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JOINT COMMITTEE ON CORPORATIONS AND SECURITIES

Wednesday, 14 March 2001

Members: Senator Chapman *(Chairman)*, Senators Conroy, Cooney, Gibson and Murray and Ms Julie Bishop, Mr Ross Cameron, Mr Rudd, Mr Sercombe and Dr Southcott

Senators and members in attendance: Senators Chapman, Cooney, Gibson and Murray and Mr Sercombe

Terms of reference for the inquiry:

Provisions of the Corporate Code of Conduct Bill 2000.

WITNESSES

Committee met at 9.37 a.m.

CHAIRMAN—Today the committee conducts its first public hearing into the provisions of the Corporate Code of Conduct Bill 2000. This inquiry was referred to the committee by the Senate on 5 October 2000, initially for report by 31 March 2001. However, the committee desires that as many people as possible have an opportunity to give evidence before it at public hearings. Consequently, the committee has sought to have the reporting date extended to 24 May 2001.

At a private meeting in February the committee agreed to release all submissions received for this inquiry. All submissions are available from the Parliament House web site or, alternatively, the secretariat can send a hard copy of submissions to those who wish to obtain them.

Before we commence taking evidence I reinforce for the record that all witnesses appearing before the committee are protected by parliamentary privilege with respect to evidence provided. Parliamentary privilege refers to the special rights and immunities attached to the parliament or its members and others necessary for the discharge of parliamentary functions without obstruction and fear of prosecution. Any act by any person which operates to the disadvantage of a witness on account of evidence given by him or her before the Senate or any of its committees is treated as a breach of privilege. I also state that, unless the committee should decide otherwise, this is a public hearing and as such all members of the public are welcome to attend.

[9.39 a.m.]

JOSEPH, Ms Sarah, Associate Director, Castan Centre for Human Rights Law, Faculty of Law, Monash University

KINLEY, Professor David, Director, Castan Centre for Human Rights Law, Faculty of Law, Monash University

CHAIRMAN—I welcome our first witnesses. Do you wish to make an opening statement?

Prof. Kinley—Yes.

CHAIRMAN—You may proceed. At the conclusion of that I expect there will be questions from the committee.

Prof. Kinley—We thank the committee and the chairman for inviting us to give evidence today. The statement we want to make draws out issues raised in our submission that we would like to highlight and, if you wish, answer questions on. There are three points we would like to make. Firstly, we want to explain why the Castan centre feels that it can give evidence and is interested in this area. In addition to the publications that Sarah and I have included in our submission the Castan centre is pursuing a major research project on corporations and human rights specifically on the issue of current legal regulation of corporations with respect to human rights and the future legal regulation.

Secondly, we would like to highlight the broad international context in which one might place this bill. Unquestionably, as the committee is more than aware, there is an increasing awareness of corporations and human rights as being relevant spheres of activity to each other. We consider that the debate today on human rights and corporations is where the debate on the environment and corporations was some 10 to 15 years ago.

A mixture of dimensions make up this international context. They are economic, trade and commerce, financial, humanitarian and legal, and they are occurring at both international and domestic levels. Perhaps the least developed of these is the legal dimension and it is the one with the greatest potential. Within legal regulation there is room for hard and soft laws. There are laws at the international level that both directly and indirectly affect corporations with respect to human rights. Implicit in all we say is a bifurcation in the legal regulation between the domestic and the international.

Thirdly, in talking about the bill we would like to highlight certain issues within our submission. We believe both this bill and the sibling of this bill in the United States Congress are evidence of the inexorable move towards legal regulation. For that reason we generally welcome the bill. However, we would like to emphasise the importance of the fact of the bill rather than its content. The very fact that the bill is mooted—with respect to corporations working overseas concerning their human rights record—is a writing-on-the-wall issue. Whether corporations like it or not, this is the inexorable path that is being trod. Ultimately, it is of the greatest importance that corporations are made to see the value of them complying with human rights standards, whether or not those are legal obligations, rather than having corporations conscripted. That value that one makes corporations view covers both self-interest

and other interests, but we emphasise the fact that whatever legal regulation is put in place must bring corporations along with it rather than force them into it, because otherwise they will find a way to subvert it.

With respect to the bill, there are three main features that we would like to refer to. Firstly, we believe health and safety and environmental standards are unexceptional in the context of the bill. They exist in other pieces of legislation. However, other less definite standards that are more problematic are included in the bill. The two that I want to refer to in particular, although there are others, are a minimum wage and employment of child labour. Generally on the issue of standards, if one is to include so-called economic, social and cultural rights—for instance, health and education, which are included in this bill—one might ask: why not therefore include equally vague civil and political rights such as securing of free speech and freedom of movement and association? We are not necessarily advocating that that be done, but if you are including the vague economic, cultural and social rights, one could then say: why not also include civil and political rights?

The second main feature of the bill is the requirement of disclosure. Generally we support this, but we believe it needs strengthening. ASIC might wish to publish not only a rogues list of those companies that are not fulfilling the demands of the bill but also an honours board. This would fulfil one of the essential criteria that we see as being important; that is, this voluntarism—rewarding as well as punishing. We also think that greater support for disclosure would be obtained if companies were required to disclose not only to ASIC but also in their annual reports.

Finally, there is the issue of civil liability. This is perhaps the most controversial part of the bill, but on the whole we would support it. We do so recognising that civil liability is both a deterrent and, importantly, another form of disclosure. The very fact that these issues will be aired in litigation is of course to disclose them. There are, however, two very important matters on this issue that we think need attention in the bill. Firstly, there is the question of whether or not one allows a local defence law—for instance, companies saying, 'We have got to do this because we are required by local law to outlaw trade unions.' We are keen to emphasise the fact that we do not allow any local law defence. It is only where, with respect to certain human rights, the local law requires it—where it is obligatory for the corporation to limit or curtail a particular human right. If they are then to continue to invest in that country they must say that they recognised this was a compulsory local law, but they must disclose the fact that they are continuing because this law is compulsory. Again there is this element of disclosure that we think is important.

Secondly—and perhaps, more than anything else, this is the most important part of the bill—what is missing at the moment is the liability of subcontractors or business partners. Subcontractors are often the front-end of a business in other countries. The parent is sitting back in the west and the subcontractors are pursuing, perhaps somewhat out of sight, out of mind of the parent, the less than honourable human rights actions. The parent company must be held vicariously liable for the actions of its subcontractors. There is some case law in the United Kingdom that emphasises the fact that there must be due diligence on the part of the parent company—that is, it must ensure that the subcontractors it employs are going to pursue acceptable human rights standards rather than simply turning a blind eye.

As we said, we are happy to respond to questions on any of these issues, or indeed we will try to answer questions on any other issue the committee might wish to raise.

CHAIRMAN—Ms Joseph, do you have anything to add?

Ms Joseph—No, I just endorse what my colleague has said and welcome questions from the committee.

CHAIRMAN—Thank you very much. The Law Council has raised concerns in its submission about compliance difficulties and penalty provisions. One of the points it made was that both of those factors are likely to discourage good directors from acting for Australian companies. It also believes the bill would engender a number of inherent risks which would be prohibitive to insure against, or might even be uninsurable. What are your responses to the points made by the Law Council?

Prof. Kinley—I think that adopts the short-term view. As we said, in our opinion this is an inevitable path. There will be legal regulation and expectations of companies to honour human rights obligations. If they are pursued by way of codes of conduct that are voluntary or semi-legal in the form of disclosure and civil liability, like this one, we are looking at the front-end of that at the moment. If one was to say that this would therefore deprive Australian companies of good business leaders, I perhaps might question whether they are good business leaders if they are willing to implicitly subvert human rights standards. It is short-sighted. The question of insurance is the same thing—it will become the case that companies will seek insurance for these sorts of issues; it will become more widespread, more companies will do it, and therefore insurance companies will come to the party.

CHAIRMAN—Other submissions have suggested that the reporting requirements included in the bill are onerous and that in fact the ASIC would be unable to assess the reports that are suggested in the bill.

Prof. Kinley—There is no reason why ASIC cannot employ external consultants. The idea of social responsibility audits is now quite common and there are a number of institutions, academic and otherwise—indeed commercial—that undertake social audits. If it is beyond ASIC to do that, it could always employ somebody. I do not see any problem with that.

Senator MURRAY—My first question is a process one. You have two chapters and you have said, 'Not for quotation without the author's permission.' The committee would be assisted, of course, by a detailed academic assessment of the field. Is there a strong restraint on us lifting slabs of this out or did you want very little—

Prof. Kinley—It is very academic. The reason was that it was a draft chapter and I had not yet edited it, so I was probably embarrassed about my usual infelicities in editing. It is now complete and we are just about to send it to the publishers. I will furnish a final copy to the committee which will be open for full quotation.

Senator MURRAY—Thank you. That saves some agony later on. Both your chapter and your remarks indicate that this bill is very much in line with a trend, and you forecast some inevitability. Does this kind of legislation need to be seen as a trade-off for what corporations

and governments want in terms of globalisation? By that I mean, corporations and governments are driving for international rules, as you know, in taxation, finance movements and copyright provisions—all those things to do with intangible and tangible possessions on the financial and economic side. I wonder about the balancing of that desire for harmonisation and commonality of international rules on the side which has always affected companies, if the trade-off internationally is not this kind of legislation, which has attached itself to social and environmental cultural standards. That is how it happened within the nation state. People pursuing trade, self-interest and profit were restrained by society in terms of labour standards, health and safety standards, gender issues and so on.

Ms Joseph—As I understand your point, I agree with what you have been indicating—that the initiatives of economic globalisation have generally given corporations and traders a lot of rights. This trend towards human rights responsibilities and environmental responsibilities is to balance that ledger so that along with rights comes responsibilities. It is indicative that, since the demise of the Multinational Agreement on Investment, which was designed to give corporations an enormous amount of rights and—in that document anyway—no real enforceable duties, there have been many international trends. For a start, the Multinational Agreement on Investment was not adopted. And since about the end of 1998 there have been an enormous number of initiatives within a number of bodies to propose duties for international investors.

Senator MURRAY—It is now a well-reported view that the protesters in Seattle, Melbourne or Davos were globalists within shouting at the globalists without, but each with a different global agenda.

Ms Joseph—Human rights globalisation as opposed to economic.

Senator MURRAY—Reporting is an important facet of the bill and I want you to react to an observation in that context. One view is that reporting is only effective where there is enforcement. However, much of the reporting that is done already within Australia reflects either an acceptance by companies of what they have to do or indication of their objectives or a kind of cultural adoption of issues which get almost no attention from regulators. In other words, they become things that companies accept they must do. I am thinking, for example, of these very substantial environmental reports produced by the mining companies, a lot of which are really first-rate. They have appointed people to do this and they do proper appraisals and so on. ASIC and ASX pay very little attention to that. Investors and the broader community do, but to me that reflects an acceptance by those companies of their obligations over and beyond the law. Would you see reporting of the kind that is envisaged in this bill falling more into the ASIC/ASX kind of role or more into the role I have just outlined, such as the mining companies with their environmental reports?

Prof. Kinley—Can one say both? Having a level of legal obligation, one would hope, would beget excessive compliance—going beyond the minimum. Indeed, if companies saw that it was in their interest to do so, by presenting such an overcompliance to those stakeholders who matter, and if that sort of reaction was inculcated in them, that would, to me, be the best situation to have—where they feel they are exceeding the legal obligation, so the legal obligations are not onerous, and yet they are able to demonstrate to all their stakeholders what fine corporate citizens they are. That is what we want from them and presumably what they want for themselves. It is somewhat hypothetical, isn't it? If, to encourage that situation, you

have to have a certain level of legal obligation, then we need it. If that can somehow be encouraged without a small stick, then maybe we do not need it. I tend to feel it is necessary to have at least a small stick.

Senator MURRAY—My point is that what sparked the mining industry's far better separate environmental reports was in fact the legal obligation. They were required to go for the minima and, culturally, they said, 'If we are required to go for the minima, we had better go the whole hog and adopt a form of analysis and reporting in response which is far greater than that required under the strict letter of the law.'

You referred to the need to ensure local business partners' accord with the intent of such legislation. I think that is easier for genuine partners as opposed to subcontractors, because that term can include someone contracted to do the maintenance of your plumbing works, or whatever. It is always easiest when you are setting ground rules to do that at the initiation of a corporate arrangement, because contractually you can set up the obligations that both parties must abide by. But most of the companies affected by this legislation would already be in existence and would have longstanding relationships with their local partners, or their joint venture partners sometimes, or with subcontractors. With your requirement for clearer liability, would you suggest any transitional arrangements in the bill so that liability could be applied very strictly to new ventures but existing ventures could have some time to arrive at it?

Prof. Kinley—I think that would be fair. I would be loath to state a particular length of time, but I think that would be fair. One has to say that the situation of a longstanding contractual relationship between a company and a subcontractor may indeed be the very thing that allows the main company leverage to ensure the subcontractor meets the demands now being placed on the main company. They can say, 'Look, you have been drawing on us now for 10 or 15 years and we are going to have to change and maybe even look for someone else if you do not comply with these extra standards.' One would like to think that those extra standards were not onerous. If they were, there would obviously be a great problem to be tackled. If there were not a great problem, it would not be that onerous for either the main company or the subcontractor.

Ms Joseph—I would add that I do not know if the transitional arrangements will be necessary with regard to the reporting obligations as opposed to the actual civil liability.

Senator MURRAY—This is my last question, because other people probably want to ask questions. You mentioned the child labour issue. I was fortunate enough to be in Geneva for part of the session when this was discussed. My summary of the way in which the child labour issue is going in the ILO—the International Labour Organisation—is that they are trying to say it is the abuse of children in work that is the problem, not the use of children. Let me draw an analogy: the traditional use of children for goat or cattle herding in a subsistence economy is perfectly acceptable, whereas sweatshop labour in a factory from six in the morning until eight at night is not. Do you have any suggestions that are more precise than you have put here as to how those kinds of qualifications could be put into the bill?

Prof. Kinley—One way is to perhaps rely on the ILO itself. I am not sure when you were there, but in 1999 the ILO produced a new convention 182, which is to outlaw the worst forms of child labour. That is precisely to address the point that child labour per se is something that is a fact and not necessarily a fact to be criticised or denigrated—but the worst forms should be.

So one practical suggestion would be to include or maybe to exclude or qualify in the list of minimum labour standards in the bill ILO Convention 182 on the Worst Forms of Child Labour.

Senator GIBSON—In your opening statement you made some comments about bringing corporations along—in other words, about encouraging rather than forcing corporations to go along—and encouraging voluntarism and disclosure. That implies to me that at a practical level you are suggesting that enacting this bill is a bit premature but that perhaps it is a good signal for corporations and groups of corporations and associations to adopt voluntary codes of conduct and voluntary disclosure of what is going on—along the lines of what Senator Murray spoke about before with the environmental example. Of course, there is a difference in that that applies to Australian law whereas this has the intention of being extraterritorial.

Prof. Kinley—I would be loath to say that it was premature. I think there may be other reasons why this bill meets the fate that it eventually meets. We were seeking to emphasise the fact that it is being seriously discussed both here and in the United States. Indeed, following on from so many of the other initiatives, including the European parliament's resolution—which is itself going to be used as a sort of a nurturing ground for legislation that will inevitably come in the EU—this is to show corporations that this is where it is going to go. It will happen—it may happen with this bill or it may happen in just a few years time with a bill of a different form or of a very similar form. Therefore, the importance is not so much the fact that it will exist and that these obligations will be placed on corporations but that corporations will have to recognise that this—if they are looking ahead, even in the medium term—is what they are going to face. But I would be loath to say that it was premature. If it came through I think it would send a particularly rude signal rather than a 'that-was-a-close-thing' signal.

Ms Joseph—On the point of being premature, some of these obligations could already exist in Australian law. In Britain at the moment cases are being brought against UK companies for their actions in South Africa. Admittedly those cases have not been decided on their merits, but the jurisdictional issue has been decided—that is, that British courts can hear claims against British companies for alleged abuse of workers, particularly with regard to health and safety, in South Africa. As Australian law is often very similar to British law—I believe we probably have more lenient jurisdictional rules—it could well be that some of these obligations already exist.

CHAIRMAN—Thank you, Professor Kinley and Ms Joseph, for appearing before the committee.

[10.07 a.m.]

BURROW, Ms Sharan, President, Australian Council of Trade Unions

RUBINSTEIN, Ms Linda Esther, Senior Industrial Officer, Australian Council of Trade Unions

CHAIRMAN—I welcome Ms Sharan Burrow and Ms Linda Rubinstein from the Australian Council of Trade Unions. The committee has your submission, No. 134, before it. Are there any additions that you wish to make to or errors that you wish to point out in that submission before we proceed?

Ms Burrow—No.

CHAIRMAN—Do you wish to make an opening statement?

Ms Burrow—Just briefly.

CHAIRMAN—Please proceed, and then we will move to questions.

Ms Burrow—We think this bill is very visionary, timely and in accord with public sentiment that is characterised by the notion of a new internationalism from civil society generally. There is a great deal written about the rapid transition from the power of nation states to corporate globalisation. Whether we agree or disagree with that, there is no argument that the power of multinational corporations and the nature of their operations within and across country boundaries are now vastly different from what they were some 40 years ago.

I want to touch on a few things that give us every reason to be confident that the Australian Parliament will play a critical leadership role. But not on its own, I might add. I just heard somebody comment on some of the developments in Europe. There are other pieces around this context emerging, but Australia would certainly put itself in a leadership role internationally as well as nationally, and we would welcome that.

I would like to start by looking at people's view of the responsibility of corporatised nations. Probably the most recent evidence is the PricewaterhouseCoopers millennium poll where they polled something like 23,000 citizens across 21 countries and found that in Australia it was a massive 92 per cent, in the UK about 80 per cent and in the United States of America about 82 per cent. But overall, 60 to 70 per cent of citizens in those countries said that they expected corporations to be socially responsible, to go beyond their core financial responsibilities and to be accountable for the environment in the context of social protections in the geographic location they operated in. That is the voice of the people and we should listen to it. Clearly this bill is part of that response.

On another point, if you look at the OECD Guidelines for Multinational Enterprises, all OECD countries have signed up to those guidelines. Yet, at the moment, there is no real capacity for implementing them as such. It would be a good thing to put a legislative base such as this bill underneath those sorts of guidelines that governments have agreed to. The other matter I would like to refer to is the United Nations' global compact, driven by Kofi Annan. Its

nine principles cover human rights, core labour standards and environmental requirements. It is a voluntary code of conduct in that companies are asked to sign on. Indeed, nation states and even cities, in the case of the deliberations here in Melbourne by the committee of Melbourne, are looking at signing on to that global compact.

We would like to see the accountability that this bill in part would bring to such a framework underpinned with the legislative base that a bill like this would provide. It is not the whole of the picture in our view, but it is certainly central to the emerging debate around ethical and sustainable investment and corporate conduct that is now a critical debate as we seek to establish a new set of global rules and legislative pieces to ensure that our society and environment are protected in the context of building a better 21st century.

In brief, we welcome this bill. We hope that it will be supported in the context of both the committee's deliberations and in parliamentary debate. While we support voluntary codes of conduct, we do not believe, if you look at the evidence, that they are successful. It is all too easy to simply put them in a box when the spectre of profit comes along, so they are often simultaneously adhered to and broken by the same corporations operating in different locations. We would like to see a much stronger base. We also believe Australian corporations that are subject to laws in this country should be responsible enough and committed enough to decent and dignified operations to accept that those laws should operate internationally. So we urge committee members to support this bill in the context of their report and look to see it debated with positive support from all parliamentarians in the parliamentary context.

CHAIRMAN—Do you have anything to add to that, Ms Rubinstein?

Ms Rubinstein—No.

CHAIRMAN—Can you tell me what discussions, if any, there have been in the ILO and the Trade Union Advisory Council of OECD on this sort of issue and what the outcomes of those discussions have been?

Ms Burrow—We have a set of the OECD Guidelines for Multinational Enterprises, so we can table them for you. They are a very good set of principles and requirements for companies to adhere to. It would form part of a worthy base of legislation to see that they had teeth in the context of our own country and corporations operating within and across Australia and other country boundaries.

