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JOINT COMMITTEE ON CORPORATIONS AND SECURITIES

Thursday, 15 March 2001

Members: Senator Chapman *(Chair)*, 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 and Gibson and Mr Ross Cameron

Terms of reference for the inquiry:

Corporate Code of Conduct Bill 2000.

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Subcommittee met at 9.44 a.m.

CHAIRMAN—Today the Parliamentary Joint Statutory Committee on Companies and Securities is conducting its second public hearing—the first was in Sydney—into the provisions of the Corporate Code of Conduct Bill 2000. Today we are sitting as a subcommittee of the committee. This inquiry was referred to the committee by the Senate on 5 October 1999, 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 and, 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 on this inquiry. All submissions are available from the Parliament House web site or, alternatively, from the secretariat. David Creed can send a hard copy of the 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 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 the parliamentary committees is treated as a breach of privilege. I also wish to 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.

[9.45 a.m.]

HOGAN, Mr Des, Campaign Coordinator, Amnesty International

McGUIRE, Ms Nicola, Business Team, Amnesty International

SULLIVAN, Mr Rory, Business Team, Amnesty International

CHAIRMAN—I now welcome our first witnesses this morning who are representatives from Amnesty International Australia. We have before us your submission, which we have numbered as No. 7. Are there any omissions or alterations you wish to make to the submission before we proceed further?

Mr Sullivan—No.

CHAIRMAN—Do you wish to make an opening statement?

Mr Hogan—Just a short statement.

CHAIRMAN—You may proceed, and following that I am sure there will be questions from members of the committee.

Mr Sullivan—I would like to briefly summarise the submission and highlight some of the key points that are made therein. First of all, Amnesty's interest in this inquiry is on the issue of human rights and on corporate behaviour in relation to human rights. Amnesty is an independent human rights group which promotes the human rights outlined in the Universal Declaration of Human Rights and in international covenants and standards relating to human rights. Amnesty sees the corporate sector as having a particularly important influence on human rights within society. With the increasing and ongoing debate around globalisation, the corporate sector has a particularly important influence on the actions of government and, increasingly, in its own right it has a direct influence both on people's lives and on their position within society.

To that end, Amnesty welcomes the objective of this bill, which is to provide a framework for the regulation of corporate conduct in the particular context that we are interested in—the area of human rights. We have reviewed the draft bill and have proposed a number of changes, alterations and extensions to reflect our specific interest in human rights. I will briefly run through those. The first is that our view is that the definition of human rights actually needs to be made more explicit to reflect international law on human rights, particularly the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the core or fundamental ILO conventions. Our first recommendation on the bill was that that be adopted as the definition of fundamental human rights.

The second issue is that we see that public reporting has a particularly important influence on the behaviour of companies. To that end, we commend the emphasis in the bill on public reporting. Many of the major Australian companies are now doing public reporting on environmental issues, and over the past one to two years we have seen a number of them

starting to produce social or community type reports, which I think is indicative that the Australian business sector recognises that it needs to communicate publicly and dialogue with civil society on not just its financial performance but also its environmental and, increasingly, its social and human rights performance.

The third issue that we have raised in our submission is the particular limitation of the bill as it currently stands in that we think there should be an open standing provision. The mechanics of that we can discuss, but in a lot of countries it is very difficult for individuals to take cases, and we actually see benefit in providing an open standing provision of some form for NGOs under the bill, where NGOs could either bring cases or complaints, or whatever the specific approach is that is adopted.

Finally, we had a number of general proposals which we thought might be of interest in the context of refining the bill to reflect, I suppose, not just our submission but perhaps the submissions of other parties. The first is that at times it can be very difficult to hold corporations or business entities responsible for their actions, so we have suggested that the provisions of the bill should be slightly widened to include the responsibility of directors and managers for human rights violations. There are a number of well-tested precedents for that in terms of environmental legislation in Australia which include due diligence provisions.

The second issue is that we think that for this bill to really have an effect it needs to tie in with government policy in a broad range of areas, including, for example, export credits, insurance and aid/tied aid development work. We see this as being part of the solution. I suppose to have a real effect it is not just the negative sanctions envisaged in the bill that need to be considered but perhaps the manner in which the Australian government’s funds more generally are spent.

That concludes the key comments we had on the bill. Another comment which has been made to us, particularly from the corporate sector, is that there is concern that this bill will impose an unnecessary cost or an unnecessary reporting burden on Australian companies. Our view and increasingly, I guess, the view of the enlightened members of the corporate sector is that that is not the case. I might just outline a couple of reasons why. The first is that the major international companies, particularly those that have had human rights issues, have reported difficulties in attracting good employees and in accessing certain markets. An example is the difficulties BHP had in accessing diamond resources in Canada after the Ok Tedi controversy and the Ok Tedi litigation in the mid-1990s.

Secondly, we have also seen the CEOs and heads of some of these companies commenting that for them their future—this may be corporate rhetoric—is bound up with the quality of the people they can attract to their organisation. Companies increasingly recognise that to attract the best people requires that they have a good reputation, that they have a good performance.

Thirdly, the growth of the ethical investment market, in particular, is increasingly putting companies’ behaviour under a spotlight. I think it will increasingly be an influence on companies’ share price and value. So they are, I suppose, the direct benefits to companies. Then there are a couple of broader macro issues that need to be considered. The first—and I think there is a broad consensus on this—is that long-term stability within countries requires that one has political stability and requires that one has basic rights being protected. We have seen the

consequences in places like Indonesia of the breakdown of government as a consequence of people's rights being repressed or of people, I suppose, acting to have their rights protected within those countries. So economic and political stability are increasingly being seen as inextricably bound up with human rights protection and democratic rights.

The final issue that I want to raise is the interest in Australia in trade liberalisation and the importance of that to the Australian economy. Increasingly, there are issues of access to markets and, be they real or artificial, barriers to trade—for example, the expectations of corporate performance. The ability of Australian companies to access specific markets may be made contingent on their performance. The manner in which the debate on globalisation is evolving at the moment, particularly the concerns being expressed about the adverse consequences of globalisation—which is not just about economic insecurity, but whether it is providing improved protection for the environment and actually leading to an improvement in the human rights situation in many countries—has the potential to undermine the Australian government's policy on trade liberalisation and the broader pushes towards globalisation. That concludes our introductory statement.

Senator GIBSON—We note your emphasis on human rights. Given that, what evidence can you put before the committee of actual human rights problems that have arisen with Australian companies offshore?

Mr Sullivan—Could I ask Nicola to talk a bit about a recent campaign on diamonds that we were involved with? I think it illustrates some of the issues. Then we can talk a bit about Australian companies specifically.

Ms McGuire—You probably heard about the De Beers diamond case. In that case there was widespread evidence that companies, including De Beers—which is one of the biggest diamond companies; I think it controls 65 per cent of the diamond market—were purchasing diamonds from the Revolutionary United Front, which were the rebel forces in Sierra Leone and who at the time were occupying critical diamond mining areas. The proceeds from the sale of those diamonds were funding the rebels who were, in turn, committing well-documented human rights atrocities throughout Sierra Leone, particularly against civilians. After fairly intense international pressure from Amnesty and other NGOs, De Beers made public commitments to stop purchasing those diamonds and to put in place a transparent system so that when the diamonds were sold people knew where they originally came from. I think from De Beers's point of view that case damaged their reputation quite severely and they are still trying to get out of that damage.

Senator GIBSON—I understand that, but what is the relevance for Australia?

Mr Sullivan—I suppose there are two issues. We are increasingly being asked by companies: what is this human rights stuff about; how do we respond to it? The first issue is that companies are actually recognising that they have a responsibility and increasingly we are seeing some of the Australian business leaders talking about their responsibilities for human rights. Secondly, the issue of whether or not Australian companies have been involved in human rights violations is not an area that Amnesty Australia has researched explicitly, but certainly a number of the other NGOs in Australia have expressed concerns about the performance of organisations like BHP, Rio Tinto and so on.

Senator GIBSON—In your own evidence this morning, you have cited some examples of companies responding to pressures basically from the communities at large—globally or regionally—to what has been going on. That communications network, via the marketplace, is obviously working. My question to you is: where is the evidence for the need for Australia to have such legislation to protect human rights?

Mr Hogan—Maybe I can answer that, Senator. The first point to make on your very precise question is that Amnesty International has not done any research on Australian companies, so we cannot answer that question—for positive or negative. But, in terms of where the need is, we would argue quite strongly that, at the very basis, the need is a real moral need. The question is not only 'Where is the need?' in terms of Australian companies abusing human rights but how can Australia demonstrate its commitment to human rights through its companies' operations overseas? If we take the example of De Beers in South Africa, based in the UK with the diamond industry—obviously Australia does not have too much of a say in the diamond market—one could imagine a similar situation where Australian companies could have competitive advantage if in fact they had transparent accountability mechanisms for their operations overseas.

Senator GIBSON—I hear what you say. But you have said this morning that there are examples out there of Australian companies responding to problems—be they human rights, environmental or whatever—and in today's world these problems are well communicated around the globe. Why should the parliament consider imposing additional restrictions and red tape, if you like, on Australian companies when we are yet to receive evidence that Australian companies have been involved in real problems with human rights?

Mr Hogan—For Amnesty International, we campaign off our research, so that is what restricts us in this case. But we can note that other organisations have made allegations against Australian companies. For example, in this week's *Guardian Weekly* there is an allegation against an Australian company involved in circumventing the landmines convention. We cannot comment on that in terms of the validity of those criticisms but we can make the point. It may be that in years to come Amnesty International will look at this area a little more closely. It is a peculiarity to our organisation as well insofar as we have always campaigned against countries, states. In the last, say, five to 10 years we have started campaigning against armed opposition groups—hence the RUF in Sierra Leone.

Senator GIBSON—Exactly.

Mr Hogan—You see, we do not want to go after companies.

Senator GIBSON—Okay.

Ms McGuire—In any event, the argument you are using is that consumers should rely on the media and NGOs to reveal to them which companies are abusing human rights. There are not enough resources in NGOs to investigate all of these companies, so the consumer should not just be expected to read it in the press; there should be a transparent system so they can say, 'Well, it is funny because X and Y companies have been abusing human rights. How do we know these companies have?' They should not have to do that research themselves and rely on underfunded NGOs to do so.

Senator GIBSON—The point I am trying to make is that legislation is a pretty blunt instrument. It is a bureaucratic process. It has to be at a fairly low, broad level, basically, to work, whereas what is in fact going on globally—I suggest, and there were some comments you made this morning, Mr Sullivan—is that communication is effective and certainly does affect the attitude or behaviour of companies, and most of them respond very quickly.

Ms McGuire—Not in every area.

Senator GIBSON—Okay, but the point I am making is that we have yet to get evidence that there are real problems that need addressing by legislation. Thank you for your comments.

CHAIRMAN—You say only when they are outed, but let me indicate that by and large most companies do in fact meet their obligations. There may be a few renegades that do not, and they are perhaps the ones that get out of it, but by and large companies are meeting their obligations in this regard without legislation. One of the points that has been made to us so far in evidence is that if you legislate for a minimum standard everyone will comply with that minimum. If they are compelled to do it they will not go beyond that minimum, but if it is left to a voluntary code or people are continuously improving their practice they will go well beyond the minimum that might be put in place by legislation.

Mr Sullivan—Can I make a comment? I think that is true. We certainly see that certain companies are going way beyond what we as a human rights NGO are looking for. We are seeing public reporting, we are seeing companies engaging with local communities, and they are doing many of the things we ask them to and in many cases going beyond what our minimum expectations are. I suppose part of the problem is that there is also, as you mentioned, Senator, the fact that some companies do not actually meet those minimum standards of performance, and they are not responding to the other pressures that are being put on them. There is an increasing body of literature on voluntary approaches and self-regulatory mechanisms which indicates, yes, that some companies use these things and do wonderful things with them and have excellent performance. However, most of the literature and most of the experience with these has also been that there is a need for a backstop. And that is one of the critical roles we see this legislation playing. It is saying, ‘What are the minimum things we expect all companies to do?’ Do you get a compliance emphasis? I think again the leading companies we are talking about have continuing improvement and go beyond compliance and even integrate things like the Universal Declaration of Human Rights and the principles of sustainability into their policies as part of the way in which they operate. For them this is not new and it is not even necessarily particularly challenging, and we are certainly not in any way trying to say to those companies, ‘Don’t go way beyond what we are looking for.’ Ultimately, voluntary approaches do not really work and there is a need for some kind of backstop or minimum performance expectation. Yes, it is a blunt instrument, ultimately, which companies are required to comply with. So we actually see the role of legislation in the context of all the other pressures—economic pressures and the public reporting and all those sorts of positive outcomes that can result. There is, unfortunately, a need for something that says, ‘You must do this, and if you don’t do it there will be some form of sanction’—whatever that is.

