identified offset site at Bemangidy.[269] This transferred management of the forest area to local administrative structures including a Malagasy NGO[270] and divided the forest into three zones, only one of which was for farming.[271] The one zone for farming also included land left to recuperate following low yield, in keeping with traditional farming methods.[272] The result was

[260] Seagle (n 116) 3.
[261] Kill and Franchi (n 116), 6.
[262] Malika Virah-Sawmy, 'Does 'Offsetting' Work to Make Up for Habitat Lost to Mining?', June 16, 2014 < https://theconversation.com/does-offsetting-work-to-make-up-for-habitat-lost-to-mining-27699>.
[263] Kill and Franchi (n 116) 22.
[264] Bruno Sarrasin, 'The Mining Industry and the Regulatory Framework in Madagascar: Some Developmental and Environmental Issues' Journal of Cleaner Production 14 (2006) 389.
[265] Amber Huff, 'Black Sands, Green Plans and Conflict: Structural Adjustment, Sectoral Reforms and the Mining-Conservation-Conflict Nexus in Southern Madagascar' Evidence Report No 183 Addressing and Mitigating Violence, Institute of Development Studies, March 2016 9.
[266] Kill and Franchi (n 116) 22.
[267] Huff (n 124) 9; Seagle (n 116) 4.
[268] Kill and Franchi (n 116) 7 notes a *dina* was not traditionally a written document but the agreed outcome of negotiations that included those to whom it would be applied. On this occasion the *dina* was presented to the local community as a *fait accompli*.
[269] Ibid 6 notes QMM chose this as a biodiversity offset site.
[270] The NGO was Asity, a partner of BirdLife International – a conservation group working with QMM on the offset program.
[271] Kill and Franchi (n 116) 7.
[272] Ibid 7.

less land to use, some of which would be less fertile without time to recover, leading to a lower yield of crops. Accessing land was made more difficult with restrictions put in place requiring a permit to use the land,[273] the cost of which was beyond the reach of some locals.[274]

One of the World Bank's conditions for funding an operation where people are displaced is that they are offered land 'for which a combination of productive potential, locational advantages, and other factors is at least equivalent to the advantages of the land taken.'[275] To this end, QMM bought sixteen acres of land as compensation.[276] However, as I will demonstrate in the paragraphs below, this land was insufficient and unsuitable for farming.

11 Unsuitable Alternatives for Farming

Land given by QMM as compensation for the displacement of local communities was shown by tests to lack 'the level of fertility necessary to grow staple crops.'[277] QMM had not only taken much of the land used for cultivating but they had taken the plots best suited for growing. Combined with the limited access to their previous land, this left the local population in need of new plots of land they could cultivate. However, the only options available to farmers meant a journey of three or four kilometres from home which became treacherous in the rainy season.[278] Furthermore, sandy soil meant these plots were less productive than their old land resulting in an insufficient yield of manioc, a local staple, to feed everyone in the villages.[279] This lack of alternatives saw some farmers migrate into mountainous areas that were also ill-suited for growing some crops[280] and where they risked fines from the Ministry of Water and Forests for deforestation.[281] The inability to source land suitable for growing sufficient crops threatened the local community's food security and led to an increased reliance on buying food. However, as I will highlight below, just as the physical access to food was limited, so too was economic access.

[273] Ibid 7-8. People farming without a permit have to pay a fine of between 50,000 and 1,000,000 Ariary. In 2015 the official minimum wage in Madagascar was 125,000 Ariary per month. Villagers are forbidden from using fire on the land, an important part of preparing land for cultivation.
[274] Huff (n 124) 9; Seagle (n 116) 3 notes financial restrictions included penalties for trespassing in forest areas.
[275] World Bank operational policy BP4.1.2 on involuntary settlement – see Harbinson (n 115) 30.
[276] Harbinson (n 115) 31.
[277] Ibid.
[278] Kill and Franchi (n 116) 9.
[279] Ibid 9 and 11.
[280] Seagle (n 116) 8.
[281] Ibid.

12 Insufficient Compensation and Rising Prices

QMM paid residents compensation for the loss of land but this was 'much lower than World Bank regulations'[282] and 'insufficient to buy replacement land of the same quality in proximity to their homes.'[283] Compensation was also insufficient due to what local people claimed was an unfair assessment of land which saw them receive a price considerably lower than its value.[284] The situation was worse for farmers who did not own or could not prove ownership of the land they had been cultivating and as little as eight per cent of land owners had formal land titles.[285] The concept of ownership is further complicated when land is communally accessed but owned by another, including the state.[286] Farmers who relied on accessing land owned by others to feed their families received no compensation at all. Efforts to buy land became even harder for the local population as the start of mining operations increased prices in the area.[287] With land more valuable it was often sold to foreigners which meant a further reduction of land that local farmers could access[288] and a further increase in prices.[289] These factors compromised their ability to either grow or buy food.

In addition to little or no compensation for the loss of land for cultivating, local communities struggled to access food economically due to a lack of regular income to buy staple foods. Although villagers were told there would be jobs in exchange for losing access to the forest, only a small number were hired and were paid around half of what was needed to buy enough food for their family for one day.[290] With employment on a casual basis the same villagers were often chosen for work each time, leaving some even more disadvantaged with no income at all. The result was that villagers were 'without their staple food for much of the year.'[291] In addition, with increased numbers of people arriving in the area to work at the mine the increased demand for food saw a rise in prices,[292] further threatening the local population's ability to access food.[293]

[282] Seagle (n 116) 4; Kill and Franchi (n 116) 9 and 12-13 notes some villagers received no compensation.
[283] Harbinson (n 115) 31.
[284] Ibid 35.
[285] Harbinson (n 115) 8
[286] Huff (n 124) 10.
[287] Kill and Franchi (n 116) 9 and 11.
[288] Ibid.
[289] Harbinson (n 115) 32.
[290] Kill and Franchi (n 116) 10.
[291] Ibid 9.
[292] Friends of the Earth, 'Mining Madagascar – Forests, Communities and Rio Tinto's White Wash' (Media Briefing, October 2007) 5.
[293] Harbinson (n 115) 21.

This section has demonstrated how the mining operation at Fort Dauphin had a detrimental impact on the local community's ability to feed itself either by growing or buying food. It is relevant to the theme of this thesis to now demonstrate how this constituted a violation of the local community's right to adequate food. This entails considering how the right is defined, how it was violated by the mining operation and how the state might have protected the right.

13 How the Mining Operation Violated Human Rights

The right to adequate food is enshrined in the ICESCR,[294] is crucial for the enjoyment of all other rights,[295] and is linked to the inherent dignity of the human person.[296] It is defined as 'when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement.'[297] The right is realised when there is access to adequate food 'from productive land or other natural resources'[298] and incorporates the notion of long-term availability.[299] The analysis of the QMM mining operation has highlighted its negative impact on the local community's physical and economic access to adequate food. This serves to underline that the mining operation contributed to a violation of the local community's right to an adequate standard of living. Analysing the steps that Madagascar should have taken to protect the right will highlight why the Malagasy government failed in its obligations to uphold the ICESCR.

[294] *ICESCR* (n 19) art 11(1). Alston stresses the importance of the right to food, describing it as having been 'endorsed more often and with greater unanimity and urgency than most other human rights, while at the same time being violated more comprehensively and systematically than probably any other right'. Philip Alston, 'International Law and the Human Right to Food' in P Alston and K Tomaševski (eds), *The Right to Food* (Martinus Nijhoff Publishers, 1984) 9, 9.
[295] Ibid para 1.
[296] Ibid para 4. For a historical discussion on the right to food see Antti Belinskij, 'International Governance' in Peter Saundry and Benjamin L. Ruddell (eds), *The Food-Energy-Water Nexus* (Springer, 2020) 163-4.
[297] *General Comment No 12: The Right to Adequate Food*, UN Doc E/C.12/1999/5 (n 187) para 6; para 9 notes the importance of a mix of nutrients necessary for physical and mental growth.
[298] Ibid para 12; Olivier De Schutter, *The Right to Food*, UN Doc A/65/281 (11 August 2010) para 1 which highlights the importance of access to land for food security and the consequences when this access is taken away, noting that those cultivating small plots of land 'are often relegated to soils that are arid, hilly or without irrigation as they compete…for access to land and water.'
[299] Ibid paras 12, 13 define availability and note the particular vulnerability of indigenous population groups.

14 The Host State's Role in Protecting the Right to Adequate Food

The CESCR underlines the host state's responsibility to facilitate the realisation of the right to adequate food by taking measures to ensure individuals are not deprived of access to adequate food by the state itself or third parties.[300] This means not only refraining from measures that 'deprive individuals of access to productive resources on which they depend when they produce food for themselves,'[301] but also protecting access to those resources and preventing encroachment from third parties.[302] To achieve this states should use legislation, monitoring and information to prevent third parties from inhibiting access to food.[303] They should also seek to improve food production and conservation to achieve the most efficient development and utilisation of natural resources.[304] This is relevant to the scenario in Madagascar with the CESCR warning that damage to food sources is even more serious in developing countries as there is an increased risk of acute hunger and malnutrition,[305] particularly for those 'who depend most closely on natural ecosystems for their material needs.'[306] Therefore, states need to protect 'existing access to land, water, grazing grounds, or forests, all of which may be productive resources essential for a decent livelihood.'[307] The importance of states taking action to protect areas essential for food production is heightened when there is a lack of alternative means to produce or buy food,[308] as was the case in this scenario.

The argument in this section has revealed the value and necessity of the host state protecting the right to adequate food. This is particularly important with people relying on natural resources for food production. Analysing the regulation of the mining project will show why the government failed to protect the right to food.

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[300] *General Comment No 12: The Right to Adequate Food*, UN Doc E/C.12/1999/5 (n 187) paras 15 and 20.
[301] De Schutter, (n 157) para 2.
[302] Ibid; *General Comment No 12: The Right to Adequate Food*, UN Doc E/C.12/1999/5 (n 187) para 25; it should be note that not just this refer to business activities such as the QMM mining operation. See UN Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Madagascar*, UN Doc E/C.12/MDG/CO/2 (16 December 2009) para 12, where the CESCR notes land acquisition by foreign investors has an adverse impact on access to cultivable lands and natural resources for communities living in rural areas.
[303] Ibid paras 23, 42, 43, 44(b) and 52; *General Comment No 12: The Right to Adequate Food*, UN Doc E/C.12/1999/5 (n 187) paras 15, 19 and 27; *General Comment No 14: The Right to the Highest Attainable Standard of Health*, UN Doc /E/C.12/2000/4 (n 50) paras 50 and 51.
[304] *ICESCR* (n 19) art 11(2)(a).
[305] *General Comment No 12: The Right to Adequate Food*, UN Doc E/C.12/1999/5 (n 187) para 5.
[306] John H. Knox, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, on his Visit to Madagascar*, UN Doc A/HRC/34/49/Add.1 (26 April 2017) para 31.
[307] Ibid.
[308] De Schutter, (n 157) para 3.

15 The Host State's Failure to Protect the Right to Food

Comparing the relevant legislation and its enforcement to the UN's recommendations on how the right to adequate food should be protected highlights why the Malagasy government was unable to protect the right. This requires considering the extent to which land reform legislation might have protected the local community's ability to access land for cultivation or ensured appropriate compensation to purchase land of the same quality in a suitable location. In addition, analysis of Madagascar's mining regulation will show why the government was unable to protect natural resources from encroachment by third parties, and in so doing fail to protect the right to food. This will support the argument that Australia should do more to prevent its companies violating human rights when governance is weak and ineffective.

16 Failure to Protect Access to Natural Resources

Analysis has shown that the local community lost access to land for cultivating and received little or no compensation to buy suitable alternative land. This was despite the existence of legislation that may have protected the interests of local farmers. Decree No 98-610 of 13 August 1998 regulated land security tenure and was the first attempt to recognise customary property rights 'for local communities to whom the state had transferred management of natural resources.'[309] This would have formalised land ownership and simplified land access by introducing long-term leases.[310] However, implementation was weak and the law contained no provisions or tenure security for those with customary claims.[311] This meant that those who worked and accessed land but were not formally recognised as the owner, in part due to a process that was so complex, time consuming and expensive as to be inaccessible,[312] continued to be unable to lay claim to land on which they relied for growing food. New legislation was introduced in 2005 as part of a land reform programme that allowed land that was occupied but not registered to be certified as untitled private property. This may have provided a measure of security and tenure to those working farmland in areas set aside for the mining offset program, with the result that they would have received compensation if they were recognised

[309] Huff (n 124) 10.
[310] Ibid.
[311] Huff (n 124) 10-11.
[312] Ibid 10

as the official owners of the land.[313] However, the legislation did not govern 'forest land, protected areas, and land with natural resources subject to special legislation, mineral and hydrocarbon rights or land set aside for planned investment zones.'[314] The lack of protection afforded by this legislation meant that farmers who accessed and cultivated land, but could not attain or prove formal ownership, were unable to claim any kind of compensation when the QMM operation encroached on land they had used and relied upon for growing food.

Rising prices resulting from the mining operation made the purchasing of land even more difficult for local farmers. This was compounded by foreign nationals buying land which further increased prices and reduced the amount of land available for farming. The purchasing of land by foreign nationals was part of a move to facilitate the approval of investment projects[315] and was facilitated by the Law on Investments passed in 2004 under which foreign nationals were permitted to own land of 2.5 hectares.[316] This section now highlights how the creation of an environment more favourable for foreign investment influenced mining regulation and was prioritised over local communities and their access to food.

17 Regulating the Mining Sector to Attract Investment

The World Bank confirmed that foreign investment was needed to realise the mining industry's potential in Madagascar,[317] having concluded that this had not happened due to 'continued state intervention in the sector, cumbersome regulations, and lack of incentives for developing mining operations on an industrial scale.'[318] To promote reform of the mining code in Madagascar, the World Bank funded US$57.35 million over twenty years, with eighty-five per cent of this money to develop 'a more liberal regulatory framework for this industry.'[319] The

[313] It should be acknowledged that even those who could prove ownership of land and received compensation were underpaid for the value of their land.
[314] Huff (n 124) 11.
[315] Ibid.
[316] Ibid. A revision of the law in 2008 allowed 'a perpetual lease up to 99 years.'
[317] Sarrasin (n 123) 390.
[318] World Bank, Project Appraisal Document for a Mining Sector Reform Project, Report No. 17788-MAG, The World Bank, Washington, D.C.; 2 June 1998, 5-6.
[319] Sarrasin (n 123) 389.

goal was to encourage foreign investment[320] but the outcome was to weaken the Malagasy government and its ability to reject investment opportunities.[321]

Without a mining tradition in Madagascar, the government lacked experience in developing a new code,[322] which presented QMM with an opportunity to influence the new legislation. A new mining code was passed in 1999 (Law No. 99-022) which aimed to incentivise investment, improve infrastructure for mine access and open up the sector to international investment.[323] This was part of the government's policy of establishing an 'economic environment conducive to private sector development [and] a quest for foreign investment'[324] and was a direct result of the approach encouraged and facilitated by the World Bank.[325] QMM profited from this liberalisation[326] and 'since its early activities in the country in 1986, it has been at the source of the major reforms within the mining sector.'[327] The Law on Large Scale Mining Investments (Law 2001-031) which 'can undermine local resource access, property rights and tenure security' was largely inspired by the 1998 founding agreement between QMM and the Malagasy government.[328] While negotiating with the government, QMM were simultaneously building legitimacy for their offset program by promoting a narrative that it would prevent environmental damage caused by the local population.[329] The legislation for regulating the mining industry which was encouraged by the World Bank and influenced by QMM, left Madagascar's government lacking power to protect the environment or local communities. The principle driving the regulatory reforms was 'to provide a legal framework favourable to large-scale investments in the mining sector.'[330] The outcome was the 'transfer of social and environmental responsibility from a regulatory state to foreign mining companies.'[331] This loss in governmental authority and power was due to the need to encourage and accept foreign investment. This was recognised by a government official who claimed that 'the decision to

[320] Harbinson (n 115) 7; one legislative example encouraging investment was a Law on Large-Scale Mining Investments which was passed in 2001.
[321] Sarrasin (n 123) 394. For a discussion on the weakening of state power to attract investment see Jens Martens 'The Role of Public and Private Actors and Means in Implementing the SDGs: Reclaiming the Public Policy Space for Sustainable Development and Human Rights' in Sustainable Development Goals and Human Rights (eds Markus Kaltenborn, Markus Krajewski, Heike Kuhn) Springer Open 2020, 209-211, 215.
[322] Ibid 393.
[323] Ibid 392.
[324] Ibid 393.
[325] Ibid.
[326] Bruno Sarrasin, 'Mining and Protection of the Environment in Madagascar' in Bonnie Campbell (ed) *Mining in Africa: Regulation and Development* (Pluto Press, 2009) 150, 166.
[327] Ibid.
[328] Ibid.
[329] Seagle (n 116) 12 and 16.
[330] Sarrasin (n 185) 158-159.
[331] Huff (n 124) 13.

grant the mining permit [to QMM] was made at a senior level before the Environment Ministry had had the opportunity to complete all steps in the assessment process, thus bypassing procedures.'[332] One suggestion for this was that QMM would have wanted 'some kind of assurance'[333] that undertaking the Social and Environmental Impact Assessment would lead to a mining permit being granted.[334] The Minister of Mining also acknowledged the ease with which mining permits had been obtained.[335]

The influence of QMM on legislation together with contradictory laws hampered Madagascar's efforts to regulate. Mining operations were overseen by a 'complex regulatory patchwork that lacks consistent oversight and enforcement mechanisms.'[336] This resulted in confusion and a lack of clarity, with 'different ministries and agencies, often with competing missions'[337] attempting to implement different laws. While the legislative reforms succeeded in enticing foreign investment into Madagascar's mining sector, the contradictory nature of the governance structure has undermined the government's capacity to protect the population and ecosystems.[338] This lack of capacity has contributed to a scenario where mining investors are responsible for their own regulation and adherence to appropriate laws.[339] The result is that the 'interests of local populations are often subordinated to the primary goals of extractive operations'[340] which is why QMM's offset program was deemed more important than the food security of the local population.

As the previous case study highlighted, when a host state is economically dependent on a major resource project, either through acquiring a stake or taxation, it may relinquish its role as an independent arbiter in matters involving environmental and social impact. This is particularly problematic with heightened environmental risks associated with mining projects and underlines the importance of effectively regulating operations. This leaves the governments of developing countries left with choosing between strong and effective regulation of an operation or the much-needed revenue that it may bring. Highlighting the need for investment

[332] Harbinson (n 115) 46.
[333] Ibid
[334] Ibid.
[335] Knox (n 165) para 55.
[336] Huff (n 124) 22.
[337] Sarrasin (n 185) 163.
[338] Huff (n 124) 23; Yvonne Orengo, Tall Tales and Tailings (3 April 2017) suggests Rio Tinto renegotiated or flouted national laws to encroach into the environmental buffer zone < https://theecologist.org/2017/apr/03/tall-tales-and-tailings-truth-about-rio-tintos-rare-earth-mine-madagascar>.
[339] Huff (n 124) 22.
[340] Ibid.

in Madagascar will show that the Malagasy government was in a weak position to reject investment. This supports the argument that when the host state is in need of investment it is not well placed to ensure effective regulation to protect the human rights of its citizens. In this scenario the home state of the subsidiary's parent company should ensure rights are protected.

18 Economic Necessity versus Environmental Protection

The QMM project was driven by demand for ilmenite from North America, Europe and, increasingly, China.[341] As the largest of Madagascar's creditors the World Bank was keen to encourage Foreign Direct Investment as the best way to foster economic growth in the country[342] which was vital as approximately seventy per cent of the population lived in poverty.[343] The project was 'the largest foreign investment in Madagascar's history'[344] and the first of several extraction projects involving the country, the World Bank and the mining sector.[345] This underlines Madagascar's need for investment. The UN acknowledges that while countries will not forego the wealth that comes from mining operations, they should 'allow only activities that respect and protect human rights, especially the rights of those who reside most closely to the activities.'[346] As noted, the reality is different when governments need the foreign investment that mining operations will bring. In short, 'when mining investments and environmental preservation come into conflict, mining wins out.'[347] This is what happened in Madagascar where the desire to attract investment saw policy reforms that 'led to diminution of state power and regulation just when it is most needed for protecting the environment.'[348] Ultimately, the indigenous peoples and local communities paid the heaviest price for these actions.

[341] Seagle (n 116) 3.
[342] Sarrasin (n 123) 389; Harbinson (n 115) 58.
[343] Sarrasin (n 123) 389; Huff (n 124) 17.
[344] Harbinson (n 115) 7.
[345] Ibid.
[346] Knox (n 165) para 38.
[347] Huff (n 124) 23.
[348] Sarrasin (n 185) 166.

19 Conclusion

While host state governments who are a party to human rights treaties have an obligation to protect those rights, they must also have the capacity and will to do so.[349] This case study has provided further evidence that when it comes to mining operations in Africa the capacity and will to regulate is not always present, to the detriment of the local population's human rights. In such scenarios the Australian government needs to make more efforts to regulate the operations of its TNCs, particularly because Australian mining companies have been linked to hundreds of deaths and injuries in Africa alone.[350]

Thus far, this chapter has highlighted how the overseas subsidiaries of Australian mining companies have violated human rights through actions which were damaging to the environment. This has shown the harm caused when regulation in the host state is weak due to laws that are not enforced, outdated or unsuitable for specific scenarios. The next section, while maintaining a focus on Australian TNCs, highlights human rights violations by businesses in their supply chains.

20 The Garment Industry in Bangladesh

The final case study in this chapter focuses on the garment industry in Bangladesh, analysing how Australian companies can become complicit in human rights violations through their supply chain.[351] The industry has seen high-profile human rights violations in Bangladesh, most notably the Rana Plaza factory collapse in 2013 which claimed the lives of 1,136 workers and saw an increased focus on safety within the industry in that country.[352] However, this study examines the economic plight of workers who do not receive a living wage and shows how this constitutes a violation of human rights. Analysis will highlight why domestic legislation

[349] Huff (n 124) 22.
[350] Will Fitzgibbon, Martha Hamilton and Cécile Schilis-Gallego, 'Danger Under Ground', *Sydney Morning Herald*, 11 July 2015.
[351] For a general discussion on the growth of apparel supply chains and their related problems see Sun Hye Lee, Kamel Mellahi, Michael J. Mol and Vijay Pereita, 'No-Size-Fits-All: Collaborative Governance as An Alternative for Addressing Labour Issues in Global Supply Chains' (2020) 162 *Journal of Business Ethics* 291-4.
[352] See Muhammad Mahboob Ali and Anita Medhekar, 'A Poor Country Clothing the Rich Countries: Case of Garment Trade in Bangladesh' (2016) 12(4) *Ekonomika regiona (Economy of Region)* 1178, links US, European and Australian companies to the Rana Plaza disaster. On the Tazreen Fashions factory fire, see Benjamin A Evans, 'Accord on Fire and Building Safety in Bangladesh: An International Response to Bangladesh Labor Conditions' (2015) 40(3) *North Carolina Journal of International Law and Commercial Regulation* 600.

in Bangladesh has failed to protect garment workers and why the risk of complicity in human rights abuses is particularly strong for Australian companies. This will support the argument that the Australian government should do more to prevent TNCs from this country from becoming complicit in human rights violations throughout their operations.

Remuneration is a problem throughout the garment industry[353] and when labour costs grow in one country many companies relocate production to lower-cost markets.[354] This is often encouraged by host states who set minimum wages 'below poverty levels in the pursuit of attracting international business.'[355] Attracting and keeping that business is vital to the Bangladeshi economy[356] with the garment industry employing 4.9 million workers,[357] eighty-five per cent of whom are women.[358] This study analyses the remuneration of garment workers in Bangladesh and demonstrates that the low pay violates their human rights.

21 The Importance of a Living Wage

The living wage is defined as 'sufficient for workers to be able to afford the basics (food, water, healthcare, clothing, electricity, and education) for themselves and their dependents.'[359] Paying a living wage can enable people to lift themselves out of poverty and help ensure other rights.[360] For example, if parents earn a living wage it means their children can get an education, reducing the likelihood of child labour.[361] However, wages are not always calculated on what workers need but usually on what the government or an appointed body

[353] S Nayeem Emran, Joy Kyriacou and Sarah Rogan, *What She Makes* (Report, 2019).
[354] Gershon Nimbalker, Jasmin Mawson, Claire Harris, Meredith Rynan, Libby Sanders, Claire Hart and Megan Shove, 'The 2018 Ethical Fashion Report: The Truth Behind the Barcode' (Baptist World Aid Australia, April 2018) 9 ('*2018 Ethical Fashion Report*').
[355] Ibid 49.
[356] See Kaniz Farhana, 'Present Status of Workers in Readymade Garments Industry in Bangladesh' (2015) 11(7) *European Scientific Journal* 564, 565. See also Ali and Medhekar (n 211) 1178–9, 1182 regarding the decrease in the incidence of poverty and increase in females employed, and 1184 regarding contributing to the country's future economic goals.
[357] *2018 Ethical Fashion Report* (n 213) 9.
[358] Gershon Nimbalker, Jasmin Mawson and Claire Harris, *The 2016 Australian Fashion Report: The Truth Behind the Barcode* (Baptist World Aid Australia, 2016) 24. The Australian Fashion Report for 2013 notes at 11 that it accounts for 80 per cent of the country's exports. See also Shaheen Ahmed, Mohammad Zahir Raihan and Nazrul Islam, 'Labor Unrest in the Ready-Made Garment Industry of Bangladesh' (2013) 8(15) *International Journal of Business and Management* 69 for figures on the growth of exports and employee numbers.
[359] *2018 Ethical Fashion Report* (n 213) 15; see also *ICESCR* (n 19) art 7(a)(ii); Deloitte, A Living Wage in Australia's Clothing Supply Chain (Report Produced by Deloitte Access Economics for Oxfam Australia, September 2017) 18.
[360] *2018 Ethical Fashion Report* (n 213) 15.
[361] Ibid.

determine the market can bear.[362] Bangladesh has a legal minimum wage but it can remain the same for many years and, as it is insufficient for providing basic necessities, it is below the living wage.[363] Indeed, the country's minimum wage has been described as one of the lowest manufacturing wages in the world[364] and a recent report noted that wages would need to be increased seventy-six per cent to provide a living wage for garment workers.[365] Therefore, the cheap production costs that fuelled the industry's rapid growth have also made the country synonymous with human rights violations including low wages.[366] This study now highlights how garment workers and their families are impacted by the denial of a living wage.

