

**ASX Corporate Governance Council**  
*Corporate Governance Principles and Recommendations*  
**Consultation Draft, 5<sup>th</sup> edition**

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**Executive summary**

1. This submission is solely concerned with Principle 3 and Recommendation 7.4 as proposed in the Consultation Draft (**5e Draft**) for the 5<sup>th</sup> edition of the ASX *Corporate Governance Principles and Recommendations* ('ASX Principles').
2. Principle 3 asks listed entities to instil a culture of acting lawfully, ethically and responsibly. Three recommendations are intended to give effect to the Principle 3. The *ASX Principles* are not mandatory and listed entities may depart from them upon explanation of their reasons for doing so.
3. The rationales for Principle 3 expressed in the third edition of the *ASX Principles* endure: market sensitivity to corporate reputation and the importance of community expectations.<sup>1</sup> Principle 3 reflects the reality of business that these expectations cannot be ignored, particularly around brand reputation and investor sensitivity to long-term value. The vulnerability of many large companies reflects the high valuations placed upon intangible assets represented by branded products and services. The fundamental truth is that long-term sustainable value depends on meeting community expectations of responsible business conduct. For listed entities, reputational capital is an important element of financial capital.
4. The reputational capital of corporate officers is no less vulnerable: when Rio Tinto legally blasted a sacred rock shelter in Jukuun Gorge in the Pilbara in 2020, it simultaneously destroyed the careers of several of its senior officers.
5. Briefly stated, the argument here is that, in an apparent attempt to avoid undue prescription, the **5e Draft** fails to provide adequate guidance on responsible business conduct when clear, authoritative standards of corporate responsibility are readily available. These standards are globally accepted, express the explicit expectations of the Australian Government, and reflect those of the Australian community. Instead, the **5e Draft** leaves interpretation of its injunction to act responsibly to the subjective determination of each listed entity since none of the Recommendations, with the partial exception of Recommendation 3.3, is inherently concerned with or directed towards entity responsibility. There is consequently a disconnect between Principle 3 and the recommendations intended to give it effect. This is surprising since

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<sup>1</sup> To these might be added that large corporations exercise great power with consequent moral responsibilities for wider impacts.

established standards of responsible business conduct provide entities with a safe harbour against social opprobrium that destroys investor value and corporate careers.

6. Guidance on responsibility is not prescription since it supports entity board judgment; there is false liberty in its absence. Giving more explicit guidance on entity responsibility does not compromise the principle underlying the *ASX Principles* that it is for an entity's board to choose the governance practices an entity adopts.
7. Section A surveys the evolution of Principle 3 from the first edition of the *ASX Principles*. This reveals attempts in the third edition and the Consultation Draft for the fourth edition to provide guidance with respect to the Principle but a drawing back after opposition to the chosen model of responsibility through the concept of social licence to operate. In consequence, the fourth edition provides less guidance to entities than the second and third editions, and the burden of instilling and reinforcing the culture of acting responsibly is to be achieved through statement of entity values.
8. Section B considers the **5e Draft's** proposed changes in light of entity experience under the fourth edition. It concludes that entity values statements have failed to address entity responsibility in any meaningful way and are likely to continue to do so despite the **5e Draft's** welcome measures with respect to engagement with stakeholders. This is because of the absence of guidance as to settled standards of corporate responsibility that would protect against loss of long-term sustainable value.
9. Section C identifies authoritative standards that provide such guidance and how they support entities in giving effect to Principle 3. The section introduces the *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (OECD Guidelines)*. The *OECD Guidelines* are recommendations by adhering governments that express shared expectations of responsible business conduct for enterprises operating in or from their countries. As a member of the OECD, the *Guidelines* express the Australian Government's expectations with respect to responsible business conduct. Chapter 4 incorporates the United Nations *Guiding Principles on Business and Human Rights (UNGPs)*.
10. Section C anticipates concern that the Council might have that human rights have no relevance to corporate governance. The relevance of corporate responsibility to corporate governance is not contested — Principle 3 makes that clear with its reference to acting responsibly. Human rights become relevant simply because they are an element of the generally accepted standard of responsible business conduct.
11. Section D considers a consequential change to Recommendation 7.4(a).

