



CORPORATE DUTY AND HUMAN RIGHTS UNDER AUSTRALIAN LAW

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Corporate Duty and Human Rights under Australian Law

1. Introduction

This report is provided on behalf of the International Bar Association to the UN Special Representative of the Secretary General on Business and Human Rights in response to a request for advice on the extent to which a corporate duty to respect human rights may be considered to exist, or may be accommodated, under Australian law.

Corporations are subject to a range of domestic human rights law obligations in Australia that necessarily entail a corporate duty to respect human rights in certain circumstances. There is, however, no generally applicable legal duty to respect international human rights law that applies to Australian corporations, and the extent to which the State's international human rights obligations have been incorporated into domestic law so as to create direct human rights obligations for corporations is limited.

There are, though, due diligence processes that a corporation must undertake to meet its general legal obligations that either accommodate or are at least amenable to consideration of human rights laws or standards. This may be the case regardless of whether the legal obligations to which these due diligence processes attach mandate corporate compliance with human rights.

In this sense, we refer to "due diligence" as the 'diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or discharge an obligation'.¹

As such, these due diligence processes may provide a means of incorporating consideration of human rights standards into operational and legal compliance processes. This, in turn, may allow a corporation to decide, on an informed basis, how to meet a duty to respect human rights, if such a duty is incorporated into Australian domestic law.

On the basis of the above, this report provides an overview of the extent to which corporations are required to, or may, consider human rights when considering their legal obligations in the following contexts:

- (a) compliance with laws containing human rights related obligations;
- (b) undertaking project and infrastructure development impact assessment;
- (c) preparing for public sector decision making on corporate activity;
- (d) compliance with directors' duties;
- (e) addressing shareholder action including litigation; and
- (f) investment decision making.

¹ Blacks Law Dictionary, 8th Edition

Consideration of human rights within the due diligence processes attached to the legal obligations relating to the above activities will not necessarily provide a comprehensive, generic 'human rights due diligence and compliance programme' for a corporation. Development of such a programme would have to be undertaken on an individual basis.

Further, the list of corporate activities identified above does not represent a complete list of circumstances in which corporations undertake due diligence that may accommodate human rights consideration. Other examples of relevant corporate activity may include engaging in mergers and acquisitions, complying with risk management processes established by market bodies such as the Australian Stock Exchange, and complying with voluntary industry codes or standards. The above activities, however, provide a broad range of due diligence processes for consideration from a human rights perspective.

These due diligence processes and the extent to which they provide for consideration of human rights are discussed, in turn, below.

2. Human rights law obligations of corporations

A corporate duty to respect human rights can be said to exist under Australian law where corporations are subject to direct human rights law obligations. Human rights-based due diligence processes will attach to these legal obligations.

The *Commonwealth Constitution of Australia Act 1900* (UK) (the **Constitution**) contains specific guarantees with respect to some express rights and in recent years the High Court has held that it is possible to imply from the Constitution some additional rights and freedoms. The relevance of these constitutional rights to corporations is limited, however, because the rights relate to the conduct of the Commonwealth and States and as such are not enforceable against corporations.

Australia does not have a federal bill of rights. However, two state jurisdictions have enacted dedicated human rights legislation, which in both cases has limited application to corporate activity as explained below.

Corporations are also subject to obligations arising under federal legislative instruments that protect or may be relevant to human rights, such as anti-discrimination, work place relations and environmental legislation.

In addition, the *Criminal Code Act 1995* (Cth) (the **Criminal Code**) applies, with necessary modifications, to bodies corporate. This includes those provisions of the *Rome Statute of the International Criminal Court* (the **Rome Statute**) it incorporates.

2.1 Dedicated human rights legislation

In the State of Victoria, the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the **Charter**), imposes human rights obligations on 'public authorities' which substantially mirror the rights contained in the *International Covenant on Civil and Political Rights*.

Section 38(1) of the *Charter* makes it unlawful for a 'public authority' to act in a way that is incompatible with human rights; or in making a decision, to fail to give proper consideration to a relevant human right.

