**UN Working Group on Business and Human Rights**

Call for Inputs to information note: “‘Ensuring business respect for human rights in the political and regulatory sphere and preventing ‘corporate capture’”

**Submission by Professor Justine Nolan and Dr Martijn Boersma**

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# About the Authors of the Submission

Justine Nolan is the Director of the Australian Human Rights Institute (UNSW) and a Professor in the Faculty of Law and Justice at UNSW Sydney. Justine's research focuses on the intersection of business and human rights, including modern slavery. Justine works closely with business and civil society and has been a key driver of the Australian business and human rights movement. She has held various expert advisory roles including currently as a member of the  [Australian Government's](https://www.homeaffairs.gov.au/criminal-justice/Pages/modern-slavery.aspx)Modern Slavery Expert Advisory Group. Prior to joining UNSW in 2004, she worked as the Director of the Business and Human Rights program at the Lawyers Committee for Human Rights (now Human Rights First) in the USA. Her 2019 co-authored book *Addressing Modern Slavery* (with M Boersma) examines how consumers, business and government are both part of the problem and the solution in curbing modern slavery in global supply chains.

Justine.nolan@unsw.edu.au

Martijn Boersma is a senior lecturer at the University of Technology Sydney Business School. He is interested in the intersection of business and society and has extensively published on these topics. Martijn became in the trade union movement since 2012, when he joined Catalyst Australia, a progressive policy institute and think tank, which worked closely with trade unions, non-governmental organisations and academics to promote policy solutions for pressing social and economic issues. He has also worked as a researcher for United Voice, a trade union that represents over 120,000 Australian workers in various industries. Previously, throughout his seven-year career with Greenpeace International in Amsterdam, his interest has been the socio-economic impact of global campaign work by civil society organisations. Current projects focus on multistakeholder efforts to improve working conditions in the Australian commercial real estate cleaning supply chain, and strategies to improve labor conditions within the Australian cotton value chain. Together with Justine Nolan he published the book *Addressing Modern Slavery* (2019).

Martijn.Boersma@uts.edu.au

**Influence and corporate capture: background and examples in the business and human rights field**

Since the mid-1970s, there has been increasing international interest in the approaches adopted by business in ‘addressing’ or ‘influencing’ social policy issues. This can be attributed in part to the US Congress passing “a series of new social regulations to address a range of environmental and consumer safety concerns… These new regulations, combined with the declining economy, awoke the sleeping political giant of American business. Hundreds of companies hired lobbyists for the first time in the mid-1970s, and corporate managers began paying attention to politics much more than they ever did before.”[[1]](#footnote-1)

We suggest there is a distinction in businesses addressing or influencing policy development on social issues vs corporate capture. The Center for Constitutional Rights defines corporate capture as a “phenomenon where private industry uses its political influence to take *control* of the decision-making apparatus of the state, such as regulatory agencies, law enforcement entities, and legislatures.” The key issue here in distinguishing influence from corporate capture is determining what constitutes ‘control’ and having sufficient information to make that assessment. Mandating human rights due diligence (HRDD) which could increase the transparency around such interventions may be a useful mechanism to address this issue.

Today, big business is acutely aware of its potential in shaping social policy, which can be used to enhance its brand. Tying social issues and actions to brand reputation has long been a critical strategy in co-opting a corporate response. The 2021 Edelman Trust Barometer supports this by noting that 71 per cent of employees surveyed expected that employers would join them in taking action on societal issues.[[2]](#footnote-2)

For example, some companies have adopted public stances on contemporary social and political issues. Well-known brands - including Nike, Pepsi and Apple[[3]](#footnote-3)- have spoken up in support of the Black Lives Matter (BLM) movement in 2020 aligning their brand with the movement against racial injustice. However, at the same time, such public stances have also been put under the microscope to examine how much of this interest in supporting or changing public policy is substantive or merely cosmetic and brand aligned. While companies have been quick to support BLM, they have not shown the same enthusiasm for addressing diversity deficits in their boardroom or in senior management.[[4]](#footnote-4) Logically, business is most likely to take a public stance on social issues when it has a connection with its brand, but how this translates into substantive action – whether external or internal – is a more difficult question.