12. This submission argues for these specific changes:

- i. In addition to a values statement, Recommendation 3.1 should seek from entities' boards a formal statement with a policy commitment to respect human rights: see [40].
- ii. Under Recommendation 3.3 engagement should be with those stakeholders identified by assessment of salience of risk of human rights harm from entity operations and business relationships: see [40].
- iii. Recommendation 7.4(a) should require communication of significant actual or potential adverse human rights impact or risk: see [43].

#### A. The evolution of Principle 3

13. From the first edition of the *ASX Principles* in 2003, Principle 3 has been concerned with ethical and responsible conduct. The first two editions simply said, 'Promote ethical and responsible decision-making'. The second edition (2007, revised 2010) added commentary that companies 'should also consider the reasonable expectations of their stakeholders including: shareholders, employees, customers, suppliers, creditors, consumers and the broader community in which they operate.'

14. In the third edition (2014), Principle 3 was expressed in imperative terms: 'Act ethically and responsibly.' Its expressed basis was reputation protection and responsiveness to investor and community expectations. Commentary described reputation as one of an entity's most valuable assets; anything less than failure to meet reasonable expectations of investors and the broader community 'is likely to destroy value over the longer term.' It gave examples of 'good corporate citizen[ship]' that mark ethical and responsible conduct.<sup>2</sup>

15. Preparation of the fourth edition took place in the context of loss of trust in business revealed in the contemporaneous hearings of the Royal Commission into Misconduct into the Banking, Superannuation and Financial Services Industry. In his Interim Report, Commissioner Hayne said that '[m]uch if not all of the conduct identified in the first round of hearings can be traced to entities preferring pursuit of profit to pursuit of any other purpose.'<sup>3</sup> The Final Report was released only three weeks before publication of the fourth edition. From the outset, corporate culture and values informed work on the edition as 'critical governance issues'. The alignment of culture and values with community expectations was considered 'imperative' to arrest loss of

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<sup>2</sup> Viz, respecting the human rights of its employees (for instance, by not employing forced or compulsory labour or young children even where that may be legally permitted); creating a safe and non-discriminatory workplace; dealing honestly and fairly with suppliers and customers; acting responsibly towards the environment; and only dealing with business partners who demonstrate similar ethical and responsible business practices.

<sup>3</sup> Vol 1, p54.

trust in business.<sup>4</sup> That was to be primarily effected through revision of Principle 3.

16. The consultation draft for the fourth edition (**4e Draft**) proposed recasting Principle 3 in these terms: 'A listed entity should instill and continually reinforce *a culture* across the organisation of acting lawfully, ethically *and in a socially responsible manner*.' Essentially, the **4e Draft** introduced a focus on corporate culture and substituted acting 'responsibly' with acting in a 'socially responsible manner'.
17. To explicate social responsibility, the **4e Draft** introduced the concept of a company's 'social licence to operate'. Social licence was seen as one of the most valuable corporate assets and would be jeopardised by unlawful, unethical or socially irresponsible action. Its preservation requires the board and management to have regard to the views and interests of a broader range of stakeholders beyond shareholders alone. Stakeholder trust was seen as the foundation of long-term, sustainable value creation, to be secured through management engagement with stakeholders so that the company is seen to be a 'good corporate citizen'. The **4e Draft** gave examples of potential stakeholder groups<sup>5</sup> and referred in footnotes to international standards of corporate responsibility.<sup>6</sup> The concepts of 'social licence to operate', 'good corporate citizenship' and 'socially responsible' conduct were not otherwise developed.
18. The Council did not, however, persist with the social licence concept. Launching the fourth edition, the Council Chair said that '[a]most all investor interest groups, accounting bodies and standards setters strongly supported the concept of "social licence to operate" and the recognition of broader stakeholder accountability.'<sup>7</sup> She noted, however, that some other stakeholders were troubled by the term, arguing that it was 'vague, subjective and elastic. They also pointed out the particular difficulties that it could cause for listed entities legitimately operating in particular sectors that some parts of society are opposed to—such as companies involved in the gaming, alcohol, tobacco, fast food, coal and coal seam gas sectors.' The Council, she said, 'saw the force of these arguments' and the term was replaced with references to 'reputation and standing in the community' on the basis that the two terms were 'essentially synonymous'. The terminology was also seen as

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<sup>4</sup> Elizabeth Johnstone, 'Launch of the 4th Edition of the Corporate Governance Principles & Recommendations' (27 February 2019).