'Public authorities' are defined as including any entity established by a statutory provision that has functions of a public nature and any entity whose functions are, or include, functions of a public nature when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise)².

As a result, numerous corporations operating in Victoria, particularly those performing functions that were traditionally performed by the State or that are delegated by the State by way of contract, are subject to the obligations on public authorities imposed by the *Charter*.

The relevance of the *Charter* to public sector decision-making affecting corporations is discussed at Parts 3 and 4 below.

In the Australian Capital Territory, the *Human Rights Amendment Bill 2007 (ACT)* seeks to insert provisions that impose similar obligations on public authorities into the *Human Rights Act 2004 (ACT)* as those imposed by the *Charter*. The definition of a public authority contained in the amendment provides a non-exhaustive list of functions which are deemed to be of a public nature, many of which are performed by corporations, including the operation of detention and correctional centres, the provision of gas, electricity and water services, emergency services, public health services, public education, public transport and public housing.

Those corporations subject to the obligations of 'public authorities' contained in the *Charter* and the *Human Rights Act 2004 (ACT)* have, to varying degrees, established due diligence processes to ensure compliance with these obligations.

2.2 Other Laws imposing human rights obligations on corporations

A wide variety of domestic legislation protects various internationally recognised human rights in the areas of employment, discrimination and equal opportunity. The *Workplace Relations Act 1996 (Cth)*, for example, purports to protect rights contained in various International Labour Organisation and other human rights conventions, with provisions prohibiting the termination of a person's employment on such grounds as race, sex, age, disability, pregnancy, religion, political opinion and membership of a trade union.³ The *Racial Discrimination Act 1975* and *Sex Discrimination Act 1984* also impose rights related constraints on corporations' employment practices.

Companies operating in Australia, particularly those in the resources field, are also subject to legislation in respect of indigenous land. The *Native Title Act 1993 (Cth)* supports the right to self determination for Australia's indigenous people by protecting their native title to traditional land. Companies must consider the effects of this Act when their projects involve land over which native title exists or may exist.

The *Privacy Act 1988 (Cth)* has recently been extended to cover the private sector, protecting individuals from corporate invasions of personal privacy. An individual may complain to the Privacy Commissioner if he or she believes there has been a breach of a

² s4(1)(b) and s4(1)(c) of the *Charter* respectively.

³ s170CK. It should be noted, however, that this legislation is expected to be amended this year with an amending bill introduced to federal Parliament in February 2008.

National Privacy Principle in relation to personal information. Determinations of the Privacy Commission, which may include declarations for compensation, may be enforced in Court.

Additionally, each Australian jurisdiction, including the Federal Parliament, has enacted environmental legislation, giving rise to many statutory controls on corporations in relation to the environment, health and safety.

Again, rights based corporate due diligence processes attach to these legal obligations.

2.3 Application of the *Australian Criminal Code Act 1995* (Cth) to corporations

Part 2.5 of the *Criminal Code* extends liability for all offences within the Criminal Code to corporations. The *International Criminal Court (Consequential Amendments) Act 2002* (Cth) amended the *Criminal Code* to include the crimes of genocide, crimes against humanity and war crimes. Other provisions in the *Criminal Code* also create human rights related offences (for instance, the slavery provisions contained at s270).

Corporate intention under the *Criminal Code* may be determined by demonstrating that a corporate culture existed that 'directed, encouraged, tolerated or led to non-compliance with a relevant provision' or that the corporation 'failed to create and maintain a corporate culture that required compliance with a relevant provision'⁴. As a result, a due diligence program aimed at ensuring compliance with human rights will be of direct relevance in refuting corporate liability for the human rights related offences in the *Criminal Code*.

3. Project and infrastructure development assessment

In a range of national and international contexts, Australian law requires corporations to obtain the approval of government authorities in order to pursue or to finance development and infrastructure projects. Such approval is frequently conditional on the relevant authority determining that the extent of environmental or social impact that may be associated with the project is acceptable, having regard to information supplied by the corporation, as well as applicable legislative criteria and internal executive policies.