Companies have a history of working both publicly and quietly to address public policies. In 2017, when the Trump administration announced it would be acting on immigration by rescinding the Deferred Action on Childhood Arrivals Program (DACA) in the United States, companies such as Microsoft, Facebook and Google spoke out.[[5]](#footnote-5)

However, for every example where companies have adopted progressive pro-rights public policy stances, there are numerous negative examples. The story of US telecommunications company, ITT’s involvement in the 1970 election of Chile’s Socialist Party candidate Salvador Allende, is often used as such an example.[[6]](#footnote-6) More recently, social media has come under the spotlight in adversely influencing elections[[7]](#footnote-7) and inciting genocide[[8]](#footnote-8) where companies have been accused of responding slowly and ineffectively. Tales of corporate capture are plentiful from issues as diverse as climate change[[9]](#footnote-9) to food manufacturing[[10]](#footnote-10) to shaping child consumers.[[11]](#footnote-11)

# Can human rights due diligence be effective in addressing this issue?

# In considering how best to prevent or mitigate corporate capture impacting the development of social policies, human rights due diligence (HRDD) has a role to play. HRDD was crafted in the UN Guiding Principles on Business and Human Rights (UNGPs) as the method by which businesses are to prevent adverse human rights impacts and also for business to mitigate, and where relevant, to remediate these impacts, however for HRDD to be effective there must also be a clear role for the state.

# While there is currently a strong momentum towards more national and regional legislation on mandatory HRDD, at least within parts of the Global North,[[12]](#footnote-12) at the moment, these initiatives are somewhat piecemeal in terms of the scope of human rights, businesses covered, the nature of the HRDD duties and in consequences. For HRDD to be effective in addressing corporate capture we suggest attention should be focused on the following three issues.

1. **Increased transparency and clarity around the nature of HRDD requirements**

There is currently incoherence between differing legislative approaches, business practices and the demands of workers and their representatives with respect to HRDD. While HRDD retains the potential to reshape preventative approaches to addressing human rights harms, including those instigated by corporate capture, there is the need for greater clarity around what is required and ensuring there is transparency on activities undertaken in the name of implementing HRDD. For example, a primary focus on reporting (rather than the activities which underpin reporting) will have limited success in improving business practices or providing accountability for impacted rights holders.[[13]](#footnote-13) HRDD must be a holistic and ongoing process and the development of legal frameworks that provide clarity on the obligations inherent in HRDD are key to increasing its effectiveness.

For example, the Australian Illegal Logging Prohibition Act 2012 incorporates due diligence requirements that obligate the importers and processors of timber into Australia to initiate verification and certification processes aimed at ensuring the imported timber had not been illegally logged.[[14]](#footnote-14) The regulations attached to the Act provide clear guidance as to what will constitute compliance with the due diligence requirements.[[15]](#footnote-15)

1. **Mandate consultation with rights holders in HRDD**

HRDD has both preventative and remedial elements to it and ensuring the participation of rights holders in the process is a key aspect. In developing HRDD processes that might be effective in addressing corporate capture it is essential to ensure that HRDD is designed and implemented in a manner that is sufficiently flexible to cater for its application in a variety of sectors but not so flexible that it is overly deferential to business practices and discounts the participation of rights holders. While the UNGPs encourage such participation in HRDD, mandatory HRDD legislation that requires rights holders to be part of that process is more likely to ensure HRDD is effective.

For example, while the French Duty of Vigilance Act requires consultation with worker representatives when business is developing a process to identify risks and undertake consultation with stakeholders in implementing their vigilance plans, the process lacks clarity around that consultation process and may result in any ‘engagement’ with rights holders being temporary rather than ongoing.

1. **Focus on the role of investors and their leverage.**

The extent to which investors can play a key role to play in using their leverage[[16]](#footnote-16) to develop and implement HRDD as a preventative tool for addressing business impacts on human rights remains an open question. However, investors, as shareholders of corporations, can, in effect, become the ‘regulators’ of business with respect to human rights and can use their leverage to raise questions about the extent to which business is capturing government policy. Investors have been active in supporting calls for the development of mandatory HRDD to ensure greater corporate attention is given to sustainable development and such focus and leverage may also be useful in developing clearer standards around HRDD and its relevance to corporate capture.[[17]](#footnote-17)

**Concerns about “Corporate Capture” using “progressive” concepts**

The biggest threat to communities is not posed by economic globalisation, but by the withdrawal of the state as the guardian of the public interest. In the words of Bernie Fraser, former governor of the Reserve Bank of Australia, neoliberalism “[favours] the market system ahead of the state system, and individual interests ahead of community interests, [which] can lead to profoundly unfair social outcomes”.[[18]](#footnote-18) Capitalism, the operating model of the world economy, is widely regarded as being in crisis.[[19]](#footnote-19) In the face of this, attempts are being made to revisit the foundational theses of capitalism and neoliberalism. In this context, the following paragraphs examine the advent of the “Social License to Operate”, “Corporate Purpose” and “Stakeholder Capitalism”.

