



# Seven Questions to Help Determine When a Company Should Remedy Human Rights Harm under the UNGPs

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A recent OECD National Contact Point (NCP) case from Australia illustrates the fluid nature of a company's business activities and its responsibility to participate in providing remedy under the UN Guiding Principles on Business and Human Rights (UNGPs). The UNGPs discuss three separate concepts—cause, contribute, and directly linked—to define a company's connection to a negative impact and subsequent duty to provide a remedy. These are not rigid categories but rather “guiding principles” designed to assist companies in assessing how they can act responsibly.

Building on guidance published by the UN and others in recent years, and using the [Equitable Cambodia \(EC\) & Inclusive Development International \(IDI\) v. ANZ Group & ANZ Royal](#) (“ANZ”)<sup>1</sup> OECD NCP matter as an example, this white paper identifies some of the questions that companies may ask to better understand their connection to negative impacts and appropriate responses.

The questions for consideration, presented and explored in detail below, are:

1. Did the company's actions on their own cause human rights harm?
2. Did the company facilitate, enable, or incentivize other parties to cause harm?
3. Could the company have known about or foreseen the potential harm?
4. How specific was the connection between the company's operations and the harm?

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<sup>1</sup> See [https://cdn.tspace.gov.au/uploads/sites/112/2018/10/11\\_AusNCP\\_Final\\_Statement.pdf](https://cdn.tspace.gov.au/uploads/sites/112/2018/10/11_AusNCP_Final_Statement.pdf).

5. Did the company take steps that likely could have prevented the harm from occurring?
6. Did the company directly benefit from the negative impact?
7. Do stakeholders and rightsholders believe that the company caused, contributed to, or was directly linked to the harm, or that the company should otherwise provide or contribute to remedy?

As with the cause, contribute, and directly linked concepts themselves, these questions are not intended to be applied formulaically or rigidly. They are designed to help guide companies as they consider appropriate actions under the UNGP cause/contribute/directly linked framework when a negative impact arises. The paper concludes by reframing these questions as forward-looking inquiries, intended to help shape a company's human rights due diligence efforts. A [worksheet](#) to help guide the analysis is also available.

## THE UNGPS

The UNGPs, adopted unanimously by the UN Human Rights Council in 2011, provide the global standard of conduct for business to respect human rights. Organized into three pillars, the first explains the State's duty to protect human rights through enacting and enforcing laws. The second pillar outlines the corporate responsibility to respect human rights, which means business should "avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; and seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."<sup>2</sup> The third pillar provides guidance on providing access to remedy after human rights impacts have occurred.

An "adverse human rights impact" is defined by the Office of the UN High Commissioner for Human Rights (OHCHR), the UN body tasked with developing guidance on the UNGPs, and the UN Working Group on Business and Human Rights, which promotes implementation of the UNGPs, as an impact that "occurs when an action removes or reduces the ability of an individual to enjoy his or her human rights."<sup>3</sup> Impacts can be either actual human rights harms (i.e. "those that have already occurred")<sup>4</sup> or potential human rights impacts (i.e. risks that may occur in the future).<sup>5</sup> Actual impacts require remedy where the company "caused" or "contributed to the impact," while potential impacts require preventing and mitigating the risk to the extent possible.<sup>6</sup>

Companies are expected to conduct ongoing human rights due diligence to identify, prevent, mitigate, and account for actual and potential human rights impacts they may be causing, contributing to, or directly linked. Companies are also expected to have in place remediation processes to address adverse

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<sup>2</sup> UNGP 13. "Business relationships" refer to "business partners, entities in its value chain, and any other non-State entity directed linked to its business operations, products or services." UNGP 13, Commentary.

<sup>3</sup> OHCHR Interpretive Guide on the Corporate Responsibility to Respect Human Rights ("Interpretive Guide") Q10 at 15

<sup>4</sup> UNGP 19, Commentary

<sup>5</sup> Interpretive Guide Q10 at 15

<sup>6</sup> Interpretive Guide Q10 at 15. For more guidance on developing business and human rights remedies, see: Jungk, Margaret; Chichester, Ouida; Fletcher, Chris. "In Search of Justice: Pathways to Remedy at the Porgera Gold Mine," available at <https://www.bsr.org/en/our-insights/report-view/porgera-gold-mine-barrick-pathways-to-remedy>

human rights impacts they “caused” or to which they “contributed.”<sup>7</sup> The UNGPs set out several propositions regarding the cause/contribute/directly linked framework:

- **Cause:** “Where a business enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact.”<sup>8</sup>
- **Contribute:** “Where a business enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm.”<sup>9</sup>
- **Remedy for harms “caused or contributed”:** “Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.”<sup>10</sup>
- **Direct linkage:** “Where adverse impacts have occurred that the business enterprise has not caused or contributed to, but which are directly linked to its operations, products, or services by a business relationship, the responsibility to respect human rights does not require that the enterprise itself provide for remediation.”<sup>11</sup> A company is expected to use its leverage to prevent or mitigate the impact, however.<sup>12</sup>

In understanding this framework, the concepts of cause, contribute, and directly linked are not strict categories. Like all other aspects of the UNGPs, they are intended to be read with the objective of “enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization.”<sup>13</sup>

Appropriate business responses may differ from situation to situation, and the notions of cause, contribute, and directly linked are perhaps more accurately considered as guideposts on a multi-dimensional spectrum of responsible business conduct. As Professor John Ruggie has explained:

“There is a continuum between contribution and linkage. A variety of factors can determine where on that continuum a particular instance may sit [including] the extent to which a business enabled, encouraged, or motivated human rights harm by another; the

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<sup>7</sup> UNGP 15

<sup>8</sup> UNGP 19 Commentary.

<sup>9</sup> UNGP 19 Commentary.

<sup>10</sup> UNGP 22.

<sup>11</sup> UNGP 22 Commentary.

<sup>12</sup> UNGP 13.

<sup>13</sup> UNGPs, General Principles

extent to which it could or should have known about such harm; and the quality of any mitigating steps it has taken to address it.”<sup>14</sup>

The seven questions below are intended to help practitioners navigate the variety of factors along this continuum.

## The Case of ANZ

The outcome of the recent OECD National Contact Point Specific Instance involving the Australia and New Zealand Banking Group Limited (ANZ) is consistent with the multi-dimensional framework detailed above. In that case, two civil society groups filed a Specific Instance with the Australian NCP against ANZ on behalf of hundreds of Cambodian families who claimed that they were forcibly displaced from their land by Phnom Penh Sugar (PPS), the developer of a sugar plantation and refinery project in Cambodia. ANZ was one of PPS’s financiers. While recognizing that the sugar company was primarily responsible for the alleged harms, the civil society groups alleged that ANZ failed to implement effective due diligence and requested that ANZ improve its risk governance and redress mechanisms and disgorge the profits from its loan to the sugar company.

The NCP concluded that ANZ had not “acted in line with its own stated corporate standards with respect to human rights” and encouraged ANZ to improve its processes.<sup>15</sup> In February 2020, the parties reconvened and reached a final agreement.<sup>16</sup> ANZ conceded that while it had encouraged the sugar company to remedy the adverse impacts from its conduct, the efforts were not successful.

ANZ agreed to pay its profits to the affected communities, and the NCP concluded that the responsibility to remedy extends to instances where, as with ANZ, the company was *directly linked* to the impact: “Where a company’s due-diligence identifies impacts which it has caused or contributed to, or to which it is linked through a business relationship, the company has responsibilities regarding remedy for those impacts.” It also noted that when “a company has gained revenue” from activities that cause negative impacts, “the payment of the revenues to those parties may be one way a company can” act responsibly.<sup>17</sup>

At first blush, the Australian NCP’s analysis appears inconsistent with the UNGPs, as well as the OECD Guidelines for Multinational Enterprises, which incorporate the cause/contribute/directly linked framework. While the UNGPs and OECD Guidelines note that companies directly linked to negative impacts do not have an obligation to “itself provide for remediation,”<sup>18</sup> the NCP instead states that a company “linked through a business relationship to a negative impact...has responsibilities regarding remedy for those impacts.” However, understood as part of the holistic approach toward responsible company behavior, in which the terms “cause, contribute and directly linked” are not rules but assistive devices, the ultimate outcome is more logical.

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<sup>14</sup> Ruggie, John G. “Comments on Thun Group of Banks Discussion Paper on the Implications of UN Guiding Principles 13 & 17 In a Corporate and Investment Banking Context,” February 21 2017, available at <https://www.business-humanrights.org/sites/default/files/documents/Thun%20Final.pdf>

<sup>15</sup> See [https://cdn.tspace.gov.au/uploads/sites/112/2018/10/11\\_AusNCP\\_Final\\_Statement.pdf](https://cdn.tspace.gov.au/uploads/sites/112/2018/10/11_AusNCP_Final_Statement.pdf).

