

Committing to Human Rights in Australia's Corporate Sector

Sally Wheeler ANU

Abstract

This paper draws on data collected from the ASX 50 with a focus on policy commitment to human rights. As the UNGP makes clear a visible and accessible policy commitment is the most basic form of recognition that corporations should afford to human rights. The paper takes the position that this policy commitment offers corporations a chance to declare a positive relationship with human rights. Therefore the presence or not of a policy statement, and the form that the statement takes, tells us much about the relationship between the corporate sector and human rights. The data reveals that there is generally a low compliance with the policy commitment requirement. The most significant factor amongst a range of variables examined for predicting whether compliance will occur or not is membership of human rights engaged Business and Industry Non-Governmental Organisations (BINGOs). We might expect a rather stronger public commitment to human rights reflecting the position taken by Australian corporations on other ESG standards. The paper suggests that the absence of human rights discourse as a political and cultural artifact at the domestic nation state level is a possible explanation for this.

Introduction

In 2011, the UN Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights.¹ Often known colloquially as the Ruggie Principles, with Ruggie taken from the name of the UN Special Representative for Business and Human Rights, John Ruggie, who presided over the drafting of the principles from 2005 to 2011,² the Guiding Principles were the first international instrument to openly request that corporations exercise a responsibility to respect human rights and to set out how they should do this. The Principles sit atop a raft of

¹ OHCHR 2011.

² S Jerbi (2009)

other mechanisms³ such as the UN Global Compact⁴ and the OECD Guidelines for Multinational Enterprises⁵ that, if voluntarily adopted by individual corporations, seek to establish a connection between business practises and Human Rights.

The most basic requirement of the Guiding Principles is that corporations should express a commitment to human rights through a publically available policy. The human rights that they are being asked to commit to are those contained in the six families of rights set out in the UDHR and elaborated upon in subsequent human rights instruments; social, political, equality, security, liberty and due process rights.⁶ Whilst there has been considerable discussion of the Guiding Principles and the Framework within which they are situated and what they mean for corporate practice, the threshold requirement of *commitment* and its significance has largely been ignored. This paper presents data on policy prevalence drawn from an examination of the web presence of Australia's 50 largest publicly listed companies (the ASX 50). Section 1 of the paper explains why this policy commitment is central to symbolising and entrenching the relationship between the corporate sector and human rights. Section 2 of the paper examines the empirical data collected on policy commitment to try and tease out what single factors might influence a corporation's decision to craft a policy that avows their commitment to human rights. The intention is to look at trends in the position adopted by corporations rather than the position of individual corporations. Section 3 of the paper reflects on what this data tells us about the cultural setting for human rights within the corporate sector across the exchange of a large developed economy noting that the constitutional position of human rights in Australia is different from that in most other democratic states.

Section 1 Policy Commitment to Human Rights in Context

³ S Waddock (2008); N Seppala (2009)

⁴ UN 2000

⁵ OECD 2011

⁶ UN 2011: GP 12. Muchlinski speculates that the reference in GP 12 to 'core internationally recognised human rights' could be read as not including some human rights instruments such as the UN Convention on the Elimination of all Forms of Discrimination Against Women, see P Muchlinski 2012 at p148.

In his third report to the UN in 2008 Ruggie explained that corporations were economic actors⁷ and as such had 'unique responsibilities' which were distinctive from the responsibilities of states. His answer to the question of how this distinction could be operationalized so as to leave states to carry the burden of the legal obligations of human rights law whilst pulling corporations indirectly into the ambit of human rights as values was to offer a 'conceptual and policy framework'⁸ based on 'differentiatedresponsibilities'.⁹ Those 'differentiated responsibilities' are expressed as a 'protect' responsibility for states and a 'respect' responsibility for corporations.¹⁰ By expressing himself in this way Ruggie avoids creating a position whereby corporations have a legal duty; instead they are locked into achieving an outcome based on pre-selected values ie human rights. In Ruggie's terms the justification for connecting human rights values to corporate activities is given as offering 'more effective protection to individuals and communities'¹¹ which are needed as a result of the 'governance gaps' created by globalized, rather than nation state based, corporate activity.¹²

Governance gaps is a rather prosaic way of describing how human rights and corporations are linked¹³ but it does illustrate very effectively the approach of principled pragmatism that Ruggie saw himself taking.¹⁴ He is effectively recognising that before we can think about the enforcement of human rights, typically at the level of the state, we have to recognise the *locus* from which compliance is generated. In many instances that *locus* occurs within the decision-making structures of corporations.¹⁵ Pushing on to corporations the respect responsibility focuses (their) attention on their role in compliance. Ruggie's explanation of 'governance gaps' takes us down well-trodden paths into the

⁷ UN 2008:4 at para 6

⁸ UN 2008:3 at para 1

⁹ UN 2008:4 at para 9

¹⁰ Ruggie's position can be traced back to the typology of rights and concomitant duties set out by Shue, see D Bilchitz (2010) at 205f.

¹¹ UN 2008:3 at para 1

¹² UN 2008:3 at para 3, 27 at para 104)

¹³ S Wheeler (2012)

¹⁴ J Ruggie (2011); UN 2006:20 at para 81.

¹⁵ G Dancy and K Sikkink (2017)

narratives of corporate hegemony under the conditions of economic globalization;¹⁶ states that have governance structures that are too weak, and so are also contested, to create or enforce national level protections for their citizens¹⁷ or states that are tied to bilateral investment treaties which restrict their ability to develop their own policy solutions to potential human rights abuses.¹⁸ From these narratives emerge complex networks of power and policy that intertwine market (corporate) concerns with the foreign and domestic policies of states. These networks 'directly structure and articulate territories and populations ... transnational corporations directly distribute labor power over various markets, functionally allocate resources, and organise hierarchically the various sectors of world production'¹⁹ in both local and international contexts.²⁰

The corner stone on which Ruggie built the "respect" aspect of his framework and the subsequent Guiding Principles was the notion of a policy commitment from corporations. This could be expressed in 'broad aspirational language'²¹ and moderated for SMEs that he recognized might have less capacity and possibly less formal processes and management structures.²² Further reassurance on this point of difference can be found in the acknowledgement contained in the Guiding Principles that the means by which they, the Principles, are realized will be different from state to state and enterprise to enterprise. Nevertheless a publicly available (implicit in 'publicly available' is the idea of ease of accessibility and prominence) policy statement that commits the corporation to meeting its human rights responsibilities is a non-negotiable requirement²³ that cannot be mitigated by resorting to arguments about the cost of training employees or inspecting the premises of suppliers for example. This top-down designed policy statement is to be communicated internally to employees and externally to business

¹⁶ F Wettstein (2009; J Mikler (2018) at pp 1-19

¹⁷ C Häberli and F Smith (2014)

¹⁸ UN 2008:5 at para 12; M Sheffer (2011).

¹⁹ M Hardt and A Negri (2001) at p31

²⁰ K Meyer, R Mudambi and R Narula (2011).

²¹ UN 2008:18 at para 60

²² UN 2011: GP14.

²³ UN 2011: GP16

partners and stakeholders and is to be reflected in any operational discourses that will impact on human rights becoming embedded in the life of the corporation. Ultimately the policy statement is the front end of the internal due diligence process²⁴ that corporations must put in place to deliver on their respect commitment.²⁵ The responsibility to respect human rights then elides into a responsibility to protect human rights under this process; positive action might be required to 'avoid' the infringement of others' rights and to address 'human rights impacts' that result from activities with which they are connected.²⁶ This is an important elision as it moves the role of the corporation from being essentially neutral in its operations to having a specific role in the protection of interests and perhaps, at its widest, a general role in human rights promotion.²⁷

Just as the policy statement is central to the respect regime from the perspective of the UN, that same centrality is also mirrored in the position of the corporation. It marks the beginning of the encounter between the corporation and human rights. It allows the corporation to engage with and adopt the discourse of human rights in an *ex ante* manner ie before its activities have impacted adversely on human rights. This engagement is very different from other outward facing, broadly pro-social, practices that corporations engage in.²⁸ These are policies of philanthropy and corporate social responsibility (CSR).²⁹ Both of these interventions are largely voluntary in the sense that the decision to undertake them and the subsequent design of them are voluntary (although few corporations would eschew these practices completely). There are jurisdictions that require corporations to

²⁴ Due diligence is the name that Ruggie gives to the process that corporations must undertake to identify, prevent and address human rights infringements that result from their activities, broadly conceived. For an account of the different understandings that the human rights community and the business community have of due diligence as a concept and how a coherent definition of the term for the purposes of the Ruggie Framework might be arrived at, see J Bonnitcha and R McCorquodale (2017).

²⁵ UN 2011: GP17.

²⁶ UN 2008: 17 at paras 55-56, UN 2011: GP 11.

²⁷ M Taylor (2011); F Wettstein (2015)

²⁸ For a detailed overview of these differences see F Wettstein (2016)

²⁹ There are numerous definitions of CSR but the most enduring is the pyramid model constructed by Carroll from his four-part definition in 1979. Carroll has recently provided a reprise and reflection of that model, see Carroll (2016).

undertake CSR as a matter of law but these are very much in the minority.³⁰ Corporate philanthropy might be encouraged through taxation policy and governed by law if its activities are framed as charitable structures but the adoption of these are a matter of choice for corporate management as are the objects of philanthropic support. CSR policies and interventions are designed by corporations to achieve a variety of strategic outcomes often *ex post facto*; for example high social or reputational impact at low cost, the amelioration of previous reputational damage, the checking of rising social risk, or support for the corporate endeavor through the supply of education or health services to employees and their families.³¹ Corporate management selects the values that CSR interventions made by their particular corporation represent.

Human rights are not voluntary or strategic initiatives pushed outwards from the corporation whose objects of attention reflect the preferences of corporate managers and attract the sympathy of audiences that corporations wish to influence. Instead human rights are the markers of humanity possessed by every individual.³² They represent the basic conditions necessary for every individual to live a life as opposed to eking out a mere existence. As a short form descriptor we could say that they are the obligations we owe each other in a civilized world.³³ They are inalienable and are not conditional on the bearer enjoying or maintaining a particular status. This is an avowedly rhetorical view of human rights and should not gloss over the difficulties of presenting them as universal and not culturally relative, particularly in the context of political rights.³⁴ It is easier, and perhaps more appropriate, in the context of corporations to make these claims for human rights because the rights that are corporations are most intimately, although not

³⁰ In Indonesia the Company Liability Act 20/2007 Art 74 requires companies engaged in the natural resources field to undertake CSR, see P Rinwigati Waagstein (2011). In India, the Companies Act 2013 sec 135 requires companies of a certain size and above determined by net profit, net worth and net turnover to spend 2% of their average net profit in the preceding 3 years on CSR activities chosen from an indicative list contained in the legislation, see G Kapoor and S Dhamija (2017).

