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Say what? The regulation of company statements arising from UNGP processes

Domestic regulation of company statements has significance to the increasing obligations on businesses to report publicly on human rights. The United Nation's Guiding Principles on Business and Human Rights (UNGPs), and subsequent developments, require public reporting on human rights in general or limited to specific areas like slavery or conflict minerals. The resultant reporting and statements present little risk of liability through existing international mechanisms. However there is considerable exposure under domestic regulation of misleading statements (regulation that was not designed with mandatory human rights reporting in mind). This article examines these domestic laws and the balance between mandatory reporting and liability for any such reports.

Introduction

The UNGPs encourage companies to publicise policies and procedures about human rights aspects of their operations.[1] This reporting framework has since been supported and replicated in other initiatives.[2] The UNGPs describe themselves as 'voluntary'; and there are few general mechanisms that review a company's UNGP compliance in word or deed.[3] However, many *domestic* laws regulate company statements and can apply to materials published by a company in following the UNGPs, such as regulation of false/misleading statements and corporate disclosure regimes. These national laws were not drafted or developed with human rights reporting in mind but now have a new realm of significance in their operation arising from the transparency and accountability within the UNGPs and related processes. In summary, this article emphasises a difference in corporate liability arising from *mandatory* reporting (which enjoys greater immunity) and *voluntary* statements (which are more strictly regulated). That summary informs both application of existing laws/standards, but also any movements towards domestic law reform associated with the UNGPs.

Domestic laws regulating corporate statements can be grouped into three categories:

1. controls over false/misleading publicity;
2. corporate disclosure regimes; and
3. misrepresentations in contract and tort law.

A brief summary of each of these is set out below (including their potential relevance to UNGP reporting), drawn frequently from Australian law but also including examples from some other jurisdictions. The aim is not to present the law of any particular jurisdiction, but rather to summarise some of the frequent ways in which domestic laws regulate company statements and reporting. This research then enables some observations to be made on the interaction between domestic regulation and the reporting requirements of the UNGPs (and analogues).

The efficacy of domestic laws depends, of course, on the particular institutional mechanisms and capacity in place to implement those laws. This applies to domestic law regulating corporate statements as it does to any other area of law. These laws do, however, loom large for the future of UNGP reporting.

False/misleading publicity and advertising

Many jurisdictions prohibit companies from using inaccurate publicity to attract business.[4] These laws primarily aim at ensuring a 'fair' market, protecting both consumers from being deceived and businesses from competitors' falsehoods,[5] but their application extends to broader corporate statements.

A relevant example is the United States litigation where proceedings were brought against Nike regarding statements it made about conditions in factories producing

its products. The grounds for action included that Nike's statements breached California's False Advertising Law and Unfair Competition Law. The proceedings were ultimately settled but not until various interlocutory decisions[6] about US Constitutional 'free speech' protections.[7] The upshot of *Nike v Kasky*, and subsequent US decisions, is that, for corporate statements in the US, '[w]hen the content and purpose... is promotional and related to products and services, then it is commercial speech [and more exposed to liability under false advertising laws, but]... [w]hen the content and purpose... is informational or engaging in public debate then it is fully protected under the First Amendment'.[8]

Useful guidance from this area of law, in informing how UNGP disclosures may be regulated, can be drawn from how some legal systems assess corporate environmental claims. There have been many legal actions and prosecutions in different jurisdictions, showing that businesses incur liability for statements where they are unable to substantiate their claims about their products or services.[9] The extension to UNGP statements and reporting may well follow the same approach regarding what any company publishes about its human rights policies/procedures, if there is no basis for the statements made by the company. If the company cannot show that it 'practices what it preaches', then that may well constitute false/misleading statements attracting liability in some jurisdictions.

Corporate disclosure regimes

Most jurisdictions have laws requiring reporting or disclosure from companies.[10] While some of this applies to *all* companies, and other requirements only fall on large companies, the most prevalent area of disclosure regulation is stock exchange disclosures. That is, for companies that choose to invite public investment in their shares, there are various obligations on those companies to keep the market informed.

The stock exchange reporting requirements in some jurisdictions have been informed by UNGP developments.[11] For example, UK-listed companies must now include, in their annual report, 'information about... social, community and human rights issues... to the extent necessary for an understanding of the... company's business';[12] and South African companies must monitor and report on a range of human rights and social issues (this applies to state-owned companies as well as companies listed on the stock exchange).[13] In the US, parts of the Dodd-Frank Act required companies using tantalum, tin, gold or tungsten to indicate either that: (1) their product does not come from the Democratic Republic of Congo and neighbouring countries; or (2) if that assurance cannot be given, then explain what due diligence and related checks are taken regarding conflict minerals.[14] Numerous stock exchanges are developing these types of 'apply or explain' obligations on companies in relation to sustainability procedures and indicators.[15] Most stock exchanges also have controls over statements that are misleading, and prosecutions are taken where company reporting has been inaccurate.