Mr Hogan—Rory is right. It is a difficult area. One wonders whether voluntary compliance will do the job. One wonders whether regulation will be too onerous. From our point of view, we think that standard setting is the lowest common denominator which grades up. If you look

at what the United Nations, Amnesty International and other organisations have campaigned for over the years, for example, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in 1984, and after that the Convention on the Elimination of all Forms of Discrimination Against Women and a new convention on disappearances, which we hope is going to come through soon, you will see that these were not there until quite recently. People would have said, ‘Torture is bad,’ but, unless you have some form of minimum compliance where companies and countries sign up and then get monitored on their performance, we will have, in too many areas and countries, as much as in companies, too many abuses. To look at our reports on every country in the world is horrendous. The RUF in Sierra Leone was hacking little boys’ and little girls’ arms off, and women were being rounded up and raped in camps. It was just horrific. There were crimes against humanity. In Sierra Leone we had this action on the De Beers company. We have also been pushing the UN to intervene and we welcome the setting up by the Security Council of a special criminal court on Sierra Leone, which has to try those crimes against humanity and bring the guilty to justice—otherwise we have this cycle of impunity. There cannot be any actor in society who, through wilful blindness or through being a silent witness, allows these abuses to continue. They are not necessarily Australian companies, but once Australia takes a lead on this we are going to see countries around the world being asked, ‘Why not you?’ This is a real opportunity for Australia to do something which is not too onerous on Australian companies because, as you have said, most Australian companies do not have a problem; it requires only a little extra reporting, and they already do it on environment grounds. We think it is really important, particularly given Australia’s region.

CHAIRMAN—It has been suggested that this approach is a Eurocentric approach because it originated in Europe. All things considered, Europe is not a friend of Australia’s in terms of trade issues. Why should we follow down a European path, maybe to their advantage against us?

Mr Hogan—I am not sure about it being to anyone’s advantage but, yes, Europe and Australia compete in trade, but I do not think they compete in human rights values. Of course, from time to time there are different issues, but Australia is part of the European bloc in United Nations voting in the General Assembly and in the Commission on Human Rights, so from the moral point of view you would find that Australia has more in common than it has not in common with the Europeans. Of course, there are always going to be concerns that it is not a level playing field or that European companies are able to get away with things that the Australian companies have to do, and that is something we just have to look at and work on. If we get Australia to sign up to a good regulatory regime here in Australia we are going to go back to our European colleagues in Amnesty International and get them to bang on the doors of governments in Europe. You have the precedent there, and it is a really good look for Australia.

CHAIRMAN—How do you respond to the concern that legislation could cause Australian companies to shift offshore in terms of their corporate structure and head office structure, and—the mirror image of that—that it would make it more difficult for Australia to attract head offices to Australia, which is part of the government strategy to improve our economic performance?

Mr Sullivan—Because of the thinking behind the bill and the manner in which the requirements of the bill are being structured, I do not think the cost argument is particularly

relevant. Many companies are already doing this kind of reporting and so on anyway, or will be expected to do so either under the Corporations Act or in the ethical investment market. The actual cost implications for Australian companies, given that most of them do not have any real issues anyway, should be quite minimal. The actual economic impact of a bill like this, in terms of direct cost, is marginal and not that significant. The issue of whether transparency in disclosure acts as a barrier to corporations setting up here has two aspects. One is that, on financial reporting, Australia does have a reasonably onerous financial reporting mechanism for corporations based here. I think that is the issue that companies are more sensitive to anyway. If a company is going to make a decision whether to invest in Australia, it will be financial disclosure and financial performance requirements that, excluding subsidies and tax breaks, et cetera, are really of concern. The type of disclosure that is envisaged in this bill is increasingly being seen as an international norm. We need only look at the mining industry as an example. Australian mining companies are competing internationally in a very cost competitive market, yet they are able to do this kind of reporting and are willing to engage with NGOs and do all those other things. Increasingly, what is being envisaged in this bill is getting closer to codifying a norm than being a cost disadvantage or imposition on companies. If a company is going to make a decision to set up its HQ in Australia I would be surprised if this bill had anything to do with their decision one way or the other. There are a lot more fundamental business issues that would have to be considered and looked at. This is a minor imposition in that overall context.

CHAIRMAN—I have a couple of questions to ask on behalf of Senator Murray, who is absent today. If the bill is not passed in Australia in the near future, can you think of any other ways its objectives can be achieved?

Mr Sullivan—In Australia we are seeing a range of influences acting on companies to achieve certain outcomes, such as public disclosure, investment, et cetera. We think regulation is the missing influence. If this bill does not go ahead, one potential direction where we already have an institutional structure and a mechanism would be to make the OECD Guidelines for Multinational Enterprises in some way more binding. Australia already has a National Contact Point in Treasury. Australia has an international reporting obligation on the manner in which the guidelines operate. Unfortunately, at the moment the NCP is a very weak, unresourced and probably not that committed to implementing the guidelines type body but, certainly, the structure and resources are there for that. It is not that hard to envisage, particularly if the decision is to adopt some kind of closer to voluntary approach, that structure and those requirements being used as a starting point or an intermediate step on the way to regulation, to create at least the culture of reporting and some of the pressures that we would see regulations providing. To do that obviously requires that the government is committed to making the National Contact Point effective, independent and transparent with public reporting. It could be, and may be in the context of Australian companies' concerns about this bill, quite a useful step forward. We would probably see it as an intermediate rather than a final step.

CHAIRMAN—The other issue Senator Murray would like to raise is whether you have a view on the effectiveness of the UK pension fund prerequisites, which he believes are along similar lines to the legislation.

Mr Sullivan—Again, we would see them as an influence. I do not have the current data for Australia, but my understanding is that between 30 per cent and 50 per cent of the funds that are held, for example, in the stock market or in superannuation are equivalent type funds.

Obviously, financially, those funds have a huge influence. They are obviously constrained by issues like their fiduciary duties, but certainly it would be interesting to see what values companies use when they are assessing the selection of stocks or shares to invest in. We would see it as an influence, not as the only thing that makes a difference. Again, it sends out quite a strong signal to companies: ‘We are going to look at these issues when we decide whether to invest with you.’ Again, to date no real outcome has been seen from the UK pension fund legislation. The requirement to have a policy only came in about 12 months ago. Whether it has affected investment decisions or led to any change in corporate performance, it is probably far too early to say. Symbolically it is an important influence and quite an important step forward. Again, if we look at the cost implications it could be implemented in Australia at very little cost, if it were decided to use that as a potential solution to this issue.

Mr ROSS CAMERON—This bill applies to proprietary companies as well as public companies; is that correct?

Mr Hogan—That is our understanding of it.

Ms McGuire—The Corporations Law companies, which would be proprietary and public.

Mr ROSS CAMERON—So the directors, mum and dad and—

Ms McGuire—Yes, but they probably would not have 100 or 20 or whatever employees overseas, so—

Mr ROSS CAMERON—Is 120 employees the threshold?

Ms McGuire—No, 100, but people are arguing 20—sorry, I was getting confused.

Mr Hogan—The bill says 100, but we have suggested that it should be 20.

Ms McGuire—So I am assuming that that amendment will be made.

CHAIRMAN—At this stage it is limited to those who have at least 100 employees overseas, but you want it to be 20?

Mr Hogan—Yes, we would like it to be 20.

Mr ROSS CAMERON—Senator Gibson talked about the problems of legislation being, in effect, a blunt instrument to address a complex human problem. Senator Bourne’s second reading speech talks about roughly seven million children dying each year attributable, according to Senator Bourne, to the Third World debt crisis. Whatever the actual cause, clearly there are a lot of children dying from malnutrition, famine and then, in some cases, workplace related injuries. Take the case of a mother in a country like Sierra Leone, Bangladesh or North Korea—in many cases, countries starved of foreign investment because of a culture of corruption in the domestic state or just high levels of country risk—struggling to put food on the table to keep her children alive but who has access to a source of hard currency by having her kids work alongside her making garments or whatever it is. All us would look at that situation

and say, ‘That is deplorable. It is morally offensive that we have to have kids doing that.’ But if you are the mother making the choice between, for example, not having food and having food, you may be willing to commit an infraction of an ILO convention in order to keep your children alive. How do you think the legislation addresses an issue like that?

Mr Hogan—For the purposes of your question, let us imagine that the employer was an Australian company employing more than 100 people. In the case you mention, of course, the woman and her child have human rights which would apply: the right to survive, the right to water, the right to eat and the right to be able to live in security and dignity. It sounds to me that those rights are already being impinged, partly through poverty—the state being unable to feed its children—partly through corruption, as you said, and partly through political inaction. I would imagine that this bill would have very little effect in terms of the woman: nobody would ever ask that woman under any human rights convention to not infract in that situation, because that is her right. Who cares whom she gets the money from? She is feeding her child.

The issue here is the company. What obligations has that company got to that woman who has that child? If the company is employing that woman on wages that require her to bring her child into work beside her, I think that there is something seriously wrong. If the company brings that child in and employs that child in a situation where they do not go to school and they work long hours—they work in sweatshop conditions—that is a serious breach of child labour rights. I would imagine in that situation that the company would be in breach. At present, that company would be profiting from that situation and would not have any accountability mechanisms applied to it except under domestic law, which would be North Korean or Bangladeshi law, in your example. The question here is: if that company reports to anyone anywhere in the world—it might be back here in Australia—on its workplace relations and the fact that it is employing women in these situations, without taking care of the children, the situation obviously will not be as you have described it. So I would see this as being a very positive step towards trying to help remedy that situation.

As you said, it is an extremely complex situation: you have the state not acting, you have the international community probably not acting, you have the company not acting and you have the woman and child at the bottom of the heap. Nobody would expect them not to take money from anywhere they could to keep themselves alive. But, if she is taking money for paid employment and if the child has to work alongside her because she cannot get a decent wage to put the child through school, as she should, that sounds like a serious human rights abuse.

Mr ROSS CAMERON—There is an increasing trend toward an implicit criticism of foreign investment—in the second reading speech, certainly. An example of the human rights consequences of the absence of foreign investment may be seen in probably the most isolated state in the world today—North Korea. It has no problem with foreign ownership of North Korean assets, because they are all owned by the North Koreans, but according to, I think, the World Food Program, one million people starved to death in North Korea in 1999. Do you see foreign investment as an implicit problem for human rights?

Mr Hogan—No. Amnesty International have said many times that we do not take any position on trade liberalisation. We said this before the Joint Standing Committee on Treaties in the context of the WTO inquiry. We see trade over the last 300 years as bringing human rights benefits as well as problems. There are risks and opportunities with trade. While it is neutral as

a concept, it is how it is applied which has human rights outcomes. Obviously, North Korea is a case in point, where there is no international trade for a variety of political as well as economic reasons. It is a good example, because there are, as you said, all those people starving to death. What you do as an international community? How can you make that better? Yesterday I had the pleasure of being down in Canberra for the DFAT-NGO consultations which the foreign minister attended. I should not say this because of the Chatham House rules, but I think the China desk will forgive me because it is quite a good example. The question was about Australian companies operating in China and the benefits they can bring in terms of having clean workplaces and bringing people into the fold. We do not think that is a bad thing as long as, of course, along different tracks you are criticising China for the horrendous abuses that are happening there. As Rory said earlier, no one thing is going to make it better. This bill, of itself, while commendable, is not going to fix things overnight. But what do you do? Do you stop? Do you say that we should not do it? It is a question of grading up: starting from the lowest common denominator and grading up, so that we can then put countries and, increasingly, companies, on notice, because the influence of companies, as we all know, has really accelerated over the last few years and we all need to say that every actor in society has an obligation for human rights protection.