<sup>16</sup> See [https://ausncp.gov.au/sites/default/files/2020-02/Complaint\\_11\\_statement.pdf](https://ausncp.gov.au/sites/default/files/2020-02/Complaint_11_statement.pdf)

<sup>17</sup> See [https://ausncp.gov.au/sites/default/files/2020-02/Complaint\\_11\\_statement.pdf](https://ausncp.gov.au/sites/default/files/2020-02/Complaint_11_statement.pdf).

<sup>18</sup> UNGP 22, Commentary.

## Seven Factors to Help Determine Responsible Business Conduct

The ANZ outcome helps illustrate the usefulness of seven questions companies can ask when considering appropriate responses to negative impacts.<sup>19</sup> These questions emerge from the UNGPs themselves, as well as guidance from the OHCHR, OECD, Professor Ruggie, and others that have been provided since the UNGPs were adopted. These questions also incorporate learnings from our extensive engagement with companies over the last ten years on interpreting and applying the UNGPs across many industries and geographies through several multi-stakeholder fora. The questions help guide and narrow down which category the company may be in or perceived to be in by external stakeholders. These questions should not be treated as a formula of any sort, and other questions may be relevant in any given case-specific analysis.

### 1. DID THE COMPANY'S ACTIONS ON THEIR OWN CAUSE THE HUMAN RIGHTS HARM?

The first question a company may ask is whether its activities on their own without other stakeholders were sufficient to cause a negative human rights impact.<sup>20</sup> If so, the company is likely to be more closely aligned with the “cause” aspect of the framework.<sup>21</sup> If the company's activities were not sufficient in themselves to cause the impact, it may be more closely aligned with the “contribute” or “directly linked” aspects.<sup>22</sup>

In the context of ANZ, the bank's actions or omissions alone did not cause the harm. The bank was a partial lender, and the harms were caused by a customer and not the bank itself. Nor did the bank control the customer or direct its conduct in any way. As such, ANZ's response was justified in focusing on the principles associated with contributing or being directly linked to the negative impact.

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<sup>19</sup> This paper does not provide a framework to determining appropriate remedy and does not attempt to define “cause” “contribute,” or “directly linked” in the context of the UNGPs. In addition, one unaddressed issue is that a business' involvement in a negative human rights impact may shift over time based on its actions or omissions, which thereby changes the business' scope of responsibility. UNGP 17(c) states that human rights due diligence “should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.” As the OHCHR, the OECD, and Professor Ruggie have articulated, a company's involvement with an impact may shift over time. For example, the Letter from John Ruggie to Prof. Dr. Roel Nieuwenkamp Chair, Working Party on RBC OECD notes that “the Debevoise paper rejects the idea that there is a continuum among cause/contribute/linked.” <https://www.business-humanrights.org/sites/default/files/documents/OECD%20Workshop%20Ruggie%20letter%20-%20Mar%202017%20v2.pdf>. OECD Guidance (2018), at 70. While the continuum theory is useful in the context of monitoring rapidly evolving situations, particularly in high-risk markets, it is not as useful when trying to determine remedy, though it may be useful to keep in mind when planning future due diligence and mitigation efforts.

<sup>20</sup> OHCHR Letter to Banktrack (2017), pg. 5. Examples of when a business may “cause” a negative impact, sourced and inspired by [Doing Business with Respect for Human Rights](#) (2017), include: a business which manufactures a defective toy which injures children causes a negative human rights harm, namely violating health and safety and children's rights; a company which dumps chemical effluents from its production processes in a community's water supply causes harm as polluting the water supply infringes on the community's right to health and right to water and sanitation; retaining the passport of temporary foreign workers or migrant workers as a way to ensure their compliance with working schedules; using threats to persuade peasants to sell their land to give way to a new infrastructure project.

<sup>21</sup> OHCHR Letter to Banktrack (2017), pg. 7. According to the OHCHR, a company causes a human rights impact when its “actions and decisions on their own were sufficient to result in an adverse human rights impact, without the contribution of clients or other entities.”

<sup>22</sup> This is also known as the “necessary and sufficient” test, where a company's actions were both necessary to bring about the harm and sufficient on their own to bring about the harm.

