Business for the Rule of Law

CONSULTATION WORKSHOP REPORT

LOCATION:
Australia, Sydney

DATE:
5 March 2015

HOST/FACILITATOR:
Global Compact Network Australia and LexisNexis
Part I: Executive Summary

1. UN Global Compact and Business for the Rule of Law Overview
   - The Rule of Law has a role to play in creating certainty for businesses; Australia’s current electoral political culture is for short term governments, which are unable to offer certainty for investment which may be required beyond the 3-4 year term.

2. Business Support for the Rule of Law in Practice [Explained]
   - The Rule of Law enables, or is important to assisting with effective communication across jurisdictions.

3. Business Case for Supporting the Rule of Law
   - It enables worldwide standards across borders.

4. Business Actions and Business Examples in Support of the Rule of Law
   - Businesses need to learn what the international norms and standards are and disseminate this information throughout the business.
   - To advocate for business respect and support for the Rule of Law is to embed Rule of Law principles in practice throughout the operations of the business (including internal and external business interaction).

5. Call to Action (to Business and by Business) to Support the Rule of Law
   - Joint ventures must comply with the Rule of Law, mutual covenants and guiding principles for parties unsure of how to comply with Rule of Law principles. Businesses can nominate a senior employee to be the Rule of Law Compliance Officer for a company and ensure CEOs to promulgate the message and tone in a leadership culture.

6. Mobilising Business to Support the Rule of Law
   - Use UN brand name at all times. Corporate Social Responsibility tends to have limitations for participation (e.g., people are time poor, not interested). UN reinforces impact of multilateral institutions on organisations, and they may make all the difference.
Part II: Workshop Report

On 5 March 2015, LexisNexis and the Global Compact Network Australia convened 27 representatives of business (primarily General Counsels) and other stakeholder groups at the Business for the Rule of Law Consultation Workshop in Sydney. This report provides a summary of the workshop discussion, in keeping with the Chatham House rule of non-attribution, under which the meeting was held. This report does not necessarily represent LexisNexis or the Global Compact Network Australia’s, or any participating organisation’s, views.

1. UN Global Compact and Business for the Rule of Law Overview

Over recent decades, a growing number of businesses — from multi-national corporations to small and medium enterprises — are becoming more engaged in environmental, social and governance issues. The growth in the UN Global Compact, the world’s largest corporate sustainability initiative, is testament to this movement towards responsible business. As a result of growing engagement in issues of corporate responsibility, the relationship between business, governments, and other actors has evolved, with business playing an increasing role in addressing environmental, social and governance issues.

Alongside these developments has been a growing recognition by business — particularly those seeking opportunities in new markets — that it has greater success in its strategic and operational endeavours where the rule of law exists. Where the Rule of Law is absent, business finds it hard to operate and there are significant damaging commercial ramifications, such as legal transparency and poor means of contract enforcement and regulatory compliance. These ramifications stifle entrepreneurial creativity, and work to the detriment of global business stability. There are many benefits to Rule of Law:

Among other things, the rule of law promotes economic investment by improving governance, peace and security, increasing contractual certainty and allowing for the timely, fair, transparent and predictable resolution of disputes. It also creates opportunities by making it easier for business to set up or expand its operations providing access to new resources, human capital and consumer markets. Finally, the rule of law ensures legal identity and empowerment of individuals and organisations otherwise overlooked, allowing for greater economic and social participation. Further, at a broader level, the Rule of Law is both “a development outcome in its own right and an enabler of other outcomes” (UN Secretary-General Ban Ki-moon).

"The rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law,
accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.” Report of the UN Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies

The UN Global Compact’s Business for the Rule of Law initiative seeks to highlight the role of business in advancing the rule of law at the national and international levels, and underscores the importance of business (and other actors) in:

- driving positive change in accountability, transparency and certainty through the rule of law; and
- creating an enabling environment which promotes ease of doing business at the international and national levels in an ethical and socially-responsible way.

2. Business Support for the Rule of Law in Practice [Explained]

As noted, now more than ever before there is a growing realisation by business that the rule of law is essential for sustainable and inclusive economic growth and providing an enabling environment for responsible business to operate. It provides the foundation for respecting and supporting human rights, labour, environmental and anti-corruption considerations, consistent with the principles of the UN Global Compact.

In order to engage the global business community and mobilise support for the rule of law at the global and local level, the UN Global Compact launched its Business for the Rule of Law initiative. The initiative will deliver the Business for the Rule of Law Framework (in draft form at the time of the consultation workshop), which highlights the business case, business actions, examples of business support for the rule of law, and a call to action for business to respect and support the rule of law.