Ms Rubinstein—Perhaps I could add something to that. As Ms Burrow said, the OECD guidelines are very good and very positive, but unfortunately the processes by which they are enforced are not. The ACTU had their own experience in attempting to have an issue processed, as the guidelines require, through the national contact point, who in our case is a Treasury official. Our experience was that the complaint was dismissed without any attempt to try to resolve, discuss or investigate it. The treatment of that complaint by the national contact point in Australia raised some eyebrows and concern with the OECD committee in terms of these guidelines for multinationals.

CHAIRMAN—Are you saying in that case it was the Australian contact point and not the OECD?

Ms Rubinstein—No, the problem was not with the guidelines. It is like any voluntary code—there is a complaints procedure and the government are required to have a national contact point to deal with that and there are processes to do it, but if they do not do it you cannot take the matter to court. There is nowhere else to go in that sense. You can go back to the OECD or the committee on multinational enterprises, which is what occurred, and they can express some concerns, but beyond that there is no enforceable way of dealing with it. That was a good example, we think, of what the problems can be.

Mr SERCOMBE—Are you able to provide the circumstances of that particular case?

CHAIRMAN——Are you able to identify the case?

Ms Rubinstein—It was a complaint against Rio Tinto, and the nature of the complaint was that Rio Tinto was in breach of some of the provisions of the guidelines.

CHAIRMAN—In a particular country or in Australia?

Ms Rubinstein—In Australia.

CHAIRMAN—In Australia! That would not be affected by this legislation anyway.

Ms Rubinstein—No, it would not have been affected by this legislation. But the point is about voluntary codes. If they are not enforceable, at the end of the day there is no way of ensuring that complaints are treated properly. It may be that there was substance in the ACTU complaint and it may be that there was not, but the point is that it was never investigated or responded to.

CHAIRMAN—Can you tell me what other countries, if any, have legislation of the type contemplated in this bill?

Ms Burrow—There is no legislation regarding corporations, but there is debate and deliberation in Europe centred around two instruments, the dominant one being the OECD multinational guidelines. The committee would be aware that the European Union has a regulatory floor with a lot of standards around safe work practices, discrimination, the environment and the like. This is a debate about how you further that. In my opening comments I indicated that Australia was well within the context of international deliberation.

Of course, there have been, as I heard the previous speaker say, cases and case law where courts in the United States have had challenges from corporations with headquarters in the US that operate in other countries, such as South Africa or the United Kingdom. Those jurisdictional arguments are better documented by lawyers than by somebody like me. I understand that they provide a base to show that, despite objections from people about constitutional technicalities, this sort of legal jurisdiction is possible and can be delivered. We have the example here of the use of the sex crimes law. So it is possible and it should happen.

I will give a current example of a company we are concerned about that is going to move its technology from a factory in Melbourne to Brazil. My understanding from unions in Brazil is that it will not go to the unionised work force sector in Brazil in the white goods industry but

rather to an export processing zone. That will raise all sorts of questions about safety, treatment and access to international law, whether it concerns human rights or labour standards that we know are breached everyday in those export processing zones. So this is a very important piece of legislation for us because it will provide a basis at least for transparency and prosecution where companies are not behaving as they should in this country.

CHAIRMAN—Do you see any scope for this legislation to be used against Australian companies, if we adopted the legislation and other countries had not got to the stage of legislating, as a trade issue or barrier that will be detrimental to Australia's interests?

Ms Burrow—By other countries, you mean? I think it probably would be used by all of us if we felt that Australian companies were operating in a way that was environmentally damaging or at odds with human rights or that failed to adhere to core labour standards. That is the basis of the legislation, so the answer is clearly yes. That is in part why we should be supporting this bill. We should be proud enough as Australians to set standards we would want our companies to adhere to.

Senator GIBSON—You mentioned in your opening statement that you wanted Australian companies to behave decently and well, and you used the term 'dignified'. Do you have any evidence of Australian companies not behaving in that way overseas in recent years?

Ms Burrow—We could provide you with a list, but the most infamous one is Ok Tedi and the environmental destruction that surrounded BHP's operations in that context. There are some other famous cases, but there are hoards of them where we would not be too proud of the sort of deliberate neglect or abuse of human rights and environmental standards.

Senator GIBSON—What about other human rights and labour concerns? Do you have any other examples?

Ms Burrow—Linda mentioned the issue of Rio Tinto.

CHAIRMAN—You said that was in Australia.

Ms Burrow—Within and outside of Australia. I will give you an example of the difference. If you take the global compact, there are a range of companies whose headquarters are based in Europe. They can sign up to Kofi Annan's principles or the UN's principles with little or no fear that they might be in breach of them. But those same companies operate in Asia where there are no rules, in Australia where there are no such rules—because, sad as it might be, our industrial relations legislation is at odds with and falls far short of international law in recognising core labour standards, particularly the right to collective bargaining—and in other parts of the world. Because there is such a complex maze in terms of where headquarters and branch operations are, we believe that this sort of legislation will ultimately set a new set of global rules, but it will have to be decisions initially taken by nation states. We can provide you with a list of breaches, if that is what you are looking for.

Ms Rubinstein—Just to add to that, the complaint that the ACTU made under the OECD guidelines was about conduct in Australia as it is required to be, but there have been instances where Rio Tinto and other Australian mining companies have breached both human rights in

respect of indigenous people and labour rights in Indonesia and Latin America. I think it is well known that a large number of Australian manufacturing enterprises have moved offshore, many of them to the export processing zones of Asia. The conditions that apply to workers in those zones are also well known.

It is not necessarily easy to have a dossier on particular companies and their activities, which is why the crucial part of this bill is the requirement for reporting. Just asking companies to think about what they are doing and to report on that is probably more important than the actual penalty provisions. It is simply not possible for us to go on an investigatory mission to South Korea, Indonesia and Vietnam to see what various shoe manufacturers, clothing manufacturers and small electronic manufacturers are up to. But clearly there is reason for concern.

Ms Burrow—May I say one more thing. We are currently compiling a list of Australian companies who are operating in Burma in contravention of the ILO decision around sanctions in regard to forced labour standards. It will not be available for a month or so after the time we have finished our consultations, but we would be happy to make that list available. It will include companies who have pulled out of Burma as a sign of commitment to international standards and requests and those who are still operating, whom we think the government should take action against. It seems pertinent to the inquiry and we will forward that when it is available.

Senator MURRAY—Mr Chairman, may I ask that we accept that OECD guideline list as a tabled document?

CHAIRMAN—Yes.

Senator MURRAY—Thank you. Ms Burrow, would you agree with me that the economic, social and environmental laws of Australia establish standards which run into costs for companies that are far higher than most countries in the world?

Ms Burrow—I would disagree in the context of costs in other developed countries. Perhaps if you compared it with developing countries and the cost of labour in those countries and lack of environmental standards, then that may well be the case.

Senator MURRAY—My point is as follows: successive governments of whatever persuasion have agreed that those standards are appropriate for Australia. That obviously affects our exporting costs and our ability to compete with importers who might come from lower standard countries. I would think it logical, given our acceptance as a society, that we be prepared to accept a cost for higher standards.

Ms Burrow—Absolutely.

Senator MURRAY—And we should extend that acceptance to other jurisdictions. It seems to me to be a contrary view that it is all right for Australia but it is not all right in other countries.

Ms Burrow—We would agree with that.

Senator MURRAY—The core issue for most companies in labour terms is labour cost. Explicitly this bill has accepted that it cannot impose labour costs in other countries. Explicitly the bill has said that companies should ensure that a living wage is reached in whatever country the company operates in so it is regarded as relative but still as a standard. What is your view of that approach?

Ms Burrow—That is our approach entirely. The only set of principles that we have ever promoted are those that promote core labour standards, which are of course eradication of child-enforced labour, the right to freedom of association and the right to organise and collectively bargain. If working people everywhere in the world have the right to bargain collectively, then they themselves will set appropriate labour costs in the context of economies and affordable rates within the specific industries. That is the basis. It is about human rights and labour standards, along with environmental standards. It is not about us dictating that there should be a common minimum wage or whatever the other fallacies are that people like to promote.

Senator MURRAY—Child labour is an issue in many developing countries. The previous witness agreed with me that the focus of modern analysis of this area is to prevent the abuse of children and not the use of children where use might be traditional to activities such as goat keeping or looking after cattle. The previous witness believed that the best precedent for the legislation to use would be the ILO standard on child labour. Would you agree that that is the appropriate reference for child labour restrictions?

Ms Burrow—Absolutely, and if you could get the Australian parliament to sign up to that convention in the process that would be very helpful.

Senator MURRAY—If you think I can do that, you think I have more power than I have. The ACTU have a long and, in my view, honourable history of promoting high—and higher—international human rights standards and labour standards. In that sense the ACTU have always been globalists. The question for me is: does this bill merely balance up the drive by Australian corporations to support globalisation in other economic areas such as copyright laws, capital movements and international tax harmonisation—those sorts of things? Is it your view that it is appropriate for the government to ensure that that is balanced out with a civilised and proper attention to social and environmental standards?

Ms Burrow—Absolutely. We argue, just as you have indicated, that companies understand rules. In fact, they demand rules around property rights, intellectual property, investment rules and the like. So we think a fairer set of global rules must incorporate the sorts of provisions that are enshrined in the bill—in particular, as you have indicated, on issues like child labour.

Senator MURRAY—One of the provisions in the bill is reporting. I agree with you that that is probably amongst the most important of the bill's provisions. However, the bill says expressly that reporting shall not be a greater onus than it is in Australia already—in other words, you will not be required to report on things that you do not have to report on in Australia. Do you think that is a reasonable approach to take, or would you prefer a stricter or tougher approach?

Ms Rubinstein—I think it would be necessary to have reporting across all of the areas that are covered in the bill. It can be assumed in Australia that environmental reporting, for example, is required, and some reporting of employment practices is required. But generally companies

do not report on whether they adhere to human rights standards, or collective bargaining standards for that matter, because it is assumed we have legal structures that ensure that those activities do not take place or that those laws are not breached. So it may well be that companies would need to be required to address their minds to those specific areas.

Senator MURRAY—Rather than the bill being explicit about exactly what should be reported, would you think it appropriate that it just delegates the development of the reporting criteria to, say, the Australian Securities and Investments Commission, and for ASIC to understand that the bill requires companies to tell them whether they are paying a living wage, whether they are complying with basic health and safety standards, et cetera?

Ms Rubinstein—Having it done through ASIC would be fine. I think that legislation, increasingly, is looking at establishing codes in a sense and ways of reporting, or whatever it might be, that suit the needs of the people who have to do it. They do not have to be set down in legislation as long as there is proper input, they are done properly and they are enforceable

Ms Burrow—And public. If they are publicly available and the reports are inadequate, then that allows civil society to do its work. We think that your endeavours here will be complemented by the emerging societal debate. If you go back to that PricewaterhouseCooper poll, one of its directors—I think it was a woman called Sandra Berkensleigh—predicted that within five years no auditors would be engaged by major corporations if they did not have the skills to audit company performance beyond just the core financial responsibilities. I would hope that the five-year period was not just an optimistic view, because I genuinely think that is the way the debate is shaping up. The investment community and, increasingly, Australians as shareholders will want to know the full story, so I think your endeavours will be complemented. It is the transparency and the public availability of reporting that we would find most important.

Senator MURRAY—One of the things the bill does is establish a threshold against which the bill, if it became an act, would apply. That threshold is 100 persons. As you know, in Australian law thresholds are commonly established for many kinds of tax or regulatory reasons—and frankly if parliament could harmonise them at some stage it would be helpful. For instance, small business for manufacturing is described as 100 persons. There are other thresholds that begin at 15 employees and others that relate to turnover, and so on. But a core consideration of this bill would be, firstly, that it is impossible to regulate or investigate small operations or even large operations, probably in many companies; and, secondly, that there are only certain companies that are equipped to be able to do this kind of reporting or that have a significant impact in the countries concerned. The examples you have used have been large mining companies, which have a significant impact. I note you have made remarks about the threshold. Do you have contrary recommendations about what level the threshold should be set at, or is this a good starting point?

Ms Rubinstein—We would accept that legislation like this should at first apply to at least reasonably sized businesses, but we would make the point that we raised in the submission: that the law should also apply to Australian corporations that contract out their manufacturing to local bodies—by doing that, they should not be able to abrogate any responsibility for the activities of their subcontractors.

Senator COONEY—Is there any merit in looking at the victims of the action rather than at the size of the company? What you want to react to is the way in which people have been treated around the world rather than saying, 'This is a company that is so big; we are going to look at that.' I think you have answered this in terms of the outworkers to some extent, but you need to look at the people who have been affected and say, 'Something must be done about them.'

Ms Rubinstein—That is partly right, but I guess large companies can do more damage than small companies. That is not inevitable, but often those things go together—for example, with the large environmental destruction by large mining companies. But the outworker is a good analogy because of the system of contractors and subcontractors that is used. Most people in Australia would believe the ultimate responsibility for outwork is with the large retailers who sell under their own brands, but there is a complex chain of contractors and subcontractors that goes down to the victims. The responsibility has to go back to those large companies whose contractual requirements set in place this later chain of events.

Ms Burrow—We have not done the research that would give us a view about how many Australian companies with less than 100 employees in Australia would be operating in an international context, but we could certainly seek some further advice about that. But we all accept that you have to start somewhere. If we were urging the committee to consider anything, it would be to keep the standard under review so that should there be evidence, anecdotal or otherwise, at a future point that it needed to be changed, that could be done—that is what parliaments are for. We have been really heartened to see this concrete starting point and Australian politicians taking such a principled position in terms of the way in which rules should be established to protect people and their environments. We think it is a fantastic first step.

CHAIRMAN—In that context, what can the ACTU do for its sister-brother organisations overseas to inform Australia of what is going on?

Ms Burrow—I indicated to Senator Murray that I thought the question of reporting would be complemented by emerging activities and the debate and the associated activities internationally. The international unions—we now call ourselves global unions—will meet at the end of this month to consider in detail how we might best support a transparent monitoring process that would complement the global compact. That involves our talking to large international auditing firms about the way in which they rank companies for not only financial responsibilities but disclosures on some of the other areas such as human rights, labour laws and environmental standards—those social protection areas. In that context, we would hope that the non-government organisation community as a whole and unions in particular would not only be in a position to use this legislation but to add value to it in terms of their complementary activities, which is what I think you are requesting.

CHAIRMAN—Thank you for appearing before the committee and for answering our questions.

[10.42 a.m.]

MUNCHENBERG, Mr Steven, Assistant Director, Business Council of Australia

WELLS, Mr Richard C., Executive Director, Minerals Council of Australia

CHAIRMAN—Welcome. The committee has before it your submission 21. Are there any omissions or additions you wish to make to it? If not, do you wish to make an opening statement?

Mr Wells—The Minerals Council of Australia, the Business Council of Australia and the Australian Industry Group welcome the opportunity to make a submission to the committee. We think it is an important area of global governance that raises a lot of issues. At the outset, I wish to state clearly that the associations we jointly represent share the concerns about human rights, the environment, labour and occupational health and safety standards, which the bill seeks to address. The associations are committed to seeking high levels of corporate performance in the areas covered by the bill. While being sensitive to the concerns of non-government organisations and the public relating to examples of poor performance, we consider the industry has come a long way in improving its performance, but this is part of a continuing process. We consider the poor performance by Australian companies is unacceptable. The Australian industry does not support the legislation, however, which proposes to regulate the overseas activities on Australian companies in these areas of human rights, the environment, labour and occupational health and safety. We consider it inappropriate and unworkable from an industry perspective.

In our view, the numerous references to incidents in the second reading speech appear to give a false and highly misleading perception that stronger regulation would have prevented their recurrence. This fails to recognise that legislation cannot prevent accidents or incidents. All it can do is to set minimum standards. Australian industry considers it would be impracticable and inappropriate for Australian companies to function under a different regulatory regime to those established in the countries in which they are operating. We consider that the environmental, employment and safety and health regulations are matters that should be addressed by sovereign governments both independently and collectively through organisations such as the United Nations.

The further progression of the bill would entail the imposition of Australian standards, implying that local standards are either inferior, inadequate or somehow inappropriate. It could also result in difficulties for Australian companies operating locally to be seen as sanctioning the Australian government's actions on issues for which the host government has primary responsibility. In addition, by imposing these standards and judgments, the bill may be seen as attempting to negate the rights of sovereign countries to determine how their natural and industrial resources would be used and how their societies would benefit from the development of those resources.

From an operational perspective, industry is concerned about the practicalities of complying with laws that have extraterritorial application. Were conflict to arise between the legal obligations of both the Australian and the host country jurisdictions, the process by which this would be resolved is unclear. Furthermore, it is not clear how the bill would deal with

international joint venture partners of Australian companies involved in projects, a common feature in modern industry. The bill has the potential to create competitive disadvantage for Australian companies.

We note that the approach to the environmental standards, as proposed in clause 7 of the bill, is largely consistent with environmental management practice employed by Australian industry; however, we consider that the proposed standards are inappropriate measures for improving the performance of Australian operations offshore. Australian industry supports the disclosure of environmental performance by corporations. However, we do not support mandatory reporting which extends beyond the numerous terms and conditions already prescribed in licensing agreements under which we operate. Where firms elect to publish additional information on their environmental policies and performances, this provides an area of company distinction and possibly of competitive advantage, and we encourage this. For example, as a result of the Minerals Industry Code there are 44 public environmental performance reports in the public arena, and major corporations are applying this to their sites around the world. On the other hand, mandatory reporting requirements, such as those proposed in the bill, instead shift the focus towards basic compliance and away from innovation and stakeholder engagement.

We are basically talking about going beyond compliance here. Instead, we consider that an integrated approach of local laws and voluntary industry measures, coupled with international agreements, is a more appropriate pathway. This approach, together with negotiated agreements between companies and local communities, provides a more effective means for bringing about real change and improvement on the ground. Under this model, companies are encouraged to treat legislative requirements as a bare minimum and to seek continual improvement in the way in which they operate, both domestically and overseas. This approach also provides the necessary flexibility to ensure that practices employed are relevant to the particular issues associated with different industries operating under very different circumstances from those in Australia.

The bill has the potential not only to fail to meet its objectives but also to devalue many of the international initiatives that are being undertaken through cooperative working relationships with industry. Australian industry has been at the forefront of developing codes and approaches covering its environmental and, increasingly, its social performance. This is evidenced in the context of the parties to this submission by the Australian Industry Group's environment policy, the Minerals Industry Code for Environmental Management, the Minerals Council's Statement on Social Principles and the Statement of Principles and Sustainable Development by the Business Council of Australia. A large number of international initiatives are also being undertaken by industry. There is a sustainable development agenda taking place through organisations such as the United Nations Environment Program, the United Nations Development Program and the World Business Council for Sustainable Development.

In conclusion, I reiterate that we share the concerns about the matters that the bill seeks to address. We are committed to seeking high levels of corporate performance, but we do not support the legislation. We consider a framework of local laws and voluntary industry measures coupled with international agreements as the only effective way of bringing about change and improvements in these areas on the ground.

Senator MURRAY—Mr Wells, how do you react to the following statement. If we go back to environmental regulation, when people with environmental concerns originally got this going and governments eventually imposed regulation at both the state and federal levels, my memory is that your organisation opposed those on all sorts of grounds—in other words, you were followers, not leaders—however, now, in many respects you are leaders and not followers. You mentioned the 44 environmental reports. Some of the environmental reports produced by members of your organisation are outstanding and go far beyond the laws and regulations requirements. They have developed a cultural response within the companies, which is very credible. My memory is that originally those companies opposed these things but have now adopted them and are happy with them. Do you think that same mentality exists here in opposition to this bill and that if it became a reality the important members of your organisation would be good supporters of an approach of this kind?

Mr Wells—I am not sure which of the specific legislative provisions you say we opposed, so I cannot deal with it in general. It is fair to say there is a changing process that has been going on for some time in the industry more broadly than just the minerals industry in terms of recognising community views and the need to take community concerns into account when planning and developing a project. If you go back a couple of decades, statutory authorities granted to companies to build a plant or develop a mine were considered the appropriate base on which to go forward. It is now well recognised that you would not even attempt to do such a thing without consulting the communities with which you were going to interact. That is not necessarily an altruistic thing; it is about securing investment and shareholders' interests. Companies want to operate in a way that is compatible with the community values in which they operate to provide greater security, particularly when you are talking about projects that may be ongoing for 30 to 40 years.

