Human Rights Law Review, 2024, **24**, ngae022
https://doi.org/10.1093/hrlr/ngae022
Article

OXFORD

Filling the Accountability Gap: Misleading Conduct Law in Business and Human Rights

Lee Hansen* and Renginee G. Pillay**

ABSTRACT

This article examines the use of misleading conduct law to challenge false or deceptive business claims about their human rights practices and impacts. It does so in the context of recent developments in the field of business and human rights including the introduction of non-financial reporting, disclosure and human rights due diligence that have seen an increase in business communications about their human rights impacts. The article uses the Protect, Respect and Remedy framework of the United Nations *Guiding Principles on Business and Human Rights* to analyse the EU Directive on Unfair Commercial Practices (2005/29) and the Australian Consumer Law. Each prohibit misleading conduct by business. The article argues that, to differing extents, these legislations partially address the accountability gap that has emerged in the context of corporate human rights claims and practices.

KEYWORDS: business and human rights, corporate social responsibility, consumer law, EU law, Australian law, misleading conduct

1. INTRODUCTION

This article analyses consumer law that prohibits misleading corporate claims in the context of recent developments in the field of business and human rights (BHR). We examine the potential uses of misleading conduct law to improve business accountability for their human rights claims and impacts. Whilst such laws initially targeted false or misleading statements in the promotion or supply of consumer products and services, they have, in some contexts, been used much more widely and can operate as a 'gap filler' against other egregious commercial conduct.[1] We argue that these laws can fill the gap in corporate human rights accountability by providing tools to consumers, activists, competitors, regulators and others to take actions to make corporations accountable for their professed commitments towards human rights, especially in their global value chains (GVCs).

The well-known United States (US) case of *Kasky v Nike*[2] (*Kasky*) involved the innovative use by a consumer activist of laws designed for the protection of consumers against misleading advertising. The laws were deployed in litigation to highlight the abuse of workers' rights in

* Associate Professor, University of Essex, UK; email: l.hansen@essex.ac.uk.
** Associate Professor in Law, University of Greenwich, UK; email: R.Pillay@greenwich.ac.uk.
1 See, e.g. *Kasky v Nike* 45 P3d 243 (Cal 2002) (*Kasky*).
2 Ibid.

Received: May 22, 2024. **Accepted:** September 19, 2024

Nike's GVCs. The litigation was ultimately settled, and whilst two decades have passed since the case was resolved, there have been few reported attempts to repeat this novel litigation strategy.[3] Indeed, as noted by Cherry and Sneirson, although the case was seen as 'a promising avenue to keep corporations to their word regarding worker rights, it is more tantalizing than fulfilling, as the issue itself was never litigated and the Supreme Court of the United States never heard the case'.[4]

From this perspective, we examine how recent developments in BHR have strengthened the potential for misleading conduct law to challenge false or deceptive business claims about human rights practices and impacts. In this article, we use the phrase 'misleading conduct law' to encompass a range of consumer law provisions aimed at promoting accuracy in a business's external communications. The landscape for non-financial reporting (NFR) focusing on human rights has changed considerably since *Kasky* as the wider movement emphasising the need for the responsibilities of companies to respect human rights has gained ground. The introduction of the United Nations *Guiding Principles on Business and Human Rights* (UNGPs)[5] has been notable in this regard: the Protect, Respect and Remedy framework expects not only companies to undertake human rights due diligence (HRDD), that is, to 'identify, prevent, mitigate and account for how they address their adverse human rights impacts',[6] but also states to guide companies on how to respect human rights, including advising on HRDD by encouraging or even requiring them to communicate how they address their human rights impacts via disclosure or reporting mechanisms.[7] Whilst the UNGPs have been criticised for their soft law status, they hold both normative and increasingly jurisprudential promise as they combine soft law with an increasing array of hard law elements to address the systemic challenges raised by corporate behaviour.[8] As such, the UNGPs provide a valuable lens through which to examine the use of misleading conduct law to promote corporate accountability for human rights claims and impacts. Whilst previously, there was the occasional misleading conduct case, such as *Kasky*, upon which the existing scholarship had centred,[9] the relevance of misleading conduct law is strengthened with the increased reporting and communication requirements around human rights performance. Accordingly, this article offers original insights into how these increased transparency requirements have implications at the intersection of consumer law and BHR.

Following the advent of the UNGPs, regulation (both proposed and introduced) imposing mandatory social disclosure, due diligence and NFR obligations on companies has increased at national and regional levels.[10] Disclosure or reporting is seen as being an essential element in providing transparency and accountability,[11] specifically in terms of giving access to information

[3] See Auchan and Lidl cases discussed below at section 3B.

[4] Cherry and Sneirson, 'Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster' (2011) 85 *Tulane Law Review* 983 at 1030.

[5] United Nations Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011) A/HRC/17/31 (UNGPs).

[6] UNGP 17.

[7] Martin-Ortega and Hoekstra, 'Reporting as a means to protect and promote human rights? The EU Non- Financial Reporting Directive' (2019) 44 *European Law Review* 622 at 624.

[8] See below at section 2.

[9] See, e.g. Goldstein, 'Nike v. Kasky and the Definition of Commercial Speech' (2002) *Cato Supreme Court Review* 63 at 66; Chemerinsky and Fisk, 'What Is Commercial Speech-The Issue Not Decided in Nike v Kasky' (2003) 54 *Case Western Reserve Law Review* 1143; Collins and Skover, 'The Landmark Free-Speech Case That Wasn't: The Nike v. Kasky Story' (2003) 54 *Case Western Reserve Law Review* 965; Ki, 'Nike v Kasky: Reconsideration of Noncommercial v Commercial Speech' (2004) 30 *Public Relations Review* 419.

[10] e.g. California Transparency in Supply Chains Act 2010, UK Modern Slavery Act 2015; the Norwegian Transparency Act; the German Act on Corporate Due Diligence Obligations in Supply Chains; the French Duty of Viligance Law; and at regional level, see Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L 330/1 (EU NFR Directive).

[11] Buhmann, 'Neglecting the Proactive Aspects of Human Rights Due Diligence? A Critical Appraisal of the EU's Non-Financial Reporting Directive as a Pillar One Avenue for Promoting Pillar Two Action' (2017) 3 *Business and Human Rights Journal* 23 at 24.

relating to human rights in GVCs not only to investors and the general public but also crucially to consumers to enable them to make informed choices when buying goods and services. Consequently, there is a greater volume and diversity of communication by and about companies concerning compliance with human rights standards and their impacts on human rights.[12]

These developments have also left in place several gaps in the regulation of corporate communications on human rights practices and impacts. This prompts consideration of the harms that follow from such corporate misstatements. First, consumers may be directly harmed by a business's misleading claims if they have paid a premium for a product on the basis of these claims. Consumers may also experience a moral injury in that the misleading conduct has made the consumer an unwilling participant in the violation of human rights.[13] Second, competitors (including 'good actors') may suffer harm because a business making misleading claims about human rights may obtain a competitive advantage.[14] Third, the victim of human rights violations not only suffers the direct harm of that violation but also the denial of recognition or vindication of their claims by the misleading claims or practice. Fourth, the practice undermines ethical investment where institutional and other investors rely upon such claims in deciding where to direct funds. Finally, there is a collective harm to society since allowing businesses to make misleading human rights claims would render it impossible to distinguish between accurate and inaccurate claims amongst consumers, investors and the community at large, leading to an undermining of the otherwise significant strides that have been made in the BHR field.[15] As such, potential avenues for increasing corporate accountability for human rights claims are of the utmost significance.

In considering how misleading conduct laws may provide an avenue of accountability for the harms identified above, we undertake a doctrinal analysis of the EU Directive on Unfair Commercial Practice (known as the UCPD[16]) and the Australian Consumer Law (ACL)[17]. We consider the possible uses of these laws, including the availability of private law actions (such as litigation conducted by consumer activists[18]), regulatory action and the broader range of enforcement and remediation measures available under these laws. We show how both laws are representative of the potential for misleading conduct law to fill the accountability gap for misleading corporate human rights claims. These laws are selected here as they both reflect measures that are broad in scope, maintain relaxed standing requirements and provide for robust remediation and enforcement although they differ in relation to the extent and versatility of these measures. Furthermore, both laws regulate large markets interacting with new and proposed BHR frameworks and controversies, albeit to differing extents, lending significance to the debate both within and about these jurisdictions.

The remainder of the article is divided into three parts. The second part focuses on the relationship between human rights and misleading conduct law, highlighting the recent developments in the BHR field including emerging national and regional laws concerning NFR,

[12] World Benchmark Alliance, Corporate Human Rights Benchmark 2022 Insights Report (November 2022) at 8 < https://media.business-humanrights.org/media/documents/2022-CHRB-Insights-Report_FINAL_18.11.22.pdf > [last accessed 2 August 2023]. Cf. Lopatta et al., 'The current state of corporate human rights disclosure of the global top 500 business enterprises: Measurement and determinants' (2023) 96 *Critical Perspectives on Accounting* 102,512.

[13] See generally: Schwartz, *Consuming choices: Ethics in a global consumer age* (2017).

[14] Akerlof, 'The market for "lemons": Quality uncertainty and the market mechanism' (1970) 84 *The Quarterly Journal of Economics* 488.

[15] Cherry, 'The law and economics of corporate social responsibility and greenwashing' (2013) 14 *UC Davis Business Law Journal* 281 at 302.

[16] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22 (UCPD).

[17] Schedule 2, Australian Competition and Consumer Act 2010.

[18] See key example of *Kasky* discussed below at section 3A.

disclosures and HRDD. The third part sets out the key features of misleading conduct law as a tool for corporate accountability in the context of human rights claims; it provides an analysis of the consumer protection regimes of the EU and Australia showing the support these laws provide to the implementation of the UNGPs and emerging BHR frameworks. The fourth and concluding part captures the learnings from our inquiry that are of most significance to the global field of BHR.