**Takeaway:** A company’s actions that on their own cause a negative human rights impacts fall in the “cause” category.

## 2. DID THE COMPANY FACILITATE, ENABLE, OR INCENTIVIZE OTHERS IN CAUSING THE HARM?

Contribution commonly occurs in one of two ways: (1) via a third party or (2) when acting in conjunction with another entity. The first type of contribution occurs when business takes an action or decision that “creates strong incentives for the third party to abuse human rights” or “where a company facilitates or enables such abuse.”<sup>23</sup> In the second type, contribution can take place when a business activity leads to negative collective or cumulative impacts, such as drawing water from a well with other businesses that leaves little left for local residents or farmers (collective) or a relatively minor impact that over time leads to a significant impact (cumulative).<sup>24</sup>

ANZ did not incentivize the sugar company to commit negative impacts. Providing a routine loan or entering into a regular business contract is not likely to incentivize another party to cause harm. “Incentivizing” likely requires some evidence that particular promises, or contractual terms and conditions, were part of the transaction that actually incentivized another party to cause specific harm.<sup>25</sup> For example, if ANZ had specified that sugar must be grown in a specific region of Cambodia that it had reason to believe was acquired improperly, that may rise to the level of incentivizing.

However, providing funding to the sugar company could be seen as “enabling or facilitating” the harm, even if indirectly. “Enabling” can be thought of as contributing to an environment where harm is more likely to occur, e.g., by looking the other way in the face of known risks or allowing known or suspected bad actors to continue working unimpeded. “Facilitating” involves adding “to the conditions that make it possible for a third party to cause” a harm and can include affirmative actions or failing to take reasonable steps to prevent or mitigate a harm that the party knows or should know about.<sup>26</sup>

Cases that involve “enabling or facilitating” often trigger more questions specifically around what the company may or may not have known about the partner. Enabling or facilitating implies that the actor knows or reasonably should know that a harm could occur but acts nonetheless. Thus, the focus in this

<sup>23</sup> OECD Guidance (2018), at 70; The UN Guiding Principles on Business and Human Rights and conflict affected areas: obligations and business responsibilities, at 973 available at <https://www.icrc.org/eng/resources/documents/article/review-2012/irc-887-davis.htm>

<sup>24</sup> In the IBA Practical Guide on Business and Human Rights for Business Lawyers, the IBA defines contribution as when a business “incentivizes, facilitates, or enables third party impact,” and provides four examples: An internet company provides data about users of its services to a repressive government that enables the government to track and harass political dissidents, contrary to international human rights standards; An electronics retail brand changes product requirements for suppliers repeatedly and at the last minute, without adjusting production deadlines or prices, pushing suppliers to breach labor standards to ensure that the order is delivered; A food company deliberately targeting high sugar foods and drinks at children, with an impact on levels of child obesity; One factory’s wastewater discharges, in combination with the discharges of other companies, cumulatively pollute the drinking water in a community. IBA Guidance (2016), at pg. 20-21.

<sup>25</sup> OHCHR Letter to Banktrack (2017), at pg. 5 (incentivizing means “there needs to be a specific action or decision by the bank that provides motivation or incentives for the client to act in a way that results in human rights harm”); Interpretive Guide Q25 at 29-30; OECD Guidelines for Multinational Enterprises (2011), at 23 (“contributing to’ an adverse impact should be interpreted as a substantial contribution, meaning an activity that causes, facilitates or incentivises another entity to cause an adverse impact and does not include minor or trivial contributions”).

<sup>26</sup> OHCHR Letter to Banktrack (2017), at pg. 5-6.

contribution analysis would fall on whether ANZ knew or could have reasonably foreseen that the sugar company was likely to commit harm.

**Takeaway:** The more evidence that a company has enabled, facilitated, or incentivized another entity to cause harm—taking into account other factors below—the more the scales tip toward contributing.

### 3. COULD THE COMPANY HAVE KNOWN ABOUT OR FORESEEN THE POTENTIAL HARM?

Whether a company knew about or could have reasonably foreseen a harm is relevant in assessing a business response. If a company knows that a harm is likely to occur but fails to take action to prevent it, or if it would have become aware of the harm had it undertaken reasonable diligence, the company's responsibility to assist in remedying the negative impact is likely greater.