Mr ROSS CAMERON—This is my last question. Although there is this complex interaction of different factors which create atrocities or massive human rights abuses, if you take Sierra Leone as an example, the overwhelming problem—the weight of moral culpability in my view—rests with the armed opposition who are rounding the people up and committing the offences. They are the ones whose conduct and behaviour is the hardest to influence. We could have a metaphysical discussion about the moral culpability of De Beers for selling or purchasing diamonds but, presumably, the directors of De Beers are not rounding people up and shooting them. But De Beers is the easier one to lay hands on.

If you take Nike, for example, who are getting a lot of flak over labour standards in their external investments—and I understand Nike has recently made some admissions about this—and if you take Bangladesh, one of the things they have to offer at the moment is a very low labour cost in the real world. None of us would want to live by those standards of labour, but if you take Nike out it will actually be regarded as a great cost to the local communities and to the individuals lining up. If someone currently working for Nike in China or wherever says, ‘Look, I am going to leave this organisation because I am not prepared to wear these abuses of, say, international labour standards,’ the reality is that there will be 100 others in the queue to take that position. On the ground, in that set of circumstances, with the variables they do not control and we do not control, Nike is the best deal on the table for that family. Sometimes I get fearful that we all get a warm, inner glow about passing a bill, but the people who pay the price are those who, when Nike says, ‘All right; it does not make sense for us to stay’ see the economic opportunity go. The poor are the ones who get punished.

Mr Sullivan—I would like to make a comment on that. Our perspective on this is that the issue is not whether or not Nike invests in Bangladesh. Obviously Bangladesh has certain cost advantages in terms of manufacturing footwear and clothing products. Our perspective is not that Nike should or should not invest in Bangladesh. Our concern is that if Nike, or anybody else, decides to invest in somewhere like Bangladesh, yes, fine, let them reap the financial benefits but also let us make sure that the minimum expectations that we have of such companies are met. It is clear, at least with the allegations being made about Nike, that they are

not being met at the moment. There have been concerns about the conditions under which people work.

Mr ROSS CAMERON—Concerns by whom? By the employees?

Mr Hogan—By Amnesty International. Amnesty International has not done any research on Nike. Put it this way: in NGO circles these things go round quite often. To follow up from your earlier question, it goes back to the case of do you throw people out of work because they are not getting paid $7 an hour or whatever in Bangladesh. Obviously you do not because then you have another abuse of human rights, which is of their economic right to sustain themselves. However, at the end of the day, if ILO convention standards are being breached, that is a breach of human rights. We would be of the opinion that the benefits to a company in that situation would outweigh the loss if they did have to grade up, not necessarily to something like a $7 wage, but to clean conditions, a 37- or 45-hour week, making sure that children have schooling if they are going to be employed in the short term and trying to grade that out over a five- to 10-year period. You are right about the inner glow, and we have to be very careful we do not pull a company out and pull the plug on everyone, but at the same time if we just let it go on there is still a problem there.

Mr ROSS CAMERON—I think there is this huge risk of presumption. By imposing our expectations the net result will be that we deprive people of any opportunity at all.

Mr Hogan—I take your point. I think they are not so much our expectations—'our' as in like-minded, good minded, fair minded folk; it is more international standards which Bangladesh itself will have signed up to. The question there is, if a company like that pulled out and another company went in, if it was a local company, international pressure would not be all that much, but, if it was an international company that benefited from another company trying to do it right, we would have a lot to say. We would also have a lot to say to the Bangladesh government about that as well. I do not think that company in terms of reputation would be able to have an untarnished image for a long period of time, so there are variables. There is no easy answer, but I think at the end of the day you have to say, 'Here are the lowest standards in terms of human rights protection and let us do our utmost to make sure they are in.' It is a multilateral approach; it is multifaceted: it is the Bangladesh government, it is the company, it is the international financial institutions, so it is not one thing.

CHAIRMAN—As there are no further questions, thank you very much for appearing before the committee, for your presentation and for answering our questions.

[10.32 a.m.]

WANSBROUGH, Reverend Doctor Ann Patricia, Member, FairWear Management Committee, FairWear

WRILEY, Ms Lisa Jane, Campaign Worker, FairWear

CHAIRMAN—Welcome. We have before us your submission No. 35. Are there any alterations or additions which you wish to make to your submission before we proceed?

Ms Wriley—No.

CHAIRMAN—Do you wish to make an opening statement?

Ms Wriley—Yes please.

CHAIRMAN—You may proceed and, at the conclusion of your statement, we will have questions.

Ms Wriley—FairWear, I would hope you would be aware, is a national coalition of churches, trade unions and community groups. Here with me is the Reverend Doctor Ann Wansbrough from the Uniting Church in New South Wales, from their UnitingCare section. Ann has been involved in the campaign for a long time through her role with the church. Our aim is to assist workers in the Australian textiles, clothing and footwear industries to achieve their rights to a just and fair wage and to organise and to work in a safe and healthy environment. Through this, our focus has been for quite a time on Australian workers. More recently and certainly from the Victorian office, we have been involved in international networks to do with the clothing industry over a number of years such as the Clean Clothes Campaign and Homenet.

We support the bill wholeheartedly. We believe it is an important step towards fairer trading. We support the proposed legislation. We think it is good because it makes companies accountable. It makes noncompliance with environmental human rights and employment standards illegal and offers people who are wrongly done by a chance to seek redress in the courts. I invite you to imagine a world where Australian clothing companies operating offshore are renowned for doing business only with subcontractors who have high standards of health and safety, who have job security for their workers and the right to organise and who pay workers a living wage, not just the legal minimum wage. I would like you to imagine adequately resourced and independent labour rights inspectors regularly conducting unannounced visits to factories manufacturing for Australian companies, conducting confidential interviews with workers and management and publishing their reports regularly on the Internet. I invite you to imagine the same department or organisation hosting a free confidential complaints phone line or providing accessible and trustworthy channels—for example, for workers making products for Australian companies, there could be a letterbox in the factory with prepaid postal envelopes in which to lodge complaints to the company or to interested third parties if their rights or employment standards have been breached. The company would be required to guarantee that there would be no retaliation against workers who

register complaints and that all complaints would be met with a response. Imagine, if you will, that there is clear labelling of products so that informed consumers in Australia could look for clothes and feel confident that the companies making them were involved in fair trade with our trading partners.

Our focus for the FairWear campaign is strictly on one part of the industry—clothing. We are a consumer campaign, so we do not represent a detailed economic analysis of the industry. Certainly my knowledge of legislation and company requirements is not extensive, but from our perspective we want a situation to exist where consumers, whether they buy clothes made in Australia or overseas, can look for the new 'no sweatshop' label and can feel confident that they have been made in conditions where people have not had to work around the clock and have not had to pay every cent they earn towards just their rent and food, not having enough to meet their medical expenses. Increasingly, Australian consumers want to have information about and confidence in where the things that they are buying have come from and in what conditions they were made. Consumers want to be able to make that choice, to support companies doing the right thing. Those who are making a genuine attempt to meet international standards have fair work practices, environmental standards and human rights standards.

At the moment, the global situation in the clothing industry is well documented. We regularly have reports of conditions. You have already been discussing Nike as the big company which is on everybody's lips, and it has been for a while. Only last week, there was a BBC documentary on SBS about Nike and the Gap and their production in Cambodia. It was certainly a good overview and introduction to the conditions, and there was some good discussion with Nike about its code of conduct and how those things are being implemented.

The Clean Clothes Campaign has a regular email list and reports on issues around the world, whether it is the Nike factory in Mexico or a Thai factory. All over the world, there are stories all the time and research being done about the conditions and the gap between codes of conduct and the reality that workers are experiencing. In our submission in appendix 1 we referred to a Thai factory. Alongside Nike and Adidas, Myer Grace Bros was one of the suppliers—our own Australian company—and goods were produced in the same factory in conditions that did not measure up to acceptable standards in labour practices.

On the domestic front, we know that Speedo—although it is not now Australian owned, it certainly is a longstanding Australian name and it originally was an Australian family company—only last week sacked its last factory workers in Australia to move offshore or to join up with the Speedo international operations already in existence, although we also know that it is keeping some production here with outworkers in the clothing industry. The company Sussan has been documented recently in some research from an outworker phone line in Australia. Although it is a signatory to the homeworkers code of practice, it has demonstrated noncompliance with award conditions, and outworkers have been earning only a few dollars an hour—that is a regular occurrence in Australia.

The appalling conditions worldwide, in places such as Bangladesh, are well documented. We know that in Bangladesh, and in many other countries that we import from, poor safety standards and forced overtime to earn a living wage are a common experience. Recently in November, 53 people died in a fire on a Saturday evening in their dormitory-come-factory—they are often in the same building in these countries. A lot of the companies which operate in

these kinds of places have codes of conduct and voluntary codes of practice and often they are saying all the right things, but the reality keeps falling short. A particular example came up when talking to Mr Barry Tubner from the Textile, Clothing and Footwear Union in New South Wales about Australian companies. He said that every major Australian clothing company has a finger in Fiji. Fiji, with its free trade zone, has been a significant source of clothing manufacture for Australian companies. Some research by the United States federal government into that free trade zone reported that about 95 per cent of the clothing produced there comes to Australia. Fiji is an interesting example of the benefits for companies such as Australian companies going to a free trade zone and their impact. In Fiji, the original minimum wage was that of a sugarcane cutter. In the apparel section of the free trade zone, the wage level for garment workers is half the minimum wage for sugarcane cutters before the establishment of the free trade zone. So the free trade zone has halved the minimum wage in Fiji. An important part of Mr Chaudhry's election promises was to get rid of that free-trade-zone wage as it was not a living wage.

Jim Keady came from the United States during the Olympics and spent a month trying to live on the wages of Indonesian Nike workers. He pointed out that a living wage is different from a survival wage. People can survive on a lot less than a living wage. One part of the legislation that I am particularly appreciative of is the inclusion of a reference to a living wage and the fleshing out of basic needs and what that includes—medical needs, child care. Apart from a roof over your head and food, we know that there is a lot more to a living wage and good quality of life.

We support the standards that are set in the legislation. We are very pleased that the ILO conventions are set as the standard for labour practices and that basic human rights, such as the right of workers to form and join trade unions, are in there. The enforcement of it is a strong point of the legislation—people can seek redress in the courts. We would suggest that there is a need for improvement of the definition of 'employee', particularly to include outworkers and homeworkers—which are under ILO convention 177 as employees—because that is the nature of a lot of the industry. A particular concern for us is that the legislation needs to address the nature of the industry, subcontracting being a major way of carrying out the work which puts manufacturers at arm's length from the workers. As the Amnesty International submission and several other submissions have recommended, we think the number of employees should be reduced from 100 to 20, which is in line with similar legislation proposed in the United States. Otherwise, it lets too many companies through the net which still have large-scale operations but, because of subcontracting, certainly do not have a huge number of employees overseas. Companies such as Bonds used to have thousands of people working in their factories in China, but in only the last few years they have changed to subcontracting there. So their number of employees would definitely have dropped, although their production scale is still significant.

We think that there could be some improvements in the reporting requirements. There is certainly an argument for environmental audits. Similarly, we think there is a lack of detail requested to do with social auditing. For instance, the legislation requires companies to have a complaint mechanism for workers, but in the reporting there is no request for that to be provided in a document stating the policy for complaints mechanisms for workers.

They are asked to comply with the living wage but then in the reporting they are not ever asked to calculate it. We think that, instead of just asking companies for the level of income that is paid en masse, it would be helpful to ask them for a calculation of what a living wage is. In

that way, there would be some processing and calculating of what it means. That is the kind of information that NGOs in each country where they are operating could provide advice on. It would not have to be a long-debated issue; it could be regularly updated from an NGO source in the country. Other issues of transparency that need to be improved include the location of factories being known and reporting being made widely available to people so that they can find out whether standards are being met.