2. EMERGING SYMMETRIES BETWEEN BUSINESS AND HUMAN RIGHTS AND MISLEADING CONDUCT LAW

A. United Nations Guiding Principles on Business and Human Rights

Although the UNGPs are not directly binding on companies, they do set out a mix of standards, some of which may be binding in international and domestic law and others that are not.[19] Nolan has emphasised the significance of this soft law approach in regulating business behaviour, relating it to the concept of 'networked governance'.[20] This oft-criticised approach[21] 'transcends the traditional and formal role played by States as the primary regulator and not only encourages, but heavily relies on the "marketplace" to police the problem'.[22] The use of misleading conduct law, as we envisage it, complements this networked governance model. As we have noted, misleading conduct law can be used by regulators, non-governmental organisations (NGOs) and a variety of stakeholders to scrutinise the human rights claims of businesses. There is a synergy here with the broader field of consumer law—from which misleading conduct law stems—as the latter uses a mixed range of soft and hard law and relies upon various stakeholders for enforcement. Irrespective of the binding status of particular principles in the UNGPs, where a business makes a statement or otherwise engages in conduct in response to a principle or undertakes to comply with a principle, such conduct may itself be subject to appropriate scrutiny under national misleading conduct laws.

Furthermore, as has been noted, several jurisdictions have either put in place or proposed social disclosure, NFR and HRDD laws (both general and sectoral/thematic), thus hardening what may have previously been regarded as soft law elements of the UNGPs. As many of these laws rely heavily upon reporting and disclosures, they raise the significance of reliance upon misleading conduct law to tackle inaccurate human rights claims.

(i) The state duty to protect human rights

The first pillar of the UNGPs encompasses preventative measures that states should undertake to address human rights impacts by companies.[23] States are required to 'protect against human rights abuse(s)' by companies occurring within their territory or jurisdiction.[24] They must also set out an expectation that all companies 'domiciled in their territory and/or jurisdiction respect human rights throughout their operations'.[25] The UNGPs specify detailed operational guidance on state action to be taken to implement this foundational principle. Some of this guidance

[19] See, e.g. Buhmann, 'Juridifying Corporate Social Responsibility Through Public Law: Assessing Coherence and Inconsistencies Against UN Guidance on Business & Human Rights' (2015) 11 *International and Comparative Corporate Law Journal* 194.

[20] McCorquodale and Nolan, 'The effectiveness of human rights due diligence for preventing business human rights abuses' (2021) 1 *Netherlands International Law Review* 455 at 469.

[21] Ibid; Deva, 'Treating human rights lightly: a critique of the a consensus rhetoric and the language employed by the Guiding Principles' in Deva and Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (2013).

[22] Nolan, 'The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?' in Deva and Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (2013).

[23] UNGP, Ch. 1.

[24] UNGP 1.

[25] UNGP 2.

touches upon the promotion, creation and regulation of public statements and reporting by companies about their human rights impacts.

As such, states' regulatory and policy functions should '[e]ncourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts'.[26] The *Official Commentary to the UNGPs* expands upon this, noting that communication may take place through informal stakeholder engagement or more formal reporting. Crucially, the commentary states that: 'Policies or laws in this area can usefully clarify what and how businesses should communicate, helping to ensure both the accessibility and accuracy of communications'.[27] This gives clear support to the notion that corporate communications on human rights should be accurate and that states should support this through law and policy. In this regard, both misleading conduct laws and policies on the enforcement of such laws may be used to ensure the accuracy of such communications is in alignment with the state's duty to protect.

The UNGPs also provide that governmental departments responsible for business practices should be equipped with 'information, training and support' concerning the state's human rights obligations.[28] The *Official Commentary* makes it clear that this standard applies to trade departments, amongst others, that 'shape business practices'.[29] Trade departments often hold policy and regulatory responsibility for fair trading or consumer affairs. In carrying out these functions, such departments may therefore be responsible for enforcing misleading conduct law; knowledge of human rights standards will assist them in effectively assessing corporate human rights claims for compliance with this law.

(ii) The corporate responsibility to respect human rights

The second pillar of the UNGPs applies directly to companies, setting out the expectation that they will not only respect human rights but also 'avoid causing or contributing to adverse human rights impacts'[30] and prevent or mitigate those impacts that are 'directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts'.[31] One may distinguish between this concept of human rights impacts and the types of harm we have identified as flowing from misleading corporate claims on human rights practices and impacts. The former notion has been associated with human rights violations, and Birchall argues that it should encompass a broader range of conduct inclusive of 'any act that removes or reduces a person's enjoyment of human rights'.[32] Thus, scrutiny of business conduct need not establish a violation of human rights in the legal sense. It follows from this position that scrutiny of claims by business about human rights impacts, depending on their particular wording, should not be limited to those related to human rights violations but may extend to claims concerning a business's broader impact in removing or reducing the enjoyment of human rights.

Companies are also expected to have a written policy to respect human rights. The policy should be 'approved at the most senior level', be 'informed by relevant internal and/or external expertise' and set out 'human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services'.[33] The policy document should

[26] UNGP 3.
[27] Official Commentary to UNGP 3. (*Official Commentary*)
[28] UNGP 8.
[29] Official Commentary to UNGP 8.
[30] UNGP 11; UNGP(13(a)
[31] UNGP 13(b).
[32] Birchall, 'Any Act, Any Harm, to Anyone: The Transformative Potential of 'Human Rights Impacts' under the UN Guiding Principles on Business and Human Rights'. (2019) *University of Oxford Human Rights. Hub Journal* 120 at 146.
[33] UNGP 16.

be 'publicly available and communicated internally and externally to all personnel, business partners and other relevant parties'.[34] In this respect, depending on the particular wording used in the policy and surrounding communications, this text may be subject to scrutiny under misleading conduct law. Moreover, the UNGPs set out the expectation that companies will undertake HRDD ('knowing and showing'). HRDD is a process intended to 'identify, prevent, mitigate and account for how they address their adverse human rights impacts'.[35] Companies are thus asked to undertake external communication '[i]n order to account for how they address their human rights impacts'.[36] The need to do so is vital where 'concerns are raised by or on behalf of affected stakeholders'.[37] Where the context is such that there is a risk of severe human rights impacts, the business enterprise should undertake formal reporting of this.

The *Official Commentary* confirms that this measure is designed to enhance 'transparency and accountability to individuals or groups who may be impacted and to other relevant stakeholders, including investors'.[38] The *Commentary* also confirms that the method of communication can vary 'including in-person meetings, online dialogues, consultation with affected stakeholders, and formal public reports'.[39] As with the promulgation of a human rights policy by companies, the publication of such materials or communication in such modes as recommended by principle 21 might, if misleading, give rise to scrutiny under national misleading conduct laws.

(iii) Access to remedy

The third pillar of the UNGPs addresses access to remedy. The right to an effective remedy for persons whose rights are violated is a cornerstone of international human rights law.[40] Remedies such as an injunction can be preventative of more severe abuses. Remedies can also have a deterrent effect against further human rights violations, both for the particular company involved and more generally for the business community at large. Where access to remedy is implemented, this strengthens the protection of persons vulnerable to the human rights impacts of business: 'Unless States take appropriate steps to investigate, punish and redress business-related human rights abuses when they do occur, the State duty to protect can be rendered weak or even meaningless'.[41]

The *Official Commentary* recommends that: 'Gaps in the provision of remedy for business-related human rights abuses could be filled, where appropriate, by expanding the mandates of existing non-judicial mechanisms and/or by adding new mechanisms'.[42] The main gaps we are concerned about in this article are gaps in the emerging HRDD, NFR and disclosure laws, for example, where particular kinds of enterprises (e.g. small and medium enterprises—SMEs) are carved out from the obligations under these laws. In addition, some jurisdictions will not have enacted such laws, and therefore, accountability must be sought by resort to other measures where available. Lastly, such laws may be enacted with inadequate obligations concerning the accuracy of communications or reporting or with inadequate enforcement or

[34] UNGP 16.
[35] UNGP 17.
[36] *Official Commentary* to UNGP 21. Detailed practical guidance and support on reporting is available on the UN Guiding Principles Reporting Framework website, which is an initiative by Shift and Mazars. See http://www.ungpreporting.org [last accessed 1 May 2023].
[37] UNGP 21.
[38] *Official Commentary* to UNGP 21.
[39] Ibid.
[40] See, e.g. Article 3, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
[41] UNGP 25.
[42] *Official Commentary* to UNGP 27.

remediation measures, or the enforcement or remediation might be insufficient in practice (e.g. due to regulatory reluctance to use the laws). In the next part of the article, we will consider the extent to which the range of mechanisms available under misleading conduct law may fill such gaps.

It is a central element of the right to an effective remedy that the victims of a violation are able to access a remedy in vindication of their rights.[43] However, access to such remedies may not be available in some jurisdictions, or, for practical, strategic or legal reasons, access to such remedies may be avoided, for example, because of the risk of adverse costs exposure.[44] Where there is a power imbalance, particularly where a company accrues lasting power that it might assert over an individual or community, the victims of human rights abuses may be reluctant to claim their legal entitlements.[45] In these cases, legal actions using misleading conduct law could be used to indirectly vindicate the rights of those who might otherwise be denied access to a remedy and to bring attention to the breach. This is far from ideal as it is an indirect way to vindicate the rights of the victims of human rights violations; however, where it is a viable legal strategy, it may be preferable to a situation of lesser or no accountability.

As noted, there have been several normative developments at national and regional levels in terms of disclosure and reporting requirements. These include a mix of thematic, sectoral and generic BHR frameworks, the most notable being the US California Transparency in Supply Chains Act 2010, the UK Modern Slavery Act 2015[46] and the EU NFR Initiative.[47] In fact, the latter refers to the UNGPs (and the OECD Guidelines for Multinational Enterprises)[48] as 'regimes that companies might adhere to in their provision of the relevant non-financial information'.[49] In the area of HRDD itself, significantly, France introduced a duty of vigilance law,[50] which, beyond reporting obligations, requires corporations to undertake due diligence planning and act with 'reasonable diligence' to ensure that this is put into effect.[51] Subsequently, general regimes for mandatory HRDD have been adopted in the Norwegian Transparency Act and the German Act on Corporate Due Diligence Obligations in Supply Chains.[52] Discussions along similar legal implementations have also taken place in Denmark, Finland, Luxembourg, the Netherlands and Switzerland.[53]

[43] UNGP 25.