³¹ For an incisive discussion of the role that CSR plays in the life of the corporation see P Fleming, J Roberts and C Garsten (2013)

³² S Wheeler (2002)

³³ P Werhane (2016) at p12

³⁴ C Gearty (2006)

entirely,³⁵ connected with are economic and social rights.³⁶ We can see this most clearly in the articulation of the difference between CSR and philanthropy policies on the one hand and human rights respect on the other; adverse human rights impacts cannot be compensated for by corporate intervention and action in other spheres.³⁷

This view of human rights puts the corporation, as an aggregation of individuals, in the same moral space as states occupy in a legal sense – as the subject of rights claims. Ruggie deals with this by reference to the economic power of corporations and in doing so makes it clear that he is avoiding the various philosophical arguments³⁸ that are employed to make this link.³⁹ Human rights stand at the centre of the corporation and demand observance. In organizational structure terms they are an input into the business model, CSR on the other hand is an output. It is entirely irrelevant whether individual corporations and their managers perceive the end goals of human rights as a desirable object of their attention.⁴⁰ It matters for human rights observance how corporations make their profits but for CSR it does not. CSR interventions may improve the human rights of some of those affected by business operations but this is not the same as a conscious commitment by a corporation to respect its human rights obligations.

³⁵ Most accounts of the impact of corporations on political and social rights are accounts of negative impacts eg the activities of Shell in the Niger Delta. For a more positive account see D Kim and P Trumbore (2010)

³⁶ One of the best articulations of the debates around the construction of the UNHCR can be found in L Hogan (2015) at pp14-40.

³⁷ UN 2008:17 at para 55.

³⁸ UN 2008:16 at para 53; 17 at para 55. For Ruggie corporations are not democratic public institutions and this is what underscores their difference in position from states. As economic actors corporations enjoy a different position to states not one that sees them stand as secondary rights bearers to states.

³⁹ The relevant philosophical arguments centre around whether corporations can be moral agents or not. The best exploration of this is found in T Erskine (2001) which takes essentially a Frenchian perspective to the question of the moral agency of collectives. See also D Arnold (2016).

⁴⁰ Early foundational work on human rights in the corporate sector revealed that corporate executives were not always clear on the difference between voluntary pro-social activities and human rights, see A McBeth and S Joseph (2006). For evidence that this position still exists see L Obara and K Peattie (2018).

In aspirational terms the policy statement allows corporations to articulate their vision of their operating world independently of how that world is seen by rights holders, their representatives and NGOs. The policy statement frames corporate sensibilities. It is an opportunity to use 'rights talk' and 'rights speak' to address states and publics on the legitimacy of corporate existence⁴¹ and to do so to suggest an existence that is not just about an explanation of profit accumulation. It moves human rights into a place from which they have not been visible before; with that move the corporation signals that new futures are possible. The policy statement moves corporations from the position of bystander in discourses about harmful corporate activity to a position of an engaged participant. Attractive though corporations have found the bystander position in the past,⁴² the commitment in the policy statement offers an opportunity for a new narrative. This is an opportunity that Ruggie encourages corporate managers to take; in further evidence of his pragmatism,⁴³ and his belief in embedded liberalism,⁴⁴ he uses the idea of corporations enjoying a social license⁴⁵ to operate, grounded through their commitment to human rights, which the 'courts of public opinion'⁴⁶ will judge.

By creating his Framework for respect around social expectations Ruggie pushes it further away from other earlier interventions UN such as the Global Compact. It is a direct appeal to Suchman's⁴⁷ legitimacy theory; corporations are being invited to align their values to a set of values that wider society considers a requirement for acceptance and membership. Failure to make this alignment will

⁴¹ C O'Kelly (2019)

⁴² J Amerson (2011; 2012)

⁴³ Ruggie sees this appeal to social expectations as creating a polycentric governance model in which the corporate sector stands alongside the state as a co-partner in guaranteeing human rights, see J Ruggie (2014).

⁴⁴ Ruggie is clear that markets, commerce and trade need to be embedded, and in many instances already are, within the community if they are to be effectively regulated. His Framework is an attempt to enforce this connection in relation to TNCs, Ruggie (1982; 2003).

⁴⁵ For an overview of the development of 'social license' as a concept, see K Buhmann (2016)

⁴⁶ UN 2008:15 at para 54. For a discussion of what this judgment might mean in practice see, S Wheeler (2015).

⁴⁷ M Suchman (1995). There are a lot of assumptions made in this appeal to legitimacy theory, which usually is used to explain voluntary reporting or adoption of initiatives in the environmental and social responsibility arena, around how corporations see their relationship to wider society and investor behavior, see C Lokuwaduge and K Heenetigala (2017).

threaten the legitimacy of the corporation. While this approach has the appearance of requiring more from the corporate sector, and it does in the sense of requiring commitment and creating exposure of activity, it also sets up the corporatization of human rights through the responsibilisation of corporate actors.⁴⁸ This is not the appropriate place for a discussion of the merits of this approach but it is important to note that the consequence of this approach is to nest respect for human rights in neoliberal market-based structures. Human rights become more visible but are also reduced to being manageable rights rather than overriding claims to humanity.⁴⁹ The policy statement is the first page of this story.

Section 2 Empirical Data on Policy Commitment in the ASX 50

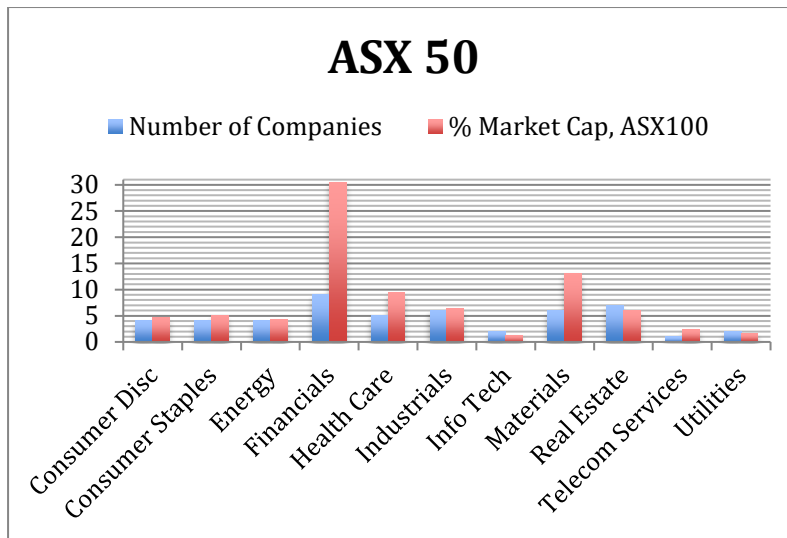
The top 50 corporations by market capitalization listed on the Australian Securities Exchange represent all 11 sectors of the Global Industry Classification Standard⁵⁰ and 84.7% of the index capitalisation, as Table 1 shows. It was for these reasons that it was felt that the ASX 50 would provide a sufficiently robust sample for the study rather than the ASX 100.

Table 1 The ASX 50 by GICS and market cap

⁴⁸ This responsibilisation of corporate actors crowds out of the business and human rights narrative the participation of rights holders and the NGOs that support them. Unsurprisingly this has led to trenchant criticism of Ruggie's framework from advocates of a more community-based approach to the issue, see T Melish (2017).

⁴⁹ C Scheper (2015) at p740, 746.

⁵⁰ The Australian and New Zealand Standard Industrial Classification (ANZSIC) lists 19 industry divisions and was updated in 2006. However the selection for ASX 100 is made by a committee from ASX and Standard and Poor's (S&P). S&P is a joint developer of GICS.



The research process involved identifying the relevant companies from the published ASX list⁵¹ as it stood on January 1st 2019. The websites⁵² for these firms were then trawled for a publically available and freestanding human rights policy. All material on the website was checked not just the most recent year of reporting. Corporations were not asked to supply additional material above that disclosed on their websites for two reasons. First the exercise was about identifying whether a policy commitment had been made and whether it had been made in a format that was available to stakeholders and second previous studies have indicated that a request to corporations for information beyond their website yields very little additional material.⁵³

The website content search produced a list of 13 corporations with a freestanding human rights policy commitment. The remaining 37 corporations divide between two groups; those that do not mention human rights at all in their web presence (15) and those that have what this paper categorizes as an embedded human rights policy (22). An embedded human rights policy was defined as one which achieved human rights traction through the auspices of another policy eg a couple of sentences referencing human rights found in a supplier's code of conduct

⁵¹ <https://www.asx50list.com/> (accessed 1 Jan 2019)

⁵² Websites can be taken as expressing a corporation's formal position on CSR and Human Rights, see Bondy, Matten and Moon (2004).

