



Foreword to the New Thinking on Business and Human Rights Special Issue

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FOREWORD



Foreword to the New Thinking on Business and Human Rights Special Issue

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In the mid-1990s, many corporations questioned the relevance of human rights to business. But since then a combination of factors, including some high-profile acts of corporate irresponsibility and an increasing focus on regulation, has put the relevance of human rights to business beyond doubt. Indeed, human rights and business are intrinsically interconnected. As a result, many companies now participate—alongside human rights practitioners, governments, and academics—in discussions about business and human rights. For many of those participants, the critical question is no longer *whether* human rights are relevant to business; it is *how* stakeholders can best address the human rights challenges that arise in the competitive business environment.

In 2019, the Australian Human Rights Institute at UNSW Sydney took up this critical question by selecting “New Thinking on Business and Human Rights” as the theme of its inaugural Innovate Rights Conference. Innovate Rights brought together more than 300 academics, business leaders, civil society advocates, trade union representatives, and human rights defenders from across the globe. Over the course of three days, they reflected on the challenges of advancing a human rights agenda within different industries and sectors, discussed the successful aspects of existing business and human rights programs, and considered how best to eliminate modern slavery and advance gender justice, indigenous rights, and other critical causes in business.

We selected a number of the academic papers presented at Innovate Rights for peer review and have since brought them together in this special issue of the *Australian Journal of Human Rights*. The papers, through the diversity of their topics, illustrate how expansive the field of business and human rights has become. They engage with critical business and human rights issues and contain innovative proposals for realising the principles of business and human rights.

Several contributors to this special issue consider the extent to which the law is an effective means to encourage businesses to adopt a proactive and responsible approach to human rights. These contributors place a specific emphasis on efforts towards eliminating modern slavery. In recent years, public interest in eliminating modern slavery has grown dramatically. Modern slavery—which includes forced labour, bonded labour, and human trafficking—is a form of serious workplace exploitation and is visible in many global supply chains. It is estimated that 40.3 million people are currently enslaved around the world; 25 million of them work as forced labourers in global supply chains (ILO and

Walk Free Foundation 2017). Recently, several governments have made efforts to formally mandate corporate disclosure as a means to address labour exploitation in global supply chains (whereas prior attempts to “regulate” working conditions in global supply chains were largely voluntary and relied on businesses’ goodwill). Such regulatory regimes are new and largely untested, and there are significant questions as to whether they will be effective in reducing modern slavery.

A number of these articles raise concerns about the laws that have been enacted to regulate modern slavery, and it is hard not to immediately jump to the seemingly obvious conclusion that the law has its limits. Numerous mechanisms and stakeholders have been involved in the decades-long struggle to improve corporate respect for human rights, and their crusade will continue. But the law, if drafted and implemented well, can be an important lever for effecting change.

In his article on Australia’s new modern slavery laws, Paul Redmond provides a valuable account of the laws’ historical origins and analyses their potential for addressing modern slavery. Redmond is unconvinced that Australia’s *Modern Slavery Act 2018* (Cth) will be effective in doing so, in part because companies’ compliance with its 2015 UK counterpart (*Modern Slavery Act 2015* (UK)) has been largely cosmetic. He highlights four measures that would strengthen the law: publishing a list of reporting entities, precluding non-compliant companies from competing for public contracts, mandating human rights due diligence, and imposing penalties. According to Redmond, without such measures, the law is unlikely to make a substantive impact.

In their article, Jolyon Ford and Justine Nolan examine the limits of mandatory social disclosure schemes as a tool for addressing business-related human rights issues. They argue that such schemes, including the one that the Australian *Modern Slavery Act* establishes, do not require businesses to conduct substantive due diligence in order to assess human rights risk. Ford and Nolan challenge some of the assumptions that underlie the design of reporting-based schemes and caution companies against over-relying on social auditing in identifying and assessing human rights risk.

Olivia Dean and Shelley Marshall also consider the Australian *Modern Slavery Act*’s potential impact, specifically in its application to the financial sector, which contributes \$140 billion per year to Australia’s GDP (Treasury 2016). The financial sector significantly influences how business is conducted, and its tentacles reach into all Australian industries. Based on their analysis of the reports submitted by Australia’s largest financial players in connection with the UK *Modern Slavery Act*, Dean and Marshall conclude that we are likely to see an uninspiring race to the middle, rather than to the top, in the finance sector’s reporting under the Australian law.