[44] Van Dam, 'Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights' (2011) 2(3) *Journal of European Tort* Law 221 at 228–32; Olsen, *Seeking Justice* (2023); Rouas, *Achieving Access to Justice in a Business and Human Rights Context: An Assessment of Litigation and Regulatory Responses in European Civil-Law Countries* (2022).

[45] UNGP 26 and the accompanying *Official Commentary*.

[46] Section 54 of the Act requires any commercial organisation, which supplies goods or services, carries on a business or part of a business in the UK and whose annual turnover is £36 m to produce a slavery and human trafficking statement for each financial statement.

[47] *EU NFR Directive* supra n 10.

[48] OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing 2011) http://dx.doi.org/10.1787/9789264115415-en [last accessed 1 May 2023].

[49] Villiers, 'Global Supply Chains and Sustainability: The Role of Disclosure and Due Diligence Regulation' in Sjafjell and Bruner (eds), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (2020) at 555. *EU NFR Directive* (2014), para 9.

[50] Loi n_ 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, JORF n_0074, 28.3.2017. See Magnier, 'Old-Fashioned Yet Innovative: Corporate Law, Corporate Governance and Sustainability in France' in Sjafjell and Bruner (eds) *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (2020) at 276.

[51] Villiers, supra n 49 at 561.

[52] Act Relating to Enterprises' Transparency and Work on Fundamental Human Rights and Decent Working Conditions, LOV-18 June 2021 (Transparency Act) Norway (Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold (åpenhetsloven)); Act on Corporate Due Diligence Obligations in Supply Chains (Gesetz über die unter nehmerischen Sorgfaltspflichten in Lieferketten), 16 July 2021, Bundesgesetzblatt (BGB1.) I, at 2959, Germany.

[53] See Schömann, 'Instilling due diligence in corporate behaviour' (Social Europe, 28 January 2020) <http://www.socialeurope.eu/instilling-due-diligence-in-corporate-behaviour> [last accessed 1 May 2023].

Moreover, the EU recently adopted the Directive on Corporate Sustainability Due Diligence (CSDDD), which focuses on large corporations and excludes SMEs.[54] The measure incorporates HRDD, disclosure and complaints resolution processes.[55] For remediation and enforcement, the CSDDD, once in force, will provide for fines to be issued for non-compliance and grant victims of rights' violations a direct right to seek damages from corporations where harm could have been avoided with proper due diligence measures. [56] This direct right to seek a remedy by victims may reduce the need to rely on indirect measures such as those examined in this article. However, misleading conduct law could still provide a supplementary role to the extent that it remains available to consumer activists and may function as a gap filler where the CSDDD is not in scope, for instance, when scrutinising the conduct of SMEs. This is particularly significant given that it is recognised that SMEs may have severe impacts on human rights.[57] As such, misleading conduct law may play an important role in addressing the accountability gap for such firms.

Even where these emerging BHR frameworks cover an enterprise allegedly engaged in inaccurate reporting or disclosures, the relevant law may include inadequate enforcement or compliance measures. For example, Chambers and Yilmaz Vastardis, in reviewing several new frameworks,[58] have noted that 'the state has almost completely withdrawn itself from the oversight and enforcement roles and assigned these crucial accountability functions primarily to consumers, civil society, and investors'.[59] This is a further area in which misleading conduct law may function as a gap filler by allowing regulators and private actors to utilise more favourable enforcement and remedial measures via the relevant consumer law regimes where they can establish a breach of the prohibition on misleading conduct. Such co-ordination with consumer law may also occur at the stage of legislative design. For example, the Norwegian Transparency Act, which imposes corporate due diligence and information duties, is embedded into Norway's consumer protection regime with the Consumer Authority given responsibility for providing guidance to businesses and enforcing the law.[60] More broadly, these developments show the potential synergies between consumer law (including those prohibiting misleading conduct) and BHR frameworks.

3. APPLICATION OF MISLEADING CONDUCT LAW TO CORPORATE HUMAN RIGHTS CLAIMS

In this part, we undertake a doctrinal analysis applying misleading conduct laws to corporate human rights claims. After considering the position from a general perspective and in its historical context, we analyse the misleading conduct laws of the EU and Australia respectively exploring how they support the implementation of the UNGPs and interact with emerging BHR frameworks. Finally, we draw lessons from this analysis before highlighting the implications for the global field of BHR.

[54] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, [OJ L details pending], Art 2 and 3.

[55] Ibid. Art. 7 (HRDD); Art 16 (disclosure); Art 14 (complaints procedure).

[56] Ibid. Art 12 (remediation) Art 27 (penalties).

[57] Working Group on Business and Human Rights, *Companion note II to the Working Group's 2018 report to the General Assembly (A/73/163), Corporate human rights due diligence Getting started, emerging practices, tools and resources* (Version 16.10.2018). https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Session18/CompanionNote2DiligenceReport.pdf [last accessed 1 May 2023] at 7.

[58] Including the California Transparency in Supply Chains Act, the French Duty of Vigilance Law, and German and EU level developments at the time of writing.

[59] Chambers and Yilmaz Vastardis, 'Human rights disclosure and due diligence laws: the role of regulatory oversight in ensuring corporate accountability' (2020) 21 *Chicago Journal of International Law* 323 at 327.

[60] Krajewski, Tonstad and Wohltmann, 'Mandatory human rights due diligence in Germany and Norway: Stepping, or striding, in the same direction?' (2021) 6 *Business and Human Rights Journal* 550.

A. Misleading Conduct Law and Human Rights Claims: General Principles and Historical Context

The core of misleading conduct law is its concentration upon the impact of the relevant conduct upon the recipient, namely, how it is liable to lead them into error.[61] With this focus, it is irrelevant whether the party engaged in the impugned conduct has breached the prohibition, intentionally or even carelessly.[62] Measures enacted have ranged from the specific (e.g. laws targeted to false advertising[63]) to those prohibiting misleading conduct or practices across a broad range of business activities (e.g. the Australian prohibition on misleading conduct[64]).

Whilst misleading conduct laws were conventionally used to respond to false or inaccurate statements made about the quality, durability or use of products or services in promotional materials, product labels, advertising and sales talk, in some contexts, the laws have been used in increasingly innovative ways. This includes, for example, within the Australian context, the use of statutory provisions of consumer law to fill the gaps that hitherto existed only within the common law: a claim may be brought under misleading conduct law as an alternative to the torts of passing off and defamation or to a personal injury claim. The use of misleading conduct law as a gap filler to challenge false or deceptive corporate human rights claims is consistent with the wide-reaching uses that have been made of such provisions in other contexts, which we explore further below.

As we have noted, the use of such consumer law to challenge the accuracy of business's human rights claims can be traced to the well-known US case of *Kasky v Nike*[65]. The case concerned the alleged abuse of workers' rights in Nike's GVCs. Kasky, a consumer activist, argued that Nike's statements contained factual inaccuracies and therefore contravened California's Unfair Competition and False Advertising Law. [66] He sought both injunctive relief to require corrective advertising and an order for Nike to give up profits derived from selling its products in California in alleged contravention of these laws.[67]

The case highlighted the potential utility of broad-standing provisions to challenge false or deceptive business claims on human rights impacts and practices. It was unnecessary under California's Unfair Competition and False Advertising Law for Kasky to claim that he had suffered harm as a result of Nike's claims as the law at the time allowed for such relaxed requirements as to standing.[68] Following *Kasky*, the law was amended to remove private law rights (or 'private attorney general actions') for persons that have not been affected by the relevant conduct.[69] Whilst the options available for regulators to pursue business for misleading communications about human rights practices and impacts remains a vital avenue highlighted by *Kasky*, the loss of private law rights increases the risk of non-enforcement of the law through regulatory inaction (eg through regulatory capture[70]). Private law rights still exist in other jurisdictions, and we will consider their significance below.

Kasky, initially litigated out of concern about working conditions within Nike's GVCs, ultimately became entangled in constitutional issues of free speech protection, in particular,

[61] In the Australian context, see, e.g. *Australian Competition and Consumer Commission (ACCC) v Dukemaster Pty Ltd* [20,091 FCA 682.

[62] See, e.g. the discussion of unintentional breaches in the discussion of the Australian law below.

[63] e.g. California Business and Professional Codes, ss 17500-17594 (proscribing false advertising).

[64] Australian Consumer Law (ACL), s 18.

[65] 45 P3d 243 (Cal 2002) (*Kasky*).

[66] California Business and Professional Codes, ss 17200-17210 (concerning unfair competition) and ss 17500-17594 (proscribing false advertising).

[67] Goldstein, supra n 9 at 66; US Government Amicus Brief at 7-8, 2003 WL 899100, *Nike, Inc v Kasky* 539 US (2003).

[68] Ibid (Goldstein); Piety, 'Grounding Nike: Exposing Nike's Quest for a Constitutional Right to Lie' (2005) 78 *Temple Law Review* 151 at 195.

[69] Sections 17203 – 4 (2003) of the California Business and Professional Codes.

[70] Ayres and Braithwaite, 'Tripartism: Regulatory capture and empowerment' (1991) 16 *Law & Social Inquiry* 435.

the commercial speech doctrine.[71] This was litigated to the US Supreme Court, garnering considerable interest,[72] which determined that it was too early in the proceedings to consider the free speech issue and remitted the matter back to the trial court.[73] Following this, the parties came to a settlement in which Nike agreed to submit to some external monitoring and to pay the NGO Fair Labor Association, which is involved in 'strengthen[ing] workplace monitoring and factory worker programmes'.[74] Therefore, Kasky's central claims about Nike's misleading conduct under the Californian law were never determined.

