

# HUMAN RIGHTS & CLIMATE CHANGE

A guide for institutional investors



## ACKNOWLEDGEMENTS

This report is the product of deep collaboration and the contribution of many. The willingness of people to give their time and talents is an indication of how important we believe investor action on the intersection between climate risk and human rights impacts is.

Responsible Investment Association Australasia (RIAA) would like to acknowledge members of its Human Rights Working Group for input to this report, particularly Mark Lyster, the Group's founding chair, who also brought together KPMG and the other contributors. Others to thank include Nicolette Boele, Gloria Chan, Alison Ewings, Will Horton and Min Wah Voon.

KPMG would like to acknowledge the work of our human rights and climate change specialists Dr Meg Brodie, Andy Symington, Dr Sayomi Ariyawansa, Sarah Hayes, Suzanne Ballard, Amelia Bruce, Naz Jacobs, Sarah Brown, Samantha Bayes, Tom Rochford, Cameron Reid, along with the support of Chief Purpose Officer and Partner in Charge of KPMG Banarra, Human Rights and Social Impact Services, Richard Boele, and Adrian King, Partner in Charge of KPMG's Sustainability Services.

Both KPMG and RIAA are grateful for the advice and expertise of the Australian Human Rights Commission during the gestation and development of this report and express thanks to Lauren Zanetti, Sarah McGrath and Katherine Samiec. We would also like to thank Sarah Barker and Ellie Mulholland at MinterEllison and the Commonwealth Climate and Law Initiative for their early contributions to the report.

We are also grateful for all of the contributions from across industry, government and civil society. Throughout this report you will find quotes and case studies which offer valuable insights and information to support investor practical learning.

## ACCESSIBILITY

We are committed to making our resources accessible and widely available. As such, two versions of this Guide are available: a KPMG- and RIAA-branded PDF version and a Microsoft Word version. The branded PDF version remains the definitive version of this Guide.

The tide has turned. As the business community and governments move towards net zero there is an unmistakable intersection between planet and people. Investors need to be alive to the risks and embrace the opportunities to lead. Placing human rights impacts at the centre of your analysis of climate change will give depth to your responsiveness and help us transition justly.

**RICHARD BOELE, CHIEF PURPOSE OFFICER AND PARTNER IN CHARGE OF  
KPMG BANARRA HUMAN RIGHTS AND SOCIAL IMPACT, KPMG AUSTRALIA**

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Most leading investors have net zero commitments in place and understand that climate risk is fundamental to prudent investment management. Those ahead of the pack also realise the relevance of engaging with climate-related human rights impacts in their portfolios. For institutional investors, risk to people directly translates to risk to business.

**SIMON O'CONNOR, CEO,  
RESPONSIBLE INVESTMENT ASSOCIATION AUSTRALASIA**

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# 1. INTRODUCTION

One of the world's most urgent challenges is climate change, which is violating human rights across the planet today and threatening to do so on a vast scale in the future."<sup>1</sup>

**DAVID BOYD, UN SPECIAL RAPPORTEUR ON HUMAN RIGHTS AND THE ENVIRONMENT**

## CLIMATE CHANGE IS AN URGENT HUMAN RIGHTS ISSUE

Global temperature rises, associated biodiversity loss, rising sea levels and extreme weather events negatively impact our security, food production, water supplies, health and the habitability of our homes and cities. Forced displacement and the increased risk of conflict due to competition for scarce resources threaten all human rights, including the right to life. Without adequate planning, even the shift away from fossil fuels itself may have a severe impact on rights, such as the extraction and manufacture of materials for renewable technologies or fossil-fuel project closure without transition for dependent communities.

The situation is critical. Technological and regulatory shifts are required – and required quickly – to achieve decarbonisation and the transition towards a sustainable global economy. In many jurisdictions these changes are emerging. However, for the decarbonisation transition to be made in a way that minimises harm to people, human rights must be at the centre of the response.

The need for a 'just transition' is being increasingly recognised by influential global institutions and thought leaders. It is now acknowledged that business must take active steps to place human rights at the core of strategies to address climate change.<sup>2</sup> Courts and statutory human rights institutions are using their respective judicial power and human rights mandates to begin to hold companies accountable for the human rights harms of climate change.<sup>3</sup> Human rights expectations of investors in general have rapidly increased.<sup>4</sup>

However, our research indicates that institutional investors are still prioritising environmental impacts over harm to humans when addressing climate change risk in their portfolios. Environmental and social risk assessments are often siloed, meaning that climate-related human rights impacts are inadequately addressed. This gap is a risk to institutional investor trustees that must be addressed as an urgent matter of prudent risk management.

## OUR COMMITMENT TO SUPPORTING INVESTORS

KPMG, and the Responsible Investment Association Australasia (RIAA)'s Member Human Rights Working Group have brought together our business, human rights, climate and financial sector expertise to support change for better.

Institutional investors are uniquely placed to mitigate and address climate-related human rights risks. However, in 2021, the UN Working Group on Business and Human Rights found that institutional investors face significant capability challenges in relation to practically

implementing consideration of human rights in their investment activities, including 'knowledge of human rights... how human rights are defined, how they are relevant across ESG factors, and what meaningful human rights due diligence looks like.'<sup>5</sup>

This is an emerging issue. Climate change risk was not a common feature of corporate reporting until fairly recently. However climate disclosures are now being increasingly regulated. We can expect disclosure of climate-related human rights risks to follow a similar pathway.

It is our hope that this guide will support investors to understand their responsibilities and embrace the opportunities presented by this moment in time. In addition to our expertise and research, we also incorporate material from in-depth research interviews with institutional investors and other key stakeholders to give readers insight into leading practice and case studies of practical approaches.<sup>6</sup> This is a fast-moving space and investors will need to stay in touch with new trends and emerging risks. However, this guide offers practical steps and key first principles information to which investors can return as they shape and mature their response by focusing on risk to people and applying a human rights lens to climate risk assessments.

## AN OUTLINE OF THIS GUIDE

This guide highlights the systemic and crucial link between climate change and human rights and establishes that institutional investors are uniquely placed to act to address and mitigate the impacts of climate change on people's rights. We analyse the key dimensions that investors should consider when making investment decisions and managing portfolios.

## RESPONSIBILITIES

Firstly, we focus on the responsibilities of institutional investors to recognise and act on climate-related human rights risks. We set out the corporate responsibility to respect human rights under domestic and international frameworks and highlight the importance for investors to manage climate-related human rights risk in order to adequately discharge fiduciary and directors' duties.

## RISK

Secondly, we identify crucial areas of emerging risk for investors related to the human rights impacts of climate change. Global trends in regulation, litigation and social expectation represent significant risk for investors who fail to engage with climate-related human rights impacts in their portfolios. For institutional investors, risk to people directly translates to risk to business.

## OPPORTUNITIES

Thirdly, embedding consideration of climate-related human rights risk into strategy and processes offers institutional investors the chance to harness the opportunities that decarbonisation and the shift towards more sustainable systems present. By looking beyond managing downside risks, institutional investors can show responsiveness to the growing expectations of beneficiaries on tackling climate-related human rights risk and employing the principles of stewardship in order to actively influence investee companies on these issues. This action allows investors to position themselves to take maximum advantage of the transition and deliver in the best interests of beneficiaries.

## TAKING ACTION

Finally, taking action by assessing, managing and mitigating climate-related human rights risk will be a new challenge for many investors. It will likely require capacity building, strategic realignment, and the development of robust, future-proofed strategies and processes. We conclude with a series of recommended practical steps and suggested strategies for effectively incorporating these considerations into existing risk management processes.

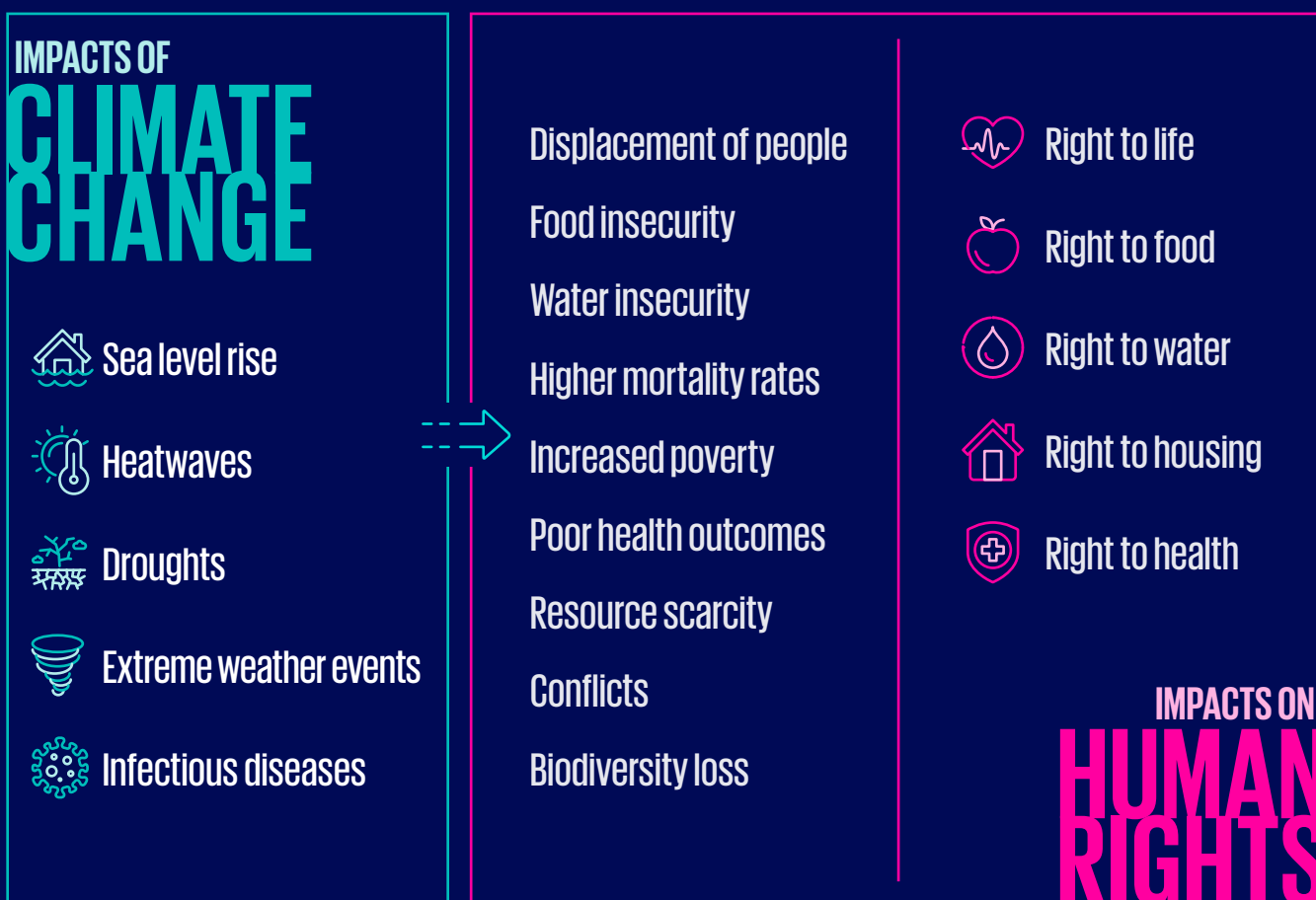
# 2. CLIMATE CHANGE & HUMAN RIGHTS

“It is now beyond dispute that climate change caused by human activity has negative impacts on the full enjoyment of human rights.”

**UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS<sup>7</sup>**

## CLIMATE CHANGE HAS A HUMAN IMPACT.

This graphic sets out some of the human impacts of climate change, and how these relate to fundamental human rights:



## The human rights risks of climate change range from those impacts caused directly and indirectly by physical effects such as sea level rise, drought and extreme weather events, to those associated with the sustainable energy transition itself, such as impacts from the mining of minerals used in renewable technologies.

Globally, the impact of climate change on the right to life is already stark: a 2021 study attributed 37 percent of all heat-related deaths worldwide between 1991 and 2018 to human-induced global heating.<sup>9</sup> Increased temperatures also exacerbate the spread of infectious diseases like malaria and dengue fever and make pandemics more probable.<sup>9</sup> There is, too, widespread evidence demonstrating that climate change is negatively affecting agriculture and food security in Asia and Africa,<sup>10</sup> and extreme weather is already impacting water security in many parts of the world.<sup>11</sup> Additionally, the danger that climate change poses to biodiversity, causing a grave threat to human rights in turn – is already being realised in polar, mountain and coral reef ecosystems.<sup>12</sup>

The nature of climate change is such that its human rights impacts fall disproportionately on the most vulnerable sectors of society – children, the elderly,<sup>13</sup> Indigenous communities across the world, Pacific Island populations and others in low-lying coastal areas, people with disabilities and those living in poverty.<sup>14</sup> It is clear that ‘the worst impacts [of climate change] afflict those who have contributed least to the problem and who have the fewest resources to adapt to, or cope with, the impacts’.<sup>15</sup>

Around the world there are urgent examples of vulnerable people impacted by the effects of climate change.

In Australia, for example, research shows that climate change is already having an effect on water supplies and threatening the viability of agriculture across large parts of the country,<sup>16</sup> directly impacting the rights of those in numerous rural communities. The increasing frequency of bushfires due to the changing climate has severe impacts on the right to life and the right to health in areas where a significant health deficit is already present.<sup>17</sup>

Australian islands and the atoll nations of the Pacific are experiencing some of the most profound human rights impacts of the climate crisis. The Torres Strait Islands are already badly impacted by sea levels which are rising more than twice as fast as the global average.<sup>18</sup> Traditional Owners state that climate change is threatening their connection to land and culture.<sup>19</sup> Property destruction is severe, including roads, building and cemeteries being washed away, eroding not just infrastructure but the emotional and spiritual health of the community.<sup>20</sup> Many are concerned that islands will be rendered uninhabitable, forcing migration or relocation.

The spectre of forced migration also confronts the inhabitants of several Pacific island nations. Former President of the Marshall Islands, Hilda Heine, describes the very real impacts on the human rights to water, food, livelihood, culture and health that climate change is already causing, and comments:

‘Given rising sea levels and the possibility that some islands will be submerged, the inhabitants of these atoll nations are likely to experience dire living situations and deteriorating quality of life on increasingly uninhabitable land, including the disappearance of their island homes’.<sup>21</sup>

**37%**

**of all heat-related deaths worldwide between 1991 and 2018 attributed to human-induced global heating.**



A recent World Bank report showed that sea level rise could imperil the Marshall Islands' status as a nation, putting its exclusive maritime zone at risk and thereby threatening access to the fisheries that sustain the population.<sup>22</sup>

Meanwhile, extreme weather events have had an immense impact on populations in sub-Saharan Africa, particularly by exacerbating food insecurity and displacement. In sub-Saharan countries prone to drought, the number of undernourished people rose by 45.6 percent between 2012 and 2019. The severe drought and associated famine in Madagascar have been directly attributed to climate change.<sup>23</sup> While some countries have been experiencing prolonged drought, others have been hit by widespread flooding, destroying crops, killing people and livestock, and displacing communities. UN data shows that 60 percent of all internally displaced people in eastern Africa in 2019 had fled due to climate-induced disasters.<sup>24</sup>

In 2020, heavy rainfall in the greater Horn of Africa region led to the largest desert locust outbreak in 25 years which damaged crops on a significant scale and increased food insecurity. In Ethiopia alone, the damage of crops left almost one million people in food insecurity, while in Somalia the number of people facing acute malnutrition trebled in the course of 2020 alone.<sup>25</sup>

A heatwave in North America in the summer of 2021 caused hundreds of deaths in normally temperate regions. Many of these were among the elderly and the homeless, who are particularly vulnerable to extreme temperatures.<sup>26</sup> A major 2021 study concluded that over 5 million people die globally each year because of extreme temperatures and that heat-related mortality was increasing.<sup>27</sup>

Human rights impacts caused by the transition towards sustainable energy include many that are the result of an increased demand for minerals integral to certain renewable technologies. For example, the artisanal mining of cobalt – used in the lithium-ion batteries that power most electric vehicles – has been associated with child labour and modern slavery conditions in the Democratic Republic of the Congo,<sup>28</sup> while alleged forced labour practices have been associated with the manufacture of solar panels.<sup>29</sup>

Assessing climate-related human rights risks also requires taking a long-term view and considering not only current risks to people but also the future impact on the human rights of the children of today and those who are yet to be born. Economic forecasts of the impact of climate change 'grossly undervalue the lives of young people and future generations'.

The stark reality of the human rights impacts of climate change point to the intersectionality required when looking at ESG related risks. Investors are uniquely placed to advance current environmentally focused risk metrics to incorporate the risk of harm to people. This need is urgent.<sup>30</sup>

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"The vulnerability of the Children is partly a function of the magnitude of the potential risk they face but is also a function of their powerlessness to avoid that harm ... the Children have no choice but to live in the environment which will be bequeathed to them."

**JUSTICE BROMBERG,  
FEDERAL COURT OF AUSTRALIA<sup>31</sup>**

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## TYPES OF CLIMATE RISK

The types of climate risk which cause human rights impacts may be categorised into Physical Risks and Transition Risks; how these risks manifest in different regions and geographies varies significantly.

### 1. PHYSICAL RISKS

Physical risks are often further categorised as acute or chronic. An acute risk is an event-driven impact such as a storm or bushfire. A chronic risk is a long-term environmental or weather change such as increasing sea levels or ocean acidification.

There is the potential for interplay between acute and chronic physical risks. For example, increases in average temperature and reductions in rainfall can contribute to conditions that increase the risk, likelihood and consequence associated with an acute event such as a bushfire event.

### 2. TRANSITION RISKS

Transition risks are those that are emerging as we follow the pathway to a low-carbon-emitting global society. The nature, extent and timing of these risks manifest in a range of ways due to the variety and pace of different approaches being taken globally to enact this transition.

# 3. WHY INSTITUTIONAL INVESTORS?

Responding to the human rights risk of climate change is in the best interests of institutional investors for two main reasons: to directly manage risk facing individual companies and sectors; and to indirectly support more stable systems on which the productive capacity of companies depends. This latter driver for action by institutional investors involves investment in the infrastructure to address physical climate risk, such as revetment walls around coastal airports, fire-proofing important assets including data centres, schools and hospitals, and flood-proofing transport networks to secure supply routes from farm to factory and then supermarket.

Institutional investors such as superannuation funds collectively control over 100 trillion US dollars' worth of assets.<sup>32</sup> These institutions represent the interests of a vast number of stakeholders and are therefore in a strong position with great responsibility as well as unparalleled leverage.

**Institutional investors such as superannuation funds collectively control over 100 trillion US dollars' worth of assets.**

## INSTITUTIONAL INVESTORS CAN:



**Power a culture of responsible investment via company and issuer engagement with industry frameworks**



**Drive action on climate-related human rights impacts through their portfolios and into their assets.**

“As a specialist investor, we recognise the risk climate change poses to fundamental human rights. It requires serious consideration of the positive ESG outcomes that can be achieved through investing in a low emissions future. We’re collaborating with investee companies, fund managers and industry generally on how we can better approach these critically important matters.”

### **MATTHEW HISLOP, DIRECTOR – LEGAL CLEAN ENERGY FINANCE CORPORATION**

Because institutional investors such as superannuation funds are legally obligated to take a long-term approach to portfolio management, they can also help to create and guarantee the foundations of a sustainable and profitable transition that mitigates and eliminates climate-related human rights harms.

Responsible investment is already snowballing. In Australia, for example, responsible investing assets under management increased in 2020 by 31 percent to A\$1.2 trillion.<sup>33</sup> Many investors have recognised the financial risks and opportunities arising for companies as a result of the physical impacts of climate change. There is pressure on institutional investors to act.