Ramona Vijayarasa’s article considers the Australian *Modern Slavery Act*’s gender-blind nature. Vijayarasa demonstrates that the Act fails to address the different experiences of women and men with supply chains, both as workers and as affected stakeholders. She suggests that the absence of strong advocacy during the legislation’s design phase and the lack of gender-sensitive legislative models elsewhere left the drafters ill-equipped to incorporate a differentiated gender approach into the Act. Vijayarasa suggests that the legislation could have been strengthened by at least including requirements that companies conduct gender sensitive due diligence and provide gender-disaggregated data.

Linnea Kristiansson and Nora Götzmann’s article continues the gender justice sub-theme. Kristiansson and Götzmann take a broader view of the existing business and

human rights framework, including the United Nations Guiding Principles, to show that its approach to advancing women's rights and addressing gender disparities leaves much to be desired. Their article helpfully identifies the most significant gaps and suggests potential responses to them, across the areas of labour, land, essential services, trade and investment, and remedy. It also engages with important advances in this area, especially the Gender Guidance for Business and Human Rights, which the UN Working Group on Business and Human Rights released in 2019. Together, this article and Vijayarasa's move the field of gender and human rights forward, by not only providing critique but also identifying concrete steps that stakeholders, especially governments, could take to ensure that the business and human rights agenda has a positive impact for all.

Dominique Allen's contribution, "Thou Shalt Not Discriminate", takes up the issue of workers' rights touched upon by Kristiansson and Götzmann. It considers the value of fourth generation workplace discrimination laws, which shift the onus from complainant to employer by placing positive duties on employers to address discrimination. Through a detailed qualitative analysis of the *Equal Opportunity Act 2010* (Vic), which is at the vanguard of Australian anti-discrimination law, Allen highlights the value of proactively addressing discrimination. Allen calls for positive duties, which 'not only permit positive action to address inequality (like special measures) [but] require it', to be put on the political agenda across Australia.

Karin Buhmann and Roxana Olivera's article takes us well beyond the issue of modern slavery by focusing on the contemporary issue of regulating social media companies. Social media companies are under continuous pressure to ensure that their operations respect human rights, but developing policies that prevent their platforms from being systematically exploited and protect diverse stakeholders from harm remains an enormous challenge for them. Buhmann and Olivera argue that, to overcome this challenge, social media companies need to better understand human rights due diligence and conduct it more effectively. They also articulate some specific considerations for conducting due diligence in the context of photo sharing.

The role played by business in conflict zones is another growing concern in the business and human rights field. Jonathan Kolieb's article, which considers how best to drive responsible corporate practice in these highly volatile situations, is an important intervention on this issue. Kolieb suggests that international human rights law has been unable to adequately regulate business operations in these situations, where human rights violations are at their most acute, and argues that requiring businesses to also act in accordance with international humanitarian law principles would produce better human rights outcomes.

We are also pleased to highlight a series of reviews. Our colleague Andrew Symington reviews Shareen Hertel's *Tethered Fates*; Paul Redmond reviews Alex Newton's *The Business of Human Rights*; and Lisa Hsin examines Justine Nolan and Martijn Boersma's *Addressing Modern Slavery* and Shelley Marshall's *Living Wage*.

It is evident from the breadth and depth of the articles in this special issue that there has been some progress on transforming the business and human rights agenda from principles into practice. As national and international policies, sector- and corporation-specific guidelines, and domestic laws have emerged, the interface between business and human rights has become clearer. But, in reality, many companies still fail to respect

human rights and, in doing so, overlook the perspective of the rightsholder. While new laws, such as those that have been enacted to combat modern slavery, are helpful, they are not sufficient. A holistic rights-based approach grounded in both law and practice that promotes the centrality of human rights in identifying and remedying abuse is still a work in progress. As this special issue shows, rigorous research plays an important role in identifying both the gaps in current human rights programs and the innovative solutions that business, government and community stakeholders could adopt to better protect human rights.

Notes on contributors

Justine Nolan is a Professor in the Faculty of Law at UNSW Sydney. She is also a Visiting Professorial Scholar at NYU's Stern Center for Business and Human Rights. Justine's research focuses on the intersection of business and human rights. Her 2019 co-authored book, *Addressing Modern Slavery*, examines how consumers, business and government are part of both the problem of and the solution to modern slavery in global supply chains.

Louise Chappell is a Scientia Professor in the Faculty of Law and the Director of the Australian Human Rights Institute at UNSW Sydney. She is also a Fellow of the Australian Academy of the Social Sciences. Louise has published extensively on women's rights; gender, politics, and institutions; public policy; and comparative federalism.

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