Without a living wage, garment workers struggle to provide a nutritious diet for their children with workers on an average wage only able to afford four eggs (the only affordable source of protein) per month for their family.[367] Workers must find other ways to cut costs including living in crowded, sub-standard accommodation with up to ten people sharing a single room.[368] Furthermore, when garment workers do not receive a living wage it intensifies the need to earn more money to meet basic living expenses which can mean working longer hours.[369] Together with unrealistic production targets[370] this scenario can result in people working night shifts following on from day shifts just to receive a basic wage.[371] Analysing the ICESCR, treaty body general comments and other relevant guidance will show how the denial of a living wage

[362] War on Want, *The Living Wage: Winning the Fight for Social Justice* (2013) 16.
[363] Khondaker Golam Moazzem and Saifa Raz, 'Minimum Wage in the RMG Sector of Bangladesh: Definition, Determination Method and Levels' (IDEAS Working Paper Series, RePEc [Research Papers in Economics], 2014).
[364] Nimbalker, Mawson and Harris (n 217) 24; see also Ahmed et al (n 217) 227, which reports that, in 2007, government inspections noted some factories were not paying the minimum wage although it had been agreed the previous year.
[365] Deloitte (n 218) 5. Others suggest a greater increase is needed – see *2018 Ethical Fashion Report* (n 213) 15 which notes the starting salary for a garment worker is US$63 per month but calculations suggest that a living wage would be approximately US$214 per month in the capital Dhaka, and US$177 per month in satellite cities.
[366] Ali and Medhekar (n 211) 1180.
[367] War on Want, *The Living Wage: Winning the Fight for Social Justice* (2013) 12
[368] Ibid. The report also notes that common bathroom facilities are shared with up to 15 other families and cooking areas with up to seven other families.
[369] Ibid notes that 'many [garment workers] are working 10 hours a day, seven days a week – well over the legally stipulated 48 hours for a normal working week, or the maximum 57 hours that are permitted with overtime. These long hours spent in the factory leave little time for any kind of family or social life, or any time for rest.
[370] This will be considered later in the chapter.
[371] War on Want, *Stitched Up: Women Workers in the Bangladeshi Garment Sector* (2011) 4; 5 notes women are more likely to be cheated out of pay, and factories hire single women to avoid workers going on maternity leave. Workers who are pregnant are not informed of their rights to take maternity leave before the birth, or their rights to any paid leave or to return to the same job at the same grade. *General Comment No 24 on State Obligations*, UN Doc E/C.12/GC/24 (n 70) para 9 notes 'Certain segments of the population face a greater risk of suffering intersectional and multiple discrimination. Women are overrepresented in the informal economy and are less likely to enjoy labour-related and social security protections. Furthermore, despite some improvement, women continue to be underrepresented in corporate decision-making processes worldwide. The Committee therefore recommends that States parties address the specific impacts of business activities on women and girls.'

constitutes a violation of the right to an adequate standard of living. This will also highlight how the Bangladeshi government could protect the right.

22 The Living Wage as Fundamental to the Realisation of Rights

A living wage is fundamental to some of the most basic human rights. The right to just and favourable remuneration is set out in two articles of the UDHR[372] and delineated further in the ICESCR which was ratified by Bangladesh in 1998. The ICESCR recognises 'the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: remuneration which provides all workers, as a minimum, with: a decent living for themselves and their families'.[373] Article 11(1) of the ICESCR defines an adequate standard of living as 'including adequate food, clothing and housing, and the continuous improvement of living conditions.'[374] The above scenarios fall short of an adequate standard of living due to conditions of work that are neither just or favourable, violating ICESCR Article 7(a)(ii).

Adequate food, a human right in itself,[375] is another indicator of a decent living. The inability of garment workers to provide a nutritionally balanced meal for their families means they do not have an adequate standard of living due to low wages. Indeed, the CESCR notes that the roots of the problem of hunger and malnutrition is not a lack of food but lack of *access* to available food due to, inter alia, poverty.'[376] This problem has also been identified by the Special Rapporteur on the Right to Food who highlighted widespread malnutrition and poverty in Bangladesh, with levels of malnutrition amongst the highest in the world.[377] This is a failure by the Bangladesh government to protect the right to an adequate standard of living and

[372] Article 23(3) of the declaration refers specifically to the right to just and favourable remuneration to ensure for the worker and their family 'an existence worthy of human dignity' and article 25(1) states that 'everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care'.
[373] *ICESCR* (n 19) art 7(a)(ii).
[374] This has been highlighted further by UN Committee on Economic, Social and Cultural Rights, *General Comment No 23: The Right to Just and Favourable Conditions at Work*, UN Doc /E/C.12/GC/23 (27 April 2016) para 18 ('*General Comment No 23: The Right to Just and Favourable Conditions at Work*') which states that remuneration 'must provide a "decent living" for workers and their families.'
[375] Denial of this right also indirectly impacts the enjoyment of other rights. The right to the highest attainable standard of health is recognised in article 12(1) of the ICESCR and its dependence on other rights, including the right to food, is highlighted in *General Comment No 14: The Right to the Highest Attainable Standard of Health*, UN Doc /E/C.12/2000/4 (n 50) para 3.
[376] *General Comment No 12: The Right to Adequate Food*, UN Doc E/C.12/1999/5 (n 187) para 5. As already noted in this chapter, access to food includes economic access.
[377] Jean Ziegler, *The Right to Food: Addendum Mission to Bangladesh*, UN Doc E/CN.4/2004/10/Add.1 29 October 2003, para 5.

CESCR General Comment 23 expands on how states should protect this and dependant rights. A minimum wage should be 'determined by reference to outside factors such as the cost of living and other prevailing economic and social conditions.'[378] Remuneration must be sufficient to enable the enjoyment of other rights in the Covenant such as an adequate standard of living, including food and housing, for workers and their families.[379] The CESCR also recommends a mechanism for periodically reviewing the minimum wage which should include participation from workers and their representative organizations.[380] In addition, the Committee recommends that the minimum wage 'should be recognised in legislation, fixed with reference to the requirements of a decent living, and applied consistently'[381] with a failure by employers to respect the minimum wage subject to sanctions. Application of the minimum wage should be ensured by, inter alia, labour inspections.[382] While the requirements of a state's economic and social development should be considered it should not be used to justify a minimum wage that does not ensure a decent living for workers and their families.[383] The CESCR has recommended increasing access to food[384] but, as noted, the denial of a living wage restricts access to food for garment workers and their families. The Special Rapporteur on the right to food recommended the need for the government of Bangladesh to increase the focus on access to food by the poorest.[385]

This case study has highlighted the importance of a living wage and its role in fulfilling the right to an adequate standard of living and dependent rights. Analysing recommendations from the CESCR has shown what states should do to protect the right to just and favourable conditions of work, particularly remuneration which provides all workers with a decent living for themselves and their families. It is now important to analyse legislation regulating the garment industry in Bangladesh to understand why the government has failed to protect the

[378] *General Comment No 23: The Right to Just and Favourable Conditions at Work*, UN Doc /E/C.12/GC/23 (n 233) para 18. This is consistent with the ILO Minimum Wage Fixing Convention, 1970 (No. 131) which highlights in Article 3 that in determining a minimum wage, governments should consider the cost of living. Although Bangladesh has not ratified this convention the Declaration on Fundamental Principles and Rights at Work stated that member states should respect and promote core labour standards regardless of ratification.
[379] *General Comment No 23: The Right to Just and Favourable Conditions at Work*, UN Doc /E/C.12/GC/23 (n 233) para 18.
[380] Ibid para 20.
[381] Ibid para 21.
[382] Ibid para 24.
[383] Ibid para 22.
[384] Ziegler (n 236) 3.
[385] Ibid 2-3.

right to an adequate standard of living. This will highlight what the regulation lacks and how, on occasion, the legislation obstructs realisation of the right.

23 The Failure of Regulation to Ensure a Living Wage

While the Bangladeshi minimum wage is demonstrably insufficient for an adequate standard of living, legislation exists which ought to ensure it is at least paid and limits the number of hours worked. The Bangladesh Labor Law (BLL) regulates, inter alia, employment, maternity benefits, working hours and leave, wages, trade unions and workplace inspections.[386] Examining this legislation and its enforcement will highlight the extent to which it promotes or enables the right to just and favourable conditions.

24 Lack of Clarity in the Legislation

The BLL regulates wages in the Bangladeshi garment industry and as such should protect workers' remuneration. However, with the minimum wage set well below the level calculated as required for a living wage, the legislation does not protect garment workers but enforces their economic struggles. Furthermore, the law fails to clearly define the composition of basic salary or salary deductions.[387] While it stipulates that workers providing extra hours of service are entitled to overtime at double the basic wage, the calculation of overtime for workers who are paid a piece rate is not spelled out.[388] The result is that not only are garment workers forced to work excessively long hours to earn enough to meet basic living needs, but they are left open to exploitation and underpayment when they do.[389]

[386] Vishal Sharma, 'Imperfect Work Conditions in Bangladesh RMG Sector' (2015) 57(1) *International Journal of Law and Management* 28.
[387] Ibid.
[388] *Bangladesh Labour Act 2006* (Bangladesh) s 108; Muhammod Shaheen Chowdhury, 'Compliance with Core International Labor Standards in National Jurisdiction: Evidence from Bangladesh' (2017) 68 (1) *Labor Law Journal* 10.
[389] War on Want, *Stitched Up*, (n 230) 4, notes approximately eighty per cent of the women surveyed were working a minimum of 12-hour shifts.

25 Limitation of Earnings Enshrined in Law

Under the BLL, workers are classified into several categories (*badli*,[390] casual, probationer, permanent, apprentice and temporary).[391] This legislates for the employment of workers on a temporary or casual basis which is how most workers in Bangladesh are employed: thus, they do not receive the pay and leave benefits of a formal employment contract.[392] This includes maternity benefits, for which a temporary worker with less than six months' service is ineligible.[393] This has led to the creation of informal employment within a formal enterprise.[394] The exclusionary character of labour regulation denies citizens the basic right of guaranteed employment at reasonable wages, as stipulated by the International Labour Organisation (ILO) and the Bangladesh Constitution.[395] Therefore, the BLL fails to protect the right to an adequate standard of living in several ways. The minimum wage, which should be enforced by the act, is insufficient to meet basic needs. Furthermore, the act enables the exploitation of workers by failing to provide clear definitions on the calculation of overtime payments. In classifying workers in a way that denies formal contracts of employment and the associated benefits and job security, the BLL legislates to keep groups of workers at an economic disadvantage. This demonstrates the government's inability to protect the human rights of workers in the garment industry. Given the industry's importance to the Bangladeshi economy, the government is reluctant to strengthen regulation for fear of losing jobs to a country with weaker regulations.[396]

Although the Bangladesh government tried to introduce reform in the labour market by revising the BLL to align its labour market with ILO conventions, it still fails to address serious issues.[397] Factory inspections are sometimes weak, ineffective or susceptible to bribery. The failure of these inspections to ensure compliance with the law has been detrimental to labour conditions in Bangladesh[398] and has been identified as a reason for the country's failure to

[390] A *badli* is a worker who is appointed in the post of a permanent worker or of a probationer who is temporarily absent.
[391] *Bangladesh Labour Act 2006* (Bangladesh) s 4.
[392] Ibid.
[393] Ibid.
[394] War on Want, *Stitched Up,* (n 230) 5.
[395] Ibid 4. Legislation restricts trade union activity by banning trade union offices within 200 yards of the workplace and preventing activity during work hours: see Sharma (n 245) 3. The *Labor Act* requires thirty per cent membership for the registration of a trade union. It also imposes a three-year ban on strikes at new establishments and factories which owned by or with a foreign partnership.
[396] Evans (n 211) 621; Mans Carlsson-Sweeny, 'How sustainable are Australian retailers' sourcing strategies?' (2012) 4(3) *Journal of Superannuation Management* observes the industry's importance to the economy makes exporters a powerful lobby group when trying to resist increases to the minimum wage.
[397] Sharma (n 245) 6.
[398] Ali and Medhekar (n 211) 1185; Sharma (n 245) 4.

meet international labour standards,[399] and protect workers' human rights. These regulatory shortfalls have seen TNCs become concerned at the risk of being implicated in human rights violations[400] with some buyers highlighting the lack of law enforcement as a problem in terms of social compliance.[401]

Action by workers seeking a living wage led to a government crackdown on strikes and the arbitrary arrest of union leaders,[402] despite the right to organise being enshrined in the ICCPR[403] and in conventions adopted through the ILO.[404] This crackdown on trade union activity is not only a denial of the right to organise but undermines attempts to secure favourable work conditions including renumeration and dependant rights,[405] and it is a further example of the Bangladeshi government taking steps to inhibit the realisation of a living wage. It is important to underline why the denial of a living wage and related human rights violations is a specific problem for Australian companies sourcing garments from Bangladesh. Considering the actions of Australian TNCs and the lack of strength they possess in the Bangladeshi garment industry will highlight the need for the Australian government to encourage adherence to human rights standards.

[399] Chowdhury (n 247) 3.
[400] McKinsey & Company, *Bangladesh's Ready-Made Garments Landscape: The Challenge of Growth* (2011) 20.
[401] Ibid 13.
[402] Interfaith Center on Corporate Responsibility, *Investor Statement on Bangladesh* (16 May 2013) 1–2 <https://www.iccr.org/investor-statement-bangladesh>. See also Ali and Medhekar (n 211) 1178, which notes other issues contributing to labour unrest. See also Ahmed et al (n 217) 22 and 73–4, which notes dissatisfaction with wages, workplace conditions and time off. See also Human Rights Watch, *Bangladesh: Stop Persecuting Unions, Garment Workers* (15 February 2017) <https://www.hrw.org/news/2017/02/15/bangladesh-stop-persecuting-unions-garment-workers>.
[403] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, (entered into force 23 March 1976) art 22(3).
[404] International Labour Organisation, *Declaration on Fundamental Principles and Rights at Work*, (adopted 18 June 1998) para 2(a); International Labour Organisation, *CO87 - Freedom of Association and Protection of the Right to Organise Convention 1948 (No. 97)*, (adopted 9 July 1948 and entered into force 4 July 1950); International Labour Organisation, *CO98 - Right to Organise and Collective Bargaining Convention, 1949 (No. 98)*, (adopted 1 July 1949 and entered into force 18 July 1951).
[405] Article 15(a) of the Bangladeshi Constitution stating that it is a fundamental responsibility of the state to attain a steady improvement in the standard of living, securing the basic necessities of life, including food, clothing, shelter, education and medical care.

26 The Increased Risk to Australian Companies

Bangladesh is the second biggest importer of garments into Australia, producing almost ten per cent of clothing items sold in this country.[406] However, of the top five importers of textiles and clothing into this country Bangladesh has the lowest wages for garment workers.[407] The actions of Australian TNCs run the risk of contributing to the scenarios described above despite increasing expectations that companies at the top of supply chains work towards eliminating human rights violations throughout the chain.[408] Most Australian retailers are 'at a relatively early stage of ethical sourcing' and lower in the hierarchy (or 'pecking order') than their northern hemisphere competitors.[409] The result is that Australian companies are often left with 'second or third-tier suppliers, increasing the risk of poor product quality as well as sweatshop conditions and associated brand risk.'[410] This puts Australian companies at a comparatively greater risk of complicity in human rights violations.

Without strong and effective host state regulation and the risk of sweatshop conditions that come with their suppliers, companies need to be encouraged to show increased awareness of the demands they make of suppliers. These demands may be experienced more acutely further down the supply chain. For example, when buyers negotiate aggressively for a reduced price less money is available to pay workers a living wage. Similarly, when a company wants an earlier release date for a product this impacts on the hours that workers may have to spend in a factory.[411] Companies can counter these negative impacts further down the supply chain by adopting responsible purchasing practices.[412] However, research shows that uptake is limited

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[406] Deloitte (n 218) 13; https://wits.worldbank.org/CountryProfile/en/Country/AUS/Year/2016/TradeFlow/Import/Partner/by-country/Product/50-63_TextCloth

[407] *2018 Ethical Fashion Report* (n 213) 9.

[408] John Ruggie, *Clarifying the Concepts of "Sphere of influence" and "Complicity"*, UN Doc A/HRC/8/16 (15 May 2008) para 59. The SRSG noted that companies at the top of the chain should have 'explicit policies to protect workers both in the company's direct employment and throughout their supply chain'. See also Fahian Anisul Huq, Mark Stevenson and Marta Zorzini, 'Social Sustainability in Developing Country Suppliers: An Exploratory Study in the Ready-Made Garments Industry in Bangladesh' (2014) 34(5) *International Journal of Operations & Production Management* 610. They note that environmental and social sustainability considerations have become fundamental to purchasing and sourcing decisions. For a discussion of the equal recognition of the dignity of workers throughout the supply chain, see Isabelle Martin, 'Corporate Social Responsibility as Work Law: A Critical Assessment in the Light of the Principle of Human Dignity' (2015) 19 *Canadian Labour and Employment Law Journal* 273.

[409] Carlsson-Sweeny (n 255) 4.

[410] Ibid 22.

[411] Oxfam, *Better Jobs in Better Supply Chains* (Briefing for Business No 5, Oxfam, 2010) 11; see also War on Want, *Stitched Up*, (n 230) 6 for scenarios that could be described as beneficial complicity.

[412] Nimbalker, Mawson and Harris (n 217) 36.

amongst Australian companies.[413] Furthermore, the threat that Australian companies at the top of the supply chain pose to a living wage is shown by data highlighting that only thirty-four per cent of companies are attempting to calculate a living wage.[414] Therefore, with regulation that will protect the rights of garment workers not forthcoming from Bangladesh, Australia needs to do more to ensure its companies are not contributing to human rights violations in the Bangladeshi garment industry.

Transparency in supply chains is a key issue as it 'demonstrates a company's willingness to be accountable to consumers, civil society, and workers', enabling these groups to collaborate to ensure workers' rights are upheld.[415] However, sixty-six per cent of Australian companies surveyed for research for the Ethical Fashion Report do not publish full direct supplier lists[416] and twenty-three per cent do not publish lists of any suppliers.[417] This highlights that a large majority of companies cannot or do not publicly identify all their suppliers. In an environment with little or no transparency this puts the continued violation of garment workers' human rights at significant risk. Furthermore, the introduction of modern slavery legislation in Australia has generated an increased understanding of the risks associated with supply chain sourcing, and this in turn will increase the spotlight and scrutiny on Australian companies and their supply chains.[418]

This lack of transparency creates difficulty in linking products and sometimes brands to a specific factory, or to say with certainty what is happening in a supply chain. However, in Bangladesh violations in this industry are so prevalent that Oxfam have stated that sweatshop factories are the norm and not the exception.[419] Indeed, without supplier knowledge 'there's virtually no way of ensuring that garment workers aren't being exploited' as the risks to human rights in supply chains is substantial when there is less visibility.[420] Therefore, it is not

[413] *2018 Ethical Fashion Report* (n 213) noted that only 27 per cent of companies took steps to use responsible purchasing practices to avoid exerting pressures on the supply chain. While 18.5 per cent of companies had a partial policy, this still left 54.5% of companies with no responsible purchasing policy at all.
[414] *2018 Ethical Fashion Report* (n 213) 15 only 17 per cent of companies could demonstrate that workers, in some part of their final stage of the supply chain were receiving a living wage. Only one in 20 companies demonstrated that all workers at their final stage were being paid such wages.
[415] Ibid 13. See also Danielle Lloyd 'Human Trafficking in Supply Chains and the Way Forward' in John Winterdyk and Jackie Jones (eds) *The Palgrave International Handbook of Human Trafficking* (Palgrave Macmillan, 2020) 825.
[416] *2018 Ethical Fashion Report* (n 213) 7.
[417] Ibid 8.
[418] Amy Sinclair and Justine Nolan, Modern Slavery Laws in Australia: Steps in the Right Direction? Business and Human Rights Journal Vol 5:1 168.
[419] Oxfam Australia, 'K-Mart, Target, Tell Us Where Your Bangladeshi factories Are' (3 May 2013) <https://www.oxfam.org.au/2013/05/k-mart-target-tell-us-where-your-bangladeshi-factories-are/>.
[420] *2018 Ethical Fashion Report* (n 213) 13.

unreasonable to conclude that Australian TNCs are having a detrimental impact on the human rights of garment workers in Bangladesh. This risk has been flagged as an issue by the NGO reports referred to in this chapter and therefore provides further support for the argument that stronger regulation in supply chains is called for, and from the home states of fashion retailers if necessary.

At this stage it is worth noting the role of Special Economic Zones (SEZs) / Economic Processing Zones (EPZs) in Bangladesh's garment industry. As has been highlighted throughout the case studies, developing countries are keen to attract much-needed foreign direct investment. Bangladesh is no exception, aiming to establish 100 SEZs with the goal of achieving economic growth, including in particularly disadvantaged regions of the country.[421] The major incentives some countries offer to companies setting up an operation within EPZs typically includes tax exemptions and duty-free imports and in addition usually sees an exemption from import quotas and the freedom to remit profits.[422] Particularly significant in the evolution of EPZs, and relevant to this case study, is the harnessing of low-cost labour. As a significant attraction to investors, 'it is not uncommon to find that the employment rights of workers, and the right to establish trade unions or to take industrial action, are more limited within the EPZ [than the rest of the host state]'[423] as a means of maintaining this financial incentive. Paradoxically, however, Muchlinski also notes that while restricting labour rights can subsequently disadvantage workers, the rates of pay (and the focus of this case study as a human rights violation) inside EPZs are often higher than those outside.[424] However, while there remains a reluctance from Australian fashion retailers to shine a light on the darkest corners of their supply chains, it is difficult to know with any degree of certainty the extent to which they are violating the right to a living wage. This applies equally to garment factories in Bangladesh, regardless of whether they are located inside or outside an EPZ, or subject to differing legislation guaranteeing levels of remuneration, for as we have seen, even this does not necessarily result in the payment of a living wage in Bangladesh.

The lack of strong regulation supporting a living wage in Bangladesh, the slow uptake of responsible purchasing, and the lack of transparency further underline the risk of complicity

[421] Mohammad A. Razzaque, et al *Promoting Inclusive Growth in Bangladesh Through Special Economic Zones: A Research Paper on Economic Dialogue on Inclusive Growth in Bangladesh* (March 2018).
[422] Peter T. Muchlinski, *Multinational Enterprises & the Law* (Oxford University Press, 2nd ed, 2007) 229.
[423] Ibid. See also *The Financial Express* – September 30, 2019 https://thefinancialexpress.com.bd/trade/epz-labour-act-to-protect-rights-of-workers-owners-1569731945 which provides examples of how this has impacted workers in EPZs in Bangladesh.
[424] Muchlinski (n 422) 230.

that faces Australian companies. Therefore, it is important that the government in this country takes steps to mitigate those risks and create a level playing field for all Australian companies with supply chains in Bangladesh, rather than relying on voluntary action.

27 Conclusion

This chapter has highlighted the complicity of Australian TNCs in human rights violations overseas due to ineffective host state regulation. Voluntary initiatives are not always capable of eradicating human rights violations so the need for stronger regulation remains. The chapter has demonstrated the problem of relying on the government of a host state to protect human rights. When a developing country is reliant on investment, which has eclipsed international aid as the primary source of external capital in developing countries, the host state may offer comparative advantages, in the form of more-relaxed regulation, to attract TNCs.[425] This underlines the predicament for host states faced with the choice of protecting human rights or attracting investment which may enable development.[426] However, despite the CESCR reminding states not to 'prioritise the interests of business entities over Covenant rights without adequate justification'[427] the reality for host states is that it remains an impossible conundrum. This evidence supports the argument that there is a greater role to be played by home state governments. Examining the Guiding Principles highlights the specific actions that Australia could take to prevent its businesses from violating human rights overseas.

[425] Tania Penovic, 'Undermining Australia's International Standing: The Failure to Extend Human Rights Protection to Indigenous Peoples Affected by Australian Mining Companies' Ventures Abroad' *Australian Journal of Human Rights* 11 (1), 2005 73.
[426] Ibid.
[427] *General Comment No 24 on State Obligations*, UN Doc E/C.12/GC/24 (n 70).

Chapter Two: The Mandate of the Special Representative of the Secretary-General

The last chapter highlighted the potential for Australian TNCs to violate economic, social and cultural rights through subsidiaries or supply chains when the host state is unable to regulate businesses effectively. With the law failing to protect human right violations involving businesses, it is necessary to look at how this may be addressed. International initiatives have tried to find ways to encourage or compel greater respect for human rights from businesses but have failed to gather consensus and gain momentum, rendering them ineffective solutions to the problem. Having succeeded in these areas where other initiatives have not, the SRSG's mandate is not only current but a relevant and practical frame of reference in the broad business and human rights debate. Analysing the mandate's guidance to governments on how to prevent corporate complicity in human rights violations will highlight clear steps that can be taken. Key to this research is also an analysis of the role of the home state in international law. This is crucial to this thesis – namely that Australia can and should act to prevent the violation of rights by its companies in their overseas operations.