Whilst *Kasky* produced an ambiguous outcome, the litigation has had a significant impact in the BHR field, helping to shape activists' thinking, and highlight the need for corporate accountability for human rights claims and impacts. Moreover, the case illustrates the use that can be made of misleading conduct law to hold business accountable for misleading communications about human rights practices and impacts: misleading conduct law functioned as a 'gap filler' where more traditional causes of action, such as tort, were less viable options.[75] The case revealed some versatility in the statutory provisions, with relaxed rules as to standing.[76] However, as noted misleading conduct law remains relevant outside the context of private actions as it is also a tool available in various jurisdictions to regulators. Beyond this narrow point about standing, the case also invites us to consider the scope and structure of the obligations against misleading conduct or practices.

After a hiatus in the aftermath of *Kasky*, there has been a small number of complaints using a similar strategy of reliance upon misleading conduct law (including both private and regulatory actions) in recent years.[77] This aligns with developments in the field of BHR demanding greater accountability for corporate impacts on human rights.

B. Australian and the European Union Laws against Misleading Conduct

We now analyse the misleading conduct laws of the EU and Australia, comparing their scope and structure and exploring how they support the implementation of the UNGPs and interact with emerging BHR frameworks.

(i) The EU directive on unfair commercial practices

This section analyses the EU Directive 2005/29/EC (UCPD) adopted in 2005 to harmonise the rules on unfair commercial practices. The EU regime covers a large significant market that has multiple interactions with BHR frameworks. The UCPD sets out the principles and definitions that must be applied in every member state 'concerning unfair business-to-consumer practices in the internal market'.[78] A commercial practice is defined as 'any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader,[79] which is directly connected with the promotion, sale or supply of a product to or from consumers, whether occurring before, during or after a commercial transaction (if any) in

[71] Hess and Dunfee, 'The Kasky-Nike threat to corporate social reporting: Implementing a standard of optimal truthful disclosure as a solution' (2007) 17 (1) *Business Ethics Quarterly* 11.

[72] For example, 31 amicus briefs were filed: Spencer, 'Talking About Social Responsibility: Liability for Misleading & Deceptive Statements in Corporate Codes of Conduct' (2003) 29 *Monash University Law Review* 297 at 306.

[73] *Nike v Kasky* 539 US 654 (2003).

[74] See Business and Human Rights Resource Centre, 'Nike lawsuit (Kasky v Nike, re denial of labour abuses)' <http://business-humanrights.org/en/nike-lawsuit-kasky-v-nike-re-denial-of-labour-abuses-0> [last accessed 1 May 2023]; Cherry and Sneirson, supra n 4 at 1030.

[75] Branson, 'Holding Multinational Corporations Accountable? Achilles' Heels in Alien Tort Claims Act Litigation' (2011) 9 *Santa Clara Journal International Law* 227.

[76] Goldstein supra n 9 at 67; Piety, supra n 68 at 195.

[77] See below at section 3B.

[78] From the full title of the directive.

[79] In the remainder of this section, the term 'trader' will be used interchangeably with company.

relation to a product'.[80] The main concern of the UCPD is to protect consumers' 'economic interests from unfair business to consumer commercial practices', including misleading commercial practice.[81]

Article 1 states that the UCPD only applies to 'unfair commercial practices harming consumers' economic interests, whilst Preamble 7 makes the point that '[i]t does not address commercial practices carried out primarily for other purposes, including for example, commercial communication aimed at investors, such as annual reports and corporate promotional literature'. This is interesting for our purposes as it suggests that statements of the sort that were litigated upon in *Kasky* would not be covered here since the latter case concerned promotional literature as well. It would also seem to not apply to statements made in non-financial reports as the primary purpose in submitting such reports is to comply with certain reporting requirements; alternatively, such reports may be aimed at investors as is the case in the EU's NFR Directive, which places human rights reporting into an annual reporting process aimed principally at investors. These factors, therefore, militate against the application of the UCPD to such reports. However, there appear to be two caveats to this: (1) Preamble 20 explicitly mentions the role of codes of conduct that can bind companies and which can therefore make them liable, and (2) the May 2016 Guidance by the Commission on the application of the UCPD refers explicitly to Corporate Social Responsibility (CSR)[82] initiatives which it contends 'will, in most cases, be "directly connected with the promotion, sale or supply of a product" and therefore qualify as a commercial practice within the meaning of'[83] the Directive. The Guidance also points out that because of 'the significant similarities between ethical/[CSR] claims and environmental claims, the key principles applying to green claims should also apply to them'.[84] Since the advent of legislation mandating NFR,[85] ethical and CSR claims now tend to be subsumed into reporting on a business's human rights impacts, owing to the similarity and overlap in such claims. As such, the guidance ought to extend to claims that are made with regard to human rights practices and impacts. We will now examine the UCPD in more detail, using the UNGPs to assess the directive's value in holding companies to account for misstatements on human rights.

Unfair commercial practices and the materiality test

According to Article 6, a commercial practice is considered misleading if it:

> causes or is likely to cause the average consumer to take a transactional decision that she would not have taken otherwise[86] and if it:
>
> 1) contains false information;[87]
> 2) contains factually correct information but the way it is presented deceives or is likely to deceive the average consumer;[88]
> 3) involves the non-compliance by the company with commitments in codes of conduct by which it has undertaken to be bound, where the commitment is not

[80] UCPD.
[81] UCPD, Recital 8 and Art 5(4)(a).
[82] The Guidance refers to CSR as 'companies taking responsibility for their impact on society by having in place a process to integrate social, environmental, ethical and consumer concerns into their business operations and core strategy'. See Commission, 'Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices' COM (2016) 320, 63.
[83] Ibid.
[84] Ibid.
[85] e.g. The EU NFR Directive. Also see: Martin-Ortega and Hoekstra, supra n 7.
[86] UCPD (2005), Arts 6(1) and (2).
[87] Ibid.
[88] Ibid.

> aspirational but firm and capable of being verified, and the company has indicated in the commercial practice that it is bound by the code.

Codes of conduct might be interpreted to include human rights policy statements or commitments made by business pursuant to the corporate responsibility to respect in the UNGPs or those produced under domestic HRDD laws. Such an approach might drive some firms towards accuracy, and yet others might be motivated to take a more aspirational approach in order to avoid legal accountability.

The UCPD is narrow in its scope of application via a 'materiality test'. This applies to practices causing (or likely to cause) a hypothetical 'average consumer' to take a 'transaction decision', defined to include 'any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right . . . ' that she would not have otherwise taken.[89] A case in point here would be when consumers decide they will pay more for products that are said to be manufactured in safe working environments in developing countries within a company's GVCs. Without that information, consumers might opt to buy a different (cheaper) product. The information about safe working conditions, therefore, can arguably influence consumers' decisions, especially as some surveys have shown that a high percentage of consumers 'place a high value on corporate social or environmental performance in their purchasing decisions'.[90] More fundamentally, there is the potential that changes to corporate culture brought about by the UNGPs, and emerging BHR frameworks might shape consumer expectations over time. As consumers raise their expectations around rights respecting behaviour by businesses, then, in turn, they may be more responsive to business claims on their human rights practices and impacts.[91] This could increase accountability as a party seeking corporate accountability for human rights claims, might, in these circumstances, be able to better demonstrate consumer reliance upon the claims informing their purchasing decisions in order to satisfy the materiality test.

False and deceptive information or statements as a misleading practice

Under Article 6, the relevant practice must be either false or deceptive. A number of characteristics are listed to which a misleading practice may be related including 'nature of the product', 'composition' and 'commercial origin'.[92] Thus, in relation to environmental claims, the Guidance notes that companies 'must present their green claims in a clear, specific, accurate and unambiguous manner' and 'must have evidence to support their claims'.[93] EU Directive 2024, recently adopted, amends the characteristics listed in Article 6, to include 'environmental or social characteristics'.[94] The phrase 'social characteristics' is likely to be inclusive of 'human

[89] Art 2(k); Chiari, 'Is Corporate Social Responsibility So Soft? The Relationship between Corporate Social Responsibility and Unfair Commercial Practice Law' (2017) 8 *King's Student Law Review* 163 at 168.

[90] See Vogel, *The Market for Virtue: The Potential and Limits for Corporate Social Responsibility* (2006) at 47. See also Singh, Iglesias and Batista-Foguet, 'Does Having an Ethical Brand Matter? The Influence of Consumer Perceived Ethicality on Trust, Affect and Loyalty' (2012) 111 *Journal of Business Ethics* 541.

[91] See generally: Polomski, Klukas and Mullen, 'Towards an Empirical Understanding of Ethical Consumption in Southeast Asia' in Gomez and Ramcharan (eds), *Business and Human Rights in Asia: Duty of the State to Protect* (2021) at 217–238; Palazzo et al., 'Shopping for a better world: how consumer decisions can help to promote sustainability and human rights'in Baumann-Pauly and Nolan (eds), *Business and Human Rights—From Principles to Practice* (2016) at 200–208; Narine, 'Disclosing disclosure's defects: Addressing corporate irresponsibility for human rights impacts.' (2015) 47 *Columbia Human Rights Law Review.* 84; Monebhurrun, 'Consumer Social Responsibility as a Requirement for Corporate Social Responsibility.' (2018) 15 *Brazilian Journal of International Law* 13.

[92] UCPD, Art 6(1)(a); (b); Chiari, supra n 89 at 169.

[93] Commission, supra n 82 at 106.

[94] Directive 2024/85 of the European Parliament and of the Council of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information [OJ L details pending].

rights impacts' and therefore strengthen the case for the application of the UCPD to misleading claims about human rights practices and impacts.

