28 June 2012

Corporate Responsibility to Respect Human Rights Sector Guidance: BusinessNZ comment

General comment

One difficulty evident in all three sector papers arises from the somewhat amorphous nature of the term 'human rights'. While each paper refers to the International Bill of Human Rights none makes clear how the provisions of those three documents are to be interpreted - a far from straightforward matter. From a business perspective there is merit in noting this point since what will be necessary by way of human rights' recognition will vary with varying circumstances. And it is perhaps trite to observe that generally speaking, the provision of reasonable employment opportunities of itself helps to improve both standards of living and human rights observance.

As an example of possible difficulty, Article 10.1 of the International Covenant on Economic, Social and Cultural Rights (CESCR) requires States Parties to recognise that *'the widest possible protection and assistance should be accorded to the family, which is the fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children'.* Applied to business, what does this require - limiting the use of overtime since overtime can interfere with family life, that all jobs be available on a flexible basis (whether appropriate or not), that employers play some part in the education of employees' children? Doubtless the Article would not be read in this way but as human rights is a rather flexible concept, in a business context some limitations are needed. This is particularly so as without the employment opportunities businesses provide, realising many human rights principles would often not be possible. In the absence of real human rights abuses, human rights should not be used to promote the kind of wish list that could undermine employment creation.

It follows, therefore, that the first requirement is for an awareness of basic human rights which must be observed in all circumstances. Notably these are the civil and political rights, most importantly, the right to life with, as well, the associated rights of freedom of expression, peaceful assembly, religious freedom, freedom of association, freedom from discrimination and freedom from cruel and disproportionately severe treatment.

Social and economic rights on the other hand, are rather more open to debate. There is the example of Article 10, above, while Article 7 of the same Covenant requires 'fair wages' and 'a decent living for [workers] and their families'. This tends to suggest that only one member of a family will be employed and gives no indication of how many individuals the word 'families' is intended to encompass. How such 'rights' are to be 'respected' is always going to be open to argument.

It is a little unfortunate that the impression gained from the three papers is that businesses will more than likely be prone to ignore human rights if they think they can. But for most businesses, if only from a reputational point of view, to do so is not in their own best interests.

Specific Sectors

Oil and Gas Sector

The paper highlights the problems that can arise in this area, and perhaps inevitably, oil and gas exploration is always likely to involve some conflict of interest. This is particularly true where governments favour exploration and extraction while many individuals - and not only members of minority and indigenous communities (many of whom may also be in favour) - do not. Such a state of affairs is likely to cause difficulty both for the government and the company or companies involved, making the extent of any claimed human rights violation notably hard to determine.

What the current discussion indicates – given the diversity of problems identified – is that for the oil and gas sector such guidance as may be provided can never hope to cover every possible situation. Consequently guidance should be restricted to recommendations of a general nature such as ensuring companies have a human rights policy that requires familiarity with host country circumstances and communication and consultation with affected communities and ensures to the extent possible, that community interests are protected. All company employees should be aware of the policy and of the need to respect the human rights of those they are dealing with. The should also see that human rights risks within the company's supply chain are properly managed, while acknowledging that this may not always be possible.

Excessively complex language and requirements should be avoided; the guidance given should be practical, clear, readily understandable, principles-based, not prescriptive and 'non-preachy'. The UN Guiding Principles on Business and Human Rights are reasonably elaborate whereas companies need straightforward advice which, given the varied situations faced, they can have some hope of putting into practice.

ICT Sector

This sector is rather different from the Oil and Gas sector in that governments in the latter are less likely than they are in the former to be the initiators of human rights abuses. With Oil and Gas, governments may fall foul of some individuals or groups because companies are asked or allowed to engage in exploration and-or extraction but that does not preclude the company itself from observing human rights requirements. By contrast, in the ICT sector, governments themselves can require companies to commit human rights abuses - not something readily controllable and therefore a fact which any guidelines will need to take into account. Observing a procedural requirement to provide an indication of 'whether and when companies can or should refuse to comply with government requests or judicial orders' (5.3) could, in operation, prove problematic.

It is evident with the ICT sector as with the other two sectors), that the provision of overly prescriptive guidelines would be self-defeating. No two companies will likely ever face identical situations making an emphasis on

principle over prescription essential. How to implement those principles companies must in all cases, decide for themselves.

Employment and Recruitment Agencies Sector

Many of the problems identified here – slavery, forced land bonded labour and the like – are more likely to be associated with irregular or illegal employment and recruitment agencies than with legitimate businesses and are therefore agencies over which individual governments need to exercise control. In the absence of such control, no amount of human rights guidance can be expected to exert much influence.

However, whether agency workers should receive the same pay as permanent workers (at least in non-EU countries) is open to question (3.2). From a business point of view there may be sound economic (and indeed survival) reasons for paying a lower wage, provided this complies with any national minimum wage provisions. On this point, attention is drawn to the *Laval* case, a decision of the European Court of Justice which, although concerned with the provisions of the EU directive on posted workers,[1] effectively found no requirement to pay workers from outside a firm above whatever is the legal minimum. From a business perspective the ruling is more likely to open up employment opportunities than (as some trade unions have suggested) lead to social dumping.

The comments on migrant workers are doubtless well-intended (3.4) but it is difficult to see in what way 'additional' human rights can be said to apply; it is difficult to see how an established human right can apply to certain individuals but not to others. Again, it needs to recognised that some form of government control on illegal or irregular employment agencies is required (as 5.4). And In New Zealand, for example, even illegal migrants working illegally are entitled to basic employment law protections.

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[1] The case concerned the legality of picketing carried out by members of the Swedish Electricians' Union following the refusal of Laval, a Latvian company, to sign the Swedish company's existing collective. The posted workers in question would therefore be paid less than their Swedish counterparts. While the European Union directive on posted workers provides for minimum protection standards applicable in the host member state to apply to posted workers, here there were no minimum standards as the Swedish collective agreement was not incorporated into Swedish law. The decision was based on the fact that industrial action can not be allowed:

> … *where the negotiations on pay, which that action seeks to require an undertaking established in another member state to enter into, form part of a national context characterised by a lack of provisions, of any kind, which are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an undertaking to determine the obligations with which it is required to comply as regards minimum pay.*

The Court considered that forcing an undertaking to surpass required minimum standards would make it less attractive for companies to provide services outside their borders.