This trend has been powered by several factors, including: strong financial performance by funds, increasing awareness that exercising social and environmental responsibility in investment can avoid negative

impacts on investment returns, and a profound and evolving shift in consumer expectations (see Section 5.3). Alongside these factors there has been a flurry of changes to the international regulatory environment, including industry and multi-stakeholder frameworks.<sup>34</sup> Moreover, research outlined in KPMG’s 2021 CEO Outlook report found that 81% of CEOs believed that the COVID-19 pandemic has caused a shift in focus towards the social component of their ESG program.<sup>35</sup> There is also a growing awareness of the need for ESG reporting to specifically consider human rights when examining potential social impacts.<sup>36</sup>

Globally, there is increasing demand for achieving a ‘just transition’ – i.e. ensuring that the transition towards a sustainable low-carbon global economy is achieved with minimal harm to humans.<sup>37</sup>

Despite the crossover of these trends, many investors have been slow to recognise that the human rights impacts caused by climate change must be factored into their calculations of portfolio risk.

“Human rights and climate change remain very siloed in current investor practice. Climate goes into the ‘E’ bucket of ESG risk and human rights goes into the ‘S’ bucket. It has been hard to get investors to see that they need to merge the two.”

### **BRYNN O’BRIEN, EXECUTIVE DIRECTOR, AUSTRALASIAN CENTRE FOR CORPORATE RESPONSIBILITY**

# 4

# RESPONSIBILITIES OF INSTITUTIONAL INVESTORS



# INSTITUTIONAL INVESTORS HAVE RESPONSIBILITIES UNDER INTERNATIONAL FRAMEWORKS, DOMESTIC LAWS AND OTHER DISCLOSURE REQUIREMENTS TO ADDRESS AND MITIGATE CLIMATE-RELATED HUMAN RIGHTS RISK.

## THIS SECTION DISCUSSES:

- The international corporate responsibility to respect human rights
- Domestic legal responsibilities to address and mitigate climate-related human rights risks
- Other responsibilities as investors to make disclosures on climate-related human rights risks
- Moral responsibilities to act to prevent harm to people.

## SOURCES OF INVESTOR RESPONSIBILITIES:

International human rights frameworks

Fiduciary obligations and mandatory disclosure

Non-binding disclosure initiatives

## 4.1

# RESPONSIBILITIES UNDER INTERNATIONAL FRAMEWORKS

// In October 2021 the UN Human Rights Council recognised ‘the right to a safe, clean, healthy and sustainable environment’ and established a UN Special Rapporteur on the promotion and protection of human rights in the context of climate change. When doing so, the UN Human Rights Council highlighted the responsibility of all business enterprises to respect human rights in accordance with the UN Guiding Principles on Business and Human Rights, including those rights adversely impacted in the context of climate change. These developments demonstrate the importance of businesses adopting a holistic response to their environmental and human impacts.”

**EMERITUS PROFESSOR ROSALIND CROUCHER AM,  
PRESIDENT OF THE AUSTRALIAN HUMAN RIGHTS COMMISSION**

International law unambiguously recognises the connection between climate change and human rights.<sup>38</sup> The Human Rights Council’s recognition of ‘the right to a safe, clean, healthy and sustainable environment’<sup>39</sup> (and appointment of the Special Rapporteur)<sup>40</sup> was preceded by decisions by international and regional human rights

courts, UN legal opinions which identified the human right to a safe and healthy environment,<sup>41</sup> and by global civil society advocacy. In addition, there are more than 155 countries that have recognised the right to a healthy environment in local mechanisms.<sup>42</sup>

## KEY INTERNATIONAL INSTRUMENTS AND FRAMEWORKS

Several international frameworks establish expectations for companies and investors in relation to identifying and mitigating their human rights and environmental impacts. They are significant and practical instruments for addressing and managing climate-related human rights risk.

“Businesses are also duty-bearers. They must be accountable for their climate impacts and participate responsibly in climate change mitigation and adaptation efforts with full respect for human rights.”

**UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS<sup>43</sup>**



### **United Nations Guiding Principles on Business and Human Rights (UNGPs)**

A set of guidelines for nation states and business to prevent, address and remedy human rights violations that occur in the course of business operations.



### **Organisation for Economic Co-operation and Development Guidelines on Multinational Enterprises (OECD Guidelines)**

Recommendations made by OECD nations to multinational enterprises regarding responsible business conduct that is consistent with applicable laws and international standards.



### **Sustainable Development Goals (SDGs)**

A set of goals to promote global prosperity by addressing social and economic issues, while also protecting the planet.



### **Principles for Responsible Investment (PRI)**

UN-supported set of investment principles developed by the financial sector to promote sustainable investment. These are discussed in Section 4.3 below.



### **Paris Agreement 2015**

A binding international treaty on climate change that specifically refers to the human rights impacts of climate change.



### **Recommendations of the Taskforce on Climate-related Financial Disclosures (TCFD)**

A set of recommendations regarding climate-related financial disclosures. A key purpose is to provide investors with resources to make informed sustainable investment decisions. These are discussed in Section 4.3 below.



### **UN Framework Convention on Climate Change (UNFCCC)**

An international treaty on mitigating and addressing climate change, it places key responsibilities on developed country Parties to take a leadership role in solving these issues.

## THE UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (UNGPs)

The UNGPs were unanimously endorsed by the UN Human Rights Council in 2011, and are the authoritative, global standard on preventing business-related human rights harms. Numerous other instruments are partly or wholly based on them. They affirm that business, including investors, has a ‘responsibility to respect’ human rights. This means entities should avoid infringing on the human rights of others and should address human rights harms to which they are connected. Notably, the UNGPs expect business, including investors, to prevent and address the human rights harms arising

from their environmental impacts, such as violating a community’s right to clean air or water.<sup>44</sup> The right to remedy for adverse rights impacts is a critical pillar of the UNGPs and should guide business responses to harm.

This ‘do no harm’ standard applies to all businesses, wherever they are operating.

The UNGPs expect business, including investors, to conduct ongoing, risk-based human rights due diligence (HRDD) to identify, prevent, mitigate and account for how the entity addresses potential and actual human rights harms arising through its business activities or relationships.<sup>45</sup>

The focus of the human rights due diligence process is not on risk to business – but risks to rights-holders, i.e. stakeholders such as employees, supply chain workers, consumers and communities, that may be affected by business operations.<sup>46</sup> This is an important conceptual difference to the investor fiduciary duties and other disclosure obligations outlined below, which focus on risks to investors and their beneficiaries.

## THE OECD GUIDELINES

A comprehensive set of non-binding government-backed standards on responsible business conduct, which 48 signatory countries have committed to promote and implement. They echo the ‘do no harm’ standard and expect multinational enterprises,<sup>47</sup> including investors, to prevent or mitigate adverse impacts ‘directly linked’ to their products, operations and services through business relationships – including, relevantly, through their investment portfolios (even as a minority shareholder). The OECD has also produced specific guidance regarding the key role of institutional investors in addressing climate change under the OECD Guidelines framework.<sup>48</sup> The OECD has also signalled just how important the link is between responsible business conduct and climate action, namely that ‘net-zero targets are implemented with integrity, accountability and responsibility – taking into account impacts on both people and planet.’<sup>49</sup>

The OECD Guidelines expect multinational enterprises, including institutional investors, to:

- prioritise responding to most severe impacts first, which will often align with material risks;
- use leverage to influence the conduct of investee companies and other business relationships; and
- conduct due diligence in relation to both human rights and environmental impacts.

The importance of international human rights standards for business is growing, as these frameworks become incorporated into reporting and other regulatory requirements, international arbitration rules, corporate benchmarking, as well as into domestic and regional laws and regulations.<sup>50</sup>

This is increasing the legal and reputational risks faced by investors who fail to conduct human rights due diligence, and address climate- and human-rights-related impacts. It has therefore become crucial for investors to take steps to prioritise and respond proactively to climate-related human rights risks.

“Many investors have themselves made commitments that have made the duty to consider climate-related human rights risk in their investment decision-making processes clear – the UN Guiding Principles for Business and Human Rights is just one example. The potential geo-political risks associated with this issue also means it would be inattentive of long-term investors not to.”

**REGNAN, A PIONEER IN RESPONSIBLE INVESTMENT.**





## THE 2030 SUSTAINABLE DEVELOPMENT GOALS

The 17 Sustainable Development Goals (SDGs) were adopted by all UN member states in September 2015 and have become a popular framework for sustainability-focused investing.<sup>51</sup> The SDGs offer a shared global framework to end extreme poverty, fight inequality, foster just and inclusive societies and protect the planet. The majority of the SDGs and their 169 targets are underpinned by international human rights standards. The SDGs reflect a globally agreed, long-term sustainability framework, which can help investors identify material ESG risks, harness new investment opportunities and encourage sustainable economies.<sup>52</sup>

The fulfilment of each of the SDGs is also inextricably linked. For example, addressing climate change is integral to achievement of a range of SDGs relating to water scarcity, food security, sustainable cities and poverty. Despite their interconnectedness, investors often selectively 'contribute' to certain SDGs in a siloed manner, while ignoring their adverse impacts in other SDG outcomes. For example, investors may make a positive contribution to SDG 13 (climate action) and 7 (affordable and clean energy) by investing in lithium-ion battery technology, while ignoring their impact on SDG 8 (decent work) due to widespread child labour in mining for cobalt for some such batteries.

Recognising this, the UN, the PRI, the OECD and others have highlighted that the most significant contribution business (including investors) can make to achieving the SDGs is conducting due diligence in order to avoid and address adverse impacts of their own activities, supply chains and portfolios.<sup>53</sup> Investors that seek to contribute to positive outcomes and avoid the adverse impacts of their investments on climate-related human rights will be better placed to meaningfully contribute to the SDGs while also safeguarding their social licence to operate.