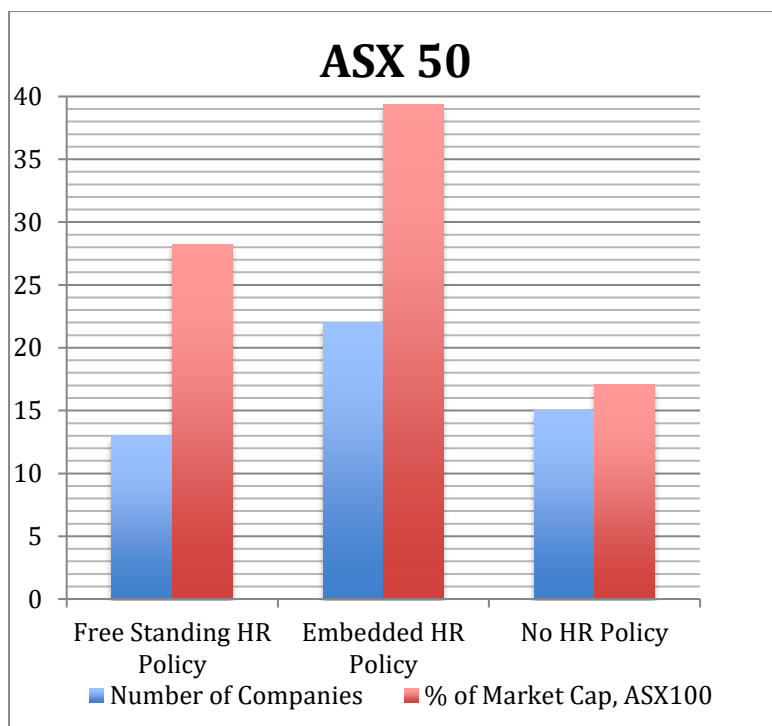
⁵³ Preuss (2010)

or a section on human rights in a general ESG (environmental and social governance) report. It was not always easy to classify corporations into these three categories; a very detailed policy could be found in some instances embedded in a general Code of Ethics. According to the definitions applied in this paper these detailed policies sit in the same category as those that are found in a very small section of a much larger document and cannot carry the label 'policy' in any meaningful sense of that word. What differentiates the policies in category two from category one is that in category one there is a separateness from other issues and a publicness about the policy; the commitment to human rights in category one is freestanding and easily locatable by stakeholders. It is a commitment that is held apart from 'usual' business operations and processes. Corporations placed in category three might also employ some language that could be construed as human rights protection but there is no attempt at policy formulation or even a statement that uses the words 'human rights'.

The services of an interrater,⁵⁴ in the guise of a colleague working in a similar but distinct field, were called upon to ensure that there was consistency of attribution to group. Table 2 shows the division of the remaining 37 corporations into these two groups. Data was collected from the corporate websites for four variables; boardroom gender diversity and three variables grouped together under the broad heading of internationalization – cross listing, ESG reporting and membership of business and industry non-governmental organisations (BINGO), to ascertain whether they might offer any insight into the different positions taken on policy commitment to human rights in the three groups.

Table 2 ASX 50 by human rights policy group and share of market cap

⁵⁴ Interrater reliability is more commonly used to assess the extent of agreement between data collectors. In this instance it was used to establish that the term 'publically available' had been applied only to those statement of human rights policy that were freestanding and easily locatable and identifiable by stakeholders as an individual corporation's commitment to human rights, see McHugh (2012).



It is impossible to know how many corporations globally have adopted the Framework as part of their business operations and structures and within that adoption have a freestanding and accessible policy commitment to human rights.⁵⁵ There have been various numerical suggestions largely based on corporate self-reporting to groups such as the Business and Human Rights Resource Centre (BHRRC), the World Business Council for Sustainable Development and the UN Human Rights Council.⁵⁶ It appears that 372 corporations globally report to the BHRRC that they have a policy commitment but it is clear that there is no disaggregation between what this paper terms group one policy commitment and group two lower traction statements. 372 seems to be a very low number of corporations and there has been little increase since 2013.⁵⁷ This suggests perhaps that corporations do not regard this database as a useful or important communication forum. Conversely the World Business Council for Sustainable Development reported an upward trend from 60% in 2014 to 87% in 2016 in its self-reporting corporate survey of commitment to human rights through 'public

⁵⁵ O'Brien and Dhanarajan (2015) at p548-549

⁵⁶ HRC (2013) at para 63 reported that in a global cross-sector voluntary survey of 117 corporations 83% of them reported that they had made a public commitment to respect human rights.

⁵⁷ Aaronson and Higham (2013) at p357

statement or policy’;⁵⁸ again there is no disaggregation between what this paper would categorize as group one and group two policy types.⁵⁹ We might contrast this figure with the 92% of the world’s largest companies that report a standalone CSR report.⁶⁰

Vigeo Eiris, an ESG rating and research agency that feeds information to the socially responsible or ethical investment market, produced a survey in 2017, rather than a corporate self-report study, of human rights traction in 3000 corporations across 35 countries. It reported that 47% of these corporations had a visible human rights policy with a further 23% referencing human rights.⁶¹ These groups would appear to replicate groups one and two in this paper. Added to this there is an index-based study of human rights traction conducted on the FTSE 100 in 2009.⁶² It found, two years before the publication of the Guiding Principles in 2011, that 57% of the 98 corporations listed had either a freestanding or embedded human rights policy (like the earlier surveys above it does not disaggregate the two positions). The combined percentage for freestanding and embedded policies in this study conducted in 2019 is 70%. This figure for the ASX 50, 8 years after the promulgation of the Guiding Principles, is disappointing and all the more so when we remember that the percentage of corporations listed there with a freestanding accessible policy is only 26% as opposed to the global figure of 47% suggested by the Vigeo Eiris research.⁶³ As Table 2B makes clear the presence of a freestanding human rights policy in the ASX 50 is not a function of an individual corporation’s size.

⁵⁸ <https://www.business-humanrights.org/en/company-policy-statements-on-human-rights> (accessed April 9 2019)

⁵⁹ WBCSD (2016) at p5

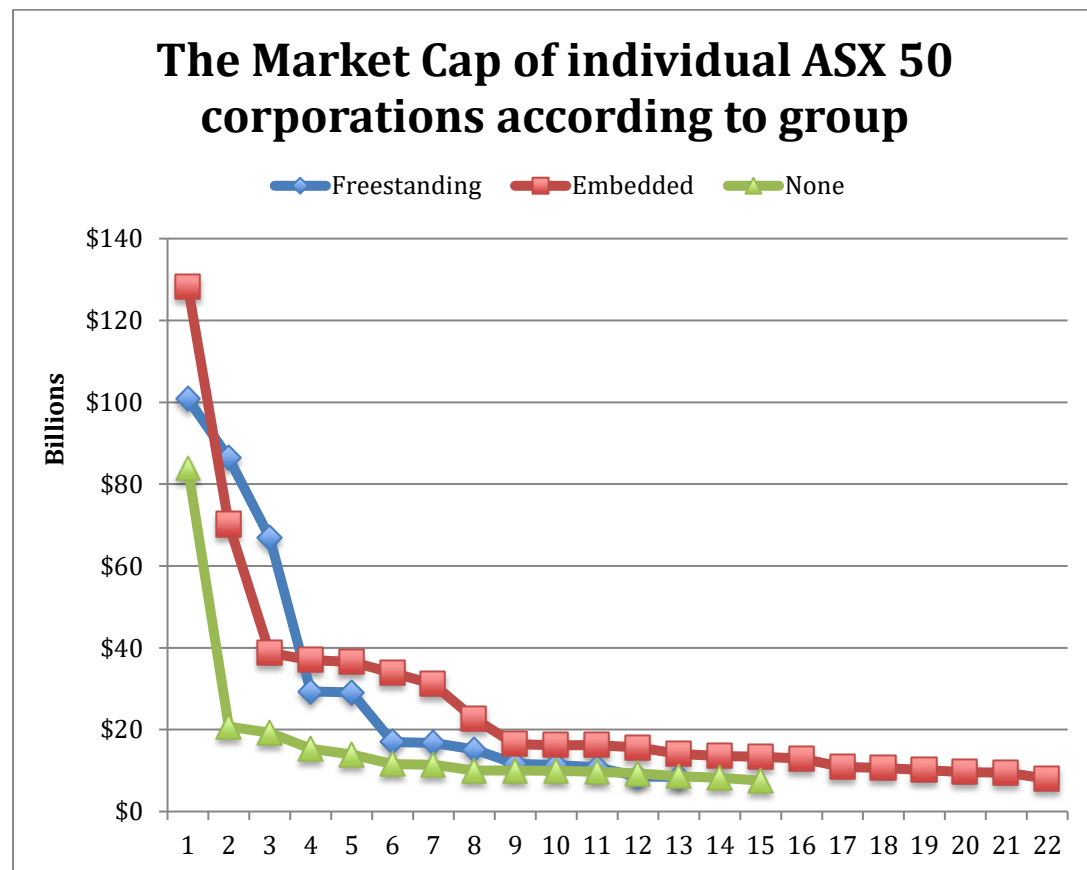
⁶⁰ KPMG (2015).

⁶¹ Vigeo Eiris (2017) at p26

⁶² Preuss and Brown (2012)

⁶³ A survey undertaken by the law firm Allens on behalf of DFAT in found that 24 of the ASX 50 had ‘public commitments’ to human rights. This was defined broadly as use of the phrase ‘human rights’ so on the schema used in this paper it is probably an amalgamation of groups 1 and 2. See Allens (2017) at p16, 74. This is a very different picture from the one offered by ACSI (2012) which suggested that only 14% of the ASX 200 had a policy on ‘labour and human rights’ (p4 and p13) and that very few corporations asserted their support for the Global Compact or ILO Conventions (p5 and p14). This survey was a desk survey of publically available documentation. It was not looking for the general commitment to human rights that this paper is centred on. Nevertheless it demonstrates that a commitment to human rights in ASX listed corporations has not historically been strong.

Table 2B The Market Cap of individual ASX 50 corporations by group



There is a movement towards integrated corporate reporting⁶⁴ in Australia,⁶⁵ as there is globally, which a corporation might see as an invitation to present all its information for external stakeholders as a unified whole. However this should not mitigate against a freestanding corporate commitment to human rights because the purpose of this statement and an integrated approach to reporting are rather different. Integrated reporting is about explaining how, by pulling together information on its strategy and governance, a corporation 'creates ... value',⁶⁶ arguably in a particular sense of the word 'value' that is not orientated towards concerns such as human rights,⁶⁷ in a risk context as a forward-looking perspective.

⁶⁴ C Higgins, W Stubbs and T Love (2014)

⁶⁵ KPMG (2018). There is implicit support for integrated reporting in the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations* (4th ed) in the commentary to Recommendation 7.4.

⁶⁶ Integrated Reporting (2013) at p2.

⁶⁷ J Flower (2015)

It might therefore have some interaction with the post human rights policy due diligence processes for human rights respect. A corporate commitment to human rights in the form of a policy statement is about stating clearly and unambiguously corporate support for, and endorsement of, the foundational tenet of human existence.