However, it is important to point out that the UCPD 'focuses on whether the commercial practice might be considered misleading and not on whether the company is actually bound by its statements'.[95] Put another way, the objective here is not to oblige the company to carry out its promises in its advertisements, for instance, but rather to check that its commercial practices do not mislead the customers. As such, the vagueness or aspirational nature of a statement does not prevent the application of Article 6(1). Thus, in France, in the aftermath of the Rana Plaza tragedy, French charities wrote to the prosecutor asking for proceedings to be brought against Auchan, a French supermarket whose items were found in the remnants of the collapsed building. They alleged misleading conduct in the business's communications with French consumers, that is, 'that the ethical public statements of the brand constitute a commercial practice likely to mislead the French consumers about the social conditions of products' production'.[96] The prosecutor, exercising consumer enforcement powers, agreed to open a 'preliminary inquiry' into whether Auchan had misled consumers in May 2014, but legal action did not ensue 'on the basis that there was not enough evidence to support criminal prosecution'.[97]

Breach of codes of conduct as a misleading practice

Art 2 (f) of the UCPD defines a code of conduct as 'an agreement or set of rules not imposed by law, regulation or administrative provisions of a Member State which defines the behaviour of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors'. In this respect, Article 6(2)(b) states that if a company does not comply 'with commitments contained in codes of conduct by which [it] has undertaken to be bound', it can be considered a misleading practice if:

1) the materiality test is satisfied;
2) 'the commitment is not aspirational but is firm and capable of being verified';[98] and
3) the company 'indicates in a commercial practice that [it] is bound by the code'.[99]

Howells et al. have pointed out that certain statements are unlikely to satisfy the conditions, for example, '"will use best endeavours", "hope to be able to", "will strive to"'.[100] It is important, thus, to pay particular attention to the words used in the code as they are usually aspirational precisely in order to avoid potential enforcement.[101] This may result in the weakening of corporate commitments to human rights in published materials so as to avoid liability. As for the second condition that the company indicates that it is bound by a code, this includes statements, adverts and notices and should extend to symbols.[102] Therefore, depending on the particular circumstances, having on the same webpage information about CSR and human rights commitments as well as shopping facilities close to each other would fulfil this condition.[103]

[95] Chiari, supra n 89 at 170.
[96] Terwindt et al., 'Supply Chain Liability: Pushing the Boundaries of the Common Law?' *Journal of European Tort Law*, (2017) Vol. 8 (Issue 3), 261at 269; RFI, 'French supermarket to face charges one year after the Rana Plaza tragedy' (RFI, 24 April 2014) http://www.english.rfi.fr/france/20140424-french-supermarket-face-charges-one-year-after-rana-plaza-tragedy [last accessed 1 May 2023].
[97] Ibid. (Terwindt); Smith, 'Probe dropped into Auchan role at Rana Plaza' (Just-Style, 3 February 2015) http://www.just-style.com/news/probe-dropped-into-auchan-role-at-rana-plaza_id124268.aspx?utm_source=article-feed&utm_medium=rss-feed&utm_campaign=rss-feed [last accessed 20 July 2020].
[98] UCPD, Art 6(2)(b)(i).
[99] UCPD, Art 6(2)(b)(ii).
[100] Howells, Micklitz and Wilhelmsson, *European Fair Trading Law: The Unfair Commercial Practices Directive* (2013) at 208.
[101] Beckers, *Enforcing Corporate Social Responsibility Codes: On Global Self-Regulation and National Private Law* (2015) at 207.
[102] Howells, Micklitz and Wilhelmsson, supra n 100 at 210.
[103] Ruhmkorf, *Corporate Social Responsibility, Private Law and Global Supply Chains* (2015) at 129.

The application of this provision can be quite limited in the sense that companies tend to be extremely careful not to draw any direct links within their marketing of a commercial practice and their participation in a particular code. Nevertheless, there is a possibility of using the provision successfully as in the case of Lidl in Germany when civil society organisations (CSOs) and national administrative authorities worked together. In 2010, the Hamburg Consumer Protection Agency (CPA) lodged a complaint alleging that the company had engaged in unfair competition against Lidl, a German supermarket chain, for advertising which had claimed the existence of fair working conditions in their supply chain. Germany had implemented the UCPD into its Act Against Unfair Competition.[104] Lidl was accused of misleading practices as the advertisement was alleged to have created a false 'impression that the working conditions at Lidl suppliers were fundamentally good and complied with minimum standards set by Lidl'.[105] In fact, a study by the Clean Clothes Campaign and the European Centre for Constitutional and Human Rights demonstrated that this was untrue: 'Inhumane working conditions were reported by seamstresses working at many of Lidl's suppliers: excessive working hours, wage deductions as punishments, non-existent or uncertain payment for overtime, obstruction of trade union activity and discrimination against female employees'.[106] As such, these were alleged to have violated the conventions of the International Labour Organisation, the Business Social Compliance Initiative (BSCI) Code of Conduct and Lidl's own voluntary undertakings.[107] Shortly after the complaint was lodged, Lidl reached an agreement with the CPA to withdraw the statements made concerning working conditions within its GVCs. The legal proceedings were finalised with the parties filing a consent decree with the court. Furthermore, the agreement provided that Lidl must refrain from referring to its BSCI membership in its advertising.[108]

The case shows that the UCPD can be used effectively to strengthen accountability for business claims about human rights practices and impacts where the laws are enforced by regulators. Whilst this is undoubtedly a form of accountability since it had an effect on Lidl's reputation, for instance, the terms of agreement were weak and might, in a sense, have had a chilling impact on corporate disclosure. As noted, such consent decrees (and undertakings under Australian law, as will be discussed later) have creative potential: rather than using them in ways that may promote disengagement with relevant initiatives, it would be preferable to use them in ways that drive better respect for human rights; for instance, a business might undertake to increase its commitment to HRDD so that it can avoid unintentionally misleading practices.

Enforcement

The main aim of the Directive here is to make sure that 'adequate and effective means' to combat unfair commercial practices are available in every member state.[109] The latter may select who is given standing under national laws: persons, organisations or competitors, but it is essential that they have a legitimate interest, and whether such parties may take private enforcement action via direct action in the courts[110] or alternatively whether they may take public enforcement action

[104] Gesetz gegen den unlauteren Wettbewerb vom 3. Juli 2004 (BGBl I 2004 32/1414); Act Against Unfair Competition in the version published on 3 March 2010 (Federal Law Gazette [BGBl.]) Part I at 254 http://germanlawarchive.iuscomp.org/?p=822 [last accessed 1 May 2023].

[105] The European Center for Constitutional and Human Rights, 'Complaint re Fair Working Conditions in Bangladesh: Lidl Forced to Back Down' http://www.ecchr.eu/en/case/complaint-re-fair-working-conditions-in-bangladesh-lidl-forced-to-back-down/ [last accessed 20 June 2023].

[106] Ibid.

[107] Ibid.

[108] Business and Human Rights Resource Centre, 'Lidl lawsuit (re working conditions in Bangladesh)' http://business-humanrights.org/en/lidl-lawsuit-re-working-conditions-in-bangladesh [last accessed 1 May 2023].

[109] UCPD, Art 11(1).

[110] UCPD, Art 11 (1);(1)(a).

by bringing 'the matter before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings'.[111] In either case, member states *shall* confer either upon courts or administrative authorities, the following powers: cessation or prohibition orders;[112] a requirement that traders provide evidence in support of the accuracy of claims,[113] with the claims being regarded as inaccurate if such evidence is not provided or is insufficient;[114] and to provide 'effective, proportionate and dissuasive' penalties for infringements of the UCPD provisions.[115] Member states may also enable publication of adverse findings of unfair practices and publication of corrective statements[116] as in the Lidl case.[117]

Member states may allow for collective enforcement via organisations taking a collective interest in consumers.[118] As the Directive does not cover individual consumers' actions, private enforcement actions would be difficult to instigate unless CSOs are involved since only the collective interest of consumers are taken into account, although, arguably, there is nothing precluding a member state from allowing an individual consumer to bring an action.[119] In addition, it can be seen from the cases that have made use of the UCPD that there is no significant detriment for the companies involved as such, although it is arguable that the company's reputation might be affected since the claims that are made are usually geared towards consumers in an attempt to boost its image as a caring enterprise.[120] In this respect, the fact that the Directive also allows courts or authorities to require companies to provide evidence as to the accuracy of the factual claims might force companies to reveal real information about the human rights conditions in their GVCs and to incentivise HRDD.[121] This has not been used at all so far since, for instance, Lidl settled out of court.

Remedies

In practice, the most relevant remedy has been the injunction, which is regulated separately in the Directive on Injunctions for the Protection of Consumers' Interests (the Injunctions Directive).[122] This remedy as 'laid down in this Directive is understood as part of a European wide standardised remedy, that is as part of the *acquis communitaire* in the field of consumer law'.[123] Article 2(1)(a) of the Injunctions Directive refers to it as an order that requires the 'cessation or prohibition of an infringement'. The procedure can only be initiated by a 'qualified entity', which is a body or organisation 'duly established under the law of an EU Member State and which [has] a legitimate interest in protecting the collective interests of consumers'.[124] An individual consumer or even a group of consumers would, therefore, be unable to seek this remedy directly although it has worked in relation to CSOs against Lidl as seen above. The

[111] UCPD, Art 11(1)(b).
[112] UCPD, Art 11(2)(a) and (b).
[113] UCPD, Art 12(a).
[114] UCPD, Art 12(b).
[115] UCPD, Art 11(2)(a) and (b).
[116] UCPD, Art 11 (2) (a) and (b).
[117] See discussion of this case above.
[118] Chiari, supra n 89 at 174; e.g. Enterprise Act 2002 (UK), ss 211–12; Esetz Gegen den Unlauteren Wettbewerb (Germany) s 8(1).
[119] Recital 9 of the UCPD mentions that it is 'without prejudice to individual actions brought by those have been harmed by an unfair commercial practice'.
[120] Lii and Lee, 'Doing Rights Leads to Doing Well: When The Type of CSR and Reputation Interact to Affect Consumer Evaluations of the Firm' (2012) 105 *Journal of Business Ethics* 69.
[121] UCPD, Art 12.
[122] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (Codified version) [2009] OJ L 110/30 (Injunctions Directive).
[123] Beckers, 'The regulation of market communication and market behaviour: corporate social responsibility and the Directives on Unfair Commercial Practices and Unfair Contract Terms' (2017) 54 *Common Market Law Review* 498.
[124] Mihajlović, 'The role of consumers in the achievement of corporate sustainability through the reduction of unfair commercial practices' (2020) 12(3) *Sustainability* 1009, 15; Injunctions Directive, supra n 122, Art 3.