There has certainly been an evolution in values, and it goes on. It is a process of continuing improvement. We advocate a leadership role and a benchmark that is set in the market by companies that are prepared to take these things on. We are now getting greater recognition for these sorts of things in financial institutions—the World Bank, and a range of others—so there is a competitive edge. Frankly, we think that it is a far more powerful force to deliver better outcomes on the ground than to set legislative requirements. I think it is a force that, in terms of the transition to the minimum requirements you can specify legislation, that we need to take account of. We need to encourage the leaders to lead and to keep going forward without constraining them by legislative provisions. I suspect that minimum provisions for the recalcitrants will always need to be put in place, but the transfer of those into the international arena, where we are already dealing with a range of international and global governance initiatives—development of codes dealing with cyanide and a range of those sorts of things—is a complicating factor.

Senator MURRAY—Both sets of witnesses that we heard this morning emphasised that they thought the reporting requirements of the bill were amongst the most important. I do not know if you were present, but when I was talking to Professor Kinley I remarked that it is the cultural and systemic adoption of an approach to these things that show the best consequences of legislation. I gave the example, which you have alluded to, of environmental law and regulation whereby the mining companies have gone far beyond the letter of the law in their environmental reports. In doing so, they have adopted a holistic approach to their operations with the appointment of environmental officers and people who monitor standards and keep a check on

things, which in many respects puts us at the forefront worldwide of these approaches. The issue then is, if reporting has or could have such an effect, whether you have any concerns about the reporting provisions in the bill and whether you have concerns about the possible route the committee could go in recommending that the detailed criteria for reporting be laid down and developed by ASIC rather than being prescribed by the bill itself.

Mr Wells—We do have concerns about aspects of reporting in the bill. We get a lot of calls for the putting together of standards for public environmental performance reports, social performance reports, and so on. We disagree with the philosophy behind this—basically, people are asking us to set minimum standards for reports. We have a market operating out here, quite seriously, in terms of competitive advantage, with people seeking to get credit for what they do. We encourage openness and transparency. In the public environmental reporting process, our greatest judge is the community. Groups like the WWF do an annual review of these sorts of things. To give you a parallel, the Joint Ore Reserves Committee, which is a joint committee between the Minerals Council and the Australasian Institute of Mining and Metallurgy, has a voluntary code about the reporting of ore reserves. The only reason it functions adequately in Australia is that there is a healthy interaction between that, the Stock Exchange and the analysts. The analysts exercise scrutiny over what the companies do. There is no statutory requirement to make the report, but the fact is that companies abide by it because they know damn well that if they do not they will get a bad report from the analytical community.

Similarly, openness and transparency is encouraged from our companies, and I think we are succeeding. The greatest level of scrutiny is exercised by the community and the critics. Frankly, if we are seen to tell lies or whatever in those reports, we will be brought to account. Statutory provisions that specify minimum requirements for reporting tend to put a baseline that does not encourage that progression. We are very much interested in encouraging commercial drivers—and there are commercial drivers now for openness, transparency and social environmental reporting—to use that energy to drive further forward. This is how the leadership initiative is driving itself. You can see that the WWF report and our public environmental performance reports are ranked. The companies that are down the bottom do not like it and they are moving. This is a process that can operate as long as there is openness and transparency and that there is a critical community prepared to examine these things. Quite frankly, I do not think it is necessary to have statutory requirements and rely on ASIC exercising a minimum standard review.

Senator MURRAY—Mr Munchenberg, let me give you one other flavour that I would like your reaction to. The bill requires that the reporting should be no more onerous—I am just paraphrasing—than Australian reporting standards currently, and that may require a regulatory body to give some guidelines to corporations.

Mr Munchenberg—I will take up that point as well, but I would just like to add to Dick's perspective on the mandating of environmental reporting and particularly trying to set standards for that. The Minerals Council deals with one sector of the economy, and the Business Council deals with most major sectors of the economy. We would certainly be concerned at any attempt to try to find a way of reporting either in the legislation or through ASIC or any other body because what is appropriate for reporting in resource sectors is unlikely to be appropriate in the telecommunications sector, the finance sector, the retail sector, the manufacturing sectors or the various other sectors that are also covered by the proposed legislation. We would be very

concerned because our expectation is that any attempt to define how environmental reporting that would successfully cover all of those sectors should work would be of such general level as to be without much benefit or use or would be inappropriate to sectors beyond the mining sector. I emphasise that, notwithstanding the tenor of the second reading speech for this legislation and much of the discussion that has occurred here today, the legislation applies way beyond the mining industry and would clearly apply to most other major corporations based in Australia who are increasingly operating overseas. We need to be careful that, in focusing on express concerns about one particular sector—and there are questions about the extent to which those concerns are currently valid anyway—that we are not actually setting up a regime that is inappropriate to the rest of business as well. What was your second point?

Senator MURRAY—I merely wanted to remind you that the bill says there need be no greater reporting required than is apparent under Australian law at present. It may need ASIC assistance to provide at least guidelines to indicate the areas that need to be covered.

Mr Munchenberg—The short answer to that is that we are not supportive of that provision in the legislation. Our view, therefore, would be that there should not be a problem. More importantly, I would also like to emphasise that if we try to cast in legislation or through administrative action the basic principles of environmental reporting, there are two concerns that arise there. One is that there are major initiatives occurring globally to try to flesh out the best ways of reporting. We have seen things like the global reporting initiative, which has been a major exercise over a number of the years. It attempts to define how environmental reporting can best be done across a whole range of sectors. It is a major exercise. It is not a mandating exercise, and it is not setting standards that need to be complied with but merely provides guidance for companies that are pursuing environmental reporting.

My other concern is that, whether in legislation or administratively, if you try to draft a set of guidelines or standards that cover the whole range of economic activities within the economy, you are going to set up a regime where you have very broad, general and perhaps even lowest common denominator standards that present a much lower hurdle for companies to jump over, which is what they will seek to do. You will stifle the innovation and progression that is occurring through the various other factors that are currently driving companies to report, whether it be external pressures, pressures for disclosure or our own association statements.

The draft statement of the Business Council of Australia—which has been released, and which I know you have seen, Senator—includes a commitment by Australia's top 100 companies to engage in both environmental and social reporting. So these things are already happening. If you mandate standards for these things, the focus will shift from companies seeking to use these reports as opportunities to drive forward further progression to instead focusing on making sure that their lawyers advise them to meet the statutory requirements. I see mandating these things as stifling innovation.

Senator MURRAY—Haven't business organisations like yours, and businesses internationally, given governments and parliaments a long experience of opposition to every kind of reporting that has ever been put up? It is only once you discover that you need to comply that you move along and find the best possible ways of doing it. You then move from the position of the minimal to again using the environmental reporting standards for a very good outcome. Aren't you, as organisations, behaving in the predictable way you always behave—namely, you will oppose any increase in standards and you will oppose any increase in reporting

mely, you will oppose any increase in standards and you will oppose any increase in reporting but once it is in you will do it very well and you will be very much the better for it? Isn't there are a cultural kind of antagonism to this stuff from you automatically?

Mr Munchenberg—There are two responses to that: the specific and the general. The specific is that we have actually seen a flourishing of environmental reporting in Australia without any legislative requirement for such reporting, notwithstanding the amendment to the Corporations Law, which I understand from various surveys is mostly for the companies that have not previously reported but are now doing so in a legalistic compliance approach rather than looking at the broader issues of environmental disclosure. More generally, I would like to argue that the paradigm you are putting up of industry opposition to environmental initiatives—to broaden it out beyond the legislation—followed by industry compliance is increasingly out of date.

It is fair to say that in the past the industry has regarded environmental pressures through environmental activities, including legislation, as being issues that needed to be managed and threats that needed to be averted. Increasingly corporations, particularly larger corporations, are understanding that environmental and social dimensions of their operations have to be managed and, if they have to be managed, it is corporate culture to turn that issue into an opportunity. Increasingly companies are looking for the opportunity so they can achieve out of better environmental and social performance. There is a fundamental and very significant cultural change occurring within the corporate sector at the moment. I will admit that any cultural change is variable between corporations, but the overall trend is strongly towards corporations seeing environmental and social performance as opportunities to improve their economic performance and their standing in the community as well as means to deal with risk and uncertainty.

Mr Wells—It is fair to say that, as community expectations and values have changed, corporations have moved to address these things where there is an advantage. I do not think it is fair to characterise it that there has been opposition at every step of the way and that only when the legislation comes through do we turn around and see the good in it and make it to our advantage. I think that would be wrong. But it is quite clear that all industries have been responding to the changes in community attitudes around those areas, and we should encourage the leadership initiatives and encourage companies to see advantages in doing this. Rather than setting up statutory frameworks that people will see in a legalistic way as not being much of a success, we should encourage leadership and encourage the credit for doing such things. There is a very positive force to work with here without constraining it.

Senator MURRAY—You have made a legitimate point—and either of you can respond—about the threshold of 100 employees. Your point is simply that if you want to impose standards or have particular standards they should apply to everybody, not just people above a certain level. Of course, in legislation we constantly establish thresholds both for reporting and other standards. Just last week, the committee produced a report which dealt with exactly that—different levels of reporting for companies of different sizes. We have to deal with it all the time. It is both a practical issue and a discretionary issue, but I would agree that it is highly subjective to pick 100 persons, although there are some precedents and thresholds. If such legislation were to be considered, would your preference be for no threshold at all, or for the threshold to be determined in a particular way?

Mr Wells—As you know, we do not support the legislation, so basically we do not think it is appropriate to have a threshold. It is a difficult one because we do not think the legislation is appropriate in terms of delivering outcomes on the ground; we do not think it is appropriate to establish some artificial benchmark, as you put it, to apply the legislation. The issue is really about how you are to gain that greater improvement in performance on the ground. There are other mechanisms that will be more effective in doing that than setting this sort of provision.

Mr SERCOMBE—In the context of globalisation, Australian business has an obvious interest to achieve greater levels of certainty. Dealing offshore with a range of matters such as electoral property, taxation arrangements and a whole plethora of other things, a higher degree of certainty is an important consideration. Noting what you have said about not having concerns about legislated standards in relation to environmental and social issues, isn't there also an argument for specifying standards for business to achieve? This social and environmental side of the coin is the other side of the more economic aspects of globalisation. Isn't there an argument that having some specified standards that Australian businesses are expected to achieve will add to the certainty of the environment in which our companies are operating globally?

Mr Wells—It is always an interesting debate between the issues of certainty and flexibility. A lot of the corporations based here in Australia and operating overseas are operating in a wide diversity of environments, social structures and cultures. You name it! So, the high level at which you would have to pitch these raises a question about whether it is relevant. Another way of putting the point, which is sometimes contentious in the industry, is that industry should take responsibility for assessing its own risks, circumstances and planning appropriately to mitigate those risks. That is a far tougher job than meeting someone's standards. What we find is that a lot of companies will take comfort, 'Give me a set of standards and I'll operate to those standards.' We are saying that is not good enough; we are saying we want to go beyond compliance. The difficulty when dealing with such a diverse range of cultures, circumstances, countries and so on is to come up with a relevant set of standards that will do anything other than people just meeting the minimum. We are setting a challenge for our companies. We are saying, 'You must operate your businesses in accordance with our principles and our code,' but we do not go to the degree of specification that is likely to intrude on what might be appropriate for a particular community. It is more a principled set of values than a specification of standards.

Mr SERCOMBE—Australian business would quite reasonably want some specification for the operation of intellectual property or taxation arrangements, for example.

Mr Wells—Yes, people want precision in the law. When you are dealing with interactions with communities—as we have found here in Australia with indigenous communities—it is extremely difficult to legislate or to put up a statutory provision that can deal with all the circumstances between different parties. It is a major frailty to think we can legislate to deal with those sorts of issues. We can certainly encourage performance and openness and transparency about these sorts of things, but to think we can legislate for those relationships is a mistake.

Mr Munchenberg—More specifically, we are not convinced that the legislation provides any greater certainty. Australian corporations are well aware of the standards that are out there,

whether they be Australian legislative standards, Australian community expectations or international standards or expectations. The legislation, particularly in the legal sense, actually introduces considerable uncertainty, particularly in the interaction between this legislation and host country legislative requirements and decisions. I think it will contribute to uncertainty rather than adding greater certainty.

Mr SERCOMBE—It was put to us by earlier witnesses—and we have not had the chance to explore it, so I do not know whether you can throw any light on it from your perspective—that in the United Kingdom in particular, there has been recent litigation concerning the performances of British companies during the apartheid era of South Africa, and that the law in Britain may be somewhat different from what some British companies operating in South Africa expected it to be. Do you have a view or any advice on the possible exposure of companies, in a common law legal environment, to the social, environmental and human rights issues and what the position may be under common law as distinct from statute?

Mr Wells—I am not familiar with the case that was referred to earlier, and I did hear the earlier witness. Suffice to say that, in a variety of jurisdictions in the United States, there have been attempts at various stages to exercise control over corporations. The United States dealt with it in relation to a commercial interaction with Iraq—exceptional circumstances. There are examples where it can occur, but I am not familiar with the particular example that was referred to earlier.

Mr SERCOMBE—If what the other witnesses were indicating is correct, it could be a fairly alarming development in that for some Australian companies there may be some exposure to risk. Statute might be able to introduce a higher degree of certainty.

Mr Wells—I do not know that that pathway will be pursued or accelerated. It is illustrative that the European resolution and those sorts of things were mentioned earlier, including the McKinney bill in the United States. It is our understanding that they favoured the voluntary approach, and they favoured the encouragement of industry codes and a lot of the things we are doing. They recommended the evolutionary approach to these sorts of measures and encouraged consultation with particular developing countries or other countries that may be affected—all of those sorts of things that we are encouraging here ourselves as industry. I think we need to be careful about thinking that those sorts of statutory provisions are likely to be locked up in law, which will give greater jurisdiction, because the outcomes are very unclear. It is very unclear what will happen with the McKinney bill in the US, for example. I think we need to be careful about presuming that that pathway will necessarily occur.

Senator MURRAY—The reference for that case is *Lubbe and other v Cape plc*, [2001] WLR 1545. It says:

> In this case the House of Lords—so it has gone to the highest court—was unimpressed by the claims of the English parent company (Cape) that it could not be held directly responsible for the actions of its South African subsidiary in whose mines the plaintiff claimed to have contracted asbestosis.

CHAIRMAN—In your submission, you expressed concern that Australian companies might move offshore if this legislation were enacted. As you are probably aware, one of the aims of the current federal government is to try to attract companies onshore to make Australia their

headquarters. Will you expand on your concerns about companies moving offshore and also the impact it might have on the government's capacity to attract other companies to come onshore?

Mr Wells—I do not want to overstate this, but there is no doubt whatsoever with the globalised approach in which most of our commodity based industries operate that there are significant increases in shareholders' interests to consider relocation elsewhere. For example, the hubs of business for the minerals industry tend to focus more on London. I can demonstrate various fiscal provisions that would encourage companies in Australia to locate their exploration offices in North America. There are already pre-existing conditions where companies have to keep assessing whether they keep their headquarters in Australia. It is another straw where, if business is seen to be more difficult in operating out of Australia than elsewhere, some boards will ultimately decided not to be here. There are some celebrated examples of companies moving to other places, such as New Zealand and other countries. It may seem that Australia is leading the way in regulatory control in an area that we do not think is necessary. Some boards may think that this is the straw that encourages them to move somewhere else.

Mr Munchenberg—There are a lot of factors that boards have to deal with in determining where they will continue to base themselves, be it here or overseas. I must emphasise that, particularly given that we do not feel legislation is necessary or is likely to achieve its objectives, the last thing we want is to add another reason to the list of considerations that companies go through.

CHAIRMAN—What about the reverse of the coin—with companies we are trying to attract here?

Mr Wells—There are some aspects of the Australian economy that make it quite encouraging for companies to come here, but when they do their due diligence about setting up business here, it is quite interesting the sorts of things they find quite confusing—indigenous laws, native title laws and a whole range of other things. To the extent that they already have operations in other countries, if they were to set up regional headquarters here, I think it would be a disincentive. There is a lot of encouragement because Australia is seen as a relatively stable country with reasonably good attributes for locating regional headquarters, and I think it would be a question for them, especially if they are going to operate in countries to our north that have very different cultural and societal expectations than we have here. I do not want to overstate it, but it is another one of those factors that would be in the back of their minds.

CHAIRMAN—Your submission suggests that a more appropriate course of action would be for Australia to assist and develop enforcement of local standards. Do you have any particular type of assistance in mind? Can you give examples of ways in which Australian companies have contributed in that way in the past or are doing so at present?

Mr Wells—There are lots of examples of this on the local scale. The standard way of operating these days, especially the long-life projects, is for companies to spend a considerable amount of time doing community and local government work to assess the risk at the community level before establishing a project. Considerable effort has gone in, and there is quite a lot of international scrutiny and healthy interaction with some of the community bodies

that operate in these spheres, to set up frameworks where the basic provisions we expect of a modern company are adhered to.

In most jurisdictions that we are going into now, there is a fairly good awareness. Delegations from Kazakhstan and from all sorts of different countries come through Australia and get awareness of the types of provisions, and we facilitate those sorts of visits. On a global scale there is better access to this, and you are now seeing the development of reasonable levels of provisions in some of those countries that perhaps lacked legislative provisions in the past.

Mr Munchenberg—A specific example of that is a joint project between Environment Australia, the federal environment department and the mining industry to develop a set of modules called *Best Practice Environmental Management in Mining*, which are a series of quite detailed booklets on environmental aspects of mining and also cover the community and social dimension. They have been exported around the world and have received accolades from the United Nations Environment Program and others. They are a clear example of Australia being able to export its knowledge and experience in managing these issues to other countries. We have helped to improve their capacity to deal with those issues, whether it be in practical terms, legislative terms or whatever.

CHAIRMAN—Can you explain the way in which you believe—as I think you referred to in your submission—the bill will reduce the flexibility of corporations for determining ways to improve performance efficiency?

Mr Wells—This goes to the point of whether you have a minimum standard. We have resisted the pressure from various critics of our code to set a minimum reporting standard because we do not believe that that is the way to go. We want to encourage openness and transparency such that the worst performers in the quality of their reports and so on are shown up to be what they are. But we do not know what the end point is, so we want to encourage continuous improvement. Our experience—and I see it in some parts of our industry—is that they would love us to set a standard because they would not have to think about it. They would have to report to the standard. We do not want to do it, and we resist. We certainly have some guidance notes about the sorts of things that should be in there, but we do not know what the end point of this process is. Community expectations change every year, and we want those people to keep moving. That is the process that we are in; I cannot emphasise it enough. If we keep specifying these things hard and fast that is exactly what people will do.

Mr Munchenberg—That is an issue that we have had to deal with in our own statement on sustainable development. We had the option of either setting out some minimum standards that would apply across the various sectors that we represent, perhaps even articulating a time frame at which people should arrive at those standards, or alternatively defining a direction in which corporations should be moving but seeing it as an ongoing process rather than a ‘you have arrived’ process. The way corporations will think is, if you tell them to be at point A at such and such a time. they will be there but they will not necessarily go beyond that. It comes back to the point I was trying to make earlier about setting standards, and that is, because of the reality of political processes, they would inevitably be relatively low standards. Therefore, you are effectively undermining and providing a disincentive against innovation and against companies being more progressive. We have taken the path with our statement of defining broadly where corporations should be going.

We have put into our statement things that we know corporations are not yet capable of doing, such as social reporting, but we believe that that is something that they are going to have to address. Rather than, say, not putting it in because they are not currently doing it or are not capable of currently doing it, we have put it in because we know that they are going to have to develop those capabilities. That is the direction that we see they will have to move.

Mr Wells—We should not underestimate the interaction with other parts of the market. The financial institutions are a very big driver in this. They are looking for measures and indicators by which they can judge whether a corporation is on the right pathway. The degree of openness and transparency and whether it is using third-party auditors are becoming competitive forces in the financial sector. This is an exciting time. I think industry is really on this pathway. I think there is a very healthy interaction. I think we will see an acceleration of this. Those who trail off will probably be left behind and will probably drop out. If you take a long-term big picture view, it is probably a good thing. It is probably be controversial to say it, but the fact is that, if we aspire to higher standards and levels of performance, we have to accept that that will happen. The only way that will happen at the end of the day is where there is significant commercial pressure brought upon the survival of those corporations. We welcome the relationship with the finance sector because we think it is a positive driver in the direction we want to go.