(ii) Boardroom Gender Diversity and Human Rights Commitment

The impact of board composition in terms of gender on decision-making and corporate behavior has been the subject of debate in the relevant literature for some time. Within social role theory women and men are considered to possess different characteristics and behaviours; for example women are said to be more emotionally expressive and sensitive than men.⁶⁸ The debate between Gilligan and Kohlberg on male and female moral reasoning draws similar distinctions;⁶⁹ women are more likely to be orientated towards the care of others and society whilst men are seen as being more individualistic. Whilst acknowledging that this summarizes a very large number of studies over a long period of time and itself essentialises the debate at a level of base crudity,⁷⁰ one of the questions that the corporate behavior theorists ask is whether the presence of more or less women on the board of a corporation affects its CSR performance. Several recent studies claim that CSR performance improves when there is gender diversity on the board,⁷¹ however the majority are more equivocal.⁷² The gender diversity of corporate boards within the ASX 50 was examined to determine if it could offer an explanation of why the corporations in group one had a freestanding demonstrable commitment to human rights and those in group two and group three had less or no human rights traction.

There are no studies to date on boardroom gender diversity and human rights and so CSR is being used as a proxy for human rights here even though, as section 1 explained, they are distinct and different concepts. The most recent

⁶⁸ A Eagly and W Wood (1991)

⁶⁹ S Jaffee and J Hyde (2000); A Cook and C Glass (2018)

⁷⁰ E Hyun, D Yang, H Jung and K Hong (2016)

⁷¹ K Rao and C Tilt (2016); K Byron and C Post (2016)

⁷² I Boulouta (2013)

suggestion in the literature is that if gender board diversity does make a difference to CSR performance it does so most in relation to less powerful stakeholders, defined as contractors and the community, within the ambit of the corporation. If this is accurate, then the relationship between gender diversity, CSR and human rights in the context of variables that might have explanatory force becomes closer,⁷³ as the community and contractors (or at least their employees) as the most likely to suffer human rights abuses within the context of ASX 50 corporations. From 2008 onwards a number of tools that purport to identify and measure human rights indicators have emerged.⁷⁴ CSR offers the opportunity for output measurement in a way that human rights policy commitment and respect does not for a variety of reasons.⁷⁵ Policy commitment can be assessed against the range of rights that it seeks to cover and for alignment with the Guiding Principles but these are input assessments. Human rights respect lends itself to the production of process measurement indicators around due diligence⁷⁶ and the remedial structure that is suggested but the bespoke nature of respect around issues such as the severity of impact for example mitigates against general output achievements. Human rights reporting relies largely on self-report by corporations. This is often a narrative report and such reports will remain difficult to standardize into assessment until either auditor expertise augmented by technology in the form of, for example, neural language processing of text for compatibility is readily available or regulatory intervention requires a certain level of disclosure.

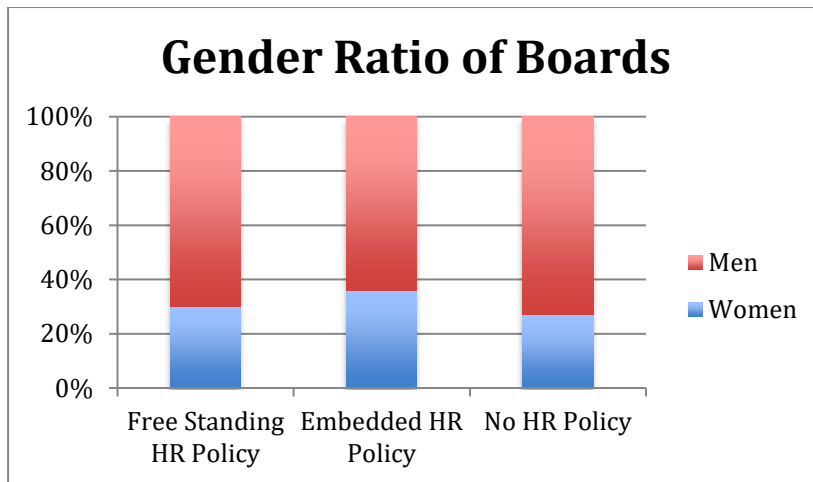
Table 3 The Ratio of Male and Female Directors in ASX 50 Corporations ordered by Human Rights Policy Commitment

⁷³ C Francoeur, R Labelle, S Balti and S El Bouzaidi (2019)

⁷⁴ S Merry (2011)

⁷⁵ D de Felice (2015)

⁷⁶ K Salcito and M Wiegla (2018)



It is clear from Table 3 that gender diversity in the boardroom does not offer any insight into why 13 corporations have a freestanding human rights policy and 37 others listed on the same exchange do not. Corporations in group 2 (embedded human rights policy) have a higher ratio (0.36) of female directors than those in group one (0.3). Corporations in group 3 (no human rights traction) have a ratio of female to male directors that is only slightly smaller than group one (0.27).

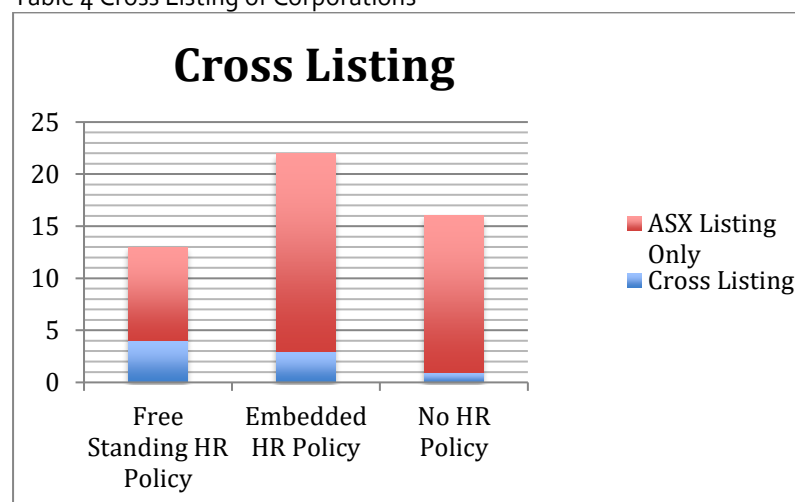
(iii) *Internationalisation of ASX 50 listed corporations*

Several measures of internationalisation that might be relevant to explaining greater or lesser human rights traction across the corporate sector are explored here; cross listing, use of reporting frameworks and membership of international business associations. The hypothesis is that corporations exposed to international influences through their capital base or through membership of a trade association for example might exhibit a higher or at least a more explicit commitment to human rights.

(a) Cross listing as a corporate strategy might either reflect an existing geographically dispersed product distribution network or construction base or the desire to acquire one or both of these. Cross listing creates the possibility of accessing external financing from foreign capital markets and of facilitating mergers and acquisitions as reputation and brand familiarity in those jurisdictions can be increased through greater visibility. However corporations that cross list are discounted against their host country peers in a measure that the literature calls *LOF* (liability for foreignness) because of their relative unfamiliarity to their host,

their different culture and the costs of information asymmetry.⁷⁷ One way of overcoming *LOF* is to adopt either similar or improved ESG practices against those found in host corporations as a legitimization strategy.⁷⁸ The relevant literature suggests that corporations that are cross-listed have a better CSR and ESG performance than those that are purely domestic corporations with the greatest performance enhancement occurring when the overseas jurisdiction has demonstrably stronger institutions and regulatory capacity than the domestic one.⁷⁹

Table 4 Cross Listing of Corporations



Interrogation of this proposition for the purposes of the data presented here requires once again relying on information derived from ESG and CSR activities in the absence of specific data on corporate human rights practices. Table 4 shows that there is some validity to this proposition reflected in the ASX 50 data collected. The corporations in group one have a higher percentage of cross listing than those in group 2 and there is only one cross-listed corporation in group 3. The cross-listing locations however remain constant across the three groups. They are primarily New Zealand and the US against which Australian institutions and regulatory capacity are broadly comparable, thus suggesting that cross-listing in these instances is not

⁷⁷ R Bell, I Filatotchev and A Rasheed (2012)

⁷⁸ B Del Bosco and N Misani (2016); N Boubakri, S El Ghoul, H Wang, O Guedhami and C Kwok (2016).

⁷⁹ We know that the converse is true; ASX listed corporations that operate in high human rights risk countries have stronger disclosure practices than those that operate in low human rights risk jurisdictions, see M Islam, S Haque and R Roberts (2017).

to jurisdictions with higher ESG levels or different ESG cultures and so it is, at best, only a possible factor in human rights traction.

(b) The second internationalization factor that might offer some explanation for the different levels of demonstrable commitment to human rights is the position that corporations take on ESG reporting; namely whether they engage with any of the many ESG global standards, some of which include the full range of human rights,⁸⁰ and whether they then use a reporting framework to document their ESG performance. If a corporation uses a global standard that incorporates human rights we might think that this will stimulate the formulation of a freestanding human rights policy. Reporting frameworks are designed to offer a measure of comparability of information for investors and other stakeholders and they also suggest that a corporation is interested in benchmarking its ESG performance against others at least within the same industry sector, if not the index. Again this suggests that a corporation is outward facing in its reporting strategy and that the creation of a freestanding human rights policy is only a small step further. KPMG report⁸¹ that the most popular framework used globally is the Global Reporting Initiative (GRI).⁸² The GRI contains a series of management and performance indicators as well providing principles around which content should be reported. From July 1st 2018 there has been a specific tool within the GRI for Human Rights Reporting (and any corporation in the ASX 50 with a reporting date after July 2018 could have utilized it for the purposes of the data collected for this paper), additionally there was basic guidance for human rights reporting available in the GRI suite from 2006.

Table 5 shows the prevalence of reporting framework use within the ASX. It is overwhelmingly the GRI that is used.⁸³ It shows that whilst use of the GRI has some correlation to the acknowledgement of human rights in that it is prevalent in

⁸⁰ A recent study identified 98 separate ESG standards of which around 20% included the full range of human rights, see T Kirkebo and M Langford (2018). See also D De Felice (2015) at p513-514.