Analysing international law and the permissibility of home state regulation will clarify the circumstances in which a country may regulate extraterritorially. The chapter also analyses what guidance has come from the most recent initiative aimed at addressing the problem of business and human rights, which will inform consideration later in the thesis of how this might be applied to Australian companies. The research offered in this thesis presents an argument that the Australian government should act to prevent rights violations in these scenarios. This current chapter examines if and how this intervention can be enacted. Because the UN is at the forefront of global efforts to address violations of human rights by businesses,[1] I focus on the UN's most recent initiative in this field, the Guiding Principles.[2] Analysing what has been written about extraterritorial regulation in the Guiding Principles and by UN treaty bodies and law experts will underline that regulating the overseas actions of TNCs is not forbidden under international law. This will demonstrate that extraterritorial regulation to prevent the complicity of TNCs in human rights violations overseas, such as in the scenarios in chapter one, is a course of action that is open to the Australian government. Secondly, the chapter

[1] See Introduction, section 1.6 – Identifying the Solutions.
[2] John Ruggie, *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) ('*Guiding Principles*').

analyses Guiding Principle 3 to identify how directors' duties and disclosure[3] can promote greater respect for human rights by businesses. These two areas will address the regulatory issues identified in the introduction and chapter one. Finally, this chapter details the steps being taken by the Australian government to implement the measures identified in the analysis of Guiding Principle 3. This analysis reveals that the Australian government could do more to prevent the involvement of its TNCs in offshore rights violations, which supports the position of this thesis.

Before examining the Guiding Principles in depth, it is important to consider how the debate about business and human rights at the UN evolved to reach the appointment of the SRSG. Analysing UN initiatives prior to the mandate will highlight their lack of success and the divided opinions the SRSG faced. This will provide context for the approach he took to the mandate and the consensus he sought.

1 United Nations Initiatives in the Field of Business and Human Rights

There have been continual efforts by the UN since the 1970s to address the problem of businesses violating human rights. In 1972 at the request of the Economic and Social Council the Secretary-General appointed a group of 'eminent persons to study the impact of multinational corporations on the world economy.'[4] In 1977 this group, the United Nations Commission on Transnational Corporations, began drafting the United Nations Code of Conduct for Transnational Corporations, which was to be a statement on the international legal obligations of businesses.[5] Despite thirteen years of drafting, the Code of Conduct was not fully adopted by the UN,[6] largely due to insufficient consensus.[7] Since the late 1990s UN initiatives to address the issue of business complicity in human rights violations have continued. The increase in efforts was a response to the growing number of 'consumers, investors, local communities, NGOs, and others [that] started to take note of and call for action regarding human rights violations by businesses.'[8] This was also a reflection of an increase in human

[3] See Introduction, section 1.6.2 – Applying the Guidance to Australian TNCs.
[4] David Weissbrodt and Maria Kruger, 'Human Rights Responsibilities of Businesses as Non-State Actors' in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press, 2005) 315, 318.
[5] Ibid.
[6] Ibid 318–19.
[7] Michael Addo and Jena Martin, 'The Evolving Business and Society Landscape: Can Human Rights Make a Difference?' in Jena Martin and Karen Bravo (eds), *The Business and Human Rights Landscape: Moving Forward, Looking Back* (Cambridge University Press, 2015) 348, 361.
[8] Weissbrodt and Kruger (n 4) 320.

rights discourse in that decade.[9] The UN Global Compact and the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights (the Norms) were developed concurrently shortly before the turn of the millennium. Looking at these two initiatives will highlight the opposing approaches to the issue that were inherited by the SRSG.

The UN Global Compact was launched in July 2000. Companies are invited to subscribe to ten key principles that include human rights, labour standards, environment and anti-corruption.[10] Companies voluntarily undertake to incorporate these principles into their policies and activities, and with participation in the initiative comes a requirement to submit a description of progress.[11] The only penalty for failing to do so is removal from the list of participating companies[12] and the initiative has been criticised as a public relations exercise for corporations.[13] Continued efforts by the UN in this field demonstrate a recognition that the voluntary approach alone does not prevent the violation of human rights by businesses.[14]

Prior to the launch of the Global Compact the issue of business and human rights was receiving attention from other interested parties at the UN. Members of the then Sub-Commission for the Promotion and Protection of Human Rights[15] established a Sessional Working Group in 1998 to renew discussions on a code of conduct for TNCs.[16] In 2003, the Sub-Commission approved the Norms which, while acknowledging the state's primary responsibility to promote respect for human rights and ensure their protection,[17] stated that TNCs had an obligation to secure the fulfilment and protection of human rights within their spheres of influence.[18] This approach was in contrast to the Global Compact's voluntary approach and would have meant the

[9] Juhana Mikael Salojärvi, *Human Rights Redefining Legal Thought A History of Human Rights Discourse in Finnish Legal Scholarship* (Springer, 2020) 188.
[10] 'About the UN Global Compact', *United Nations Global Compact* <https://www.unglobalcompact.org/about>.
[11] Addo and Martin (n 7) 348, 360.
[12] Ibid 360.
[13] Justine Nolan, 'The United Nations' Compact with Business' (2005) 24(2) *University of Queensland Law Journal* 454.
[14] For scholarly writing on the Global Compact see for example Surya Deva, 'Global Compact: A Critique of the U.N.'s "Public-Private" Partnership for Promoting Corporate Citizenship' (2006) 34(1) *Syracuse Journal of International Law and Commerce* 107; Daniel Berliner and Aseem Prakash, 'From Norms to Programs: The United Nations Global Compact and Global Governance' (2012) 6 *Regulation & Governance* 14.
[15] The Sub-Commission, which no longer exists, was a subsidiary of the Commission for Human Rights. The Commission was replaced by the Human Rights Council in 2006.
[16] Addo and Martin (n 7) 357.
[17] UN Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regards to Human Rights*, UN ESCOR, 55th sess, 22nd mtg, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (13 August 2003).
[18] Ibid.

development of a binding instrument on the human rights responsibilities of TNCs.[19] The response to the Norms was divided, however, and while NGOs championed the Norms for their mandatory approach,[20] state support was lacking and business opposition intensified.[21] The then Commission for Human Rights decided not to adopt the draft Norms[22] which had 'brought the discussions on business and human rights within the United Nations to an abrupt stalemate and dispersed the little consensus that had been developed on this subject.'[23] The Commission asked the UNHCHR to conduct an in-depth study on the scope and legal status of existing initiatives and standards relating to corporate responsibilities with regard to human rights.[24] On receipt of the study[25] the Commission created a mandate for the SRSG to identify standards of corporate responsibility, document best practices of states and corporations, and elaborate on the regulating role of states.[26] However, the divisions and polarised views remained – something the SRSG had to overcome to avoid another failed initiative. Analysing the SRSG's approach to the mandate will highlight how he sought to build consensus and avoid alienating opposing viewpoints,[27] succeeding where others had failed.

2 Developing an Inclusive Mandate

The previous section highlighted that UN initiatives to prevent the complicity of businesses in human rights violations failed to find an agreed approach. The SRSG recognised the need to move beyond the stalemate inherited from the Norms and prevent them from becoming a

[19] Addo and Martin (n 7) 362.
[20] Radu Mares, 'Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress' in Radu Mares (ed.), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff Publishers, Leiden, Boston 2012) 1, 9.
[21] Ibid 9.
[22] UN Commission on Human Rights, *Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights*, UN ESCOR, 60th sess, Res 2004/116, UN Doc E/CN.4/2004/127 (20 April 2004) ('*Responsibilities of TNCs*'); see 'United Nations Sub-Commission Norms on Business & Human Rights: Explanatory Materials', *Business & Human Rights Resource Centre* <http://business-humanrights.org/en/united-nations-sub-commission-norms-on-business-human-rights-explanatory-materials>.
[23] Addo and Martin (n 7) 363. For further reading on the Norms see Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006) 225–37.
[24] *Responsibilities of TNCs*, UN Doc E/CN.4/2004/127 (n 22).
[25] 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*, UN Doc E/CN.4/2005/91 (15 February 2005).
[26] UN Commission on Human Rights, *Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc E/CN.4/RES/2005/69 (20 April 2005).
[27] John H Knox, 'The Ruggie Rules: Applying Human Rights Law to Corporations' in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff Publishers, Leiden, Boston 2012) 51, 53.

distraction.[28] The SRSG examined the commentaries and concluding observations of human rights treaty bodies,[29] the main international accountability and monitoring mechanism for the implementation of treaties.[30] He concluded that international law does not generally impose direct duties on businesses related to human rights abuses, except in the most egregious cases.[31] Therefore, non-state actors are bound indirectly under domestic law.[32]

Having underlined that he would not attempt to resurrect the Norms, the SRSG aimed to bring the different sides together by adopting an inclusive approach.[33] This saw extensive consultations with a cross-section of stakeholders including 'States, non-governmental organizations, international business associations and individual companies, international labour federations, United Nations and other international agencies, and legal experts.'[34] The consultations and visits spanned five continents and a variety of sectors, and included discussions with communities negatively impacted by business activities.[35] The work was also informed by research papers and legal expert workshops,[36] and the SRSG's aim was to be a focal point where the various efforts could cohere.[37] This led to work which, in keeping with the SRSG's remit, re-stated and clarified international law as it stood, not as it might become,

[28] Ibid 51, 64; John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (W. W. Norton & Company Inc., 2013) 62–5.
[29] For the importance of treaty bodies and general comments, see Philip Alston and Ryan Goodman, *International Human Rights* (Oxford University Press, 2013) 792; Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, 2000) 22, 52.
[30] John Ruggie, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Addendum, State Responsibilities to Regulate and Adjudicate Corporate Activities Under the United Nations Core Human Rights Treaties: An Overview of Treaty Body Commentaries*, UN Doc A/HRC/4/35/Add. 1 (13 February 2007) para 94.
[31] The SRSG noted that, 'while no all-inclusive definition exists, it is generally agreed that [egregious acts] include genocide, war crimes, and such crimes against humanity as torture, extrajudicial killings, forced disappearances, enslavement, slavery-like practices, and apartheid.' Ruggie, *Just Business*, (n 28) 42.
[32] *2006 Report*, UN Doc E/CN.4/2006/97 (n 14) para 68. For a full explanation of this legal issue see August Reinisch, 'The Changing International Legal Framework for Dealing with Non-State Actors' in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press, 2005) 37; Jennifer Zerk, *Multinationals and Corporate Social Responsibility* (Cambridge University Press, 2006).
[33] *2006 Report*, UN Doc E/CN.4/2006/97 (n 14) para 3.
[34] Ibid; Karin Buhmann, 'The Development of the "UN Framework": A Pragmatic Process Towards a Pragmatic Output' in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff Publishers, 2012) 93.
[35] *2006 Report*, UN Doc E/CN.4/2006/97 (n 14) para 3.
[36] John Ruggie, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, UN Doc A/HRC/4/35 (19 February 2007) para 7 ('*2007 Report*'). The SRSG also received substantive written submissions from a number of organisations, including legal firms; the Business Leaders Initiative on Human Rights; NGOs; the International Commission of Jurists; the International Network for Economic, Social and Cultural Rights; the International Organisation of Employers; the International Chamber of Commerce; and the Business and Industry Advisory Committee to the OECD. John Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, UN Doc A/HRC/8/5 (7 April 2008) para 4 ('*Framework Report*').
[37] Ruggie, *Just Business*, (n 28) xliii.

in relation to protecting human rights.[38] This approach brought differing opinions together with the aim of achieving a consensus. Furthermore, by re-stating international human rights law as it is and not as it might become, it shaped the outcomes of the mandate as state-centric and provided guidance that could be acted upon immediately. This underlines further the importance of the Guiding Principles. The chapter now examines the mandate and its outcomes. This will underline the expectations of states and pinpoint specific actions home states can take through disclosure and directors' duties to encourage businesses to respect human rights.

3 The State's Role in Protecting Human Rights

The mandate's first significant outcome was the Protect, Respect and Remedy Framework (the Framework)[39] which comprises three separate but connected pillars for tackling business violations of human rights: the state duty to protect; the corporate responsibility to respect; and the victims' right to access a remedy.[40] The Framework underlined that in international law the state is the protector of human rights within its territory and jurisdiction.[41] The UN Human Rights Council (HRC) unanimously endorsed the Framework and extended the SRSG's mandate with the remit of, inter alia, providing concrete guidance on the obligations of states and responsibilities of businesses.[42] This guidance was developed in the same research-based and consultative manner that characterised the mandate and resulted in the publication of the Guiding Principles.

The Guiding Principles are thirty-one principles, each with a commentary elaborating its meaning and its implications for law, policy and practice.[43] While the Guiding Principles do

[38] *Human Rights and Transnational Corporations*, UN Doc E/CN.4/RES/2005/69 (n 26).
[39] *Framework Report*, UN Doc A/HRC/8/5 (n 36).
[40] For an overview of the reception of the Framework and Guiding Principles, including critical attitudes from NGOs see for example James Harrison, 'An Evaluation of the Institutionalisation of Corporate Human Rights Due Diligence' (Legal Studies Research Paper 2012/18, University of Warwick School of Law, 2012) 3–4. For more critical academic evaluation of the Guiding Principles, see Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martin Nijhoff Publishers, 2012); Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Businesses: Beyond the Corporate Responsibility to Respect* (Cambridge University Press, 2013).
[41] See John Ruggie, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, UN Doc A/HRC/4/35 (n 36) para 10 where the SRSG noted that the duty to protect exists under the core UN human rights treaties and is generally agreed to exist under customary international law.
[42] Human Rights Council, *Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, Resolution 8/7 (18 June 2008).
[43] John Gerard Ruggie, 'The Social Construction of the UN Guiding Principles on Business and Human Rights' (Working Paper No 67, Corporate Responsibility Initiative, Harvard Kennedy School, June 2017) 1–2.

not by themselves create new legally binding obligations, their importance is derived through their endorsement by states and support from other key stakeholders, including businesses themselves.[44] This support underlines the consensus achieved by the Guiding Principles and adds to their importance as a tool to address businesses' violations of human rights. Indeed, while other initiatives were not adopted by the UN and fell by the wayside, the UN began work on promoting the Guiding Principles even before they were formally endorsed. The HRC established an expert Working Group of five members tasked with disseminating the Guiding Principles and promoting their implementation.[45] This chapter will now examine the guidance contained in the Guiding Principles for home states and how corporate regulation, specifically disclosure and directors' duties, can be used by the Australian government to foster corporate respect for human rights overseas. First, it is essential to determine if home states would be contravening international law by regulating extraterritorially. Highlighting the steps available to home states will inform consideration in chapter three of corporate regulation in Australia and if these recommendations can be adopted.

4 Extraterritorial Regulation: The Position in International Law

This section considers whether states can use extraterritorial regulation to prevent companies domiciled in their territory from violating human rights in their overseas operations. This is one of the key regulatory issues identified in the introduction which must be addressed. Examining guidance from the UN, the SRSG's reports, and academic experts will determine the extent to which intervention from the home state to protect human rights is justified.

In the early stages of his mandate in reports to the HRC, the SRSG noted that international law permits a state to exercise extraterritorial jurisdiction provided there is a recognised basis. This includes where the actor or victim is a national,[46] where the acts have substantial adverse effects

[44] Ibid.

[45] UN Human Rights Council, *Resolution 17/4: Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc A/HRC/RES/17/4 (6 July 2011) also notes that the Working Group, a follow-up mechanism to the mandate, was given three years to, inter alia, provide advice and recommendations regarding developing domestic legislation and policies relating to business and human rights and to develop a regular dialogue with governments and relevant actors. The Working Group is still in operation.

[46] Nationality is generally based on place of incorporation, location of registered main office or the principal centre of business: see John Ruggie, *Corporate Responsibility under International Law and Issues in Extraterritorial Regulation: Summary of Legal Workshops*, UN Doc A/HRC/4/35/Add.2 (15 February 2007) para 54; John Ruggie, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Addendum, State Responsibilities to Regulate and Adjudicate Corporate Activities Under the United Nations Core Human Rights Treaties: An Overview of Treaty Body Commentaries*, UN Doc A/HRC/4/35/Add. 1 (13 February 2007) para 87 ('*State*

on the state, or where specific international crimes are involved.[47] Workshops held to inform the mandate concluded that 'many States are moving away from the belief that the use of extraterritorial regulation to hold corporations accountable for overseas abuse is illegal under jurisdictional principles of international law.'[48] Indeed, Ruggie implored governments to recognise that concepts relating to sovereignty have evolved to an extent that international law is unlikely to frown on a state taking reasonable steps to strengthen corporate accountability for abuse in another state.[49] However, while the SRSG acknowledged that 'there are strong policy reasons'[50] for home states to take action to prevent corporate complicity in rights violations abroad, the guidance in Guiding Principle 2 was more non-committal, with the SRSG advising states to 'set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.'[51] In the commentary to Guiding Principle 2 the SRSG noted that, while generally there is no requirement for a state to regulate the extraterritorial actions of businesses from their country, they are not generally 'prohibited from doing so, provided there is a recognised jurisdictional basis.'[52] Therefore, the SRSG sidestepped giving states a clear direction to regulate extraterritorially, merely noting that it was an option that was not prohibited. This conclusion drew criticism from scholars for not reflecting current thinking.[53] Analysing international law and its interpretation by the UN treaty bodies will provide a clearer understanding of when home states can regulate extraterritorially to prevent their TNCs violating human rights in another country.

Responsibilities to Regulate'). The Committee's statements suggest that that the exercise of extraterritorial jurisdiction is not prohibited, in so far as it accords with the Charter of the United Nations and applicable international law. Indeed, the Committee seems to be encouraging states to regulate corporate acts both within and outside their borders.

[47] John Ruggie, *Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, UN Doc E/CN.4/2006/97 (22 February 2006) para 65 ('*2006 Report*'); *2007 Report*, UN Doc A/HRC/4/35 (n 36) paras 15 and 25.

[48] John Ruggie, *Summary of Five Multi-stakeholder Consultations*, UN Doc A/HRC/8/5/Add.1 (23 April 2008) para 14.

[49] Ibid para 58.

[50] *Guiding Principles*, UN Doc A/HRC/17/31 (n 2) Commentary on Principle 2.

[51] Ibid Principle 2.

[52] Ibid Commentary on Principle 2.

[53] Daniel Augenstein and David Kinley, 'When Human Rights 'Responsibilities' Become 'Duties': The Extra-territorial Obligations of States that Bind Corporations' in Surya Deva and David Bilchitz (eds) 'Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?' (Cambridge University Press, 2013) are critical of the avoidance of the language of a legal obligation.

Extraterritorial jurisdiction must meet an overall 'reasonableness' test which includes non-intervention[54] in the internal affairs of other states.[55] The principle of non-intervention is 'founded upon the concept of respect for the territorial sovereignty of states.'[56] As such, it is important to consider what has been written about international law to determine if intervention by the home state of a TNC would be deemed reasonable, allowing Australia to take regulatory action in scenarios such as those discussed in chapter one where its companies threaten or violate human rights overseas. Non-intervention forbids states from intervening 'directly or indirectly in internal or external affairs of other States.'[57] As such, intervention by the home state of a TNC would be prohibited if it had a 'bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely.'[58] However, there is widespread acknowledgement that internationally recognised human rights cannot be considered as belonging exclusively to the national jurisdiction of the territorial State.[59]

Another key factor in determining if extraterritorial regulation would pass the reasonableness test is whether the action would be considered as primarily benefitting the home state, and in doing so extending its national laws.[60] On the contrary, 'in imposing on its corporations acting abroad that they comply with certain requirements derived from the international law of human rights, the home State would be upholding certain values considered essential, and of importance to the whole international community.'[61] This is supported by the fact that the second pillar of the Framework underlined the expectation that businesses respect human rights. Furthermore, a TNC's liability under its home state's law 'could depend on the question whether the act incurring liability would also be unlawful under the laws of the host State or, at least, whether it is not explicitly prescribed under these laws.'[62] In the scenarios in chapter

[54] 'Participants in [the] Brussels [workshop on extraterritorial jurisdiction] agreed that, apart from the principle of non-intervention in the internal affairs of another State, there are no significant international legal impediments to States exercising extraterritorial jurisdiction.': John Ruggie, *Corporate Responsibility under International Law and Issues in Extraterritorial Regulation: Summary of Legal Workshops*, UN Doc A/HRC/4/35/Add.2 (15 February 2007) 3.
[55] *Business and Human Rights*, UN Doc A/HRC/4/35 (n 36).
[56] Malcolm N Shaw, *International Law* (Cambridge University Press, 6th ed, 2010) 1147–8.
[57] Olivier De Schutter, *Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations* (Report to the SRSG, 2006) 28.
[58] Ibid.
[59] Ibid. See also W. Vandenhole 'Towards a Division of Labour for Sustainable Development: Extraterritorial Human Rights Obligations' in Sustainable Development Goals and Human Rights (eds Markus Kaltenborn, Markus Krajewski, Heike Kuhn) Springer Open 2020, 226.
[60] Ibid 27.
[61] Ibid 25. See also August Reinisch, 'The Changing International Legal Framework for Dealing with Non-State Actors' in Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press, 2005) 59.
[62] Olivier De Schutter, *Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations* (Report to the SRSG, 2006) 24–5.

one there was an expectation that the TNCs should not violate human rights. This was evident in the host states being signatories to the ICESCR, even though the human rights were not protected by domestic legislation. Therefore, where the home state is protecting internationally recognised human rights, particularly where a TNC's actions were unlawful or not expressly permitted in the host state, further supports regulation by the home state as it 'may be seen as a means to facilitate the compliance of the host State with its international obligations under the international law of human rights.'[63] As such, regulation to protect 'human rights belongs to the category of forms of extraterritorial jurisdiction which may be justified in the name of international solidarity'[64] and regulatory protection of those rights from the home state 'uphold[s] certain values considered essential to the international community.'[65] This has led to the view that extraterritorial protection of human rights may be seen as decentralised enforcement of international law[66] whereby host states would have difficulty 'justifying their disregard of human rights in rejecting the extraterritorial acts of others.'[67] This argument is strengthened further by the fact that extraterritorial regulation by Australia, in the examples in chapter one, would have protected rights that the host state had obligations to protect. In this scenario where a home state seeks to protect human rights, particularly covenants that both states are states parties to, 'the common rationale would be that the defence of shared substantive interests, protecting human rights, gives additional weight to the exercise of extraterritorial jurisdiction.'[68] This is a strong and valid counter-argument to any suggestion that home state regulation is an extension of their own domestic law and principles.

States can use the active personality principle to adopt legislation with an extraterritorial reach 'which will apply to its nationals even as regards their conduct abroad'[69] on the basis of the nationality of an offender. This approach is particularly relevant and justified where corporations 'have the "nationality" of the forum State, especially where the prohibitions relate to human rights violations.'[70] Furthermore, regulating extraterritorially on the basis of active personality may enable a state to prevent the 'violation of certain fundamental values abroad which would be considered as offences in the forum State.'[71] In other words, if corporations

[63] Ibid 27.
[64] Ibid.
[65] Ibid 25.
[66] Reinisch (n 61) 58.
[67] Ibid.
[68] Ibid 60.
[69] De Schutter (n 62) 23.
[70] Ibid 24.
[71] Ibid.

are forbidden from performing certain actions at home, they should not be allowed to commit the same acts in another country. Therefore, it can be concluded that international law does not prohibit or limit the use of extraterritorial regulation by a home state to ensure that TNCs 'comply with internationally recognized human rights in their operations abroad.'[72] Typically, this means regulating the behaviour of subsidiaries by regulating the parent companies.[73] Chapter three will discuss how this might be achieved and the steps necessary to overcome the separate legal personality of a subsidiary incorporated outside Australia. It is now relevant to analyse UN treaty body comments which will underline the support for extraterritorial regulation in the scenarios highlighted in chapter one.

The conclusions drawn by the CESCR are particularly relevant to this study given the focus on the violations of economic, social and cultural rights in chapter one. In General Comment No 15 the CESCR makes specific reference to states taking 'legal or political'[74] steps to prevent their own companies from violating the right to water of individuals and communities in other countries. As already noted, the threat to the right to water posed by the extractives industry is a real and current issue for Australian companies operating overseas. This comment from the CESCR encourages home states to act to prevent such abuses - an interpretation of the law echoed in subsequent communications from the Committee.

In its *Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights* the CESCR reminded states parties that their Covenant obligations do not stop at territorial borders.[75] States parties were advised that they should 'take steps to prevent human rights contraventions abroad by corporations which have their main offices under their jurisdiction.'[76] This was reiterated in CESCR General Comment No 24 where the committee highlighted that extraterritorial obligations 'follow from the fact that the obligations of the covenant are expressed without any restriction linked to territory or jurisdiction.'[77] This was underlined further by the CESCR's statement that in the spirit of international cooperation and assistance in fulfilling rights it would be contradictory 'to allow

[72] Ibid 28–9.
[73] Ibid.
[74] *General Comment No 15: The Right to Water*, UN Doc E/C.12/2002/11 (n 49) para 33.
[75] UN Committee on Economic, Social and Cultural Rights, *Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights*, UN Doc E/C.12/2011/1 (12 July 2011) para 5.
[76] Ibid.
[77] UN Committee on Economic, Social and Cultural Rights, *General Comment No 24 on State Obligations Under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, UN Doc E/C.12/GC/24 (10 August 2017) para 27 ('*General Comment No 24 on State Obligations*').

a State to remain passive where an actor domiciled in its territory and/or under its jurisdiction … harmed the rights of others in other States, or where conduct by such an actor may lead to foreseeable harm being caused.'[78] Furthermore, the CESCR stated that, while imposing due diligence obligations on companies would impact events in other countries due to the very nature of multinational corporate structures and global supply chains, 'this does not imply the exercise of extraterritorial jurisdiction by the States concerned.'[79] Therefore this is further evidence that Australia could take measures[80] to prevent the complicity of its companies in human rights violations overseas, without contravening international law.

Although the discussion of treaty body comments in this section has focused on the encouragement of extraterritorial regulation within international human rights law, it is worth noting that other treaty bodies are taking the same stance. Considering what the Convention on the Rights of the Child (UNCRC) has said about extraterritorial regulation is relevant for two reasons. Not only does it highlight further UN guidance prompting regulation from home states but, notwithstanding chapter one's focus on economic, social and cultural rights, where communities or workers struggle to access adequate food or water this will also have a detrimental impact on the rights of children in those communities or families.