At a practical level, there are a number of ways that business can support rule of law, including through:

- strengthening and improving access to the justice system;
- building local capacity to make, disseminate, implement, apply, enforce, interpret and reform the law;
- promoting more effective, accountable, transparent and inclusive institutions at all levels; and
- encouraging more responsive, inclusive, participatory and representative decision-making at all levels.
This consultation workshop sought input from participants on a number of specific questions in relation to the various elements of the draft Business for the Rule of Law Framework and its practical application.

3. Business Case for Supporting the Rule of Law

   a. What does the Rule of Law mean in Australia?

      o Procedural fairness.
      o Freedom of expression and assembly.
      o The Rule of Law is, in some respects, taken for granted in Australia.
      o Certainty (that is, all parties are playing by the same rules).
      o Rule of law does not mean rule by law. The creation and application of laws by those in power does not, of itself, legitimise those laws if the laws are contrary to human rights principles or other universal rights (such as under the Australian Constitution). An example given in relation to this point was the federal government’s proposed metadata surveillance laws which are purportedly in response to the threat of terrorism.
      o The group presented different perspectives on the relationship between democracy and the Rule of Law:
         ▪ One speaker said that there must be consistency between the law and the democratic process in which those who are subject to the law participate (i.e., the law ought to be a reflection of the will of the public/electorate).
         ▪ Another speaker said that it is not strictly necessary for the making of laws to be a reflection of the democratic process in order for the Rule of Law to be in operation. Laws can be and are made which are unpopular and do not reflect the collective will of the electorate – the key issue is whether the enforcement and accountability towards these laws is equal for all constituents.
         ▪ Laws are ‘set today and interpreted tomorrow’. Effective laws should be able to be easily interpretable in all situations, so that the principles that underpin the laws can be applied as they were intended to be.
         ▪ The Rule of Law is always evolving – interpretations to laws will be applied differently over time
         ▪ In Australia, dysfunctional and unstable governments at the federal and state levels are undermining the Rule of Law.
Politicians in Australia are exposed to the wrath of voters at an unprecedented level. In part, this is due to the 24-hour media cycle and the increasing prevalence of digital and social media.

This allows the electorate to voice their dissatisfaction with politicians more directly and with greater frequency than ever before. It was observed by one speaker that in the past, the culture would be to the effect of ‘we have an election, we respect the result, and we then allow the government to govern the country for their full term in office’. This is not the case anymore, and the electorate appears to have an appetite for change at shorter intervals.

In turn, this means that governments in Australia are focussed on short term survival and are not prioritising a strategic vision for the development of the country.

This creates frustration for business, which needs political stability and strategic certainty from government in order to have the confidence to undertake projects requiring long term investments and commitments.

b. How does business benefit when there is a strong Rule of Law? Alternatively, what challenges exist for business when the Rule of Law is weak?

- Businesses benefit from certainty in the legal sphere as this fosters confidence that their operations will not be subject to sudden, detrimental changes that are outside of their control.
- Cross-jurisdictional transactions create confusion for Australian businesses — which laws are businesses expected to comply with when international and domestic laws are in conflict?
- The enforcement of international laws adopted in Australia is often quite slow to occur. This is detrimental for businesses, as they are forced to operate without any guidance as to how new laws will work in practice. Businesses are also often held to the higher international standards by stakeholders regardless of domestic law.
- Access to the legal system is a key issue. This is more pertinent for citizens and smaller parties rather than for large corporations, which have the ability to draw on considerable funding. An example shared was that, owing to the funds available to larger businesses, and the legal representation benefits that these funds can obtain, smaller business ‘get flogged’ in court when a dispute is litigated. It was suggested that funding is required for both the courts and for litigants who do not have access to representation to ensure that the court process is not unfairly balanced in favour of well-represented litigants.
- The strong enforcement of Rule of Law principles locally might actually have detrimental impacts on the application of the Rule of Law globally. Where there is
uneven application of the Rule of Law between international jurisdictions, businesses are able seek out conditions in countries where the Rule of Law is weak; conditions which might be economically favourable to those businesses. The example was given of international tax havens and arbitrage scenarios. This situation undermines the economic stability and performance of the countries in which the Rule of Law is strong.

4. Business Action and Business Examples in Support of the Rule of Law

a. Business Action 2 – Respect and support the accountability of all persons, institutions and entities, public and private, to laws that are publicly promulgated and which are consistent with international norms and standards.

- Explore the meaning of the Business Action and how it relates to business
  - Although ‘respect’ and ‘support’ were defined within the documentation and again for participants on the day — and presumably will also be defined in the final framework — there was no definition or guidance provided regarding the word ‘encourage’. Clarity is needed on what ‘encourage’ means in the context of this Business Action; does it mean something more than the action or advocacy meant by the word ‘support’?

  “Business needs guidance on the distinction between ‘support’, ‘respect’ and ‘encourage’. What are the practical implications of these terms on businesses?”