Most significantly, the legislation as it stands presently may not protect a lot of the workers in these factories because of a lack of focus on the subcontracting issue and the lack of a proposed system of monitoring. At the moment it is based on a complaints mechanism and the self-reporting of noncompliance. We think that what is crucial for companies such as Nike is independent monitoring rather than what happens now—even by those who are saying they are doing the right thing—where often they know the inspection is coming and inspectors can talk only to management or workers who have been drilled in what they are and are not allowed to say. And there is no confidentiality about the things they do tell inspectors. That is a particularly complex area but it is being developed internationally. The UK has an ethical trading initiative which is piloting and trialling these kinds of monitoring systems and looking for best practice in these areas. I think that is a good source of information to follow up. I am not greatly familiar with it yet but I do have the documentation and could refer you to that.

We definitely support the bill. We think companies that are operating ethically deserve to be recognised. We would even go so far as to say that a label might be workable on international goods if there was confidence that it meant something. A label that says it was made fairly and is subsequently found not to mean anything would be worse than not having one at all.

Dr Wansbrough—At the outset, I would like to address a couple of the questions that were of concern to Mr Cameron, the previous speaker, which were basically about whether this bill is the sort of thing that organisations in Australia think is a good thing but that may not really be in the survival interests of the workers in these developed nations. As part of my work for the Uniting Church, I am involved in an organisation called the Asian Women's Resource Centre for Culture and Theology, which has its office at the moment in Kuala Lumpur. We publish a journal called *In God's Image*, which I would describe as being about providing an avenue for Asian women—who can usually, but not always, write in English and so we do translate articles—to reflect theologically on the survival issues of women in Asia. We have articles about work, environmental issues and various issues about survival—domestic violence and so on, the sorts of issues that are life and death issues for many women in Asia. What comes through in that, certainly from the women who provide material and the women they work with, is that women are saying that they think labour standards matter. In fact, we have published some books which are stories about some of the Asian unsung heroines who have worked with women workers in factories to try to get basic labour standards.

I believe that there is a strong concern among Asian women that there be basic standards for their work. It is not in their interests to have less than survival wages. I note that the term that is used in this bill is 'a living wage'. That is a living wage in the country where they work. We are talking about applying not Australian standards but the local standards that allow people to live. That is something that I believe would be widely supported among at least the Christian women in Asia that we have contact with.

I should also say that, as the Church, we bring people from Asian churches to Australia regularly to update us on issues. I think all the major churches do that. It sticks particularly in my mind that in 1998 we brought Sharon Ruiz Duremdes to Australia to give what we call the Thatcher lecture at the United Theological College. During the Marcos era in the Philippines, Sharon was under surveillance as a dangerous woman because she worked with grassroots women, arousing their awareness about these issues and about what was fair and reasonable, about investment and about their treatment by their own government and by overseas corporations. She is now, I think, the General Secretary of the National Council of Churches in the Philippines, so she has some credibility there. She particularly drew attention in that Thatcher lecture to concerns about Australian companies operating in the Philippines. She basically said, ‘You’ve got to do something about it. It is not good enough that you let Australian companies operate in our country in a way that treats us like this, that damages our environment and treats employees badly and so on.’ From my point of view and from the Uniting Church’s point of view, our involvement in this campaign of fair working standards for people in the garment industry comes out of that wider experience of Asian people saying that these issues matter to them.

CHAIRMAN—You talk of ‘a living wage’. Would that increase the cost of production for the Australian companies or whatever offshore company you are referring to compared with their current cost of operation?

Dr Wansbrough—I suspect that in some countries it may. But what we have been arguing in Australia is that, when you look at the cost structure of garment production, labour costs are actually a very small amount of the cost structure in a lot of places, so the change would not necessarily be an enormous change.

Ms Wriley—Let us go back to Nike—there is so much information about Nike. The proportion of the sale price of their shoes that is due to labour costs is so minimal, compared with the actual final cost of sale, that it would not significantly affect the final price of their footwear to change it. In Australia the example is the Kerry McGee companies, which calculate labour costs as eight per cent of their final price. In a lot of cases, outworkers are getting three or five per cent. So it is a difference of three per cent of the cost of the garment that needs to be absorbed by companies for them to be responsible, to be paying the right amount.

With regard to manufacture overseas, as we have said, we are asking for not an Australian level of wages but what is a living wage in those countries. It was proposed to Nike that a living wage paid to people in Indonesia would be almost a 100 per cent increase, but that would not make any significant difference to the final cost of their shoes because the labour costs are so small. It is like comparing what Tiger Woods earns from Nike and what a Thai Nike worker earns. A Thai Nike worker would need to work for 72,000 years to receive what Tiger Woods earns from a Nike contract. So it is not that Nike do not have the money to allocate to that kind of thing—the disparities are amazing.

Dr Wansbrough—Another aspect of this is that, like Nike, a number of Australian companies came under fire last year for having Olympic clothing manufactured overseas. They all claimed to be doing the right thing—in which case, one would have to say: why should there be any increase whatsoever?

CHAIRMAN—You say that the labour costs are not significant in the costs of clothing. My understanding is that the major reason that a lot of Australian companies have gone offshore in terms of manufacturing clothing is because of the labour costs. Clothing manufacture is labour intensive and our labour cost structure, when compared with that overseas, is so much greater.

Ms Wriley—Certainly if you are comparing Australian wages to overseas wages—comparing $1 a day in Indonesia to $12 an hour for a machinist in Australia—there is a significant difference. That is why the companies are there. But when comparing a fair Indonesian wage with the Indonesian wage that is currently paid, there is not always a significant difference between them. I guess that relates also to Mr Cameron's questions about companies. I got the feeling that he thinks that the campaigns are asking people to get out, that we hassle them about getting out of the countries and that we ask them to stop doing what they are doing. However, on the contrary, there is a very strong feeling through the Clean Clothes campaign and the FairWear campaign that we do not want companies to cut and run and to leave places high and dry. In fact, it is a strong part of our campaign that we ask people to stay there and to improve the conditions. That would actually have a very significant social impact on communities. If a company like Nike—which employs 500,000 people around the world—paid living wages, the social impact would be significant. People would have money to spend on the things that they need, and it would boost the whole economy of countries.

Mr ROSS CAMERON—I do not doubt that the FairWear campaign is well intentioned in that regard. The issue is not whether or not you ask them to stay but what factors are in their minds when they make investment decisions. Dr Wansbrough talked about the women of the Philippines wanting better wages. Everybody wants better wages. I do not need an academic journal to tell me that people would like better wages. The question is: how are investment decisions actually made by the people who have the money to invest, either to go into a country or to pull out of a country? We have cited Speedo today. Speedo, I think, is not helpful evidence to you.

Ms Wriley—Because they have gone offshore?

Mr ROSS CAMERON—Because they have exactly demonstrated the thesis that, if you push wages and conditions above a certain threshold, the people who are punished are the employees. I had 1,000 employees at Bonds in my electorate. Over the past decade they were reduced to 100, and in the past three weeks they have been reduced to zero because machinists are being paid $12 an hour.

One of the reasons why you have a flourishing heroin trade in Cabramatta is that you have about 10,000 Vietnamese who came to Australia as refugees, most of whom are not literate in their own language, let alone in English. The skill set that they bring to participate in the formal labour market is very small. FairWear effectively prices them out of the market. As wonderful as the intention may be—you can go to all their employers and say, 'It would be lovely if you would pay them more, if you would pay them the award wage'—the consequence is that they may lose their jobs. You have lots of people making choices—for example, to go into prostitution. Lots of Asian women in Australia make the choice to go into prostitution because that is one place they can earn award wages. If you want to talk about the Philippines, there are 160,000 Filipina maids in Hong Kong who are earning award wages but they are seeing their children for two weeks in every two years. That may be someone's idea of a great human rights

outcome. I am just not persuaded that our good intentions, in terms of the consequences in people's lives, actually improve their quality of life.

Dr Wansbrough—That is a very simplistic analysis. That is putting all the responsibility for a social problem on a particular consumer campaign. There is a whole host of other ways in which this government could take action to increase jobs.

Mr ROSS CAMERON—I am not blaming FairWear for the problem—

Dr Wansbrough—I am sorry, but that is what you said. It is an unacceptable approach to a campaign which is simply encouraging consumers to want to pay a fair price for their clothing. The idea that that is at the root of the social problems that you have talked about is simply nonsense.

CHAIRMAN—It makes no difference when determining a fair price. Wheat growers might like to be paid what they regard as a fair price for their wheat, but they are not; they have to take what the market is offering.

Dr Wansbrough—There is in fact quite substantial documentation of what in this industry will constitute a fair price. A committee is developing a manual of standards and so on, and that is all being adequately debated.

Mr ROSS CAMERON—The committee may develop a beautiful manual of standards, but the reality is that there are no workers in Bonds in my electorate of Parramatta. The committee may produce a beautiful document, it may widely consult and say, 'This is what we think is a fair price,' but there will not be any workers.

Ms Wriley—Are you proposing that we do not have a minimum wage?

Mr ROSS CAMERON—I would not be offended if we did not have a minimum wage. In terms of the impact on opportunity for the disadvantaged, for the poor, the minimum wage works powerfully to the benefit of the club that already have jobs. The people it punishes are the low skilled, who have few opportunities to get into the job market. It suits those who are already in the club; they all derive significant benefits. The United States has the lowest unemployment in the world, but it has a more flexible labour market.

Dr Wansbrough—It also has a much larger percentage of jobs in the public sector than we do, as the University of Newcastle's Centre of Full Employment and Equity is making clear. One of the major differences between Australia and the US is the percentage of jobs in the public sector; it is not wage levels.

Mr ROSS CAMERON—There is a whole range of services in the United States that simply are not provided anywhere in Australia. For example, you will never get a shoeshine in an Australian train station. That is not necessarily the end of the world; it is not a national tragedy. I do not come to work each day missing it enormously. But because of the flexibility of the wage market, shoeshining is something which you can go into with zero training, with just a good attitude and no skills, and you can make a living out of it. I would not necessarily be wanting it for my kids as a lifetime vocation, but for plenty of people it offers the dignity of a

job and the satisfaction of economic self-sufficiency, because the labour market is flexible enough to allow a personal service like that.

The consequence in Australia is that that whole strata of economic activity is wiped out. The consequence is that you have a permanent underclass who are surgically attached to a Commonwealth benefit for life and then you have the smaller, privileged group in the jobs club who get the tremendous benefit of all the inflated wage standards. With regard to those 160,000 maids in Hong Kong who see their kids for only two weeks every two years, the Philippines is effectively exporting people, and the reason for that is that they have not been able to attract foreign investment—that is one of the principal reasons why they are doing it. No-one is questioning the goodness of the intention; it is just a question of what the actual outcomes are.

Ms Wriley—We obviously have fundamental differences in our core principles. It seems a reflection of the race to the bottom. There will always be people who will be happy to take advantage whenever people are willing to work for less and less money. We must have some legislative framework to enshrine the right of people to earn enough to pay for their food and education, to not have to leave the country to look after their children, to have access to basic things that we all take for granted.

Mr ROSS CAMERON—How are you going to do it in the Philippines?

Ms Wriley—We cannot do it in the Philippines but we can enshrine legislation in Australia that helps Australian companies make that more likely to happen.

Mr ROSS CAMERON—What it means is that they simply will not invest, but we will all feel better when we pass the bill. Australian companies—like companies all over the world—will just decide not to invest in the Philippines.

Ms Wriley—That is just being ruled by the idea of profit being more important than any ethics or principle. Ethical trading is about more than just meeting the law; to me, it is a bigger concept about the kind of world—I know this might not be what is passing through investors' minds—we want to create. We can legislate to make that more likely and to support the angle of consumers. The companies might still have the profit motive as No.1, but there is a considerable and significant number of consumers saying, 'We don't want to support companies who are doing that.' When they know which companies are doing it, they can make that choice and then there will be a profit incentive for companies to operate ethically. They are making that choice already and are supporting companies like the Body Shop which are much more transparent about their trade, about where things come from, about what happens with their packaging. We can always be led by the profit motive but that is not going to make us a better community in how we look after people.

Dr Wansbrough—Some of the people in these countries are saying that they are not actually convinced that foreign investment is always in their interests if it comes with wages which are not living wages. You are making the assumption that more investment is always better. Obviously, many countries need some foreign investment but the idea that that is automatically—no matter what the conditions—in the interests of these countries seems to me highly questionable.