CHAIRMAN—What you are saying is that, if minimum standards are legislated, companies will meet those minimum standards but, if it is left to a voluntary capacity, there is the potential for them to exceed the standards.

Mr Wells—That is right. On the issue of safety, for example, years ago we had safety standards, so everyone met the safety standards, but we were not improving performance. It was not possible to put into statute all the issues that needed to be taken account of in managing safety. We need individual companies to assess their risks and to put in place plans that mitigate those risks with different circumstances, mines and locations. That is what you need—the flexibility to make companies apply their thinking processes to address the issues in that particular locality. You need public scrutiny, openness and transparency to ensure that it is meeting the community's needs. It is counterintuitive to the way we have traditionally seen legislation, but we must recognise that the interaction between the legislature, business and the commercial world has changed in the last decade or two. We need to be careful with everything we do in legislation these days to ensure that we do not hinder the forces that are out there. It is a positive change by well-meaning, well-intended standards, which can ultimately constrain it.

Senator MURRAY—A summary of that is that guidance notes are okay but standards or criteria might not be. Is that an unfair summary of what you have said?

Mr Wells—In most of the statements we have put forward, there are statements of principle and so on that we think should be adhered to. They are like values. We have issued guidance notes. They are not binding, but they are intended to assist companies that are perhaps lower down on the pathway than others to apply those principles in a way that is applicable to their business. The guidance notes are not prescriptive; they are advisory.

Senator MURRAY—Let me use an example from the bill. If the bill said, 'We want you to report on whether you are meeting living wage conditions in the countries in which you are

operate in,' that is a principle. ASIC then says, 'Here are the guidance notes that might assist you in reporting on that.' Would you disagree with that?

Mr Wells—I disagree because you are making it a statutory requirement to put a report out.

Senator MURRAY—So your opposition is the requirement to report on your performance in other countries?

Mr Wells—What I am arguing is that, to abide by the law, you will inevitably have to get down to some prescription because whether you have met your obligation to the law will be tested in the court of law at some stage, which will therefore, de facto, establish a standard.

Senator MURRAY—I would like your clarification on in a couple of points. The Corporate Code of Conduct Bill 2000, HR45961H, was introduced into the House of Representatives on 7 June 2000 by Congresswoman Cynthia McKinney. I assume she is a Democrat and not a Republican, but if she is not I may have maligned her.

Mr Munchenberg—You can never tell with US politics!

Senator MURRAY—You are exactly right. If the bill were passed in what ever form and the United States accepted these principles, and if Australia considered legislation that simply harmonised with that, would it change your views or would your views remain the same?

Mr Wells—For a start, my advice is that it is not likely to go forward. I think the piece of legislation we are talking about here today does go further than the McKinney bill in terms of its links to the securities and exchange type provisions. I do not think it is talking about harmonisation if you put this piece of legislation through.

Senator MURRAY—No, my question was: if the McKinney bill goes through would you disagree with an Australian government which harmonised with it?

Mr Wells—We would have to look at the bill and the terms on which it got through before we could answer that question but, if the general philosophy is to seek to regulate the activities of corporations in other jurisdictions, we would probably have difficulties with it as well.

Senator MURRAY—The reason I raise it is because one of your arguments is that it affects the investment climate of the world. If the United States of America saw it as appropriate to introduce and influence their companies—those which reside in the United States or elsewhere—it may set a precedent that you say does not exist at present.

Mr Wells—Seeking precedent in the US is a dangerous thing to do, Senator. Too often we think that what happens in the US or the EU necessarily should translate to Australia's interests. I do not think that is necessarily the case, but we would have to look at the detail of what was passed at the time.

Senator MURRAY—I agree with you on that mark. I have one last question. In July 2000, 50 multinationals and 12 peak labour organisations and NGOs, many of whom are represented in Australia, signed the global compact. It commits all the signatories within their respective

spheres of influence to protect and promote human rights as expressed in a set of nine universal principles, which include non-discrimination of employment, the elimination of child labour and slave labour, allowing free trade unions and environmental protection. I assume you support that.

Mr Wells—We have not taken a formal decision on the global compact, but obviously the general direction for international business groups of those sorts of things is supported. It is consistent with the voluntary approaches to these sorts of high standards that we advocate.

Senator MURRAY—If as an organisation you ended up supporting that approach, is it likely that your organisations would make yourselves signatories as well?

Mr Wells—Speaking for the Minerals Council, I do not know the answer to that. We are in the process of significant rearrangement of our global governance arrangements for the world minerals industry, and it is certainly an issue. Global governance approaches and transboundary approaches to such things as the management of cyanide and so on are very much in the forefront of what we are doing. I would imagine that any new global body that is set up would look very closely at what other global governance arrangements are in place when establishing its framework of values and principles. That should happen over the next nine months.

Mr Munchenberg—We have gone through a process of looking at the various international instruments that are about, like the global compact, the series of principles and various others. At this stage we have decided that we would prefer to generate our own not because there is anything wrong with any of those other principles but because we are trying to achieve cultural change. We thought it was more important for our members to go through the process of developing their own statement on these issues because of the cultural change that will flow from that rather than just to sign off on a piece of paper from another organisation. Having said that, we will then be in a position to consider whether there are reasons or advantages for our membership to commit to international instruments that our own principles are consistent with.

Senator MURRAY—Do I misunderstand or are you saying to me that representatives of the 50 multinationals here, which might be members of your BCA, would take a different approach to their leaders who signed this compact elsewhere?

Mr Munchenberg—Not at all. The global compact is just one of a number. At the last count I think there were a dozen different statements of principle in these areas. We have thought it more appropriate to synthesise all of those into one Business Council statement which is consistent with the general thrust of all of those statements. Then those organisations who are not currently signatories to those other international instruments will be in a position to match up their own commitments here with overseas commitments and sign on if they have reasons for doing so.

CHAIRMAN—There being no further questions, I thank both of you for appearing before the committee and for the answers to questions you have given us.

[11.36 a.m.]

DAVIS, Mr Brent, Director, Trade and International Affairs, Australian Chamber of Commerce and Industry

TYTHERLEIGH, Mr Andrew, Senior Adviser Environment, Australian Chamber of Commerce and Industry

CHAIRMAN—I now welcome the representatives of the Australian Chamber of Commerce and Industry. We have before us your submission, which we have numbered 16. Are there any corrections to errors or omissions or additions you wish to make?

Mr Davis—None at all.

CHAIRMAN—Do you wish to make an opening statement? If so, you may proceed and we will follow that with questions.

Mr Davis—Thank you, Mr Chairman. Like others, we welcome the opportunity. In one respect we wish we were not here because of our opposition to the bill, which is in both principle and practice. Our recommendation to the committee is that it recommends against the proceeding of the bill through the parliament.

Our objections fall into two categories both in principle and in practice. I am sure in the questions and answers session many of the questions of practice will come forth, so at this stage I will stay with those of principle. Our must fundamental objection in principle applies to the extra territorialism that underpins this bill. Basically it is about imposing Australian values on the rest of the world, exporting our views to others, and we are fully aware that all parties in the parliament have spoken strongly against such a practice when others have sought to do it upon us. We have heard people in other places expressing reservations about this undesirable practice.

Ultimately, the tone of the bill is paternalistic—it really is. It is a one-size-fits-all model, the Australian way is the best way and others should ostensibly conform with its view of the world. I know successive Australian governments of both persuasions have railed strongly in support of the business community when foreign governments, most notably the United States but also Europe, have attempted similar exercises in the past. That opposition goes back 25 years. As one of the other submissions says, it is basically a form of cultural imperialism. We bridle at that, as do many others.

There are also problems of conflicts of laws. If we do accept this extra territorial application of laws, under whose laws do businesses operate when they are operating in a third, fourth or fifth country? Is operating in accordance with the national law of the host country a defence against the extra territorial application of the Australian law? If one is higher or lower than the other, with which one do we comply? What happens when we have multiple jurisdictions? How do we deal with those? It is a serious problem for business.

Ultimately, if the legislation were to proceed, we think it would be counterproductive. That comes out from several provisions of the act, most notably part 6 dealing with body corporates and the liability of holding companies. As observed by Mr Wells and Mr Munchenberg, who

appeared before you earlier—and we endorse their view—it would deter Australian foreign investment into many developing countries. Quite simply it would discourage business from going into those places because the onerous reporting obligations under the bill are much beyond those that apply under Australian law. Of course, it would deter foreign investment coming into Australia.

Again I refer to the definition of 'corporate' under clause 6. We are aware from reading the other submissions by the Law Council and the accounting bodies that it could have an uplift effect—that is, drag in parent bodies from other countries. We also endorse the view put forward by Mr Wells that we do not have a natural monopoly or an automatic right to foreign investment into this country. We have to compete with it, and Mr Wells is absolutely right that when boards make decisions they take a comprehensive view. We have to promote our assets rather than adding to the liability side of the balance sheet. When many boards look at this bill, especially at the director's liabilities implicit in the bill, which go beyond the nature of some of our corporate law obligations, it will have a discouraging effect.

In terms of general points, we observe there is no proven need for this legislation. We have seen no substantial or proven evidence that Australian firms are operating to lesser standards abroad. I am sure we could find a few isolated instances, but anyone with a background in statistics will tell you that the outlier or end point of the distribution does not prove the case. It is not proven in Senator Bourne's tabling statement, or in anything else we have been able to find in support of the bill, that volunteerism does not work. We have seen no proven case that legislation is superior. We heard a very good argument from Mr Wells and Mr Munchenberg that legislation can have a static effect and that it can have a levelling-down effect.

Ultimately, if we look at what is in Australia's national interest in this matter, it is not about alienating other countries by practising cultural imperialism; and it is not about deterring foreign investment, both inwards and outwards. Our national interests are about being a good citizen. I do not know that the bill in its current form will do that. For those reasons, Mr Chairman, we would like to encourage the committee to recommend against the progress of this bill.

Senator MURRAY—That was an unambiguous statement of support, wasn't it?

Mr Davis—If I was not clear on any point, I am happy to repeat it.

Senator MURRAY—The bill is an amalgam of standards, values and principles established in various international forums, some of which your organisation has a history of opposing, some of which your organisation has a history of accepting and some of which your organisation has probably supported. However, I think your submission and your remarks oppose not only the content, interpretation or description but the intent of the law. You use some quite strong language to express that, but you then immediately lay yourself open to a debate as to whether cultural imperialism is worse than or better than economic imperialism. But we will not go down that path.

My question to you relates to a general cultural approach from your organisation, and that is whether it is in your nature as an organisation—not you personally, Mr Davis—to oppose initiatives of this kind wherever they come and that, as an organisation, you have a long history

of opposing every single social, cultural, community and environmental initiative of importance in this country. You have always been followers, not leaders, in that area. Your principal objectives have always been related to the hip pocket and the self-interest of your members, not the interests of your community, of which you are a part. That is a stylised view of the arguments about the way you approach these issues. How do you react to that sort of view of yourselves?

Mr Davis—I think it is an unreasonable view. The Australian Chamber of Commerce and Industry has always looked at initiatives put before it on their merits. There are some that we have supported over time, there are some we have opposed over time and there are some on which we have sought the middle ground where the underlying idea was good but needed to be reworked. We see the best way to go forward on many social and economic issues as being economic growth and development, and the underlying engine for that remains a vibrant private sector. We will always get more growth, we will always get more development and we will always get more social progress and social good if we have a driving, efficient, competitive and vibrant private sector whereby profits generate employment, investment and taxation revenue from which governments can then pursue social objectives.

I do not think it is the case that we blanketly oppose things. Our opposition is reasoned; we would not contemplate any knee-jerk position being taken; and there are instances of us supporting matters. Regrettably, my colleagues from our labour relations side are not with us today because they are before the Australian Industrial Relations Commission on another matter. In many areas, we have taken a progressive view. I know we have done some considerable work in the corporate philanthropy area, but I believe from my superiors that that is one of the quiet achievement type areas where we have not taken a high profile, because those engaged with us in some of that work prefer it that way.

Senator MURRAY—Let us look at a specific area. You reflect in your remarks the great debate in the world about, for instance, child labour issues. Your organisation is well acquainted with that because you have been part of the ILO debate on that matter, so I regard you as having expert insights into these issues as opposed to just having opinions. However, if I understand your organisation correctly, it has indeed opposed the abuse of child labour—

Mr Davis—Correct.

Senator MURRAY—But it has understood that the use of child labour is acceptable with regard to the cultural norms of some societies under certain restrictions. That indicates to me that there is a bottom line—that you accept that, regardless of the practice in a country, international law and international morality requires us to oppose it if it results in the abuse of children. Would you categorise that as cultural imperialism or rather as a reflection of international morality and law—in other words, the entire international community accepts a baseline beyond which the use of children in work in unacceptable?

Mr Davis—The inherent difference is between volunteerism and compulsion and extraterritoriality and national sovereignty. As the committee would well appreciate, ILO processes involve a voluntary mechanism whereby governments come forward and agree to a proposition. They then ratify it within their national jurisdictions where they choose to do so and are expected to implement it. As with all international instruments, not all governments

participate and ratify them and, regrettably, some governments do not implement what they have ratified. But the critical difference between this bill and the ILO processes is what in diplomacy is called modalities—that is, the ILO is a voluntary process whereby sovereign governments are encouraged to adhere to international agreements and implement them at home, which is very different from what this bill is about.

Senator MURRAY—Is it not a fundamental misstatement to argue that this bill seeks to oppose national sovereignty—and I will qualify this—where national sovereignty is not in conflict with international law, because on some issues sovereignty in, say, Iraq or Libya is just not accepted in terms of certain behaviours? But is it not a fundamental misstatement—because the bill requires an Australian company to act in a certain way, not that the entire society acts in a certain way? For instance, it requires that appropriate health and safety or environmental standards are maintained in a company. That does not affect national sovereignty—the sovereign right of nations to use DDT or pour cyanide into their rivers or whatever—but is simply saying that Australian companies should not do that.

Mr Davis—The bill says to foreign nations that, 'We do not regard your standards as adequate, and we will ensure our firms do better than you require of them. We will mandate higher standards than you will for yourselves'. As we have heard in the trade and development debate, the trade and labour debate and the trade and environment debate with the World Trade Organisation, many countries regard it as a question of sovereignty and circumstances that fit with their state of economic development. This is about exporting one's values.

Senator MURRAY—If you were an Australian company in Iraq, for example, and the standard in Iraq was to discriminate against Kurds, are you arguing that an Australian company should not employ Kurds because that would be contrary to their standard?

Mr Davis—When one looks at national standards, Australian firms will practise the Australian standards voluntarily when they go into these places. If you want to stay with that example, Australian firms will employ the best people available to them. From my experience, many of those firms have a positive lift-up effect. I can give the committee case studies of Australian firms operating in India where they have gone in and had a positive lift-up effect on the local standard. They often pay higher wages for scarcer skills than English language proficiency which then has a market based effect of lifting up the local standard. That is the innate nature within the enterprise of taking Australian standards and values with them rather than being compelled to do so.

Senator MURRAY—Are you saying that voluntary cultural imperialism is all right but compulsory statutory laid-down cultural imperialism is not?

Mr Davis—I do not think volunteerism and imperialism go together—it is a non sequitur to me.

Senator MURRAY—You see where you have gone with that language, do you not? You say it is all right for Australian companies to operate to Australian standards if they do so voluntarily but if a statute sets out minimum standards and reporting then that is wrong?

Mr Davis—It is a question of intention behind it. I believe the intention of the Australian firm when it goes abroad is generally and automatically to be a good citizen. We referred to this in our opening remarks. We are not aware of any firms that generally go abroad with a deliberate intent to operate at lower standards than they would at home.

Senator MURRAY—I am sure that is true for the majority of Australian companies. As you know, laws deal with minority, generally speaking. We do not have laws for murder because everybody is a murderer. We have laws for murder because there is a nasty minority for which we need them. However, that is an obvious point. If such laws and standards started to apply in Australia compared with, say, the United States of America, Europe and others where there are moves of this kind, would you resist that being adopted in Australia?

Mr Davis—As Mr Wells said, there can be an appeal to some to follow the American and European model, but it is not something we would do as a general practice. We would look at the nature of these agreements and instruments. The sense of the McKinney bill, as we understand it, and the European initiative is volunteerism and more light-handed reporting requirements than are envisaged under this legislation. Whether they proceed beyond their current germ state is another matter of interest in politics in both places.

Senator MURRAY—What do you think of the reporting standards of Australian companies presently in their operations overseas? We have had an interesting discourse with Mr Wells on how high the standard is now for environmental reporting by many of the mining companies. Do you think there is scope for a much better standard for Australian companies' reports in terms of overseas operations to, if you like, catch up to the very advanced and now available environmental reporting in Australia?

Mr Davis—I am not aware of any proven need for general improvements in mainstream corporate reporting. I have not been made aware of any deficiencies in our reporting requirements.

Senator MURRAY—You do not think it affects a company's capital raising possibilities, for instance, through the strong development of interest in ethical investments, whereby the practice of companies both in Australia and other jurisdictions affects how investors regard them? I will give you an example. The Shell oil company had a very damaged image because of its Nigerian interactions—I seem to remember that there was a great supply of DDT in Southern Africa, et cetera—and it might have got over those. BP, in contrast, has deliberately developed a different response so that it gets a better ethical flavour. Do you think that matters at all, or will the market simply determine that?

Mr Davis—Ultimately the market will sort it out. We would also point out that there are some enterprises and superannuation funds that have gone forward with ethical investment strategies and they have tended to underperform. Individuals have tended to go round them because of some of their investment strategies and rates of return. There are experiences both ways with ethical investment. There have been some cases where firms have voluntarily gone along that track but, as I say, we have observed in superannuation that they have tended to underperform in the market and have suffered accordingly.

Senator MURRAY—Mr Davis, you are obviously aware that I would disagree with many of your opinions here, but I want to compliment and thank you for your submission, because the way in which you have laid it out very clearly gives the bill's provisions and your response to it, which is of some considerable assistance. There was one area that you agreed with—that is, clause 11 of the bill: 'An overseas corporation must comply with the tax laws in each country in which it operates'. You said:

Commerce and industry recognises all businesses should comply with, and are entitled to the opportunities provided, by all the laws, including those of a taxation nature in the countries within (which) they operate.

If, for instance, the health and safety laws in a particular country were the set standard and the Australian company complied with that but the provisions in the bill were such as to report on whether a company was in fact providing a better environment for health and safety—for instance, an indigenous mine might operate quite differently to an Australian mine—don't you think that that is useful to know? Isn't the effect of international corporations on many developing countries to show better standards of how management and accounting are done and operations are managed and so on?

Mr Davis—You gave a good example before, Senator, when you pointed to Shell and BP. Where they do better than the national standard in the host country, they tend to profile that, and that is quite understandable. The companies of which I am aware that operate abroad generally do operate to that higher standard. Some use it to make promotional value out of it; some keep quiet about it because they see it as part of corporate citizenship. With occupational health and safety, I cannot contemplate an Australian firm that would go abroad and apply deleteriously lower standards. Standards are not always within the capacity of an Australian firm. There are language difficulties and social practices and laws can be different. The lower education and productivity of some indigenous people means that they are not always capable of meeting Australian standards, but Australian firms operating abroad do their best to lift them up.

Senator MURRAY—I think you put the finger on one of the problems we face, and that is the perception the community has about the corporate world. Few Australians would have wide experience of many Australian corporations in many countries, and that is just going to be the fact. One of the things I think we need to do in our society, where there is so much cynicism, distrust and concern, is to reassure people that the right thing is being done. In Australia, we have good environmental reports and so on. The Wildlife Fund do their rating of the 44 mining and environmental reports and people come away much more content about the performance and environmental standards of mining corporations in this country. Reporting is almost a reassurance for our own people that we are good corporate citizens in the international sense. Do you think a necessary function is to reassure our population, in an area of cynicism and concern and perhaps where the perception is different from the reality, as to the real state of events and that the corporate culture we are exhibiting in foreign countries is a desirable one which we can be proud of as Australians? Do you think that should have any bearing on the consideration of this bill?