There are numerous examples of such impact assessment procedures at Commonwealth and State level. For instance, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the *EPBC Act*) provides that certain activities, such as undertakings that will have a significant impact on a declared World Heritage property, are subject to approval by the Minister for the Environment and Heritage, on the basis of procedures including a submitted environmental impact statement or an accredited assessment process. The *Mining Act 1992* (NSW) requires the relevant Minister to take into account environmental considerations and features of Aboriginal, architectural, archaeological, historical or geological interest, including any relevant studies that may be carried out, before granting certain mining authorisations. The *Gaming Machine Act 2004* (ACT) requires a licence application to the gambling and racing commission, in respect of gaming machines, to include a social impact assessment.

⁴ Criminal Code ss12.3(2)(c) and (d) respectively.



Assessing the social and environmental impact of a project may, in some cases, involve looking at criteria similar to that which would be raised by assessing the project's impact on human rights. To that extent, impact assessment procedures may already incorporate due diligence processes that could equally, or additionally, be brought to bear on the specific question of a project's human rights compliance.

3.1 Express Requirements to Consider Human Rights

There are few examples of legal impact assessment obligations expressly requiring consideration of human rights. The *Export Finance and Insurance Corporation Act 1991* (Cth) provides that the Export Finance and Insurance Corporation must, in the course of performing its functions, have regard to Australia's obligations under international agreements. The Corporation's functions include environmental and social screening of international projects and transactions, in accordance with the OECD's *Recommendation on Common Approaches on the Environment and Officially Supported Export Credits*. Corporations in Victoria whose functions are of a sufficiently public nature to attract the operation of the *Charter* are required to ensure that their actions are compatible with the human rights set out in the *Charter* and, accordingly, to conduct such impact assessments as are required for this purpose. Governmental authorities subject to the *Charter* are similarly required to consider human rights impacts when making decisions in relation to infrastructure and development projects (see Part 4, below).

3.2 Scope for Further Consideration of Human Rights

While there are few examples of an express requirement to consider human rights in an impact assessment context, the breadth of administrative discretion in the context of impact assessments means that there is significant potential for human rights concepts to influence decision-makers. This is discussed in greater detail at Part 4 below.

4. Public sector decision making on corporate activity

International agreements and treaties, including those regarding human rights, do not create direct rights or obligations in Australian domestic law, without implementation by domestic law.⁵ There is, however, a measure of express recognition in Australia that concepts drawn from international laws regarding human rights may form part of governmental decision making processes. The High Court held in *Minister for Immigration and Ethnic Affairs v Teoh*⁶ that the ratification of an international agreement by the Australian executive government, in that case the United Nations Convention on the Rights of the Child, gave rise to a legitimate expectation that administrative decision-makers would act in conformity with the terms of that agreement (although subsequent cases indicate that the Court might now be inclined to withdraw from that position).⁷

⁵ See, for example, *Bradley v Commonwealth* (1973) 128 CLR 557 at 582-584; *Josse v ASIC* [1998] HCA 77 at [21]; *Scott v Bowden* (2002) 194 ALR 593 at 595; *Re East; Ex Parte Nguyen* (1998) 196 CLR 354 at 362.

⁶ (1995) 183 CLR 273.

⁷ See especially *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1.



In addition, public sector decision-makers face obligations to consider human rights in their decision-making as a result of the operation of state based human rights dedicated legislation.

To the extent that these obligations and initiatives will cause government agencies to take account of human rights issues in their choice of corporations with which to contract, and their processes for assessing matters such as applications for licences and project approvals, these obligations and initiatives may increasingly require corporations to incorporate human rights considerations into standard operating practices, and monitor their human rights performance, with the same due diligence processes they would bring to bear on other areas of compliance or operating risk.