In General Comment No 16, the Committee on the Rights of the Child (CRC) considered state obligations regarding the impact of the business sector on children's rights and observed that under the Convention states have the obligation to respect and protect children's rights within their jurisdiction. Jurisdiction is not limited to territory and 'in accordance with international law, the Committee has previously urged states to protect the rights of children who may be beyond their territorial borders.'[81] The CRC also stated that the realisation of the Convention's provisions should be of major and equal concern to both host and home states of business enterprises.[82] Furthermore the CRC contended that home states have obligations, arising under the Convention and the Optional Protocols thereto, to respect, protect and fulfil children's rights in the context of businesses' extraterritorial activities and operations, provided that there is a reasonable link between the state and the conduct concerned.[83] A reasonable link is defined

[78] Ibid.
[79] Ibid para 33.
[80] The nature of those measures is highlighted later in this chapter.
[81] UN Committee on the Rights of the Child, *General Comment No 16 on State Obligations Regarding the Impact of the Business Sector on Children's Rights*, UN Doc CRC/C/GC/16 (17 April 2013) 6.
[82] Ibid.
[83] Ibid.

as when a business enterprise has its centre of activity, is registered or domiciled or has its main place of business or substantial business activities in the state concerned.[84]

This section has underlined that since the publication of the Guiding Principles treaty bodies have supported home states taking regulatory action to prevent their companies from violating human rights when operating overseas.[85] Therefore, not only are states permitted to regulate extraterritorially but they are being encouraged to do so by treaty bodies. However, in the absence of a clear international legal obligation, states have refrained from enacting laws to directly regulate the extraterritorial behaviour of their corporate nationals. States have distanced themselves from extraterritorial regulation for fear that too much regulation would put their firms at a competitive disadvantage. The introduction to this thesis highlighted the benefits to companies of clear regulation and clear expectations about their behaviour, and therefore this is a course of action that Australia can and should be taking.[86]

5 The Guiding Principles

The previous section demonstrated that Australia would not be contravening the principles of extraterritoriality in international law by regulating Australian TNCs to prevent complicity in human rights violations overseas. Having argued that this is permissible and presents strengths and benefits, examining the Guiding Principles will highlight how the Australian government can prevent the complicity of Australian TNCs in human rights violations abroad. As already discussed in the introduction, corporate law, specifically directors' duties and disclosure, has an important role in fostering corporate cultures that are more respectful of human rights. Therefore, this section examines how Guiding Principle 3 advises states to act in relation to these two areas of corporate regulation and considers how this guidance has been interpreted to facilitate concrete action. This will inform consideration of the Australian government's actions and whether it is taking steps to implement the recommended guidance. The analysis will also inform consideration in the next chapter of these areas of corporate law in Australia

[84] Ibid 6–7. In keeping with the reasonableness test, the General Comment adds that, when adopting measures to meet this obligation, states must not violate the Charter of the UN and general international law nor diminish the obligations of the host state under the Convention.
[85] For alternative views on extraterritorial jurisdiction see Penelope Simons and Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (Routledge, 2014) 5.
[86] See the introduction for arguments in support of Australia regulating its companies extraterritorially.

and the extent to which the legislation as it currently exists allows the recommendations in the Guiding Principles to be actioned.

Before analysing Guiding Principle 3 in depth it is important to understand the SRSG's thinking on how the Guiding Principles might be most effective, namely maximising leverage by drawing on different governance systems that influence and shape corporate behaviour. The benefits of this approach to corporate regulation will become more apparent in chapter three, which will highlight how the hard law of directors' duties in Australia is connected to intangible assets such as a company's reputation which in itself can be shaped by what a company reports.

6 The Special Representative's Adoption of Polycentric Governance

The Global Compact and the Norms showed that voluntary and mandatory approaches to corporate regulation would not bring all sides of the business and human rights debate together, so the SRSG recognised a different approach to regulation was needed. While still emphasising the importance of legislation and judicial remedies, the SRSG argued that a combination of all available legal and policy tools, a smart mix of measures, was the best way to influence, pressure or compel businesses to respect human rights.[87]

The approach adopted by the SRSG is known as polycentric governance[88] and embraces the need to leverage 'the multiple governance systems that shape the conduct of multinational corporations: public, civil, and corporate.'[89] Public law sets out the formal rules for corporate conduct in the home and host countries of TNCs and in the international sphere,[90] and influences corporate behaviour by imposing penalties for contravening the law. Civil governance involves external stakeholders affected by or with an interest in multinationals and expresses social expectations of corporate conduct.[91] Corporate governance internalises

[87] *Guiding Principles*, UN Doc A/HRC/17/31 (n 2).
[88] See for example Larry Catá Backer, 'From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nations' "Protect, Respect and Remedy" and the Construction of Inter-Systemic Global Governance' (2012) 25 *Pacific McGeorge Global Business & Development Law Journal* 69; Kenneth W Abbott and Duncan Snidal, 'Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit' (2009) 42 *Vanderbilt Journal of Transnational Law* 501; John Gerard Ruggie, 'Reconstituting the Global Public Domain: Issues, Actors, and Processes' (2004) 10(4) *European Journal of International Relations* 499.
[89] John Gerard Ruggie, 'Hierarchy or Ecosystem? Regulating Human Rights Risks of Multinational Enterprises' in César Rodriguez-Garavito (ed), *Business and Human Rights: Beyond the End of the Beginning* (Cambridge University Press, 2017) 11.
[90] *Framework Report*, UN Doc A/HRC/8/5 (n 36) para 18.
[91] Ruggie, (n 89) 12.

features of the other two governance systems and shapes enterprise-wide strategy and policies, including risk management.[92] This can identify risks to a company's global operations, including complicity in human rights violations. Through the Guiding Principles the SRSG sought to create a normative platform 'on which the three governance systems could be better aligned in relation to business and human rights, compensate for their respective shortcomings, and begin to play mutually reinforcing roles out of which significant cumulative change can evolve over time.'[93] As a result, these elements of polycentric governance are incorporated into the Guiding Principles, where the mandatory elements are based on existing legal standards and the principles also promote the potential to regulate more readily with soft-law instruments.[94] This approach helped to shape the Guiding Principles, creating a politically authoritative formula that reflects the respective social roles these governance systems play in regulating corporate conduct.[95]

The greater emphasis on interactions between law and voluntarism[96] means that the SRSG's method creates regulatory opportunities that voluntary or mandatory approaches alone failed to utilise. While a lack of regulation is demonstrably not the answer to preventing human rights violations,[97] utilising soft law has a number of benefits, not least the potential to develop at a less sluggish pace than international or national law.[98] Soft law can also encourage corporations to internalise human rights norms, which can shape the standards of care legally expected of business.[99] This approach is particularly important in the absence of regulation requiring companies to respect human rights in their overseas operations, in those of their subsidiaries, or in their business relationships throughout a company's supply chain. This underlines the need to adopt a mix of measures. The benefits of this approach will become more apparent in

[92] Ibid.
[93] Ibid.
[94] Ruggie, *Business and Human Rights*, UN Doc A/HRC/4/35 (n 36) para 45. Ruggie defines soft law as law that does not create legally binding obligations by itself but derives its normative force through recognition of social expectations by states and other key actors. He describes it as beneficial in charting possible directions for future laws, or to address a particular issue where a legally binding mechanism is not the best tool.
[95] See Ruggie, *Just Business*, (n 28) 39; Justine Nolan, 'From Principles to Practice – Implementing Corporate Responsibility for Human Rights' Jena Martin and Karen E. Bravo (eds), *The Business and Human Rights Landscape: Moving Forward, Looking Back* (Cambridge University Press, 2015) 387, 391.
[96] Radu Mares, 'Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress' in Radu Mares (ed.), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff Publishers, Leiden, Boston 2012) 57.
[97] See Nolan, 'From Principles to Practice' (n 95) 402 notes examples of corporate irresponsibility compiled by Human Rights Watch, which included several in which companies professed to be operating according to a human rights code of conduct. See reports available at 'Business', *Human Rights Watch* (2019) <https://www.hrw.org/topic/business>.
[98] Nolan, 'From Principles to Practice' (n 95) 388.
[99] Halina Ward, *Legal Issues in Corporate Citizenship* (International Institute for Environment and Development, February 2003) iii <http://pubs.iied.org/pdfs/16000IIED.pdf>.

chapter three where the analysis of directors' duties and disclosure will show that hard law and soft law sometimes overlap in the regulation of businesses. Having discussed the thinking and rationale behind the SRSG's approach to the mandate, it is key to this thesis to analyse the actions states should be taking. This requires analysing Guiding Principle 3 to identify the steps available to the Australian government to prevent the complicity of the country's TNCs in rights violations overseas.

7 The Guiding Principles and Corporate Law

The introduction to this thesis noted that corporate law is an under-utilised tool in attempts to prevent the violation of human rights by businesses. This is particularly relevant in the absence of targeted legislation aimed at preventing Australian companies from violating human rights throughout their operations. This thesis has argued that the Australian government should be addressing this governance gap through corporate law, specifically directors' duties and disclosure, and as such it is important to examine Guiding Principle 3, which has the state duty to protect at its core. Guiding Principle 3(a) notes that states should 'enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights',[100] which encapsulates corporate law. Guiding Principle 3(b) and (d) are particularly relevant to directors' duties and disclosure and will be analysed to highlight the actions Australia might take to foster corporate cultures that are more respectful of human rights. This analysis will allow an informed comparison of what is currently happening in Australia and, in the next chapter, the extent to which Australian corporate regulation allows or encourages respect for human rights through directors' duties and disclosure.

8 Directors' Duties and Human Rights

The SRSG used Guiding Principle 3(b) to emphasise the connection between corporate law and human rights, imploring states to ensure that 'laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights.'[101] The commentary to Guiding Principle 3 addresses directors' duties more specifically, as the SRSG noted 'a lack of clarity in corporate and

[100] *Guiding Principles*, UN Doc A/HRC/17/31 (n 2) I.B.3.
[101] Ibid I.B.3(b).

securities law regarding what companies and their officers are permitted, let alone required, to do regarding human rights.'[102] The SRSG expanded on this thought further in the commentary, noting that 'laws and policies in this area should provide sufficient guidance to enable enterprises to respect human rights.'[103] This chapter now explains the connection between directors' duties and human rights, and why considering human rights might be problematic for directors. This discussion will be followed by an analysis of what the SRSG suggested states should do to overcome corporate law problems. This will promote an understanding of how directors' decision-making can impact human rights and provide a context for an analysis in the next chapter of the interpretation of directors' duties in Australian corporate law and the resulting scope for considering a company's human rights impacts.

Directors have a duty to make decisions that are in the best interests of the company and with due diligence and care. This has the potential to allow consideration of the impacts of company actions on, for example, the environment or workers — two areas that the case studies have highlighted can suffer negative consequences if human rights are not considered. However, while directorial decisions may prevent or limit harm to human rights, the decision-making process is not straightforward, as it is framed within the best interests of the company. This leaves directors room for interpretation and a choice between short term profit maximisation on one hand, and a longer-term approach which would protect a company's reputation on the other. The short-term approach has often been at the expense of respecting human rights, while a longer-term approach can be beneficial down the line by avoiding boycotts or reputational damage. The concept of the best interests of the company has provoked much debate in legal and academic circles and the next chapter will look more closely at how this has been interpreted in Australia. This chapter now highlights how different interpretations of the best interests of the company can constrain decisions that respect human rights, before looking at the guidance in the UNGPs to ascertain what states should do.

[102] Ibid I.B.3.
[103] Ibid.

9 Best Interests of the Company

The dominant interpretation of the best interests of the company is the shareholder primacy model[104] which favours short-term profit maximisation.[105] This is facilitated by existing entrenched norms such as executive renumeration and financial market incentives that measure success in terms of shareholder value, encouraging directors to base their decision-making on short-term considerations.[106] Considering a company's social or environmental impacts may mean short-term financial sacrifices even if the benefit is experienced in the longer term through, for example, avoiding lawsuits and reputational damage.[107] This can leave directors uncertain about whether they may consider human rights as part of their decision-making, or whether this would be contrary to the predominant profit-maximising interpretations of corporate law and potentially leave them open to a lawsuit for breach of duties.[108] This uncertainty is a constraint on directors and a widespread issue. The SRSG's corporate law research found that in most jurisdictions there is a lack of clarity about what directors are permitted or required to do regarding consideration of a company's impact on human rights.[109] This finding prompted the SRSG's call for states to clarify what companies and their officers are permitted to do.[110] Therefore, states should examine their corporate regulation to ensure it allows the consideration of human rights impacts and provides the necessary coverage in light of evolving circumstances.[111] This would promote a regulatory environment that is conducive of business respect for human rights. This chapter now considers the actions states can take to achieve this outcome. This analysis can be compared with the current interpretation of directors' duties in Australia in the next chapter to determine whether the Australian government is giving directors enough encouragement to consider human rights.

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[104] See Chapter Three – Interpretations of Directors' Duties in Australia.
[105] Jean Jacques du Plessis, 'Shareholder Primacy and Other Stakeholder Interests' (2016) 34 *Company and Securities Law Journal* 238.
[106] Paul Redmond, 'Corporations and Human Rights in a Globalized Economy: Some Implications for the Discipline of Corporate Law' (2016) 31 *Australian Journal of Corporate Law* 3, 27 ('*Corporations and Human Rights*').
[107] Emily Rumble, 'The Easy Way or the Hard Way: Should Directors Cooperate with Regulators?' (2016) 34 *Corporate & Securities Law Journal* 143.
[108] Shelley Marshall and Ian Ramsay, 'Stakeholders and Directors' Duties: Law, Theory and Practice' (2012) 35(1) *University of New South Wales Law Journal* 304.
[109] John Ruggie, *Human Rights and Corporate Law: Trends and Observations from a Cross-National Study Conducted by the Special Representative*, UN Doc A/HRC/17/31/Add.2 (23 May 2011) ('*Human Rights and Corporate Law*').
[110] *Guiding Principles*, UN Doc A/HRC/17/31 (n 2) I.B.3.
[111] Stephanie Lagoutte, 'The State Duty to Protect Against Business-Related Human Rights Abuses' (Working Paper No 2014/1, Danish Institute for Human Rights, 2014) 18.

There are three main courses of action open to states that would facilitate greater consideration of human rights impacts by company directors. States could give explicit permission for directors to consider human rights impacts; make such consideration a requirement; or provide a safe harbour that protects directors from shareholder action for making decisions that sacrifice short-term profits. Considering these actions in turn will highlight the benefit to human rights of directors having greater clarity in their decision-making and underline the options available to Australia.

States could amend corporate law to give directors explicit permission to consider the human rights impacts of their company's operations and their business relationships more generally.[112] The SRSG said that 'an important next step' would be to make it explicit that 'taking into account a company's impact on society is in keeping with directors' duties to their companies'.[113] This would allow directors to act in accordance with the responsibility to respect human rights, free from any doubt that they were acting inconsistently with their fiduciary duty to the company.[114] The benefit of states adopting this course of action is two-fold. It would encourage boards to establish more extensive oversight of company programs for managing social risks, including human rights,[115] and it would protect directors from possible shareholder claims that they are breaching their duty to the company by straying too far from short-term profit maximisation.[116] However, while a statutory provision would permit directors to consider respect for human rights it may do little to actually promote and encourage its uptake amongst directors,[117] particularly with financial incentives favouring short-term thinking. Furthermore, permission for directors to consider the interests of non-shareholders would need additional guidance.[118] A failure to do so risks different boards reaching different views on when and how to consider non-shareholders and risks producing inconsistent results from a regulatory perspective.[119] The analysis in chapter three will highlight if this has happened and whether Australian directors are clear about what they can take into account.

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[112] Redmond, *Corporations and Human Rights*, (n 106) 27; Paul Redmond, 'Directors' Duties and Corporate Social Responsiveness' (2012) 35(1) *UNSW Law Journal* 317, 332 ('*Directors' Duties*').
[113] Ruggie, *Just Business*, (n 28) 191.
[114] Redmond, *Corporations and Human Rights*, (n 106) 27.
[115] Ruggie, *Just Business*, (n 28) 191.
[116] Peter Muchlinski, 'Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation' *Business Ethics Quarterly* 22 1 (January 2012) 146, 158; Redmond, *Corporations and Human Rights*, (n 106) 27.
[117] Redmond, *Corporations and Human Rights*, (n 106) 27.
[118] Bryan Horrigan, *Corporate Social Responsibility in the 21st Century* (Edward Elgar, 2010) 204.
[119] Ibid.

An alternative to explicit permission would be governments requiring directors to have regard for a wider range of stakeholder interests including the impact of their company's operations on human rights, while still promoting the company's success.[120] This step has been taken in the UK with s 172 of the *Companies Act 2006*, which states that, in promoting the success of the company, directors must have specific regard for the effect of the company's operations on, inter alia, the community and the environment. However, those interests are relevant only to the extent that they promote shareholder interests.[121] This limitation notwithstanding, such a provision requiring directors to consider the human rights impacts of the company's operations 'would contribute significantly to the development of rights-respecting corporate cultures'[122] while remaining true to the criterion for directors' decisions, namely the company's success and shareholder welfare.

It should be noted that, under the shareholder primacy model of corporate law, any consideration of a company's human rights impacts, whether permitted or required, must still be framed within the success of the company.[123] Any action to improve respect for human rights must rely on the business case that respecting human rights is in the best interests of the company. Governments could encourage and incentivise directors to consider their companies' impacts on rights, while still acting in the best interests of the company, by making eligibility for government contracts or support dependent on human rights–related factors such as undertaking sustainability reporting or human rights due diligence.[124] While a detailed examination of these ideas is beyond the scope of this thesis, it is worth noting as an option available to governments to foster corporate cultures that are respectful of human rights, which would also be in keeping with the policy coherence promoted in Guiding Principle 9.

A further option available to states is a safe harbour protecting directors from shareholder action if considering the company's human right impacts reduced profits.[125] This would give company directors the freedom to make informed and rational business judgments to avoid

[120] Redmond, *Corporations and Human Rights*, (n 106) 27.
[121] There is no obligation on directors in the UK to act on their findings, only to consider stakeholders.
[122] Redmond, *Corporations and Human Rights*, (n 106) 27. See also Redmond, *Directors' Duties* (n 112) 336.
[123] This model of corporate law is known as enlightened shareholder value.
[124] John Ruggie, *Business and Human Rights: Further Steps Toward the Operationalization of the 'Protect, Respect and Remedy' Framework*, UN Doc A/HRC/14/27 (9 April 2010) paras 69-71 ('*2010 Report*') paras 31–2; Marcia L. Narine, 'Living in a Material World – From Naming and Shaming to Knowing and Showing: Will New Disclosure Regimes Finally Drive Corporate Accountability for Human Rights?' in Jena Martin and Karen E. Bravo (eds), *The Business and Human Rights Landscape: Moving Forward, Looking Back* (Cambridge University Press, 2015) 219, 249. It should be noted that this would not apply to all industries, but it would be relevant to the garment industries highlighted in chapter one.
[125] Redmond, *Corporations and Human Rights*, (n 106) 27–8.

complicity in human rights violations. If such decisions were to involve profit sacrifice over the short term, such as through ensuring that a living wage was paid in the company's supply chain, or carrying out thorough human rights impact assessments, directors might be at risk of being sued for not acting in the best interests of the company. However, the safe harbour could protect them against legal action if it stipulated that taking a long-term view of a company's success by ensuring respect for human rights was an acceptable under the best interests of the company.[126]

This section has demonstrated that the directors' duty to act in the best interests of the company can shape company conduct to foster respect for human rights at a key stage of decision-making. Directors also have a duty to act with care and diligence[127] and this chapter now examines how states might encourage greater consideration for human rights as part of company due diligence processes.

10 Duty of Care and Diligence

This section examines how a director's duty of care allows consideration of a company's human rights impacts, and how the Guiding Principles suggest states should act to maximise this potential. This will highlight how states can foster greater respect for human rights through uptake of Guiding Principle 3 and maximise the opportunity to foster corporate respect for human rights through directors' duties. The analysis will consider how the guidance in Guiding Principle 3 has been interpreted and what human rights due diligence might entail. This will highlight the existing opportunities for directors to consider human rights within current corporate due diligence structures, while noting where this may fall short and require government guidance. Before analysing Guiding Principle 3 and related interpretation to pinpoint the actions available to states, it is first important to analyse how the directors' duty of care has the potential to incorporate consideration of human rights. This will provide an understanding of why it is important that states act to encourage this course of action from company directors.

[126] Ibid 28. For further reading on this concept see Redmond, *Directors' Duties* (n 112) 336–8.
[127] *Corporations Act 2001* (Cth) s 180(1).

Directors must discharge their duties with the care and diligence that a reasonable person would exercise in the same circumstances.[128] This involves undertaking due diligence to identify, assess and manage any risks the company may face. The SRSG noted the potential to incorporate human rights due diligence[129] into this duty, as part of the risk assessment processes typically already embedded in companies due to legal requirements to assess and manage financial and related risks.[130] This viewpoint has been echoed by others.[131] The obligation in both processes is to collect and utilise information, and engage in risk assessment, reasonable decision-making procedures, monitoring, reporting, and adjustments in corporate policy when and where necessary.[132] However, it should be noted that this is an incomplete overlap. Transactional due diligence may only be required on a one-off basis such as before a merger or acquisition, but the SRSG described human rights due diligence as a 'comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity.'[133] Furthermore, human rights due diligence requires engagement and communication with rights holders, which also sets it apart from commercial due diligence.[134] Therefore, to realise the potential of due diligence in the context of human rights requires a broader focus than that of corporate risk management systems at present.[135]

States have a role to play if human rights due diligence is to become an accepted part of a director's duty of care and diligence, and the United Nations Working Group on Business and

[128] Robert P Austin and Ian M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 16th ed, 2015). This is essentially the same standard imposed upon directors under common law.
[129] John Ruggie, *Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework*, UN Doc A/HRC/11/13 (22 April 2009) para 71 ('*2009 Report*') due diligence is defined as 'a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks.'
[130] *Framework Report*, UN Doc A/HRC/8/5 (n 36) para 56.
[131] Muchlinski (n 116) 150; Jonathan Bonnitcha and Robert McCorquodale, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights' (2017) 28(3) *European Journal of International Law* 899; Redmond, *Corporations and Human Rights*, (n 106) 29.
[132] Lucien J Dhooge, 'Due Diligence as a Defense to Corporate Liability Pursuant to the ATS' (2008) 22 *Emory International Law Review* 455, 470–1.
[133] *2009 Report*, UN Doc A/HRC/11/13 (n 129) para 71. The role of due diligence in preventing human rights violations by businesses is still being emphasised by the UN. *General Comment No 24 on State Obligations*, UN Doc E/C.12/GC/24 (n 77) para 16 states are advised to 'adopt measures such as imposing due diligence requirements to prevent abuses of Covenant rights in a business entity's supply chain and by subcontractors, suppliers or other business partners.' This is reiterated in para 33. Because the list of business partners extends to supply chains, there is an implication that home states could also impose human rights due diligence. This supports the encouragement of extraterritorial regulation by treaty bodies discussed earlier in this chapter.
[134] *2010 Report*, UN Doc A/HRC/14/27 (n 124) paras 84–5.
[135] Redmond, *Corporations and Human Rights*, (n 106) 29; Muchlinski (n 116) 156, 149; Ruggie, *2010 Report*, UN Doc A/HRC/14/27 (n 124) paras 81–3.

Human Rights (UNWG)[136] have suggested that governments could introduce human rights considerations into a company director's legal duty of care in corporate law.[137] Redmond recommends a degree of compulsion to enforce the duty.[138] This could result in the institutionalisation through legal practice of a legally binding duty to observe human rights. It would also lead to greater clarity for those carrying out human rights due diligence, as companies would have to meet standards set up in law to discharge a duty of care.[139] In addition, states could identify specific stakeholder groups for directors to consider which would add clarity to the duty of care and a director's ability to maintain a reputation for high standards of business conduct.[140] It is worth noting that some jurisdictions have already begun to use due diligence to make directors assess issues which can impact human rights. In Canada, due diligence has developed into a basic element of complying with a wide range of environmental, health, safety and other regulations involving strict liability offences, and to exercise due diligence corporate officers must put in place internal corporate systems to prevent violations of regulatory requirements and to minimise their adverse effects.[141]

11 Benefits for Human Rights and Businesses of Conducting Human Rights Due Diligence

Incorporating human rights considerations into existing due diligence mechanisms would prevent human rights violations and would also be beneficial to businesses. The importance of due diligence cannot be understated in identifying human rights risks for businesses. Indeed, the SRSG frequently highlighted the importance of due diligence to his mandate,[142] stating that no single measure would yield more immediate results in the human rights performance of firms than (mandatory) due diligence.[143] It would allow companies to know and show that they respect rights by investigating their business activities and relationships.[144] Companies could

[136] UN Working Group on Business and Human Rights, *The UN Guiding Principles on Business and Human Rights: An Introduction* (Report, 2013). The Working Group is mandated by the HRC to ensure that the UNGPs are widely disseminated, robustly implemented and firmly embedded in international governance.
[137] UN Working Group on Business and Human Rights, *Guidance on National Action Plans for Business and Human Rights* (Version 1.0, 2014) 19.
[138] Redmond, *Corporations and Human Rights*, (n 106) 30.
[139] Muchlinski (n 116) 157.
[140] Ibid 160.
[141] Ibid 157.
[142] See for example *Protect, Respect and Remedy*, UN Doc A/HRC/8/5 (n 39) paras 25, 56; *2009 Report*, UN Doc A/HRC/11/13 (n 129) paras 81–3; *Guiding Principles*, UN Doc A/HRC/17/31 (n 2) 17–19.
[143] *Business and Human Rights*, UN Doc A/HRC/4/35 (n 36) para 77.
[144] *2010 Report*, UN Doc A/HRC/14/27 (n 124) paras 80, 83. See Ruggie, *Guiding Principles*, UN Doc A/HRC/17/31 (n 2) Principle 17 for more detail of what human rights due diligence might include.

identify actual or potential adverse human rights impacts, integrate and act upon the findings, track responses, and communicate how the impacts are addressed.[145] This could include adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships.[146] While some companies have claimed that human rights due diligence leaves them more susceptible to litigation, there are strong arguments that the opposite is true. The SRSG stated that human rights due diligence will only increase the risk of litigation if a company is found to have ignored and failed to act upon prior knowledge, or if it publicly misrepresents the findings of due diligence and this becomes known – the point of due diligence is to learn about the risks and then take action to mitigate them.[147] Therefore, due diligence creates opportunities to mitigate risks and engage meaningfully with stakeholders,[148] thereby placating those who might otherwise begin legal claims or public campaigns.[149] However, the failure to undertake human rights due diligence can and does lead to unwanted consequences. Companies have become aware that failure to identify human rights risks and to minimise them through corporate decision-making can lead to serious and unwanted commercial consequences, particularly in relation to reputation and significant clear-up costs.[150] The failure to undertake human rights due diligence may also expose directors to liability for breach of duties because of loss to the company.[151] Human rights–related risk is a significant material risk, especially for enterprises selling branded goods and services with production outsourced through supply chain arrangements, where a substantial portion of the enterprise's value is represented by intangible assets.[152] This shows the benefit to companies of undertaking and acting upon human rights due diligence and supports the argument that Australia should encourage or compel companies to undertake human rights due diligence for their operations.