1. **The Social License to Operate**

The notion of the “social license to operate” was popularised in the 2000s and remains prevalent today. It emerged in the resource industry, which was "distrusted by many of the people it deals with day to day" and has been "failing to convince some of its constituents and stakeholders that it has the “social license to operate”.[[20]](#footnote-20) The social license to operate is related to the idea of “organisational legitimacy” and has also been called "legitimacy by another name".[[21]](#footnote-21) The central idea is that companies need to consider pressures emanating from society, and deal with these factors accordingly, in order to retain legitimacy and continue their enterprise.[[22]](#footnote-22) This means companies should not only consider the dynamics of the market and the interests of shareholders, but they should also consider community concerns.

Definitions of the social license to operate include having "the approval, the broad acceptance of society to conduct its activities"[[23]](#footnote-23), being responsive to the demands "that emerge from neighbourhoods, environmental groups, community members, and other elements of the surrounding civil society"[[24]](#footnote-24) and as a sign of "social acceptance or approval […] a socially constructed perception that your company or project has a legitimate place in the community."[[25]](#footnote-25) The social license to operate has become embedded in corporate sustainability reports, as well as in company and industry policies and standards, in CEO speeches, and in statements by peak industry bodies: "[…] the concept of a social license to operate has been widely accepted by the industry as an essential attribute of success. It has prompted companies to look well beyond their self-interest."[[26]](#footnote-26) The concept has also been embraced by civil society: "[t]he social license is fundamentally about accountability to people and not just powerful interests" according to Kumi Naidoo, former Executive Director of Greenpeace International and former Secretary General of Amnesty International.[[27]](#footnote-27)

Despite its common acceptance, the social license "exists" on the basis of an unwritten agreement between business and society. Problematically, while an actual regulatory license has precise conditions, the social license to operate is intangible with conditions that are not universally defined, in addition to being subject to continuous change. The idea of the social license suggests that it can be granted and revoked, propositions which are questionable. It has also been pointed out that "it is easier to point to an absence of particular factors […] necessary for a social license rather than to know when all relevant factors are actively in place" and that the "absence of explicit forms of contestation can be interpreted as latent support in so far as communities have not offered any explicit point of objection."[[28]](#footnote-28)

The burden of proof seems to lie with stakeholders to show what companies are doing wrong, not with companies to prove what they are doing right, while the absence of community protest can be interpreted as consent. While companies that act against societal values can ostensibly suffer repercussions, if companies do not break the law these potential repercussions only have reputational and financial bearing, which suggests that the social license relies on the market to balance interests and create desired outcomes for companies and stakeholders. In the context of neoliberalism and in the absence of government intervention, financial repercussions arguably pose the main (if not only) threat to organizational legitimacy. Yet it remains uncertain whether this leaves stakeholders with enough leverage to challenge and change corporate conduct.

The debate around the need to formalise the concept of a social license recently played out in Australia. The Australian Securities Exchange (ASX) Corporate Governance Council publishes principles-based recommendations on corporate governance practices to be adopted by ASX listed entities (ASX Principles & Recommendations).[[29]](#footnote-29) They are intended to provide a common reference point for corporate practices, and whilst not mandatory, an ASX listed company that does not adopt a particular recommendation must provide reasons for not doing so.[[30]](#footnote-30) In 2018, the ASX undertook a public consultation to review the principles and proposed amending them to include a revised principle 3 which would “recognise the fundamental importance of a listed entity’s social licence to operate and the need for it to act lawfully, ethically and in a socially responsible manner to preserve that licence. … in doing this, a listed entity must have regard to the views and interests of a broader range of stakeholders than just its security holders.”[[31]](#footnote-31)

Select businesses pushed back strongly against this proposal and it was argued that “corporate culture cannot be prescribed by a set of rules, and the principles and recommendations should not seek to do so.”[[32]](#footnote-32) The revised principle was ultimately not updated to include an explicit reference to a company’s social license and it was replaced with terms such as "reputation" and "standing in the community" in the fourth edition of the council's principles and recommendations on best practice for corporate governance.[[33]](#footnote-33)