CHAIRMAN—The alternative, if that investment is not there, is that there are no jobs at all and no wages. So you are going to have an even poorer community.

Dr Wansbrough—Foreign investment often brings with it a change in the nature of how the economy works in those countries. People get moved from a subsistence economy—an economy where they are able to subsist—to a more formal economy with paid employment in corporations.

CHAIRMAN—Usually with a rising standard of living as a consequence—otherwise they would not move.

Dr Wansbrough—Often it takes over land; it changes the whole context in which they are operating.

Mr ROSS CAMERON—They could stay with the subsistence economy. Do you think it is in their strategic, long-term interests to have a domestic subsistence economy?

Dr Wansbrough—I am saying that the fact that they move into a paid job does not automatically mean that they are better off. It may mean they are. Under certain conditions it will mean they are better off, if it is a living wage. If formerly, through other forms of activity, they had a livelihood, then the fact that they now do that through money does not mean that they are better off. That is an issue which Asian churches are raising with us—this idea that a paid job is always a better job. No-one wants to see subsistence economies preserved totally. That would be a simplistic view of what I am saying. We are saying the opposite: that the idea that bringing in foreign investment is automatically better—either extreme—is silly. It is about negotiating a way of improving the economy that really does have benefits for the people at the bottom of the heap. Just being in a factory does not automatically mean you are better off.

CHAIRMAN—Aren't some Asian churches in fact having great success in assisting people through that process to become self-sufficient through the means of micro credit? They are actually becoming self-sufficient businessmen.

Ms Wriley—Yes. That is another way of developing and moving beyond the subsistence community. If a fair trades act comes in—and we do not say that all the jobs have to stay in Australia; it will be a globalised thing—we should change our concept of investment. Australian companies, for instance, going to Fiji already get the benefit of the different cost over there of a living wage and the standard of living. We would like to think that it could be enough of a benefit to be over there, to have that impact. You can change the community by bringing in a new kind of work with the manufacturing industry and paying a living wage that will mean they can then make a significant contribution through taxes to support the state over there to provide education, health and services. But there is the issue of trying to make more profit, of companies who are there trying to get as much out as they can—within the law. Mr Fred Hallaby, an Australian businessman with Mark One Apparel, is a key lobbyist in the Fijian chamber of commerce equivalent in the apparel section of the free trade zone. He is a key lobbyist for keeping this minimum wage—that is, half what the minimum wage was before. If he were bound by legislation that set a higher standard in terms of a living wage—which a Fijian NGO would tell you is higher than what a canecutter earns—then it would have a

positive impact throughout that whole economy. It could be an investment that actually changes communities rather than an investment that just exploits and takes advantage of things.

Mr ROSS CAMERON—What makes you think they would stay in Fiji?

Ms Wriley—If he stayed as an Australian company, then wherever he went, hopefully, he would have that standard and would be rewarded by consumers for having it.

Mr ROSS CAMERON—I think that the labelling idea is a nice idea. The reality is that there are choices, say, for his company—and I do not know his company. We could have a discussion about the moral benefits, but we want to talk about the commercial benefits of having access to a large work force at half the wage being paid to sugarcane cutters and the commercial benefit of having a FairWear label. I suspect his interests will still be on the costs side rather than on the consumers side. If you look at the Fijian economy, right now it is a basket case, very largely because of the withdrawal of foreign investment, partly driven by sanctions on the part of countries like Australia. It is an economy which is overwhelmingly subsistence except for the sugarcane industry—which is about 60 or 70 per cent of the economy. It is a one-crop economy. The thing that is empowering women in developing countries like Fiji is access to a cash wage. If you want to look at the experience of women throughout the Pacific, they are overwhelmingly in patriarchal environments where the women do all the work and the men take all the benefits because they are subsistence economies. One of the things empowering women is the fact that in many instances they are getting access to hard currencies, cash wages, in foreign investment based enterprises. In Fiji today, say, in the copra industry, 80 per cent of the copra is not harvested. The coconuts lie on the ground and rot because, in terms of the global copra market, it does not make sense economically to harvest them. The costs of harvesting are greater than the return to any company that wants to invest. I suspect that, when it comes to a human rights issue, I would probably be right alongside Mr Hallaby for the retention of the current wage rate.

CHAIRMAN—Any further questions? If not, thanks for your evidence to the committee and the way in which you have answered our questions.

[11.13 a.m.]

RANALD, Dr Patricia Marie, Principal Policy Officer, Public Interest Advocacy Centre

CHAIRMAN—I welcome Dr Ranald of the Public Interest Advocacy Centre. We have before us your submission, which we have numbered 11. Are there any alterations to or omissions from that submission?

Dr Ranald—No.

CHAIRMAN—Do you wish to make an opening statement?

Dr Ranald—I will briefly rehearse the main points in the submission.

CHAIRMAN—You may proceed and then we will move to questions.

Dr Ranald—The Public Interest Advocacy Centre is an independent and non-profit legal and policy centre. Its charter is to undertake strategic legal and policy interventions in public interest matters, to foster a fair, just and democratic society and to empower citizens, consumers and communities. PIAC, because it is located in New South Wales, undertakes matters to do with that state. We also undertake matters to do with the national interest and which have consequences beyond state boundaries. Hence our interest in this issue. We have been particularly active in the policy debate both at the national and the international level about the regulation of the conduct of corporations for many years both at local and international levels.

We basically support this bill because we believe it reflects a trend which is both national and international in public opinion which is moving away from voluntary self-regulation towards more formal regulation of companies based on the experience of self-regulation, which has not been a successful one. So we support the aims of the bill to apply environmental, employment, health and safety and human rights standards to the conduct outside Australia of Australian corporations. We note that the bill requires corporations to report on their compliance with such standards, to develop such standards for themselves to report on their compliance, and provides also for the enforcement of standards.

The impetus for the bill came in part from the BHP Ok Tedi environmental disaster in Papua New Guinea and the Esmeralda environmental disaster in Romania, both of which were Australian companies which failed to implement overseas basic environmental standards which would have been legislative requirements in Australia. We believe it addresses a regulatory vacuum which exists at the national and international level. I will not go into detail about the arguments to support this but note that we have had considerable experience with the OECD voluntary guidelines for multinational enterprises which were essentially voluntary and which were revised last year following the major international public debate about the MAI. They remain voluntary. Those guidelines have been slightly updated and more comprehensive but there is basically still no means of enforcing them. Clearly, their existence had no impact on the behaviour of companies like BHP or Esmeralda.

We have also looked at industry codes of conduct. They suffer from fundamental weaknesses. Firstly, there is no requirement for companies to sign up to such codes. We note that Esmeralda

was not a signatory to the Australian mining industry code. Secondly, there is no evidence that the code is effective for those who sign it because there are not specific enough standards, nor any penalties for non-compliance.

We have also looked at corporations developing their own voluntary codes and I think this committee has already heard enough about the experience of the Nike code of conduct. Unless such codes are taken seriously by management, unless staff are trained to implement them, unless there is independent monitoring and some specific objectives and unless there are some penalties for noncompliance, they will, in many cases, be ignored in practice and serve a public relations function only. We also note in our submission that there are similar legislative moves in both Europe and the United States. These moves are at an early stage, as is this one in Australia, but we believe that they reflect an international trend in public opinion and that the trend will continue. Standards developed in Europe and the United States are likely to be adopted by international funding and insurance bodies and therefore the development of similar standards and means of enforcing them in Australia will not place Australian companies at a disadvantage—on the contrary, it will enable them to comply with global best practice in these areas.

In closing, I note the bill requires Australian based companies to undergo an internal process of developing a code of conduct which complies with the minimum standards in the bill. It involves an internal process for the company and a training process for the company internally, which we believe is positive. However, it also involves penalties if the companies do not implement or comply. It involves reporting mechanisms and penalties. We think all of those elements are important. We support the legislation because it addresses a gap in the regulatory framework which has resulted in disastrous consequences in the examples I have given. It follows precedents set by other recent Australian and international legislation—we refer here to bills which deal with the issue of territoriality as in the bribery of foreign public officials bill 1999 and the slavery and sexual servitude bill 1999—and it will enable Australian companies to comply with emerging international best practice.

CHAIRMAN—Thank you. Your submission refers to the Esmeralda case, can you give me any other specific examples of Australian companies you believe have met acceptable standards.

Dr Ranald—The other major environmental example we have used is the Ok Tedi example in Papua New Guinea, BHP.

CHAIRMAN—Are there any others?

Dr Ranald—I think a number of examples were given by the previous speakers in the clothing trades area, but I do not think the rationale for this legislation rests solely on having 500 examples of Australian companies that are behaving badly. We could provide those but I think what we're trying to do here—

CHAIRMAN—When you say the rationale, that is not the rationale. If there are no significant examples of that occurring, why we do want to legislate? Why increase regulation, if there is no need?

Dr Ranald—I have just given you two significant examples which I would put to you brought Australian companies into severe disrepute around the world. They were major environmental disasters. The previous witnesses have just given you half a dozen examples of companies operating in one industry, the clothing trade. What I am saying is that this bill is about setting standards which help Australian companies to reach international best practice. As I have read some of the other submissions and a lot of the responses from companies to the bill say, 'We do not need this bill because we are already complying with the standards.' If that is the case, those companies that are already complying with the standards should welcome this bill because what it will do is make sure that the companies that are not complying with these standards meet those higher standards and are not competing with them on unfair basis of exploitation of either people or the environment.

CHAIRMAN—In that context, evidence that has been put to the committee is that if you impose a legislative regime of this nature then the companies will certainly comply with it but they will comply to the extent of the legislation and no more, whereas, as you said, at the moment there are companies, and probably lots of companies, whose own action exceeds the requirements of the legislation. They will say, 'Well, if we are required to do this by legislation we will meet what the legislation says but we won't continually improve our practices beyond that.'

Dr Ranald—I think that is a tautological argument because if companies are already complying there is no problem. The legislation certainly does not prevent them from doing better than those minimum standards. Minimum standards are always about minima; they are not about forbidding people from doing better. The purpose of this legislation is precisely to engage with those companies who at the moment are not complying with those minimum standards and who probably will not unless there are some minimum standards established.

Senator GIBSON—You place particular emphasis on the two environmental examples. Looking at that at a practical level, one could say, even with those examples, that the companies involved have copped a fair bit of flak globally about those particular examples. There is no legislation and the companies have responded by trying to do something about it. I do not think you were here earlier this morning when we had the Amnesty people here. I said to them, 'Isn't it true that when there are in fact problems exposed today, wherever they are around the globe, communications today are such that you can't hide anything.' If something has gone wrong or if someone is doing the wrong thing it is quite readily exposed. The communication systems of the world, the media of the world, basically expose things and in fact are a practical pressure on organisations, whether they be companies, to do the right thing all the time. What I am getting at is that legislation is a very blunt instrument. It adds to the bureaucratic layer with extra costs and things. Are we going to get a better outcome at the end? I am suggesting to you that evidence we have had suggests that people are responding, entities are responding when there are problems.

Dr Ranald—Certainly they respond in terms of a PR response by saying, 'Yes, we will do better next time,' but I think public opinion is demanding more than that. If you look, say, at the experience of Nike, there has been a public debate about Nike's treatment of its subcontracted workers in factories for at least five or six years, and Nike has said continually all during that period, 'Yes, we are improving; yes, we are doing better.' They have had their own monitoring system which supposedly gave evidence that they were doing better. Only in the last two weeks

has there been some independent monitoring of Nike factories which actually shows—it was demonstrated in that program on BBC television which was shown on SBS last week—that in fact Nike had not improved the situation in those factories. Because there was no independent monitoring, because there was no legislative requirement to meet certain standards, they had not been meeting them, although they had been telling the world that they were because that is part of their machinery with their public relations for the rest of the world. I agree with you that it is easier to expose abuses with the current state of communications, but it is not always easier to actually get companies to live up to their rhetoric. That is a very good example where it has not occurred so far.

Senator GIBSON—Here we are talking about a proposal to put in Australian legislation to affect Australian companies.

Dr Ranald—I know that BHP has made commitments about what it is going to do in its environmental practices around the world, but I am not sure that we have in place now the independent monitoring mechanisms to actually know whether it is doing those things that it is promising to do.