The UNGPs' concept of "due diligence" means nothing if not to acquire or gain knowledge about how a company may impact human rights. Gaining knowledge about potential involvement in a human rights risk or impact would also be rendered meaningless without an obligation to act on that knowledge—preventing, mitigating, and/or remedying (discussed more below in Question 5). By the same token, if a harm was actually not knowable or foreseeable, in such a way that reasonable due diligence would not have identified it, the responsibility to participate in remedy could be lowered consistent with a "directly linked" concept.<sup>27</sup>

This approach has been endorsed by the OHCHR and the OECD. In 2017, in the context of discussing a financial institution, and in particular the concept of "facilitation," the OHCHR stated: "[A] bank may facilitate a client or other entity to cause harm, *if it knows or should have known that there is human rights risk associated with a particular client or project*, but it omits to take any action to require, encourage or support the client to prevent or mitigate these risks. The bank's failure to act upon information that was or should have been available to it may create a facilitating environment for a client to more easily take actions that result in abuses."<sup>28</sup> Such facilitation, the OHCHR concluded, is tantamount to "contribution" under the UNGPs.

Similarly, in 2018, the OECD published guidance to companies on implementing the 2011 OECD Guidelines for Multinational Enterprises.<sup>29</sup> Echoing the OHCHR, the OECD explicitly states that "contribution" is when a company "causes, facilitates, or incentivizes" another entity to cause the harm.

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<sup>27</sup> A sound approach in this situation is to investigate the issue. In some cases where the harm was truly not reasonably foreseeable or knowable, the company could be closer to "directly linked" even though its specific products were involved in meaningful harm. In other cases, an investigation may reveal that it was reasonably knowable for a company to have identified a situation where they could and should have known that their products or operations were involved in causing harm. Thus, it would be closer to the "contribute" concept.

<sup>28</sup> OHCHR Letter to Banktrack (2017), at pg. 7. Professor Ruggie has agreed with such an approach. Letter from John Ruggie to Prof. Dr. Roel Nieuwenkamp Chair, Working Party on RBC OECD (2017) at 2, available at <https://www.business-humanrights.org/sites/default/files/documents/OECD%20Workshop%20Ruggie%20letter%20-%20Mar%202017%20v2.pdf>. The emphasis in the quoted text is present in the original.

<sup>29</sup> OECD Due Diligence Guidance (2018), available at <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

One factor relevant to this determination is the “extent to which an enterprise *could or should have known* about the adverse impact or potential from adverse impact, i.e. the degree of foreseeability.”<sup>30</sup>

The UNGPs note that “[even] with the best policies and practices, a business enterprise may cause or contribute to an adverse human rights impact that it has not foreseen or been able to prevent.”<sup>31</sup> The UNGPs do not apply a formulaic approach to situations that are complex and nuanced. Just because a negative impact connected to a company’s operations was foreseeable does not necessarily mean a company caused or contributed to it, and vice versa. Foreseeability and knowledge are, however, important considerations in assessing the appropriateness of a response. It casts light on the behavior of the company before making a business decision. In some cases, it may help protect companies from truly unforeseeable harm.

In assessing whether an impact was *reasonably* foreseeable, some questions that may be relevant are: how the company understood the potential risks before beginning its diligence efforts; the extent to which diligence efforts were pursued by the company and whether those efforts were commensurate with and tailored to the risks; whether the diligence undertaken was consistent with the company’s generally established approach to diligence; whether the company identified some or all aspects of the relevant risk during diligence; and the reason the company failed to identify all aspects of the risk during its diligence.

In the context of ANZ, the NCP noted in its final statement that there was publicly available information at the time of the financing that suggested the existence of human rights risks connected with ANZ’s lending, which should have raised “substantial questions and concerns.”<sup>32</sup> ANZ also noted that its initial due diligence “was inadequate,” which perhaps explains why it failed to actually foresee the risks.<sup>33</sup> Because the harms were foreseeable, ANZ’s connection to the resulting negative impact is perhaps closer to contribution, and its decision to provide remedy is therefore consistent with the UNGPs and responsible business practices.

Alternatively, had ANZ conducted reasonable due diligence but failed to identify a risk that later manifested into a negative impact, the risk may not have been reasonably foreseeable, and this outcome might have tilted the scale more toward directly linked. In this scenario, the question is whether the due diligence was, in fact, reasonable and adequate under the circumstances. Companies in this situation should consult trusted external stakeholders before reaching a conclusion to ensure that it comports with external expectations and perceptions of adequate due diligence.