4.1 Impact of human rights obligations or commitments binding government agencies

The Victorian *Charter* and the *Human Rights Act 2004* (ACT) as well as directly imposing human rights obligations on corporations exercising functions of a public nature (as discussed above at Part 2), is likely to have the effect of strengthening requirements of human rights compliance for corporations that interact, in various ways, with government agencies.

Councils, Government Ministers and public officials in Victoria and the ACT, as 'public authorities' under the *Charter* and the soon to be amended *Human Rights Act 2004* (ACT), have an obligation to act consistently with, and give proper consideration to, human rights.⁸ This obligation extends to all acts, omissions and decisions of a public nature, including, for example, the granting of contracts, project approvals and licenses, and the reviewing of impact assessments and like submissions. Applicants for contracts, approval and licenses are thus likely to be required to take human rights into account in the development of their project or undertaking, and to be able to demonstrate they have done so, both of which will involve incorporating human rights considerations into regular operational 'due diligence' practices.

Even in jurisdictions that do not have bills of rights placing explicit obligations on public authorities to take account of human rights, there is scope for human rights considerations to be relevant to the conduct of corporate activity. For example, both federal and state governments have policies in relation to procurement, and human rights considerations could at some point be incorporated into these policies and guidelines.

4.2 Public sector complaints mechanisms for corporate human rights impacts

Australia has established a variety of complaints mechanisms that allow parties to raise human rights issues with corporations, and seek improvements in rights compliance.

For example, as a signatory to the *OECD Guidelines for Multi-National Enterprises* (*OECD Guidelines*), a voluntary code of conduct for business intended to supplement rather than override national legal systems, Australia has been required to establish a National Contact

⁸ See s38(1) *Victorian Charter*, s40B(1) *Human Rights Act* (assuming the *Human Rights Amendment Bill 2007* (ACT) is passed in its present form).

Point (**NCP**) for OECD Guidelines.⁹ The NCP is to act as a forum for discussion, but also to 'contribute to the resolution of issues that arise relating to the implementation of the Guidelines'.¹⁰ The Guidelines include provisions that require corporations to '[R]espect the human rights of those affected by their activities consistent with the host government's international obligations and commitments' and 'Not make representations or omissions, nor engage in any other practices, that are deceptive, misleading, fraudulent, or unfair'.¹¹ The Australian NCP is the Executive Member of the Foreign Investment Review Board, although the NCP also works through advisory committees. The Australian NCP has previously been involved in addressing complaints concerning corporate behaviour.

Other complaint mechanisms that have been established by the Australian government and which provide a forum for bringing rights-based complaints against corporations include the complaint mechanism of the Human Rights Equal Opportunity Commission (**HREOC**). Under the legislation administered by HREOC, the Commission has responsibility for inquiring into alleged infringements under 5 anti-discrimination laws – the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992* and the *Aged Discrimination Act 2004*, as well as inquiring into alleged infringements of human rights under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). Matters which can be investigated by the Commission include discrimination on the grounds of race, colour or ethnic origin, racial vilification, sex, sexual harassment, marital status, pregnancy or disability.

Building human rights considerations into regular operational practice, and subjecting human rights performance to the same due diligence processes as are applied to other areas of compliance and risk, may assist corporations in avoiding, or responding to, complaints in these fora.

5. Directors' duties

Australian corporations law does not impose any specific duty upon directors to ensure that a corporation is respecting human rights, nor any duty that directors take into account human rights considerations. As discussed below, however, a number of aspects of Australian corporations law provide directors with scope to consider human rights issues.

Directors of Australian companies are subject to general law duties based on their fiduciary relationship with the company and their general duties of care. Additionally, directors have statutory duties under the *Corporations Act 2001* (Cth) (**Corporations Act**), which, to varying degrees, overlap with their general law duties. Of the various duties imposed on directors both under the *Corporations Act* and general law, those that provide the greatest scope for the consideration of human rights impacts are considered below.

⁹ OECD Guidelines, section I.10.

¹⁰ Decision of the OECD Council (June 2000), Procedural Guidance, section I.C.1.

¹¹ Sections II.2 and VII.4 respectively.



