

EDITORIAL

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All human beings are ‘free and equal in dignity and rights’ and are entitled to these rights ‘without distinction of any kind’.¹ This has been the consensus of the global community at least since the adoption of the *Universal Declaration on Human Rights* by the United Nations General Assembly in 1948. For the past half-century, there has also been consensus that governments have a binding obligation to protect at least some of these rights,² and, where necessary, to change the law to do so,³ accompanied by varying degrees of enforcement.⁴

Over the same period, there has been a dramatic transition in the expectations placed on the private sector,⁵ which rivals government in its capacity to affect human rights.⁶ Initially, businesses were allowed to relentlessly pursue profit provided the most basic ethical standards were met.⁷ This led to the recognition that corporate social responsibility could potentially have long term financial pay-offs and be compatible with and conducive to profit making.⁸ Today, however, businesses are directly and indirectly subject to human rights obligations in a growing number of government, industry and civil society

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1 *Universal Declaration on Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) arts 1, 2.

2 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 3 (‘ICCPR’); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 3 (‘ICESCR’).

3 ICCPR art 2(2); ICESCR art 2(1).

4 See Open Society Justice Initiative, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions* (Open Society Foundation, 2010) 118–21; cf Buhm-Suk Baek, ‘Economic Sanctions against Human Rights Violations’ [2008] *Cornell Law School Inter-University Graduate Student Conference Papers* Paper 11, 21, 49–53 <http://scholarship.law.cornell.edu/lps_clacp/11>.

5 Justine Nolan, ‘Business and Human Rights in Context’ in Dorothee Baumann-Pauly and Justine Nolan (eds), *Business and Human Rights: From Principles to Practice* (Routledge, 2016) 2, 2.

6 See, eg, ‘Towards the End of Poverty’, *ViewsWire, The Economist* (London), 1 June 2013, 17; Ram Kesavan et al, ‘Did Business Development Reduce Poverty in China?’ (2014) 10(1) *International Management Review* 21; United Nations, *The Millennium Development Goals Report 2013* (2013) 6–7. Cf Arthur L Ruoff, ‘World Poverty, Another Look’ (2011) 13 *Environment, Development and Sustainability* 677.

7 Milton Friedman, ‘The Social Responsibility of Business Is to Increase Its Profits’, *The New York Times Magazine, The New York Times* (New York), 13 September 1970, 32, 33.

8 Marc Orlitzky, Frank L Schmidt and Sara L Rynes, ‘Corporate Social and Financial Performance: A Meta-analysis’ (2003) 24 *Organization Studies* 403, 423, 427.

initiatives, most notably the United Nations Guiding Principles on Business and Human Rights.⁹

In this context, and with a potential binding treaty on business and human rights on the horizon,¹⁰ the thematic component of this Issue explores the role the law can play in this developing field. The use of the law to address the existing or potential human rights abuses of businesses is a double-edged sword: overregulation can fail to improve the situation and create redundancy;¹¹ inadequate standards can encourage businesses to aim for the minimum level of compliance to remain competitive;¹² and yet a regulatory environment that appropriately responds to human rights concerns can lead powerful entities to act in a socially responsible manner.¹³

The 10 authors that contributed to the articles in the thematic component offer perspectives on the different legal approaches to business and human rights: from soft law mechanisms to domestic criminal legislation; from home and host state jurisdictions to international law; and from regulatory enforcement to campaigns by civil society organisations. More specifically, they address: how Australian corporations could be held criminally liable for extraterritorial human rights violations committed by foreign subsidiaries; the current progress and potential of the business and human rights treaty; critiques of the treaty process through the lens of regulatory ritualism; the improving responses of companies to child labour in supply chains induced by soft law initiatives, as observed by civil society organisations; and how local stakeholder involvement in private regulatory mechanisms can better protect workers in global supply chains.

It is my hope that these insights can inform policies and practices in the field over the coming years.

9 John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, UN Doc A/HRC/17/31 (21 March 2011) annex 26.

10 *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, HRC Res 26/9, UN GAOR, 26th sess, 37th mtg, Agenda Item 3, A/HRC/RES/26/9 (14 July 2014, adopted 26 June 2014).

11 See, eg, Christine Bader, 'Whose Job Is It to Prevent Worker Abuse Abroad?', *The Atlantic* (online), 18 May 2015 <<http://www.theatlantic.com/business/archive/2015/05/the-importance-of-supply-chain/393320/>>. Bader observed a factory in Bangkok that had three fire extinguishers on the wall at different heights. The reason for this was that it had entered three different contracts that had well-intentioned but inconsistent safety code requirements, each demanding a different height.

12 See, eg, Daniel Flitton, 'Rio Tinto's Billion-Dollar Mess: "Unprincipled, Shameful and Evil"', *The Sydney Morning Herald* (online), 21 August 2016 <<http://www.smh.com.au/world/billion-dollar-mess-a-major-disaster-the-people-do-not-deserve-to-have-20160817-gquzli.html>>. Flitton reports that Rio Tinto abandoned its mine in Bougainville, leaving the local community to clean up the serious environmental damage caused. The company believed its actions were justified as it complied with the relevant environmental regulations of Papua New Guinea at the time.

13 See, eg, Suzanne Goldenberg, 'Exxon Knew of Climate Change in 1981, Email Says – But It Funded Deniers for 27 More Years', *The Guardian* (online), 9 July 2015 <<https://www.theguardian.com/environment/2015/jul/08/exxon-climate-change-1981-climate-denier-funding>>. Goldenberg reports that ExxonMobil was deterred from proceeding with a mine that would have been the world's biggest point source of carbon dioxide emissions because they predicted governments in the future would put a price on carbon.

The general component of the Issue contains eight articles that each make a valuable addition to contemporary legal discourse on their respective topics. They are illustrative of the *UNSW Law Journal's* ongoing contribution to originality and excellence in Australian legal scholarship. The issues considered by these articles include: the constitutional duty to give reasons for judicial decisions; how statutory interpretation applies to Interpretation Acts themselves; parliamentary deliberation on the constitutional validity of legislation; voting rights at local government elections; planning regulation applicable to supermarket competition; the relevance of welfare overpayments to fitness for legal practice; public attitudes towards personal bankruptcy; and indigenous water rights in Australia and Chile.

The publication of this Issue would not have been possible without the dedicated efforts of a number of people who deserve a word of thanks. First and foremost, I would like to thank the authors who have contributed to both the general and thematic components. It has been a privilege to work with each of them and to see their articles through to publication in the *Journal*.

Next, I must thank Associate Professor Justine Nolan for suggesting the thematic topic of business and human rights, assisting in the development of the theme, and for writing the foreword to the issue. Her willingness to provide guidance from the start to the finish of this process has been invaluable. I must also thank Ms Amy Sinclair, Representative for Australia, New Zealand and the Pacific at the Business and Human Rights Resource Centre, for delivering the keynote address at the launch for this Issue on 26 September 2017.

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I acknowledge the anonymous reviewers for generously donating their time and expertise to give critical appraisals of the articles submitted to the *Journal*. This enables the Executive Committee to make publication decisions and to pass on feedback to the authors.

I also thank our Premier Sponsor Herbert Smith Freehills for hosting the launch event for this Issue. I acknowledge our other Premier Sponsors, Allens Linklaters and King Wood Mallesons, the generous support of whom enables the *Journal* to maintain its high level of quality.

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Finally, on a personal note, I would like to thank God, my friends, and my family for their support over the last year, and my life up until this point. I am blessed to have so many places to turn to in times of both trial and triumph.