### 2011

- UNGPs
- OECD GUIDELINES

### 2012

- CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT
- US DODD-FRANK ACT ON CONFLICT MINERALS
- IFC SUSTAINABILITY FRAMEWORK

### 2014

- SINGAPOREAN PREVENTION OF HUMAN TRAFFICKING ACT
- EU DIRECTIVE ON NON-FINANCIAL REPORTING

### 2015

- UK MODERN SLAVERY ACT
- TCFD RECOMMENDATIONS
- SUSTAINABLE DEVELOPMENT GOALS
- PARIS AGREEMENT

### 2017

- FRENCH CORPORATE DUTY OF VIGILANCE LAW
- GERMAN CSR DIRECTIVE IMPLEMENTATION ACT
- EU CONFLICT MINERALS REGULATION

### 2018

- AUSTRALIAN MODERN SLAVERY ACT

### 2019

- OECD DUE DILIGENCE GUIDELINES FOR RESPONSIBLE CORPORATE LENDING
- EU REGULATION ON SUSTAINABILITY-RELATED DISCLOSURES IN THE FINANCIAL SERVICES SECTOR

### 2020

- DUTCH CHILD LABOUR DUE DILIGENCE LAW
- THE EQUATOR PRINCIPLES

### 2021

- GERMAN SUPPLY CHAIN DUE DILIGENCE ACT
- NORWEGIAN TRANSPARENCY ACT
- INTERNATIONAL SUSTAINABILITY STANDARDS BOARD

### 2022?

- EU MANDATORY ENVIRONMENTAL AND HUMAN RIGHTS DUE DILIGENCE LAW (FORTHCOMING)

## 4.2

# RESPONSIBILITIES AS INSTITUTIONAL INVESTORS

“It is apparent that regulators and investors now expect much more from companies than cursory acknowledgement and disclosure of climate change risks ... The effect of regulatory and investor intervention is that large scale firms will be expected to invest seriously in capabilities to monitor, manage and respond to climate change risks.”

**NOEL HUTLEY SC & SEBASTIAN HARTFORD DAVIS<sup>54</sup>**

Investors are required by law and accounting standards to disclose material climate-related financial risks and also face other human-rights-related disclosures, such as modern slavery reporting obligations.

Institutional investors must also consider and act on the climate-related human rights risks of their investment decision-making based on their responsibilities as fiduciaries and directors. What it means to be a sound fiduciary has not changed, but stakeholder recognition of climate-related human rights impacts is fundamentally changing which matters must be considered when assessing what is in the ‘best financial interest of beneficiaries.’ Fiduciaries should consider the broader ESG risks associated with the investments they make, and climate-related human rights impacts should be specifically considered when evaluating these risks.

Leading market stakeholders in Australia and across the globe – from large institutional investors to credit rating agencies and prudential regulators – already recognise climate change as a significant economic and financial risk. This risk arises from the physical and human rights impacts of climate change (such as the impacts of large-scale environmental loss and damage) and

associated economic transition risk (such as the risk of assets becoming stranded in the face of regulation to bring about net-zero emissions). Systemic risk associated with the devastating projected impacts of global warming beyond the 1.5°C mark must also be factored into the equation.

For example, on climate-related risks in particular, the EU Directive on sustainability-related disclosure in the financial services sector is now in force.<sup>55</sup> It sets out disclosure obligations for institutional investors in relation to financially material sustainability risks – but also the adverse sustainability impacts of the investment. In this way, the regulations extend the scope of what most asset managers consider to be their current disclosure requirements.

In May 2021, US President Joe Biden signed an executive order on climate-related financial risk, commissioning a roadmap towards enhanced regulations on climate-related disclosures by companies in the financial system. Notably, the order recommends that the social cost of greenhouse gas emissions be incorporated into government procurement decisions, signalling that the Biden administration considers that human rights risk must be included in climate disclosures.<sup>56</sup>

In specific jurisdictions, regulators are requiring more of corporate directors. For example, the Australian Securities and Investments Commission (ASIC) has incorporated climate change into its monitoring and supervision of directors, companies and capital markets. Physical and transitional risks of climate change have been identified as examples of common risks that might have to be disclosed in a retail prospectus (RG 228),<sup>57</sup> and climate change in general has been identified as a systemic risk that could impact an entity's financial prospects for future years and that therefore could require disclosure (RG 247).<sup>58</sup> In February 2021, ASIC Commissioner Cathie Armour stated that disclosing and managing climate-related risk is a key director responsibility.<sup>59</sup>

The trend is clear worldwide. In New Zealand, the government has introduced legislation mandating climate-related disclosures for publicly listed companies as well as institutional investors.<sup>60</sup> The UK's Financial Conduct Authority has similarly required companies to report on whether their climate risk reporting is consistent with TCFD.<sup>61</sup>

In a similar vein, leading South African pension lawyer Rosemary Hunter published 'the Fasken opinion' in April 2019 that stated that boards of South African pension and provident funds are required to embed considerations of climate risk into investment decisions. This would be as per the directors' fiduciary duties and would protect trustees from the prospect of legal liability for losses incurred by the fund due to lack of due diligence.<sup>62</sup>

In Chile, the Financial Markets Commission (Comisión para el Mercado Financiero) issued a strategy in September 2020 to instigate regulatory change in financial markets by requiring listed companies to disclose information related to climate change. It also calls for integration of climate risks into risk assessments.<sup>63</sup>

In short, the standard for discharging fiduciary obligations and directors' duties continues to rise, as does its scope.

**Investors must now consider and act on the climate-related human rights impacts of their investment decision-making when these impacts are financially material and/or intersect with their beneficiaries' best financial interests, in the same way they would any other material financial risk.**<sup>64</sup>

Failure to adequately assess and manage these risks may amount to a breach of fiduciary and other directors' duties – which carries potential significant personal liability in addition to the financial and reputational risk associated with regulatory or commercial litigation.

## DANGERS OF POOR-QUALITY DISCLOSURES, 'GREENWASHING' AND THE EMERGING SPOTLIGHT ON 'BLUEWASHING'

With the increasing attention on the role of companies in addressing climate change, many companies have made commitments to 'net zero' emissions, climate-related disclosures and other measures in pursuit of sustainability objectives. However, in 2021 the International Consumer Protection Enforcement Network conducted a sweep of over 500 corporate websites, finding over 40% included misleading 'green' claims.<sup>65</sup> This is mirrored in other research, such as recent surveillance by ASIC which found that, while the quantity of climate disclosures has increased, the quality of these disclosures is highly variable. Moreover, 'greenwashing' was prevalent in many of the reviewed disclosures.<sup>66</sup>

Investors should be aware that directors may be found liable for misleading or deceptive conduct if they make selective disclosures on climate related risks or make public commitments to achieve certain emissions targets without proper governance structures, strategies or processes to achieve them.<sup>67</sup> In the UK, from 1 January 2022 the Competition and Markets Authority will review misleading claims, and the underpinning guiding principles require that companies must not omit or hide important information, and must consider the full lifecycle of the product.<sup>68</sup>

Increasingly, the regulations requiring social disclosures are leading to deeper analysis of the way in which entities present not just their environmental credentials but their social and human rights related ones too.<sup>69</sup> When companies mislead on social impact metrics, this is sometimes referred to as 'bluewashing'. Disclosures at the centre of environmental and social concerns – such as the human rights impacts of climate change – are likely to be steadily targeted for their veracity.

Moves are afoot to set a baseline for high-quality disclosure. In November 2021, the formation of a new International Sustainability Standards Board (ISSB) was announced by the IFRS, a landmark decision that puts sustainability reporting on the same level as financial reporting. Its role will be to develop standards on sustainability disclosure. The sustainability prototype being developed refers extensively to human rights.

Public accountability for sustainability commitments will be key. Nicolette Boele, Executive Policy and Standards, Responsible Investment Association Australasia says that

“Core to good ESG assessment and credible sustainability claims ... is aggressive transparency.”<sup>70</sup>

## CASE STUDY: INVESTOR ENGAGEMENT

Some investors are engaging with investee companies on both climate issues and human rights issues – in the latter case, some are using the Australian *Modern Slavery Act 2018* (Cth) as a driver of discussion.

For example, Alison Ewings (Head of Engagement, Regnan) has advised:

// We have engaged with emission-intensive sectors on the link between their modern slavery ambitions and their climate action. These discussions have highlighted that their modern slavery efforts may come to naught if we fail on climate change. The volumes

of people that could become vulnerable to modern slavery as a result of displacement caused by the physical risks of climate change is likely to see this issue worsen.”

This reinforces the fact that investors are operating in a regulatory environment that is constantly shifting, and that with the increased expectations placed on investors there is a growing acknowledgment of important intersections between frameworks that address climate change risk and those that address human rights risk. This comes back to the recognition that protection of the environment and protection of human

rights are inextricably interlinked and emphasises the need for investors to de-silo their decision-making on these issues.

## CASE STUDY: AN EXAMPLE OF LEADING PRACTICE IN THIS AREA

Quinbrook Infrastructure Partners (Quinbrook) is a global investment manager focused on decarbonisation and renewable energy. Anne Foster, Director and Head of ESG states:

“In our investment and asset management processes, we investigate and manage a broad range of ESG and climate related impacts, risks and opportunity considerations. “We look at both climate risks across the projected asset life (including water stress, performance under changing weather patterns and climate scenarios including operational resilience) as well as new value opportunities (such as likely new policy creating investment incentives and/or driving fundamental industry change).”

// Our focus extends beyond climate risk and impact, spanning a range of specific ESG risks, opportunities and impacts when evaluating new investments as well as decisions required for ongoing asset management. Through the creation of new renewable

energy, storage and grid support infrastructure assets, we are able to drive job creation and preservation, reduce the impact of pollution on vulnerable communities, support new partnerships and resulting economic benefits to indigenous, rural and regional communities, support skills development and training, and directly seek to avoid, resolve, and influence supply chain issues especially those implicated by modern slavery concerns. Through the use of advanced technology, we can better optimise and coordinate our renewable energy and storage assets to deliver more efficient and valuable contributions to reliable and low-cost energy supply, with the aim of supporting a just transition for the broader communities in which we operate.”

“Yes, climate change is absolutely a human rights issue. Investors in infrastructure have a responsibility to assess and where possible, implement solutions addressing job obsolescence

and retraining, COVID-19 recovery, biodiversity and local habitat impact for communities, as well as improving energy affordability and reliability. Additionally, we must strive always to avoid adverse impacts on human health and wellbeing and any form of pollution particularly where vulnerable communities are potentially impacted. Climate transition, improved resilience and renewable energy investment are all central to our core and long-standing investment thesis, seeking to build businesses and infrastructure that drives real change in support of the Paris targets and the transition to Net Zero. We believe this is fundamental to overall human wellbeing, to creating and preserving healthy communities and cities, supporting job creation and business continuity. Doing this well makes us better stewards of investor capital.”