5.1 The duty to act in good faith in the interests of the corporation and for a proper purpose

Directors are under a statutory duty to exercise their powers and discharge their duties in good faith in the best interests of the corporation and for a proper purpose.¹² Importantly, this duty requires a consideration of the best interests of the *corporation*, which is not always contiguous with the best interests of the shareholders.

While not explicitly required to do so, directors may have regard to the interests of non-shareholder stakeholders, which may include the human rights and social impacts of the corporation's operations. Provided such considerations are reconcilable within the interests of the corporation, they may legitimately impact on boardroom decision making.

Two Australian governmental bodies delivered reports in 2006 that considered, *inter alia*, the extent to which the current legal framework governing directors' duties encourages or discourages directors from having regard for the interest of stakeholders other than shareholders'.¹³ Each of the reports concluded that the *Corporations Act* permits directors to have regard for the interests of stakeholders other than shareholders, and supported the existing legal framework that relies on business adopting an 'enlightened self-interest' approach to the integration of notions of human rights and corporate responsibility into corporate operations.

The position in Australia may be contrasted with that in the United Kingdom, where the *Companies Act 2006* mandates that directors 'must have regard to' a range of relevant employee, social, and environmental considerations in fulfilling their duty to act in good faith and promote the success of the corporation.¹⁴

5.2 The duty of care and diligence

Under s180 of the *Corporations Act*, a director must exercise the degree of care and diligence that a reasonable person occupying the position and having the same responsibilities within the corporation would exercise in the corporation's circumstances.¹⁵

The so-called 'business judgment rule', which is found at s180(2) of the *Corporations Act*, provides that a director who makes a business judgment is taken to have met the duty of care and skill required of them under s180(1) if, *inter alia*, the director rationally believes that the judgment is in the best interests of the corporation and is made for a proper

¹² Section 181(1) of the *Corporations Act*. Directors are also subject to a general law duty to act bona fide in the interests of the corporation and to act honestly in what they consider to be the best interests of the company.

¹³ See Corporations and Markets Advisory Committee, *The Social Responsibility of Corporations*, 2006; at [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); and the Parliamentary Joint Committee on Corporate and Financial Services, *Corporate Responsibility: Managing Risk and Creating Value*, Commonwealth of Australia, 2006, at http://www.aph.gov.au/Senate/committee/corporations_ctte/corporate_responsibility/report/report.pdf.

¹⁴ Section 172 of the *UK Companies Act 2006*.

¹⁵ Directors are also subject to a common law duty to take reasonable care in the performance of their office.

purpose.¹⁶ A director can, therefore, consider human rights in decision-making if he or she believes that to do so is in the best interests of the company.

5.3 Reporting and risk assessment

Recently introduced reporting requirements¹⁷ provide scope for corporations to inform the market and wider stakeholders of a corporation's non-financial performance and risk profile, covering business drivers and risks of various kinds. Human rights may inform this process, where they impact on corporate performance and/or risk.

As well as external reporting requirements, directors must ensure that they manage risks by ensuring that oversight systems and controls provide adequate internal monitoring and reporting of corporate performance. Again, to the extent they are relevant, consideration of human rights may be incorporated into these systems and controls.

As a result of the above identified duties, directors have scope to assess, oversee and consider relevant human rights impacts and risks of their decisions and of their corporation's operations, in the course of considering their obligations under Australian corporations law.

6. Shareholder relations

A number of aspects of Australian corporations law provide shareholders with scope for raising human rights issues. These avenues, which include proposing resolutions, requisitioning extraordinary general meetings or posing questions at annual general meetings, as well as pursuing shareholder litigation, increasingly may require corporations to take account of human rights impacts in their due diligence processes, in order to properly assess human rights-related risk and make necessary disclosures.