**Takeaway:** The more evidence available that the harm could have been reasonably foreseen, the more likely it is that a company moves into the contribute category.

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<sup>30</sup> OECD Guidance (2018), at 70 (emphasis added). The OHCHR provides another example of where a company would be directly linked to a harm based on a situation that is not knowable: A company’s supplier “subcontracts work, without the company’s prior knowledge, to contractors that use forced labor. The company has not caused or contributed to the issue, but once made aware of it, it still has a responsibility to act to seek to prevent and/or mitigate it.” OHCHR FAQ, pg. 31.

<sup>31</sup> Commentary to UNGP 22. To be clear, this paper argues that *with* reasonable foreseeability combined with the specificity and meaningfulness tests, companies are usually “contributing to” harm. The UNGPs only mention the type of situation highlighted here, where there is not reasonable foreseeability but the company may still be contributing to harm.

<sup>32</sup> See NCP Final Statement, [https://cdn.tspace.gov.au/uploads/sites/112/2018/10/11\\_AusNCP\\_Final\\_Statement.pdf](https://cdn.tspace.gov.au/uploads/sites/112/2018/10/11_AusNCP_Final_Statement.pdf).

<sup>33</sup> See NCP Follow Up Statement, [https://ausnccp.gov.au/sites/default/files/2020-02/Complaint\\_11\\_statement.pdf](https://ausnccp.gov.au/sites/default/files/2020-02/Complaint_11_statement.pdf).



## 4. HOW SPECIFIC WAS THE COMPANY'S CONNECTION TO THE HARM?

Another key question to ask is whether there is a specific tie between the harm and the company's "own activities."<sup>34</sup> The inquiry should focus on how closely the company's own products or core business sales, services, operations, or sourcing activities are connected to the harm. The more specific the tie to a company's own products, sales, or specific decisions, the more likely it is that the company will be "contributing" and thus have some responsibility for providing remedy under the UNGP framework.<sup>35</sup>

As the OHCHR acknowledges, "activities that have only a 'trivial or minor' effect" are not specifically connected, while "a specific action or decision by the [business] that provides motivation or incentives [to another actor] to act in a way that results in human rights harm" creates a more specific connection.<sup>36</sup>

In ANZ, the bank provided some of the financing in connection with the refinery project, which led to the forced displacement activities. Thus, it was tied to the negative impact, although perhaps not strongly, since the negative impact occurred through a third party and ANZ was not the sole financing entity. Nor is there evidence that the bank imposed conditions or made specific decisions directly tied to the negative impact, such as imposing a timeline or seeking reports on the company's activities related to land clearance. It thus might fairly be said that its connection was meaningful and specific, but removed to a degree.

**Takeaway:** The closer the connection between the company's core business operations, specific products, or specific purchasing activities and the resulting harm—balanced with other factors—the greater likelihood that the company contributed to the harm, and vice versa.

## 5. DID THE COMPANY TAKE STEPS THAT LIKELY COULD HAVE PREVENTED THE HARM FROM OCCURRING?

Another important question is the extent to which the company acted to prevent the harm from occurring. Failing to take steps to prevent or mitigate a harm the company knew or should have known about creates a stronger connection to the impact and thus a greater level of responsibility to help address it. That remains true even if the company does not believe its steps would have been effective.

This concept was explored by the OHCHR in its BankTrack letter. As the OHCHR noted, "[A] bank may facilitate a client or other entity to cause harm, if it knows or should have known that there is human rights risk associated with a particular client or project, but it omits to take any action to require, encourage or support the client to prevent or mitigate these risks. The bank's failure to act upon information that was or should have been available to it may create a facilitating environment for a client to more easily take actions that result in abuses. Conversely, if the bank knows about a human rights risk associated with a

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<sup>34</sup> UNGP 13 Commentary, 18.