CHAIRMAN—Thank you, Dr Ranald.

[11.34 a.m.]

COLLEY, Mr Peter, National Research Director, Construction, Forestry, Mining, Energy Union

MAITLAND, Mr John William, National Secretary, Construction, Forestry, Mining, Energy Union

CAMERON, Mr Doug, National Secretary Australian Manufacturing Workers Union

HOLMES, Ms Natasha, Research Officer, Australian Manufacturing Workers Union

CHAIRMAN—Welcome. We have before us your respective submissions, Nos 9 and 13. Are there any alterations or additions you wish to make to those submissions?

Mr Cameron—No.

CHAIRMAN—I invite you to make opening statements to the committee, at the conclusion of which we can proceed to questions.

Mr Cameron—This is the first time we have outnumbered a committee! Thank you for the opportunity to address the committee. The AMWU supports the principles and passage of the Corporate Code of Conduct Bill 2000. We believe it is a reflection of the growing concern and distrust of the actions of corporations operating both in Australia and overseas. In Australia we hear that factories have to be closed and governments must privatise to stay competitive to stay in the good books of financial institutions that dictate the value of our currency and the credit rating that we receive. We hear the Thatcher mantra that 'there is no alternative'. The AMWU believes that there are alternatives. One of the alternatives is to regulate corporations to act in a socially responsible manner. The Australian government has a responsibility to the working people of Australia to ensure that its corporations are not simply players pursuing the race to the bottom of labour and environmental standards.

The AMWU supports the view that corporations are bound and responsible to society, workers and other stakeholders and not just profits and shareholders. For too long corporate interests have overtaken and ignored their responsibilities to Australia; therefore, this Corporate Code of Conduct Bill is imperative. Australian corporations operating overseas should not be able to abuse lower labour and environmental standards to pursue a greater profit advantage to the detriment of the peoples of the country that they operating in; nor should they be able to play Australian workers and their families off against workers in another country. Corporate arguments that claim they abide by local law are unacceptable when these laws disadvantage the poor. It is imperative that Australian corporations operate under minimum standards legislated in Australia. Australia has a responsibility to set a standard of corporate behaviour that seeks to advantage and benefit working people.

The Millennium Poll on Corporate Social Responsibility referred to in Senator Bourne's second reading speech was conducted by Environics International Ltd in cooperation with the Prince of Wales Business Leader Forum and the Conference Board in mid-2000. The business forum comprised senior executives from 2,900 enterprises and 60 nations. PricewaterhouseCoopers was a major Australian sponsor. The poll was conducted across 23

countries and six continents and involved 25,000 average citizens. The highlight of the poll indicated that citizens in 13 of 23 countries think their country should focus more on social and environmental goals than on economic goals in the first decade of the new millennium. Informing impressions of companies, people around the world focus on corporate citizenship ahead of either brand reputation or financial factors. Two in three citizens want companies to go beyond their historical role of making a profit, paying taxes, employing people and obeying all laws. They want companies to contribute to broader societal goals as well. Actively contributing to charities and community projects does not nearly satisfy people's expectations of corporate social responsibility. There are 10 areas of social accountability rated higher by citizens in countries on all continents. Fully half of the population in countries surveyed are paying attention to the social behaviour of companies. Over one in five consumers report either rewarding or punishing companies in the past year based on their perceived social performance and almost as many are considering doing so. Opinion leader analysis indicates that public pressure on companies to play broader roles in society will likely increase significantly over the next few years.

Australians were asked their views on the role of large companies in society. They were asked should their role be to make profit, pay taxes, create jobs and obey all laws, or set higher ethical standards and help build a better society, or should they operate somewhere between the two positions. In Australia, only eight per cent of those polled said that the role of companies should be to make profit, pay taxes, create jobs and obey all laws. Forty-five per cent of Australians said companies should set higher ethical standards and help build a better society, and 43 per cent said companies should operate somewhere between the two positions. Unfortunately, many of our key politicians and political parties adopt the view of those polled in Kazakhstan, where 48 per cent say a company's role is to make profits and only 18 per cent say they should set higher ethical standards.

The strength of the millennium poll findings suggests that in the coming decade corporate social responsibility is likely to become a new pillar of performance and accountability of successful companies. Nevertheless, hoping that corporations will adopt the aspirations of communities around the world is, in my view, pie in the sky. Corporations need to be regulated through various binding treaties and legislation, both internationally and in a domestic sphere.

The AMWU has also conducted a poll of 1,200 voters in 18 marginal seats in June 2000. We did this for a number of reasons, obviously. The polling demonstrated the following: 53.5 per cent of respondents believed that jobs will become less secure in the next few years; 65 per cent believed that jobs had become less secure in recent years, and overall the federal government was nominated as being responsible for the reduction in job security; 90.2 per cent believed that the Australian government should do more to protect Australian jobs from competition from countries where employees earn very low wages.

The AMWU believes that it is time that the major political parties and politicians listened to the Australian public, who have demonstrated that they not only want major corporations to act in a more socially conscientious way but want the politicians to act in their interests and intervene on behalf of the Australian public.

The AMWU would like to restate our stated recommendations to the bill. Firstly, we call on all political parties to support the principles and concepts of the bill. We recognise the complex

nature of the legislative process and, as such, commend this hearing, which has allowed the input of such a vast array of people to comment on the bill. Secondly, codes of conduct must be enforceable with a legislative underpinning under the act. Thirdly, codes of conduct must incorporate binding and enforceable core labour standards as enshrined by the International Labour Organisation. These codes and adherence to core standards must be independently audited and vetted by an independent third party such as the ILO.

Fourthly, corporations must show their subcontracting and contractual obligations. It is unacceptable that corporations can hide behind a web of contracting arrangements and, as such, joint ventures must also be included in the scope of the act. Fifthly, monitoring and enforcement procedures as stipulated by the act must include representatives of labour, environment and community organisations. The incorporation of the international institutions such as the WTO, the OECD and the ILO must be included in the reporting and enforcement of the act as a tool of global governance. Seventhly, the reporting process must be open to the public and ensure public scrutiny and consultation. Reports must be filed on annual or biannual basis.

Eighthly, individual reports of adherence to the act must be posted at company sites so that employees can access information about the effectiveness of the act to the operations both in Australia and overseas. Ninthly, DFAT and DISR must also be incorporated into the review process. Lastly, all government funded contracts must be awarded under the auspices of the act. Companies that are found to breach the principles and procedures of the act must not be awarded government tenders.

A current example of the effect of globalisation and the endless race to the bottom of wages and conditions is seen by the relocation of jobs to China. China has an average hourly rate for production workers at less than $US2.11. Their record on human rights and the environment is abysmal. There are no free trade unions in China, there is no right to strike and child labour is rife. We only had to look in the newspapers last week to see the atrocious death of children who at school were manufacturing fireworks.

In line with this bill, it would be appropriate for a company like Sunbeam to be reported. Ever since Sunbeam was bought by GUD Holdings they have been relocating factories to China to take advantage of these conditions. Jobs are being lost in Australia, to be undercut by the lack of freedom and rights accorded workers in China. It is unacceptable that a company’s bottom line does not take into account workers’ rights. It is unacceptable that an Australian company could relocate in this manner with no recourse to their country of origin. If this is globalisation, then Australian legislation should be ensuring that workers are not undercut and party to a corporate race to the bottom. It should also be noted that GUD Holdings announced a 15 per cent increase in net profit after tax in December 2000. It can only be said that this profit was at the expense of workers’ jobs in Australia and the pursuit of unacceptable conditions in China.

CHAIRMAN—Do you wish to make an opening statement too, Mr Maitland?

Mr Maitland—Thank you for the opportunity to make this presentation on behalf of the CFMEU. As stated in our submission, the CFMEU covers approximately 120,000 working Australians. We work in some of the most intensively competitive and internationally exposed industries. In mining and in forestry—and ever so more now in construction—we are dealing with employers who are multinational corporations with operations in many countries.

Globalisation and the need to compete internationally are therefore nothing new to us—we have been doing it for almost 100 years. The committee may not be aware that I also wear another hat—I am the elected President of the International Federation of Chemical, Energy, Mine and General Workers Union that covers something like 140 trade unions from 110 countries, representing 20 million workers worldwide in those industries. In most ICEM industries there is a high degree of international trade and foreign investment—in chemical, energy, mine and other areas—and our members know fairly well about varying degrees of corporate citizenship, environmental management and respect for human rights. In any particular week, I deal with unions as broad as chemical workers from South Africa, mineworkers from the United States, goldminers in Brazil and power workers in Thailand. So, when we say that our submission is based on substantial international experience, we really mean it.

Our submission is based on three central points. Firstly, is there a significant problem that the bill needs to address? Secondly, can any Australian policy response in the form of legislation deal with the problem? And, thirdly, does this particular bill effectively or efficiently address the problem? On the first point, CFMEU has given a number of examples of Australian mining companies operating overseas. This list includes both large and small companies. What this illustrates is that the problems are not confined to, or there are not isolated cases of, small operators. One could go through an entire list of Australian mining companies and, if you did a search on them, within a few minutes you would undercover allegations of environmental mismanagement and conflict with indigenous peoples. Some of these allegations are baseless and may be part of the bargaining process between companies and communities in which they seek to operate. I expect that companies and industry associations making submissions to this inquiry will claim that there is no real problem, just local minor grievances. However, from the experience of the CFMEU and the ICEM, the reverse is true. Where there's smoke there's fire.

For most of the last decade, it has been very difficult for those experiencing major problems with mining companies to communicate their concerns to the home country of the company that they are concerned about. A lot more has been kept hidden than ever has been made public. Modern communications, however, and the spread of democracy is changing that. That is why so many companies are finding their problems being exposed to public scrutiny now. As one example, Rio Tinto in Indonesia has a major coalmine and a separate goldmine in Kalimantan—a remote part of that country. Since the mid-1990s, it has also had a stake in a massive Freeport Grasberg mine in West Papua. Both areas are pretty inaccessible. Until the fall of the Suharto regime, it was basically impossible for workers and communities near those operations to communicate to the outside world. In fact, it is our unit's experience that it was impossible to even visit these areas around the mine site without the express permission of the company or indeed the central government.

When the ICEM and the CFMEU finally turned up on the doorstep of Rio Tinto's Kaltim Prima coalmine in December 1998 it caused a considerable shock to the local Australian management. They certainly appear to have preferred the good old days where there was simply no exposure to the outside world except through invited guests. Now that Rio Tinto's international operations have been exposed to public scrutiny, they have been found wanting. You cannot argue against that. These cases are well documented and very public. They are by no means the worst cases of company performance overseas, but it is of major concern that they are by a company that claims to be among the best performers in this area worldwide. If Rio

Tinto is a star performer, what does it say for the worst performer? Clearly there is a problem, and it is on considerable scale and warrants a significant public response.

A further question arises here: if it is accepted that there are significant problems with the conduct of at least some Australian companies operating overseas, why should the Australian government act? The Esmeralda case in Romania and Hungary shows that the conduct of Australian companies reflects on the reputation of the country as a whole—and you can ask anyone in the mining industry what has happened since that particular incident took place. Australian laws regulating the conduct of Australians overseas with respect to sexual exploitation of children clearly reflect the view that the Australian people do not want to be shamed or embarrassed by the conduct of a few of their citizens. Any Australian corporation is, for many legal purposes, equivalent to a citizen. By and large, they are vastly more prominent than any individual. It is more appropriate rather than less appropriate that we, the Australian community, should seek to regulate their conduct.

I turn to the issue of the usefulness of any public policy response. With respect to the argument that self-regulation is the preferred alternative, I make the following comments. Firstly, the mining industry's existing codes of environmental management are next to useless and do not even bind the members of the industry association—the Minerals Council of Australia—let alone non-members. At least with professional associations, such as those of engineers or accountants, there is some level of minimum performance for their membership, but not for the Minerals Council with its environmental management code. When it comes to human rights, including labour rights, they do not even have voluntary standards. This absence is the only evidence you need that self-regulation does not work—at least for the mining industry.