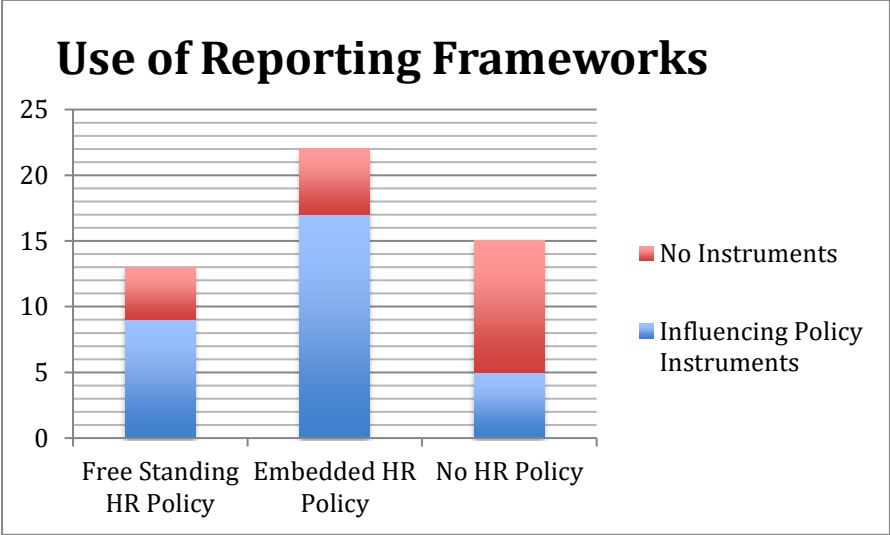
⁸¹ KPMG (2017) at p27-28. See also F Marimon, M Alonso-Almeida, M Rodriguez and C Cortez (2012)

⁸² GRI (2018)

⁸³ Two corporations expressly referred to using the Integrated Reporting Council Standard.

groups one and two and not group three, it does not explain the adoption of a freestanding commitment to human rights by the 13 corporations in group 1.⁸⁴

Table 5 Use of Reporting Frameworks



(c) The third measure of internationalization for which data was collected was membership of a Business and Industry Non-Governmental Organisation (BINGO). Typically these are made up of corporations engaged in commercial competition with each other that have nevertheless come together to co-operate on matters of ‘joint concern[to] formulate appropriate strategies to advance their interests’. These strategies are often aimed at influencing regulation, government policy and public opinion through dialogue, education and lobbying.⁸⁵ They disseminate information across their membership and are often producers of voluntary ESG standards and codes of conduct.⁸⁶ BINGOs frequently have conditions of membership for corporations around standards of behavior presumably to ensure that they can maintain a shared voice and some credibility when engaging with governments, NGOs and other global bodies on behalf of their members.⁸⁷ Table 6

⁸⁴ There is a suggestion that human rights issues are not well reported within the GRI framework. The data on which this literature is based pre-dates the release of the Guiding Principles, UN (2011) so its validity for the current era of business and human rights is not assured, see R Gray and S Gray (2011) at p 787 and J Morhardt (2009).

⁸⁵ T Rajawni, T Lawton and N Phillips (2015)

⁸⁶ R Doner and B Schneider (2000)

⁸⁷ K Ronit (2018) at p59, 63

displays the level of BINGO membership in each of the three ASX 50 groups. There is considerable BINGO traction in group one but none in the other two groups.

Table 6 Bingo Membership by Human Rights Group



This appears to be the clearest point of distinction between the 13 corporations in group one which have freestanding and accessible human rights policies and the corporations in groups two and three which have either a lower commitment to human rights or no stated commitment at all. There are mixed views on the desirability of BINGOs and the effects of the pro-social activities, in particular, which BINGOs engage in within the literature on business associations.⁸⁸ However on this occasion they appear to be a force for positive social action. The relevant 7 corporations⁸⁹ in group one subscribe to a wide range of BINGOs from the very broad based International Council of Mining and Minerals (ICMM),⁹⁰ of which 4 are members, to the more focused Responsible Jewelry Council. Given the information in Table 2B on the size of corporations across the three groups, it is not the case that Bingo membership accrues only to the largest corporations.

What the BINGOs that these 7 corporations are members of have in common is their high degree of engagement and participation in the formulation of the

⁸⁸ J Marques (2017)

⁸⁹ A further 2 of the 13 corporations in group one have very particular histories and cultural settings deriving from their founders’ interests. Their commitment to human rights and ESG concerns are expressed in these terms.

⁹⁰ The background narrative to the establishment of the ICCM can be found in K Lee (2017)

Ruggie Framework. The ICMM, for example, made submissions and provided information throughout the drafting of the Framework.⁹¹ These BINGOs were undoubtedly assisted in this participation effort by the desire of Ruggie himself to achieve legitimacy for the Framework through extensive consultation with industry and NGOs.⁹² Ruggie's desire for legitimacy in relation to stakeholders has in the case of these actors morphed into adoption and dissemination of his Framework by them. This should not be seen as an endorsement of the ICMM's behavior and position on all ESG matters or even of their definition of appropriate or responsible business conduct,⁹³ far from it. There are trenchant critiques of the guidelines for behavior that the ICMM sets out for its members in relation to development outcomes, free informed and prior consent and the contractual model that these are based upon.⁹⁴ However the ICMM's influence in relation to human rights commitment is entirely in keeping with their role, in common with other BINGOs, of working as a strategic actor operating as a reputation manager and 'supporter, acceptor or challenger'⁹⁵ of soft and hard regulation to assist the profit making activities of their members. This is a very good example of the corporatization of human rights that was referenced in section one of this paper. In the battle to attract and retain global investment capital this might mean a race to the top rather than a race to bottom in respect of adopting and trickling down issues like CSR and human rights commitment. It seems that is what has happened in relation to the public commitment to human rights in these corporations.

Section 3 The Policy Statement in Wider Perspective

The ASX data collected for this paper does not represent, nor does it set out to represent, the full story of the largest listed Australian corporations and their engagement with human rights. There is no attempt to examine which rights are engaged with most frequently for example. What the data does tell us is something about the place of human rights and human rights discourse; its relative importance and its standing as 'an issue' within the corporate endeavor. It also tells us that the

⁹¹ J Ruggie (2013) at p28

⁹² J Ruggie (2013) at pp141-148

⁹³ A MacInnes, M Colchester and A Whitmore (2017), J Owen and D Kemp (2013)

⁹⁴ B Meyersfeld (2017)

⁹⁵ K Tienhaara, A Orsini and R Falkner (2012) at p49

variables of cross-listing, the gender of directors and the use of reporting frameworks have little or no demonstrable effect on policy commitment to human rights. We now know that the most important factor in triggering a publically available, accessible policy commitment to human rights is membership of a particular type of industry based international organisation. These findings need to be looked at in the broader context of corporate behavior and the role that the state has assumed in relation to human rights in Australia. There are several layers to this context.

(i) Australian Corporations, ESG/Human Rights and National Culture

The first layer is that Australian listed corporations are considered to have a good record, in international comparative terms, on ESG activities and ESG reporting. Codes of ethics⁹⁶ and corporate social responsibility practices⁹⁷ have been growing in use since at least 1990, even if there is a suggestion that there is a greater importance placed on governance practices rather than explicitly social or environmental interventions.⁹⁸ The 2017 KPMG Survey of Corporate Responsibility Reporting lists Australia as one of the countries with a higher than the global average CSR reporting rate.⁹⁹

The second layer is that, perhaps because of its apparently positive relationship with ESG, Corporate Australia tells a particular story, echoed also by Government, about itself in relation to its commitment to human rights. This story is a story of successful and positive engagement. For example, Australia has recently become the second state after the UK to introduce modern slavery

⁹⁶ M Callaghan and G Wood (2014) and C Higgins, M Milne and B van Gramberg (2015)

⁹⁷ See for example the Corporations and Markets Advisory Committee (2006) and the Annual Review of the State of CSR in Australia and New Zealand which is now in its tenth year of production, ACCSR (2017)

⁹⁸ J Galbreath (2012) at p533. However even within what are obviously governance structures ESG concerns are not entirely forgotten. Whilst not going as far as the draft for the 4th edition released in 2018 suggested, the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations* of February 2019 do in Principle 3 suggest that a corporation ensure that it has a culture of 'acting lawfully, ethically and responsibly'.

⁹⁹ KPMG (2017) at p16. The band that above average countries sit in is from 72% to 89% and Australia is well within that band.

legislation¹⁰⁰ and much of the evidence given to the foregoing Senate inquiry¹⁰¹ asserted that Australian corporations were adopting and embedding the Ruggie Framework. Australia enjoys membership of the UN Human Rights Council and is frequently presented by its Government as an advocate for human rights in the region.¹⁰² On a domestic level Australia created its national Human Rights Commission in 1986 and as a regional international power Australia has played a role in supporting the creation of national Human Rights Commissions in the Asia-Pacific region and their umbrella organization, the Asia Pacific Forum.¹⁰³

The third layer is that this positive story, notwithstanding the material above, is largely illusory. There is considerable evidence which calls its accuracy into question. The Australian Centre for Corporate Responsibility (ACCR) in its Benchmarking Report of October 2017¹⁰⁴ on the relationship between human rights and corporations asserts that 'Australian Companies typically have a policy statement'¹⁰⁵ but no evidence is provided to support this statement. The ACCR report looked at a sample of 23 corporations and its own analysis of the position of these corporations on human rights is that they perform poorly.¹⁰⁶ A 2017 survey from KPMG examines, *inter alia*, the engagement (explained as policy commitment, evidence of due diligence structures and reporting) with human rights in the top 100 corporations by size in each of 49 countries. Australia does not rank in the top 10 countries in the survey and is out performed by the corporate sector in a range of European countries and others such as Mexico, India and Brazil.¹⁰⁷ The 10 best

¹⁰⁰ Modern Slavery Act 2018 and the Modern Slavery Act 2015.

¹⁰¹ https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/ModernSlavery/Submissions. A full account of the process adopted to establish the legislation can be found at <https://www.business-humanrights.org/en/inquiry-into-establishment-of-a-modern-slavery-act-in-australia> (accessed May 8th).

¹⁰² See for example a speech given by the then Foreign Minister, Julie Bishop, to the Lowy Institute, on the December 12th 2016, <https://www.lowyinstitute.org/publications/julie-bishop-australia-and-un-human-rights-council> (accessed May 10th 2019)

¹⁰³ A Durbach, C Renshaw and A Byrnes (2009)

¹⁰⁴ ACCR (2017)

¹⁰⁵ ACCR (2017) at p30

¹⁰⁶ ACCR (2017) at p21. Using a scoring system established by the Corporate Human Rights Benchmark which weights corporate performance against 6 distinct measurement themes derived from the Ruggie Framework the average score band of the 23 companies was 20-29% with 8 ASX listed companies scored in the second lowest band of 10-19%.