  - Respect the equality of all before the law: initially, there was general consensus that the Rule of Law is largely taken for granted in Australia in this day and age and therefore didn’t require much analysis; incentives to respect the law inherent in the law already, along with penalties for not respecting the law.

  - The gathering and dissemination of data about issues of actual or potential inequity was one manifestation of ‘support for equal protection’ that businesses should be well-equipped for, due to businesses typically already having mandatory and/or voluntary reporting mechanisms in place. More accurate and widely available data can result in the illumination of previously unnoticed areas of inequity, a spotlight on areas in which inequity is increasing, and better advocacy on the relevant issues. Greater understanding of causes and correlations should lead to more effective countermeasures. The collection and communication of this data goes above and beyond what is currently expected of corporations, and actively sustains existing public policy work or initiate new areas for examination, these sorts of activities were considered to be part of the undertaking to ‘support equal protection’ and may also fit within the definition of ‘encourage’.
• Consistent with international norms and standards: the differences between the standards captured in free trade agreements and the local application of related domestic laws can lead to more or less just outcomes. This was offered as one reason why consistency between domestic laws and international norms is so important.

• Encourage the appropriate consultation in the drafting of laws
  - The volume of legislation that is currently being generated by Australian parliaments, and the often short timeframes within which parliamentarians (and sometimes businesses) are afforded the opportunity to review and comment on this legislation, means that meaningful contributions to legislative development from businesses are forestalled.
    “When I was working [with an Australian Federal politician], there was a new law every day. People couldn’t read and respond in time… The government was just trying to drive an agenda.”
  - The view was expressed by a number of participants that lobbying by businesses can be either good or bad. Business lobbies for self-interest, which can be bad because it can occur “under the table or behind closed doors” (i.e. in non-transparent ways). However, lobbying by businesses was considered a potential counterweight to lobbying by (equally) self-interested lobby-groups or political parties.
  - An evolving critical view of the regulatory regime was considered an important aspect of the drafting, and re-drafting, of laws. Well-meaning legislative approaches to issues can outgrow themselves and be abused or become anachronistic and do more damage than the issues they were addressing. Constant vigilance is required.

• Explore how the Business Action can be implemented by business by sharing an actual or hypothetical example

  Respect the accountability of all to the law
  - There was some question of whether anyone in business is meaningfully held accountable for breaches, once they have been detected. In other words:
    “As businesses, are we disciplining people internally?”

    An example provided was the recent Global Financial Crisis (GFC) and some of the value destruction which occurred leading up to the GFC. If the bodies and people who were responsible for this value destruction were ever held accountable for their contributory activities, the business community isn’t generally aware of those prosecutions, or the penalties dispensed.

    The perception of the level of accountability of businesses to regulators is governed by euphemisms which soften the perception of the power exercised by the
regulator and the nature of the relationship. For example, when a regulator approaches a business regarding allegedly problematic activities, and the business agrees to a series of undertakings to address or mitigate these problematic activities the business also pays an amount which is effectively a fine, but which is called a 'settlement'.

"Firms are buying their way out of regulatory accountability."

Similar examples provided were of voluntary contributions by corporations (often banking institutions) to financial literacy projects after self-reporting of misconduct under the Australian Bank Bill Swap Rate (BBSW).

"Feels like buying your way out of it."

Further, those voluntary undertakings are often perceived as the sorts of activities which the business should have been pursuing anyway, based on the relevant regulatory regime which the business has fallen afoul of. While it’s obviously good that the business has now agreed to adhere to the regime, it was considered worth stressing that these businesses must respect the spirit of the enforceable undertakings they enter into, not just the letter.

- The perception is that deferred prosecutions (by regulators) are coming about due to the regulator(s) recognising the risk of not getting a successful prosecution, which may be for evidentiary reasons, or the cost of prosecution; enforceable undertakings are an easier option for the regulator as well.

- Despite, or perhaps because of, the earlier observation that respect for the Rule of Law is largely taken for granted in Australia in 2015, the lack of attention paid by most corporations to anti-corruption and anti-bribery measures was raised by more than one participant as an area of risk for the Australian business community. It was observed that the divergence between the perceived risks of bribery (low) and the actual risks of bribery (high) indicates that most people in business do not have an adequate understanding of anti-corruption laws and the risk of bribery and corruption have little knowledge of this area. A private sector economics report survey on bribery and corruption in Australia and New Zealand will soon be released detailing the extent of this divergence between actual and perceived risk and highlighting the need for businesses to conduct a thorough risk assessment and develop a better understanding of the law.

"There seems to be a disconnect between the risk and reality. Most [companies surveyed] did not report bribery and corruption among their top 5 risks."