Mr Davis—I think the best effect we can have is being there. The operation of Australian businesses can have a profound effect on those indigenous businesses, wherever they may be—Indonesia, India, Pakistan or anywhere in Africa. That has the most positive effect. The person who is looking at his option for employment will say, 'This is an Australian firm that is operating at a higher standard than the local firm, so I will go there.' All of a sudden the local

firm will realise that it cannot get the skilled labour it needs. Australian firms are lifting standards up to a relevant standard in the marketplace, reflecting the productivity skills, labour skills, education and products available for trade. I think we have to encourage that. Regrettably, this bill acts as a disincentive for Australian firms to go abroad. It says, 'Stay at home,' and it says to foreign firms, 'Don't come to Australia.' That would be a sad loss for many of those in the developing countries. We believe engagement is the way to go forward. That is the message we have continually put in the trade and development debate in the World Trade Organisation. I know my colleagues who represented us at the ILO take the same view: it is about engagement, not disengagement.

Senator MURRAY—To an extent I agree with you. Some people know I have considerable experience in southern Africa. In southern Africa, multinational and international companies, as a generalisation, not universally, were far better employers and corporate bodies than were indigenous companies. That is probably not true in Australia where our indigenous companies operate to as high a standard as do the multinationals. However, one of the things that emerged out of southern Africa was that that was not clearly understood in their home countries. Eventually, America said to American companies, 'We want you out of there,' when in many respects they were a source of education and advancement of progressive policies and so on. Different views should be taken on that, but I sense the same non-business community approach to the corporate sector here, and that is why I emphasised the importance of telling Australians what the corporate sector are doing in foreign countries, what standards they are reaching, how well they are performing, whether they are being non-discriminatory—all those sorts of things. The bill seeks to promote that.

Mr Davis—If you are saying, Senator, that Australian firms operating abroad hide their light under their bushel at home, I would agree with you, because we do not promote ourselves in our achievements and what we are doing. Some may think that we probably should, for a whole host of reasons. Boards these days and the competitive nature of financial markets and the range of institutional investors very much have a 'Stick to the knitting view of the world'. Others such as Mr Wells's enterprises, for various reasons, particularly in that industry, have taken a lot more effort to promote themselves in some of those wider issues. I do not know that the bill will deliver the outcome that you specify, that Australian firms can promote their achievements better. I think the net balance of the obligations that might go with any benefits are far outweighed by the downside.

Senator MURRAY—The other side of that coin is that there are bad companies and sometimes good corporate citizens who do bad things, such as Ok Tedi, which is a famous example of a very bad outcome that has remained in the community memory. Isn't one point that the good corporate citizens will not have to do any more than they are doing but the bad corporate citizens will have to pull their socks up?

Mr Davis—In another inquiry I have heard it said that the law will never make the good any gooder and will never make the bad good. I think it was a member of your party that put that one to me—or maybe it was a member of the Labor Party. Again I think it is a net balance. We dispute that there is any benefit from the bill, and the burden that it will impose on the good firms does not justify any benefit that may come from any perceived bad cases. You mentioned Ok Tedi. As I understand it, Esmeralda in Romania was a freak—a once in a century event that might never happen again. The other underlying assumption is that these bad events as may be

identified would not have happened if Australian law, regulation or standards were in place. I do not know that that follows in all cases. Again we can focus on particular instances, but I will come back to a good statistician's point, and as someone doing a doctorate in econometrics, that I am very well aware of how the exception cannot prove the rule. We can focus on outlier cases, but again they are the exceptions and one does not want to throw the baby out with the bathwater.

CHAIRMAN—You raise in your submission the issue of the description of executive officer and the fact that it could have wide and deep application for directors who are operating management. Would you care to enlarge on the dangers faced by both management and directors and at what level of management there could be liabilities?

Mr Davis—The executive officer is not a precise measure. From the chief executive officer, who would be the most obvious candidate, to senior officers would be fairly clear. But, as we interpret the bill, executive officer is a line that could be drawn fairly low down the organisation, especially when the bill goes on to say 'someone who could have knowledge or could reasonably have knowledge or could impact upon the outcome'. We think that is a very broad sweep and the range of capture is much beyond what the drafters of this bill may have intended.

CHAIRMAN—I do not have any further questions. Thank you to both of you—

Mr Davis—Could I make one other remark.

CHAIRMAN—Yes.

Mr Davis—We have had the benefit of sitting through the evidence of earlier witnesses and were taken by Senator Murray's assurance that the bill will not impose any more onerous obligations than exist under Australian law. My colleagues in the industrial relations part of the organisation have pointed out to me that that would mean that the living wage component would have to be struck out of the bill, because the living wage is not Australian legislation. It is not even an Australian value. It is still a matter of great debate within a regulatory agency. Insofar as the bill proceeds—and again we recommend against it, that part would have to come out, by Senator Murray's criteria.

Senator MURRAY—Or be amended.

Mr Davis—Indeed.

CHAIRMAN—There being no further questions or comments, I thank you for your contribution and your answers to our questions.

Proceedings suspended from 12.09 p.m. to 1.38 p.m.

FRASER, Mr Christopher Joseph, Executive Director, Victorian Chamber of Mines Inc.

KOMESAROFF, Mr Andrew, Chair, Legislation Committee, Victorian Chamber of Mines Inc.

CHAIRMAN—I welcome representatives of the Victorian Chamber of Mines. We have before us your submission which we have numbered 16. Are there any alterations or corrections that you wish to make to your submission before we proceed?

Mr Fraser—I have an opening statement.

CHAIRMAN—I invite you to address the committee. I am sure that at the conclusion of your comments there will be some questions.

Mr Fraser—The Victorian Chamber of Mines welcomes the opportunity to comment on the Corporate Code of Conduct Bill. At the outset it is important that we say that we are sympathetic with the general principle that Australian companies operating in overseas countries should adopt high environmental and workplace standards and respect the human rights of the people from the communities in which they operate. In fact, we have empathy with the aims of the bill. However, we have grave concerns about the mechanics of the bill and believe it to be an inappropriate and unworkable instrument for achieving the improvements sought.

We believe that if the bill were passed the legislation would do little, if anything, to reduce the risk of Australian companies being involved in serious environmental catastrophes or gross violations of human rights. To demonstrate this it would be instructive to test the validity of the bill against the outcome of a recent overseas incident involving an Australian company. Such a test could be applied to the tailings spill at the Baia Mare operation in Romania, which we understand to be one of the catalysts for the preparation of this bill. Any examination of the incident would, in our view, clearly demonstrate that the application of the bill would not have prevented the accident—it would merely have enabled follow-up action in Australia. With such an outcome we really question the value of the bill.

Our particular concerns with the bill include five areas. The first is that the proposed legislation will impose standards over what is the sovereign right of other nations to manage. The imposition of Australian law on companies operating in other countries impinges on the national sovereignty of those nations. It is patronising, paternalistic and possibly dictatorial, especially when applied to Third World countries. Environmental employment and safety regulations are matters that should be addressed by sovereign states. It is impractical and inappropriate for companies to function under a different regulatory regime from others established in the countries in which they operate.

Our second point is that it is assumed in the bill that Australian environmental safety and other workplace standards are inherently superior to those of other nations and are valid in all other environments and cultural settings. The assumption that Australian standards are more suitable for the unique environmental, social, political and geographical situations experienced in other countries is not valid. To assume this is to be self-righteous. We cannot assume that we have all the answers.

Our third point is that extraterritorial legislation cannot be properly enforced without the full agreement of all the parties involved. Companies that operate overseas are rightly concerned about the practicalities of complying with extraterritorial laws. In particular, the process for dealing with conflicts between the legal obligations of the Australian and local laws creates yet another level of uncertainty or risk to those companies. Also, many of the compliance reporting requirements are unnecessarily onerous and will impose an unwarranted burden on Australian industry. The requirements are also very subjective. That is a problem for ensuring the results reported have value.

Our fourth point is that experience has demonstrated that heavy-handed regulation is not the most effective way to improve performance. Instead, market forces and self-regulation initiatives such as voluntary codes are more appropriate vehicles. Strict regulation leads to the adoption of minimum standards of performance. The use of voluntary codes in the minerals industry has demonstrated that standards of performance, including public reporting, can be continuously improved in an environment of competitiveness.

Our final point is that the legislation suffers, we believe, from being Eurocentric. If implemented, it could very well lead to the perception by our near neighbours that Australia is behaving in a colonial manner. Third World regulators could rightly see the requirement for Australian companies to operate to Australian standards when overseas as akin to the often misguided and inappropriate missionary zeal of the 19th century. Surely we have moved on from there.

A more effective means of successfully raising standards in other countries is with self-regulation mechanisms. Self-regulation encourages companies to treat legislative requirements as bare minimum standards and to strive for high standards as a competitive advantage for that company. Self-regulation through voluntary codes also provides the necessary flexibility to ensure that the regulations are relevant to the particular issues associated with different operations in a wide range of different situations.

The minerals industry code for environmental management provides very well-respected voluntary processes for improving the environmental performance of the industry. The code is widely endorsed by Australian mining companies and has been instrumental in lifting standards of performance in Australia. The work of the Minerals Council of Australia in promoting the code is well appreciated by the industry.

In addition to the environmental code, industry associations, including the chamber, provide leadership in promoting safer mine sites. Through numerous safety programs, standards have improved, and all member companies are committed to a culture of providing healthy and safe workplaces. This has been achieved in an environment where the regulations have become more flexible rather than more prescriptive.

In conclusion, I wish to restate that the Victorian Chamber of Mines does not condone poor standards of performance in environmental and community issues. In fact, a great deal of our work is spent encouraging and assisting member companies to improve the standards of performance in a competitive and continually improving environment. We do not believe that heavy-handed, negative approaches as proposed in the bill will be as successful as industry based codes in improving standards of performance.

An appropriate role for the Australian government in lifting the standards of environmental and social performance in developing countries is to provide assistance with capacity building to enable the refinement of local regulations. Such programs should target the countries and industries where such help is welcomed.

CHAIRMAN—Thank you very much, Mr Fraser. Do you have anything to add, Mr Komesaroff?

Mr Komesaroff—No, not at the moment.

CHAIRMAN—We will move to questions.

Senator MURRAY—Mr Fraser, in July 2000 the Secretary-General of the United Nations, Kofi Annan, presided over the signing of the global compact by the United Nations, 50 multinationals and 12 peak labour organisations and non-government organisations. The compact commits all the signatories within their respective spheres of influence to protecting and promoting human rights as expressed in a set of nine universal principles. Specifically, these include non-discrimination in employment, the elimination of child labour and slave labour, allowing free trade unions and environmental protection. Do you not think, in terms of what you have just said, that the global compact impinges on the national sovereignty of nations and is patronisingly paternalistic?

Mr Fraser—Other than that that it was signed, as I understand it, voluntarily by those companies, and those companies have undertaken to make those improvements at their own voluntary will; they have not been imposed by an outside government.

Senator MURRAY—But to the countries affected—the companies that have signed up on it—it is irrelevant. Your proposition is that anyone acting under this law would be acting in a patronising and paternalistic manner. This bill does not seek to impose laws on a country; it seeks to impose laws on a company.

Mr Fraser—And through that the Australian government would, I believe, be acting in a patronising way—not necessarily the company.

Senator MURRAY—So, I am correct in transferring that view to those 50 multinationals and the Secretary-General of the United Nations?

Mr Komesaroff—I think the involvement of the United Nations in the global compact is an example of the evolution of international law as it applies to countries and companies in a way that is well recognised in the development of international law generally. I am sure you are aware that international law evolves in different ways and at different times. If the result of that evolution is that various companies in various parts of the world seek to abide by certain guidelines that emanate under the auspices of the United Nations, I think people would say it is an example of international law at work, which devolves down into domestic economies and is then implemented domestically. It represents a top down evolution in respect of those standards rather than the Australian government saying that it knows best in terms of how to impose Australian type standards on our neighbours.

Senator MURRAY—The bill does not seek to impose it on our neighbours, it seeks to impose it on Australian companies—that is the key difference. I do not understand where you go with this because it seems to me that either something is patronising and paternalistic or it is not, whether it is from the United Nations or from Australia. Why does it make a difference if it is the United Nations that does it?

Mr Komesaroff—It makes a large difference from the point of view that laws evolved in Australia are representative of the values held by Australia, and Australian politicians as representatives of the Australian people. The United Nations is a world based umbrella organisation representing the views of people from many different walks of life, cultures and value systems. I see that as a sharp distinction.

Senator MURRAY—This bill is not an exclusively Australian concept; it wraps within it concepts that are apparent in international law and international treaties which concern human rights and labour standards. It has regard to common environmental standards and reflects some of the provisions that are before the United States Congress from a Congress bill. I am concerned that your submission seeks to paint this in a light that represents an extreme view of it rather than the accurate derivation of its thoughts and values.

Mr Fraser—That is as we see it. We are concerned that it is imposing on others what we believe they should have. We do not believe that is right.

Senator MURRAY—You are aware—I believe you sat through some of the evidence before—that I asked a number of business groups that are opposed to this bill whether their reaction reflects a long-held culture in the business and corporate world, going back perhaps centuries, of resistance to any advancement whatsoever in a significant way of human rights, environmental issues or any other issues. That is not to say there have not been some outstanding individuals in individual corporations who have taken a different view, but I do not recall, in any of my readings, business organisations such as yourselves ever doing anything else but opposing the latest environmental, social and community standard. Are you just reflecting a cultural response, or do you think your attitudes are more deeply based than that?

Mr Fraser—I sat through some of those discussions this morning, and you ask whether we are followers or leaders. We clearly believe that we are leaders. We believe we have passed that issue and are showing distinctly the shift through things such as the code for environmental management. For example, the Victorian Chamber of Mines has just developed a guideline on building effective relationships with the indigenous people of Victoria. They are initiatives that are not being taken up by government; they are initiatives that the industry believes are required to further some of those environmental and social needs.

This is done through a realisation that it is in our competitive advantage to be up-front and in front. I do not think it is right to say that we always oppose environmental or social change. We have demonstrated that we are up-front and leading in a lot of these things. There are many examples in recent times of environmental or social legislation put forward by all shades of government which we have actively promoted and supported.

Senator MURRAY—You have put an interesting proposition under ‘Other Options’ saying that you support the development of a multilateral treaty in relation to minimum standards in

terms of employment, environment, health and safety and human rights. What that seems to say to me is that you agree with certain values and principles, but you would like to see a situation where all countries have to abide by the same standards, and therefore companies that emanate from those countries, rather than Australia leading in this way. Is that a correct summary of your view?

Mr Fraser—Yes, that is right. We do not think it is right that we should be leading. It is a bit more than what you have said, Senator. It is to do with the fact that we do not believe that you can achieve these changes unless there is also a sign-on in the country in which you are trying to create those changes. There must be a sign-on with the country in which we are working.

Senator MURRAY—Do you agree with my impression of what Mr Wells said—namely, that essentially the bill was unnecessary because, and I am paraphrasing, most Australian companies are good corporate citizens and operate to high standards and set a good example in the countries they operate in?

Mr Fraser—Are you saying that that was Mr Wells' position or—

Senator MURRAY—Yes, as I understood it.

Mr Fraser—I do not think he would have said that. I do not think he would be as brave as to say that all—

Senator MURRAY—No, he did not say 'all'. I used the word 'most'.

Mr Fraser—I would believe that to be true, yes.

Senator MURRAY—I think one issue is very pertinent, and I will quote from your submission:

> The minerals industry is particularly concerned with the provisions of clause 17(6), which provides for private persons to initiate legal action on the grounds of "the public interest". Such a provision could expose companies operating overseas to vexatious and frivolous legal actions brought by single interest groups or individuals with a social or political agenda.

Of course, it could also expose companies to legal actions which were not vexatious and frivolous, and we should accept that. That is a pertinent issue. One of the things facing governments, countries and organisations is the spread of international law and being called to account in other jurisdictions. For instance, the rapists and murderers from the former Yugoslavia are before international law. They tried to drag in the former President of Chile before that. Those are the more dramatic cases. There are other cases of successful pursuit of actions in the International Court of Human Rights in The Hague and of course there is the case which was brought to our attention today, which was the South African-English case concerning the Cape company—I am not sure whether that is its full title—and its liability under English law. There have been cases before the High Court where it has taken note of foreign law, or foreign treaty, and drawn some inferences about application and jurisdiction in Australia.

What I am saying to you is that there is an increasing motivation for accountability—if you want to call it that in the broader sense—to be required by companies and businesses

worldwide. I am pleased to record that President Mugabe cannot go to the United States of America because otherwise they will arrest him. There are some good side effects to that. In one sense I am asking you whether you think clause 17(6) is merely a representation of a trend which you may or may not like, which clarifies it, or do you think it is an aberration in terms of the law?

Mr Fraser—Clearly, as we have pointed out, we believe that could be abused. That is why we have concerns about that clause and about permitting any individual to call a company to account. If it were to remain—and we would hope that it did not—there would have to be a process to prevent companies from being subjected to vexatious claims and go-nowhere issues.

Senator MURRAY—Those persons who have supported the bill in their attendance today as witnesses have indicated that one of the areas to which they are particularly attracted is reporting. Reporting can be mandatory, voluntary or a mix of both, which it tends to be in this country. What is your opinion of the current standard of reporting by Australian companies on non-financial and commercial issues in the countries in which they are operating? For instance, how are they doing with employment, nondiscrimination and gender issues, which are important in this country, or environmental issues which are critical? Do you have an opinion on whether that level of reporting could be considerably improved?

Mr Fraser—Clearly, our exposure primarily is to the minerals industry public reporting that has evolved out of the mineral industry code for environmental management. That is setting a pretty high standard of reporting. I think you have already acknowledged that. We believe the development of those reports can only get better and more sophisticated as they evolve. We are keen to encourage those reports.

I would like to make the point that in your discussion of other parts of the bill you talk about Australian companies not being required to report on anything that they do not have to do in Australia. I am puzzled as to why we are saying that when in the bill it is proposed that companies do report on things they do not have to report in Australia. That does not fit, in my mind. I am lost as to why you would say that. I am not certain where we are going because clearly the bill is seeking to require companies to report on things they do not have to do in Australia; yet the bill is purported to say that companies will not have to do anything that they do not have to do in Australia.

Senator MURRAY—I expressed myself somewhat loosely, but the answer is in two parts. Firstly, with regard to those things that they do have to report in Australia as well as what the bill is suggesting they report on overseas, they should not have to report to a greater extent than they do in Australia. With regard to those things they do not have to report in Australia but it is asked that they report on overseas, they would report in terms of the bill. That is the answer, if you need it.

I want to pick up on the area of environmental reporting. I am impressed by the number of environmental reports of mining companies which have advanced considerably. I try to read a selection of them every year. My technical appreciation is limited because I am not an environmental scientist or even a geologist. Having put that caveat on it, I have not noticed in those reports the same intensity of analysis and reporting on some of the very considerable mining operations overseas. In other words, the standards which you have correctly regarded as

high, and which you have set and developed, are being expressed in terms of Australian operations but are not being expressed about international operations and I wonder why.

Mr Fraser—To be honest, I cannot answer that. The code is a requirement on all of the signatory companies to report on all of their operations in Australia and they do that. We are moving down the path of reporting on overseas operations. It is part of the evolution. Some of them do report on their overseas operations, but some do not.

Senator MURRAY—But not to the same extent. I have never seen it, but maybe I have missed something.

Mr Komesaroff—Thinking of the last Rio Tinto annual report, there are divisions of their operations throughout the world and there is exactly the same degree of reporting in respect of all of them.

Senator MURRAY—That is true. They had a good section on Brazil, I seem to recall.

Mr Fraser—As part of the evolution, some companies have chosen to do a single report in one document for all of their operations, and therefore the report becomes overarching on them all. Others have chosen to prepare a report on each of their sites. This is part of the evolution. Who is the audience? If you are preparing a report for a whole company that has operations all over the country and internationally, the audience is really a range of stakeholders who are global, whereas the companies who have chosen to report on each of their operating sites have chosen the local community as the audience they are targeting. I do not think we are in a position to say which is the appropriate way, but it is part of the evolution we are going through. I am seeing really interesting competitiveness between these companies as they vie to produce the best report. It is very competitive.