## 4.3

# RESPONSIBILITIES UNDER OTHER INITIATIVES

**Beyond legislation and international frameworks, reporting requirements are also increasing in other contexts. A growing number of investors are signing up to voluntary industry frameworks with enhanced disclosure obligations in relation to climate- and human-rights-related.**

For example, the Principles for Responsible Investment (PRI) began in 2006 with 20 of the world's largest institutional investors, which developed the principles that champion both climate action and social impact aligned with the SDGs. Today, there are over 3,000 signatories from over 60 countries, representing US\$103.4 trillion in assets under management.<sup>71</sup> The PRI requires signatories to report annually on their responsible investment progress, and works to assist them to meet the minimum requirements over a two-year period if necessary. If a signatory fails to meet these requirements after this period, they are delisted. Notably, in 2020, in recognition of the increasing importance of considering human rights in investment activities, the PRI set out a three-step process for investors to demonstrate their respect for human rights which follows the key elements of the UNGPs – policy commitment, human rights due diligence and access to remedy.<sup>72</sup> The PRI has indicated that it is 'affording its work on human rights equal strategic priority [as] its work on climate change'<sup>73</sup> although there is more to be done by the PRI to bring the intersections of these areas together.

Another key example of an investor- and business-led initiative is the Task Force on Climate-related Financial Disclosures (TCFD). Founded by Mark Carney, former Governor of the Bank of England, the TCFD – as the name suggests – is focused on climate change. The TCFD recommendations set out a framework for voluntary, comparable disclosures on climate-related risk to help investors to assess companies' climate-risks and opportunities,<sup>74</sup> and ultimately to steer capital towards sustainable, climate resilient investments.<sup>75</sup> In TCFD's 2021 status report, it noted that the number of supporting organisations grew by more than 72% over the preceding 12 months, bringing it to a total of over 2,600 companies across the world with a market capitalisation of US\$25 trillion and financial institutions with responsibility for assets of US\$194 trillion.<sup>76</sup> Demonstrating the influence of investor and business activity on state action, as of 2021 over 120 governments and regulators support the framework.<sup>77</sup> Disclosures made in response to TCFD recommendations are a potential opportunity for investors to practically embed human rights considerations in their analysis and assessments.

## CASE STUDY: INTERSECTIONS BETWEEN TCFD FRAMEWORK AND HUMAN RIGHTS RISKS IN PRACTICE

Our interviews suggest that some investors are already considering the intersections between climate change and human rights impacts when assessing risk for the purpose of the TCFD. For example, Alison Ewings from Regnan observed:

“The human rights implications of climate change have the potential to manifest in political, regulatory and reputational risks so it is useful for people to consider a human rights lens when exploring these risks as outlined in the TCFD. Further, the ability of climate change to exacerbate human rights risks has the potential to undermine financial stability (for instance, the disruption from climate events, and heightened potential for conflict). It is therefore a feature of the very risks the Financial Stability Board is seeking to address.”

Assessing material financial risk in investment decision-making processes requires the consideration of both climate and human rights risk. Reimagining existing frameworks offers an opportunity for deeper analysis and better risk management.

Other related trends include the growing number of stock exchanges that require inclusion of ESG-reporting criteria as conditions for listing,<sup>78</sup> the increasing prevalence of banks and other financial institutions mandating sustainability disclosures before lending, and downstream companies in value chains requiring transparency and action plans on certain ESG issues from their suppliers.

For example, the Singapore Exchange (SGX) requires all SGX-listed issuers to prepare an annual sustainability report on a ‘comply or explain’ basis.<sup>79</sup> While the SGX hasn’t provided specific guidance on the human rights impacts of climate change, it noted that many issuers who report on climate change refer to the SDGs.<sup>80</sup> Similarly, the Hong Kong Exchanges and Clearing (HKEX) requires annual ESG reporting, as do 24

other exchanges worldwide (see table below). In 2019 the Australian Securities Exchange (ASX) released updated corporate governance principles that recommended that listed companies should disclose any material exposure to environmental or social risks and a plan for managing them. Social risks are defined as including risks associated with large scale mass migration and shortages of food, water or shelter, which relates them directly to climate change.<sup>81</sup> Finally, listing rules set by the relevant UK regulator require listed companies on the London Stock Exchange (LSE) to report on greenhouse gas emissions as well as on human rights.<sup>82</sup> Again, there is an emerging recognition of the link between climate change and its human rights impacts – and investors are being urged to recognise and act on this.

**The following table, using data from the Sustainable Stock Exchanges Initiative, shows a marked recent increase in stock exchanges producing annual sustainability reports themselves or mandating certain ESG requirements for companies to be listed:**

### SSE AFFILIATED EXCHANGES



### ANNUAL SUSTAINABILITY REPORT PRODUCED



### MANDATORY ESG LISTING REQUIREMENTS



## 4.4

# MORAL RESPONSIBILITIES

Given that climate-related human rights impacts involve harm to people, responsibility must be considered to go beyond just the legal and corporate.

**This raises the moral question: Who should be responsible for mitigating the impacts of climate change?**

1. Should the brunt of responsibility to address human rights impacts caused by climate change fall on those who have directly contributed to the problem? For example, a study found that a mere 100 companies have been to some extent responsible for 71% of global emissions.<sup>83</sup>
2. Should it fall on those who have most benefited from high-emissions industries – such as the investors and shareholders in these companies?
3. Or should it fall to those who have the greatest capacity to respond to the risks of climate change?<sup>84</sup>

Many institutional investors will fall into the first two categories, but all are covered by the third. Considering the catastrophic actual and potential impacts of climate change upon people, there is a strong moral duty for those with significant capacity to respond, including powerful national and global actors such as institutional investors, to take action.



# 5 RISK TO PEOPLE, RISK TO BUSINESS



# CHANGE IS HERE.

Boards, directors and governing bodies are no longer accountable on financial performance alone. Steadily, non-financial risks have come to dominate the agenda and in doing so, there is an incremental up-ending of the typical framing of risk.

**Appropriately, business generally assesses risk by putting itself at the centre of the risk matrix:**

- What are the financial, regulatory and reputational risks associated with any given event?
- How likely is it and how severe will the impact be?

**More nuanced assessments now put people and planet into the centre of these questions:**

- How likely is it that people will be harmed if I undertake this business activity?
- What is the severity of the impact on people if I invest in this asset class?
- And more mature still – what positive impact can I have if I deploy my leverage and leadership to signal a shift in priorities?

Understanding and addressing risk to people is at the heart of the corporate responsibility to respect human rights. Supporting the fulfilment of human rights – like the right to life, right to health, right to water, right to housing, right to education and more – is key to sophisticated responses.

Just as the fiduciary responsibilities of institutional investors must be reinterpreted in light of the actual and potential human impacts of the climate crisis, existing perceptions of business risk and opportunity must also be broadened to capture the increasing and evolving expectations of governments, civil society and other stakeholders in relation to this issue. Failure to put people and planet at the heart of investors' consideration of risk, will ultimately expose investors to cascading business risk issues – particularly legal risk (both compliance with regulation and emerging jurisprudence through litigation) and reputational risk. The Harvard Initiative for Responsible Investment also highlights political risks given the highly regulated nature of some elements of the energy sector, including utilities, and systemic risks arising from the 'extensive reshaping of economic activity... [and likely] unequal distribution of costs and benefits in this transition.'<sup>85</sup>

This section highlights regulatory, litigation and reputational risks emerging for investors that are not addressing climate-related human rights impacts.

## 5.1

# REGULATORY RISK – THE RISE OF MANDATORY DISCLOSURE AND HUMAN RIGHTS DUE DILIGENCE REQUIREMENTS

Human rights and climate policies of governments around the world are shifting rapidly so regulatory risk is now a major consideration for investors. Governments have adopted commitments to reach net zero emissions by mid-century and are also introducing laws to protect human rights, including the right to a healthy environment, from climate-related impacts caused by companies. Elements of this protection are being operationalized in many countries and will have global effect: legislative steps are increasingly being taken that require companies, including investors, to take action to identify and mitigate human rights risk in their own operations but also in their supply chain. These new laws generally mandate processes such as human rights due diligence in order to specifically focus on risk to people.

A good example of this emerging trend is the European Union's legislative proposal to implement mandatory human rights and environmental due diligence (see Case Study).

## CASE STUDY:

### EU MANDATORY ENVIRONMENT AND HUMAN RIGHTS DUE DILIGENCE LAW (FORTHCOMING)<sup>86</sup>

The European Parliament's Draft Directive was adopted in March 2021 and recommends a law that would require companies to:

- respect human rights, the environment and good governance
- not cause or contribute to potential or actual adverse impacts through their activities
- prevent and mitigate those adverse impacts
- be accountable and liable for those impacts

The proposed law would apply to any companies operating in the EU or governed by the law of a member state. Importantly, it would include not just the business itself, but also its value chain.<sup>87</sup> **Its impact therefore would be global.**

A company's 'value chain' refers to all activities, operations, business relationships and investment chains of an undertaking. It includes direct and indirect business relationships, either

upstream or downstream, and which either (a) supply products or services that contribute to the company's own products or services, or (b) receives products or services from the company. This broad definition of 'value chain' includes a much broader range of entities than would be captured by reference to a 'supply chain'.

The preamble also specifically states that these proposed laws are to have extraterritorial effects, and this would 'affect the social, economic and environmental development of developing countries and their prospects of achieving their SDGs'.<sup>88</sup>

The potential impact of this new law is highly significant, for companies in relation to their own operations and those of their supply chains.

**It will require companies including investors that have not engaged with climate-related human rights risk to do so, with likely penalties for non-compliance.**

Several European countries have already implemented laws requiring companies to conduct human rights and environmental due diligence<sup>89</sup> and it is to be expected that similar regional, national and sub-national legislation of this type will increasingly come into effect worldwide.

In France, the Duty of Vigilance law (2017) requires companies above a certain size to establish and implement a public due diligence plan to address human rights risk in their operations and supply chains. Harm that occurs as a result of a plan not being implemented can cause civil liability for the damage.<sup>90</sup> In 2021, both Norway and Germany introduced similar laws mandating human rights due diligence through supply chains.<sup>91</sup>

In Australia, the Australian Law Reform Commission has examined mandatory human rights due diligence, and while no specific recommendations were made for immediate legislative reform, they indicated support for its introduction

as part of a smart regulatory mix.<sup>92</sup> In South-East Asia, the Office of the UN High Commissioner for Human Rights (OHCHR) has been working to integrate international human rights standards into laws and policies on the environment and climate change.<sup>93</sup> Participants at a recent forum in Mexico organized by the EU, the OECD and the UN on human rights due diligence and the impacts of companies activities also agreed on the need to impose mandatory human rights due diligence in host countries in Latin America.<sup>94</sup>

Irrespective of the region in which an investor is headquartered, the global reach of these regulatory trends make it crucial that investors proactively respond to and go beyond the highest regulatory requirements governing human rights and environmental due diligence.