Support the equal protection of all under the law
o Gender equality in business can, and has been, encouraged due to supply chain examination by organisations such as big banks. One big bank routinely examines their panels and asks challenging questions regarding how many women are on panels. Suppliers have to provide statistics to provide transparency. I’ve had to have some tough conversations... “You don’t have any women on your panel, you need to go away and think about why because I’m sure you have plenty of smart women in your business.”

o Equality of hiring and promotion of employees with non-heteronormative characteristics is also under examination by certain corporations. One financial services firm was cited as an example of a company which says to their suppliers:

“unless you can tell us what the figures are for your gay, lesbian and bisexual employees and managers, we don’t believe you’re taking [equal hiring and promoting practices] seriously”.


- Explore the meaning of the Business Action and how it relates to business
  o Businesses need to learn what the international norms and standards are. Many wouldn’t have the faintest idea. That knowledge needs to be disseminated throughout the business.

- Explore how the Business Action can be implemented by business by sharing an actual or hypothetical example

Participants raised the following points in their discussion:

- Principle number three arises in the conflict situation for which preparation can be made. What can businesses do about these things?
- Need to disseminate that knowledge across the business.
- If the international norms and standards aren’t complied with, you need to know what they are and not to play the game.
- Not to obfuscate, delay, obstruct, object, frustrate resolution of the dispute. What is desirable is a proper resolution. Cooperation in the conduct of the dispute resolution process is very important. Being willing to negotiate and disclose what needs to be disclosed. Actively seeking out a fair resolution of the dispute needs to be done. Also, giving instruction to legal reps to seek the same resolution is needed.
- Don’t generate unnecessary costs that can become someone else’s burden.
- Think about providing some level of pro-bono assistance to community legal bodies. There are community justice centers in NSW that can’t afford it otherwise, to ensure that these goals are pursued. An incentive is needed to complete this and an inventive thought about providing a session or financial assistance.

- We need to support the constitution or recognition of the Indigenous population. Strengthen their position in society and allow them to share our goals.

- Make representation for positive legal development and develop the law in positive ways to develop the community. Lobbying, making submissions to appropriate bodies on a principle basis is needed as well.

- You can support corruption by turning a blind eye to it. There should not be a blind eye when the situation arises. If you are acting in a principle way to prevent corruption you would say no, and make the situation known as widely as you can amongst your colleagues. There is a combined existence which can change the idea.

**c. Business Action 4 – Support initiatives that make justice accessible to all. Specifically:**

i. Support initiatives to strengthen access to legal services such as paralegal services or free legal clinics

ii. Support enhanced access to information

iii. Support efforts to increase understanding of the law and its application

- Explore the meaning of the Business Action and how it relates to business

One participant noted:

- Within the Australian context, most access to justice initiatives such as access to legal services and information focus on the 20% who create 80% of the most urgent demand due to socio economic and/or special needs. Equally, the wealthiest are able to access justice by means of affording top legal advice; this is closed to most people.

- Access to justice for all requires thoughtful understanding and a more profound, meaningful support to all members of Australian society by ensuring they can access information and understanding of the effect of law and access justice through means they can afford. Understanding the law and its application is closed to many of those who most need it.
Another participant noted: The enormous costs around litigation and accessing quality legal advice is one of the most significant barriers to accessing justice in Australia. The participant highlighted:

- Private citizens cannot afford to litigate matters: adverse cost orders are a significant inhibition to accessing justice — the threat of these move litigation entirely out of the realm of private citizens and make it the preserve of the corporate elite. As a consequence many claims may settle for a fraction of what claimants are potentially entitled to — negotiated bargains are also unfairly weighted (e.g., legitimate insurance claims for $3m may end up settling for $150,000). Providing security for costs orders severely impedes access to justice via litigation.

- “Missing middle”: the participant raised this class (i.e., neither corporate elite nor disadvantaged) as the most significant under reported loser in terms of access to justice. Some attempts at reform have suggested solutions such as an income based contingent loan scheme repaid via taxation system (like Higher Education Contribution Scheme designed by HECS architect Bruce Chapman).

- Missing middle also applies to business i.e., 95% of Australian businesses have less than 20 employees — small business is the norm.

- **Explore how the Business Action can be implemented by business by sharing an actual or hypothetical example.**

  One participant outlined how a law firm could support access to justice

  - Clients pay for legal services: Most clients of a top tier firm have the financial means to access that level of justice which is very expensive.

  - One law firm funds a Homeless Persons Legal Clinic (a shop front services to homeless people which are assisted by firm staff enthusiastic for the project).