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[145] *Guiding Principles*, UN Doc A/HRC/17/31 (n 2) Principle 17.
[146] Ibid Principle 17(a).
[147] *2009 Report*, UN Doc A/HRC/11/13 (n 129) para 82.
[148] Ibid paras 80–3.
[149] Astrid Sanders, 'The Impact of the "Ruggie Framework" and the "United Nations Guiding Principles on Business and Human Rights" on Transnational Human Rights Litigation' in Jena Martin and Karen E Bravo (eds), *The Business and Human Rights Landscape: Moving Forward, Looking Back* (Cambridge University Press, 2015) 288.
[150] Muchlinski (n 116) 156 cautions that, while complicity in human rights violations may present a commercial risk to companies, human rights risk should not be viewed only in the context of corporate profitability. See also 150 where he discusses how to reduce commercial risks resulting from a failure to address human rights due diligence and to reinforce the responsibility to respect human rights as a corporate policy.
[151] Redmond, *Corporations and Human Rights*, (n 106) 30.
[152] Ibid. Redmond argues that such a human rights due diligence standard might develop into an essential element of the duty of care so that there might be a breach of the duty of care when failure of human rights due diligence exposes the company to loss. See also Muchlinski (n 116), who notes that due diligence mechanisms normally create direct duties of care of the entity carrying out such an assessment.

This section has considered the importance of directors' duties in fostering corporate cultures that are respectful of human rights, demonstrating that clarifying those duties could provide an opportunity for directors who wish to consider the human rights impact of their company's actions. In highlighting the potential for a directors' duty of care and diligence to foster corporate cultures that are more respectful of human rights, it was noted that this course of action would provide companies with the opportunity to know and show that they respect human rights. It is therefore important now to consider how companies may show this through their reporting processes. The following section also considers whistleblowing as an alternative method of disclosure if companies are not fully transparent in their reporting. This is particularly important if, for example, due diligence identifies risks which are not acted upon.

12 Disclosure as a Means to Encourage Respect for Human Rights

The last section demonstrated the importance of due diligence and how states might encourage companies to identify and mitigate their negative human rights impacts. It is now relevant to consider how governments can encourage or compel companies to communicate their actions through disclosure.[153] Reporting provides companies with the opportunity to identify and mitigate risks, engage with stakeholders and demonstrate efforts to respect rights, so it is an area of huge importance.[154] However, not all companies are completely transparent in reporting their operations. Accessing information on processes, procedures, acts and decisions has been described as one of the biggest challenges to holding corporations accountable for their human rights impacts.[155] It is important to consider how the UNGPs advise states to address this situation. This analysis will inform a comparison later in this chapter, through an evaluation of the actions being taken by the Australian government. It will also inform consideration in the next chapter of the extent to which corporate regulation in Australia requires human rights reporting.

[153] See the introduction for discussion on the importance of disclosure and its relevance to this thesis. See also Gregory Jackson, Julia Bartosch, Emma Avetisyan, Daniel Kinderman, Jette Steen Knudsen, 'Mandatory Non-financial Disclosure and Its Influence on CSR: An International Comparison' (2020) 162 *Journal of Business Ethics* 323-5.
[154] See Amy Sinclair and Justine Nolan, Modern Slavery Laws in Australia: Steps in the Right Direction? *Business and Human Rights Journal* Vol 5:1 169 for a discussion on the importance of reporting as the final step in identifying, assessing and mitigating risks.
[155] Simons and Macklin, (n 85) 241.

13 Actions States Should Take

To promote greater transparency from companies the Guiding Principles advise that states should 'encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.'[156] The UNWG has considered this subject extensively and suggested courses of action for states. It suggested that governments could clarify their expectations of companies by specifying that they should include information on their human rights impacts, measures taken to address them, and the effectiveness of those measures.[157] In addition states could also consider legally binding reporting requirements on non-financial issues which would include publishing names of companies that have resisted, and sanctions for non-compliance that go beyond reputational sanctions.[158] The SRSG said that securities regulators can impose disclosure rules 'on companies listed in its jurisdiction requiring them to report on certain types or magnitudes of risk in their entire global operations, on the grounds that domestic investors need to be informed about and protected against such risks, no matter where they may be incurred.'[159] This was intended to encourage states to explore the use of disclosure as a means to identify and mitigate human rights–related risks posed by companies' operations. This would provide a common standard for transparency and increase encouragement for companies to engage in human rights due diligence and voluntary initiatives.[160] Reporting could also be extended by requiring parent companies to report on the global operations of the entire enterprise.[161] This would enable greater transparency and consideration of the actions of overseas subsidiaries which see a heightened risk of complicity in human rights violations, as demonstrated in chapter one.[162]

In most jurisdictions, companies must disclose information that is 'material' or 'significant' to their operations and financial conditions, and human rights would be included if it reached that threshold of consideration. However, there is a general lack of guidance about when a human rights–related impact constitutes a material risk. Governments could address this and facilitate the inclusion of human rights–related issues by shaping materiality tests so that human rights

[156] *Guiding Principles*, UN Doc A/HRC/17/31 (n 2) Principle 3(d).
[157] UN Working Group on Business and Human Rights, *Guidance on National Action Plans* (n 137) 21.
[158] Nolan, 'From Principles to Practice' (n 95) 409; UN Working Group on Business and Human Rights, *Guidance on National Action Plans* (n 137) 21.
[159] Ruggie, *Just Business*, (n 28) 109–10.
[160] UN Working Group on Business and Human Rights, *Guidance on National Action Plans* (n 137) 21.
[161] *2006 Report*, UN Doc E/CN.4/2006/97 (n 47) para 71.
[162] For examples of how human rights reporting has been incentivised, see Institute for Human Rights and Business, *State of Play: Human Rights in the Political Economy of States: Avenues for Application* (Report, 2014) 30 which notes that some US states have made eligibility to bid on state procurement contracts dependent on compliance with reporting requirements.

impacts are explicitly identified as areas of risk to be disclosed, and by requiring reporting on efforts to mitigate those risks.[163] This would increase the scope of reporting for businesses as anything considered a material risk would also be considered in financial reporting.[164]

14 Benefits of Reporting

Disclosure is not only useful to stakeholders who wish to be informed of a company's operations but is also directly beneficial to the company itself. Businesses seeking to mitigate human rights–related risks would benefit as reporting guidelines 'increasingly encourage greater awareness of activities in all aspects of the value chain.'[165] Thus the very act of gathering information and compiling reports can increase awareness of what is happening throughout a company's operations, which may identify risks to the company including the potential for complicity in human rights violations. Improved communication not only helps to identify risks in a company's operations; stakeholder engagement can also help prevent disputes from escalating[166] and increased transparency increases investor confidence.[167] Companies also speak and report in terms of the triple bottom line – people, profit and planet – because the market either encourages or requires them to do so[168] and companies indicate that reputation is also a key factor in sustainability reporting.[169]

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[163] *2010 Report*, UN Doc A/HRC/14/27 (n 124) para 66.
[164] *Summary Report: Expert Meeting on Corporate Law and Human Rights: Opportunities and Challenges of Using Corporate Law to Encourage Corporations to Respect Human Rights* (United Nations, 2009).
[165] *Human Rights and Corporate Law*, UN Doc A/HRC/17/31/Add.2 (n 109) para 146.
[166] *Human Rights and Corporate Law*, UN Doc A/HRC/17/31/Add.2 (n 109) para 14. See also Corporations and Markets Advisory Committee, Australian Government, *The Social Responsibility of Corporations* (Report, 2006) para 115 ('*The Social Responsibility of Corporations Report*'), which notes 'the very process by which information is collected and disseminated can focus corporate managers on identifying and dealing with issues' and 'in many cases, companies whose activities touch areas of community concern are themselves putting more effort into explaining their own practices and contributions to the community.'
[167] Jonathan Copulsky and Christine Cutten, *Business Trends 2013* (Deloitte University Press, 2013) <http://cdn.dupress.com/wp-content/uploads/2013/03/2013-SO-Business-Trends_vFINAL.pdf>. The authors recommend integrating environmental, social and governance reporting into their financial reporting to build trust with customers, improve understanding of risk, and enable targeted mitigation when things go wrong. They observe that responsible enterprises attract funding and enjoy a lower cost of capital. See Paul von Nessen, 'Australian Efforts to Promote Corporate Social Responsibility: Can Disclosure Alone Suffice?' (2009) 27.1 *Pacific Basin Law Journal* 31.
[168] For examples, see Robert G Eccles, Ioannis Ioannou and George Serafeim, 'The Impact of a Corporate Culture of Sustainability on Corporate Behavior and Performance' (Working Paper No 12–035, Harvard Business School, 14 November 2011) <http://hbswk.hbs.edu/item/6865.html> which found that, over an 18-year period, sustainable firms outperform traditional firms in stock market and accounting performance.
[169] Narine (n 124) 230. See also Institute for Human Rights and Business (n 565) 22 which notes that current approaches to non-financial reporting that are premised on a 'comply or explain' basis can use investor and civil society pressure to prompt robust disclosures and explanations that will contribute to the development of due diligence thresholds.

This section has highlighted the benefits that transparency can bring to companies such as improving stakeholder engagement, reputation and investor confidence, all while helping a company identify and mitigate risks through the process of gathering information for disclosure.[170] The alternative is stakeholders, including NGOs, investors, activists, consumers, and labour organisations, challenging TNCs in the courts, boardrooms, and increasingly through name and shame campaigns on social media.[171] Therefore, states should take action to improve transparency through greater guidance, as it is not only an important tool in mitigating human rights risks but is also of benefit to companies themselves. However, the benefits outlined above may not be enough to convince every company to disclose what is happening in their operations and so it is important for governments to consider other avenues to increase transparency. While not addressed specifically in the Guiding Principles it is worth noting that whistleblowing could facilitate the desired outcome of increased openness. If companies are reluctant to be completely open about the impact their operations can or have had on human rights, then employees with access to crucial information about the company's operations have the potential to increase transparency through whistleblowing.[172] In so doing, whistle-blowers represent another means of exposing and deterring corporate behaviour which violates human rights.[173] If employees were to be protected or even rewarded for disclosing corporate misconduct it could help to prevent corporate complicity in, or commission of, human rights abuses.[174] Therefore, legislation protecting whistle-blowers could offer a means of holding corporations to account for complicity in human rights violations wherever they have occurred in a company's operations.[175]

This section has highlighted how the SRSG suggested states should address the complicity of businesses in human rights violations and underlined specific actions in the corporate law areas of directors' duties and disclosure. Consideration of treaty body comments has shown that if Australia was to adopt any of the suggested measures it would not be contravening international human rights law. Later in the chapter, there is an analysis of the Australian government's

[170] See also Sinclair and Nolan (n 154) 164, 168.
[171] Narine (n 124) 221.
[172] Jim Apollo Mathiopoulos, Katrina Hogan and Jean Jacques du Plessis, 'Whistleblowing Reforms: A Critical Analysis of the Current Law and the New Bells and Whistles Proposed' (2017) 35 *Company and Securities Law Journal* 261 describe a whistleblower as an organisational insider 'who wishes to raise concerns in order to publicly expose workplace wrongdoing.'
[173] Simons and Macklin (n 85).
[174] Ibid; see also Jason MacGregor and Martin Stuebs, 'The Silent Samaritan Syndrome: Why the Whistle Remains Unblown' (2014) 120 *Journal of Business Ethics* 149-164.
[175] *General Comment No 24 on State Obligations*, UN Doc E/C.12/GC/24 (n 77) para 20 also supports the protection of whistleblowers as a means of helping to realise rights.

efforts to implement the steps highlighted. Firstly, it is important to acknowledge that, while the SRSG has given states guidance on how to regulate companies with the aim of promoting respect for human rights, there have been varied reactions to the mandate and its outcomes. Considering these reactions will acknowledge voices that were not completely supportive of the SRSG and help to give a balanced view of his work.

15 Literature on the Guiding Principles

The involvement of businesses in human rights violations is a complicated and emotive issue and, unsurprisingly, the mandate and the work produced prompted a range of reactions. The SRSG was widely praised for some significant achievements, particularly the removal of any remaining doubt that the state duty to protect human rights covers the activities of businesses.[176] The SRSG has also been praised for his success in achieving some measure of consensus, not least the strong buy-in from companies that had previously disputed the idea they even had human rights responsibilities.[177] Grounding the second pillar, the responsibility to respect, in international human rights standards as laid out in various treaties has provided greater clarity for companies than previous initiatives, where the idea of human rights was more of a moral foundation which lacked the clarity of the SRSG mandate.[178] In advocating for the use of a smart mix of measures, the SRSG created a broader template aimed at leveraging the responsibilities and roles of various social actors, combining legal and other strategies to move markets towards a more socially sustainable path.[179] The result is a mandate that succeeded where other initiatives failed by getting closer to a shared understanding of how businesses should think about at least some of their core human rights responsibilities.[180]

While the SRSG's progress in achieving consensus[181] and taking the discussion forward was recognised, there remained disappointment that the outcome was a soft law instrument that gave TNCs a responsibility, rather than an obligation, to respect human rights. Indeed, with the emphasis on the state's duty to protect rights, the SRSG's work was described as underscoring

[176] Knox (n 27) 51-53.
[177] Chris Albin-Lackey, Without Rules: A Failed Approach to Corporate Accountability (Human Rights Watch, 6 February 2013).
[178] Knox (n 27) 51-53.
[179] Mares (n 96) 2.
[180] Albin-Lackey (n 177).
[181] See also Surya Deva, 'Regulating Corporate Human Rights Violations: Humanizing Business' (Routledge, 2014).

the failures of the current approach, driven by weak government action, and criticised for failing to push governments to ensure corporate respect for human rights.[182]

The SRSG's efforts have come in for criticism and particularly relevant to this thesis is his failure to address serious legal issues surrounding extraterritorial regulation and corporate law.[183] While acknowledging that these areas may have been underemphasised in order to gain the necessary support to move beyond the stalemate he had inherited,[184] commentators have been critical of a continuation of the status quo. This is highlighted by Thabane, who notes that without greater emphasis on action from the home state 'there is a perpetuation of corporate impunity, particularly in the developing world where most multinationals are attracted.'[185] Others have drawn attention to the continued need for greater clarity regarding whether states are obliged to regulate the activities of corporations under their jurisdiction, and the role of the parent company when the subsidiary is responsible for the abuse.[186]

Despite the criticism, the Guiding Principles have swayed governments[187] and the SRSG credits them with influencing binding US legislation such as Dodd-Frank §1502, the conflict minerals provision requiring due diligence related to the Democratic Republic of the Congo,[188] and the law requiring certain companies investing in Burma to disclose steps they have taken to protect human rights.[189] What remains to be seen is the extent to which Australia has implemented the Guiding Principles.

16 Uptake of the Guiding Principles by the Australian Government

In 2014, the UNWG undertook a survey of state actions to implement the Guiding Principles. Despite Australia being a co-sponsor of the resolution endorsing the Guiding Principles, the

[182] Albin-Lackey (n 177).
[183] On the difficulty of regulating due to the structure of corporate law see Muchlinski (n 116) 151–3.
[184] Knox (n 27) 51.
[185] Tebello Thabane, 'Weak Extraterritorial Remedies: The Achilles Heel of Ruggie's "Protect, Respect and Remedy" Framework and Guiding Principles' (2014) 1 *African Human Rights Law Journal* 43, 60.
[186] Daria Davitti, 'Refining the Protect, Respect and Remedy Framework for Business and Human Rights and its Guiding Principles' (2016) 16(1) *Human Rights Law Review* 55.
[187] Center for Human Rights and Global Justice, 'Panel Discussion of John Ruggie's "Just Business: Multinational Corporations and Human Rights"' (New York University School of Law, 4 May 2013).
[188] Narine (n 124) 233–4. Under this legislation companies must conduct due diligence and report whether certain minerals in their products originate from the DRC or adjoining countries. The legislation does not prohibit the use of conflict minerals but seeks to establish the steps a company has used to identify and mitigate risks and improve its due diligence processes. It is a naming and shaming law which may encourage companies to change their behaviour to avoid public opprobrium and investor pressure.
[189] Ibid 230.

responses show that action since then has been underwhelming. The Australian government's response stated that there were no intentions to develop a plan to implement the Guiding Principles [190] and that Australian companies are not required to report on how they address potential or actual adverse human rights impacts.[191] Furthermore, Australian companies operating abroad are not required to report whether or not they have due diligence procedures in place to manage the human rights impacts of subsidiaries.[192]

A response to the UNWG in 2016 on the implementation of a National Action Plan on Business and Human Rights noted that the Australian government had made a commitment to undertake a national consultation on the implementation of the Guiding Principles that year. The response also highlighted that initial consultations had taken place with business and civil society stakeholders and that the government is also undertaking a stocktake of Australian laws, policies and business practices relevant to the Guiding Principles.[193] While this is a positive step, it leaves Australia years behind the progress made by other states in developing a National Action Plan to guide implementation of the Guiding Principles.[194] A stocktake on business and human rights in Australia found that, while there were relevant laws regulating the domestic conduct of corporations, there had been less active enforcement where there was a significant international component of a company's operations.[195]

17 Conclusion

The SRSG's mandate succeeded in gaining buy-in from key stakeholders in business and human rights. The Guiding Principles outline the roles of governments and businesses, highlighting specific actions to protect human rights. This chapter has focused on how directors' duties and disclosure might be utilised to prevent companies from violating human rights throughout their operations. The Australian government's response to the Guiding

[190] Australian Response to UN Human Rights Council Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Questionnaire for States: National Action Plan on Business and Human Rights* (July 2014) Question 5.
[191] Ibid Questions 8 and 10.
[192] Ibid Question 19.
[193] Australian Response to UN Human Rights Council Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Questionnaire for States: National Action Plan on Business and Human Rights* (September 2016) Question 1.
[194] For information on steps other countries are taking to publish a National Action Plan see <https://www.business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans>.
[195] Allens Linklaters, *Stocktake on Business and Human Rights in Australia* (Report, April 2017) 9.

Principles has been underwhelming, leading to inconsistent understanding and engagement from Australian companies.[196] While some companies have made significant investments in human rights, others have not for a number of reasons, including a lack of awareness.[197] It is this lack of awareness that the Australian government can address. The next chapter will analyse corporate regulation in Australia to determine the potential for using directors' duties and disclosure to encourage or compel businesses to respect human rights in their overseas operations.

[196] Ibid 71.
[197] Ibid.

Chapter Three: Corporate Regulation in Australia

The SRSG noted that while corporate law and human rights might generally be thought of as distinct spheres, there was nevertheless an overlap between the two. Indeed, with corporate regulation shaping what companies do and how they do it, he highlighted the possibility of utilising existing legislation to prevent the violation of human rights by companies. This was in keeping with the mandate's remit of not creating new legal obligations. The last chapter analysed specific guidance relating to corporate regulation to demonstrate the potential for its use as a tool to prevent human rights violations. Having also established that extraterritorial regulation is not only permissible under international law and argued that it should be used by the Australian government to prevent corporate complicity in human rights violations overseas, it is important to examine corporate regulation in Australia. This will produce a clear understanding of whether the use of corporate regulation to prevent human rights violations, as envisaged by the SRSG, is a tool that can prevent human rights violation by Australian businesses and their operations overseas. This analysis holds a key imperative: to align disparate parts of law. The separation of corporate and human rights law results in a succession of partial judgements and arguments. Through their alignment, intervention is possible.

This thesis has shown so far that the complicity of Australian TNCs in overseas human rights violations connected to their operations is both an historical and ongoing problem. An analysis of international law showed that while not an obligation, home states are not forbidden from regulating the overseas activities of their TNCs. This course of action is encouraged by some UN treaty bodies, notably the CESCR, which is particularly relevant given the violation of economic, social and cultural rights examined in the case studies in chapter one. The SRSG has described fostering corporate cultures that are more respectful of human rights as a priority area for states,[1] so it is important to identify how this can be done. Chapter two underlined the SRSG's advice that corporate law should provide sufficient guidance to enable corporations to respect human rights.[2] The SRSG's guidance on directors' duties and disclosure pinpoints specific actions that Australia could take to prevent the scenarios examined in chapter one.

[1] John Ruggie, *Business and Human Rights: Further Steps Toward the Operationalization of the 'Protect, Respect and Remedy' Framework*, UN Doc A/HRC/14/27 (9 April 2010) para 19 ('*2010 Report*').
[2] John Ruggie, *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) I.B.3 ('*Guiding Principles*').

Analysing corporate law principles relating to directors' duties[3] and disclosure in Australia will determine the extent to which the SRSG's recommendations in Guiding Principle 3 can be adopted in this country. This will also highlight the extent to which these elements of corporate regulation encourage or allow directors to consider human rights impacts. This will determine if these areas of corporate regulation could have prevented the human rights violations discussed in chapter one, or if amendments or better enforcement is needed to prevent complicity of Australian TNCs in human rights violations overseas. Furthermore, in keeping with the SRSG's advocacy of a smart mix of measures,[4] it is important to identify any soft law factors that might shape or influence corporate behaviour and how they overlap with more formal corporate regulation. This includes non-obligatory reporting and the influence of intangible assets such as a company's reputation on directors' decision making.

To understand the scope that directors of Australian companies have to consider human rights, it is necessary to analyse the findings of two government committees which examined the relationship between corporate regulation and human rights, along with more recent commentary on Australian corporate regulation. This analysis will show how directors' duties are being interpreted in Australia and help inform whether or not the government is utilising corporate regulation to provide companies with meaningful guidance on how to respect human rights.[5] This chapter also considers how reporting requirements encourage businesses to show that they are considering their human rights impacts. Firstly, it is important to provide some background about corporate regulation in Australia to promote an understanding of the legislation and bodies that shape business behaviour.

1 Introduction to Corporate Regulation in Australia

Corporations are regulated in Australia by the Commonwealth Government which has enacted two statutes to this end, the *Corporations Act 2001* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth). These Acts have become known as the corporations legislation.[6] These pieces of legislation were enacted due to the parliaments of Australian states and territories referring legislative power to the Commonwealth Parliament.[7] It is also

[3] The importance of directors' duties to a company's human rights impact is highlighted in chapter one.
[4] *Guiding Principles*, UN Doc A/HRC/17/31 (n 2).
[5] *Guiding Principles*, UN Doc A/HRC/17/31 (n 2) I.B.3.
[6] Robert P Austin and Ian M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 16th ed, 2015) 59–61.
[7] Ibid 59.

important to note the roles of the Australian Stock Exchange (ASX) and the Australian Securities and Investments Commission (ASIC). As co-regulators of companies that wish to have their shares and other securities quoted on the ASX stock market, these bodies prescribe standards for companies admitted to the Official List of the Exchange and police those standards,[8] including those in the ASX Listing Rules. Examining these standards will identify any opportunities or requirements for Australian companies to consider and/or report on their human rights impacts.

It is not only legislation that can influence behaviour: as noted in chapter two the SRSG advised states to adopt a smart mix of measures to encourage or compel businesses to respect human rights. Transnational private governance incorporates a number of actors, instruments and mechanisms such as industry codes of conduct, and is expressed principally in soft law.[9] It is driven by responsiveness to societal expectations[10] and the sanctions that globalisation imposes on corporate stakeholders,[11] such as consumer boycotts or shareholder activism.[12] Governance systems beyond corporate law can not only provide a context for the operation of legal norms, but in many situations are equally powerful moderators of corporate conduct.[13] Such measures are relevant to this chapter as they have the potential to work in tandem with corporate law when considering the best interests of the company and as such this chapter considers the ASX Corporate Governance Principles and Best Practice Recommendations, which companies may report against.[14]

Having provided a background to the framework that regulates the conduct of Australian companies, it is important to consider directors' duties. The relevance of directors' duties to human rights was discussed in the introduction and chapter two analysed the specific actions governments might take to encourage greater corporate respect for human rights. This chapter will consider Australia's corporations legislation and how it is currently implemented in this country. This will highlight the scope that companies have to respect human rights in their

[8] Ibid.
[9] Paul Redmond, 'Corporations and Human Rights in a Globalized Economy: Some Implications for the Discipline of Corporate Law' (2016) 31 *Australian Journal of Corporate Law* 5 ('*Corporations and Human Rights*') 10.
[10] The corporate responsibility to respect human rights is one such soft law mechanism shaped by societal expectations.
[11] Redmond, *Corporations and Human Rights*, (n 9) 10.
[12] Sarala Fitzgerald, 'Corporate Accountability for Human Rights Violations in Australian Domestic Law' (2005) 11(1) *Australian Journal of Human Rights* 14.
[13] Redmond, *Corporations and Human Rights*, (n 9) 4.
[14] ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (February 2019).

operations and determine if the Australian government needs to do more to promote and encourage this respect. These findings will inform consideration and recommendations in the conclusion of what Australia might do to foster greater corporate respect for rights through corporate regulation.