<sup>5</sup> Including employees, customers, suppliers, creditors, regulators, consumers, taxpayers and local communities.

<sup>6</sup> OECD, *Guidelines for Multinational Enterprises on Responsible Business Conduct*; United Nations *Guiding Principles on Business and Human Rights*.

<sup>7</sup> Johnstone, *op cit*.

more likely to be better understood and therefore more consistently applied by companies.

19. The Council also discarded the **4e Draft's** references to good corporate citizenship, the importance of engagement with and regard for the views of stakeholders, and the earned trust of these different stakeholders as the foundation of long-term value. Instead, commentary to Recommendation 3.1 in the fourth edition merely refers to the need for the company to preserve and protect its 'reputation and standing in the community and with key stakeholders'. No further elaboration of the injunction to act 'responsibly' is now provided.
20. The **4e Draft** had proposed a new Recommendation 3.1 that an entity should 'articulate and disclose its core values.'<sup>8</sup> These were the guiding principles and norms that define what type of organisation it aspires to be, and what it requires from directors, management and employees to realise that aspiration. The division of responsibilities between board and management should now be expressed in a charter (Recommendation 1.1). Commentary to Recommendation 1.1 would add to the list of 'usual' board responsibilities the definition of the company's purpose, and approval of a statement of the company's values and a code of conduct, to underpin the desired culture within the company.
21. In the fourth edition, the **4e Draft** of Recommendation 3.1 was retained, but its disclosure extended to values, and not merely 'core' values. In the fourth edition, the board should, 'generally speaking', approve the company's statement of values and charge the senior executive team with responsibility for their inculcation across the organisation. The values chosen should reflect behaviours considered necessary to build long-term sustainable shareholder value. Commentary retains the text from the **4e Draft** that describes values as the norms that define the company's aspirations. They are seen as linking corporate purpose and strategic goals through their expression of standards and behaviours expected from officers and employees to fulfil that purpose and meet those goals. Only values need be disclosed, however, and not corporate purpose, much less strategic goals. It is the evident intent that the statement of values is to bear a considerable burden of instilling and reinforcing the culture of acting lawfully, ethically and responsibly.

## **B. The 2024 Draft provisions**

22. The 2024 consultation draft (**5e Draft**) proposes no changes to the short form text of Principle 3. To give effect to the principle, a listed entity should articulate and disclose its values (Recommendation 3.1); have and disclose a

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<sup>8</sup> Commentary in the third edition had stated that the entity's code of conduct a 'meaningful statement' of its core values.

code of conduct (Recommendation 3.2); have regard to the interests of key stakeholders (Recommendation 3.3); and have a diversity and inclusion policy (Recommendation 3.4). The latter is not discussed here since it does not bear generally upon the responsibility injunction.

23. The **5e Draft** restates the longer form statement of Principle 3 to make it clear that the culture of acting lawfully, ethically and responsibly should apply both within the organisation and in its dealings with external shareholders.
24. The **5e Draft** proposes a change to commentary to Recommendation 1.1 that would make board's definition of corporate purpose discretionary rather than presumptive. In consequence, commentary to Recommendation 3.1 now merely proposes that corporate values be aligned with any purpose that has been articulated, as well as with its strategic objectives and risk appetite. The **5e Draft's** commentary sees responsible business conduct as a possible, but not necessary, element of corporate purpose although it acknowledges that its inclusion 'may more effectively drive ethical, lawful and responsible behaviour.'
25. In all previous editions, a code of conduct has been a central mechanism for supporting lawful, ethical and responsible operations. The **5e Draft's** Recommendation 3.2 goes further by adding that the code be 'in the best interests of the entity (including having regard to the interests of the entity's key stakeholders).' The code of conduct would be overseen by the board and aligned with the entity's values.
26. Recommendation 3.3 makes further advertence to stakeholder interests: the entity should have regard to the interests of its key stakeholders, including having processes to engage with them and to report material issues to the board. Commentary states that it is in the best interests of an entity to have such regard to impact and interaction with key stakeholders as is appropriate to support creation of long-term sustainable value for security holders (LTSV). The universe of possible stakeholders is broadly drawn. The **5e Draft** proposes that entities identify and regularly review key stakeholders, having regard to its purpose (if articulated), values, strategic objectives and risk appetite, and consider a stakeholder engagement program appropriate for its circumstances.
27. The **5e Draft** repeatedly asserts the need for entities to act by reference to the best interests of the entity with a view to creation of LTSV. This submission accepts that the best interests of the entity with a view to LTSV is the ultimate objective of the entity. The focus of concern is upon measures best designed to realise that objective.