Senator MURRAY—I have not had the opportunity to compare Australian reports of this kind with international reports, but I have the impression that ours at least rank with the best. Do you know whether that is so?

Mr Fraser—I cannot confirm that.

Senator MURRAY—There is no international comparison of these things?

Mr Fraser—The only comparison that we are aware of is the comparison that the WWF is conducting on the reports coming out of the Australian—

Senator MURRAY—And they do not do an international comparison?

Mr Fraser—Not that I am aware of.

Mr Komesaroff—I am aware that one of the major accounting firms in the world has recently done a comparative study on the degree of environmental reporting. You might be aware of it. It compares Australian companies with US and South African companies. In that selective international survey Australian companies come out fairly well.

Senator GIBSON—In your submission you promote the idea of assistance being provided to developing countries for capacity building and so on in relation to the further development of local regulations and the development of a multilateral treaty on minimum standards of employment, environment, health and safety. Can you expand on how you would see that operating in practice?

Mr Fraser—To a large extent it already is. For example, next week a party of regulators from Romania will be in Victoria dealing with companies and government on trying to understand the Australian minerals industry and how it is regulated and the standards of performance it achieves. That is a real life example of an AusAID type project. We often have delegations from China. I have been involved in some of this work in overseas countries.

There is another very good way; for example, there is an excellent set of guidelines, called the best practice environmental guidelines, that have been jointly prepared by Environment Australia and the Australian Minerals and Energy Environment Foundation. These are 'how to do' guidelines. They are of world standard and have already been translated into three languages, I understand—Spanish, Chinese and Indonesian. They are positive ways in which we can help in overseas countries.

I have done a lot of work in Indonesia and I was there when the busang issue arose—the fraud that happened in Indonesia. The Indonesians are now starting to take a lot more interest and starting to develop the processes to adopt our JORC code for reporting of ore reserves so as to avoid those sorts of fraud. There are government and industry initiatives. There is a lot of cooperation between government and the Australian industry in developing that capability building.

Probably the only mining engineer in East Timor is in Melbourne at the moment. He is on secondment for a few months to try and understand how our processes work so that he can be in a position to establish those processes, presumably, in East Timor. These are the positive ways that we can have an influence on changing the standards in developing countries. However, it must be where those developing countries want that help and identify the need for that help.

CHAIRMAN—Do you have any further comments in conclusion?

Mr Fraser—No, I was keen to talk about the capability building, and that has come out.

Mr Komesaroff—The only concluding comment I would make is that, as Senator Murray indicated earlier, in different ways international law is increasingly dealing with these issues whether by way of the International Court of Human Rights and so on or High Court decisions. There is a natural evolution in place towards those principles finding their place in the international arena or domestically. By all means there ought to be proactive things done to try and hasten that process, but unilateral Australian legislation against that delicate background of evolving principles does not seem to be sensible.

CHAIRMAN—As there are no further questions, thank you very much for your appearance before the committee and your answers to our questions.

[2.14 p.m.]

ENSOR, Mr James, Advocacy Manager, Oxfam Community Aid Abroad

HOBBS, Mr James, Chief Executive Officer, Oxfam Community Aid Abroad

PLAHE, Ms Jagjit, Policy and Campaigns Officer, Global Economic Issues, World Vision Australia

THOMPSON, Mr Gregory Frederick, Manager, Advocacy Network Australia, World Vision Australia

CHAIRMAN—We now welcome representatives from Community Aid Abroad and World Vision Australia. We have before us your submission, No. 10. Are there any additions or omissions you wish to apprise us of in relation to your submission?

Mr Hobbs—No.

CHAIRMAN—In that case I invite you to make an opening statement if you so desire. At the conclusion of that there will be some questions from the committee.

Mr Hobbs—Both Community Aid Abroad/Oxfam and World Vision Australia welcome this opportunity. We see this as a very important bill. Both organisations broadly support the bill. The context we would like to bring to you is that we have a wide range of engagement with corporations in this country, ranging from corporate sponsorship to fairly tough advocacy. The fundamental point is that, while we see the activities of Australian companies in developing countries as extremely important—we are certainly not anti-mining companies or anti-business—we do see in the globalisation activities of many companies potential risks and, in fact, real risks to some of the partners we work with in the field.

We have tried to come to this very much from the point of view of constructive engagement. Both our organisations are involved with a number of large companies, particularly in talking about social impacts. There has been a lot of focus on environmental issues in codes, and we feel that, until very recently, there has been some neglect of the social impact of the activities of companies. Without rehearsing the list of disasters that have befallen people in our region, such as Bougainville and Ok Tedi, we believe there are still quite significant risks to local communities from the activities of Australian companies, notwithstanding considerable improvements in some of those companies.

Our views are based on real experience with people affected by those activities. We believe there needs to be alternatives to regulation, such as stakeholder pressure, industry codes of conduct and complaints mechanisms. While there have been considerable improvements to corporate practice, they do not necessarily cover the bases. We see the value of this bill in addressing some of those problems. We have taken—in Community Aid Abroad at least—our own initiatives in this area by establishing a mining ombudsman to try and address the lack of access for local communities to issues that confront them directly. Currently we are managing eight cases that have been brought to us. Our experience is that these alternative mechanisms

have been inadequate in themselves in securing the rights of poor and marginalised communities.

Specifically, we believe that a number of industry codes of conduct remain fundamentally flawed, and we give you five key areas. Firstly, they are voluntary. 'Voluntary' means companies can opt not to be part of the code, and that obviously leaves a very large loophole. Secondly, they contain no sanctions for noncompliance. We fail to see how a code of conduct is useful if particular companies who are signatories can get away with noncompliance. Thirdly, they fail to provide opportunities for recourse for those who claim grievances. Hence our reason for establishing the mining ombudsman. The codes are rarely accompanied by independent monitoring and evaluation, and we fail to see how people can have confidence in a code if that does not exist. And they are rarely based on international human rights standards. We would argue that that needs to be the fundamental benchmark for codes of conduct.

We believe the lack of mandatory independent and extraterritorial complaints mechanisms in key Australian industries with potential to undermine the basic rights of poor and marginalised communities in developing countries serves to bolster the case for extraterritorial regulation. Australian extraterritorial regulation underpinned by the international human rights framework neither equates to the imposition of Australian values nor undermines the sovereignty of foreign governments. We believe that the key value in this bill is its simplicity. It is not arguing for a large layer of extra regulation—new rules and new standards—it is actually asking Australian companies to operate to Australian standards. That is our broad position. I would like to invite my colleague from World Vision Australia to address some specific case areas.

Ms Plahe—Thank you. Our submission was No. 37.

Senator MURRAY—The number was not on our hard copy.

Ms Plahe—To give you some specific examples, we have the OEDC Guidelines for Multinational Enterprises that have recently been revised, and at the international level we also have the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. Although there are problems with the areas that they cover, we do recognise at the international level that that is what we have. The biggest drawback, especially with the OECD guidelines is that, firstly, they are not binding and, secondly, they do not address the behaviours of transnational corporations outside the OECD. With regard to the ILO declaration, although there are some weak enforcement procedures, the dispute procedure is not judicial. The corporations are therefore not legally obliged to uphold principles outlined in the declaration.

Having said that, there are thousands of voluntary initiatives all over the world, and they mean different things to different people. For instance, we are not saying all of them are bad, and we are not putting them into one basket and saying they all have these problems. Some of them do work, especially when regulations do not. We have examples from other parts of the world, such as the Netherlands, whereby governments get together with the industry and develop long-term agreements. They have been able to bring down their emissions—CO_2 emissions, for instance—in a large way without regulations but through these legally binding contracts. The reason they work is because they are legally binding and because the government and other parties are also involved.

So what we are saying is that these codes of conduct tend to work when there is some sort of enforcement mechanism that deals with violations. The extraterritorial legislation area outlined in this bill is not new. It is something that has been introduced through the McKinney bill in the United States. A resolution was also recently passed in the European Union asking the commission to develop some sorts of binding standards for EU corporations that are going to invest in developing countries.

Lastly, the extraterritorial component that has been introduced in this bill is also not new in Australia. We have various acts in place that already have an extraterritorial effect. In June last year the Australian parliament passed a bill to amend the Criminal Code Act 1995, which is now the Criminal Code Amendment (Bribery of Foreign Public Officials) Bill, in line with the OECD legislation. We also have the Child Sex Tourism Amendment Act, the Environment Protection and Biodiversity Conservation Act 1999, the Environment Protection (Sea Dumping) Act 1981 and the Protection of the Sea (Prevention of Pollution from Ships) Act 1983. These also address the activities of Australian corporations overseas, so this is not a new area. I will end there.

Mr Hobbs—Mr Ensor would like to make some comments about possible improvements to the bill.

Mr Ensor—In the submission of Community Aid Abroad/Oxfam to the inquiry we have suggested some amendments that we believe would improve the bill. Specifically, they relate to sections 4, 10, 14 and 16 of the bill, with a suggestion for another section to be added as well.

Briefly, we see a significant loophole in section 4 in the compliance with standards around the proviso of employment of more than 100 people in a foreign country. We would advocate reducing the number to pick up a greater proportion of companies operating offshore. Additionally, we suggest the act also specifically apply to joint venture activities.

In terms of section 10 of the bill we have suggested that there be a greater degree of rigour around defining international human rights standards for compliance. This relates to the argument around sovereignty in that, if we have an internationally accepted human rights system and instruments—such as the Universal Declaration of Human Rights—that are signed on to, agreed to and adopted by more than 150 countries throughout the world, then the framework under which the act operates is not as easily regarded as being an imposition of Australian values or standards. It is instead put more in terms of internationally accepted standards. We have suggested that some of the benchmarks the bill might consider examining include not only the UDHR but the covenants to that: the International Covenant on Civil and Political Rights, the International Covenant on the Economic, Social and Cultural Rights, the Convention on the Elimination of Racial Discrimination and the Convention on the Elimination of all forms of Discrimination against Women.

In section 14 of the bill, with regard to reporting to the Australian Securities and Investments Commission, we have suggested slight modifications to the reporting procedures—specifically, that they require a statement of whether the rate at which employees are paid in each country, other than Australia, is consistent with a living wage in that country. Section 14(2)(h) requires companies to specifically define risk factors extending beyond direct financial risk to include, as the bill is currently drafted, social and environmental risk. That brings a broader dimension to

that risk analysis. We were not clear about section 14(1) of the bill—whether the reports to ASIC would be made available to the public. We have suggested in our submission that that be the case.

The final area concerns preferential treatment. There is one feature of the McKinney bill in the US which we think has considerable merit in that it provides incentives for corporate compliance with the bill in a manner consistent with the possibilities of the Corporate Code of Conduct Bill. Examples of that could be that a section be added to the bill requiring the Australian government to provide incentives for Australian firms to comply with the bill, including—when entering into contracts for the provision of goods and services—for Australian government agencies to give preference to corporations in compliance with the bill, for potential preferential trade and investment assistance to be provided by Austrade and other government agencies to corporations in compliance with the bill and for the Export Finance Insurance Corporation to be prohibited from providing assistance to corporations not in compliance with the bill. That is another way of addressing the issue from a more positive and proactive stance that could be incorporated into the bill.

Senator MURRAY—My first question is to Ms Plahe. Each of the five examples you enunciated of Australia enacting laws with extraterritorial jurisdiction pretty well focus on a discreet area—sex, corruption of public officials and those sorts of things. Do you think that it is better for governments to do that with specific objectives in mind relative to each area of authority—environment, corruption or behaviour of tourists and so on—or does this bill, as a general across-the-board, offer greater possibilities, even though it does not have specific and detailed focus?

Ms Plahe—I think this bill has that potential because it is based on international law. A bill that covers a broad range of rights would be better in that sense, because the Universal Declaration of Human Rights is pretty old now and lots of countries in the world have recognised it and covenants are built on it. Since the UDHR is widely recognised, it would not seem difficult to say that we want these standards for all people all over the world. We are not imposing anything new. These are internationally recognised and the broad range would definitely be better.

Mr Hobbs—To add to that, in our discussions with industry, one of the arguments they have raised against extraterritorial legislation has been that they do not wanting greater complexity. We believe that a benefit of the bill is its simplicity. It is basically alluding to Australian standards generally, and we believe linking that to the UDHR strengthens that even further. We would see this as a simpler and more easy to comply with approach than trying to identify particular problems and legislate accordingly.

Mr Thompson—If I could just add something from our perspective generally, the thought of catching up after the horse has bolted—addressing specific issues—by approaching it in this way within the framework of international law is to pre-empt some emerging issues with the increasing globalisation and integration of the global economy. A new report from the United Nations Conference on Trade and Development was released yesterday in Geneva pointing to the increased extent of transnationalisation of industry. This would seem to indicate the need for the international community and Australia, in playing its part in the international community, to

play some role in trying to pre-empt the increasing impact of the increasing complexity of globalisation and global market integration.

Senator MURRAY—Mr Hobbs, three of the sets of witnesses from business groups before us today have used words like this and said that this law on companies operating in other countries impinges on the national sovereignty of those nations and is patronising and paternalistic. You have countered that view on page 7 of your submission, but I think that is a kind of cultural and attitudinal criticism that needs to be taken seriously as a defence of the status quo and for proponents of the bill to counter. You are supporters of the bill. What do you have to say to that view that this is colonial, patronising, paternalistic, cultural imperialism and all those sorts of attitudinal things?

Mr Hobbs—I think it is a specious argument. If you talk to the people who are negatively affected by Australian mining companies, they want protection from irresponsible company behaviour. That has nothing to do with sovereignty but is about behaving properly. The classic examples would be where a company colludes with the local police or military to militarise a mine site which then leads to forced displacement of people and, quite often, significant human rights abuses, which quite often the national government would not condone either. This is happening in Indonesia now; the central government has clearly lost significant control in the areas where a lot of mining is happening and regional police and governments are running amok. Talk to BHP about their problems with illegal mining. The whole breakdown of proper control means that sometimes mining companies are colluding in either corrupt or illegal activities by local or regional governments. In the case of Ok Tedi, BHP, by its own admission, says a 60-year sediment wave going down the Ok Tedi and Fly rivers will have an enormous impact on the people directly affected, and the PNG government basically wants to continue that process. BHP is now trying to withdraw from that situation. It is a more complex issue and it is not good enough just to focus on what would be seen as a national level sovereignty question when quite clearly there are direct infringements on people's human rights which extend to murder, rape and other kinds of abuses.

Senator MURRAY—What do you say to the argument by those companies, which may or may not be regarded as self-serving, that, where they succumb to the advances of local warlords—I use that term descriptively—in, say, Angola or the Democratic Republic of the Congo or Nigeria to keep their companies operating, their mines running and their output going on, do in the process provide some benefits to the countries in which they are situated. What do you say to the argument that, 'If we didn't do it we would have to close our doors'?

Mr Hobbs—I think we have consistently said that, if the conditions mean that you have to operate either in the contravention of human rights or illegally or corruptly, you should close your doors on the operation. What is encouraging to us in our discussions with large mining companies is that they take that view as well. What concerns us and why we think the bill is important is that medium and smaller sized companies, who are less brand name companies and therefore less affected by public pressure—I think we have cited one company that we have concerns with, Aurora Gold—seem much less tractable in terms of a code of conduct. So the large companies have the sophistication and understanding to try to improve their performance but we find that smaller companies are not prepared to go the full distance. There is a good example with the Esmeralda case. That company is not a signatory to the current code. It falls

through the cracks. So basically we need some kind of framework which makes sure there is compliance with basic standards.

Ms Plahe—With international law we do have the territoriality and the nationality principles. The conclusion of the International Council for Environmental Law, the United Nations Environment Program and the American Society for International Law, which have come together, is that international law does provide for the extraterritorial application of national laws to domestically owned or controlled corporations which are incorporated overseas. So they are controlled not just by the host state, the country that hosts the investment, but also by the home state. It is recognised in international law. So, whereas the whole sovereignty principle is recognised as a territoriality one, so is the nationality one.

In the second question you mentioned Nigeria, and in this case the Ogoni people wanted something done. It was very clear that the Nigerian government was not going to use its courts or other systems to do anything about it. In fact, it was part of the whole problem. This is where such extraterritorial legislation from the home country becomes important. It was the communities within Nigeria that had a problem and Ken Saro-wira gave his life for that and his colleagues up to today are suffering and are in exile. The people cry out for justice the same as in Burma. Where the people are crying out for justice, that justice needs to be served in one way or the other. Where the host country is not able to provide that, then the onus is on the home state to do it.

Senator MURRAY—I think the point would be made that the bill does not require companies to be activist in terms of the political life of the country; it merely requires them to ensure that people are paid properly, that they are in a healthy and safe environment and that they are not discriminated against as employees on the grounds of gender, race or ethnicity—those sorts of things. It is not asking Australian companies to become participants in the political process of a foreign country.

You have helpfully suggested a number of recommendations for changes to the bill. One of the areas that has been mentioned as being of concern is that of the living wage description. The point has been made that, in the Australian industrial relations environment, the living wage is not a legal concept—in other words, it is not used in award determination or anything else but it is well known. The proposers of the bill designed a phrase such that companies could determine what that meant relative to their circumstances in the country concerned, because of the difficulty of applying what is a living wage for each individual circumstance. In my view, it makes a more open interpretation available for companies to use rather than going for a specific, more legally and internationally established standard. I found the argument a little odd from the businesses concerned, because if it were tightened up it would make it harder for companies, not easier. You have said here that you believe that it should be consistent with a living wage, but do you support the use of that phrase? What views do you have on that?

Ms Plahe—International law does cover that area. From my knowledge, developing countries do have minimum wage standards. However, what we are finding is that very often within the export processing zones and other areas people are paid below the minimum wage because labour is not unionised and casual labour is hired. So the national laws are not followed. I think we are saying that countries do have established levels of minimum wages, hours worked and overtime worked.

Senator MURRAY—My assumption is that an Australian shareholder here, having seen the country might say, 'We comply with the living wage in Brazil,' for instance. You would be able to ask, 'Exactly what does that mean?' and the company might reply that it means the equivalent of $A10 a day or whatever. They would be able to establish on comparability terms whether that was appropriate for the country and the zone. Is that how you think it would work?

Mr Hobbs—I think we would see more the process of how the wage was established as being important. If labour is coerced into below acceptable standards, that is clearly in contravention of the human rights standards that we referred to. Obviously, freedom of association and freedom to organise become important issues, and the way you have phrased it from our point of view would stand.

Senator MURRAY—You have made some remarks about the threshold in the bill being 100 persons. Obviously that is arbitrary; there are many different kinds of thresholds to determine small from large and tax, industrial relations and corporations. However, you have gone from an arbitrary 100, which is, loosely speaking, a small business definition for a manufacturing company, to an arbitrary 50. Given that they are both arbitrary, what is your reason?

Mr Ensor—I think the issue there is our analysis of the sectors with which we are engaged, which are primarily the extractive industries, footwear and textiles. Particularly in relation to the extractive industries, it is the larger companies with the greater degree of reputational risk which are the most willing to engage in adequate practices across the board. For example, Western Mining Corporation and more recently BHP have referred to a commitment to the principles of UDHR in policy documents and in the process of operationalising what that means.

The problem areas arise with the smaller companies without necessarily the reputational risk imperatives or the management capacity to address these issues adequately. Looking at the extractive industry sector, if you maintain 100 employees—the level proposed in the bill—it is arguable whether you would pick up many of the companies that Community Aid Abroad has engaged with in terms of the work of our mining ombudsman. They tend to be companies employing far smaller numbers of people. This has been our experience particularly in Indonesia.

There is a balance in this. The figure of 50 is arbitrary. The McKinney bill I think refers to 20. It is our view, though, that we need to have the capacity in the bill to pick up those smaller operators who, particularly in the extractives sector, are in our experience less likely to have specific drivers demanding improvements in practice. Whether it is 20 or 50 becomes a judgmental call, but our feeling is that 100 based on our mining ombudsman experience is a figure that will not pick them up.

Ms Plahe—With the minimum wage ones, there is an ILO convention that deals with that and we would want it to be based on that. Just remember that is the convention that deals with the minimum wage. They have dealt with that.

Senator MURRAY—Does it use the phrase 'living wage'? I do not think so.