## 5.2

# LITIGATION RISK – THE RISE OF CLIMATE- AND HUMAN-RIGHTS-RELATED LAWSUITS

Courts around the world have begun to acknowledge the connection between human rights and the responsibility to act on climate change.<sup>95</sup> Research by the LSE Grantham Research Institute on Climate Change and the Environment in 2020 identified the pursuit of human rights arguments as one of the key developing trends in climate litigation.<sup>96</sup> A 2020 report by the United Nations Environment Programme reviewing climate change litigation found that one of the principal categories involves plaintiffs claiming that insufficient action by defendants to mitigate climate change constitutes a violation of their human rights.<sup>97</sup> Many of these cases have been brought by children and young people, and the “rights of future generations” are likely to become a key legal battleground in climate rights cases of the future (see recent case study below). In 2021, Vanuatu notably asked the International Court of Justice for an advisory opinion on the right of current and future generations to be protected from climate change,<sup>98</sup> and the UN Child Rights Committee ruled that states can be held responsible for the negative impact of carbon emissions on the rights of children in other nations.<sup>99</sup>

Legal actions seeking to hold major corporate emitters to account for causing or failing to mitigate climate change are increasing in number and sophistication. In May 2021 a Dutch court decided in

favour of a coalition of environmental groups and citizens, ruling that a natural resources company must reduce its carbon emissions 45 percent by 2030. This case involved the company’s duty of care obligations under Dutch law but the applicants also invoked the human rights to life, and to private and family life, enshrined in international treaties. While these rights normally apply between nation states and citizens, the court observed that, due to the fundamental interest of human rights, they may also play a role in governing the relationship between the applicants and the company. Accordingly, the court factored these human rights into interpreting the legal standard of care. This is a significant example of the judicial system using international human rights conventions that impose obligations on states to influence how domestic law applies to private actors. Importantly, the court also considered the UNGPs in interpreting the relevant Dutch laws – so this case is also an example of how non-binding frameworks can have tangible legal consequences.

Another important claim involves the California crab fishing industry suing the carbon majors for economic losses from ocean warming and acidification.<sup>100</sup> Corporations and their directors and officers have also been sued for a failure to adapt their infrastructure to the physical impacts of a changing climate,

or failing to disclose climate risks, with notable claims made against ExxonMobil and PG&E following its bankruptcy for climate-related liabilities in the aftermath of the Californian wildfires.<sup>101</sup> A claim has also been brought by retail investors against the Australian Commonwealth government and public officials, who are held to an equivalent standard of care to company directors, alleging a failure to report climate risks to sovereign bonds in breach of their fiduciary duties and disclosure obligations.<sup>102</sup>

A particularly notable case in Australia is considered a sign of things to come. In *McVeigh v Retail Employees Superannuation Pty Ltd* a member claimed that the superannuation fund had failed to acknowledge, consider and disclose climate risk and was therefore in breach of its obligations under the *Corporations Act 2001* (Cth). The fund settled out of court and committed to a series of measures. These included measuring, monitoring and reporting on climate risks, actively considering and voting on all climate change related shareholder resolutions of investee companies and monitoring their own investment managers’ approaches to climate risk.<sup>103</sup> It is predicted that large investment funds will increasingly be the target of this type of litigation due to their ability to apply leverage to other companies.<sup>104</sup>

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“We use corporate and financial law and leverage the financial risks that climate change poses to large companies to encourage them to take action”

**SOPHIE MARJANAC, CLIMATE ACCOUNTABILITY LEAD, CLIENTEARTH<sup>105</sup>**

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## CASE STUDY:

### DUTY OF CARE TO YOUNG PEOPLE NOT TO CAUSE PHYSICAL HARM FROM CLIMATE CHANGE

A group of Australian children brought an action against the Minister for the Environment of the Commonwealth of Australia on behalf of all children who reside in Australia. In a landmark decision in May 2021, Justice Bromberg of the Federal Court of Australia found that the Minister owes a duty of care to the children of Australia to not cause them physical harm arising from climate change. In making this determination, Justice Bromberg noted that there is a ‘relationship between the government and the children of the nation, founded upon the capacity of the government to protect and upon the special vulnerability of children.’ Poignantly, Justice Bromberg also observed:

“... it is not merely the vulnerability of the Children which I find potent. It is also their innocence. They

bear no responsibility for the unparalleled predicament which they now face. That innocence is also deserving of recognition and weight in consideration of the relationship between the Children and the government they look to for protection.”

This is a novel claim, with potentially far-reaching consequences. It is an extension of the law of tort that imposes a duty of care on a person with the ability to cause or control harm to their neighbour. For this reason, this decision may have implications beyond a state’s duty to prevent harm. It may, for example, be used to impose an expanded duty of care on companies who materially contribute to CO<sub>2</sub> concentration in the atmosphere.

## 5.3

# REPUTATIONAL RISK – GROWING EXPECTATIONS FROM SOCIETY

Civil society, consumers, customers, beneficiaries and other stakeholders are becoming both more informed and increasingly concerned about climate and human rights risks. Traditional advocacy and activism leveraged by media and social media can result in significant momentum gathering behind campaigns that seek to persuade companies and investors to implement more robust climate policies, divest from fossil fuels, commit to emissions targets and more. This applies to both major emitters themselves and those associated with them via value chains.

As a result, customer-facing companies are increasingly required to ensure that companies in their value chain effectively manage and mitigate the risk of climate-related impacts on human rights. This includes elements of transition risk – such as how so-called sustainable technologies are themselves being manufactured in a way that causes human rights impacts.

## CASE STUDY:

### SUPPLY CHAIN TRANSITION RISK

A recent example of customer-facing companies moving to address transition-related human rights risk in their value chains is the decision by two German car manufacturers to investigate human rights issues in the sourcing of Chilean lithium for their electric vehicle batteries. This involved precisely the type of human rights risk calculation that is becoming increasingly employed by companies in the sustainable technology sector.

Companies in this sector are typically more reputation sensitive than their upstream suppliers. For example, the purchase of an electric vehicle is a deliberately ethical choice for many consumers, who are likely to care deeply about human rights impacts involved in their manufacture. Concern from Indigenous communities about the impact of lithium extraction in

South America had been publicised. In response Volkswagen sent a delegation to the Atacama region of Chile to assess the social and environmental impact of mining operations there. The company concluded that, because of the lack of certainty around the impact of lithium mining on community access to water, it could not classify extraction as non-damaging.<sup>106</sup> Having identified this example of risk to people caused by the sustainable energy transition Volkswagen, along with other companies, have set up the Responsible Lithium Partnership, a multi-stakeholder initiative including a German development agency and local Indigenous stakeholders that seeks to promote sustainable extraction of lithium in the region.<sup>107</sup>

Similar questions about climate-related human rights risk and demands for divestment are being levelled by superannuation fund members and other individual investors at their fund managers. A 2020 RIAA report shows that 86 percent of Australian consumers expect super funds to invest their money responsibly and ethically.<sup>108</sup> Notably, three quarters of Australians would consider moving away from their current banking, super or other investment provider if they found that these providers invested in companies engaged in activities that were inconsistent with their values.<sup>109</sup>

There is measurable change. RIAA's 2021 Responsible Investment Benchmark Report for Australia, which reports annually on the size and nature of responsible investments, showed that investor intention is matched by action. The findings show money moving at great pace across from mainstream investments to those that systematically consider ESG factors such as human rights and climate risks.

Responsible investments now represent 40 percent of professionally managed funds in Australia. Leading responsible investing grew 15 times faster than the total market in 2020. In other words, as responsible investment increased by

31 percent, total funds increased only two percent over the same period.<sup>110</sup>

What the data shows is that investment managers committed to responsible investment are seeing money moving across into their funds, while the rest of the market is being left behind as the capital moves out.

Shareholder action and activism, too, is a growing trend. The Australasian Centre for Corporate Responsibility (ACCR), for example, is a shareholder advocacy organisation that seeks to engage with companies and gain traction on climate action via shareholder motions filed at AGMs. In 2020, a majority of shareholders backed an ACCR-led motion calling for Woodside Petroleum to commit to hard targets on emissions in line with the goals of the Paris agreement.<sup>111</sup> This type of action is increasingly common.<sup>112</sup> It points to the role that institutional investors are playing in exerting their influence as shareholders on investee companies. While activist investors press for a change in risk positions,<sup>113</sup> the adoption of climate-focused voting patterns is mainstreaming. In a published rationale for its voting decisions, BlackRock explained that it had 'voted against the longest serving [Woodside] director

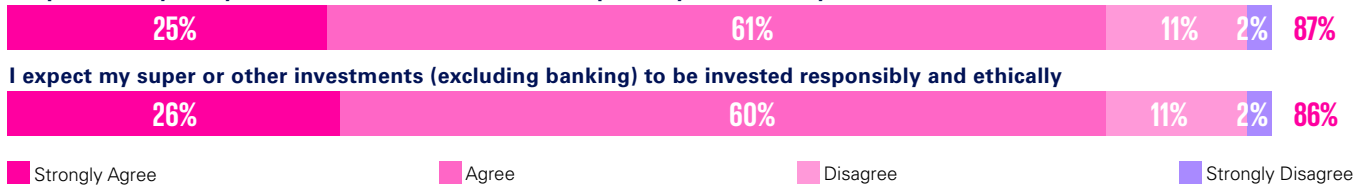
up for re-election given our concerns about the comprehensiveness of the company's current climate risk disclosure."<sup>114</sup>

Nevertheless, institutional investor ESG voting patterns worldwide show how human rights (social) and climate change (environmental) remain siloed considerations.<sup>115</sup> As the integration of ESG concerns becomes more pressing and understood, it is likely that the risk of reputational damage from failure to address climate-related human rights impacts will become more pronounced as the effects of climate change and its impacts on human rights become more severe and widespread. New strategies will also emerge. It is not difficult to imagine, for example, that the power of mobilising individual investors exemplified by the 2021 GameStop phenomenon could be leveraged in the cause of climate advocacy.