## *Uncertain efficacy of reliance upon values*

28. Principle 3 asks listed entities to act ethically and responsibly. The mechanism offered to achieve this is through Recommendation 3.1 with the articulation and disclosure of corporate values. As noted, commentary describes the entity's values as the guiding principles and norms that define what type of organisation it aspires to be, and what it requires from its officers and employees to achieve that aspiration. It is the **5e Draft's** apparent intention that the identification of entity values will carry the primary load of instilling and reinforcing the desired responsibility culture. This is so because neither of the other recommended measures—a code of conduct and recognition of stakeholder interests—specifies any explicit or necessary connection to norms of entity conduct.
29. The difficulty here is that the presumed nexus between values disclosure, with or without its correlate purpose, and corporate responsibility is not obvious. The *ASX Principles* do not specify a standard of responsible conduct but assume that an entity will, by articulating and disclosing values, meet this undefined standard. The rationale underlying Recommendation 3.1 seems to be that, by pitching their tent in a values bazaar, companies will send a signal as to their organisational culture that leads to responsible business conduct and enables pricing of investment risk. This is a surprising act of faith. Values disclosure involves a process that bears no apparent connection with corporate responsibility as that concept is known through long-standing, authoritative standards. These standards offer specific guidance to business that protects against reputational loss; it is not clear why values disclosure should do so.
30. Whether any nexus exists between disclosure and responsibility is revealed by examination of values disclosures made under the fourth edition. The corporate governance statements of some leading Australian companies are examined here to see how the responsibility injunction is implemented in practice. The companies chosen are especially sensitive to customer and social sentiment generally by reason of the nature of their business sector and brand vulnerability to reputational loss.
31. The Commonwealth Bank's values are **care** (for 'customers and each other'), **courage** ('to step in, speak up and lead by example'), and **commitment** (to 'do what's right'). The Bank's purpose is referred to as a correlate with its values but is nowhere disclosed in the corporate governance statement although the 2023 annual report expresses it as 'building a brighter future for all'. Its strategy is 'build tomorrow's bank today for our customers'. The disclosure of values seems disconnected from and contributes little to the elaborate reporting upon corporate responsibility elsewhere in its sustainability reporting, largely framed through a ESG lens. Values do not seem to drive,

inform or provide any structural foundation for its ESG reporting. The Bank expresses its support for the United Nations *Guiding Principles on Business and Human Rights* (UNGPs) although they do not play a foundational role in its sustainability commitment.