  - Pro bono legal services such as that litigation support provided by one law firm in M61/2010E v Commonwealth [2010] HCA 41 (major refugee rights/Rule of Law win in the Australian High Court striking down the Malaysian solution — Malaysia not party to Refugee Convention and Australia would place refugees at risk by sending them there) — the participant noted that Pro Bono practice is treated as “an ordinary part of business” by one big law firm — they run Pro Bono as ordinary client matters — treated just the same, as if it were a big commercial matter — this is crucial to success; career advancement for staff doing Pro Bono work is the same and solicitors are not penalised for Pro Bono work.

  - The participant also noted the need for governments to invest in infrastructure/infrastructure spending to support access to justice (unspecified).
A government participant noted:


- Need to follow international best practice models — e.g., US does not have adverse cost orders (thus removing a barrier to litigation participation).

A corporate participant highlighted access to justice issues in understanding legal rights (or failure to understand them) and consequences of accessing justice in inappropriate forums using the following illustration:

- Tenancy disputes — many of these are brought as a result of, e.g. a failed business venture — i.e. the tenancy dispute or the grounds for bringing it is not the real legal issue rather someone looking for any remedy anywhere. The Tribunal dealing with tenancy is respectful of the needs of all parties but the Company/Landlord will always win when this fact situation occurs as the law is on their side. This inequity could be mitigated by a comprehensive legal education campaign including corporations running education forums as a contribution. Most of the table noted caution in relation to the requirement for independent legal advice issues here — funding of programmes run by an independent agent may be better.

- This participant also raised a specific illustration of the way in which business may drive law reform relevant to Rule of Law and access to justice and on request he emailed the following (as per the UNGC guidelines):

> “The Property Law Reform Alliance is an alliance of organisations involved in the property industry.

> “The main project for a number of years has been the development of a Uniform Torrens Title Act. The reason for such an Act is that differences in property laws between each state jurisdiction cause extra costs in transactions. As property law forms the basis of all commercial transactions in Australia there will be benefits to Australia beyond those immediately gained in property transactions. The benefits are not only for corporate Australia but also for mums and dads and smaller operators e.g. a practitioner working in Albury will work in New South Wales and Victorian jurisdictions; a resident in New South Wales may invest in Western Australia.

> “The proposed Act has been drafted by Emeritus Professor Peter Butt. Professor Butt was asked to draft a document that represented best practice. It has been distributed to the constituent bodies of the PLRA, the Registrars-General and State and Commonwealth Attorneys-General.

> “The proposal has been put to the Australian Council of Attorneys General, the Attorney General’s Department (Cth) and twice to the Registrars-General Conference in Australia.”
been put forward as industry’s best practice knowing that any decision and form of document is a matter for Australian Governments.

“Whilst there seems to be general support for the proposal there are difficulties in pushing the proposal ahead. They relate to States’ rights and costs. It has been suggested that if a cost/benefit analysis were undertaken the proposal would be actively supported by Government. The cost of such a study and the resources required are beyond that of the Association’s constituent members and the current focus is on trying to find support to initiate that process”.

An NGO participant noted:

- Government programmes need to be regularly assessed for impact, for example USAID — massive aid programme, but overall assessment found USAID did not have the effect of improving anything at all in terms of developing countries and international trading networks — the big countries continued to set the pace.

- Need for business to follow model litigant rules and to pay their taxes in their place of operation (i.e., not off shore) — no point for business to sign up to well-meaning programmes if they don’t pay tax as required in the first place.

- A government participant:

  - Pro bono needs examination. In the course of his enquiry into Access to Justice it became apparent that who gets Pro Bono is skewed to certain groups, e.g., top tier law firms will do pro bono work for elite organisations such as Opera Australia and small firms will do pro bono for local Rotary Clubs or the local Bowling/Services Club. In terms of Pro Bono initiatives only c.2% goes to access to justice in any meaningful way.

  - Pro bono initiatives work best if done in form of paid support for Community legal centres who can then allocate work according to need (measureable standards).

**Table Presenter to Room - Summary of Discussion:**

It is important to always consider the community affected when considering support for access to justice initiatives e.g.:

- Well-funded, highly resourced corporations and elites able to afford legal representation

- “Missing middle” — ignored, disadvantaged, e.g. security for costs orders inhibits litigation options.

- Highly disadvantaged on socio-economic grounds.
The absence of clear, focused information is a major problem affecting, particularly, groups ii and iii.

Support for access to justice by business:

- What are businesses doing to facilitate justice? Are they behaving ethically? Are they using tax structures which prevent money being spent on social justice initiatives?
- Model litigant rules for business — limits on adverse cost orders which would frustrate access to justice of those who cannot afford security for such orders.
- Law firms may support through pro bono activities, e.g. by funding legal clinics (such as the Homeless Persons Legal Clinic).