2 Directors' Duties

Directors have the power to make decisions effecting their company and its operations.[15] These decisions are wide ranging in their impact, with the potential to impact shareholders and a range of other stakeholders such as employees, consumers or the community where a company operates. As demonstrated in chapter one, company actions, a result of directors' decisions, can impact the human rights of those stakeholders. While avoiding the violation of human rights would not seem like a moral or ethical dilemma, the decision-making process for directors is not so straightforward. Company directors are given certain legal discretions, directors' duties, to balance the power of their office. The *Corporations Act 2001* (Cth) stipulates that directors must exercise their power and discharge their duties in good faith in the best interests of the corporation[16] and with reasonable care and diligence[17] for the purposes for which they were conferred.[18] Failure to do so could see a director subject to civil or criminal penalties.[19] Examining how directors' duties and the best interests of the company are interpreted will show that considering a company's human rights impacts would not be contradicting the original intention of the duty.

[15] *Corporations Act 2001* (Cth) s 198A.
[16] *Corporations Act 2001* (Cth) s 181(1)(a). See *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* where the court expressed the view that there was no material difference between acting in the interests of the company and acting in the *best* interests of the company. This supports the argument put forward in this chapter that directors may consider the human rights impact of their company's operations as being in the company's interests.
[17] *Corporations Act 2001* (Cth) s 180(1).
[18] Ibid s 181(1)(b).
[19] Ibid s 182(1). Where it has been proved that there has been a contravention of a corporation/scheme civil penalty provision, the court may seek a declaration of contravention. ASIC can then seek a pecuniary penalty order, a disqualification order or a compensation order (see *Corporations Act 2001* (Cth) s 1317J). Where a director breaches their duty by being reckless or intentionally dishonest, they may be fined up to $220,000, or imprisoned for up to five years, or both (*Corporations Act 2001* (Cth) sch 3).

3 The Best Interests of the Company

The stipulation that directors act in the best interests of the company recognises that those interests may diverge, with the result that a director may place their own self-interest ahead of benefit to the company.[20] Acting in the best interests of the company means that directors are under a duty not to promote personal interest by making or pursuing a gain in circumstances in which there is a conflict, or a real possibility of a conflict, between their personal interests and those of the company.[21] As such, 'the main function of directors' duties is to ensure the loyalty of directors to their company.'[22] This enables a balance between keeping directors accountable to the interests of the company while allowing them discretion to make decisions which inevitably involve a degree of risk.[23] This demonstrates that the historical intention behind the directive to act in the best interests of the company was to prevent directors prioritising personal gain, thus ensuring directors make decisions for the good of the company rather than themselves. As such, considering the impact of a company's operations on human rights would not be contrary to the historical intention of directors' duties, namely preventing personal gain at the expense of the company. However, what constitutes the best interests of the company remains open to interpretation. Examining those interpretations will underline the difficulty facing directors in their decision-making and highlight if the government needs to act to clarify the scope for Australian companies to consider their human rights impacts.

There are two interpretations of what constitutes the company, whose benefit for which it should be run, and therefore whom directors should consider in their decision-making: the shareholder primacy model and the stakeholder model. The shareholder primacy model argues that the company consists of current members and the decision-making of directors is to maximise wealth for shareholders.[24] The stakeholder model argues that besides shareholders there are other groups that contribute to the success of the company including future members,[25] employees, customers, contractors and the community,[26] and their interests should be considered in corporate decision-making. While it is beyond the scope of this thesis to

[20] Austin and Ramsay (n 6) 418.
[21] Ibid 440–2.
[22] Ibid 418.
[23] Ibid 440–2; Peter Muchlinski, 'Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation' *Business Ethics Quarterly* 22 1 (January 2012) 163.
[24] Jean Jacques du Plessis, 'Shareholder Primacy and Other Stakeholder Interests' (2016) 34 *Company and Securities Law Journal* 238.
[25] Austin and Ramsay (n 6) 446 note that 'the duty of directors is not so much to take into account the interests of future members as one to act for the benefit of existing members having regard to their future interests as well as existing interests.'
[26] Ibid 444–6.

analyse the arguments for or against each model, arguments already considered at some length elsewhere,[27] it is important to consider how the best interests of the company is currently interpreted in Australia. This will demonstrate if there is scope for directors to consider non-shareholders while making decisions in the best interests of the company.

As noted, directors' decisions can impact the rights of a range of stakeholders. However, uncertainty remains amongst directors about what and whom they may consider when managing a company. The SRSG highlighted the need for greater guidance for businesses at this stage of decision making.[28] In the absence of case law or legislation in Australia imposing an obligation on companies to consider the interests of employees, customers, contractors and the community,[29] it is important to draw on interpretations of *Corporations Act 2001* (Cth) s 181(1) to ascertain the scope directors' duties allow for considering human rights. This will inform an understanding of whether or not the current interpretation of directors' duties in Australia could have prevented the rights violations highlighted in chapter one.

4 Interpretations of Directors' Duties in Australia

The Parliamentary Joint Committee on Corporations and Financial Services (PJC) and the Corporations and Markets Advisory Committee (CAMAC) were government bodies tasked with submitting a detailed report on their analysis of the relationship between corporate law and the social responsibility of corporations. The two committees remain the most recent government initiative in Australia examining corporate law and its potential to promote respect for human rights. The reports from the two committees also highlight how the government is interpreting directors' duties. As such, they are an important point of reference in determining the guidance the Australian government is giving company directors and the scope they have to consider company impacts on a range of stakeholders besides shareholders.

In March 2005, CAMAC was asked by the Parliamentary Secretary to the Treasurer to consider and report on the social responsibility of corporations in Australia. This included considering whether the *Corporations Act 2001* (Cth) should be revised to clarify the extent to which

[27] For the foundation arguments in this debate see Adolf A Berle, 'Corporate Powers as Powers in Trust' (1931) 44 *Harvard Law Review* 1049; E Merrick Dodd, 'For Whom are Corporate Managers Trustees?' (1932) 45 *Harvard Law Review* 1145; Adolf A Berle, 'For Whom Managers are Trustees: A Note' (1932) 45 *Harvard Law Review* 1365.
[28] *Guiding Principles*, UN Doc A/HRC/17/31 (n 2) I.B.3.
[29] Austin and Ramsay (n 6) 454.

directors may consider the interests of specific classes of stakeholders when making decisions in the best interests of the company, and if this should be a requirement. CAMAC was also asked to consider if companies should be encouraged to adopt socially and environmentally responsible business practices, and if the *Corporations Act 2001* (Cth) should require companies to report on their social and environmental activities. The findings were published in December 2006 in the report *The Social Responsibility of Corporations*.[30] In June 2005 the PJC resolved to analyse corporate responsibility and triple-bottom-line reporting for incorporated entities in Australia. The PJC was tasked with considering a number of specific areas, including the extent to which organisational decision-makers do and should have regard for the interests of non-shareholders and the broader community; whether the current legal framework governing directors' duties encourages or discourages them from having regard for the interests of non-shareholders and the broader community; whether changes to *Corporations Act 2001* (Cth) s 181(1) are required to enable or encourage regard for these interests; and the appropriateness of reporting requirements associated with these issues. The findings were published in June 2006 in a report titled *Corporate Responsibility: Managing Risk and Creating Value*.[31] The findings of both committees are particularly important to this chapter as they demonstrate how companies in Australia are being guided in interpreting directors' duties and reporting. Furthermore, although the reports of these committees preceded the Guiding Principles, they remain the most recent efforts by the Australian government to consider the potential of directors' duties and disclosure to promote corporate respect for human rights, in keeping with Guiding Principle 3.

The PJC's and CAMAC's interpretations of the *Corporations Act 2001* (Cth) ss 180 and 181 both found that there is sufficient scope for company directors to consider a range of stakeholders if this would contribute to the long-term success of the company.[32] In other words, if avoiding complicity in human rights violations is in the best interests of the company then directors' duties provide an opportunity to mitigate the risk of complicity in violations.[33] This allows for consideration of human rights impacts even if it results in a short-term loss (and a short-term decline in share value for current shareholders), while protecting the long-term

[30] Corporations and Markets Advisory Committee, Australian Government, *The Social Responsibility of Corporations* (Report, 2006) para 115 ('*The Social Responsibility of Corporations Report*').
[31] Parliamentary Joint Committee on Corporations and Financial Services, Australian Government, *Corporate Responsibility: Managing Risk and Creating Value* (2006) vii ('*Corporate Responsibility: Managing Risk and Creating Value Report*').
[32] Ibid 4.34 and 4.59.
[33] Fitzgerald (n 12) 14.

success of the company, which is associated with good reputation, and public and investor confidence. Supporting this view, the PJC highlighted the wording of the *Corporations Act 2001* (Cth), which states that directors must act in the best interests of the corporation, not the shareholders.[34] This means that a decision taken to avoid complicity in human rights violations, and thus to protect a company's reputation, would still be in the interests of the company.[35] The PJC stated that there was nothing in the current legislation constraining directors who wish to contribute to the long-term development of the company by considering its impact on non-shareholder interests, and that any hesitation on the part of Australian corporations in considering their human rights impacts does not arise from legal constraints in the *Corporations Act 2001* (Cth).[36]

Despite arguing against amending the *Corporations Act 2001* (Cth) s 181(1) to specifically permit or require directors to consider stakeholders, CAMAC was clear in its assertion that directors should already be taking environmental and social matters into account when determining the best interests of the company, and that directors may legitimately choose longer-term over shorter-term considerations in particular situations.[37] This highlights that there is scope for directors to consider the human rights impacts of company operations without there being an obligation for them to do so.

The PJC also promoted an enlightened shareholder value[38] interpretation of the law, describing it as the most appropriate perspective for directors to take. This interpretation holds that corporate responsibility 'can contribute to the long-term viability of a company even where [it does] not generate immediate profit.'[39] The PJC also noted that many directors have led their companies towards increased corporate responsibility without facing the shareholder revolts envisaged by those promoting restrictive interpretations of the best interests of the company.[40]

Given developments in the field of business and human rights since the two committees published their reports, particularly the SRSG's mandate, it is worth considering the findings

[34] Allens Arthur Robinson, 'Corporate Law Tools Project: Australia' (2010) 12 demonstrates that Australian courts have stated that they will allow directors considerable discretion in determining whether a decision is in the best interests of the company.
[35] *Corporate Responsibility: Managing Risk and Creating Value Report* (n 31) 44.
[36] Ibid 63. This view was shared by CAMAC which added that the statutory requirements to act in the best interests of the company were sufficiently broad to enable corporate decision-makers to consider environmental and social impacts of their decisions, including changes in societal expectations.
[37] Ibid 21.
[38] See chapter three.
[39] *Corporate Responsibility: Managing Risk and Creating Value Report* (n 31) 52.
[40] Ibid 53.

of the committees. This will highlight if the Australian government is keeping pace with global developments to clarify what directors can consider in the best interests of their company. The corporate law surveys which informed the SRSG's mandate highlighted a lack of clarity about whether directors should consider the impacts of a company's operations.[41] Despite an expectation that companies consider the impact of their overseas operations on non-shareholders,[42] there is a general lack of guidance from governments on how to consider those impacts.[43] The corporate law surveys suggested that guidance could be provided by regulators.[44] However, an amendment to the *Corporations Act 2001* (Cth) to increase guidance and clarity for directors, or a requirement for directors to consider non-shareholders, is unlikely at present as the PJC and CAMAC concluded that amendments to the directors' duties provisions within the *Corporations Act 2001* (Cth) were not required.[45] Furthermore, CAMAC stated a preference for addressing 'irresponsible business activities … through legislation targeted at the mischief in question,'[46] thus favouring legal tools other than corporate law to compel respect for human rights. Thus, in the short term it seems unlikely the Australian government will expand on the guidance given to company directors other than that given by the PJC and CAMAC. Nevertheless, directors in Australia can consider the human rights impacts of a company's operations if they choose, despite the government's reluctance to increase clarity.

The PJC and CAMAC interpreted the best interests of the company according to an enlightened shareholder value approach.[47] This means directors of Australian companies have the scope to consider the interests of stakeholders, provided this does not prejudice shareholder interests. However, the scope of directors' discretion to consider human rights impacts on non-

[41] *2010 Report*, UN Doc A/HRC/14/27 (n 1) paras 37, 39, 43; Mandate of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, *Summary Report: Expert Meeting on Corporate Law and Human Rights: Opportunities and Challenges of Using Corporate Law to Encourage Corporations to Respect Human Rights* (United Nations, 2009).
[42] John Ruggie, *Human Rights and Corporate Law: Trends and Observations from a Cross-National Study Conducted by the Special Representative*, UN Doc A/HRC/17/31/Add.2 (23 May 2011) paras 83-5 ('*Human Rights and Corporate Law*').
[43] Ibid para 80.
[44] Ibid para 122.
[45] *Corporate Responsibility: Managing Risk and Creating Value Report* (n 31) 1, 63; *The Social Responsibility of Corporations Report* (n 30) 5.
[46] *The Social Responsibility of Corporations Report* (n 30) 111. This ignores the fact that there is no legislation targeting complicity by Australian TNCs in human rights violations overseas. The Corporate Code of Conduct Bill 2000 (Cth) was not enacted and was dismissed by some as unworkable and unnecessary. On this Bill see for example Surya Deva, 'Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should Bell the Cat?' (2004) 5 *Melbourne Journal of International Law* 37.
[47] *Corporate Responsibility: Managing Risk and Creating Value Report* (n 31) 59.

shareholders remains a grey area because judicial decisions have not specially addressed the question and corporate law gives little in the way of clear guidance.[48] Even within the constraints of shareholder prioritisation, the guidance and clarity that would result from legislative amendments would be beneficial.[49] Without this guidance the director's discretion is key and, while the *Corporations Act 2001* (Cth) does not inhibit the consideration of human rights impacts, neither does it encourage their consideration. In effect, this means that consideration of a company's human rights impacts remains largely voluntary. With short-term wealth maximisation encouraged through executive remuneration and bonuses, and financial market incentives,[50] any desire to consider human rights impacts may fail due to entrenched norms even if decisions may improve a company's reputation and investor confidence in the company.[51]

This section has shown that the *Corporations Act 2001* (Cth) allows directors to consider the human rights impacts of a company's actions on non-shareholders when making decisions in the best interests of the company. This demonstrates that, in the examples of Australian corporate complicity in human rights violations highlighted in chapter one, company directors would not have been in breach of their duties had they considered, identified and mitigated the risk of violating human rights in their company's operations. While this might have prevented the violations in question, even if the directors were able to overcome the challenges of separate legal personality which are examined later in this chapter, the consideration of human rights impacts is not required or expressly permitted. This results in a continued lack of clarity and guidance about when and to what extent directors should consider their company's impacts on stakeholders. Focusing on the *Corporations Act 2001* (Cth) s 180(1), the next section considers how a director's duty of care and diligence might foster corporate cultures that are respectful of human rights.

5 Duty of Care and Diligence

As well as a duty to make decisions in the best interests of the company, directors must also exercise care and diligence when doing so. According to the *Corporations Act 2001* (Cth) s

[48] Redmond, *Corporations and Human Rights*, (n 9) 26.
[49] Ibid 25–7, notes that the argument for shareholder value looks very different in the global economy with no political sovereign, where power is dispersed among weakened national actors and economic activity shifts to sites where social protection is weakest, and where social costs can most easily be externalised.
[50] Redmond, *Corporations and Human Rights*, (n 9) 27.
[51] Allens Arthur Robinson (n 34) 12.

180 a director 'must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise' in the same circumstances and with the same responsibilities.[52] This obligation may present an opportunity for directors to consider the human rights impacts of their company's operations.[53] Examining how the duty of care and diligence has been shaped by rulings in Australia will determine the extent to which directors of Australian companies must consider the human rights impacts of their company's actions. This will inform consideration of the extent to which corporate regulation in Australia promotes respect for human rights in keeping with the guidance laid out in UNGP3.

In the Federal Court case of *Australian Securities and Investments Commission v Cassimatis (No 8)*[54] Edelman J noted that:

> a corporation has a real and substantial interest in the *lawful* or *legitimate* conduct of its activity independently of whether the illegitimacy of that conduct will be detected or would cause loss. Corporations have reputations, independently of any financial concerns, just as individuals do. It would be hard to imagine examples where it could be in a corporation's interests for the corporation to engage in serious unlawful conduct even if that serious unlawful conduct was highly profitable and was reasonably considered by the director to be virtually undetectable during a limitation period for liability.[55]

Edelman J's judgment underlined the importance of legal compliance for companies, and clarified that companies' interests are not limited to finances but include their reputation.[56] Further, an economically justifiable decision, such as releasing a large amount of toxic waste, could still result in a breach of the *Corporations Act 2001* (Cth) s 180 by the director(s) even if the cost of disposing of it lawfully outstripped the cost of a penalty.

This underlines that directors should avoid activities that are unlawful even if they are cost-effective and result in a short-term financial benefit. Indeed, the decision indicates that a failure to avoid such activity could be considered a breach of a director's duty of care. The judgment also highlights the value of a company's reputation and the importance of not damaging this

[52] *Corporations Act 2001* (Cth) s 180 (1)(a) and (b).
[53] Muchlinski (n 23) 146 notes that due diligence mechanisms normally create direct duties of care upon the entity carrying out such an assessment. Therefore, this area of directors' duties could create an obligation to respect the human rights of stakeholders.
[54] [2016] FCA 1023.
[55] Ibid [482].
[56] Reputation is one of the drivers of CSR identified in *Corporate Responsibility: Managing Risk and Creating Value Report* (n 31).

by, for example, engaging in illegal activities. A parent company's reputation can also be damaged when a subsidiary receives unwanted attention. For example, the share price for Paladin Energy fell in Australia as a result of PAL's involvement in litigation in Malawi.[57] In highlighting the need for directors to consider not only the legality of their company's actions but also the impact of those actions on a company's reputation, this decision has significant implications for company directors and their decision-making in relation to human rights. Complicity in human rights violations can damage a company's reputation.[58] In underlining the importance of companies not breaking the law, even if this is profitable, the decision also highlights the value of a company's reputation. With the decision stating that maintaining a good reputation is in a company's interests it allows scope for directors to consider their company's impact on human rights to mitigate the risk of reputational damage.

The ruling in *Australian Securities and Investments Commission v Cassimatis* encourages directors, in executing their duty of care and diligence, to consider whether the company's actions are lawful, and the impact the actions might have on the company's reputation. The relevance of this case to this thesis is increased by Edelman J's statement that identified the reputational risk to the company of breaking the law by releasing toxic waste into the water supply. This is a similar scenario to the PAL case study in chapter one, where a water supply was damaged by the company's actions. Likewise, the involvement of Rio Tinto in the QMM operation in Madagascar, and Australian fashion retailers with supply chains in Bangladesh, has led to negative stories and reports that have caused reputational damage.[59] Therefore, a director's failure to exercise care and diligence can be harmful to the company if this leads to complicity in human rights violations and subsequent reputational damage.[60] The judgment provides a window for directors to consider the impact of their company's actions on human

[57] Rafiq Hajat, 'Kayelekera and the Uranium Mining Saga in Malawi' in *Towards the Consolidation of Malawi's Democracy: Essays in Honour of the Work of Albert Gisy* (Konrad-Adenauer-Stiftung, 2008) 75, 84.
[58] John Ruggie, *Summary of Five Multi-stakeholder Consultations*, UN Doc A/HRC/8/5 (23 April 2008) Add. 1 para 54 links a company's complicity in human rights violations to subsequent reputational damage by stating that 'in addition to compliance with national laws, the baseline responsibility of companies is to respect human rights. Failure to meet this responsibility can subject companies to the courts of public opinion – comprising employees, communities, consumers, civil society, as well as investors – and occasionally to charges in actual courts.' See Sally Wheeler, 'Global production, CSR and human rights: the courts of public opinion and the social licence to operate' (2015) 19 (6) *The International Journal of Human Rights* 757-778.
[59] See Chapter One footnote 278 for an example of negative publicity.
[60] Redmond, *Corporations and Human Rights*, (n 9) 27 states that the materiality of human rights-related risk is highly significant, particularly for companies selling branded goods and services with a substantial portion of enterprise value represented by intangible assets. While that reputational damage may not be a significant risk for every company such as a smaller company who neither sells on the high street nor has the reputation of a more sizeable company, Hajat (n 43) 84 notes that Paladin was 'directly affected by virtue of adverse publicity generated in Australia, with a resultant fall in its share price on the stock exchange.'

rights, as complicity can lead to reputational damage, which the judgment confirms is not in the company's interests.[61] Directors can exercise care and diligence to prevent complicity in human rights violations and the subsequent risks to the company such as reputational damage, and the potential loss of investor and public confidence that can follow.[62] Therefore, elements of corporate law requiring directors to consider human rights-related risks already exist, albeit with the focus on the company.

While corporate law does not impose a specific duty on directors to avoid reputational damage, a failure to prevent damage to the company's reputation may not only be regarded as a breach of the duty of care and diligence, but may also constitute a breach of the duty to act in good faith and in the best interests of the company.[63] This is demonstrated by Edelman J's statement that, if a company's reputation was damaged due to its actions, this would not be in the company's interests even if it was profitable.[64] It is not inconceivable that shareholder activists[65] or investors could sue the company directors for a breach of duty if failing to consider social and environmental impacts leads to complicity in a human rights violation, impacting both the short-term share price and the long-term benefit of a company's good reputation.[66]

Thus far, this chapter has considered how complicity in human rights violations may constitute a breach of directors' duties. However, the examples of violations in chapter one involved companies incorporated outside Australia and bound by the laws of the country of incorporation. This means it is necessary to analyse means of overcoming separate legal personality so that Australia's corporate regulations will apply to the directors involved in the decision-making process here in this country. Therefore, it is relevant to consider how a parent company in Australia may be considered a shadow director and in so doing have the same obligations to make decisions for the subsidiary with the same care and diligence discussed above. This is particularly relevant as the UNWG suggested that governments could go a long

[61] Redmond, *Corporations and Human Rights*, (n 9) suggests that directors could choose to ignore human rights impacts if the cost of respecting them exceeds the benefit to the company in the short-term, or where the long-term benefit is uncertain, particularly if the company has no public reputation to protect.
[62] Allens Arthur Robinson (n 34) 2. See also Ieke de Vries, Megan Amy Jose, and Amy Farrell 'It's Your Business: The Role of the Private Sector in Human Trafficking' in John Winterdyk and Jackie Jones (eds) *The Palgrave International Handbook of Human Trafficking* (Palgrave Macmillan, 2020) 757.
[63] Allens Arthur Robinson (n 34) 11.
[64] See earlier discussion about the interests of the company and the *best* interests of the company.
[65] For example, Redmond, *Corporations and Human Rights*, (n 9) 41 notes that proposals on environmental and social issues have been the largest single category of shareholder proposals in recent years.
[66] The interests of directors and shareholders may diverge when directors act with insufficient care or diligence in relation to the affairs of the company. The duties of care, skill and diligence are directed to this scenario.

way to addressing human rights violations by ensuring that parent companies are legally responsible for acts conducted by other members of the enterprise they oversee.[67]

6 Overcoming Separate Legal Personality

So far, this chapter has highlighted that the *Corporations Act 2001* (Cth) ss 180 and 181 allows directors of Australian companies to consider the human rights impacts of their operations. However, subsidiaries incorporated in another jurisdiction are regarded as separate legal entities which are subject to the laws of that country. As the case studies of the subsidiaries of Australian companies in chapter one demonstrated, this contributes to a regulatory problem when the host state's regulation is too weak or ineffective to protect human rights. This thesis argues that the Australian government should take more regulatory action to ensure that Australian companies respect human rights throughout their operations, in keeping with the guidance in Guiding Principle 2.[68] However, if the Australian government is to utilise corporate law to this end then separate legal personality must be overcome. This would ensure that Australian TNCs have the responsibility, as directors, to ensure that their subsidiaries act with care and diligence, and in the best interests of the company. This section will now consider how the directors' duties to act with care and diligence in the best interests of the company could be extended to include the subsidiaries of Australian TNCs, focusing on holding the parent company liable as a shadow director, and treating the parent and subsidiaries as one enterprise.

Before discussing if a parent company can be held accountable for the actions of its subsidiaries as a shadow director, it is important to consider the definition of director contained in the *Corporations Act 2001* (Cth) and how this has been interpreted in legal rulings.

In the *Corporations Act 2001* (Cth) s 9 the definition of director includes a person (or body such as another company) who acts 'in the position of director'[69] or a person if 'the directors of the company or body are accustomed to act in accordance with the person's instructions or wishes.'[70] This is applicable even if the person has not been appointed a director, and they will

[67] UN Working Group on Business and Human Rights, *Guidance on National Action Plans for Business and Human Rights* (Version 1.0, 2014) 19, 20.
[68] *Guiding Principles*, UN Doc A/HRC/17/31 (n 2) I.A.2.
[69] *Corporations Act 2001* (Cth) s 9.
[70] Ibid.

still be considered to be one unless the contrary intention appears.[71] Therefore, the definition of director includes shadow directors and de facto directors.[72] Furthermore, it is not necessary that the wishes or instructions of the shadow director embrace all matters involving the board, so even if a subsidiary has a degree of independence from the parent company and makes some independent decisions, the parent may still be considered a shadow director.[73] Therefore, it might be argued that in the examples of PAL and QMM the Australian parent company constituted a shadow director.