32. Westpac's disclosed purpose is helping 'Australians and New Zealanders succeed.' Its values are **helpful** (passionate about providing a great customer experience), **ethical** (trusted to do the right thing), **leading change** (determined to make it better and better), **performing** (accountable to get it done), simple (inspired to keep it simple and easy). Underpinning these values are 16 detailed behaviours; six are referred to in the 2023 statement. They are a mixture of ethical and efficiency considerations.
33. Rio Tinto's purpose is expressed in its 2022 Strategic Report as finding better ways to provide the materials the world needs. Its declared values are **care** (for people, for the communities in which we operate and for our environment), **courage** (to try new things, speak up and do what is right), and **curiosity** (to collaborate, learn and innovate). Its purpose is expressed to be delivered through its strategy and four objectives, namely, to be the best operator, to have impeccable ESG credentials, to excel in development, and to earn trust by building meaningful relationships and partnerships and thereby winning its social licence. Its values do not appear as the foundation of purpose delivery. The achievement of social licence and discharge of responsibility is outlined in detail through other more specific instruments. The social licence concept plays a key role here.
34. Qantas declares that its purpose is to 'take the spirit of Australia further.' Principles, beliefs and values are said to underpin the organisation. Eight Non-Negotiable Business Principles are the most elaborated and specific of the three bodies of norms and are declared to be the foundation for Group Policies. Behaviours express how the business is carried on routinely; they are expressed in general terms: always care and be responsible; working together and being respectful and inclusive; resilient (a positive attitude to everyday challenges); and striving for excellence. There are a separate set of Brand Values for Qantas and Jetstar. The Qantas values, expressed to support the vision 'to be a great airline that champions the spirit of Australia', are simply stated as: together; **genuine**; **inventive**; **optimistic**; and **experienced**. They palpably do little, if any, heavy lifting. The Qantas Group's Human Rights Policy Statement 2020 is founded on the UNGPs. That policy statement is further elaborated in other, more specific policy instruments whose architecture and content the UNGPs inform. The human rights policy statement and those instruments, rather than its values, expresses Qantas's corporate responsibility commitment.



35. ASX Ltd's purpose and values follow, as might be expected, more closely the path laid out in the *Principles*. The corporate purpose is to 'power a stronger economic future by enabling a fair and dynamic marketplace for all'. Its values are: **to put the market first** (to benefit all customers); **to stand up for what's right** (proudly protecting market integrity); **to achieve more together** (by collaborating with purpose); and **to drive positive change** (to deliver meaningful outcomes). There is a specificity about corporate purpose which sets it apart from the others examined above. The first two values share that specificity although the other two take on the more generic character evident in other corporate governance statements.
36. What do these values statements say about the responsibility challenges these companies face and their anticipatory responses? Those challenges include the risk of human rights harms in their global value chains and take myriad other forms peculiar to different business sectors. Values and purpose, where the latter is disclosed, are usually expressed in such generality as to say little as to the approach by the company to the key matters germane to responsibility. In many cases, they appear to be little more than wholesome statements that display worthy aspirations but do not address the moral, human rights and reputational risks confronting the business arising from its operations and value chain relationships. Principle 3 values articulation and disclosure seems to provide little guidance to companies in this task. For these companies responsibility risk is addressed by other measures more apt for the task. The detailed commitments Australian business leaders make concerning their environmental, social and governance risks and challenges are developed through other frameworks. What are those frameworks?

### C Settled standards of enterprise responsibility

37. The **5e Draft** offers no guidance as to what is meant by acting responsibly. This is a serious lacuna. There are well articulated standards of responsible business conduct which provide clear guidance to business in relation to expectations of responsible conduct and identification of relevant stakeholders. If followed, they provide a safe harbour from adverse investor and community sentiment. Responsible business conduct is not a matter for subjective entity judgment. It may be that the 'social licence to operate' concept proposed in the **4e Draft** (and later discarded) is more useful as metaphor than governance standard, but it nonetheless expresses the fundamental truth that LTSV depends on community acceptance of the social utility of its activities or at least not significant discomfort with them.
38. This submission proposes that the *ASX Principles* recommend that listed entities adopt the current authoritative standard expression of corporate responsibility contained in the *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (OECD Guidelines)*. The *OECD Guidelines* are

recommendations by adhering governments that express shared expectations of responsible business conduct for enterprises operating in or from their countries, and provide an authoritative point of reference for businesses and their stakeholders. The *OECD Guidelines* express comprehensive standards of responsible conduct in areas such as information disclosure; human rights; employment and industrial relations; environmental protection; bribery and corruption; consumer interests; science, technology and innovation; competition; and taxation. The *OECD Guidelines* were updated in 2023.<sup>9</sup> As a member of the OECD, the *OECD Guidelines* express the Australian Government's expectations with respect to responsible business conduct.