injunction has been criticised as being ineffective in that it can discourage companies from communicating about their human rights impacts. But, as Beckers notes, it can also ensure 'that companies do not provide incorrect factual information and must be prepared to substantiate vague claims' as well as 'function to prevent traders from continuing and repeating an unfair behaviour'.[125]

In January 2020, EU Directive 2019/2161 on the better enforcement and modernisation of consumer protection rules, also called the 'Omnibus Directive', came into force,[126] introducing representative actions across the EU for breaches of certain EU consumer laws. Interestingly, the Omnibus Directive requires member states to provide private law remedies (compensation, a price reduction or termination of a contract, that is, a refund) in their national legislation where consumers have been harmed by unfair commercial practices.[127]

As we have noted, we are considering a multiplicity of harms, yet when considering how harm is defined, EU consumer law as it stands lacks a 'theory of harm'.[128] There is, therefore, scope to argue for the inclusion in a definition of harm any direct financial detriment, for example, where a consumer pays a premium for a product based upon its ethical or human rights-based claims and then to extend this theory to include moral injury, where misleading conduct has made the consumer an unwilling participant in the violation of a person's human rights, that is, in circumstances where the consumer would not have engaged in the transaction if they knew of the business's actual human rights practices and impacts.[129] In any case, it is important to note that some uses of misleading conduct law (such as in the Australian context we consider below) do not require the claimant to establish harm, and so, a consumer activist may be motivated by the avoidance of moral injury in bringing a claim but need not prove this in the claim itself.[130]

National authorities are now also able to impose stronger penalties for certain severe violations, including the imposition of fines linked to annual turnover.[131] The introduction of fines linked to turnover is significant since it is hoped it can act as a deterrent to infringing companies as it has a detrimental effect on profits. The imposition of such a penalty might also lead to boycotts by more consumers once they learn about the unfair practice, thus impacting on the companies' image and reputation and could lead to them being more truthful in their commitments. The most welcome and significant reform, however, remains the introduction of representative actions that will facilitate litigation by designated organisations or public bodies.[132] Not only does this protect the interests of consumers but also, for our purposes, it allows them to initiate actions much more easily against companies that make misleading human rights claims, especially as it is coupled with the incentive of stronger remedies in the form of compensation as well as the prohibition and cessation of the unlawful conduct of the trader. Whilst the relevant unlawful conduct here is the misleading practices or statements rather than the underlying human rights violation, such actions have the potential to visit significant

[125] Beckers, supra n 123 at 499.

[126] Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (2019) OJ L 328/7. (Omnibus Directive).

[127] Omnibus Directive (2019), Art 3 (5).

[128] Esposito and Sibony, 'In Search of the Theory of Harm in EU Consumer Law: Lessons from the Consumer Fitness Check' in Mathis and Tor (eds), *Consumer Law and Economics. Economic Analysis of Law in European Legal Scholarship*, vol 9 (2021).

[129] See generally: Fagan, 'Buying right: Consuming ethically and human rights' in Dines and Fagan (eds), *Human Rights and Capitalism* (2006) at 115–141.

[130] See, e.g. discussion below concerning s 232 of the ACL at section 3B(ii).

[131] Omnibus Directive (2019), Art 3 (6).

[132] Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC [2020] OJ L 409/1.

reputational damage on the corporation. As such, it is arguable that these changes might catalyse consumers to take a more active role in attempting to make corporations more accountable in this area.

(ii) Australian consumer law

We next turn to Australia which, as it will be shown, provides a high level of consumer protection, has a broad-based prohibition on misleading conduct and employs a range of robust remediation and enforcement measures.

The scope of the prohibition on misleading conduct

Claims made under the misleading and deceptive conduct law have been said to be 'useful for plaintiffs because in some situations, such claims can operate as a "gap filler", freed from the strictures of common law or equitable causes of action, and can provide flexible forms of relief'.[133] Accordingly, we have identified misleading conduct claims' potential to play a similar role in filling the BHR accountability gap.

In Australia, the Trade Practices Act (TPA) came into force at a federal level on 1 October 1974. Section 52 of the TPA created the following obligation: 'A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive'. In 1977, the Act was amended further to include conduct that is 'likely to mislead or deceive'.[134] The obligation since 2011 has been located in identical terms in section 18 of the ACL. The provision was situated in the part of the TPA headed *Consumer Protection*. Nevertheless, the scope of the provision extends well beyond the protection of the consumer's position and has established a general norm of commercial conduct.[135] Misleading conduct law has become such an essential part of the Australian corporate legal fabric that its relevance must be considered in any commercial legal dispute or transactional legal advice.[136] As originally envisaged, the prohibition on misleading conduct might have been expected to be used primarily in consumer litigation. However, in practice 'nearly all s 52 litigation has not directly involved consumers and a protection of public rights at all, but has involved traders suing each other to protect quite individual rights and quite private property'.[137] This is because consumers would typically seek to avoid the risks and costs of litigation or might not be able to fund litigation. Yet the prohibition was able to be used to protect the private rights and property of a business against competitors, enterprises or individuals engaged in misleading practices that are harmful to the claimant (for example, in actions similar to the tort of passing off, defamation or personal injury).

Notwithstanding the broad scope described above, the provision is limited to conduct in *trade or commerce*. A wealth of case law tests the boundary between private or public conduct outside of the purview of the prohibition vis-à-vis that conduct that occurs in trade or commerce. The leading case in this regard is *Concrete Constructions (NSW) Pty Ltd v Nelson*, which emphasises that the phrase concerns conduct directed 'towards persons, be they consumers or not, with whom [the corporation] ... had or may have dealings in the course of those activities or transactions which, of their nature, bear a trading or commercial character'.[138] Accordingly, the conduct of business in its impacts on human rights and associated reporting could ordinarily be expected to come within trade or commerce. However, there may be some activities such

[133] Clarke, 'Misleading or Deceptive Conduct Cases in the Supreme Court of Victoria' (2015) 89 *Australian Law Journal* 397 at 397.

[134] Malcolm, 'Introduction' in C. Lockhart (ed), *Misleading or Deceptive Conduct Issues and Trends* (1996) at 2.

[135] *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd (Hornsby)* (1978) 140 CLR. 216.

[136] Pengilley, 'Section 52 of the Trade Practices Act: A Plaintiff's New Exocet?' (1987) 15 *Australian Business Law Review* 247 at 249.

[137] Ibid.

[138] (1990) 64 ALJR 293. (*Concrete Constructions*).

as public advocacy that are excluded.[139] Moreover, internal communications were held not to be conducted in trade or commerce in *Concrete Constructions (NSW)*.[140] Therefore, in the BHR context, the unpublished internal deliberations and communications within a business when undertaking its HRDD may not be impugned by misleading conduct laws. Instead, it is its external communications concerning these matters that may be subject to such scrutiny. A further area where the term 'trade or commerce' limits the application of the provision concerns communications with regulators. These have also been held to be conduct *not* occurring in trade or commerce because they do not bear the requisite trading or commercial character.[141] As such, to the extent that any reporting set out in the UNGPs is made legally binding under domestic law, then compliance with the requirement, at least when it comes to communications with regulators, may take them outside of the definition of 'trade or commerce' and, therefore, outside of the scope of misleading conduct law.

Both voluntary and involuntary industry codes of conduct may be prescribed under the ACL, in which case, the statute provides an express obligation to comply with the code[142] and empowers the regulator to take a range of compliance and enforcement actions, such as the issuance of infringement notices and public warning notices, in the event of contravention.[143] A company that subscribes to any non-prescribed code of conduct will also be required to comply with the general prohibition against misleading conduct.[144]

Unintentional breaches and future facts or circumstances

A crucial aspect of misleading conduct law leading to its potentially broad application to business communications on human rights is that the intention of the business is irrelevant to a finding as to whether or not the provision has been breached, although evidence of intention may assist the court to more readily reach such a finding.[145] At a practical level, this shifts responsibility onto the corporation to ensure that its communications are not misleading in order to avoid an unintentional breach of the law; practices such as HRDD would therefore be supportive of such a careful approach as they help the business identify human rights concerns within the value chain, and communications can then be shaped in a manner that respects the reality on the ground.

Where a company makes representations as to their future human rights–related practices or impacts, then a particular additional proof requirement will apply to them under the ACL. Section 4 provides that where a person makes a representation about a future matter and the person 'does not have reasonable grounds for making the representation', then the representation will be taken to be misleading.[146] Moreover, in any proceedings concerning the representation, the person making the representation, that is, the company itself or its employees or suppliers, would need to adduce evidence to the contrary. [147] That person would need to show 'facts or circumstances existing at the time of the representation on which the respondent in fact relied which are accepted by the court as objectively reasonable and which support the

[139] e.g. public advocacy has been held to be conduct not done in *trade or commerce*. See *Robin Pty Ltd v Canberra International Airport Ltd* [1990] FCA 1019; (1999) 179 ALR 449; (1999) ATPR 41–710. Miller, 'Cases: lobby groups and public advocacy' in *Miller's Australian Competition and Consumer Law Annotated*, 36th ed. (2014) para [1.S2.18.420].

[140] (1990) 64 ALJR 293.