¹⁰⁷ KPMG (2017) at p44

performing countries identified in this report all have either legislative requirements for human rights reporting and/or a public discourse that expressly articulates, in the context of domestic governance, commonly held political, social and cultural values as human rights.

The ESG positions and codes of conduct that corporations adopt are both 'culture-free' and 'culture-bound'.¹⁰⁸ They reflect what is important within the country they list in.¹⁰⁹ We can identify 'culture-free' issues as being those where there is a difference of emphasis within the positions taken across jurisdictions but there is still similar policy traction. For example we might expect Japanese corporations to be more concerned with the environment and Swedish corporations to be more concerned with policies that point towards social equality.¹¹⁰ In another culture free issue Australian corporations have been shown to have corporate codes of conduct for employees that rely less on taking the advice of internal monitors than US corporations perhaps reflecting a different litigation environment between the two jurisdictions. The same study from 1990 indicates that there is a temporal dimension to this. It was conducted at a time when Australia had a strong protectionist stance towards external industrial competition; codes of conduct in Australian corporations focused on conduct in relation to foreign governments to a much lesser degree than their American counterparts.¹¹¹ That gap is likely to be considerably smaller in 2019 as the Australian economy has become less isolated over time.

Issues that are overtly political in nature are 'culture-bound'. An example would be employee representation in corporate decision making structures; this is an issue that divides national models of corporate governance.¹¹² Employee

¹⁰⁸ C Langlois and B Schlegelmilch (1990)

¹⁰⁹ R Welford (2004). Cross listing adds another dimension to this. As explained in section 2 (iii) (a) cross listing has been shown to enhance the ESG performance of corporations above that of sole listed corporations.

¹¹⁰ V Esteban (2017) at p27

¹¹¹ G Wood (2000) at p289 and 297

¹¹² The different models of corporate governance are the shareholder model (often called the Anglo-US model) and the stakeholder model (often called the European or German model). Their

representation is mandated or advocated as best practice in some jurisdictions. Corporate codes of conduct there are likely to speak of ideas of shared responsibility and co-operation between employees and the corporation rather than mandating certain behavioural expectations of employees with a sanction for non-compliance. Sanction imposition is likely to feature in jurisdictions where employees do not have a voice as co-governors of the enterprise as a legal right. Human Rights is a 'culture-bound' issue. As a discourse and as values, human rights are given very different positions within nation states. The 22 corporations in Group 2 embedded their position on human rights within other ESG strategies. For 12 of these corporations their human rights focus is entirely positioned on the responsibility of their suppliers to the integrity of the supply chain. Human Rights has been distanced from the corporations and become one that is external to it. 27 members of the ASX 50 do not view human rights as an issue that should be drawn into the corporation and 'owned'. As a state Australia takes a similar position; human rights protection is important in its role as a regional power but human rights as a descriptive term and as an aspirational objective is not part of the *lingua franca* of Australian political and social discourse at the domestic level.

(ii) *Human Rights in Australia*

The position accorded to human rights discourse within Australia is the fourth and final layer of context. To claim that human rights as a discourse is absent from the political and cultural sphere of Australian life is a big claim to make but there are strands of evidence that can be pulled together to support this proposition. In 2016 Australia underwent a UN Universal Periodic Review (UPR).¹¹³ In that Review three states (Sweden, The Netherlands and Ecuador) made trenchant recommendations about the need for Australia to initiate a consultative process that could produce a National Action Plan (NAP) for Business and Human Rights. The Australian

differences are well documented and not infrequently overstated. See for example E Jeffers (2005) and R Aguilera and G Jackson (2010).

¹¹³ <https://undocs.org/A/HRC/31/14> (accessed 10 May 2019)

Government did indeed undertake a consultation process in 2016¹¹⁴ and 2017¹¹⁵ but in October 2017 it announced that it would not, unlike 21 other states including the US, UK, Columbia and India, be proceeding with a NAP for implementing and supporting the Ruggie Framework.¹¹⁶ The response of the UN Working Group on Human Rights and Transnational Corporations was to comment that initiating legislation on slavery in supply chains could not be seen as a substitute for full engagement with human rights issues.¹¹⁷ It is hard to see the negative response to the suggestions made in the UN UPR as anything other than an Australian Government refusal to support the advancement of the Framework domestically.¹¹⁸

On a larger constitutional stage away from the business and human rights nexus there is also a marked 'reluctance about rights' from a domestic political standpoint.¹¹⁹ Australia has been slow to enshrine the contents of major human rights treaties in domestic legislation while being content as an international actor to ratify them.¹²⁰ It has ignored adverse findings against it from the UN Human Rights Committee suggesting, in doing so, that the Committee is not a judicial tribunal and that Australia has a significantly better human rights record than many other jurisdictions.¹²¹ This is not to suggest that there are no constitutional protections in Australia that amount to preventing human rights infringements – there are; for example freedom of religion and the requirement that the State acquire private property on 'just terms', but the point is that these protections are

¹¹⁴ In 2016 it held a series of roundtables with business, see <http://www.unglobalcompact.org.au/new/wp-content/uploads/2016/08/Summary-Towards-Aust-NAP-on-BHR-FINAL.pdf> (accessed 10 May 2019).

¹¹⁵ In 2017 it set up a multi-stakeholder group (business, civil society, academia) to consider establishing a NAP, see <http://www.unglobalcompact.org.au/2016/11/22/australian-government-invites-eois-for-multi-stakeholder-advisory-group-on-business-and-human-rights> (accessed 10 May 2019).

¹¹⁶ <https://www.hrlc.org.au/news/2017/10/17/government-ignores-advice-of-expert-group-on-business-and-human-rights> (accessed 10 May 2019).

¹¹⁷ <https://www.business-humanrights.org/sites/default/files/documents/UNWGLetterAustralia.pdf> (accessed 10 May 2019).

¹¹⁸ An NAP would have set out how Australia intended to deal with existing regulatory, legislative and practical gaps in its human rights protection regime in addition to guiding business on their obligations, see General Assembly (2014) at para 33.

¹¹⁹ H Charlesworth (1993)

¹²⁰ J Nolan (2007) at p75

¹²¹ H Charlesworth (2006)

framed as non-discrimination issues and not as questions of human rights. There are rights which have constitutional status in most democracies such as the right to freedom of speech, movement, and association that are absent from the Australian Constitution.

The most obvious feature of the Australian political settlement is its transactional quality. The Constitution is not an instrument that sets out or defines the values of the Australian polity as a newly independent state forged from revolution or freed from colonial rule.¹²² Rather it reflects its historical context which was the formation of a federation of states that, content to be within the British Empire, needed to effect co-operation in areas like defence and trade whilst balancing fiscal and policy responsibilities between individual states and the resulting Commonwealth.¹²³ In a broader social context human rights are not seen as an issue that merits reflection, historical or otherwise. They do not feature as an organizing principle of civic or history education on the School curricula.¹²⁴ Ideas such as Australian 'mateship',¹²⁵ heroism, self-reliance and 'fair go' forged through the trauma of Anzac experience and the harsh conditions endured by early European settlers¹²⁶ play a much more significant part in national consciousness than human rights.

In other democracies the absence of constitutionally entrenched rights has been dealt with by legislatively embedding rights. The UK famously lacks a written constitution but the Human Rights Act 1998 and the constant reference by all UK Courts to the jurisprudence of the European Convention on Human Rights and the European Court of Human Rights ensures that the prevailing judicial discourse, supported by societal sentiments, is one of the articulation and protection of human

¹²² E Arcioni and A Stone (2016) at p 75-76.

¹²³ H Collins (1985)

¹²⁴ N Burridge, J Buchanan and A Chodkiewicz (2014)

¹²⁵ Michael Howard famously suggested that the proposed preamble to the Australian Constitution (the second question asked in the 1999 Australian republic referendum) should include the statement '[w]e value excellence as well as fairness, [and] independence as dearly as mateship', M Howard (1999). For a thorough consideration of the concept of mateship and its obviously gendered overtones see N Dyrenfurth (2015)

¹²⁶ J Page (2002)

rights. Former Australian Human Rights Commissioner Gillian Triggs identifies reluctance on the part of Australian Courts to engage with and draw upon 'the jurisprudence of international tribunals and organisations, or the standards nations have accepted in treaties, declarations and practices.'¹²⁷ Their preferred matrix of analysis has been the principles of constitutional and statutory interpretation. It is open to question whether this judicial approach comes from a suspicion about the appropriateness of comparative methodology or a narrative about recognizing Australia's distinctive constitutional settlement or both¹²⁸ but the result is the same; there is an absence of discussion of human rights.¹²⁹

Conclusion

The presence of a prominent corporate policy statement on human rights is a civilizing presence in the life of the corporation. Using the idea of the policy statement as the first formal commitment that a corporation makes to respect human rights this paper has explored the contours of human rights traction in the ASX 50. Only 13 members of the ASX 50 have a policy statement in the format proscribed by the UNGP; an accessible and public commitment. The level of corporate disengagement with human rights sees Australia ranked on this measure behind not only other developed economies but also the economies of many developing nations. Previous research tells us that states can assist in the promulgation of the Ruggie Framework in the corporate world through, first, regulatory inducement and coercion¹³⁰ and, second, training and awareness raising. Even signals of interest in the Framework from government that fall short of intervention and actual programmes can heighten awareness and improve

¹²⁷ G Triggs (2018) at p 82

¹²⁸ C Geiringer (2016)

¹²⁹ Three Australian states have adopted human rights legislation; the ACT through the Human Rights Act 2004 (ACT), Victoria through the Victorian Charter of Human Rights and Responsibilities Act 2006 and most recently Queensland through the Queensland Human Rights Act 2019. Whilst these developments are praiseworthy, they are still a long way from being even the catalyst for human rights discussion and promotion at the Commonwealth level.

¹³⁰ Corporate human rights engagement could be set as the price for accessing government supported export credit and finance. Public procurement exercises could require evidence of the human rights measures adopted by tenderers.

traction.¹³¹ In the Australian context this could mean, for example, that a requirement for a publically available human rights policy is tied to the reporting obligations of the Modern Slavery Act 2018 and that a state maintained repository of policy statements is created. States are a key actor in advancing corporate respect for human rights and yet, as section 3 explains, the Australian State is absent from this space both in relation to corporations and in terms of human rights support domestically more generally.