With regard to the effectiveness of the legislation, it is argued that one shortcoming is its unilateral application. Certainly, a multilateral instrument of this kind would be preferred, but its absence is no justification for a lack of action by Australia. The history of multilateral instruments in the area of trade and the environment is that they are preceded by significant action by nations showing some responsibility individually and bilaterally. The bill is by no means perfect. You will note that the CFMEU has made suggestions for improving it. For example, we think that the threshold for application of the proposed law to a corporation is too narrow if it just focuses on the number of workers employed. We propose a multidimensional threshold more in line with the Corporations Law. If the committee is of the view that there are technical problems with the bill, then fix them. Do not use technical hiccups as an excuse for inaction.

Finally, I want to canvass the issue of public support for the type of initiative in the bill. My colleague Doug Cameron has already made mention of some opinion polls, so I will not cover that. What I think might be of additional interest is what we have found out about the investment community and what their response was when we ran the Rio Tinto shareholder campaign in the first half of last year. Committee members may be aware that Rio Tinto ran an aggressive antiunion campaign for several years in Australia until we ran the shareholder campaign last year. Subsequent to that, Rio Tinto has entered into collective agreements with the CFMEU and other unions in the mining industry, and there was a big article about that in the *Weekend Financial Review* last Saturday week. The CFMEU and the international union movement won significant support from Rio Tinto's own shareholders for this initiative. Central

to the campaign was a shareholder resolution that sought to require the company to have a code of conduct that respected core minimum labour standards of the International Labour Organisation, much as the bill here seeks to do.

That resolution attracted the support of over 17 per cent of shareholders and a further 10 per cent or so abstained. That meant that almost one in three sharesholders failed to support the company and its management in their rejection of the resolution. Within public company circles, such a high protest vote is extraordinary. The result sent a shock wave through Rio Tinto and the financial markets. The campaign and the voting results indicate two things: firstly, that we cannot rely on company management to put their rhetoric into practice—Rio Tinto says nice things about their respect for human rights but when it came to them being pushed to have a binding management policy on labour rights they refused; secondly, there was substantial support within the investment community for requiring one of the world's major mining companies to have explicit commitments to respect human rights in the workplace. Investor support was despite total opposition from management and despite the convention that investors leave it to management to manage or else get rid of them.

My advice to the committee is to pay heed to the groundswell of public and investor sentiment that is building around the need to improve the conduct of major corporations. The public is tired of being told that every bit of regulation around environmental performance, human rights and labour rights is somehow an impediment to trade and investment. This bill does not impose onerous requirements. I will bet that most companies who present their evidence to this committee will say that they already do better than the bill requires. That is proof that what this bill seeks is both achievable and not an impediment to the competitive success of Australian companies. As Australian legislators, it is within your power to act to safeguard and improve the lot of workers and communities dependent on Australian companies and safeguard and improve the environment in which Australian companies operate. We can make the world a better place to live. The question for the committee is whether it chooses to assist or frustrate the process. Thank you.

CHAIRMAN—Thank you, Mr Maitland, and thank you, Mr Cameron. Mr Cameron, in your submission you referred to a survey of consumers and so on that you undertook. It seems to me that the outcome of that survey would indicate that the people surveyed wanted Australian companies to be altruistic but did not necessarily want to be altruistic themselves. They wanted companies to provide more jobs and perhaps better wages and a high standard of living in Australia—a country which by any standard does have a very good standard of living—but they did not want those companies providing jobs in developing countries. They wanted those jobs to be provided in Australia rather than in developing countries where they may have made a much greater contribution to the standard of living of those people.

Mr Cameron—I think that is a bit of a long bow to draw. How you could make that analysis, I am not quite sure.

CHAIRMAN—I think you stated quite explicitly that they wanted to protect Australian jobs rather than having those jobs created in offshore countries.

Mr Cameron—What they have indicated is that they want to protect the Australian economy from social dumping. Australian companies overseas are practising social dumping. They are

taking advantage of the conditions in China and Indonesia basically to improve profit and the bottom line. I do not think it is unaltruistic for any Australian to seek to have a secure job. There will be a lot of politicians by the end of the year having the same worries.

CHAIRMAN—I think it is an example of, if you like, the 'charity begins at home' view, which I am not necessarily criticising. Nevertheless, they are saying, 'Let's look after ourselves first.'

Mr Cameron—It is a more sophisticated view. In my discussions with the general public and my membership, the view starting to appear is that they understand the need for a competitive economy but do not accept the rhetoric that has been fed to them by the Department of Foreign Affairs and Trade or the politicians that if you simply put the basics in place everything will be okay. You only have to look at the dollar today and our economy to question whether all these years of this approach from our politicians has been correct. We would say that it has not. There is now a growing concern about the political and economic direction that politicians have taken us.

CHAIRMAN—Mr Maitland, in your evidence you focused very strongly on Rio Tinto and what you saw as Rio Tinto's shortcomings. Can you give any other significant examples of Australian companies that have not performed to the standards that you believe are appropriate? In that context, before you answer, I refer to an example I saw in Argentina a bit less than 18 months ago, the Alumbrera mine operated by MIM, which has a half share, a quarter is owned by North, which is now, I suppose, Rio Tinto and a quarter is owned by a Canadian company. Speaking to the local Argentinean community there, they said that that company was a model company in terms of the standards it has maintained in its operation and the way it treated the local people and, compared with companies that were based in other countries, it was a marvellous example of the way in which a mining company should operate. They wanted more Australian companies there because of that example.

Mr Maitland—I cannot comment on how the Argentinean people might view large investment by Australian companies. What I used Rio Tinto for was to demonstrate that a company that claims that it is amongst the world's leaders in dealing with human rights, workers' rights and environmental questions is failing. It is quite a comprehensive list of what other Australian companies have done. You only have to look to New Guinea, for example, and you can see what BHP has been involved in with Ok Tedi. The list goes on. I mentioned Esmeralda, one of the worst cases of environmental damage. You ought to understand that mining companies themselves have already recognised that their social licence to operate is under threat and in many cases they are putting out policies with a lot of flowery words in them but which really do not have any benchmarking. That is why we are saying essentially that if Australia, one of the leading mining countries in the world, does not take the lead in this area then there will be significant economic ramifications. People try to say that if you put in place more barriers to companies operating then there will be less investment and less opportunity for them to return reasonable rewards to the country that they operate in and to their investors. Right now, as I have said, the mining industry's licence to operate is under threat, under challenge, and Australia can actually take the lead in helping to build a good reputation for mining companies by introducing this piece of legislation.

CHAIRMAN—You might be able to clarify this for me. Would this legislation apply to Rio Tinto? As I understand it, Rio Tinto is not an Australian—

Mr Maitland—It is a dually listed company. It will apply to Rio Tinto. Rio Tinto is listed on the Australian Stock Exchange. It is also listed on the British Stock Exchange. The British and United States governments have recently put together a treaty regarding the use of security guards by companies in the United States and Britain because there has been quite a deal of conflict in the developing world involving these companies from Britain and the United States in terms of the security people they employ to protect their assets. So there is a move worldwide to deal with some of these very significant challenges, and this is one of the areas where Australia can take the lead.

CHAIRMAN—If Australia does take the lead, what is your response to the argument that has been put to the committee that it would result in Australian companies moving their corporate headquarters offshore and equally would militate against the Australian government's attempts to attract more headquarters to be based in Australia, if we are taking the lead and other countries are not to that stage of legislative requirement?

Mr Maitland—Quite frankly, there are not too many places where companies can go that will give them the same sort of mining environment as they have in Australia. Very high quality, abundant reserves of natural resources are available in Australia. You will not see too many mining companies skipping out of Australia. In fact, you are seeing a heck of a move of mining companies into Australia. You are talking about South African mining companies moving into Australia in a very large way. In any case, the point is that, in the submissions that you will hear from mining companies, they will say that already they are above the standards that are being proposed here. So we are saying that there is nothing erroneous in what is being proposed. It is really starting to take hold of this very significant question and give some direction to those mining companies who are not abiding by at least the minimum level that will be within this bill.

CHAIRMAN—This does not relate to them operating in Australia; this relates to Australian companies operating offshore.

Mr Maitland—That is right.

CHAIRMAN—The issue I was raising was in relation to where their headquarters are. If they want to mine in Australia, it will not affect that operation, but if they shift their headquarters away they are not subject to this legislation in overseas countries.

Mr Maitland—You are going to find that that will not affect the circumstances at all. If that is a suggestion by mining companies, then obviously it is simply a red herring to try to confuse the debate about what we are trying to do here.

Mr ROSS CAMERON—Thank you for the fair bit of work you have done on both submissions. I presume that Peter and Natasha were primarily responsible. I appreciate the analysis of the AMWU's submission of whether there is a problem and, if so, whether this legislation can fix it. I think that is exactly the right analysis that we need to be going through. I like your use of the commercial interest for corporations arguments in terms of reputation,

which I think both of you argued. I am frankly still sceptical of each of those points—whether there is a problem for Australian companies and whether this legislation will fix it. I appreciate Doug's point about politicians looking for a job at the end of the year. I am interested in your submissions because I think it is possible that the two of you could be running the country again by the end of this year, and so we might get an opportunity of seeing whether or not you can actually implement some of these ideas.

Mr Cameron—You will be watching it from a lawyer's office somewhere!

Mr ROSS CAMERON—I am pleased that Mr Cameron is keeping open a slot for my colleague Mr Katter, who I am sure will make a substantial contribution to any new administration.

Mr Cameron—He is a remarkable Australian.

Mr ROSS CAMERON—Don't you worry! The thing that worries me is that commercial life proceeds on this basis of whether or not there is a deal to be done. Every day you get, in effect, the representatives of capital coming together, looking at business opportunities and forming a view about the relationships between the costs, the value added, the margin and, essentially, the return to capital—and that commercial reality is the fundamental driver of economic activity. So you look around the world, and there are plenty of places where people are doing that equation—whether it is Sierra Leone, Somalia, Korea or Bangladesh—and they are all forming the view that there is not a deal to be done in whatever that forum happens to be. I get concerned that what we are doing here is adding just another increment to the cost of doing whatever the deal happens to be for Australian companies. Admittedly, we can have an argument about what the threshold should be—and I note your submission says that we should adopt more of a Corporations Law view about when a company is caught—but, ultimately, we are saying that, at the end of each year, we are basically going to have a dedicated member of staff whose whole job it is to produce a document which is for a bunch of people to have a look at, and that is part of the cost of doing business for an Australian company.

On the other side of it, you run this risk. Doug says that Australian companies should not have the right to leverage down their Australian wages and conditions on the basis of what they could get in China or somewhere else. I am not so sure that it is some sort of genetic or UN based right; it is just the way the deal is done. If you can get that component of your inputs, of your costs, somewhere else, that is just a factor you consider when deciding whether or not to do the deal.

Mr Maitland—Modern commercial thinking causes people to look at not just what the bottom line is in terms of what happens in their operation; it really also requires people to be very aggressive in their thinking about issues that will affect their business, that will decrease or increase the value to their shareholders. It was without question—

CHAIRMAN—It is a bottom line factor.

Mr Maitland—It is a bottom line factor. It is broader. It is not just simply within the company; you have to look external to the company. More and more there is recognition that human rights, including workers' rights and the environment, are amongst those issues which

companies have to deal with. In fact, there is a whole bevy of companies trying to sign on to Kofi Annan's global compact because that will add respectability and value to their company. Even the investment community has recognised that. We are seeing AMP launch a socially responsible investment portfolio. Westpac has already done it, and done it internationally. So there is a huge opportunity for Australia to take a lead in this. There is a lot of capital out there that is looking for places where there is a high degree of respect for human rights, workers' rights and for the environment if you look at what is now starting to bubble up through the North American investment areas. So we are saying that Australia can take the lead in this area and we can do something which will encourage, not discourage, investment, as you are hearing from companies. My colleague will add to what I have said as well.