[141] *Gold and Copper Resources Pty Ltd v Newcrest Operations Ltd* [2013] NSWSC 281; *Glueck v Stang* (2008) 76 IPR 75; *RGC Minerals Sands Ltd v Wimmeral Industrial Minerals Pty Ltd (No 2)* [2000] FCA 22.

[142] ACL, s 51.

[143] See, e.g. Division 2A Infringement Notices; Division 3 Public Warning Notices; Division 4 Orders to Redress Loss or Damage.

[144] See Spencer, supra n 72 at 297.

[145] Miller, supra n 139 at para [1.82.18.40].

[146] ACL, s 4(1).

[147] ACL, s 4(2).

representation made'.[148] It should be noted here that representations made by business with respect to the future impact that their operations may have on the human rights of the individuals and communities with which they operate, whether home or abroad, made, particularly in the context of the undertaking of HRDD, are likely to be captured by section 4. In proceedings alleging that the business had engaged in misleading conduct in making the representation, it would be for the business to adduce evidence establishing each of the matters set out above. In the context of human rights claims, documented HRDD may therefore be used to show that the claims were objectively reasonable. This requires a business to take particular care with respect to statements made about future matters concerning human rights practices and impacts and to be prepared to justify them with evidence. In this regard, by incentivising the use of HRDD, the law is supportive of corporate accountability for misstatements on future human rights practices and impacts and accordingly, the state duty to protect. This is a positive development if companies engage in HRDD on a good faith basis; however, there are emerging concerns that they treat HRDD as a box-ticking exercise that undercuts its effectiveness.[149]

Application of accessorial liability to corporate groups and GVCs

The ACL can also enhance business accountability by establishing accessorial liability. It allows for claims to be directed to a range of accessories if the person:

> (a) has aided, abetted, counselled or procured the contravention; or (b) has induced, whether by threats or promises or otherwise, the contravention; or (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or (d) has conspired with others to effect the contravention.[150]

Most claims seeking a remedy are available against persons involved in a contravention or attempted contravention of the prohibition against misleading conduct.[151] This allows courts to pierce the corporate veil and attribute responsibility to the individuals or entities involved thereby reducing the ability of businesses to evade accountability.[152] This considerably extends the reach of the misleading conduct law in circumstances relevant to the BHR context. For example, the UNGPs ask of states that they consider 'legal, practical and other relevant barriers that could lead to a denial of access to remedy'.[153] The *Official Commentary* describes a particular legal barrier, '[t]he way in which legal responsibility is attributed among members of a corporate group under domestic criminal and civil laws facilitates the avoidance of appropriate accountability'.[154] In other words, consideration should be given to laws and mechanisms that allow for the corporate veil to be pierced where a subsidiary has violated human rights so that those who are responsible may not avoid accountability. Where corporate communications or policies are drafted or approved on another level of a corporate group (for example, at the parent company level), then such accessorial liability can support accountability for both those drafting and those using those misleading communications in a public way. Given the breadth of section 2, accessorial liability may also have relevance beyond corporate groups to circumstances where enterprises have a looser association with each other, such

[148] Miller, supra n 139 at para [1.S2.4.47]; *Sykes v Reserve Bank of Australia* ATPR 41–699 at 42,902 (ATPR), Heerey J.
[149] Quijano and Lopez. 'Rise of mandatory human rights due diligence: a beacon of hope or a double edged sword?' (2021) 6 (2) *Business and Human Rights Journal* 241 at 245–50.
[150] ACL, s 2.
[151] Part 5–2.
[152] *Houghton v Arms* [2006] HCA 59; 225 CLR 553.
[153] UNGP 26.
[154] *Official Commentary* to UNGP 26.

as that which may exist across value chains,[155] and have co-ordinated in a breach of the prohibition.

Remedies and enforcement

The ACL sets out a series of robust and flexible remedies including damages,[156] compensation[157] and monetary redress for non-party consumers;[158] community service; orders requiring that a compliance program be established; that an education or training programme be established; or that internal operations be revised.[159] Orders may also require the publication of an advertisement;[160] adverse publicity orders[161] or disqualifying a person from managing a corporation.[162] The regulator may accept an enforceable undertaking and this need only be 'in connection with a matter in relation to which the regulator has a power or function'.[163] There is considerable scope for creativity in drafting such undertakings, for example, a trader that might otherwise face more severe enforcement action might avoid this by undertaking appropriate HRDD in order to mitigate future risks of making misleading statements about human rights practices or impacts.

A particularly useful tool for improving corporate accountability for misleading corporate human rights claims is the injunction. The regulator or any person has the right to apply for an injunction,[164] and the persons who may be subjected to an injunction include: persons who contravene or attempt to contravene the provision or are otherwise captured by the accessorial liability provisions noted above. The court has the power to restrain a person 'from carrying on a business or supplying goods or services'.[165] Injunctive power may be invoked by the court to require a person to undertake a positive action including 'refund money, transfer property, honour a promise, destroy or dispose of goods'.[166] Access to injunctive proceedings is further improved by the fact that it is an open standing provision as s 232 provides that *any person* may apply for an injunction.[167] As 'the essential nature of his suit is one for the protection of the public interest',[168] any person has standing to seek an injunction under the ACL against a business that has engaged in conduct that is misleading or is likely to be misleading with respect to its impacts on human rights. The person may take that action irrespective of whether they have any interest affected by the conduct.

The power to seek injunctive relief or restrain egregious conduct is an important remedy supportive of the state duty to protect human rights. For example, where a business has undertaken to take specific actions in recognition of the rights of persons impacted by their business activities throughout the value chain, then it is debatable whether the injunction provides a remedy to compel them to honour their promises in this regard where failure to do so may amount to misleading conduct, even where contractual or equitable remedies (such as specific

[155] For example, this could arise where there are looser associations such as those that existed between those involved in the Rana Plaza tragedy noted earlier, namely, between the proprietors of the clothing factory in Bangladesh on the one hand and the Western brands selling its outputs: see Saxena (ed.) *Labor, global supply chains, and the garment industry in South Asia: Bangladesh after Rana Plaza* (2019).

[156] ACL, s 237.

[157] ACL, s 238.

[158] ACL, s 240.

[159] ACL, s 246(2)(a); (b)(i); (b)(ii); (b)(iii).

[160] ACL, s 246(2)(d).

[161] ACL, s 247.

[162] ACL, s 248.

[163] ACL, s 218.

[164] ACL, s 232.

[165] ACL, s 232(5).

[166] ACL, s 232(6).

[167] The breadth of this open standing provision has withheld constitutional scrutiny. See *Truth About Motorways v Macquarie* [2000] HCA 11; 200 CLR 591.

[168] *Phelps v Western Mining Corporation Ltd* (1978) 20 ALR 183, 187 (Bowen CJ).

performance) might not otherwise be available. In this manner, injunctive relief could be harnessed to advance the protection of rights of persons harmed by a business's failure to abide by its human rights claims. Even if injunctions are not used in such far-reaching ways, they may be more fruitful measures to mandate companies to undertake HRDD and other remedial measures to prevent further misleading practices.

A breach of the prohibition on misleading and deceptive conduct leaves a company open to a range of civil actions but is not an offence. However, the ACL also sets out offences for false or misleading representations about goods and services. For example, it is an offence to '[make] a false or misleading representation that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use'.[169] Whilst not as broad as the s 18 prohibition on misleading and deceptive conduct, the offence might conceivably extend to some misleading statements about human rights impacts and compliance with human rights standards. Fines may be imposed of up to $AUSD 50 million for a contravention.[170] Such heavy penalties may function as a strong deterrent, suggesting that if regulators were to target compliance and enforcement on misleading human rights claims, this could drive improvement in corporate behaviour.

Whilst the Australian courts have not had occasion to consider the application of the prohibition on misleading conduct to corporate human rights claims, the regulator has recently shown a willingness to scrutinise environmental claims in this way and this approach should credibly be extended to human rights claims.[171] Recent scandals, such as Rio Tinto's destruction of Juukan Gorge, provide a reminder of the need to secure corporate accountability for human rights claims.[172] The Australian developments in introducing thematic HRDD, NFR and disclosure requirements in response to human trafficking,[173] whilst welcome, draw attention to remaining accountability gaps in those areas of business outside of the scope of the Modern Slavery Act, as is shown by the Juukin Gorge episode.[174]

4. AN OVERALL ASSESSMENT OF MISLEADING CONDUCT IN BUSINESS AND HUMAN RIGHTS

We now draw from our analysis of the EU and Australian regimes to form an overall assessment of misleading conduct laws' potential support for the implementation of the UNGPs' Protect, Respect and Remedy framework and interaction with emerging BHR regulation. We show how misleading conduct law may fill the gap in corporate accountability for misleading human rights claims, noting also both the potential and shortcomings in the law for providing direct access to remedy for the ultimate victims of rights' violations. Laws prohibiting misleading conduct by business are in principle supportive of the state's duty to protect under the first pillar of the UNGPs as they provide accountability for misleading human rights claims where this has not otherwise been addressed in the applicable legal regime. We have noted that the official commentary of UNGPs makes specific reference to the need to ensure the accuracy of such communications.[175]

[169] ACL, s 151. Offences may also be pursued under civil penalty provisions.

[170] Australian Government, *Fines and Penalties*, http://www.accc.gov.au/business/business-rights-protections/fines-penalties [last accessed 1 May 2023]. If the court can determine a reasonable attributable benefit, then the fine may be up to three times that benefit if that figure is greater than $AUSD 50 million.

[171] ACCC, *ACCC 'greenwashing' internet sweep unearths widespread concerning claims*, https://www.accc.gov.au/media-release/accc-greenwashing-internet-sweep-unearths-widespread-concerning-claims (2 March 2023) [last accessed 15 June 2023].

[172] McCorquodale and Nolan, supra n 20 at 473.

[173] Modern Slavery Act 2018 (Cth—Australia).