1. **Corporate Purpose and Stakeholder Capitalism**

In 2019, Larry Fink, CEO of Black Rock, the largest asset management company in the world[[34]](#footnote-34), called on business leaders to consider the purpose of their company. “Purpose is not a mere tagline or marketing campaign; it is a company’s fundamental reason for being – what it does every day to create value for its stakeholders. Purpose is not the sole pursuit of profits but the animating force for achieving them. Profits are in no way inconsistent with purpose – in fact, profits and purpose are inextricably linked. Profits are essential if a company is to effectively serve all of its stakeholders over time – not only shareholders, but also employees, customers, and communities. Similarly, when a company truly understands and expresses its purpose, it functions with the focus and strategic discipline that drive long-term profitability.”[[35]](#footnote-35)

Fink argues that business should tackle socio-economic issues: “Unnerved by fundamental economic changes and the failure of government to provide lasting solutions, society is increasingly looking to companies, both public and private, to address pressing social and economic issues. These issues range from protecting the environment to retirement to gender and racial inequality, among others. Fuelled in part by social media, public pressures on corporations build faster and reach further than ever before. In addition to these pressures, companies must navigate the complexities of a late-cycle financial environment – including increased volatility – which can create incentives to maximize short-term returns at the expense of long-term growth.”[[36]](#footnote-36)

Calls for companies to adopt a more purposeful approach to business including one that includes greater transparency and responsibility on social issues are growing. In 2019 the US Business Roundtable issued a Statement on the Purpose of a Corporation in which it acknowledged that while “the free-market system is the best means of generating good jobs, a strong and sustainable economy, innovation, a healthy environment and economic opportunity for all”[[37]](#footnote-37) it also recognises that companies must consider their impact on customers, employees, suppliers and the communities in which they operate.

The protagonists of corporate purpose are, ostensibly, arguing for a shift away from shareholder capitalism towards stakeholder capitalism. In Fink’s letter, he argues that companies should no longer prioritise short-term profits or solely focus on maximizing shareholder returns. Rather, companies should aim to create value for all stakeholders, and contends that companies need to do so because of the failure of public institutions to adequately address the pressure exerted by the public. By promoting a narrative that revolves around corporate purpose, Larry Fink gives credence to the idea that companies are beholden to all of their stakeholders rather than merely to their shareholders.

Since its introduction in the 1980s, scholars have used stakeholder theory to capture the dynamics between companies and their stakeholders. Today, nearly all companies have adopted the stakeholder narrative in their annual and sustainability reports. The father of stakeholder theory, Edward Freeman, describes stakeholders as "any group or individual who can affect or is affected by the achievement of the organization’s objectives."[[38]](#footnote-38). What is often left unsaid about the genesis of stakeholder theory is that it was introduced as part of a strategic management paradigm.[[39]](#footnote-39) Freeman described how companies could manage stakeholders to further the goals of the company, he did not suggest that stakeholders should replace shareholders as the locus of business.

1. **Challenging or Maintaining the Status Quo?**

Empirical data contradicts the supposed shift in interest from shareholders to stakeholders. Like Larry Fink, Jamie Dimon – CEO of JPMorgan Chase, has also come out publicly to say that companies should consider the common good: “the [Covid-19] crisis must serve as a wake-up call and a call to action for business and government to think, act and invest for the common good and confront the structural obstacles that have inhibited inclusive economic growth for years”, he added that “[t]he last few months have laid bare the reality that, even before the pandemic hit, far too many people were living on the edge.”[[40]](#footnote-40) However, Dimon was given a $US31 million bonus in 2019, surpassing pre-GFC bonus levels.[[41]](#footnote-41) During the early stages of the Covid-19 outbreak, a survey conducted in the US showed that 84 per cent of businesses had taken no action on executive pay. Two-thirds of companies had already made equity grants to executives and 94 per cent did not plan on making changes to these awards.[[42]](#footnote-42)

Wage growth across the world has lagged behind the growth of labour productivity in recent decades, which means that the wage share of national income, has been in decline.[[43]](#footnote-43) While the world economy has grown, not everyone has benefited from this development. Although many have been lifted out of poverty, around 736 million people continue to live in extreme poverty, earning less than US$1.90 per day.[[44]](#footnote-44) Being paid a wage does not mean escaping poverty, as workers at the lower end of the labour market often remain in debt and struggle to feed their families. The charitable organisation Oxfam estimated that the richest 1% of people are now as wealthy as the rest of the world combined.[[45]](#footnote-45) It takes a CEO from one of the top five global fashion brands only four days to earn what a Bangladeshi garment worker earns in a lifetime, while in 2017, 82% of all of the growth in global wealth went to the top 1%, whereas the bottom 50% saw no increase at all.[[46]](#footnote-46) The ITUC has called for a new social contract to “build back better” after Covid-19 and redress some of these imbalances.[[47]](#footnote-47)