More broadly, many stock exchanges have continuous disclosure requirements, requiring companies publicly to notify of matters that may materially affect their share price. Stock exchanges with continuous disclosure requirements, like Australia, are seeing increasing legal liability arising from a failure to disclose a matter that could affect share price.[16] The relevance here to UNGPs is obviously more than just reporting: if a business learns of significant issues through its due diligence process, what written disclosure is required and when must that occur? Obviously, the answer to that cannot be provided in one or two sentences in this general article about the UNGPs, but hopefully the question is sufficient to reinforce that this is a significant issue to be considered regarding any publicly listed companies operating under continuous disclosure laws.

Misrepresentations: contract and tort law

Companies can incur liability to parties who relied on the company's statements or representations that are subsequently shown to be incorrect.

Liability can arise where a party contracts with a company because of its representations.[17] This may seem an unlikely scenario here – that is, a party deciding to contract with a company *because of* something in the company's UNGP statements or reporting. However, that potential will become increasingly more common as a result of attention to supply-chain responsibilities. Financiers, such as the World Bank and Equator Principle banks, frequently require

information and action as a condition for lending. Many larger organisations (both government and corporate) are demanding their suppliers to commit formally or report in relation to UNGP matters.[18] Should such statements later be found inaccurate, that could well present liabilities around breach of contract or improper entry to contract.

Companies can also incur tortious liability for misrepresentations, even where the parties are not in a contractual relationship.[19] To make a statement known to be wrong, or careless as to its accuracy, which then causes loss to another party, will render the maker of the statement liable in various jurisdictions.[20] The relevance to UNGP statements and reporting has some similarity to how false/misleading statements are approached: liability is likely to turn on what basis the company has to substantiate any statements it makes through UNGP processes.

Protections under domestic regulation

Where regulations direct a party to make some statement/report, many legal regimes will also give that party protection from liability arising from things said in that document.[21] The protection arrangements differ according to the extent of information or disclosure sought and the potential liability the party may incur if protection is not offered (which also relates to the likelihood of such reporting in the absence of legal protections). So, for instance, one legal structure requiring staff to report assaults in aged care facilities provides confidentiality and immunity to those making a report *as long as* the report is made to the relevant authorities in good faith and on reasonable grounds believing it to be true.[22] By contrast, stock exchange rules that require listed companies to make various reports do not provide blanket immunities but instead usually include additional rules making it an offence to provide inaccurate information. Protection is also frequently lost for statements known to be false: in the US – renowned for its free speech protection – even the constitutional protections do not cover 'false speech'.[23]

Quite plainly, there is no universal formula of what protection in return for how much compulsion. The different 'law-makers' (whether government regulators, legislators or judiciary) examine the context of the specified disclosure and set the related protection at what is considered an appropriate level.

This dynamic of protection for reporting that is compulsorily required creates a curious dilemma for the UNGPs and how they operate in any particular jurisdiction. Various governments have been reluctant to introduce any regulation addressing aspects of the UNGPs, purportedly because this may make some form of 'bureaucratic red tape'. The irony is that, in leaving corporate UNGP reporting completely voluntary, those jurisdictions with other laws regulating corporate statements may result in greater corporate exposure to liability for UNGP statements.

Notes

1 UN, *Guiding Principles on Business and Human Rights* (Human Rights Council 2011), eg, Guiding Principles 16(d), 18(b), 21, 31(e).

2 Eg, public reporting aspects feature in the *Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains* (China Chamber of Commerce of Metals, Minerals and Chemicals Importers & Exporters 2015); *International Code of Conduct for Private Security Service Providers* (2010, signatory companies); *Principles and Criteria for the Production of Sustainable Palm Oil* (Roundtable on Sustainable Palm Oil 2013); and *OECD Guidelines for Multinational Enterprises* (Organisation for Economic Co-operation & Development 2011) ('OECD Guidelines').

3 The closest form of international 'policing' would be through the OECD Guidelines (see n 2, above) but that imposes no legal liability for non-compliance.

4 Eg, Australia: Australian Consumer Law (Sch 2 to Competition and Consumer Act 2010), s 18; Canada: Competition Act 1985, s 52; United Kingdom: Consumer Protection from Unfair Trading Regulations 2008, regs 3–6.

5 Eg, UN, *Guidelines for Consumer Protection* (Department of Economic and Social Affairs 2003).

6 *Kasky v Nike Inc*, 79 Cal App 4th 165 (2000, Californian Court of Appeal upholding the trial judge's ruling that Nike's statements had constitutional protection); *Nike Inc v Kasky*, 27 Cal 4th 939 (2002, California Supreme Court overturning the lower decisions and ruling the action could proceed); *Nike Inc v Kasky*, 539 US 654 (2003, US Supreme Court dismissing appeal and directing the proceeding to continue).