Frustrations to support for access to justice:

- Law firms/lawyers - pro bono problem/issue — provision of scarce Pro Bono resource is often to affluent sectors/organisations.
- Non-lawyers — access to legal remedies outside of litigation; need for better understanding of rights and obligations via appropriate information sharing and information forums.
- More effective (or more effective use of) industry ombudsmen with power to educate and be a touch point for consumer rights.
- Challenge for law firms/businesses’ employee engagement where pro bono is seen to diminish career or career opportunities however legal community has obligation to dispel this.

d. **Business Action 5 – Respect applicable contract and property rights.**

- **Explore the meaning of the Business Action and how it relates to business**
  - A strong legal framework with clear contractual and property rights is largely in place in the broader Australian legal context. However, this is not necessarily true for Indigenous communities.
  - The development of the ‘Western’ legal system has mostly been built on proprietary rights — so the concepts of contract and property are quite refined in Australia.
  - There is a greater need for a strong framework to guide international investment activities undertaken by Australian businesses.
  - The group noted that a recent example of this Business Action being implemented in Australia was the enforcement of international investment rules by the federal
government which has had the effect of revoking property purchases made by Chinese investors because the purchases were in breach of proscribed limits on foreign property investment.

- The group noted that, in the context that some time was devoted to differentiating the concepts of ‘support’ and ‘respect’ earlier in the workshop, these two terms seemed to be used interchangeably in the Business Action — both terms are included but it seems unclear in which areas positive steps are required and in which areas mere compliance is sufficient.

- There are not nationally consistent laws across the Australian states with respect to property (e.g., conveyancing), which makes the equal application of the law throughout Australia problematic.

- Property development is always fraught with uncertainty because of state by state differences — much greater certainty could be offered by a uniform system.

- Businesses are seeking consistent application of the law regarding the making of contracts around the world, particularly in the area of bribery and corruption. The example was given that ‘gift giving’ in the course of business negotiations with businesses in countries such as China and Brazil is commonplace, whereas under Australian law businesses are prohibited from engaging in these activities. This can have the effect of putting the Australian companies at a competitive disadvantage in comparison to other countries with less rigorous bribery laws.

  - Anecdotally, as a way around this, some companies hire other companies to do the gift giving as an agent, so that the original company does not have to get involved itself.

- The question was posed whether there should be a more standardised view of contract law around the world — owing to the differences between civil and common law systems. In the US it is codified, and in many countries in Europe, whereas Australia tends to follow a common law system of legal development and interpretation.

- Explore how the Business Action can be implemented by business by sharing an actual or hypothetical example.

  - There are business organisations such as the Property Council of Australia and Business Council of Australia which act as forums for proposing legal reform, and the group has found these organisations are an effective way to promote legal reform.

  - Businesses can get involved via education for their staff on compliance with contractual obligations (oral and written contracts), anti-corruption obligations and fair dealing.
Directives on contractual compliance must come from the top of a company at the CEO level, not just from the legal department or any other department.

Law firms and companies can provide Pro Bono work for contractual and property matters to parties with a demonstrable need.

Respecting the Rule of Law means not taking every technical point in the contract just because you can. A collaborative dispute resolution process between parties should be fostered.

Submissions to government are usually made via law firms on behalf of businesses.

The ‘agreed dispute resolution procedures’ between businesses in a contract should not be used as a leverage point to achieve a commercial outcome. That is, there should not be a ‘threat of litigation’, but rather a genuine attempt to collaboratively resolve a dispute.

- The key question for businesses is how to promote this culture internally to all members of a company to ensure that the business as a whole is in compliance. It is not enough for the legal department to be aware and compliant – all parts of the business must be compliant.

All businesses must respect the final outcome of whatever mediation or arbitration process is in place.

The point was made that it would be an impediment to business negotiations for there to be some kind of code proscribing standards or contractual terms to redress any imbalances in bargaining positions between parties to a contract. All businesses, regardless of their size or position, should be allowed to enter into a negotiation with open eyes and without restrictions, aside from the laws which bind them internationally and domestically.

e. Business Action 6 – Advocate business respect and support for the Rule of Law in our business relationships and share our experiences in this area.

- Explore the meaning of the Business Action and how it relates to business
  - To advocate for business respect and support for the Rule of Law is to embed Rule of Law principles in practice throughout the operations of the business (comment that this includes internal and external business interaction)

- Explore how the Business Action can be implemented by business by sharing an actual or hypothetical example
  - Managers at all levels within a business will need to be well-versed with the initiative in order to promote it internally and externally.
Implementation of the Rule of Law principles within business needs to include both the private and the public sector otherwise it will not work.

The implementation may need to receive bi-partisan support from Parliament, for fear that it will become too politicised.

Businesses will need to utilise internal resources and allocate funds to communicate Rule of Law initiatives.

High profile meetings in which the CEO of a business promotes the implementation to another would be a successful measure to advocate for Rule of Law. This will cement action.