Recognising a parent company as a shadow director would create the same expectation on the parent company to act in the best interests of the subsidiary and with due care and diligence[74] as with an appointed director. Therefore, just as an appointed director has scope to consider the human rights impacts of a company's operations while acting with care and diligence in the best interests of the company, this would apply equally to a parent company as shadow director. This means that a failure to act with care and diligence may lead to a parent company being in breach of its directors' duties and, together with the subsidiary, suffering reputational damage.[75] Furthermore, the *Corporations Act 2001* (Cth) s 5(4) provides that 'each provision of this Act also applies, according to its tenor, in relation to acts and omissions outside this jurisdiction.'[76] This underlines that a parent company as shadow director is expected to act with the same due care and diligence in the best interests of the subsidiary company as would an appointed director, even if that subsidiary was incorporated outside Australia. However, it should be acknowledged that this approach is complicated. It is unlikely that a subsidiary company would sue its parent for a breach of duties and so any enforcement of a breach of duties would have to be initiated by ASIC in the public interest. This scenario will be discussed later in this chapter.

In the examples analysed in chapter one, the overseas subsidiaries of Australian companies were complicit in human rights violations. It may be suggested that the link between PAL and its Australian parent company was strong enough that the parent could be considered a shadow director. Paladin owned eighty-five per cent of PAL and the board of directors of Paladin

[71] Ibid.
[72] Austin and Ramsay (n 6) 422.
[73] Ibid.
[74] Ibid.
[75] *Australian Securities and Investments Commission Act 2001* (Cth) s 93AA.
[76] The court in *PCH Offshore Pty Ltd v Dunn* [2009] FCA 553 also based its conclusion on the policy consideration that breaches of duty overseas by officers of Australian companies may have an adverse effect within Australia.

Energy Ltd was responsible for the corporate governance of the group.[77] Furthermore, PAL was financed by a large intra-company loan (from Australia) which amounted to eighty per cent of its capital and required 'very large interest payments'[78] which gave Paladin Energy financial control of PAL.[79] In this instance the connection between the parent and subsidiary would appear to be strong. This is underlined further by Paladin's share price in Australia falling due to the adverse publicity created by PAL's involvement in a High Court case in Malawi brought about by NGOs. However, this did not result in a lawsuit against Paladin Energy Ltd from ASIC for a breach of its duties as shadow director of the subsidiary. This underlines that treating Australian parent companies as shadow directors of their subsidiaries may be an option to ensure greater control of overseas operations in some scenarios depending on the level of ownership. However, this approach would not provide consistency as it would have to be applied on a case by case basis. Furthermore, as the PAL example demonstrates, even where a parent company owns the majority of shares in an offshore subsidiary, there is no guarantee that the threat of prosecution for a breach of duty against the parent company will prevent the subsidiary from contributing to rights violations in the host state. Indeed, even the loss in value of Paladin shares in Australia did not prompt action from shareholders in this country. The example of QMM leads to a similar conclusion. This study now considers the enterprise entity interpretation of corporate law and how this might see greater accountability from parent companies in Australia for complicity in human rights violations by their overseas subsidiaries.

The enterprise entity doctrine 'deduces parent company liability from the fact of economic integration between itself and the subsidiary.'[80] Recognising the corporate group as a single entity allows separate legal personality to be overcome. This has potential to make directors in Australia accountable for the actions of an offshore subsidiary, and also to ensure that Australian standards of diligence and care, and the best interests of the company, are exercised throughout an operation to avoid human rights violations. However, Muchlinski notes that 'most legal systems admit the direct liability of the parent company for the act of its subsidiary

[77] Paladin Energy Limited, *On Strategy. On Course* (Report, 2011) 58.
[78] Action Aid, *An Extractive Affair: How One Australian Mining Company's Tax Dealings are Costing the World's Poorest Country Millions* (Report, 2015) 3.
[79] Ibid. As part of the process for repaying the loan Paladin set up a subsidiary in the Netherlands. It was a party to the development agreement between PAL and the Malawi government on the KUM project and had no employees. The purpose of creating this subsidiary was to transfer payments from Malawi to Australia without paying tax.
[80] Peter T. Muchlinski, *Multinational Enterprises & the Law* (Oxford University Press, 2nd ed, 2007) 317.

only in special circumstances'[81] with a lack of evidence of 'widespread acceptance of the logic of enterprise liability for multinational corporate groups.'[82] The legal protection afforded by limited liability means there are strong reasons for retaining the current approach to group liability.[83] Therefore, although an enterprise entity approach to regulating TNCs is a legal possibility, it remains an outside possibility.

The SRSG underlined the importance of a smart mix of measures in preventing the violation of human rights by businesses. Soft law[84] instruments such as codes of conduct, guidelines and the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations* (*Corporate Governance Principles*) act as a way of 'monitoring and assessing a company's performance with regard to human rights.'[85] These instruments are also being used to clarify the expected behaviour of directors and to interpret directors' duties.[86] When soft law instruments advocate ethical business practices and mitigating risks, such as the complicity in human rights violations, this informs the interpretations of how directors should act. This may develop to a point where the failure to identify and mitigate the risks associated with violating human rights could be a breach of directors' duties to act in the best interests of the company and with diligence and care, 'particularly where the company's conduct negatively impacts share price or reputation.'[87] However, while this argument does highlight the potential for directors to consider human rights impacts there are problems with this approach. Although the law would not require amendments, the continued development of an interpretation of directors' duties that necessitates considering human rights impacts may not be a quick solution. Determining if action should be taken against a director for breach of duties would be difficult to measure if this was based on financial and reputational damage. Rather than protecting rights in all cases it might only be effective on a case by case basis. Furthermore, this approach may punish directors for the impacts their decisions have had on their company and not on the rights holders themselves. While it is important to emphasis to companies the benefits of respecting human rights by promoting a business case, taking

[81] Ibid 318.
[82] Ibid 319.
[83] Ibid.
[84] Dimity Kingsford Smith, 'Governing the Corporation: The Role of 'Soft Regulation'' (2012) 35 *University of New South Wales Law Journal* 378, 378-379.
[85] Justine Nolan, 'The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond Corporate Responsibility to Protect?* (Cambridge University Press, 2015) 138, 152.
[86] Riana Cermak, 'Directors' Duties to Respect Human Rights in Offshore Operations and Supply Chains: An Emerging Paradigm' (2018) 36 *Corporate and Securities Law Journal* 134-5; Kingsford Smith (n 84) 378.
[87] Ibid 133.

punitive action based on the impact on shares in Australia is a flawed approach to protecting human rights.

So far, this chapter has looked at the expectations on company directors to make decisions in the best interests of the company while exercising care and diligence. This has been linked to how management decisions taken in Australia may impact company operations overseas if a parent company is deemed to be the shadow director of a subsidiary. The risks to the company of not acting with diligence and care and the reputational harm this may cause to the company, including the potential for a director to be found in breach of their duties, have also been highlighted. Despite the importance of considering a broader range of interests in the decision-making process, uncertainty remains amongst directors as to whether or not they can look beyond the short-term interests of the company.[88] Therefore, it is worth noting how the law can protect directors from being sued for a breach of duties if they consider the company's impacts on a range of stakeholders.

7 Business Judgment Rule

Despite clarification from the PJC and CAMAC that directors may consider the impacts on a range of stakeholders if it is beneficial to the company's long-term success, research has shown that uncertainty remains amongst directors.[89] One reason for this may be a director's concern about being sued for a breach of duty if they consider the impact a company's operations may have on a range of stakeholders in addition to shareholders. Therefore, it is important to note how the *Corporations Act 2001* (Cth) may protect directors from being found in breach of their duty of diligence and care. A statutory business judgment rule is contained in the *Corporations Act 2001* (Cth) s 180(2).[90] This section provides that a director or other officer of a corporation who makes a business judgment is taken to meet the requirements of the statutory duty of care

[88] Shelley Marshall and Ian Ramsay, 'Stakeholders and Directors' Duties: Law, Theory and Practice' (2012) 35(1) *University of New South Wales Law Journal* 304 notes not all directors are aware that they can consider the interests of non-shareholders. Although they were only 5.7 per cent of the directors surveyed, this shows clarity is needed.
[89] Ibid.
[90] The statutory business judgment rule in Australia is expressed to apply only to the director's duty of care rather than the duty to act in the company's interests, and the provision has been interpreted to operate as a defence to an action for breach of duty, and not a protection from suit itself. See *ASIC v Rich* (2009) 236 FLR 1, [7251]–[7294].

and diligence in s 180(1), and the equivalent duties at common law and in equity, in respect of the judgment if they

> make the judgment in good faith and for a proper purpose; do not have a material personal interest in the subject matter of the judgment; inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and rationally believe that the judgment is in the best interests of the corporation.

Business judgment means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.[91] This rule gives directors the flexibility to take a long-term view of their duties. If they do, they will be taken to have fulfilled their duty to act with care and diligence, even if that decision results in loss or damage to the company.[92] While directors may breach their duty if they fail to give proper consideration to the interests of the company, situations of this kind tend to arise when circumstances induce directors to believe that the company's interests correspond with their own interests or with the interests of some other person.[93] However, this scenario is not consistent with considering human rights impacts, underlining that the duties exist to protect the company from a director who may make decisions for personal gain. While it does not create a new obligation on directors to consider the company's social and environmental impacts, the business judgment rule provides a measure of protection from claims of a breach of duty if directors choose to consider non-shareholders as part of the decision-making process. Therefore, the business judgment rule provides directors with additional security as decisions, in the best interests of the company, that consider a range of stakeholders can be justified even if non-profitable.

Having outlined a scenario where a director may be protected from being sued for a breach of duties, it is worth considering how a breach may be enforced if the result of a director's failure to consider human rights impacts leads to harm. As non-shareholders are not members of the company they are unable to enforce a breach of duty regardless of any harm they may have faced due to a company's operations.[94] Shareholder activists who wish to influence a company's behaviour towards greater respect for human rights and the environment may enforce a breach of duty but this is not common and so cannot be relied upon as a means of

[91] *Corporations Act 2001* (Cth) s 180(3).
[92] Allens Arthur Robinson (n 34) 13.
[93] Austin and Ramsay (n 6) 440–2.
[94] *Corporations Act 2001* (Cth) s 236(1)(a)(i) and (ii).

holding directors to account for ignoring human rights risks. ASIC may enforce a breach of duty in the public interest[95] which could encourage directors to consider their company's human rights impacts. This may also serve to send a regulatory message on the importance of considering human rights impacts.[96] Therefore, it is important to consider how a breach of directors' duties for failure to act with due care and diligence or in the best interests of the company may be enforced in the public interest. This will highlight if this is a realistic option for making directors accountable for negative human rights impacts.

8 Consequences of a Breach of Directors' Duties

ASIC administers the *Corporations Act 2001* (Cth).[97] It gives effect to the law[98] and has powers to ensure the integrity of the market and investigate suspected breaches of the law.[99] This includes enforcing a breach of directors' duties if it is deemed to be in the public interest.[100] When directors fail to exercise their responsibilities, which could include acts or omissions that contribute to human rights violations, the results can impact the company, its shareholders, stakeholders and confidence in Australia's capital markets.[101] In such scenarios therefore, it could be deemed to be in the public interest for ASIC to enforce a breach of directors' duties. This threat of action has the potential to encourage directors to consider their companies' impacts on non-shareholding stakeholders with a view to avoiding a violation of their human rights.

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[95] *Australian Securities and Investments Commission Act 2001* (Cth) s 50.
[96] Shueh Hann Lim, 'Do Litigation Funders Add Value to Corporate Governance in Australia' (2011) 29 *Companies and Securities Law Journal* 135, 154.
[97] *Corporations Act 2001* (Cth) s 5B.
[98] 'Our Role', *Australian Securities and Investments Commission* (Web Page, 1 February 2019) <http://asic.gov.au/about-asic/what-we-do/our-role/>.
[99] Ibid. ASIC is a co-regulator of the ASX with the ASX. *Australian Securities and Investments Commission Act 2001* (Cth) s 1(2) directs ASIC to strive to maintain, facilitate and improve the performance of the financial system in the interests of commercial certainty and the efficiency and development of the economy. ASIC is the main authority responsible for regulating financial products, financial services and financial markets. For example, under the *Corporations Act 2001* (Cth) pt 7.2 operators of a financial market such as the ASX must be licensed by ASIC. ASIC has the responsibility for ensuring compliance with the provisions of the *Corporations Act 2001* (Cth). To this end, the *Australian Securities and Investments Commission Act 2001* (Cth) pt 3 provides ASIC with wide investigatory and information-gathering powers where it has reason to suspect that a contravention of a national scheme law may have been committed.
[100] Belinda Gibson and Diane Brown, 'ASIC's Expectations of Directors' (2012) 35(1) *UNSW Law Journal* 254.
[101] Emily Rumble, 'The Easy Way or the Hard Way: Should Directors Cooperate with Regulators?' (2016) 34 *Corporate & Securities Law Journal* 143.

ASIC has the authority to undertake proceedings against company directors for various breaches of their duties.[102] The objective of these proceedings is to reinforce standards of corporate behaviour, which is important in ensuring public confidence in Australia's corporate sector and capital markets.[103] ASIC may make that claim where: the director knew there was a risk of a contravention of a statutory provision; the director was in a position to prevent the contravention and did not take reasonable steps to prevent the contravention; and the breach of the statutory provision seriously jeopardised the interests of the company. If a director knows there is a risk of contravening a statutory provision which will jeopardise the interests of the company, there is an expectation from ASIC that the director takes reasonable steps to prevent this course of action.[104] While to date no actions have been taken against directors for breach of their duties due to corporate complicity in human rights violations, there is potential that this could happen. This view is supported by the fact that in *Australian Securities and Investments Commission v Cassimatis* Edelman J underlined the importance of a company's reputation – something that can be damaged by complicity in rights violations, and which it therefore may be in a company's interests to avoid.

This chapter has highlighted the potential for directors' duties to shape corporate cultures that are more respectful of human rights. While there is no requirement or explicit permission for directors to consider the human rights impacts of a company's operations, interpretation of the best interests of the company has shown that directors could take social and environmental risks into consideration as part of their decision-making. This approach has been encouraged by Edelman J stressing the value of a company's reputation. However, although the PJC's and CAMAC's interpretations of directors' duties were published in 2006 and they encouraged directors to consider social and environmental impacts when making decisions in the best interests of the company, this did not prevent the violations highlighted in chapter one. Therefore, hoping that Australian companies may be viewed as shadow directors of their subsidiaries cannot be relied upon to overcome separate legal personality and to make companies accountable for the actions of offshore subsidiaries. Other means of ensuring that directors of Australian TNCs consider the human rights impacts of offshore operations also show potential while having significant drawbacks. Enterprise theory is described as an

[102] *Australian Securities and Investments Commission Act 2001* (Cth) s 1(2)(g).
[103] Gibson and Brown (n 100) 256.
[104] *Corporations Act 2001* (Cth) pt 2D.1.

approach 'in line with the contemporary evolution of multinational firms.'[105] While this has the potential to hold Australian directors to the same duties of care and best interests in overseas operations as they are held to in this country, the adoption of this interpretation has been minimal globally. A developing duty of care may also see directors in this country subject to a breach of their duties for complicity in human rights violations overseas. However, this approach is based on the financial or reputational damage that are a consequence of a company's actions. This may be hard to measure definitively and on occasion may ignore the harm done to rights holders if the impact is not logged, understood and researched in this country. Furthermore, this approach may take time to develop into a binding duty and therefore may not be compatible with the SRSG's view of corporate regulation as a tool which can be used in the present as a means of combatting corporate complicity in rights abuses. Having analysed how directors' duties might be used to regulate the overseas operations of Australian companies, it is important to consider how reporting requirements might contribute to increased awareness of a company's human rights impacts.

9 Disclosure

Disclosure has been described as the principal regulatory tool in Australian corporate law[106] and is therefore important in attempts to address corporate complicity in human rights violations. Reporting is also important as a means of sharing best practice and putting a company's human rights performance in the public domain for scrutiny.[107] In the area of reporting, hard law overlaps with soft law corporate governance principles, as a company may have to report on their performance against desirable corporate practices.[108] Reporting is vital for market integrity as false or misleading information, or accurate information that is announced late, can contribute to uninformed investments and trading, reducing investor trust in market fairness and transparency.[109]

[105] Olivier De Schutter, *Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations* (Report to the SRSG, 2006) 40.
[106] Redmond, *Corporations and Human Rights*, (n 9) 37.
[107] Amy Sinclair and Justine Nolan, Modern Slavery Laws in Australia: Steps in the Right Direction? *Business and Human Rights Journal* Vol 5:1 164.
[108] Ibid 19.
[109] Australian Securities and Investments Commission, *ASIC Enforcement Outcomes: July to December 2016* (Report 513, 2017) 14.

In Australia, companies are subject to reporting requirements under the *Corporations Act 2001* (Cth) and the ASX Listing Rules. This provides companies with the opportunity to be transparent about their operations, their business relationships (including suppliers), and the human rights impacts associated with those operations. Examining the reporting requirements of Australian companies will determine the scope and opportunity for companies to report their human rights-related impacts.

10 ASX Listing Rules and Other Reporting Requirements

The ASX Listing Rules oblige the largest and most significant companies in Australia to conform to standards of disclosure higher than those imposed by the *Corporations Act 2001* (Cth).[110] Under ASX rules, listed companies are subject to continuous disclosure obligations and must inform the ASX immediately of any information that would be expected to have a material effect on the price of the company's shares, including the impact of the operations of the company or its subsidiaries on stakeholders.[111] Such information could include damaging human rights impacts or litigation by concerned stakeholders, such as communities where a company or subsidiary is operating.[112] This material effect may be recognised in the short-term with a drop in share prices, or can impact the company over a longer period of time if reputational damage leads to consumer boycotts or divestment from shareholder activists.

While the ASX Listing Rules provide no specific requirement to report on social or environmental issues, under Listing Rule 4.10.3 companies must disclose in their annual reports the extent to which they have followed the ASX Corporate Governance Principles and Best Practice Recommendations, and the reason for any deviations from them. This approach is referred to as 'if not, why not?'[113] Principles three and seven are particularly relevant to this

[110] Paul von Nessen, 'Australian Efforts to Promote Corporate Social Responsibility: Can Disclosure Alone Suffice?' (2009) 27.1 *Pacific Basin Law Journal* 26.
[111] *Corporations Act 2001* (Cth) s 647(2) reinforces the importance of Listing Rule 3.1, stating that where a listed entity has information about specified events that is not generally available and is information that a reasonable person would expect, if generally available, to have a material effect on the price or value of enhanced disclosure securities, the entity must notify ASX of that information.
[112] Hajat (n 43) 84 notes that Paladin's share prices fell as a result of litigation in Malawi.
[113] Austin and Ramsay (n 6) 392. According to the ASX Corporate Governance Council, the best recommendations are not prescriptions. They are guidelines, designed to produce an efficiency, quality or integrity outcome. They state aspirations of best practice to optimise corporate performance and accountability in the interests of shareholders and the broader economy.

chapter as they provide an opportunity to report on areas that, if ignored, could be detrimental to human rights.

Principle 3 provides that companies should disclose their values which should incorporate the expectation of both 'investors and the broader community' that the company will act 'lawfully, ethically and responsibly.' The principle underlines the importance of actions that preserve and promote 'long term sustainable value' and a good reputation. These should be part of a company's aspirations and be reflected in a disclosure of its values, which will encourage thinking about the necessary actions for the company to reach these goals.[114] While this course of action is not mandatory for companies under the "if not, why not" approach of the ASX Corporate Governance Principles, it is nevertheless an important step in encouraging companies to respect human rights throughout their operations. By underlining the importance of a company's reputation and building long term value Principle 3 underlines that directors can take this approach to decision making. Furthermore, in stating the importance of lawful, ethical and responsible behaviour the principle may even influence how directors' duties are interpreted.[115]

Principle 7 recommends how companies should recognise and manage risks, providing another opportunity to consider human rights-related behaviour.[116] Complicity in human rights violations can lead to reputational damage and litigation against the company and possible material risks such as fines, boycotts or a fall in share prices.[117] Establishing a system of risk management and oversight, incorporating potential human rights impacts, is important for companies wishing to avoid these material risks. Companies should report on relevant activities they are undertaking to identify, assess, monitor and manage these risks, and identify material changes to the company's risk profile.[118] Reports on these activities should be made publicly available and therefore this may help to increase the transparency of a company's efforts to address their human rights risks. These recommendations provide an opportunity for companies to consider their impacts, but the focus is still on the risk to the investor. The importance of reporting is measured by the effect that the information or conduct may have, or

[114] ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (4th ed, 2019) 16.
[115] Cermak (n 86) 134-5.
[116] ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (4th ed, 2019) 26.
[117] See footnotes 78 and 611.
[118] ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (4th ed, 2019).

has had, on the company share price or company performance.[119] Including subsidiaries in this reporting[120] would mean that companies would have to include information on the overseas operations of the group, which may impact share prices, as was the case with PAL in Malawi. While this reporting is not an obligation for companies, who may choose to explain why they have not reported, the opportunity to report on company actions may modify company behaviour. This is particularly relevant in relation to Principle 3 and the importance of reputation. It is also important to consider mandatory reporting obligations and the penalties for failing to comply.

11 Failure to Comply with Continuous Disclosure

If the ASX considers that a listed entity is withholding information from the market that ought to be announced under Listing Rule 3.1 or 3.1B, it may suspend trading in the entity's securities until it releases that information and the market is properly informed. In an extreme case, it may remove the entity from the official list.[121] A director involved in a breach of Listing Rule 3.1 may also breach their statutory duties of care and diligence to the entity under the *Corporations Act 2001* (Cth) s 180(1). This can lead to the imposition of a civil penalty of up to $200,000, a liability to compensate the listed entity for any loss or damage it suffers, and disqualification from managing a corporation.[122] Breaching the *Corporations Act 2001* (Cth) s 674(2) is a criminal offence and is also subject to a financial services penalty provision.[123] If ASIC has grounds to suspect such a breach it may issue an infringement notice.[124] ASIC may bring representative proceedings on behalf of persons who suffer loss or damage as a result of a listed entity's breach of s 674(2) and has used its power to enter into enforceable undertakings to require a listed entity to establish a compensation fund to meet prospective claims under s

[119] Allens Arthur Robinson (n 34) 17–18 para 17.1
[120] Ibid 17–18 para 17.2 notes this is probably also the case if the actions of a subsidiary, supplier or business partner, whether in Australia or not, are likely to have a material effect on the company's obligations or results.
[121] ASX, *ASX Listing Rules Guidance Note 8* (2018) 45.
[122] Ibid 63.
[123] Ibid 62. It is punishable in the former case by a fine of up to 1,000 penalty units and in the latter case by a civil penalty of up to $1,000,000. See ss 1317DA, 1317E(1)(ja), 1317G(1A), 1317G(1B)(b).
[124] See generally ASIC, *Continuous Disclosure Obligations: Infringement Notices* (Regulatory Guide 73, 2017). See also ASIC, *ASIC Enforcement Outcomes: January to June 2012* (Report 299, 2012) 22 and ASIC, *ASIC Enforcement Outcomes: January to June 2017* (Report 536, 2017) 15 for examples of ASIC serving infringement notices for breach of continuous disclosure obligations.

1317HA.[125] A director involved in a listed entity's contravention of s 674(2) may breach s 674(2A),[126] punishable by a penalty of up to $200,000.[127]

As noted earlier in this chapter, if human rights-related risks were to trigger materiality thresholds under continuous disclosure requirements, it is unlikely that the company will be making timely disclosure as required. While not related directly to human rights impacts, ASIC has taken action against directors for failing to meet their continuous disclosure obligations.[128] Therefore, directors failing to consider their company's human rights-related risks may run the risk of enforcement action from ASIC if their omission leads to a failure to meet disclosure obligations. These cases show that, however remote, ASIC could potentially enforce a breach of duties if complicity in human rights violations were to result in a company suffering reputational damage or failing to meet continuous disclosure obligations.

12 Annual Reports

In addition to reporting obligations to the markets, companies must submit annual reports which, according to the *Corporations Act 2001* (Cth) s 674 and the ASX Listing Rule 4.10.17, must contain a review of operations and their results. This provides an opportunity to report on a company's impacts on a wide range of stakeholders. According to the *Corporations Act 2001* (Cth) s 675(2), annual reports must contain information that shareholders would require to make an informed assessment of the company's operations, its financial position and its business strategies and prospects for future financial years. Because the potential for long-term reputational damage is detrimental to a company, this could include a company's social and environmental impacts. Indeed, the explanatory memorandum to the introduction of the *Corporations Act 2001* (Cth) s 299A(1) refers to the Group of 100 Incorporated's *Guide to Review of Operations and Financial Conditions*, indicating that non-financial considerations such as human rights may be relevant. This demonstrates a further window for companies to report on the social and environmental impacts of their operations. Additionally, if reporting

[125] ASX, *Guidance Note 8* (n 121) 62.
[126] *Corporations Act 2001* (Cth) s 79 defines involvement in a breach of the Act. It includes aiding, abetting, counselling or procuring the breach or being in any way, by act or omission, directly or indirectly, knowingly concerned in the breach.
[127] ASX, *Guidance Note 8* (n 121) 63. There is a due diligence defence in s 674(2B), which protects officers of a listed entity from civil penalties and civil claims for damages if they can prove that they: took all steps (if any) that were reasonable in the circumstances to ensure that the entity complied with its continuous disclosure obligations; and believed on reasonable grounds that the entity was complying with those obligations.
[128] *Australian Securities and Investments Commission v Padbury Mining Limited* [2016] FCA 990.

obligations were extended to include the subsidiaries of Australian companies, this would provide greater transparency of overseas operations linked to Australian companies which may negatively impact human rights.

Extending companies' reporting requirements to include social and environmental impacts would not be a step in a new direction, as examples of companies having to report on social issues already exist within Australia. In keeping with the Convention to Eliminate Discrimination Against Women,[129] the *Workplace Gender Equality Act 2012* (Cth) stipulates that companies in Australia with 100 or more employees[130] must report annually against gender equality indicators.[131] This includes the gender composition of the workforce; the gender composition of governing bodies of relevant employers; and equal remuneration between men and women.[132] While there is scope to extend reporting obligations within corporate regulation in Australia, it is important to consider the government's position to determine how likely it is that human rights issues will become a disclosure requirement.