7 US law makes a distinction between 'commercial' and 'non-commercial' speech (with the former receiving less Constitutional protection), see Myers, 'What's the legal definition of PR?: An analysis of commercial speech and public relations' (2016) 42(5) Public Relations Review 821, 824–825.

8 Myers, see n 7, above, at 829 (summarising from a range of court decisions following and applying the *Nike v Kasky* judgment and reasons).

9 Eg, Australian Competition & Consumer Commission, *Green marketing and the Australian Consumer Law* (Australian Government 2011); Canadian Standards Association, *Environmental Claims: A Guide for Industry and Advertisers* (Competition Bureau Canada 2008). Another

example is the decision of the UK Advertising Standards Authority *Final Adjudication – Shell International* (A08-50657, 13 August 2008).

10 Gillian North, *Company Disclosure in Australia* (Thomson Reuters 2013) 41.

11 Sumithra Dhanarajan and Claire O' Brien, 'Human Rights and Businesses: Background Paper' (Asia Europe Foundation 2014) 19: '[V]arious countries' stock exchanges have put in place either mandatory or voluntary disclosure requirements for social and environmental impacts'.

12 Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013, reg 3 (inserting s 414C(7) into the Companies Act 2006).

13 Companies Regulations 2011, s 43.

14 The current extent of US reporting requirements is in flux given the February 2017 Congress and Presidential disapproval of the 2016 US Securities and Exchange Commission's 'Disclosure of Payments by Resource Extraction Issuers'.

15 IHRB and UNEP, Human Rights and Sustainable Finance: Exploring the Relationship (United Nations Environment Programme, Nairobi 2016) 43. See also, UN Sustainable Stock Exchanges Initiative, *Model Guidance on Reporting ESG Information to Investors* (Geneva: UNCTAD Division on Investment and Enterprise (CHE) 2015); and World Federation of Exchanges WFE, *ESG Recommendation Guidance and Metrics* (London: World Federation of Exchanges 2015).

16 Eg, *Grant-Taylor v Babcock & Brown Ltd* [2016] FCAFC 60, [92]–[93] and [96] per Allsop CJ, Gilmour and Beach JJ; *Melbourne City Investments v UGL* [2015] VSC 540, [156] per Robson J.

17 Eg, Australia: *Alati v Kruger* [1955] HCA 64; 94 CLR 216, 222; South Africa: *Brink v Humphries & Jewell (Pty) Ltd* [2004] ZASCA 131, [2]; UK: *Salt v Stratstone Specialist* [2015] EWCA Civ 745, [1]–[4].

18 Eg, examples of government procurement and contracting in the US, EU, Denmark, Italy, Holland and UK are noted in DIHR and ICAR, *Briefing Note: Protecting Human Rights through Government Procurement* (Danish Institute for Human Rights 2014) 3–6; a corporate example is FIFA, 'Executive Committee Sets Presidential Election for 26 February 2016 and Fully Supports Roadmap for Reform' (Fédération Internationale de Football Association 2015).

19 Eg, Canada: *Queen v Cognos Inc* [1993] 1 SCR 87, 108; UK: Misrepresentation Act 1967, s 2.

20 Eg, US: *Dun & Bradstreet v Greenmoss Builders*, 472 US 749 (1985) 761.

21 Eg, Australia: Aged Care Act 1997, s 96.8 (protection for mandatory reporting of assaults); US: *Beeman v Anthem Prescription Management*, 58 Cal 4th 329 (2013), section III per Liu, Kennard, Baxter and Werdegar JJ (discussing the US law and protections on 'compelled speech').

22 *Ibid*, Aged Care Act, s 96.8.

23 Eg, *New York Times v Sullivan*, 376 US 254 (1964) 279–280 (recovering damages for defamation permitted where the statement was made 'with knowledge that it was false or with reckless disregard of whether it was false').

The rule of labour law and conflict with international human rights guidelines

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Summary

Countries throughout the world have taken different approaches to the right of association of employees and the right to organise labour organisations. The common thread is that these rules of law deny to some extent an employee's free choice to determine whether or not to associate with or consent to representation by a labour organisation. These conflicts raise particular issues under international frameworks and the International Labour Organization's (ILO) Conventions. When these Conventions are included in treaties, the conflict between the labour laws of the countries involved in such treaties and the ILO Conventions becomes more significant.

Introduction

When it comes to the right of association by employees and the right to organise labour organisations, countries around the world have taken very different approaches. In some countries, the representation of employees by a labour organisation is mandatory depending on the size of the employer or the industry in which the employer operates. At the other end of the scale, there are some countries in which it is illegal for any type of labour organisation to represent the employees. Between these two polar opposites are countries, such as the United States and Canada, where unionisation is largely left to elections in which even a slight majority may decide that all employees in a designated unit are to be represented by a union, even