6.1 Shareholder activism on human rights issues

Shareholders may draw public attention to perceived human rights impacts and pressure corporations to increase consideration of human rights in a range of ways. A group of 100 shareholders may move resolutions at an annual general meeting (**AGM**),¹⁸ have material distributed in support of those resolutions or against resolutions proposed by the Board,¹⁹

¹⁶ There has been very little judicial consideration of the limits, if any, that the 'proper purpose' requirement imposed on directors in taking into account the broader environmental and social context in their decision making: Corporations and Markets Advisory Committee, *The Social Responsibility of Corporations*, 2006; at [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) (at p92).

¹⁷ See, for example, ASX, *Corporate Governance Principles and Recommendations*, 2nd ed, Corporate Governance Council, 2007 (principle 3, to promote ethical and responsible decision making; and principle 7, to recognise and manage risk); and s299A of the *Corporations Act* (mandating that certain information be included in the directors' report)

¹⁸ S249N *Corporations Act 2001 (CA)*. There are limits on the subject matter of a resolution: in particular, it must not deal with matters in respect of which directors exercise exclusive powers of management.

¹⁹ Ss249O(2), (3) and 249P CA.

and requisition extraordinary general meetings.²⁰ Individual shareholders may also pose questions at an AGM.²¹

Further, to the extent a corporation misrepresents to or fails to inform the market regarding the human rights impacts of its operations, and such failure is a cause of loss to shareholders by lowering the share price, shareholders may also, in theory, bring actions against the corporation to recover this loss.²²

7. Investment decision-making

The notion of a corporate duty to respect human rights is relevant to investment decision-making in Australia in two key respects.

The first is the extent to which legal duties imposed on institutional investors consider or accommodate ethical considerations such as socially responsible investment (**SRI**) or environmental, social and governance (**ESG**) factors. The second is the legal requirement for vendors of financial products with an investment component to disclose SRI and ESG considerations involved in the creation, retention and realisation of that investment.

Although neither of these sets of requirements mandate consideration of human rights issues, if a vendor of financial products did declare an intention to take SRI and ESG factors into account in investment decision-making, it would need to have in place due diligence processes to ensure it was actually weighing these factors with the rigour it claimed to be exercising.

7.1 Institutional Investor duties

While the three key types of institutional investor active in the Australian market - superannuation funds, life insurance funds, and Managed Investment Schemes - are governed by different legislation,²³ broadly speaking, the duties imposed on each kind of investor are similar. All institutional investors are expected to exercise due care, skill and diligence in managing their investments²⁴ and all investors are expected to place the interests of members over the investor's own interests.²⁵

²⁰ S249D CA. The extraordinary general meeting (**EGM**) must be for, inter alia, a proper purpose: s249Q. Shareholders cannot requisition a meeting to discuss a resolution that is exclusively within the powers of the Board, or for some purpose extraneous to the passing of the resolution. However, if an extraordinary general meeting is requisitioned, for example, to buttress a union's position in enterprise bargaining negotiations, this does not affect the validity of the requisition. The key issue is whether the members seeking the meeting genuinely want the meeting held in order to consider the resolution in question: *NRMA v Parkin* (2004) 49 *Australian Corporations and Securities Reports* 386.

²¹ See s250S(1) CA, requiring that the chair of an AGM allow 'a reasonable opportunity for the members as a whole ... to ask questions about or make comments on the management of the company'.

²² See, for example, sections 674, 104E(1) and H(1) of the *Corporations Act*.

²³ Superannuation funds are regulated by the *Superannuation Industry (Supervision) Act 1993* (Cth), life insurance funds, by the *Life Insurance Act 1995* (Cth), and Managed Investment Schemes by the *Corporations Act 2001* (Cth).

²⁴ Section 52(2)(b) *Superannuation Industry (Supervision) Act*; s48(2) *Life Insurance Act*, s601FC(1)(b) *Corporations Act*.

²⁵ Section 52(2)(c) *Superannuation Industry (Supervision) Act*, s48(3) *Life Insurance Act*, s601FC(1)(c) *Corporations Act*.