Ms Plahe—I think it does.

Senator MURRAY—Does it?

Ms Plahe—We can go further back than that. I am sure it is there. We would want it to be based on that.

CHAIRMAN—Did you hear some of the witnesses earlier today or have you had a chance to look at their submissions?

Mr Hobbs—Just the last ones.

CHAIRMAN—Earlier there was concern raised about the danger of Australian companies moving offshore as a response to this legislation and also, the mirror image of that, making it more difficult to attract company head offices to Australia. What is your response to that concern?

Mr Ensor—It is an interesting and valid question. In our engagement with the mining industry in particular there is another dialogue emerging around that issue—that there is increasing recognition in some areas of the need for a stable investment framework. We are finding that companies, particularly in relation to Indonesia, are coming to Oxfam, Community Aid Abroad and saying, 'The politics of Indonesia have changed. The operating environment has changed. Our exploration programs have been sabotaged. Our mining pits have been occupied. What do we need to do to secure a licence to operate, in the broader sense?'

Previously the licence was provided through a central authority across the whole archipelago without reference to people on the ground. Now you have great instability in terms of the investment environment. The larger companies in particular are grappling with how to manage that process and are looking at adopting principles around the prior, informed consent of local landowners, upholding human rights and looking at a range of areas they had not dealt with previously.

The argument around driving investment offshore needs to be countered by that sort of broader political analysis of change in the region. Unless rights are upheld in rapidly democratising countries like Indonesia, and more broadly throughout the Asia-Pacific, the investment climate is not going to be stable for the private sector because, at the end of the day, it will be local communities—local people—who will be increasingly asserting their rights, whether to sustainable livelihoods, to the right to have a say over the use of their land, a range of other rights related to labour, or whatever. Unless we move down that path in countries like Indonesia, there will be an increasing difficulty for companies to obtain a licence to operate. There is a counter to that.

Mr Thompson—Further to that, Senator, as my colleague Jagjit has mentioned, there have been discussions in the European Union relating to prospective legislation. In similar ways, the Canadian government and legislature have been actively encouraged not only by non-government organisations but also industry groups to look prospectively at parallel legislation. Australia is likely not to be alone, particularly in the context I mentioned earlier of the transnationalisation of the global economy and a recognition of appropriate instruments to manage that process internationally with respect to human rights standards. Australia might be in the position where it could show some leadership by example but find itself in company with

others at the same time. The question of companies being able to find other places may not be realistic, or that opportunity may not be there in the future.

Ms Plahe—With the United States, under US law a US corporation is defined as any business located anywhere which is owned or controlled by US citizens, US residents, temporary or permanent, or US corporations. If they are controlling that corporation from the United States, no matter where it is working, it is still supposed to be a US corporation and subject to US law. They frequently use that for embargos, exports and so on. That is the definition. Corporations operating overseas are controlled or regulated by US law. Similarly, with the United Kingdom, if it is seen that there is no legal authority to deal with such issues in a foreign country, that case can be referred back to the UK. This is not completely new. It is preceded by a whole history of law in other parts of the world.

CHAIRMAN—This is making me a little confused. I understood there was a bill of a similar nature to this one currently before the US Congress. If United States corporations are already subject to United States law, why would there need to be a further law there?

Ms Plahe—The McKinney bill was stronger and dealt with a whole new area of rights.

Senator MURRAY—The United States law does not, as I understand it, at present require the reporting of these issues, whereas that bill does.

CHAIRMAN—Another issue that was raised this morning was that, if you legislate for this minimum standard, that is what companies will comply with, whereas, if you effectively have a code of conduct and companies are being continuously encouraged to improve their standards, they will go beyond what might have been the minimum legislative standard. If they are compelled to meet a standard, they will simply meet that minimum and not bother to continuously improve beyond that.

Mr Hobbs—That is certainly not our experience of working with large Australian mining companies. I reiterate the point I made at the beginning: I think significant improvements are coming from within industry, particularly larger companies, and a willingness to embrace improvement, which some of them treat as a competitive advantage. The problem is with the ones that do not see that and they need a floor under them. There does need to be a minimum standard for those that are not prepared to go the extra mile. In our dealings, BHP, Rio Tinto, Western Mining and Placer Dome are all companies that are trying to be world's best practice in both environmental and social developments. The context for us is how do you pick up the industry as a whole and not just the large ones. It gives a lie to the idea that people will move offshore, because companies that can see the advantage of being good corporate citizens are doing so.

Senator MURRAY—Which is why they are signing the global compact.

Mr Hobbs—They are saying there is nowhere to hide; that is on the lips of a lot of mining executives.

CHAIRMAN—I thank you all for appearing before the committee and for the answers you have given to our questions.

Mr Thompson—Thank you, Senator. I reiterate that we were happy to be associated with Community Aid Abroad in this joint submission even though our emphases were slightly different. We look forward to continuing to play a role with Community Aid Abroad and others in the development of appropriate legislation, emphasising as we did the significance that voluntary codes of conduct are not working and are not sufficient at this stage. Further appropriate legislation that would pick up the framework within international human rights law is something that would help us all move forward, particularly those communities around the world where both of our organisations are working and feel the impact of the practices of companies that are in less conformity with those international standards. Thank you.

Senator MURRAY—Thank you for your detailed submissions.

[3.00 p.m.]

ASE, Mr Damien, PNG NGO Mining Coordinator, NGO Environment Watch Group, Papua New Guinea

KOMA, Ms Matilda, PNG NGO Mining Coordinator, NGO Environment Watch Group, Papua New Guinea

KERR, Mr Michael John, Legal Adviser, Australian Conservation Foundation

KOSMAS, Ms June, World Wide Fund for Nature

CHAIRMAN—I now welcome the representative of the Australian Conservation Foundation, Mr Michael Kerr, and the two witnesses who are joining in with the submission of the Conservation Foundation and appearing via a telephone link from Papua New Guinea, Mr Damien Ase and Ms Matilda Koma. The committee has before it the Australian Conservation Foundation submission No. 33. Are there any additions or alterations?

Mr Kerr—No, Mr Chairman.

CHAIRMAN—Do you wish to make an opening statement?

Mr Kerr—I would like to make a brief statement, but would like to make that statement after my colleagues in Papua New Guinea have made their statements.

CHAIRMAN—That is fine. I call on Mr Ase and Ms Koma to make their presentation to the committee.

Mr Ase—The PNG NGO Environment Watch Group is made up of environmental and social NGOs in PNG and its membership consists of PNG's environmental, conservation and social NGOs. Its main focus is to ensure that constitutionally protected environmental and social rights of indigenous groups are upheld in areas where multinational mining corporations are extracting non-renewable resources. Most, if not all, communities in areas where large scale development projects are located are illiterate as they do not have easy access to education, much less information on their rights and how they could assert them. That is why we say here that the majority of landowners' rights should be recognised by law in Papua New Guinea.

The difficulty we face is that the independent state of Papua New Guinea is not only a stakeholder but more importantly is a shareholder in these mining projects and with policy issues shareholders' interests take precedence over communities' rights. They are some issues that we would want to raise and which we hope can be considered by the committee with regard to this bill.

We have had our experiences with Ok Tedi, Misima, Lihir, the oil and gas pipeline, Porgera, Tolukuma and also there is the new Ramu nickel mining project, where they will be dumping the waste into the submarine bay, which is going to cause a lot of environmental impact. For

BHP, as you are all aware, there are lots of problems in terms of environmental issues and it has been a big problem for BHP and the company as well as the government. From those experiences and the environmental issues in terms of the companies dumping waste into the river system, we are indeed very grateful and happy that this bill has come about. We hope that it can help solve some of the problems that are contributing to our problems here, especially by Australian mining companies.

One thing we are submitting is that all the information by the mining companies be disclosed and made public. We hope that this can be empowered under the bill because currently we have difficulty gaining access to those documents belonging to the companies because of their policies and the law that they operate under. We are hoping that that can be catered for under the proposed law. We strongly support the disclosure provisions of the bill and think that it should also go further and include provisions which make it mandatory for Australian companies to redress the wrongs that they have caused to uneducated and uninformed communities of other countries.

The other issue that we want to raise is the need to stop Australian companies from interfering in internal laws of other countries, for instance, as in our case in PNG. That has been brought about by the problem with BHP where BHP supported legislation to outlaw and criminalise landowners' initiatives to take legal action against BHP in a court of law of their choice. We are suggesting that the Australian companies should not be allowed to interfere with legislative processes in other countries, especially if they support internal legislation that abrogates the rights of indigenous communities. We strongly think that this should be reflected in the bill through an appropriately worded provision.

Finally, we have a problem in PNG where we think that the Australian companies are practising double standards. In Australia they would not dump waste or tailings into the river system or the marine system. But in PNG that is not the case because our government is not able to enforce the laws, so the companies are dumping waste into the river system, which is causing a lot of problems, as experienced at Ok Tedi and Tolukuma. In the light of all these issues, we would strongly urge that the bill be strengthened with the provision to prohibit Australian companies from practising double standards; the same standards that apply in Australia should also be applied in the countries where Australian companies operate.

In conclusion, we would like to say that we are strongly in support of the spirit and intent of the bill, but we think that the environmental and social wrongs inflicted on unsuspected communities in other countries should be used as lessons. The bill should therefore cover wrongs committed in the past, wrongs being committed today and to avoid any wrongs being committed in the future by Australian companies doing business in other countries, as in our case in PNG.

We would also urge that Australian companies which have come across similar problems in other countries internalise lessons that they may have learned so that they do not make the same mistakes elsewhere. These are the three points we wish to raise about the bill. I ask Ms Matilda Koma to say a few words especially in relation to her experience in the Tolukuma goldmine which is owned and operated by Dome Resources, an Australian company.

Ms Koma—I want to speak about my experiences with the Tolukuma goldmine which I have been involved in, particularly representing the people in that particular area. The mine is a medium-scale operation on PNG standards because it has been operating for less than 10 years. We are trying to give our opinion about this proper code of conduct bill, which should be passed, so that we can also get some benefits out of it if Papua New Guinea laws are unable to help.

The two main concerns that I have are, first, the disposal of tailings into the river system and the second is the transportation of dangerous goods by air. Currently, the mine is allowed to dispose of its tailings into the river system. Apart from the tailings, about 80 per cent of additional sediment from the overburden waste rock is dumped into the river system. The river is used by the local people; they are dependent on it for their livelihood. The river flows through an area of about 100 kilometres and four different ethnic groups are dependent on it. The local people have been complaining and have put in requests to the company. They are losing some of the resources from the river and their use of the river is no longer recognised by the company. They are afraid of using the river because they believe it is polluted by the work that is occurring upstream. The company has said that there is no damage to the river even if it appears dirty. The government has stated a compliance point about seven kilometres downstream of the mine. At this moment the sacrificial zone is about seven kilometres above and the people are not being compensated for anything. Below that, at the compliance point, at this point in time there is still a lot of work to be done. The company has complied with some standards but not all. I have pushed for something to be done in order to compensate for what has been lost. It has not been entertained by the company because of some weak regulations or legislation that overlap each other in Papua New Guinea. As a result, it is very hard for the people to air their concerns to the company. They have not got anything up to this stage, which is about six years since the mine was set up. There is no development at all in the area. There is no beneficial developments or projects such as a proper water supply system or bridges over the rivers that have been discoloured so people cannot see well. The fish life has been destroyed. That is about it for the disposal of tailings.

The other issue is the transportation of dangerous goods by air. This experience came about when there was a cyanide spill when the company was operating in the area. The only means of transportation from Port Moresby into the area is by helicopter. During the past six years, and before that during the exploration stage, they have been transporting goods from the city into the area. In March last year a pallet of cyanide fell into an area of virgin rainforest, polluting the streams and killing off all the vegetation that was within reach. At that stage the people were asked to keep away until after some form of investigation. After the exercise was completed the people were told that the water was safe to use. It is not the only case. There have been a couple of things falling off in the area.

The people have tried telling the company to look at other means apart from using helicopters to transfer the goods. Once we raised the concern, it shifted from one place to the other, one environment agency to the other and we found it was very difficult. There were a lot of time consuming things along the way, with people referring us from one agency to the next. We just gave up in the end. It would be very good if a corporate code of conduct was encouraged so that Australian companies working in Papua New Guinea were able to do what they practise overseas in their own country if our legislation is weaker than theirs. In that way they could

help those who are really in need instead of having the government overrule them just because of the interests of others. That is about all I can say now unless you have any questions.

Mr Ase—Would the committee be prepared to hear a representative from the landowners in the Ok Tedi area? She wants to say something about the bill.

CHAIRMAN—You have a third person there whom you wish to speak?

Mr Ase—Yes, she is representing the landowners from the Ok Tedi area.

CHAIRMAN—If she could give her full name and the capacity in which she is appearing before the committee, we will hear what she has to say for five minutes and no more.

Mr Ase—Thanks. I will direct her to speak and she should be able to introduce herself. Thank you.

Ms Kosmas—Thank you for giving me the opportunity. I work for the World Wide Fund for Nature in Western Province but I am also a landowner along the Fly River. I do not have a prepared paper, but I would just like to say a few words about my experience to do with the royalties since the 1996 Melbourne court case. The landowners on the Fly River received some compensation but that was after three years. In my family, each one of them got 120 kina in 1999—that was after three years. That was the only payment they got from BHP and they are still waiting for the next. In the river itself, the forest has died out kilometres away from the river. People cannot make gardens because the river banks are being silted up. Floods are regular. It has ruined their transport system, it has taken away their hunting grounds and it has taken away their gardening land. They cannot hunt on the river banks where they normally hunt because the silt from the mine has taken away their hunting grounds.

As Damien said, the companies are playing double standards. Australian companies abide by one law in Australia and they come to Papua New Guinea and there is another law. I am speaking on behalf of people living along the Fly River. Thank you for giving me the opportunity.

CHAIRMAN—Thank you very much. I will now ask Mr Michael Kerr to address the committee.

Mr Kerr—Thank you, Mr Chairman. I realise that we probably do not have much time so I will make a brief statement and simply say—

CHAIRMAN—We have until 3.45 p.m. for your time span, including questions.

Mr Kerr—Right. I will make a quick statement and explain to the committee why I invited representatives from the Papua New Guinean community along simply to emphasise three points. The first point is that Australian corporations and their activities are having an impact on overseas countries, their people and the environment of those countries. The second point is that the legislative arrangements in those countries are not adequate to protect those people and the environment from the impacts that Australian corporations are having. The third point is that the judicial system in those countries is not sufficient to enable people coming from those countries

to air their grievances and to ensure that such corporations are punished if their activity has caused harm; also that the local and indigenous people receive adequate compensation as a result.

The most telling thing that was said, and I think it was mentioned by all three Papua New Guineans, is the fact that Australian companies when undertaking activity in Papua New Guinea often undertake those activities by employing double standards. One of the speakers—I think Damien—mentioned that if BHP were undertaking its mining activity in Australia it certainly would not be dumping the waste into the river system, whereas in Papua New Guinea BHP is actually doing that. That is what the Corporate Code of Conduct Bill 2000 is all about: ensuring that there are no double standards and that Australian corporations operate by the same standards when they undertake their activities overseas.

I urge the committee to take with the strongest weight possible the evidence given on the line from the Papua New Guinean people. More than anybody who is giving evidence to this inquiry they have an entitlement to be heard because they are the people who are affected by the activities of corporate Australia. I urge the committee to take their comments on board and consider them very thoughtfully and that their comments be reflected in the decision of the committee. I strongly urge the committee to recommend to the federal parliament that it pass into legislation the Corporate Code of Conduct Bill. Thank you.

CHAIRMAN—Thank you, Mr Kerr. The focus of your evidence, and obviously that of the witnesses by teleconference, has been on the situation in New Guinea. Papua New Guinea has had a long association with Australia, and its government would be very much aware that its administrative structure, administrative law and so on is based on Australian structure and law. So the Papua New Guinean government would be very much aware of Australian standards in those areas. Why is it not appropriate for Papua New Guinea to legislate those standards in its own country and require foreign companies operating in New Guinea to meet those standards? Why should Australia legislate for Papua New Guinea when it is not prepared to legislate for itself?

Mr Kerr—Good question. I suppose you could say that the Papua New Guinean government has had an opportunity to legislate to ensure that there are adequate social and environmental protection provisions put in place. To date they have not been successful in doing so. You might be aware that the Papua New Guinean government even called on BHP, a corporation that was about to undertake a major mining operation in that country, to help them draft the environmental protection laws. On that basis I would say, with all due respect to the Papua New Guinean government, that perhaps they have not taken the opportunity to legislate as they should. Unfortunately, I think it is now up to the Australian government to regulate the behaviour of Australian corporations and Australian corporate citizens. We are not asking the Papua New Guinean government to raise the standards. We are merely asking the Australian government to raise standards in relation to its own citizens.

CHAIRMAN—How do you then answer the charge of paternalism in relation to Papua New Guinea?

Mr Ase—I would like to say something, please.

CHAIRMAN—Please go ahead.

Mr Ase—A big thing in PNG is that, although we have lost our resources, the government does not have the resources to implement, monitor or enforce all those laws. That is a big problem that we are facing in PNG: although we have lost the environment, the government simply does not have the money or the people capacity to monitor and to make sure that companies do the right thing. That is one of the problems the government is facing.

Another thing is that, as you may be aware, the government is also a shareholder in all the mining operations in PNG, so on the one hand it is the regulator and on the other it benefits from all the mining operations in PNG. So we have a problem in that the government simply sees where it benefits. Those are the two big problems in terms of the government not being able to enforce or implement the regulatory legislation in PNG.

Mr Kerr—In relation to the question of paternalism, I have heard that it has been raised in a number of other submissions and probably raised by the corporations also. I would say that the people living in these countries would not say that the Australian government was acting paternalistically if it were to pass such legislation. That would be my first point. The other point I would like to make is that the corporate code of conduct is based on standards accepted by the international communities. So it is not as if the Australian government would be imposing higher standards than would otherwise be accepted.

I will give you a very prominent and recent example. Australia recently went into East Timor, and I did not hear anyone within the Australian community or the Australian corporate community accusing the Australian government of being paternalistic in those circumstances. There was seen to be a need, the Australian government made a decision and, as a result, Australian foreign policy dictated that we act paternally—if you want to call it that—and go in and try to assist the East Timorese people in their time of need.

CHAIRMAN—Another issue that has been raised is a concern that this legislation would encourage Australian companies to move their head offices offshore. The mirror image of that is that our attempts to attract head offices of other offshore companies to Australia would be detrimentally affected by the legislation. What is your response to that?

Mr Kerr—I have heard that. I would say that, if suddenly there was a raising of the benchmarks, you would have to wonder why corporations would be scared off. You would wonder, 'Are they intending to have a race to the bottom and imposing the lowest standards possible?' Perhaps we do not want corporations in this country that are intent on having very low environmental and human rights standards through their activities. That is one point.

On the other point, global standards are rising. If we implement this corporate code of conduct, there will be an assurance that Australian companies are operating to the highest international standards possible. It might even be a boon for business in some respects because it will ensure that we meet the highest international standards at all times, that all marketplaces are open and that we are never shut out.

CHAIRMAN—It has also been said in evidence today that, if you legislate minimum standards, companies will simply comply with those minimum standards, whereas, if you have

a voluntary code, the industry organisations and companies that are part of that structure will seek to continuously improve their practices and go beyond what would have been the legislated minimum.

Mr Kerr—That is a true remark in some respects. The whole concept of a voluntary code is that you can pass any levels and standards that you want and you can have the highest standards, even above legislation. But, unfortunately, voluntary codes have been in place for a long time, and that has not been the case. The standards have not been higher than legislation. Indeed, there is an argument to say that voluntary codes often appeal to the lowest common denominator of the group of corporations that adhere to that code. Unfortunately, time and history has shown us that we need to regulate. If we were talking at a time when voluntary codes had never been implemented I would say, 'Let's give them a shot,' but unfortunately there is ample evidence to show that voluntary codes have not worked. I do not think, unfortunately, corporations can be trusted to regulate their own activities.

I draw this example: I cannot even be trusted to walk my dog in the local park without a law telling me that it has to be on a lead. So how can the government justify the fact that it will allow corporations to regulate their own behaviour, when government, including local government, regulate ordinary citizens' behaviour to the extent that they cannot even walk their dog in the local park without a lead? There is a bit of an imbalance there. Corporations are left to regulate their behaviour too often.