13 CAMAC's and the PJC's Analysis of Reporting Obligations

As part of their remit, CAMAC and the PJC also considered the reporting obligations of Australian companies. As with their analysis of directors' duties, this remains the most recent government-level initiative in Australia which considered the role of corporate reporting obligations in relation to social responsibility. Considering these reports will reveal the government's position on reporting and indicate whether change is likely and how this may impact corporate behaviour in terms of respecting human rights.

CAMAC concluded that the provisions in the *Corporations Act 2001* (Cth) were sufficient to ensure disclosure of non-financial information.[133] In addition, CAMAC noted that the current reporting regime under the *Corporations Act 2001* (Cth) is an imperfect mechanism for meeting the needs of interest groups extending beyond investors, but that the Act should not be used to achieve disclosure ends that go beyond its underlying rationale. While s 299A of the Act already provides a platform for the disclosure of non-financial information that is material to

[129] *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981). See in particular arts 2(e), 11(1)(b), (c), (d).
[130] *Workplace Gender Equality Act 2012* (Cth) s 3.
[131] Ibid s 13(1).
[132] Ibid s 3.
[133] Ibid 17 para 16.9.

the business of a company, CAMAC concluded that it would be counterproductive to introduce detailed legislative social and environmental reporting requirements given that the form and content of non-financial disclosures are still evolving.[134] To that end, CAMAC supported a continuation of the status quo, namely reporting initiatives by the ASX and voluntary reporting under industry and international initiatives which, it argued, are flexible and responsive to change, more so than legislation.[135]

The CAMAC conclusion that reporting requirements are already sufficiently broad to encompass social and environmental risks is a missed opportunity to give the markets and the public greater information on human rights-related issues that Australian companies may encounter. This approach assumes that businesses prefer or benefit from state inaction, a conclusion at odds with much of the corporate law surveys that informed Ruggie's mandate,[136] which highlighted the need for greater guidance from governments.[137] Such guidance should clarify when a material[138] threshold for reporting is reached,[139] the scope of reporting obligations and whether or not they extend to the acts of subsidiaries or other business partners.[140]

While current reporting requirements in Australia allow businesses to consider and report on their human rights impacts, there is limited regulation that would require this approach from companies. Rather than encouraging or compelling companies to be more transparent, the government is allowing a more voluntary approach to reporting by which businesses may report on their human rights impacts without it being mandatory. The human rights violations highlighted in chapter one continued despite the existing approaches to corporate regulation in Australia. Indeed, in relation to fashion supply chains, Australian companies remain reluctant to be transparent about where they source their garments and the conditions for workers in the supply chains, with the main pressure for transparency coming from NGOs rather than the

[134] *The Social Responsibility of Corporations Report* (n 30) 144.
[135] Ibid.
[136] *Human Rights and Corporate Law*, UN Doc A/HRC/17/31/Add.2 (n 42) para 206.
[137] Redmond, *Corporations and Human Rights*, (n 9) 38 notes that explicit reference to the UNGPs in the ASX Corporate Governance Principles and Recommendations would provide clearer guidance and support for the norm.
[138] Ibid 39, defines 'material' as a real possibility that the risk in question could substantively impact the listed entity's ability to create or preserve value for security holders over the short, medium or long term.
[139] *Human Rights and Corporate Law*, UN Doc A/HRC/17/31/Add.2 (n 42) para 160. See also para 210 where Ruggie noted that 'financial reporting requirements should clarify that human rights impact in some instances may be "material" or "significant" to the economic performance of the business enterprise.'
[140] Ibid para 162.

government.[141] The fact that current disclosure requirements are not preventing the complicity of Australian TNCs in human rights violations overseas demonstrates that the government should take a different approach to businesses and reporting. The next chapter will consider what the Australian government ought to do to increase transparency. It is now important to consider more recent developments that might help clarify what companies are doing in relation to their human rights risks and impacts.

14 Recent Developments to Promote Increased Transparency

The *Modern Slavery Act 2018* (Cth) was introduced as a means of increasing reporting and addressing the risks of modern slavery in company operations and supply chains. The legislation 'requires entities based, or operating, in Australia, which have an annual consolidated revenue of more than $100 million, to report annually on the risks of modern slavery in their operations and supply chains, and actions to address those risks'[142] and this extends to acts, omissions and matters outside Australia.[143] While it is beyond the scope of this thesis to provide a detailed analysis of the *Modern Slavery Act 2018* (Cth), it is important to highlight areas of the legislation which are relevant to the theme of this thesis.[144]

As noted above, the *Modern Slavery Act 2018* (Cth) extends to acts or omissions of Australian companies that take place in their overseas operations. This is an example of legislation that extends beyond territorial borders to cover the acts of subsidiaries or suppliers and supports the argument that the Australian government can and should regulate the overseas operations of Australian TNCs if the host state is unable. However, the legislation does not penalise companies who refuse to report on slavery in their supply chain. Furthermore, although the modern slavery statement has mandatory criteria for what companies should include in a report,[145] the report itself is not mandatory. The Minister can ask for an explanation from companies that fail to report[146] but the only penalty for companies that still fail to comply is that they may be added to the Modern Slavery Statements Register, which is publicly

[141] Oxfam Australia, 'K-Mart, Target, Tell Us Where Your Bangladeshi factories Are' (3 May 2013) <https://www.oxfam.org.au/2013/05/k-mart-target-tell-us-where-your-bangladeshi-factories-are/>.
[142] *Modern Slavery Act 2018* (Cth) s 3.
[143] Ibid s 10.
[144] For a recent appraisal of the legislation, see Sinclair and Nolan (n 107) 164-170.
[145] *Modern Slavery Act 2018* (Cth) s 16A(4).
[146] Ibid s 11.

available.[147] The lack of penalties for non-compliance is contrary to suggestions on how states might promote respect for human rights through reporting.[148] The primary drivers for compliance are investor pressure and reputational costs, so it is little stronger than a voluntarily initiative.

15 Inducing Greater Transparency from Companies

So far, the focus of this chapter has been on how directors' duties and disclosure might foster greater respect for human rights in Australian companies. Since the current regulatory framework allows but does not require businesses to consider their human rights impacts, it is worth considering other avenues by which this outcome might be achieved.

Effective whistleblowing provides an essential service in fostering integrity and accountability while deterring and exposing misconduct.[149] The threat of whistleblowing has the potential not only to encourage good corporate behaviour, such as respect for human rights, but may lead to reputational damage if companies are not open and transparent about their actions. For whistleblowing to become a more effective tool to foster greater respect for human rights there must be strong protection in place.[150] However, the PJC report on whistle-blower protections found that laws in Australia's private sector were lacking compared to other G20 countries. It made a number of recommendations including:

- broadening the private sector definition of disclosable conduct to include a breach of any Commonwealth, state or territory law;
- providing protections for staff who make, receive or act upon disclosures;
- allowing anonymous disclosures;
- protecting the confidentiality of the disclosures and the whistle-blower's identity;
- establishing a Whistleblower's Protection Authority.[151]

These recommendations demonstrate that Australia is lacking in protections for whistle-blowers and the PJC's recommendations could encourage an increase in private sector

[147] Ibid s 18(2).
[148] See Chapter Two.
[149] Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Whistleblower Protections* (Report, 13 September 2017).
[150] Gladys Lee, Esther Pittroff and Michael J. Turner 'Is a Uniform Approach to Whistle-blowing Regulation Effective? Evidence from the United States and Germany' (2020) 163 *Journal of Business Ethics* 557-8.
[151] Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Whistleblower Protections* (Report, 13 September 2017).

whistleblowing for serious misconduct. Since the PJC's report the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Cth) has been introduced to Parliament. The purpose of the Act is 'to consolidate and broaden the existing protections and remedies for corporate and financial sector whistle-blowers'[152] by amending existing legislation, including the *Corporations Act 2001* (Cth). Strengthening whistle-blower protections has the potential to encourage more ethical conduct from companies and more transparent disclosure, for fear of the reputational damage that whistleblowing might bring.

16 Conclusion

The research in this chapter sustains a clear role and function in this thesis, demonstrating that corporate regulation in Australia allows scope within directors' duties and reporting requirements for companies to consider their human rights impacts. However, it also highlights the regulatory issue of separate legal personality which must be overcome if directors' duties in Australia are to have any impact on how subsidiaries act. Identifying the parent company as a shadow director of subsidiaries is a haphazard approach which lacks consistency as it may only be applied on a case by case basis. Likewise, other approaches to overcome this regulatory hurdle have drawbacks.

Even if separate legal personality is overcome, there remains a need for greater clarity about what directors can consider when making decisions, for while considering a company's human rights impacts is permitted by regulators it is not an obligation and is not explicitly encouraged. CAMAC was not persuaded that extending the scope of what directors could consider would improve the quality of corporate decision-making in terms of preventing the violation of human rights. Instead it argued that considering a non-exhaustive catalogue of interests serves little useful purpose for directors and affords them no guidance on how various interests are to be weighed, prioritised or reconciled.[153] CAMAC's position was that the corporate sector's own appreciation of the relevance of responsible practices to business success is likely to be the key

[152] 'Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2018', Parliamentary Business, *Parliament of Australia* (Web Page, 2019) <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s1120>. At time of writing the Bill has passed the Senate and the House of Representatives.
[153] *The Social Responsibility of Corporations Report* (n 30) 111.

determinant of change.[154] This reinforces the current scenario in Australia where competitive markets are key to providing directors with incentives to act in the interests of the company.[155] The Australian government's position of preferring to leave the market as the regulator ignores the fact that businesses have called for greater guidance, particularly in light of the SRSG's mandate and the Guiding Principles. The government's position is not limited to directors, duties and extends to reporting.

In 2008, the PJC considered the issue of disclosure of environmental, governance and social issues in an enquiry concerning better shareholder engagement. As with CAMAC and PJC reports of 2006, the PJC conveyed strong support and encouragement for companies adopting reporting on a voluntary basis, stressing that companies should be given the opportunity to determine the best way to approach the task free of government regulation. Australian corporate law 'demands little in the way of disclosure of social impacts and none specifically for the human rights impacts of corporate activities and relationships.'[156] While other jurisdictions have used mandated reporting as a way of promoting respect for human rights through due diligence,[157] reporting requirements in Australia are based upon keeping the market informed and protecting the investor.[158] The Australian government has continued this approach to regulation in the form of the *Modern Slavery Act 2018* (Cth), whose requirements are not mandatory and which provides no penalties for non-compliance. The trend for corporations to place information relating to corporate social responsibility in the public domain on a voluntary basis[159] increases the need for guidance from regulators.

Respect for human rights is increasingly viewed as integral to good business. However, reliance on the benefits to business should not be the only method of encouraging corporate respect for human rights. This approach is tantamount to self-regulation on the part of business which, as demonstrated in chapter one, has failed to work. Von Nessen suggested that any improvement in the human rights-related actions of Australian companies may indicate the success of the government's light touch.[160] The continued involvement of Australian companies in human rights violations overseas shows that the government's approach is not working. The

[154] Ibid 167. Also, the PJC decided it would not be appropriate to mandate directors to consider stakeholder interests as part of their duties and concluded that an amendment to the directors' duties provisions in the *Corporations Act 2001* (Cth) is not required.
[155] Austin and Ramsay (n 6) 418.
[156] Redmond, *Corporations and Human Rights*, (n 9) 37.
[157] *Human Rights and Corporate Law*, UN Doc A/HRC/17/31/Add.2 (n 42) paras 130, 145.
[158] Redmond, *Corporations and Human Rights*, (n 9) 37; von Nessen (n 110) 34.
[159] *Human Rights and Corporate Law*, UN Doc A/HRC/17/31/Add.2 (n 42) para 153.
[160] von Nessen (n 110) 30.

conclusion offers the action the Australian government might take to improve the human rights-related performance of Australian companies overseas.

Conclusion

The continued involvement of Australian companies in the violation of human rights overseas remains a stain on the reputation of the country as a protector of rights, and on the businesses themselves. However, there is no instant solution to the problem and in some instances, legislation entrenches bad behaviour. This thesis has examined the issue of businesses contributing to human rights violations and considered how it happens and how it could be prevented. Governance gaps allow TNCs to operate without effective regulation, particularly in offshore locations.[1] Under international law the host state is responsible for protecting human rights within its territory. However, the study showed that corporate complicity in human rights violations often involved a subsidiary or supplier of a TNC. While the parent company is usually domiciled in a developed country with a strong rule of law,[2] the rights violations often occur in developing countries where regulation is weak. In these scenarios the need for investment can take precedent over protecting rights.[3] This can leave workers and local communities vulnerable to the violation of their human rights. While the home state of the parent company may act, the political will to regulate TNCs extraterritorially is generally absent. In this regulatory void corporate complicity in violating human rights continues.

Three examples were highlighted in this thesis of overseas human rights violations that implicated Australian TNCs due to a subsidiary or suppler. This underlined the issue as an existing problem for Australian TNCs and highlighted the reach that Australian companies have either through their subsidiaries or their supply chains. In the mining industry, which has a strong Australian presence, opportunities for mineral exploration have led companies to developing countries where the difficulties in protecting human rights are particularly acute. The examples in chapter one highlighted that the host state may not have the legislation to effectively regulate mining industries and where legislation existed, it was ineffective and lacked enforcement. However, the chapter demonstrated that in spite of these problems, the host state governments continued with mining operations due to a pressing need for economic growth in their country. The case studies demonstrated that this scenario is not limited to the extractives sector with an analysis of remuneration in the Bangladeshi garment industry which implicates Australian fashion retailers.

[1] See Introduction – Transnational Business Without Transnational Regulation.
[2] Ibid.
[3] Ibid.

The issue of supply chains is complex and different to the parent / subsidiary relationship of the mining examples. A lack of protection afforded to workers in the garment industry in Bangladesh allows rights violations to continue. This was due to the need for investment, the nature of the legislation and a lack of enforcement of laws which may have gone some way to minimising harm.

The main focus of the thesis was how to overcome regulatory problems and protect human rights from violation by Australian TNCs, their subsidiaries and their business partners. Analysing the SRSG's mandate, with a focus on Guiding Principle 3, highlighted how states might use corporate regulation to prevent the complicity of their companies in offshore human rights abuses. Corporate regulation was analysed as it is an area of law that shapes what companies do and how they do it,[4] yet the implications for human rights remained misunderstood (and under-utilised). This is particularly important in the absence of specific legislation aimed at preventing businesses from violating human rights overseas.

Chapter two highlighted specific recommendations from the SRSG's mandate with regard to utilising directors' duties and disclosure to encourage corporate respect for human rights. This included guidance and clarity for company directors to increase awareness of what they may consider while acting in the best interests of the company. It also identified the potential for human rights due diligence to be incorporated into existing corporate risk assessment structures. The importance of disclosure was also emphasized as part of identifying and mitigating risks, and the transparency of company operations. The study showed that if Australia regulated extraterritorially to prevent its companies from becoming complicit in human rights violations overseas, this would not be contrary to the principles of state sovereignty in international law. However, although home states can act to prevent the complicity of their companies in offshore rights violations, there is no obligation to do so.

This research argued that in the absence of an obligation, it would be beneficial for the Australian government to act to prevent the complicity of companies domiciled here in the violation of human rights overseas. Governments should not assume that they are helping businesses by not providing guidance on how to avoid human rights violations.[5] Indeed, avoiding complicity in rights abuses is better for businesses as it avoids the risk of legal action; is better for a company's reputation (and possibly, as a result, its share price); and it can prevent

[4] See Introduction – Corporate Regulation in Australia.
[5] John Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, UN Doc A/HRC/8/5 (7 April 2008).

the disruption that comes with strikes, protests and boycotts. The Australian government could ensure that businesses are operating on a level playing field and can meet their responsibility to respect human rights regardless of the strength or enforcement of the domestic legislation in the host state. Furthermore, when an Australian company is involved in human rights violations overseas it may result in the host state violating its own human rights obligations if it is a part-owner of the project, as with the mining case studies. Ensuring respect for rights would also avoid a scenario where a project supported by the Australian government was linked to rights violations. Finally, the thesis argued that the Australian government should prevent its companies violating rights overseas as this course of action is being encouraged by the UN, and the government already regulates the behaviour of Australians in other countries in some specific scenarios.

Analysing the SRSG's recommendations in terms of corporate regulation pinpointed specific actions that could be undertaken to foster corporate respect for human rights through directors' duties and disclosure. These actions could have gone some way to preventing the rights abuses highlighted in the case studies in this thesis.

Reporting on human rights-related risks, or human rights due diligence undertaken, would be a useful step in identifying, reporting and mitigating risks in a company's value chain. If the Australian government required reporting from parent companies on overseas subsidiaries it would provide greater transparency not just for local communities but for regulators and shareholders back in Australia. For example, in the case of PAL, it may have forced the company to provide information to the local community on the level of waste and toxic chemicals being released into the water. This might have encouraged the company to rethink its actions in polluting the water source rather than report on what it was doing. As demonstrated in the case study, the denial of access to information also undermined the community's access to water. Furthermore, gathering information and compiling reports gives companies the opportunity to identify and mitigate risks, and in so doing encourage greater awareness of activities within their supply chain.[6] If Australian fashion retailers were compelled to identify the source of their products it may trigger action to practice more responsible purchasing or use leverage with suppliers to encourage the payment of a living wage. Reporting throughout the operations of the company may also serve to act as a deterrent

[6] John Ruggie, *Human Rights and Corporate Law: Trends and Observations from a Cross-National Study Conducted by the Special Representative*, UN Doc A/HRC/17/31/Add.2 (23 May 2011) para 146 ('*Human Rights and Corporate Law*').

if directors do not wish to be caught violating human rights. The value and benefit of this approach is highlighted by the reputational damage a company risks when they are complicit in violations. Whistleblowing could also serve as a deterrent if employees had the protection to publicly lift the lid on operations that threatened human rights, but the company did not report on or want to get into the public domain.

This thesis has demonstrated that avoiding complicity in human rights violations is in a TNC's best interests. When a company fails to meet societal expectations with their behaviour it can result in falling share prices[7] and reputational damage.[8] Edelman J underlined that damaging its reputation was not in the company's best interests. It should be noted that this may be harder to highlight the further down the supply chain the violation occurs, with companies often lacking transparency and openness about their suppliers. Moreover, they may simply not know the source of their product or raw materials and the thesis showed that if companies are unaware of the source of their product, they are exposing themselves to risk. Therefore, a lack of transparency and/or knowledge is a risk to companies, as evidenced by the case study on garment industry supply chains, where human rights violations are described as the norm. Avoiding this complicity would be in the best interests of the company and a specific requirement or permission to consider supply chain conditions, as part of a broader consideration of social or environmental factors, would allow directors to consider how to avoid human rights violations linked to their company. However, unlike a parent company / subsidiary relationship a company will have no control over the operations of a supplier, only influence through leverage, and critically will also have less information about the operations of a supplier. Therefore, the importance of identifying and mitigating the risks to the company becomes paramount if they are to avoid complicity in human rights violations, even if only for the benefit of their brand. This has been highlighted as a problem for Australian companies. As a result, there is huge importance in a company's due diligence process to identify the risks faced when entering into a relationship with a supplier.

Incorporating human rights due diligence into the directors' duty of care and diligence would allow companies to identify, assess and manage risks of a human rights nature that faced the company. Identifying every single risk at every point of the supply chain might be an enormous

[7] For example, see Rafiq Hajat, 'Kayelekera and the Uranium Mining Saga in Malawi' in *Towards the Consolidation of Malawi's Democracy: Essays in Honour of the Work of Albert Gisy* (Konrad-Adenauer-Stiftung, 2008) 84.
[8] See Introduction, footnote 75 and Emily Rumble, 'The Easy Way or the Hard Way: Should Directors Cooperate with Regulators?' (2016) 34 *Corporate & Securities Law Journal* 143.

task for companies, particularly in the garment industry with so many points between the raw material and a finished product on the high street. However, due diligence and disclosure would give companies increased awareness of their supply chains and the opportunity to show that they are attempting to respect human rights.

The SRSG recommended that companies identify the human rights impacts that the business might cause or contribute to through its own activities, or which may be directly linked to its products by its business relationships.[9] It should be a comprehensive attempt to uncover actual and potential human rights risks over the entire life cycle of a project or business activity.[10] A starting point for companies undertaking due diligence in this area would be to assess how their own purchasing practices can create the risk of human rights violations. This can happen when fluctuating release dates for a product may see timelines brought forward to match and result in workers being forced to work longer hours to meet the new target. Identifying the threat to human rights as a result of decisions made at the top of the supply chain would help companies to assess their own practices and strive towards more responsible purchasing practices, currently lacking in Australia,[11] and amend their policies accordingly. Government encouragement of human rights due diligence within directors' duties would also be beneficial to companies. It would show that they are at least trying to identify, assess and mitigate the potential risks to human rights that their operations pose and would only increase the risk of litigation to companies if it was found to have ignored and failed to act upon prior knowledge, or have wilfully misrepresented findings.[12]

1 Limitations of the Thesis

All research projects contain pathways and trajectories that could have been taken. This thesis has not considered every legal option to regulate TNCs with a view to preventing human rights violations. To do so is beyond the scope of a single higher degree and requires a succession of monographs. The focus remains tightly constituted: how the specific directors' duties and

[9] John Ruggie, *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) Principle 17(a).
[10] John Ruggie, *Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework*, UN Doc A/HRC/11/13 (22 April 2009) para 71 ('*2009 Report*') para 71.
[11] Gershon Nimbalker, Jasmin Mawson, Claire Harris, Meredith Rynan, Libby Sanders, Claire Hart and Megan Shove, 'The 2018 Ethical Fashion Report: The Truth Behind the Barcode' (Baptist World Aid Australia, April 2018).
[12] *2009 Report*, UN Doc A/HRC/11/13 (n 10) para 82.

disclosure elements of corporate regulation might allow or even encourage companies to respect human rights. As a result, the research has not considered other potential legal approaches to the problem. This may include international human rights law applying directly to corporations – a discussion which is continuing in spite of the SRSG's rejection of this approach. Another method could be the creation of a specific piece of legislation, as was attempted in this country with the Corporate Code of Conduct Bill. The decision to focus on corporate law does not dismiss any other options that exist now or may evolve in the future, but was intended as an analysis of what could be used in the here and now without the need to develop new legislation.

2 Drawbacks to the Advocated Approach

This thesis has highlighted the importance of TNCs respecting human rights, and the Australian government can encourage and enable this transformation through corporate regulation. It is clear that companies can and do report on the operations of overseas subsidiaries which can benefit and encourage respect for human rights. Similarly, if companies had to report on their supply chain it would identify human rights risks they should address. Disclosure crosses boundaries to promote respect for human rights. What is not so straightforward is how directors' duties can overcome separate legal personality to reach offshore operations and apply the same standards of care that are expected in Australia.

Treating the parent company as a shadow director is one method that is possible as the parent would have to avoid reputational damage, and its potential impact, in the best interests of the company. Likewise, the duty of care and diligence expected of Australian TNCs would apply to their subsidiaries. The Cassimatis case opened the door to considering that environmental damage, and the subsequent harm to company reputation, is not in a company's interests. This duty could potentially apply to parent companies as shadow directors. However, there are significant drawbacks to this approach. The circumstances in which a parent company would be assumed to be the shadow director would need increased clarity. This would need to be a standard criterion that does not need to be met on a case by case basis. Such complications would not expedite a solution for rights holders and is not an approach that has been used frequently.

3 Recommendations

Another option to overcome separate legal personality would be the adoption of enterprise theory, which would see all parts of the company treated as a single group, with the parent liable to the same standards of care and diligence for its subsidiaries. However, this approach to corporate regulation has also failed to see widespread adoption.

Corporate regulation governs what companies do and how they do it, so the SRSG saw it as an area of law that had potential to influence human rights even though he noted that the two areas of law were in different spheres. However, the ease of applying this existing body of legislation to human rights is complicated, as this thesis has shown. Opportunities to overcome separate legal personality have not seen widespread adoption with the result that considerable regulatory challenges still exist if directors' duties are to shape how subsidiaries overseas conduct their operations. Therefore, it may be more expedient for Australia to revisit the Code of Conduct Bill or similar legislation with the specific intent of regulating the offshore operations of Australian TNCs in relation to their human rights impacts.

The Code of Conduct Bill was rejected on the grounds that, inter alia, it was unnecessary[13] and imposed Australian values on other countries. This thesis has shown beyond all doubt that as Australian TNCs continue to become complicit in overseas human rights violations, measures to prevent these occurrences are not unnecessary. It is also clear that safeguarding human rights is not an imposition of Australian values but a universal system of values.[14] This is particularly true in the case studies in chapter one where the host states had ratified the ICESCR. The actors targeted by extraterritorial regulation are Australia's corporate nationals and not host states. Australian companies have engaged in practices that would not be permitted in Australia, undermining fundamental human rights in the process and making considerable profits that have been repatriated to Australia.[15] Therefore, it is imperative that Australia takes effective measures to prevent the complicity of its companies in human rights violations overseas. Failing to extend the protection 'of fundamental human rights … to those affected by Australian companies' operations abroad is in fact a form of imperialism and elitism. In light

[13] See Introduction, footnote 34.
[14] W. Vandenhole 'Towards a Division of Labour for Sustainable Development: Extraterritorial Human Rights Obligations' in Sustainable Development Goals and Human Rights (eds Markus Kaltenborn, Markus Krajewski, Heike Kuhn) Springer Open 2020, 226-7.
[15] Tania Penovic, 'Undermining Australia's International Standing: The Failure to Extend Human Rights Protection to Indigenous Peoples Affected by Australian Mining Companies' Ventures Abroad' *Australian Journal of Human Rights* 11 (1), 2005 107-8.

of the primary objective of international human rights, such a proposition cannot withstand rational analysis.'[16] While there is no straightforward solution, it is clear that the Australian government must act to prevent the complicity of TNCs domiciled in this country in the continued violation of human rights in their overseas operations.

[16] Ibid.

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