To date, these duties have not been interpreted as requiring regard to human rights considerations. In fact, case law concerning investments based on SRI and ESG concerns suggests that an institutional investor has a duty to maximise profits for members,²⁶ with the implication being that if an investor were to decline to make a more profitable or more robust investment on the basis of human rights considerations, or SRI and ESG concerns, the investor may be found to be acting in breach of that duty. If true, these points could lead to claims for breach of care, skill and diligence.

In addition to the above, superannuation funds face a further restriction. Section 62 of the *Superannuation Industry (Supervision) Act 1993* (Cth) provides, essentially, that the superannuation fund must be run for the 'sole purpose' of benefiting members of the fund. This arguably provides a specific barrier to consideration of human rights in investment. Alternatively, however, it is arguable that the word 'purpose' should be construed as referring to the goal of the fund, rather than the means by which it is to be achieved.²⁷ On this approach, provided the investments were profitable, the considerations taken into account in making the investment would not preclude consideration of human rights issues.

7.2 Disclosure obligations of financial investment product vendors

Generally, sellers of financial products are required to give potential retail (as opposed to institutional) purchasers a product disclosure statement (*PDS*). The information required in a PDS is set out in s1013D of the *Corporations Act*. Section 1013D(1) provides that where a product includes an investment component, the PDS must detail the extent to which 'labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realisation of the investment.' The PDS must contain such information as a person would reasonably require to make a decision whether to invest in the product.²⁸ Failure to comply with the requirements of s1013D can lead to criminal and civil sanctions, as well as entitling the purchaser to return the product and obtain a refund.²⁹

²⁶ See *Cowan v Scargill* [1984] 3 WLR 501. Although an English case, it is cited by *Halsbury's Laws of Australia* for guidance on this point. This reading has been challenged, see Freshfields Bruckhaus Deringer, *A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment*, 8 – 9. That case dealt with the obligation of a fiduciary, rather than institutional investors generally, but the view seems to have been taken that it is of wider application.

²⁷ Leigh, above fn 8.

²⁸ Section 1013D(1). Reasonableness is considered from the purchaser's perspective. See ASIC section 1013DA Disclosure Guidelines, December 2003, 11.

²⁹ See *Corporations Act*, Pt 7.9, Div 7, Sub A (criminal offences), Sub B (civil liability) and s1016F (right to return and refund).

The Australian Security and Investment Commission has published guidelines on compliance with s1013D(l) and it is clear that it is sufficient to merely state that SRI and ESG factors were not taken into account in respect of the investment component of the product in question.³⁰ This appears to be the approach taken in the majority of PDSs.³¹

The more significant risk would appear to be where partial, but insufficient, disclosure is made. In such circumstances, the PDS may be considered defective and expose the issuer to civil and criminal penalties.³² There would also seem to be the possibility of an action for misleading and deceptive conduct in relation to a financial product.³³

8. Summary

The legal obligations and due diligence processes identified above relate to a corporate duty to respect human rights in different ways.

The corporate human rights law obligations identified at Part 2 require a corporation to respect human rights to the extent that these rights based laws regulate corporate activity.

The regulation of project and infrastructure development and of public sector decision-making on corporate activity, at Parts 3 and 4 respectively, indirectly impose a corporate duty to respect human rights in these contexts, as a failure to do so may result in an adverse outcome for the corporation.

The due diligence processes that attach to consideration of legal obligations relating to directors' duties, shareholder relations and investment decision-making, at Part 5, 6 and 7 respectively, are amenable to consideration of human rights but do not service legal obligations that impose a corporate duty to respect human rights.

It should also be noted that the due diligence processes identified above do not represent a complete corporate due diligence programme which, if adapted to include consideration of human rights, would allow a corporation to meet a general duty to respect human rights. As stated at the outset of this paper, a comprehensive human rights focused due diligence programme, tailored to a corporation's operations, would be required in the event that a general, as opposed to circumstance-specific, corporate duty to respect human rights was incorporated into Australian domestic law.

³⁰ ASIC, above fn 16, 5 – 6.

³¹ Freshfields, above fn 4, 48.

³² See fn 17 above and sections cited there.

³³ Under s1041H of the *Corporations Acts*.