The data presented in section 2 reveals that the most determinative factor in whether ASX 50 members have adopted a freestanding and available human rights policy statement is their membership, or not, of a BINGO. In the absence of the state in the promulgation space, what results is that BINGOs come to the fore. The relationship between human rights and the corporate sector in Australia is being shaped and driven by them. Leaving BINGOs to be the mobilizing force for human rights agenda setting through the corporate policy statement means that there is no systematic or coordinated approach to human rights that a NAP would bring for example.¹³² This does not achieve an optimal outcome for human rights holders. Additionally if human rights engagement is increasingly valued by international capital and required by the procurement policies of other nation states the majority of ASX 50 corporations firms lose the possibility of a level playing field for attracting investment and supplying infrastructure and services internationally.

¹³¹ K Salcito, C Wiegla and B Singer (2015)

¹³² H Cantú Rivera (2018)

References

- S Aaronson and I Higham "'Re-righting Business": John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms' (2013) 35 *Human Rights Quarterly* 333
- R Aguilera and G Jackson 'Comparative and International Corporate Governance' (2010) 4 *The Academy of Management Annals* 485
- J Amerson 'What's in a Name? Transnational Corporations and Bystanders under International Law' (2011) 85 *St John's Law Review* 1
- J Amerson "'The End of the Beginning?": A Comprehensive Look at the UN's Business and Human Rights Agenda from a Bystander Perspective' (2012) 17 *Fordham J Corp and Fin L* 871
- E Arcioni and A Stone 'The Small Brown Bird: Values and Aspirations in the Australian Constitution' (2016) 14 *International Journal of Constitutional Law* 60
- D Arnold 'Corporations and Human Rights Obligations' (2016) 1 *Business and Human Rights J* 255
- R Bell, I Filatotchev and A Rasheed 'The Liability of foreignness in capital markets: Sources and remedies' (2012) 43 *J of Int Business Studies* 107
- D Bilchitz 'The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?' (2010) 7 *SUR* 199
- K Bondy, D Matten and J Moon 'The Adoption of Voluntary Codes of Conduct in MNCs: A Three-Country Comparative Study' (2004) 109 *Business and Society Review* 449.
- J Bonnitcha and R McCorquodale (2017) The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights 28 *European Journal of International Law* 899.
- N Boubakri, S El Ghouli, H Wang, O Guedhami and C Kwok 'Cross-listing and corporate social responsibility' (2016) 41 *Journal of Corporate Finance* 123
- I Boulouta 'Hidden Connections: The Link Between Board Gender Diversity and Corporate Social Performance' (2013) 113 *JBE* 185
- K Buhmann 'Public Regulators and CSR: The 'Social Licence to Operate' in Recent United Nations Instruments on Business and Human Rights and the Juridification of CSR' (2016) 136 *JBE* 699
- N BurrIDGE, J Buchanan and A Chodkiewicz 'Human Rights and History Education: An Australian Study' (2014) 39 *Aus J of Teacher Education* 18
- K Byron and C Post 'Women on Boards of Directors and Corporate Social Performance: A Meta-Analysis' (2016) 24 *Corporate Governance: An International Review* 428
- M Callaghan and G Wood 'The Engagement with Business Ethics: an Australian Journey 1995-2010' (2014) 26 *European Business Review* 286
- H Cantú Rivera 'National Action Plans on Business and Human Rights: Progress or Mirage' (2018) *Bus and Human Rights J* DOI: <https://doi-org.virtual.anu.edu.au/10.1017/bhj.2018.33>
- A Carroll 'Carroll's Pyramid of CSR: taking another look' (2016) 1 *International Journal of Corporate Social Responsibility* 3
- H Charlesworth 'The Australian Reluctance about Rights' (1993) 31 *Osgoode Hall Law Journal* 195

- H Charlesworth 'Human Rights: Australia versus the UN' (2006) *Discussion Paper 22/06*
<https://apo.org.au/sites/default/files/resource-files/2006/08/apo-nid1479-1079181.pdf>
- H Collins 'Political Ideology in Australia: The Distinctiveness of a Benthamite Society' (1985) 114 *Daedalus* 147
- A Cook and C Glass 'Women on Corporate Boards: Do they advance corporate social responsibility' (2018) 71 *Human Relations* 897
- G Dancy and K Sikkink 'Human Rights Data, Processes, and Outcomes: How Recent Research Points to a Better Future' in S Hopgood, J Snyder and L Vinjamuri (eds) *Human Rights Futures* (2017) CUP 24
- B Del Bosco and N Misani 'The effect of cross-listing on the environmental, social and governance performance of firms' (2016) 51 *J of World Business* 977
- R Doner and B Schneider 'Business Associations and Economic Development: Why Some Associations Contribute More Than Others' (2000) 2 *Business and Politics* 261
- A Durbach, C Renshaw and A Byrnes "'A Tongue but No Teeth?': The Emergence of a Regional Human Rights Mechanism in the Asia Pacific' (2009) 31 *Sydney L R* 2011
- N Dyrenfurth *Mateship* (2015) Scribe Publications Melbourne
- A Eagly and W Wood 'Explaining sex differences in social behavior: A meta-analytic perspective' (1991) 17 *J of Personality and Social Psychology Bulletin* 306
- T Erskine 'Assigning Responsibilities to Institutional Moral Agents: The Case of States and Quasi-States' (2001) 15 *Ethics and Int Affairs* 67
- V Esteban 'Cultural Values on CSR Patterns and Evolution: A Study from the Biplot Representation' (2017) 81 *Ecological Indicators* 18
- D de Felice 'Business and Human Rights Indicators to Measure the Corporate Responsibility to Respect: Challenges and Opportunities' (2015) 37 *Human Rights Quarterly* 511
- P Fleming, J Roberts and C Garsten 'In Search of Corporate Social Responsibility: Introduction to Special Issue' (2013) 20 *Organization* 337
- J Flower 'The Integrated Reporting Council: a Story of Failure' (2015) 27 *Critical Perspectives on Accounting* 1
- C Francoeur, R Labelle, S Balti and S El Bouzaïdi 'To What Extent Do Gender Diverse Boards Enhance Corporate Social Performance?' (2019) 155 *JBE* 343
- J Galbreath 'ESG in Focus: The Australian Evidence' (2013) 118 *JBE* 529
- C Gearty *Can Human Rights Survive* (2005) CUP, Cambridge.
- C Geiringer 'What's the Story? The Instability of the Australasian Bills of Rights' (2016) 14 *International Journal of Constitutional Law* 156
- R Gray and S Gray 'Accountability and Human Rights: A tentative exploration and a commentary' (2011) 22 *Critical Perspectives on Accounting* 781
- C Häberli and F Smith 'Food Security and Agri-Foreign Direct Investment in Weak States: Finding the Governance Gap to Avoid "Land Grab" (2014) 77 *MLR* 189

- M Hardt and A Negri *Empire* (2001) Harvard University Press, Cambridge Mass.
- C Higgins, W Stubbs and T Love 'Walking the talk(s): Organisational narratives on integrated reporting' (2014) 27 *Accounting, Auditing and Accountability Journal* 1090
- C Higgins, M Milne and B van Gramberg 'The Uptake of Sustainability Reporting in Australia' (2015) 129 *JBE* 445
- L Hogan (2015) *Keeping Faith with Human Rights* Georgetown University Press Washington
- M Howard Press Conference 23rd March 1999 <http://pmtranscripts.pmc.gov.au/release/transcript-11109>
- E Hyun, D Yang, H Jung and K Hong 'Women on Boards and Corporate Social Responsibility' 8 (2016) *Sustainability* 300
- M Islam, S Haque and R Roberts 'Human Rights Performance Disclosure by Companies with Operations in High Risk Countries: Evidence from the Australian Minerals Sector' (2017) 80 *Australian Accounting Review* 34
- S Jaffee and J Hyde 'Gender differences in moral orientation: A meta-analysis' (2000) 126 *Psychological Bulletin* 703
- E Jeffers 'Corporate Governance: Toward Converging Models?' (2005) 16 *Global Finance Journal* 221
- S Jerbi 'Business and human rights at the UN: What might happen next?' (2009) 31 *Human Rights Quarterly* 299.
- G Kapoor and S Dhamija 'Mandatory CSR Spending-Indian Experience' (2017) 3 *Emerging Economy Studies* 98
- D Kim and P Trumbore 'Transnational Mergers and Acquisitions: The Impact of FDI on Human Rights, 1981-2006' (2010) 47 *Journal of Peace Research* 723
- T Kirkebo and M Langford 'The Commitment Curve: Global Regulation of Business and Human Rights' (2018) 3 *Bus and HR J* 157
- C Langlois and B Schlegelmilch 'Do Corporate Codes of Ethics Reflect National Character? Evidence from Europe and the United States' (1990) 21 *Journal of International Business Studies* 519
- K Lee 'Does Size Matter? Evaluating Corporate Environmental Disclosure in the Australian Mining and Metal Industry: A Combined Approach of Quantity and Quality Measurement' (2017) 26 *Bus Strategy and the Environment* 209
- C Lokuwaduge and K Heenetigala 'Integrating Environmental, Social and Governance (ESG) Disclosure for a Sustainable Development: An Australian Study' (2017) 26 *Business Strategy and the Environment* 438
- A MacInnes, M Colchester and A Whitmore 'Free, prior and informed consent: how to rectify the devastating consequences of harmful mining for indigenous peoples' (2017) 15 *Perspectives in Ecology and Conservation* 152
- F Marimon, M Alonso-Almeida, M Rodriguez and C Cortez 'The Worldwide Diffusion of the Global Reporting Initiative: what is the point?' (2012) 33 *J of Cleaner Production* 132