Growing expectations from society have created a context in which institutional investors who fail to fulfil their responsibilities to manage and mitigate climate-related human rights risks in their portfolios will themselves be exposed to significant risk.

## EXPECTATIONS OF BANKS AND SUPER FUNDS

**I expect money in my bank account/s to be invested responsibly and ethically**



**I expect my super or other investments (excluding banking) to be invested responsibly and ethically**

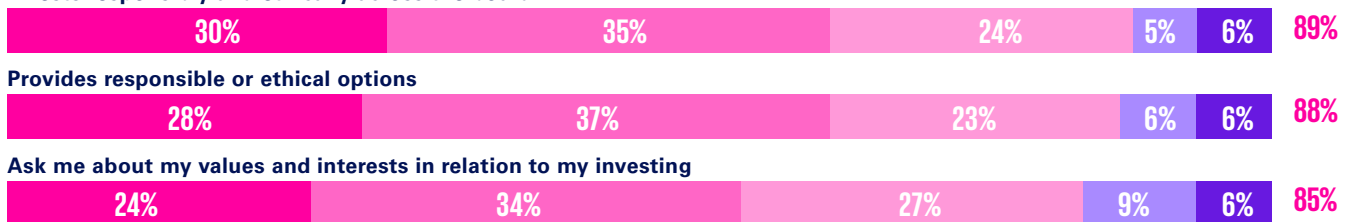


Q. For each of the following statements, which do you personally believe is applicable for banks, superannuation funds, or neither? Gen pop 18+ (Base n=1135). \*Figures may not add up due to rounding.

Source: Responsible Investment Association Australasia, *From Values to Riches 2020: Charting consumer expectations and demand for responsible investing in Australia.*

## EXPECTATIONS OF FINANCIAL INSTITUTIONS MORE GENERALLY

**Invests responsibly and ethically across the board**



**Provides responsible or ethical options**



**Ask me about my values and interests in relation to my investing**



Q. How important to you is it that your financial institutions (e.g. bank, super fund, etc.) does each of the following? Gen pop 18+ (Base n=1135).

Source: Responsible Investment Association Australasia, *From Values to Riches 2020: Charting consumer expectations and demand for responsible investing in Australia.*



# 6 OPPORTUNITIES AND LEADERSHIP

“What the investment community needs to recognise, is the ultimate beneficiaries of the investment chain are regular citizens. Accordingly, the savings and investment system is here to serve citizens and is directly and morally accountable to them. Stewardship involves a search for responsible investment practices that bring in returns for the beneficiaries through channelling money toward the development of a sustainable economy which drives real value creation along the entire chain.”

**STEWARDSHIP ASIA<sup>116</sup>**

## Investors are uniquely placed to effect meaningful change by mitigating and addressing the risks and impacts associated with climate change. Investors can exercise their collective influence and significant leverage to pursue sustainable and socially responsible outcomes across the global economy.

Groups of institutional investors are coming together to lead the way. The 2021 Global Investor Statement to Governments on Climate Change from 457 investors managing US\$41 trillion in assets urges a race-to-the-top on climate policy, including specifically ‘the development of just transition plans for affected workers and communities.’<sup>117</sup> Under the auspices of the PRI in 2020 161 investors, representing US \$10.2 trillion in assets made a commitment to support a just transition on climate change, including specifically the compelling case for alignment with international labour and human rights standards.<sup>118</sup> There are also country-specific initiatives, such as the Investor Group on Climate Change in Australia, which created the Climate League 2030, bringing together 20 investors – including Cbus, AustralianSuper, IFM Investors, and HESTA – with \$910 billion under management, with the goal of reducing Australia’s greenhouse gas emissions by a further 230 million tonnes on 2030 projections, and to net zero by 2050.<sup>119</sup> It is notable that Climate League 2030 seeks to integrate emission reduction goals and investment in line with the Paris Agreement, which draws a close link between climate change and sustainable development and requires Parties to consider their human rights

obligations when taking action to address climate change.

Additionally, investors – particularly asset owners – are in a unique position to use their leverage to engage investee companies on the need to assess and mitigate climate-related human rights risk. This falls in line with the broader principles of responsible investment discussed above but is also grounded in the notion of investor stewardship. Stewardship concerns the role of investors in influencing and collaborating with current or potential investees and other stakeholders, such as service providers and policymakers, to maximise the long-term value of their investments.<sup>120</sup>

The Australian Council of Superannuation Investors (ACSI) observed that Australian asset owners ‘have a long history of engaging with companies and voting their shareholdings to protect and enhance long-term value for their beneficiaries.’<sup>121</sup> ACSI also noted that its members are already committed to integrating ESG ‘considerations into their investment strategies and engaging collaboratively with companies to improve their ESG performance.’<sup>122</sup>

“  
Divestment was really unpopular with Australian institutional investors until October 2020, then a large number of funds divested from coal – portfolio decarbonisation. But this often has no impact on the investee company’s business model. We promote forceful stewardship, forceful engagement by investors, using powers afforded to shareholders by ownership rights to impel decarbonisation of the underlying companies and assets in their portfolio. Investors have a lot of power there and it needs to be used, not left on the table.”

**BRYNN O'BRIEN, EXECUTIVE DIRECTOR,  
AUSTRALASIAN CENTRE FOR CORPORATE  
RESPONSIBILITY**

## CASE STUDY:

**INVESTOR ENGAGEMENT ON A JUST TRANSITION<sup>123</sup>**

Quinbrook's engagement with the Gemini project is an example of how investors can closely engage with investee companies on the human rights risks associated with the transition to green energy.

The Gemini project is the largest solar and battery project in the United States. Quinbrook is working with the procurement and contracting

teams to address potential human rights issues in the supply chain. This includes collaborating to implement comprehensive Human Rights and Supply codes of conduct and working with the Gemini project to compel proper disclosure from suppliers, to avoid products and suppliers associated with forced labour in Xinjiang and to seek alternatives to cobalt in lithium-ion batteries (noting

that cobalt mining has been associated with forced and child labour).

Here, Quinbrook represents leading practice in working with investee companies to ensure that divestment from fossil fuels does not come at the cost of adverse human rights impacts from the transition.

Institutional investors have the potential to exert significant influence for the benefit of better risk management and respect of human rights.

However, interviews undertaken for this guide suggest that though many institutional investors are signalling a desire to focus on ESG risks and opportunities in making investment decisions, they do not yet explicitly acknowledge the human rights impacts of climate change as a specific area of risk, nor do they always feel that they have the capability to de-silo, identify, manage, and exercise leverage on these complex issues. In Section 7, we suggest some strategies to address these challenges.

Despite these concerns, some interviewees signalled a desire to integrate their climate change and human rights risk management processes and incorporate climate-related human rights risks into decision-making:

“

Adamantem assesses and addresses human rights and climate change risks in its portfolio companies and has developed assessment frameworks based on Australian's modern slavery legislation and the TCFD framework. Currently, these risks are assessed separately and have a focus on financial materiality. In recognition of the intersection of these two risks, in our next review of our climate assessment framework we will consider including analysis of physical and transitional climate-related human rights impacts as an additional output. We imagine this will be particularly relevant in building the long-term sustainability of global supply chains in the businesses we invest in.”

**NATASHA MORRIS, DIRECTOR - RESPONSIBLE INVESTMENT, ADAMANTEM CAPITAL<sup>124</sup>**

## 6.1

# BEYOND RISK MANAGEMENT – OPPORTUNITIES FOR INVESTORS

**As outlined above, there are significant risks to business for investors who fail to consider the human rights impacts of climate change: potential breaches of fiduciary duties, directors' duties, other litigation and reputational risks as well as rapidly changing norms and being out of step with consumer demand. There is also the risk that institutional investors will expose their beneficiaries to the longer-term risks associated with investments that are ultimately unsustainable.**

However, the intersection of business and human rights is not only about downside risk: companies can also have a significant positive impact on rights. At a minimum, the UNGPs are driving risk-based responses to preventing harm to people or remedying it when it occurs. However, embedded in the principles is the exhortation for business to go beyond risk management to maximise positive impact, specifically that, business enterprises may undertake other commitments or activities to support and promote human rights, which may contribute to the enjoyment of rights.<sup>125</sup> Critically, any work done to create positive change will not “offset” harm caused in other parts of an entity's value chain.

Leading investors are not just using their leverage to prevent harm, but to invest with impact, aiming to demonstrate measurable positive change. The profound alterations to the global economy that our response to

climate change requires represent an unparalleled opportunity for investors to proactively identify where their strategies can positively impact on human rights.

For example, in recent years there has been a growing focus on the concept of “impact investing.” That is, not just improving the risk-adjusted returns of investments, but intentionally allocating capital to activities and enterprises that are part of the solution for addressing the global challenges that our economies face. By building portfolios around companies which seek to contribute to rights fulfilment, whether that be through overcompliance on labour standards, cooperation in community development projects, benefit sharing, or other value-adding initiatives, investors can make a significant positive impact. This can and should extend to the intersection of human rights and climate change. Grantham Research Institute on Climate Change and the Environment argues that:

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“Institutional investors can play an important role in financing local climate action with positive social impact, not least through real assets and private markets: infrastructure, real estate, private equity and private debt. Through their inherent ties to workers and the long-term investment horizon, pension funds can be key actors and it is in the interest of beneficiaries to increase future-proof investments in their regions while creating positive financial returns.”<sup>126</sup>

## CASE STUDY: PARTNERS GROUP<sup>127</sup>

Partners Group, a global private markets investment management firm with US\$78 billion under management, launched PG Life in 2008. It is part of a blended investment strategy combining competitive risk-adjusted financial returns with a mandate to create measurable impacts in alignment with the SDGs (particularly: No Poverty; Good Health and Well-being; Quality Education; Affordable Care and Clean Energy).