<sup>35</sup> As Professor Ruggie has clarified, "directly" was intentionally placed before "linked" to emphasize that any human rights abuse must be linked to "the company's operations, products or services, not merely to the fact of a business relationship itself." Letter from John Ruggie to Prof. Dr. Roel Nieuwenkamp Chair, Working Party on RBC OECD at 2, available at <https://www.business-humanrights.org/sites/default/files/documents/OECD%20Workshop%20Ruggie%20letter%20-%20Mar%202017%20v2.pdf>

<sup>36</sup> OHCHR Letter to Banktrack (2017), at pg. 6-7

particular project and takes reasonable steps to prevent and mitigate these risks, the situation would instead in principle be one of 'linkage'.<sup>37</sup>

As with all aspects of this holistic analysis, acting reasonably or failing to act when a risk was foreseeable is not a black-and-white, outcome-determinative rule. It is for that reason the BankTrack letter makes use of the word "may" and the term "in principle:" a bank "may facilitate" an entity to cause harm if it knows or should know of a risk but fails to act, the failure to act "may" create a facilitating environment, and taking steps to mitigate risks "in principle" is consistent with linkage.<sup>38</sup> Questions relevant to reasonable steps in light of foreseeable risks include: the amount of leverage the company possessed, the nature and degree to which that leverage was utilized to mitigate and prevent the impacts, whether the risks were partly mitigated, and the reasons the impacts could not fully be mitigated.

In the ANZ NCP matter, the bank took no steps to reduce or mitigate the negative impacts. In addition, it should have been aware of the risks of the negative impact at the time of its lending decision. Accordingly, consistent with the OHCHR's exposition, the bank's responsibility to assist in facilitating remedy may have been stronger than if it had taken affirmative steps to prevent or limit the potential impacts.

**Takeaway:** If there were no mitigation measures taken, as in ANZ, the analysis probably leans toward "contributing." If some measures were taken but the harm occurred nonetheless, it's important to look more closely at the reasonableness of those steps, including their nature, how they were determined, their robustness, and their implementation, along with why the harm occurred despite the mitigation steps. It might be worthwhile to consider bringing in external stakeholder views to help reach a reasonable conclusion.

## 6. DID THE COMPANY DIRECTLY BENEFIT FROM THE NEGATIVE IMPACT?

Another relevant question is whether the business directly benefited from the negative impact. To be clear, a business does not need to benefit from the harm—financially or otherwise—to fall within the cause, contribute, or directly linked framework or to have a responsibility to assist in providing remedy.<sup>39</sup> In addition, a company receiving indirect, diffuse, or highly limited benefits should not assist the analysis.

However, where businesses do *directly* benefit from negative human rights impacts, companies should consider whether the benefits they receive should go directly to the victims, under the basic principle—related to but distinct from the cause, contribute, directly linked framework—that responsible businesses should not directly profit from human rights violations. The UNGPs indicate as much when discussing the

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<sup>37</sup> OHCHR Letter to Banktrack (2017), at pg. 7.

<sup>38</sup> OHCHR FAQ, pg. 43, definition of "mitigation." The OHCHR's FAQ guide on the UNGPs makes clear that the "mitigation of adverse human rights impact refers to actions taken to reduce its extent, with any *residual impact then requiring remediation*."

<sup>39</sup> Letter from John Ruggie to Prof. Dr. Roel Nieuwenkamp Chair, Working Party on RBC OECD rejecting such positions at 1-2, available at: <https://www.business-humanrights.org/sites/default/files/documents/OECD%20Workshop%20Ruggie%20letter%20-%20Mar%202017%20v2.pdf>.

non-legal concept of “complicity.”<sup>40</sup> Indeed, beyond the UNGPs themselves, potentially substantial legal ramifications can arise when companies benefit from human rights abuses, particularly if the business knew or should have known about the negative impact.<sup>41</sup>

The most obvious kind of direct benefit, and perhaps the easiest to value for disgorgement, is financial. That said, businesses may receive many other kinds of direct benefits from negative impacts, such as access to land, resources, labor, or goods. Valuing those direct benefits can pose challenges and may require good faith and reasonable effort, even if a mathematically imperfect one. And to be clear, disgorgement of this type is a distinct concept from providing broader human rights-compatible remedies,<sup>42</sup> but it is consistent with the principle that businesses should not directly benefit from human rights violations.

In ANZ, the profits received by the bank in connection with its loans was a critical consideration. As the NCP concluded, “[where] a company has gained revenue in a manner inconsistent with” responsible business conduct, “and that has resulted in parties being impacted, the payment of the revenues to those parties may be” appropriate. Although ANZ did not provide a full human rights remedy, which perhaps would have started by considering how the affected stakeholders could be restored to their pre-impact condition, the NCP deemed the bank’s disgorging its profits to be a responsible approach under the circumstances.

**Takeaway:** Where the benefit is directly related to the harm and easily identifiable, the more likely it is that the company will be considered to have contributed to that harm and the greater the possibility that disgorgement may be included in part of a broader remedy analysis.