Senator MURRAY—Mr Ase and Ms Koma, if I understood you correctly, you stated that, although Papua New Guinea has an environmental act, it does not have the resources nor does it act in a way to enforce it. Is that correct?

Mr Ase—That is correct, Senator Murray. That is the big problem in PNG. Companies that operate here are supposed to be given conditions, which includes monitoring by four officers from the environment department. That has not been done. The department does not have the money and the people to monitor because in most cases they are in the remotest parts of the country, such as Tolukuma. The department simply does not have the money and the people to do the monitoring and to see whether a company is complying with the conditions of the permit that has been granted by the Papua New Guinea government.

Senator MURRAY—This bill would not give the Australian government the resources to monitor, investigate or in any way enforce law in Papua New Guinea. What it would do is give an ability for a company operating in Papua New Guinea to be brought to account by private action, if you wish, in Australia. It will also enable, through the reporting mechanism, market pressure to be applied to a company to justify its actions against the requirements of the bill in Australia. I expect that will not altogether prevent bad actions happening in countries. Is your reason for supporting this bill that you believe Australian people and institutions are likely to be more alert to putting pressure on companies than is the Papua New Guinea government?

Mr Ase—I think from the operations of Ok Tedi that was the case. By putting this bill forward we hope we can get the Australian companies to comply with the standards that are applied in Australia. We strongly recommend that the Australian companies that operate here do not dump all their waste into the river system. In Australia that is not the case because the law does not allow it. We hope that the Australian community watch how their companies operate in

other countries in terms of environmental issues and indigenous people's rights, which is becoming a major international issue now. We hope that, through this bill, the Australian companies can tell people what they are doing and comply with the standards.

Senator MURRAY—Mr Asen and Ms Koma, witnesses from the business sector who have appeared before the committee have described this bill as being one in the tradition of colonialism, imperialism and paternalism, as being patronising and Eurocentric. Do you see it in the light of the 'we know best' state telling developing countries what to do? How do you react to such remarks from those witnesses?

Ms Koma—From my experience and talking to the people, I hear what they say and, yes, I agree with that.

Senator MURRAY—Do I understand you to say that you agree the bill is paternalistic and patronising?

Ms Koma—I want to say that as Papua New Guineans—I do not know about Australia—the people own the land and they depend on what is surrounding them. There are limited resources. I am talking from experience as a landowner from Tolukuma. At the moment the companies do not want to do the monitoring and the government does not make them. I do not like this. I would rather have the government do the tests themselves. At the moment the government is party to mining activities in Papua New Guinea. I do not think Australian companies should just be allowed to do that, but that is another topic.

Mr Ase—We feel that the important thing is to get the Australian companies complying with national laws not only in PNG but elsewhere. The important issue is that the Australian companies need to comply with both the international laws and Australian laws in relation to different countries where they operate. We hope that, by enacting this law, it will create a system where we can then control the operations of Australian companies.

Senator MURRAY—Mr Kerr, the designers of the bill have deliberately tried to keep it as simple and as straightforward as possible. Even so, there is considerable opposition. You have recommended that an addition be made to the bill to include an environmental impact assessment, which is kind of standard fare now in Australia. I personally think that to get over the first hurdle, namely to get acceptance, it is going to be very difficult. Would it be better to see it as a first phase, recognising some limitations and, if you were determined on that particular area, rather than to express it as a requirement for companies to do an environmental impact statement that they justify why they did not do one? In other words, you put it in reverse and ask them to report on why it was not done.

Mr Kerr—I think that the wording of the bill was probably adequate. It was just a suggestion as to how to make it stronger. If that were going to some way affect its implementation, I would rather see it implemented in its current wording and work towards perhaps one day in the future having stronger wording in relation to the environmental impact assessment provisions. I take your point and I would agree.

Senator MURRAY—What lies behind some of your remarks and those of the witnesses who support this kind of approach, as I understand it, is that even though it does not go far enough—

of course the other side says that it goes too far—it is a significant first step in ensuring that our companies comply with at least basic human rights, labour and environmental standards.

Mr Kerr—I would agree and that is probably why ordinarily, being a lawyer, I would write a more detailed submission and try and look at a bill and make some detailed recommendations as to how it could be improved. In this instance I did not, simply because I support the principle of the bill. There needs to be a bill in some form or another that imposes mandatory standards.

I know that there are many other institutions, corporations or whatever that are trying to pick holes in this bill at the moment. Every one of those holes that they have picked can be filled—I have no doubt about it—with clever drafting. Their concerns can be catered for and we can soon have a bill before parliament that ensures that there are consistent mandatory standards, at a base level, but at least there is something for overseas communities to hang their hat on at the end of the day.

Senator MURRAY—With the permission of the chair, Mr Kerr, and if you were willing to do so, could I ask you if you would not mind looking at two submissions. One is from the ACCI and the other is from Community Aid Abroad. Both of them have a more detailed commentary, if you like, on weaknesses and shortcomings in the bill—in the case of the ACCI, disagreements with, and in the case of Community Aid Abroad, recommendations to adjust and improve the bill. As a lawyer with an environmental focus, it would be useful for me—if you were willing to do it—if you would put in a short supplementary submission to the committee on any aspects that jump out at you from the two submissions, one which is for and one which is against.

Mr Kerr—Yes, I would be more than willing to do that.

Senator MURRAY—Thank you.

CHAIRMAN—Thank you very much, Mr Kerr, Mr Ase, Ms Koma and your colleagues. Thank you very much for being witnesses for the committee this afternoon.

Mr Ase—Thanks a lot. We will be sending the prepared submission to the committee.

CHAIRMAN—Thank you.

[3.47 p.m.]

DIXON, Mr Arthur James, Director, Accounting and Audit, CPA Australia

PRAGNELL, Mr Bradley John, Acting Director, Intellectual Capital, CPA Australia

CHAIRMAN—Welcome. We have before us the submissions from the CPA, which we have numbered 29 and 31. Are there any errors or omissions which you wish to correct in the submissions?

Mr Pragnell—No.

CHAIRMAN—I invite you to make an opening statement, if you wish, and then we will proceed to questions.

Mr Pragnell—CPA Australia is Australia's largest professional association with 92,000 members in the banking, finance and the accountancy industries. Our members are very well represented in providing advice to both small businesses and to larger corporations acting in roles as chief executives, chief financial officers, accountants and auditors. Two submissions were put forward by CPA Australia, one jointly with the Institute of Chartered Accountants Australia through the Legislative Review Board of the Australian Accountancy Research Foundation and another submission prepared by the Ethics and Corporate Governance Centre of Excellence.

In terms of the position of CPA Australia regarding the Corporate Code of Conduct Bill 2000, we agree with the initiatives which seek to raise corporate conduct within the community; however, we have very serious concerns about this measure—in particular, the compulsory nature of the measure in creating unnecessary compliance and business costs. We have other secondary concerns about the measure, and I will quickly go through some of those. I suspect some of these issues have been raised by other business groups, but we would like to reiterate some of them. There is the uneven application only to overseas operating companies of this measure; the 100-employee rule, which could be seen as arbitrary and probably could be easily contravened; the use of Corporations Law and the appropriateness of the Australian Securities and Investment Commission to regulate areas such as labour standards, human rights and environmental activities where, to the best of our knowledge, there would be a lack of expertise in being able to make sound judgments in these areas. We are concerned that the measure seeks to prescribe the behaviours within the bill rather than relying on existing international standards: for instance, ISO14000 for environmental standards or ISO9000 for occupational health and safety. Misalignment with other ASIC reporting standards is also a concern. As is noted in the bill, entities are required to submit their compliance report by the 31 August, which is misaligned with many other ASIC reporting requirements for companies in this country.

We have to say that we have some concerns about the process of the bill. In her second reading speech, Senator Bourne notes that the bill is the result of months of consultation with NGOs, academics, unionists, lawyers, environmentalists, human rights advocates and other interested parties both here and overseas. We would like to note that, in her listing of the groups that were consulted, there is no mention of the business community, who would be the body bound by the strictures of this legislation. We feel that it would only be sound that, since the

business community would be expected to comply with this measure, full and open consultation with this sector of the community is critical to make sure that this measure works.

There are many organisations such as ourselves that are committed to raising the level of corporate conduct. However, the only way we can do this is jointly and by ensuring that there is an open and frank dialogue between the business community and other interested stakeholders in trying to create a regime which meets the needs of all of the bodies involved. I will end my opening statement there. Does Mr Dixon wish to add anything at this stage?

Mr Dixon—Not at this stage.

CHAIRMAN—You may have heard my reference earlier to some of the issues put before us by earlier witnesses in terms of concerns about the bill, one being that the legislation would militate against Australia attracting overseas companies to establish head offices here, and the mirror side of that is that it would be detrimental to retaining existing head offices in Australia. Tell me what your reaction is to that.

Mr Pragnell—I could not comment directly on that, but there probably would be some impact in terms of creating an uneven playing field. That would be a concern that we have in terms of domestically based corporations in Australia and those with overseas operations in a sense being bound by very different reporting requirements. As well, by creating those different strictures, it probably does open up a real possibility of some serious regulatory arbitrage going on. There are concerns about the ability to seek damages through the courts through this measure. We think it would be highly likely that commercial competitors would use this measure to try to attack those domestic competitors in Australia who also have operations overseas. That is the kind of unnecessary litigiousness in the business community that we do not want to see opened up. That would be a real can of worms and the provisions in the bill could easily open it up.

CHAIRMAN—Another issue that has been raised is that if there are legislated minimum standards it is likely that companies will only meet those standards whereas under a voluntary system companies will strive for continuous improvement in their standards and therefore actually reach a better level of performance than if they are required to do so under legislation.

Mr Pragnell—It is interesting to draw from a statement made by Senator Bourne in her second reading speech. She noted that Esmeralda had not signed on to the Australian Mining Council's code of environmental management and she used that as an example to say that volunteerism does not work. You can take that example and turn it on its head and say that volunteerism does work, because we would hope that those companies who had chosen to sign on to that code had been abiding by it but Esmeralda being outside of that had obviously fallen into breach of what that code was seeking to do. To a certain degree, we would strongly encourage volunteerism. We would also strongly encourage corporations and industries to try to develop their own codes. We are actively promoting this among our members in terms of looking at issues such as sustainable reporting and triple bottom line reporting, and those initiatives are continuing apace. We need to look at the good examples out there in the corporate community and then think about strategies to try to spread those and trickle them down throughout the business community. That is more what we want to achieve rather than the big net that captures both the good fish and the bad fish. In terms of writing up an annual report, the

bad fish are still going to lie. The bad fish are still going to get away and do bad things, and you are going to place an onerous compliance burden on the good fish.

Mr Dixon—There is some evidence in relation to voluntary disclosures. The Australian Stock Exchange, as you are aware, requires disclosure in relation to corporate governance, but it does have an appendix in its listing rules which suggests what sort of disclosures might be put. It is not compulsory. The evidence is that there has been an increased level of disclosures by many corporates that are listed on the Australian Stock Exchange in relation to corporate governance activities. I think that is evidence that voluntary disclosure is working. It has taken a little time, but you have to give entities the opportunity to learn what they need to do. Prior to joining CPA Australia, I was associated in my previous role with assisting a number of companies in writing up these corporate governance statements. What I stressed to them was that it was no use just getting a set of statements that looks good. The danger of a set of statements that just looks good is that if anything goes wrong and they get in a court of law they will be measured against that set of statements and their position is weakened rather than strengthened if the statements are not statements of substance. My experience from having assisted a number of companies in that area is that they do take a good look at themselves. I have seen a lot of evidence of companies developing statements of substance, reflecting what is within their organisations and then seeing what they can do to improve their own situation internally.

Mr Pragnell—In trying to raise the bar, and to reinforce what Jim is saying, we need recent initiatives to bed down to a certain degree. One that has been discussed—I am not sure how much it has been discussed here today—within the membership of our organisation is section 2991F of Corporations Law. That requires, in directors' reports, companies to report on activities that may have had an impact in terms of environmental activity. We need time for these types of initiatives to bed down and to increasingly see to what degree companies are reporting within these regimes. Through those various mechanisms, we are seeing increasing disclosure come out, and then we need to see whether or not that disclosure is actually working. That initiative is very much something we may be looking at four or five years down the road. In terms of where we are now and in terms of the reporting mechanisms, in terms of the knowledge, the infrastructure, the ability to report on these things, I think we are still a long way down the road of being able to do this.

Mr Dixon—One of the concerns that we had was the lack of cost-benefit analysis of these proposals. It is interesting to note that the government, in its recent legislation, imposed on the Australian Accounting Standards Board the need when it put up any standards proposal to do a cost-benefit analysis. In other words, this is standard government policy being imposed on the accounting profession. I think there would be an expectation in terms of any legislation coming forward that it met those high standards being imposed on the Australian Accounting Standards Board.

Senator MURRAY—Your last remark is a nice thought. I would love to see more cost-benefit analysis, especially when the government got rid of the R&D allowance. Let us use the mining industry as an example and let us take environment. Mines are quite often—not always—high impact activities in the countries in which they operate. It seems to me that over the last 10 years, and it really has accelerated over the last five years, that the mining industry has started to produce some really first rate environmental reports. They gave us today a figure

of those that are now coming out—44—and there is a benchmarking process independently going on through the WWF, so there are some good things happening. Some of those mining reports, such as Rio Tinto's reminded me, do pick up foreign operations, as I think does the BP one.

At the heart of the bill there is a reporting mechanism. It seeks to have companies reporting, because in reporting you get market pressure, cultural change and all the things we understand. There was a bit of a debate about ASIC's role, and I understand your criticisms, but let us stay with the environment. What I asked was: if the bill was to remain simple, the reporting obligation would still be there but the criteria or guidelines would need to be established elsewhere. It emerged in a discussion with a witness that they rather liked the guidance notes that had been developed for their environmental stuff. It reminds me of the corporate governance point you just made: that however these are termed, where you give an indication of their desirability and you are able to upgrade them, almost as a replaceable rule—if you want to call it that—you get an improvement in standards.

If the bill simply required reporting in areas that are established either by international convention or treaty, most of which Australia is a signatory to, and the reporting mechanism was the principal one, and attached to the reporting mechanism were simply guidance notes developed by a body such as ASIC—and obviously they do that in consultation with the industry sector—do you think that would be a positive market development?

Mr Pragnell—I think we need to recognise—and this bill unfortunately does not recognise—existing reporting requirements on corporate entities. Something we did not explore in our submission and will need to explore again down the road is looking at those existing requirements in Corporations Law. For instance, in section 299, in terms of what needs to be disclosed in the directors' report, there could be mechanisms for looking at trying to get at some of these issues in terms of disclosure and of trying to improve decision making within the marketplace, without necessarily creating a separate parallel, competing, distinct reporting regime as the Corporate Code of Conduct Bill seeks to do. We have not considered that fully, but it would probably be a more fruitful avenue to go down in terms of looking at a regime that would probably be somewhat more acceptable and looking at doing it on a consultative basis.

Mr Dixon—Another perspective on this is that we often focus on our listed companies, our large corporates, which often have resources within the organisation to gather the material, report on it and refine it before it is reported on. But when you start to move down to our large proprietary companies, they often do not have the resources for additional reporting; it does become a burden. So there is a concern that—and I am not saying this is undesirable reporting—the second tier firms would find this a burden in terms of reporting, particularly if large proprietary companies, just because they have an overseas holding company, have these additional costs imposed on them.

Senator MURRAY—Which brings me to 'threshold'. Thresholds are inevitably arbitrary. As you know, they are in one form or another in tax law, superannuation law and Corporations Law. However, the one chosen here is as arbitrary as any other. I mean 100 persons is the definition of small business in the manufacturing sector but, as you know, it goes all the way down to 15 in certain award jurisdictions. Some people have made the point that, if you are going to impose corporate moral obligations, if you like, in these fields, they should apply for

everyone—one employee all the way up—while others, like you, recognise that there is a real cost attached to the reporting side, and others make the very good point that it is very difficult to enforce and monitor if it is spread all across. In your submission you suggested it could drop to 50.

Mr Pragnell—I believe in one of the submissions we mentioned that 50 was a possible option.

Senator MURRAY—That surprised me. Can you indicate why or whether you have changed your mind?

Mr Dixon—I know another report that has been recently released moves away from the large-small test, but I take you back to the large-small test. One of the three criteria there was 50. There is nothing more confusing to business than to have 50 in one bit of legislation, 100 in another bit and 200 in another. Business would appreciate some consistency across legislation. That bit of legislation may be on the way out—it is a recommendation of that particular committee—but 50 was chosen for better or for worse. So I think there is an argument for consistency.

Senator MURRAY—You are right. So far as I am aware, in numerical terms there is 15, 20, 50 and I think 300 is some legislation or proposed legislation. They are the numbers of employees, and of course you get the turnover and asset things that go 1, 2, 3 all the way up to 5 and 20, I think.

Mr Dixon—Of course, you have the greatest burden on the enterprises that are struggling more so than those that are the large entities to deal with this. Then they have to go in and pay our members high fees to produce this information.

Senator MURRAY—If I can summarise the point you are making: the bill should choose that measure which has the broadest application in law at present. Is that right?

Mr Dixon—Correct.

Senator MURRAY—My last question before I pass the baton relates to extraterritorial law. Two witnesses before us today drew our attention to specific laws that already exist to apply extraterritorial obligations on Australian companies. Two of the better known are the sex tourist bill—I am sure that is not its proper name but I am sure you know what it is—and the other one is the corruption bill, which is the bribery of public officials. But there were also others, such as the Environment Protection and Biodiversity Conservation Act and various acts that relate to sea traffic. There may be more that I cannot think of. Those laws were developed as specific and quite detailed responses to particular perceived problems and the desire to enforce standards of one sort or another on Australian corporations or entities operating extraterritorially.

This bill, in contrast, is short and simple in its expression—it may not be simple in other things—builds on international law, convention or treaty and is generic. Let me add one more thing before you respond. The other point made to us is that the bill represents a trend that is occurring worldwide: namely, accompanying economic, financial and intellectual property kinds of globalisation tax initiatives and so on is the social, community and environmental

globalisation agenda and, therefore, it is following trends. If Australia were to go down this route, in your opinion are you better off with problem specific legislation, such as that I outlined—corruption and so on—or are you better off with generic across-the-board legislation such as this?

Mr Pragnell—You have identified the dichotomy between the two bills in terms of the existing extraterritorial legislation and this measure. They are aimed at specific behaviours, they are in the Criminal Code, they are in that sense very targeted and very focused; and it is about trying to address behaviours that would be viewed as reprehensible throughout the entire community. The concern we have about the broad generic legislation, the corporate code of conduct, is the wide casting of the net and the fact that there are considerable reporting requirements placed on a vast majority of corporations and organisations that are probably conducting themselves well.

What we must then consider is something somewhat more targeted to a certain degree. There are many examples. I am not putting this forward as our formal position but as something to consider, but the issues that were raised in Senator Bourne's second reading speech were looking at environmental issues within specific industries, such as mining, oil and gas exploration. In a sense, we are looking at a relatively narrow slice that we may be able to draw out of this. I am not claiming we should be targeting that group, but we must be focused on what are the specific behaviours that need to be addressed rather than focusing on those specific behaviours and then generalising across a whole range of categories and areas. From reading through some of the material, it is difficult to find stronger evidence that there are wide-scale problems or even a perception of problems in other areas. That might be something to consider in a further redrafting of the bill. It appears from a previous witness and from some of the earlier discussions, and informal discussions we have had, there should be some consideration of taking this back and making some changes.

Senator MURRAY—I cannot speak for the author of the bill, but I do know her to have a receptive attitude to redrafting. In that sense, this committee can use the bill as a draft exposure bill rather than something that is immutable.

Mr Dixon—While we have not sought legal counsel on this, one of the concerns is that from our initial reading we were not certain that what was promised by the general bill could be delivered. I must admit, making a personal statement, that I was not convinced that those who would have transgressed would have necessarily been punished.

CHAIRMAN—There being no further questions, I thank both of you for your appearance before the committee and your answers to our questions.

Committee adjourned at 4.14 p.m.