Other facts that refute the suggestion that business is increasingly concerned with stakeholder interests concern the increase in shareholder dividend pay-outs and stock buybacks. In 2018, companies in the S&P 500 Index repurchased US$806 billion in shares.[[48]](#footnote-48) Companies use share buybacks to manipulate their share price to their own benefit. Buybacks inhibit the investment in productive capabilities to sustain the company in the long run and come at the expense of employees, as well as continuing shareholders. Excessive dividend pay-outs similarly undercut reinvestment in productive capabilities. Both share buybacks and excessive dividend pay-outs make no contribution to the productive capacity of a company. Instead, they disrupt the growth dynamic between productivity and worker compensation, which results in growing income inequality, job instability, and anaemic productivity.[[49]](#footnote-49)

The neoliberal policy agenda has seen many governments around the world largely withdraw from regulating the impact that business has on society and the environment. Instead, the market is relied upon to balance social, environmental, and financial interests. The empirical data presented here shows this has not delivered outcomes that are favourable for communities. In this context, the foundational theses of neoliberalism and capitalism are being re-examined.

Yet, rather than acknowledging the downsides of relying on the market to balance social, environmental, and financial interests, regardless of demonstrable unfavourable social and environmental outcomes, these “anomalies” are accounted for by introducing new elements into the existing paradigm. This is referred to as “Ptolemization”: instead of accepting a Copernican revolution in the face of evidence that the old system is failing, attempts are made to tweak the existing paradigm to account for anomalies. [[50]](#footnote-50)

The “social license to operate”, “corporate purpose” and “stakeholder capitalism” are concepts that originate from the business world and are routinely championed by CEOs. This creates a paradoxical situation in which the companies and business leaders that benefit from the status quo are also the ones suggesting how the status quo should change. Development actors and civil society organisations engaging with business should be cognisant of this paradox. While the “social license to operate”, “corporate purpose” and “stakeholder capitalism” and the accompanying narratives are not harmful in themselves, they are unlikely to structurally change business practices. While ostensibly well-intended, these concepts are more likely to uphold the status quo and therefore the overreliance on the market. [[51]](#footnote-51)

1. #  Drutman L., (April 26 2015) How corporations turned into political beasts’ *Business Insider,* , <https://www.businessinsider.com.au/how-corporations-turned-into-political-beasts-2015-4?r=US&IR=T>