To implement successfully, business will need to work with government to explore possible regulatory implications — or a roundtable discussion.

Efforts to advocate for the Rule of Law amongst the business community should draw on the public profiles of the CEOs of the businesses which engage in advocacy activities.

One method of advocating for human rights and sustainability within the business community that has been taken by one business is to require all businesses within their supply chain to demonstrate their compliance with principles of sustainability and gender pay equality.

Are these the correct Business Actions to include in the Framework?

- The following suggestions were made for improvement to the existing Business Actions:

- Business Action 3(d) should be given prominence as a separate action as this particular action was at the centre of a lot of discussions around cross-jurisdictional business activity.

- It should be noted that the access to justice initiatives contemplated in Business Action 4 will be different in different cultures and settings (i.e., all dispute resolution processes should be contemplated and not just ‘western’ ones).

- All Business Actions need to be framed as being less aspirational and more in the nature of a directive which makes clear what is being expected of businesses under the Business Actions.

- The wording used in all Business Actions needs to be standardised to encourage compliance and remove any room for ambiguity when the Business Actions are disseminated across and within businesses.

- The question was posed whether the Business Actions encapsulate the obligations of businesses to all stakeholders, or to shareholders only?
Are there Business Actions that are missing from the Framework that should be included?

- Actions relating to bribery and anti-corruption activities need more clarity; they could be captured in a separate Business Action.

- A reference to technology (encapsulating privacy, information and e-commerce) should be included as this does not receive coverage in the Business Actions and yet is at the forefront of all modern business activities.

- There is no attempt to address (or plan for business to address) Rule of Law in the context of individuals’ privacy, and increasing government access to metadata. This is considered a very current and big issue for all developed and developing countries.

- The workshop as a whole queried why in Business Action 2 (“Respect and support the accountability of all persons, institutions and entities, public and private, to laws that are publicly promulgated and which are consistent with international norms and standards”) there is no specific mention of respect for human rights.

- A preamble recognising the interest of shareholders as a whole might be necessary for these Business Actions to be embraced and adopted by the business community.

- It was felt that the Business Actions do not fully reflect the globalised environment in which business operates. Governments must often be seen to be acting quickly to address problems as they arise but this leads to compliance issues due to inconsistency between jurisdictions (e.g., post-GFC measures). The business challenges inherent in operating across borders can lead to non-compliance due to conflicting obligations as multiple government responses may lead to multiple requirements. To be more effective, there needs to be standardisation and consensus at an international level, not just at the domestic level.

- One suggestion offered for resolving the issues of operating across jurisdictions was the argument (a la A V Dicey) that the oversight of courts would offer businesses and individual’s certainty. For this potential solution to work, there needs to be some form of recognition for, and greater clarity around, the status of corporations under international law and in relation to international bodies.

5. Call to Action (to Business and by Business) to Support the Rule of Law

a. What are some concrete steps business can take to respect and support the Rule of Law?
   ○ If the Business Actions were to be adopted by a business, an incremental analysis would be required to determine how the obligations of company directors to ‘act in
the best interests of the company’ align with the Business Actions. The frame of responsibility for company directors towards their companies and shareholders has the potential to change as a result of these Business Actions, and so any moves to formally adopt them would have to be treated very carefully.

- Guidance from groups such as the Business Council of Australia and the Australian Institute of Company Directors would be valuable in relation to this matter.

- An officer of the company could be appointed with the responsibility of: (i) ensuring ‘Rule of Law compliance’; (ii) incorporating the Rule of Law into the corporate governance framework; and (iii) educating employees regarding the concepts and obligations, including socialising the nature and scope of the specific standards to which the employees will be held.

- CEOs and Managing Directors need to take an active role in promoting the Rule of Law within their businesses. Providing prominent leadership by prioritising Rule of Law considerations in relation to standard business concerns and activities will create a culture of respect and adherence to Rule of Law principles.

- “If we get our CEOs on board to set the tone it’s a very effective measure.”

- The influence of General Counsels over their CEOs should be recognised and supported to assist with bringing in Rule of Law considerations in a pragmatic fashion, tailored for the way that makes sense for each organisation. Increase the resources provided to General Counsel to allow them to effectively guide CEOs to better respect and support Rule of Law.

- Businesses can integrate Rule of Law considerations into their existing procurement processes and spell out their expectations regarding support for Rule of Law principles in standard contractual terms within supply agreements. The combination of a rigorous procurement process which includes a check on Rule of Law issues and the inclusion of standard Rule of Law clauses clearly sets out the expectations that the bound parties have of each other for the duration of the agreement. Such “human rights due diligence” should also operate to reduce the risk of liability for problematic behaviour falling back on the party/parties which set out their expectations that such behaviour would not be entertained. An example was offered from the energy industry involving joint ventures and partnerships in addition to private contracts between the companies: mutual covenants regarding conduct between the parties and conduct in relation to governments and other parties can be included in contracts, thereby setting expectations and providing support to those individuals acting as employees or agents who are confronted by undesirable behaviour from the contracting party. Including this kind of clause in a contract is evidence of the business’ commitment to the relevant principles and
allows their staff to point to the clause as proof that they are explicitly prohibited from behaving in the relevant undesirable fashion.