[174] Joint Standing Committee on Northern Australia, *Parliament of the Commonwealth of Australia, A Way Forward Final report into the destruction of Indigenous heritage sites at Juukan Gorge* https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024757/toc_pdf/AWayForward.pdf;fileType=application%2Fpdf (October 2021) [last accessed 15 June 2023].

[175] Official Commentary to UNGP 3.

Our review of the EU and Australian law shows the potential efficacy of such use of consumer law provisions that prohibit misleading human rights claims. However, we can see that there are significant differences in the scope of each regime. In both jurisdictions, the legislation broadly applies to misleading conduct impacting upon consumers' transactional decisions and is therefore a valuable accountability measure for misleading human rights claims by business which impact upon consumers' purchasing decisions. The European regime, through the materiality test, is limited to such contexts and may therefore not apply more broadly to other harmful conduct in which business misleads in its human rights claims, for example, in communications with investors or in those that take place between businesses during HRDD processes. The Australian regime is much broader in scope and will ordinarily extend to such circumstances. The limiting principle in the Australian context, on the other hand, is that the relevant conduct must have occurred in trade or commerce, bringing such conduct as public advocacy, regulatory communications and internal deliberations outside of the scope of the law. Despite this, the Australian law retains a substantial ambit of operation highlighting the value of laws that move beyond a narrow focus on consumer protection to those that create a broad standard of accuracy across all commercial dealings.

We have also observed that the state duty to protect extends to ensuring consumer protection departments are equipped with 'information, training and support' on human rights.[176] In our examination of the EU and Australian laws, we have emphasised the role of consumer protection authorities in enforcing the laws against those engaged in misleading human rights claims either as principals to the breach or as accessories. Given the significance of knowledge of human rights to these authorities' prosecutorial and enforcement decisions there is a potential role for the global BHR community to engage which consumer protection departments and to contribute to the development of greater expertise within these departments.

Beyond this enforcement function of consumer protection departments, they also hold a greater transformative potential. Consumer protection agencies typically focus on the effects of misleading practices on consumer welfare. Bringing awareness and engagement with the UNGPs into the scope of consumer protection agencies, through their enforcement, educative and policy functions could have a mutually reinforcing effect, thus contributing to an evolving understanding of what constitutes consumer welfare.[177] In this scenario, the possibilities are various: such agencies may, for example, reframe their understanding of consumer welfare to move beyond limited notions of financial consumer detriment to consider the consumers' broader concerns to avoid moral complicity in the human rights impacts of a business's products or services.

Turning to the second pillar of the UNGPs, the corporate responsibility to respect human rights, we observe, having regard to our analysis of the EU and Australian regimes, misleading conduct law's more mixed potential in this arena. On the positive side, we have noted potential support for HRDD both in combination with the soft law approach of the UNGPs and the hard law approach of some emerging BHR frameworks. We noted in the Australian context a feature that also applies in the EU, that the intentionality of the business or party involved in the breach is not relevant to a finding of a breach of the prohibition. This thereby encourages businesses to engage in HRDD so as to help them identify human rights concerns that may then be presented accurately in their communications. A further feature of the Australian misleading conduct regime, which supports HRDD, is the requirement to justify the reasonableness of a representation made with regard to future facts or circumstances. This encourages corporations

[176] UNGP 8.

[177] Consumer welfare is a term used in competition law, consumer law and economics, the contours of which are contested. On the tensions between economic and legal conceptions of consumer welfare see: Esposito, *The Consumer Welfare Hypothesis in Law and Economics: Towards a Synthesis for the 21st century* (2022).

to use HRDD so that they may then establish that such representations when made are reasonable. More broadly, this demonstrates the value in scrutinising misleading conduct laws for support that such features may provide for genuine engagement with HRDD practices.

On the less positive front, it is apparent that the threat of litigation, enforcement or remedial action under misleading conduct provisions may encourage companies to weaken their commitments. For example, this concern arose when we considered the expectation that companies adopt a written policy commitment to respect human rights that is to be made publicly available. When we considered the application of the UCPD to such policies in the EU context we noted that the Directive indirectly encourages companies to use aspirational language in order to reduce the risk of liability. This points to the broader concern that the use of misleading conduct law to punish inaccurate corporate human rights claims, absent the existence of a corresponding duty of disclosure, may have a chilling effect on corporate commitments in this area. We also saw this in the context of the complaint against Lidl in Hamburg, where, as a result of legal action, Lidl entered into a consent decree that prompted disengagement with the human rights initiatives that had been the initial basis of the complaint. To avoid such perverse outcomes, we argue that undertakings, consent decrees and other remedies such as injunctions should be used in a manner that is supportive of the corporate responsibility to respect human rights; this may be, for example, through a commitment or order to engage on a genuine or good faith basis with HRDD and even to include supervision or monitoring of these practices.

This connects us to the third pillar of the UNGPs. At issue here is whether misleading conduct law provides victims of business-related human rights violations with access to remedy. It is important to note that there are likely to be limits to the beneficiaries who may be remediated under misleading conduct law, which, in many cases, is unlikely to extend to the direct victims of rights' violations. Misleading conduct law is therefore not a substitute for laws that provide direct access to remedy for those who are the ultimate victims of rights' violations. As we saw in our discussion of both the EU and Australian contexts, misleading conduct law may confer access to remedies such as compensation or damages to persons (e.g. consumers or competitors) who are impacted by the misleading conduct. However, the shape that remediation takes will depend on the particular context, for example, open standing provisions, such as those in place for injunctive proceedings in Australia, may enable the ultimate victims of rights' violations (amongst others) to commence proceedings to prevent further misleading claims.

We also noted that even where such provisions do not provide a direct avenue for the ultimate victim of a rights violation to seek a remedy, another actor such as a regulator, consumer or other activists may seek to use the versatile remedies available such as the open standing injunction in the Australian regime to indirectly vindicate their rights, recalling that the litigant in these proceedings need not establish an interest in the litigation as there is a public interest in enforcement of the law or show that they have suffered any harm. Whilst the options are narrower in the EU context, there is the avenue of collective enforcement in which harm to the collective interests of consumers must be established.

Moreover, consumer law remedies are versatile and there may be opportunities to use or develop them in creative ways to incorporate a more direct vindication of the ultimate victims of rights' violations. For example, within the context of negotiated outcomes, apologies and rehabilitation (such as a requirement to improve HRDD practices) may be embedded into the instrument that settles the dispute.[178]

Reflecting the position under international human rights law, the range of remedies that might be made available, according to the *Official Commentary,* include: 'apologies, restitution,

[178] e.g. an undertaking under the ACL as discussed below.

rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition'.[179] This is an extensive list of the types of remedies available that allow for a calibrated response to business behaviour. As they overlap with many of the remedies that we have identified as available under misleading conduct law,[180] they could become available if a business's misleading conduct concerning its human rights practices or impacts is established. Of particular note are the stronger fines linked to turnover now in place at both the EU and Australian level that can act as a strong disincentive to conduct that breaches the prohibition. As noted, the *Official Commentary* recommends the expansion of existing non-judicial mechanisms or the creation of new mechanisms to address gaps in the provision of remedy.[181] In this context, through its association with consumer law, misleading conduct law has an extensive range of non-judicial mandates, alternative dispute resolution and consumer complaints schemes, whose terms of reference might be modified in such a manner. We also noted the concerns expressed in the *Official Commentary* that corporations' separate legal personality across members of a corporate group may allow businesses to escape accountability and thereby deny the victims of rights' violations access to remedy.[182] In this regard, Australia's misleading conduct law provides a broad accessorial liability provision, which may be used to pierce the corporate veil across corporate groups and throughout GVCs.

5. CONCLUSION

We have observed that misleading conduct law may be used to hold businesses to account for their false or deceptive claims about human rights practices and impacts. Such accountability is needed to address harm to consumers, competitors and potential investors and to uphold the integrity of BHR. We have also observed that the UNGPs are the source of an emerging BHR framework requiring respect for and protection of human rights within corporations' GVCs and remediation where businesses violate human rights standards. Key developments include HRDD, social disclosure and NFR. Businesses responding to these developments potentially interact with consumer laws prohibiting misleading conduct. Moreover, these developments produce a number of gaps to be filled by misleading conduct law, which in its versatility, is well suited to function in this manner. In this respect, the broad scope of the law of misleading conduct and the robust enforcement regime in Australia show that this jurisdiction is particularly supportive of such action. Thus, whilst the EU UCPD goes some way to empower consumers to attempt to make companies accountable for their professed commitments to human rights, the Australian regime appears to hold more creative potential.

We have also noted that beyond a narrow approach which relies upon open or relaxed requirements as to standing, there are opportunities for other stakeholders, including regulators, competitors and consumers who are directly harmed by questionable business claims to engage, facilitate or encourage a wide range of remediation and enforcement measures. These include claims for damages, injunctions, prosecutions and corrective advertising and more creative negotiated outcomes through the use of consent decrees or undertakings. Moreover, there is the more transformational potential of the UNGPs' contact with consumer law through engagement by consumer authorities (in both their enforcement and policy development capacities) and a shifting understanding of consumer welfare shaping consumer expectations of rights-respecting behaviour, leading to a virtuous cycle of enhanced accountability.

[179] *Official Commentary* to UNGP 25.
[180] See, e.g. the extensive range of remedies available under the ACL as detailed above.
[181] *Official Commentary* to UNGP 27.
[182] *Official Commentary* to UNGP 26.

Irrespective of these points, it should be noted that both the Australian and the EU legislations focus on protecting the consumer (and, in some cases, other economic actors such as competitors) and not on advancing human rights by companies per se. Where regulators and others do not act, there is thus a reliance on consumers to bring these actions against companies, and, importantly, they do not offer direct remediation to the ultimate victims of rights' violations. As such, the importance of such laws should not be overstated. Instead, they need to be seen as one limb of the whole body of other initiatives—such as the draft Business and Human Rights Treaty[183] and new and proposed HRDD initiatives—focused on corporate accountability.

[183] Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, *Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and Other Business* (Revised Draft 16 July 2019).