 [↑](#footnote-ref-1)
2. Edelman, (2021). Edelman Trust Barometer., <www.edelman.com/trust-barometer>. [↑](#footnote-ref-2)
3. For example, see the 2002 statement by Tim Cook, CEO of Apple: <https://www.apple.com/speaking-up-on-racism/>, Nike adopted a very public stance in support of Colin Kaepernick in protesting racial injustice which allowed the brand to capitalise on the broader movement, see Creswell J, Draper K and Maheshwari S, ‘Nike nearly dropped Colin Kaepernick before embracing him’ *New York Times,* September 26, 2018. In 2020, PepsiCo pledged $437.5 million for racial equality initiatives, see Philanthropy News Digest, June 22 2020, <https://philanthropynewsdigest.org/news/pepsico-pledges-437.5-million-for-racial-equality-initiatives> [↑](#footnote-ref-3)
4. Duarte, F. (13 June 2020) Black Lives Matter: Do Companies really support the cause? BBC Worklife. <https://www.bbc.com/worklife/article/20200612-black-lives-matter-do-companies-really-support-the-cause> [↑](#footnote-ref-4)
5. "We believe this is a big step back for our entire country ... The Dreamers are part of our nation’s fabric. They belong here." Microsoft president and chief legal officer Brad Smith [wrote in a blog post](https://blogs.microsoft.com/on-the-issues/2017/09/05/urgent-daca-legislation-economic-imperative-humanitarian-necessity/) titled "Urgent DACA legislation is both an economic imperative and humanitarian necessity." September 5, 2017; <https://blogs.microsoft.com/on-the-issues/2017/09/05/urgent-daca-legislation-economic-imperative-humanitarian-necessity/> [↑](#footnote-ref-5)
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8. Human Rights Council. *Report of the independent international fact-finding mission on Myanmar.* UN Doc. A/HRC/39/64, 12 September 2018, [74]. The report notes “The role of social media is significant. Facebook has been a useful instrument for those seeking to spread hate, in a context where, for most users, Facebook is the Internet. Although improved in recent months, the response of Facebook has been slow and ineffective. The extent to which Facebook posts and messages have led to real-world discrimination and violence must be independently and thoroughly examined. The mission regrets that Facebook is unable to provide country-specific data about the spread of hate speech on its platform, which is imperative to assess the adequacy of its response. [↑](#footnote-ref-8)
9. Miller D and Dinan W. Resisting Meaningful Action on Climate Change: Think tanks, ‘merchants of doubt’ and the ‘corporate capture’ of sustainable development’ in Hansen A and Cox R (Eds). *The Routledge Handbook of Environment and Communication*, Routledge, 2015, 86. [↑](#footnote-ref-9)
10. Miller D and Harkins C. Corporate strategy, corporate capture: Food and alcohol industry lobbying and public health. *Critical Social Policy,* Volume: 30 issue: 4, 564-589. [↑](#footnote-ref-10)
11. Beder S, Varney W and Gosden R, *This little kiddy went to market: The corporate capture of childhood* Pluto Press, USA, 2009. [↑](#footnote-ref-11)
12. There are currently four pieces of national legislation which specifically seek to apply aspects of the UNGPs on HRDD. These are the French Duty of Vigilance Act 2017 (*Devoir de Vigilance Loi*), the Netherlands Child Labour Due Diligence Act 2019, the German Corporate Due Diligence in Supply Chains Act 2021 and the Norwegian Transparency Act 2021. In addition, there other pieces of national and sub-national legislation which are relevant to HRDD and were passed after the UNGPs, such as the Australian Illegal Logging Prohibition Act 2012, the UK Modern Slavery Act 2015 and the Australian Modern Slavery Act 2018 as well as some legislation in the Global South, including the Peru Labour Code 2014 (on child labour) and the Indian National Guidelines on Responsible Business Conduct 2018. The European Union (EU) also passed the EU Timber Regulation 2010 and the EU Conflict Minerals Regulation 2014 both of which require human rights due diligence, and civil society in many States have proposed instruments which will have “mandatory human rights due diligence” at their centre. [↑](#footnote-ref-12)
13. Focus on Labour Exploitation (FLEX) “Seeing through transparency: Making corporate accountability work for workers” (2018). [↑](#footnote-ref-13)
14. TURNER, R. J. Transnational Supply Chain Regulation: Extraterritorial Regulation as Corporate Law’s New Frontier *Melbourne Journal of International Law* 17 (1) 2016 p.188-209. [↑](#footnote-ref-14)
15. The *Illegal Logging Prohibition Amendment Regulation* 2012 provides that: step 1 is information gathering (the importer must obtain as much of the prescribed information as is reasonably practicable); step 2 is an option process that involves assessing and identifying risk against a prescribed timber legality framework (section 11) or a country-specific guideline (once they are prescribed); step 3 is risk assessment (section 13); and, step 4 is risk mitigation (section 14), which should be adequate and proportionate to the identified risk. Illegally logged timber is defined broadly in the *Illegal Logging Prohibition Act* 2012 (Cth) as timber ‘harvested in contravention of laws in force in the place (whether or not in Australia) where the timber was harvested’ (Section 7). The due diligence requirements, as outlined in the [Illegal Logging Prohibition Regulation 2012](https://www.legislation.gov.au/Details/F2014C01294), came into effect on 30 November 2014. From 1 January 2018, businesses and individuals may face penalties for failing to comply with the due-diligence requirements. Conducting the requisite due diligence can be used as a defense to negligence. [↑](#footnote-ref-15)
16. Human Rights Council, ‘Taking stock of investor implementation of the Guiding Principles on Business and Human Rights’ Report of the UN Working Group on the issue of human rights and transnational corporations and other business enterprises (A/HRC/47/39/Add.1, 2021), https://undocs.org/A/HRC/47/39/Add.1. [↑](#footnote-ref-16)
17. <https://investorsforhumanrights.org/sites/default/files/attachments/2020-04/The%20Investor%20Case%20for%20mHRDD%20-%20FINAL_0.pdf> [↑](#footnote-ref-17)
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