### Potential investments are identified using the following criteria:

- a link exists between the product or service and an SDG target
- more than 50 percent of the revenue of the company supports this target (or the company has a significant market share)
- there are no ESG controversies nor does the company/asset detract from any SDG target.

Adam Heltzer, Head of ESG & Sustainability, advises investors seeking to engage in impact investing to achieve consensus within the business on what “impact investment” means to them, and then communicate this externally. It is important to be precise and transparent regarding investment alignment and contribution to an SDG. Heltzer also counsels investors to be selective in the SDG targets they pursue and prioritise ensuring they have a detailed, clear and well-developed understanding of their impact metrics, risk management, and data collection.

## HOW CAN INVESTORS BENCHMARK A COMPANY'S 'JUST TRANSITION' RESPONSE?

The World Benchmarking Alliance (WBA) aims to incentivise companies to support systems transformations for a just and sustainable future. At COP26, WBA launched a world-first Just Transition Assessment, focusing on the social aspects of decarbonisation, looking at 180 companies from high-emitting sectors. These complemented assessments of their approach to decarbonisation, e.g. the 100 listed and state owned oil and gas companies and their performance against a 1.5°C pathway.

Working with key stakeholders,<sup>128</sup> WBA developed six indicators designed to assess whether companies meet the ‘fundamental requirements’ to secure a just transition. The indicators cover social dialogue and stakeholder engagement, just transition planning, access to green and decent jobs, retraining/upskilling workers, social protection and company advocacy. They are supported by a series of core social indicators, which look at the basics of responsible business conduct, including the respect for human rights, provision of decent work and ethical conduct.

Companies are right at the start of just transition responses. The first WBA assessments reveal a lack of joined-up thinking, with climate and social operating within silos. A small group of companies recognise the responsibility to address the human impacts of their planned transition. But fewer than 10 percent of companies see climate or environmental issues as one of their salient human rights risks, reflected in poor scores on human rights due diligence related indicators. Despite the assessed companies directly employing

over 10m people, fewer than 10 percent are transparent around the risks of employment dislocation, suggesting the true scale of the impacts of transition are largely unknown, raising the likelihood of stranded workforces.

“Shareholder investors have a critical role to play in holding investee companies to account on their approach to a just transition, we strongly encourage them to engage with us. WBA methodology and results are all available as a public good – investors can use these results to support their own due diligence on just transition. The race to zero is against time, not each other. It is our moral duty to ensure the transition leaves no one behind. If we start the planning and work now, this transformation offers us an opportunity to create a world that is more just and equal than the one we know today.”

**GERBRAND HAVERKAMP, EXECUTIVE DIRECTOR WBA**

# 7 ACTION PLAN FOR INVESTORS

# THIS GUIDE HAS DEMONSTRATED THAT THERE IS A CLEAR AND URGENT NEED FOR INVESTORS TO RECOGNISE AND ACT ON CLIMATE-RELATED HUMAN RIGHTS RISKS.

Climate change is already causing significant harm to people – particularly the most vulnerable – across the globe and investors have clear responsibilities to mitigate it.

It is crucial that investors de-silo their approaches to human rights and to climate change in order to produce an effective and coherent response.

This action plan provides practical guidance to help investors integrate the management of climate-related human rights risks into their existing frameworks. It sets out general guidance to embed these considerations into current governance frameworks, as well as practical guidance tailored to investment strategies.

## 7.1

# EMBED CLIMATE-RELATED HUMAN RIGHTS RISK MANAGEMENT INTO GOVERNANCE FRAMEWORKS

The following strategies support investors to embed consideration of climate-related human rights risks into their policies and management systems, in line with the UNGPs, OECD Guidelines and 2021 Human Rights Council recognition of the right to a safe, clean, healthy and sustainable environment.

Where possible, these should be integrated into existing systems to manage human rights risks. It is important for investors to consider how best to integrate this into existing processes, to de-silo consideration of climate risk and human rights risk and to ensure risk assessment is escalated effectively to those teams with subject matter knowledge.



## RECOGNISE

- Recognise the link between climate change and human rights
- Express a commitment to protecting human rights and mitigating the impacts of climate change through a board-approved public statement and/or policy

## ACCOUNTABILITIES

- Establish accountabilities for identifying and addressing climate-related human rights risks
- Allocate responsibility at operational and senior management levels, and equipped staff for these roles by training them on the nature of these risks
- Ensure accountabilities for risk assessment are extended beyond investment functions to portfolio management
- Establish senior executive KPIs for managing these risks
- Report periodically to the board on climate-related human rights risks

## COLLABORATION

- Engage with multi-stakeholder initiatives to ensure your business is at the forefront of developments in ESG reporting and responsible investment, and to distinguish yourself in the market

## HUMAN RIGHTS DUE DILIGENCE

Carry out human rights due diligence (HRDD) to identify, prevent and mitigate adverse climate-related human rights impacts in your own operations and from assets, transactions and companies in your portfolio as well as in client relationships. Human rights due diligence focuses on risk to people rather than risk to business. The following are crucial steps:

- Incorporate all human rights from the principal UN and ILO treaties into the HRDD process
- Include climate-related human rights risk when conducting portfolio stress-testing and scenario analysis
- Engage with investees to ensure that they conduct/ have conducted meaningful consultation with potentially affected groups and other key stakeholders
- Assess the adequacy of investor and investee company structure so that findings from the process can be integrated and effective responses formulated
- Gauge the capacity of investor and investee company to track the effectiveness of the HRDD process in terms of reducing impact or potential impact on affected stakeholders
- Communicate the results of the process externally in annual reporting, sustainability reporting and disclosure to regulators

## 7.2

# EXPLORE POTENTIAL STRATEGIES

Investors should consider which one or a combination of the following strategies can be most effectively integrated into existing strategies and processes in order to identify and assess climate-related human rights risks and to cease, prevent or mitigate adverse impacts.

This may be effectively embedded within existing climate change or human rights risk assessment processes associated with responsible investment but must aim to achieve a holistic, de-siloed approach to the issue.

## AVOIDING DOWNSIDE RISK (EXCLUSIONARY AND NORMS-BASED SCREENING, ESG INTEGRATION AND BEST-IN-CLASS)

### EXCLUDE POTENTIAL OR CURRENT INVESTMENTS BASED ON CLIMATE-RELATED HUMAN RIGHTS RISKS. THE PURPOSE IS TO 'AVOID THE WORST PERFORMERS'.<sup>129</sup>

#### FACTORS TO CONSIDER INCLUDE:

##### Carbon emissions

- Consider Scope 1, 2 and 3 emissions and their effect on human rights
- Evaluate plans to control or reduce emissions

##### Exposure to risk of climate change and the effect on human rights, particularly labour rights

- Assess if operations are at risk from evolving regulation or social expectation
- Assess if operations are at risk from the physical impacts of climate change
- Assess transition risk, i.e. risk associated with decarbonisation
- Assess systemic risk, i.e. risk associated with failures of global systems due to temperature rise

##### Air emissions, water management, waste management

- Consider the risks to human health and safety

##### Supply chain concerns

- Investigate the risk of modern slavery or other human rights or labour rights risks
- Evaluate the effectiveness of responsible purchasing policies with suppliers

##### Normative concerns

- Consider whether the investee has failed to meet internationally accepted norms
- Establish whether the investee has engaged in unethical behaviour
- Determine whether the investee is aligned to the interests of fund beneficiaries

## AFFECTING CHANGE THROUGH CORPORATE ENGAGEMENT AND SHAREHOLDER ACTION

- Employ shareholder responsibility to influence corporate behaviour, including through direct or indirect engagement
- Engage with companies and other issuers with exposure to climate-related human rights risks to encourage risk mitigation
- Exercise voting rights guided by ESG concerns, including climate-related human rights risks
- Establish proxy voting policies on the human rights implications of climate change
- File or co-file shareholder proposals and motions on climate-related human rights risks

## ALLOCATING CAPITAL TOWARDS SOLUTIONS (POSITIVE SCREENING, SUSTAINABILITY-THEMED AND IMPACT INVESTING)

Dedicate part of the investment portfolio to positive solutions or leading companies or industries on these issues. Factors to consider include:

- Innovative, long-term business models that address climate-related human rights risks
- Investment in themes or assets and programs specifically related to improving human rights and environmental sustainability (e.g. safe and accessible water)
- Beneficial impacts that can generate positive impacts on human rights (see Section 6.1), such as:
  - Community involvement
  - Green or sustainable product lines (that are not themselves associated with human rights risk)
  - Poverty alleviation
  - Pollution alleviation
  - Provisions of core means of subsistence – food, water, shelter
- Whether investee represents leading practice in sustainability and human rights
- Impact investing – investments made with the intention to generate positive, measurable human rights and environmental impacts alongside a financial return. Substantial guidance on the principles of impact investing is available: these are practical ways to incorporate a human rights and climate change lens into an impact investing framework.
- Implement metrics that estimate both financial return and social impact – see, for example, the impact multiple of money (IMM) methodology designed by The Rise and Bridgespan.<sup>130</sup>

## 7.3

# MONITOR AND EVALUATE EFFECTIVENESS OF THESE ACTIONS

These strategies support the need to track the implementation and results of actions taken.

## MONITOR

- Monitor and review the investment decision-making process to ensure it accurately captures current and emerging risks

## ENGAGE

- Engage with other investors and asset owners that have more mature practices in place, or who have implemented enhanced regulatory obligations in other jurisdictions

## MEASURE

- Measure and report on the effectiveness of your responsible investment program using impact metrics, acknowledging that transparency is key to industry accountability

## 7.4

# RECEIVE GRIEVANCES AND PROVIDE REMEDY

While institutional investors mature processes and capability that will facilitate remedy for human rights harm when it occurs, first steps could include:

## ESTABLISH AND PUBLICISE

- Establish and publicise an expectation that your investee companies will remediate adverse human rights impacts, including those linked to physical and transitional climate change risks

## RECEIVE AND ACT

- Receive and act on human rights and climate change related grievances through established complaints mechanisms that are reviewed to ensure they are fit-for-purpose

## ENGAGE

- Engage with investee companies directly linked with the adverse human rights impacts to determine what steps the company is taking to provide remedy for affected stakeholders

## REQUEST

- Request updates on any human rights and climate change litigation including responses for affected stakeholders

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December 2021. 785388056AARC.

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