- Provide all workers within a business with the information and tools that are necessary for them to be aware of their obligations to avoid corruption.

b. What actions can other actors, including Government, academia and civil society take to improve legal institutions, access to justice, equality before the law, capacity building and other such action?

- Incremental changes to what directors must take into account when considering the shareholder interests are necessary and are underway, including more recent considerations of risk to reputation. Breach public perception of what corporates ought to do. Changing incremental analysis of what is in the best interests of the company. The more conversations which happen in boardrooms which take into account the broader state of the world. Sensitising people to these issues takes time.

- Education from organisations like the Business Council of Australia would be helpful to provide practical insight into how to take Rule of Law considerations into account while balancing existing well-known and widely understood business considerations such as creation and maintenance of shareholder value.

- Legislative and regulatory instruments which set out liabilities and responsibilities for directors must change in parallel with the cultural changes required. By amending the relevant instruments, governments and regulatory bodies can directly incentivise the active incorporation of Rule of Law considerations in business practice and provide guidance on the balance between those standard business practices and the new considerations.

**Anti-Corruption and Anti-Bribery measures**

- Practical tools for recognising corruption etc., based on jurisdiction/culture/industry. An online website for tips to spot and combat corruption.

6. **Mobilising Business to Support the Rule of Law**

   a. What obstacles, if any, does your organisation experience that prevents it from supporting the Rule of Law in this country or in any other country it has an interest in, such as investments, operations, business relationships?

   - Business needs more clarity on what is being asked of them from the Business Actions in order to establish what it needs to do from a compliance point of view.

   - It can be difficult for business to engage with such a conceptually abstract concept.
b. How can the UN Global Compact, and other actors, support business to take action in support of the Rule of Law (e.g. information sharing via webinars on specific Rule of Law topics, in-person events, leveraging online resources, strategic partnerships)?

- The UN should be more active in leveraging the valuable UN brand to secure engagement from businesses. Businesses would derive a great benefit from association from this brand in the Rule of Law context.

- Provide opportunities for businesses that adopt Rule of Law principles to partner and network with each other.

- Provide a ‘certification mark’ for businesses to adopt if they are certified (by the UN or an associated agency) as compliant with the Rule of Law Business Actions. This will be of assistance to business executives in selling the businesses benefits of compliance with the UN Rule of Law Business Actions to the board of directors, since boards are ultimately interested in a cost/benefit analysis of all business activities. [Note: It was noted in the workshop that the UN Global Compact is not (and that B4ROL similarly would not be) a certification initiative.]

- Ensure that company investors are engaged with the Business Actions, as this is a major source of pressure in the decision making process for business executives and company directors.

- Provide examples of how to adopt the Business Actions — or more relevantly, how to integrate the Business Actions into existing business processes.

7. Additional Comments, Suggestions or Questions

- Matchmaking opportunities: Companies with similar interests in Rule of Law principles and levels of commitments to the Rule of Law Business Actions could be networked through a third party site or via a third party agency which provides a forum for these companies to demonstrate their interest and report on their commitment/compliance. This sort of network could make it easier for Rule of Law champions to further Rule of Law outcomes by drawing a direct relationship between compliance with the Business Actions and positive economic outcomes for the participating corporations.

- It has to come down to revenue — what is the cost of all this. Something tangible like a certification mark or logo can be a useful to show businesses are signed up, with an annual requirement to report any progress. Australian companies already do lots of things to report on outcomes. The competitive spirit within and between organisations can be harnessed to foster engagement with Rule of Law principles. Similar to a listing of the world’s most ethical corporations based on criteria specific to the Rule of Law Business Actions.
• There are a number of investment people who come to Global Compact Network Australia events and engage in dialogue. Some investors have used Global Compact and Rule of Law-related considerations in relation to company ESG reviews (e.g. the UN Global Compact commitment has been noted in investor research as a public statement of commitment in relation to in supply chain human rights issues). If companies are signed up to comply with the Business Actions, then it could be a good ‘tick’ for investors interested in that company.

• In the final toolkit, have examples of how these kinds of Business Actions can be adopted into practices and operations that are in already in existence. For example:

• “You can do A, by having these additional considerations factored into your existing process for doing B. Instead of setting up whole new processes, you are already spending $X on this mechanism; just add another question to your supply chain examination and you’ll be compliant.”

[Workshop Report End]