39. The *OECD Guidelines* incorporate the United Nations *Guiding Principles on Business and Human Rights* (UNGPs) as Chapter 4. The UNGPs were adopted by the United Nations in 2011; the Australian Government co-sponsored the resolution for their adoption. The UNGPs comprise three complementary pillars. The relevant pillar here is the second, that business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and address adverse human rights impacts with which they are involved (*Guiding Principle 11*). The responsibility to respect human rights contains two distinct elements—responsibility arising from *contribution* to human rights harms and from mere *linkage* with the harm through a business relationship (*Guiding Principle 13*). Business relationships are inclusively defined to include supply chain relationships, a bank financing an extractives project, a joint venture partner and a portfolio investor (*Guiding Principle 13* and accompanying Commentary). An enterprise linked to human rights harm through a business relationship should seek to prevent or mitigate the harm; where it causes or contributes to the harm through its own operations, it has the further responsibility to remediate the harm (*Guiding Principles 13, 19, 22*). The corporate responsibility is to respect internationally recognised human rights. It is the 'baseline norm for all companies in all situations'.
40. Listed entities discharge their responsibility to respect human rights through a high-level human rights policy commitment supported by an operational level due diligence process similar to that followed by reporting entities under the *Modern Slavery Act 2018* (Cth). Human rights are identified, assessed for salience (prioritised by reference to severity and scale of impact, and remediability of harm), findings integrated into enterprise systems, and tracked for effectiveness. There is a wealth of resources available to assist

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<sup>9</sup> See at < <https://www.oecd.org/publications/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct-81f92357-en.htm>>.

enterprises, including detailed sector specific resources prepared by the OECD.<sup>10</sup>

41. The business responsibility to respect human rights rests upon social norm and expectation, and not upon binding legal obligation. The responsibility is not, however, voluntary since it is a norm that has ‘acquired near-universal recognition within the global social sphere in which multinationals operate.’<sup>11</sup>

#### *Recognition of stakeholder interests*

42. The **5e Draft’s** provision for recognition of stakeholder interests acknowledges expectations with respect to responsible conduct and goes some way towards meeting those expectations. Recognition and consideration of relevant stakeholder interests is necessary for reputation protection and conducive of LTSV creation. However, the **5e Draft** leaves to entities the task of identifying key stakeholders and offers no guidance as to the basis for doing so. That is inevitable in the absence of any attempt to articulate a standard of responsible business conduct—norms of responsibility are left at large to the determination of each entity. The due diligence process described above at [40] assessing risk for salience, however, identifies the stakeholders with whom an entity should engage.

#### **D. Recommendation 7.4(a)**

43. The *OECD Guidelines* provide that communication should include significant impacts or risks, the adverse impacts or risks identified, prioritised and assessed under entity due diligence: see [40] above. Disclosure should be specific with respect to human rights risk since ‘impacts that may not seem to be financially material but that are relevant to people, and the planet may be financially material for an enterprise at some point’ (*OECD Guidelines*). Disclosure of human rights risk is independent of financial risk to the entity itself since human rights risk is to those potentially affected by the entity’s operations and business relationships. The **5e Draft’s** proposed commentary says that entities that believe that their prospects may not be impacted by any material environmental, social or governance risks should consider carefully their basis for that belief. This is surely sound advice, but it is recommended that entities also communicate how human rights risk itself is addressed through due diligence processes under [40].

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<sup>10</sup> See especially OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (2018), at <https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm>.

Separate sectoral guidance is provided for the extractive sector, mineral, agricultural and garment supply chains, the financial sector among other sectors: see <https://mneguidelines.oecd.org/sectors/>.

<sup>11</sup> J G Ruggie, *Just Business: Multinational Corporations and Human Rights* (WW Norton & Co, 2013), 92.

44. This submission argues for these specific changes:

- i. In addition to a values statement, Recommendation 3.1 should seek from entities' boards a formal statement with a policy commitment to respect human rights: see [40].
- ii. Under Recommendation 3.3, engagement should be with those stakeholders identified by assessment and prioritization of salient risk of human rights harm from entity operations and relationships: see [40].
- iii. Recommendation 7.4(a) should require communication of significant actual or potential adverse human rights impact or risk: see [43].