## 7. DO STAKEHOLDERS AND RIGHTSHOLDERS BELIEVE THAT THE COMPANY CAUSED, CONTRIBUTED TO, OR WAS DIRECTLY LINKED TO THE HARM OR SHOULD OTHERWISE PROVIDE OR CONTRIBUTE TO REMEDY?

Finally, and perhaps most importantly, the views of stakeholders and rightsholders should be considered. Indeed, while there is no single issue or formula that can identify an appropriate company response to a negative impact—actual, potential, or perceived—engaging with stakeholders and rightsholders affected by the project or the specific harm is a highly relevant and informative step. They will provide useful insights the company may not be aware of, may identify helpful remedial approaches by the company or others, and may help legitimate any final decision.

This was a critical issue in ANZ. The notifier-stakeholders recognized that ANZ was not fully responsible for the harms, but they believed that ANZ bore some responsibility through its financing activities. ANZ

<sup>40</sup> See UNGP 17 Commentary (“Questions of complicity may arise when a business enterprise contributes to, or is seen as contributing to, adverse human rights impacts caused by other parties....As a nonlegal matter, business enterprises may be perceived as being “complicit” in the acts of another party where, for example, they are seen to benefit from an abuse committed by that party.”).

<sup>41</sup> See Trafficking Victims Protection Reauthorization Act, 18 USC 1589, et seq.; UK Criminal Finances Act 2017, c. 22, §13 (Eng.)

<sup>42</sup> See, e.g., OHCHR, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, at <https://www.ohchr.org/en/professionalinterest/pages/remedyandrepairation.aspx>.

and the NCP agreed with that assessment, which led to the decision to improve ANZ's processes and disgorge its profits.

**Takeaway:** The views of stakeholders and rightsholders are critical to any company's analysis of attribution and remedial responsibilities and should be integrated into a final conclusion.

## CONCLUSION

These seven questions, derived from authoritative guidance and a range of company practices, will help guide businesses as they consider appropriate responses when confronted with negative human rights impacts to which they may be tied. Obviously, there will be additional relevant questions and issues to be considered in any given situation; thus, even these questions should not be treated as a formula. However, as companies assess how the concepts of cause, contribute, or directly linked may apply to their specific circumstances, the questions may help in navigating the multi-dimensional, fluid spectrum identified in the UNGPs and determining responsible business practices.

Looking ahead, these questions—while focused on a retrospective inquiry—can help companies at the front end of a due diligence exercise. Understanding at the outset that the company may later have to consider its connection to a negative impact, and whether it bears a level of responsibility in redressing it, can facilitate the scope, nature, and degree of diligence—and, critically, can help guide the design of management strategies to prevent the harm from occurring.

The seven questions can be rephrased into forward-looking diligence questions as follows.

ORIGINAL QUESTION	FORWARD-LOOKING QUESTION
Did the company's actions on their own cause the human rights harm?	Could the company's actions themselves cause a negative impact?
Did the company facilitate, enable, or incentivize others in causing the harm?	Is the company participating with others in activities that could lead to a negative impact on a collective or cumulative basis?
Could the company have known about or foreseen the potential harm?	What inherent harms might be predicted based on past impacts connected to the company, sector, geography, or activity, or in the eyes of stakeholders?
How specific was the company's connection to the harm?	How might the company's own products, services, operations, or sourcing activities, versus the activities of others, realistically cause harms?
Did the company take steps that likely could have prevented the harm from occurring?	What leverage does the company have to prevent potential impacts it believes could practically occur, and has that leverage been

	used in a reasonable, tailored, and specific way in light of those risks?
Did the company directly benefit from the negative impact?	How might the company benefit from the potential negative risks identified, if they are not mitigated or prevented?
<p>“Do stakeholders and rightsholders believe that the company caused, contributed to, or was directly linked to the harm, or should otherwise provide or contribute to remedy” need not be rephrased at all. The views of stakeholders and rightsholders regarding actual impacts after the fact are equally germane for potential impacts during diligence.</p>	

The answers to these questions can help a company develop an approach to identifying and addressing potential risks during due diligence. They also can assist companies, like ANZ, in evaluating their due diligence exercises when they must later assess a connection to a negative impact. And when a harm is in fact tied to a company’s activities, they can help determine the responsible and appropriate actions the company might take.

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## ABOUT THIS REPORT

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