- J Marques 'Industry Business Associations: self-Interested or Socially Conscious?' (2017) 143 *JBE* 733
- Mary McHugh 'Lessons in Biostatistics' (2012) 22 *Biochemia Medica* 276
- T Melish 'Putting "Human Rights" Back into the UN Guiding Principles on Business and Human Rights: Shifting Frames and Embedding Participation Rights' in C Rodríguez-Garavito (ed) *Business and Human Rights: Beyond the End of the Beginning* (2017) CUP Cambridge 76.
- S Merry 'Measuring the World: Indicators, Human Rights, and Global Governance' (2011) 52 *Current Anthropology* S83
- K Meyer, R Mudambi and R Narula 'Multinational Enterprises and Local Contexts: The Opportunities and Challenges of Multiple Embeddedness' (2011) 48 *J of Management Studies* 235
- B Meyersfeld 'Empty Promises and the Myth of Mining: Does Mining Lead to Pro-Poor Development' (2017) 2 *Business and Human Rights Journal* 31
- J Mikler (2018) *The Political Power of Global Corporations* Polity Cambridge
- J Morhardt 'General Disregard for Details of GRI Human Rights Reporting by Large Corporations' (2009) 10 *Global Business Review* 141
- P Muchlinski 'Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation' (2012) 22 *Business Ethics Quarterly* 145
- J Nolan 'Corporate Responsibility in Australia: Rhetoric or Reality?' (2007) 12 *Aus J of Human Rights*
- L Obara and K Peattie 'Bridging the Great Divide? Making Sense of the Human Rights-CSR Relationship in UK Multinational Companies' (2018) 53 *J of World Business* 781
- C O'Brien and S Dhanarajan 'The Corporate Responsibility to Respect Human Rights: A Status Review' (2016) 29 *Accounting, Auditing and Accountability Journal* 542
- C O'Kelly 'Human Rights and the Grammar of Corporate Social Responsibility' (2019) *Social and* <https://doi.org/10.1177/0964663918819400> (accessed April 3rd 2019)
- J Owen and D Kemp 'Social Licence and Mining: a critical perspective' (2013) 38 *Resources Policy* 29
- J Page 'Is Mateship a Virtue?' (2002) 37 *Aus J of Soc Sci* 193
- L Preuss 'Codes of Conduct in Organisational Context: From Cascade to Lattice-work of Codes' (2010) 94 *JBE* 471
- L Preuss and D Brown 'Business Policies on Human Rights: An Analysis of Their Content and Prevalence Among FTSE 100 Firms' (2012) 109 *JBE* 289
- T Rajwani, T Lawton and N Phillips 'The "Voice of Industry": Why management researchers should pay more attention to trade associations' (2015) 13 *Strategic Organization* 224
- K Rao and C Tilt 'Board Composition and Corporate Social Responsibility: The Role of Diversity, Gender, Strategy and Decision Making' (2016) 138 *JBE* 327
- P Rinwigati Waagstein 'The Mandatory Corporate Social Responsibility in Indonesia: Problems and Implications' (2011) 98 *JBE* 455
- K Ronit *Global Business Associations* (2018) Routledge London
- J Ruggie 'International Regimes, Transactions, and Change: Embedded Liberalism in the

Postwar Economic Order', (1982) 36 *International Organization* 379.

J Ruggie 'Taking Embedded Liberalism Global: The Corporate Connection', in D Held and M Koenig-Archibugi (eds) *Taming Globalization: Frontiers of Governance* (2003) Polity Cambridge 93–129.

J Ruggie 'The Construction of the UN "Protect, Respect and Remedy" Framework for Business and Human Rights: the True Confessions of a Principled Pragmatist"' (2011) 2 *European Human Rights Law Review* 127

J Ruggie *Just Business* (2013) Norton New York

J Ruggie 'Global Governance and 'New Governance Theory': Lessons from Business and Human Rights' (2014) 20 *Global Governance* 5.

K Salcito and C Wiegla 'Corporate Human Rights Risk Assessment: Aligning what is Measured and Managed' (2018) 36 *Nordic J of Human Rights* 411

K Salcito, C Wiegla, and B Singer 'Corporate Human Rights Commitments and the Psychology of Business Acceptance of Human Rights Duties: a Multi-Industry Analysis' (2015) 19 *International Journal of Human Rights* 673

C Scheper "'From naming and shaming to knowing and showing": human rights and the power of corporate practice' (2015) 19 *International Journal of Human Rights* 737

N Seppala 'Business and the International Human Rights Regime: A Comparison of UN Initiatives' (2009) 87 *Journal of Business Ethics* 401

M. Sheffer, 'Bilateral Investment Treaties: A Friend or Foe to Human Rights', *Denver Journal of International Law and Policy* 39 (2011) 483

M Suchman 'Managing legitimacy: strategic and institutional approaches' (1995) 20 *Academy of Management Journal* 571

M Taylor 'The Ruggie Framework: Polycentric regulation and the implications for corporate social responsibility' (2011) 5 *Nordic Journal of Applied Ethics* 9

K Tienhaara, A Orsini and R Falkner in F Biermann and P Pattberg (eds) *Global Environmental Governance Reconsidered* (2012) MIT Massachusetts

G Triggs *Speaking Up* (2018) Melbourne University Press, Melbourne

S Waddock 'Building a New Institutional Infrastructure for Corporate Responsibility' (2008) 22 *Academy of Management Perspectives* 87

R Welford 'Corporate Social Responsibility in Europe and Asia: critical elements and best practice' (2004) 13 *Journal of Corporate Citizenship* 31

P Werhane 'Corporate Moral Agency and the Responsibility to Respect Human Rights in the UN Guiding Principles: Do Corporations Have Moral Rights' (2016) 1 *Business and Human Rights Journal* 5

F Wettstein *Multinational Corporations and Global Justice: Human Rights Obligations of a Quasi-Governmental Institution* (2009) Stanford Business Book, Stanford

F Wettstein 'Normativity, Ethics, and the UN Guiding Principles on Business and Human Rights: A Critical Assessment' (2015) 14 *J of Human Rights* 162

F Wettstein 'From side show to main act: can business and human rights save corporate responsibility' in D Baumann-Pauly and J Nolan (eds) *Business and Human Rights* (2016) Routledge London 78

S Wheeler "Corporate Respect for Human Rights: as good as it gets?" in Perry- Kessaris (ed) *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext* (2012) Routledge London 209

S Wheeler 'Global Production, CSR and human rights: the courts of public opinion and the social licence to operate' (2015) 19 *Int J of Human Rights* 757

S Wheeler *Corporations and the Third Way* (2002) Hart Publishing Oxford

G Wood 'A Cross Cultural Comparison of the Contents of Codes of Ethics: USA, Canada and Australia' (2000) 25 *JBE* 287

Reports

ACCR (2017) *Human Rights and Australian Listed Companies* <https://accr.org.au/human-rights-report/> (accessed May 8th 2019)

ACCSR (2017) *Annual Review of the State of CSR in Australia and New Zealand 2017* <https://sharedvalue.org.au/wp-content/uploads/2017/06/ACCSR-State-of-CSR-Report-2017.pdf> (accessed May 8th 2019)

ACSI (2012) *Labour and Human Rights Standards in Corporate Australia* <https://www.acsi.org.au/publications-1/research-reports/738-labour-and-human-rights-standards-in-corporate-australia.html> (accessed April 18th 2019)

Allens (2017) *Stocktake on Business and Human Rights in Australia* <https://dfat.gov.au/international-relations/themes/human-rights/business/Documents/stocktake-on-business-and-human-rights-in-australia.pdf> (accessed April 16th 2019)

ASX (2019) *Corporate Governance Principles and Recommendations* (4th ed) <https://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-fourth-edn.pdf>

Business and Human Rights: From Principles to Action (2016) <https://www.wbcsd.org/Programs/People/Social-Impact/Resources/Business-Human-Rights-From-Principles-to-Action> (accessed April 9 2019)

Company Policy Statements on Human Rights (2017) <https://www.business-humanrights.org/en/company-policy-statements-on-human-rights> (accessed April 9th 2019)

Corporations and Markets Advisory Committee (2006) *The Social Responsibility of Corporations* [http://www.camac.gov.au/camac/camac.nsf/byheadline/pdffinal+reports+2006/\\$file/csr_report.pdf](http://www.camac.gov.au/camac/camac.nsf/byheadline/pdffinal+reports+2006/$file/csr_report.pdf)

General Assembly (2014) 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', A/69/263 <https://www.ohchr.org/Documents/Issues/SRMigrants/ConsultationRecruitment/NationalActionPlansOnBusinessAndHR.pdf> (accessed May 12th 2019)

GRI (2018) *GRI Standards* <https://www.globalreporting.org/standards/gri-standards-download-center/> (accessed April 12th 2019)

Human Rights Council (2013) *Uptake of the Guiding Principles on Business and Human Rights: practices and results from pilot surveys of Governments and Corporations*
http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/23/32/Add.2
(accessed April 9 2019)

Integrated Reporting (2013) *The International Framework*
<https://integratedreporting.org/resource/international-ir-framework/>
(accessed April 11th 2019)

KPMG (2015) *Currents of Change: the KPMG survey of corporate responsibility reporting 2015*
<https://assets.kpmg/content/dam/kpmg/pdf/2016/02/kpmg-international-survey-of-corporate-responsibility-reporting-2015.pdf> (accessed April 11th 2019)

KPMG (2017) *The Road Ahead: the KPMG Survey of Corporate Responsibility Reporting 2017*
<https://assets.kpmg/content/dam/kpmg/xx/pdf/2017/10/kpmg-survey-of-corporate-responsibility-reporting-2017.pdf> (accessed April 12th 2019)

KPMG (2018) *Corporate Reporting: Rebuilding trust through improved transparency and insight*
<https://home.kpmg/au/en/home/insights/2018/11/asx-200-corporate-reporting-trends-2018.html>
(accessed April 11th 2019)

OECD (2011) *OECD Guidelines for Multinational Enterprises* OECD Publishing, Paris.

Office of the High Commissioner for Human Rights (OHCHR 2011), *Guiding Principles on Business and Human Rights – Implementing the United Nations “Protect, Respect and Remedy” Framework* (2011). http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (accessed April 3rd 2019)

United Nations (2000) *The United Nations Global Compact* <https://www.unglobalcompact.org/>
(accessed April 6th 2019)

Commission on Human Rights (UN 2006) *Interim Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises* <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/110/27/PDF/G0611027.pdf?OpenElement>
(accessed April 3rd 2019)

Human Rights Council (UN 2008) *Protect, Respect and Remedy: a Framework for Business and Human Rights* A/HRC/8/5 <https://www.business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-report-7-Apr-2008.pdf> (accessed April 6th 2019)

Vigeo Eiris (2017) *The Human Rights Responsibilities of Business in a Changing World*
<http://www.vigeo-eiris.com/the-human-rights-responsibilities-of-business-in-a-changing-world/>
(accessed April 12th 2019)