Mr Colley—When you look at the mining industry and look at what factors influence companies and where they locate, there are two factors: where the resources are and where the best place is for their head office. In terms of the global mining industry and the volume of trade, basically Canada, the United States, Australia and South Africa are the big mining nations of the world. Probably those four nations count for two-thirds of all minerals traded. It would be in that order. Most of those are called developed world states. The United States and Canada have very high degrees of environmental regulation and corporate accountability—in fact, more advanced than Australia, generally speaking. That does not stop mining companies locating because environmental compliance costs and regulatory structures are not a significant disincentive. Much more important is political stability, access to resources, the good geology, a skilled work force and so on. If you look at Rio Tinto, it makes far more money out of Australia and the United States operations than it makes out of its Asian or South American operations. There is a lot of talk about going into South America and Africa by mining companies, but in reality, in general, they make very little money. The simple issue is the location of the head office. We had cases in recent times of major South African mining companies relocating their head offices to London. That has not been to escape onerous South African regulation. South African regulation is by no means onerous, and it is generally less rigorous than that applying in the UK. Billiton and Anglo American shifted their head offices to London because of the access they wanted to global capital markets. I would suggest to committee members that is a far bigger factor for all Australian companies than any regulation around human rights, the workplace, environmental management and so on. These are basically a very minor consideration in most companies' thinking. Most companies will always seek to avoid any mandatory reporting requirement. It is a natural function of business that they seek the greatest freedom in which to operate. They always will. Management wants the greatest flexibility in its capacity to generate profits to shareholders. That is their starting point. But, in influencing the company as to the country for their head office, I would suggest that it is actually a very small issue. Access to capital markets is a much bigger issue and one which I think will be confronting lots of Australian companies, and in the scheme of things this bill will be an insignificant consideration if it comes into law.

Mr Cameron—I think the question goes more to a philosophical underpinning as to exactly how corporations should operate. That is whether it should be based on commercial outcomes or whether a company has a social obligation to the community that it operates in. That debate has been raging for decades now and I think more and more companies are being forced to move away from that philosophical view that you simply make a profit and the drip down effect will be good enough. Even the most neoclassical economic theorists do not accept that any longer within Australia. I think they accept that there are some obligations on corporations if

they operate within our society. That debate will continue. I understand your position, but I do not agree with where you come from. In terms of cost, the area I have heard business complain about has not been whether they have to comply with some legislation on their external operations, it has been the GST. The GST has been a huge cost to corporations and this bill will not be a pimple on a bum compared to what the GST has done in terms of costs to corporations in this country.

The other issue raised, and it goes back to that philosophical argument, is whether companies or corporations should be free to exploit working people. We fundamentally say no. We do not argue that some international wage rates should apply, but we do say there should be some human rights, core labour standards, that children should not be exploited and killed. We think these are basic community social issues that have to be taken into consideration.

In terms of investment, I concur with the CFMEU's position. Our analysis of when companies will set up in Australia is on a number of issues—the training that workers have, the skills that workers hold, access to venture capital, political stability and certainty. These are the key issues that corporations talk to us about. We have just seen a huge investment in Victoria with General Motors, not someone who would invest lightly. We have had discussions with them and these are the key issues, not whether they have to make a report about their operations externally. It is a fundamental philosophical debate and I'm afraid we are at opposite ends of the debate.

CHAIR—They screwed more out of Victoria than they could out of South Australia—that is the bottom line.

Mr Cameron—Maybe you guys should do something about that in the national interest. Maybe we should have another inquiry about that.

Mr ROSS CAMERON—With reference to the GST, I note that it has been a tremendous boon to exporters and that Australian exports have grown 22 per cent over the last 12 months so I am not sure that the cost impact on Australian exporters has been other than excellent. Obviously we are not going to have to convert each other on these fundamental philosophical questions today, I suspect. You may bring me around eventually and, as a former member of the Builders Labourers Federation—

Mr Cameron—I wonder what faction that was!

CHAIRMAN—Did you hear that?

Mr ROSS CAMERON—I wonder what faction? Yes, I was a member for some time and so I frankly find the current CFMEU a fairly limp-wristed and right-wing organisation for my tastes. I am not asking this to provoke you; I am asking a genuine question. The reason I am on the side of politics I am is that, while I respect the fact that you guys are representing a particular constituency—and you can find them on a database, essentially, of those who are in jobs and particularly those who are members of the union: that is your constituency—my problem, and, as I said, in the context of this discussion, is that very often there is a conflict of interest between those who are outside—the poor—the jobs club trying to get in and the maintenance of the wages and conditions of those who are already inside the jobs club.

Frankly, every country in the world throughout history, as it goes through the process of industrial development, goes through a period of essentially low wages and relatively low value added supply of the commodity of labour—we did through the Industrial Revolution. What we are all seeking to do is not just lift wages and conditions but lift the value we are contributing to the production process. My problem here is that the sort of instrument that we are considering, while I accept it is well intentioned and, in response to Doug’s point, nobody likes the idea of prospectors getting shot inside mines or the abuse of children—I feel we are all singing the same song sheet on those sorts of issues—the question is how we address them. That is my concern. There is a trade-off. I can see the benefits to existing employees, but how do we get the others into the chain somehow?

Mr Maitland—You are wrong, essentially, because in Australia we have the capacity to look after the rights that we are talking about. I am not talking about wages or conditions. I am not going to argue for wages or conditions for workers in Brazil or South Africa. That is entirely up to them—whether they have the same rights that Australians have. We are saying that there is an obligation on Australia to ensure that countries, where their companies operate, provide those rights to the employees of their company. In fact, rather than protect the wages and conditions of the people here in Australia, it would promote value and greater return on investment for those companies operating overseas because they would be more welcome. We are talking about companies like Freeport McMoran in West Papua. They are at serious risk of being told to leave the country after there is a change in the political situation. So too are Rio Tinto and BHP in Kalimantan because the indigenous people, the Dayaks, are the ones who are now creating enormous instability. These are people who Rio Tinto and BHP now have to deal with. If they had dealt with them in a more progressive way earlier on, then they may not now have these problems.

We are talking about adding value to the Australian economy by saying that our companies hold very high regard for human rights and the environment, and they do that not only in Australia but wherever they work. They will not hide behind the local laws. I think that that has enormous potential for Australia. If we are not looking at it in terms of the enormous potential but we are looking at it in protecting companies that are not performing well, then I think all of us have lost the plot—not just you, but me as well. We ought to take up the opportunity of speaking to you more. I am not talking about the ideological difference between the Labor Party in Australia and the Liberal Party or the National Party. We all need to deal with the common interest things about how Australian companies are seen overseas for what they do. Esmeralda is just one example. I could go through heaps of examples where we have received bad press and gained a bad reputation which restricts our capacity to be able to invest in those countries.

Mr Cameron—I will take up a couple of the points. Our export capacity is an absolute national disgrace. We have a $57 billion yearly deficit in elaborately transformed manufactures—$57 billion. All the figures that are quoted of growth in manufacturing exports are from a tiny base, and we are being flooded with elaborately transformed manufactures. Our manufacturing base is being decimated. People are now talking about free trade agreements with Singapore, China and the United States. To be comfortable from our perspective, before we as an organisation could support that, we would need to know the implications of that for our manufacturing industry in Australia—$57 billion. We are not producing a modern manufacturing industry based on service advanced manufacturing; it is not happening.

Mr ROSS CAMERON—Elaborately transformed manufactures is the fastest growing sector of our export growth.

Mr Cameron—Yes, from the smallest base.

Mr ROSS CAMERON—It may be a small base, but the trend is that it is the fastest growing sector of exports.

Mr Cameron—But that is a statistical nonsense. You can argue it is the fastest growing, but analyse it—it is from the smallest base and is not going to be significant for our economy, if we continue to import $57 billion. Just think about it. Our GDP is about $500-odd billion.

Senator GIBSON—$650 billion.

Mr Cameron—Almost 10 per cent of our GDP is being imported in elaborately transformed manufactures—just nonsense. In terms of being able to access low wages overseas and that there is some formula or historical Darwinian approach that people have to go through this process, they do not. People should not be going through the processes in Indonesia and in China. Because of the crony capitalism which ripped the economy apart in those areas, the money that has gone to individuals and is not going back to working people is an absolute outrage. We have to accept that our corporations are taking advantage of that. I have got a list of corporations operating in China. About 360 corporations are operating in China, taking advantage of rates of $2.11, taking advantage of absolutely no trade union rights, taking advantage of workers who if they dare try and form a free trade union are sent to an asylum. That is what is happening. That is the reality.

Mr ROSS CAMERON—That is the reality, and I am saying that no amount of purity of intention by us is going to change that fact, because China—

Mr Cameron—If you are defeatist.

Mr ROSS CAMERON—We are talking about 1.2 billion people. What is going to be your mechanism for regulating the decisions of Chinese capitalists? Are we going to do that?

Mr Cameron—We can do it by at least Australia taking a position of principle.

Mr ROSS CAMERON—We are just going to rule Australians out of the market.

Mr Cameron—No, you are not. There are many things that can be done. Why is it good enough for Australia to take a leading role in nuclear disarmament, to be seen around the world as a leader in that area, yet we cannot take a leading position on child labour, child exploitation and the exploitation of workers? Why can't we do it? This is one part of it. It would not diminish this economy one bit.

Mr ROSS CAMERON—I just think it is a little bit of an indulgence for us, with our standard of living, with average weekly earnings where they are, to be dictating to China. I am not here as some sort of advocate for child labour; what I am here for is trying to answer John's

question about whether the instrument is going to achieve the result. The reason why the Chinese are getting paid $US2.11 an hour is that it is a reflection of a relatively lowly educated, low-tech mass production economy which is low value added. The reason why there is cronyism is that the rule of law is not an instinctive accepted cultural value in the way that it has developed incrementally in western Europe over the past 1,500 years. No piece of Australian legislation is going to alter that fact.

Mr Cameron—We are not arguing that this legislation does. We are arguing that this legislation imposes very minor obligations on corporations which are operating in a country that has got all the features that you have just indicated. That is all we are saying. We are not saying that we would change China’s mind. I think you are setting this bill out to deliver far more than the architects of the bill would argue for it, and certainly than we would argue the bill does.

Mr ROSS CAMERON—I am not suggesting that it is going to change the minds of the Chinese; I am saying that that is the actual environment in which the bill is going to be asked to operate. I feel as though this bill is proceeding on the basis that we are somehow going to change this environment. My view is that it is, on the balance of probabilities, enormously unlikely we will change the environment. All we will do is change the operators in the environment, and those ones who will be removed will be the Australians.

Mr Colley—Are you saying that the competitive advantage of Australian companies operating in China is that they succeed by not paying a living wage and by not respecting human rights, and that that is essential for their competitive success?

Mr ROSS CAMERON—Your arguments in relation to the resources sector are very strong, in my view, and the reality is that most of these companies do not make a lot of money in developing countries because of instability, fragmented relationships with the local, often indigenous, people, corruption and other various reasons. But, if you are talking about China, if you are talking about more than 1.2 billion people, while there are variations across China as a whole—there are obviously higher wages in the south and on the coast—the truth is that there is an equilibrium at which the value of Chinese labour is going to rest. That equilibrium is not based upon some academically constructed idea of a living wage or a fair wage; it is constructed on the basis of the value added in the production process and the capacity to command prices at the other end.

Mr Cameron—And the freedom of workers to be able to bargain effectively for their standard of living, which they do not have.

Mr ROSS CAMERON—Sure, but that is not a legislative problem; it is a problem because the group that stands together in their factory in central China face an employer who knows there is another billion potential sources of labour.

Mr Cameron—Look at Sunbeam; they closed the plant here and went to Shensen, which is just outside Hong Kong. They are operating in an atmosphere in Australia where workers have some basic rights—even though you have tried to take most of them away, workers here still have a right to bargain. That company says, ‘We don’t like that; we are going to move to China and we are going exploit workers.’ There is evidence of that Sunbeam plant in China being an absolutely terrible place. There is video evidence and there is written evidence. That is an

Australian company saying, 'For the profit of this company, I'm going to take advantage of workers who have no rights at all. They are not going to be able to bargain; they will accept what we give them.' I do not think that is right for an Australian company.

Mr ROSS CAMERON—I guarantee you that every one of those labourers in Sunbeam's factory—I have not visited it; I cannot comment on its work practices—is a volunteer, in the sense that none of them has been press-ganged into that factory.

Mr Cameron—I am talking about the workers in Australia—people at Sunbeam who may live in Parramatta and who will be thinking about whether they vote for you at the end of the year. They are out of a job. All your rhetoric about economic theory and the equilibrium means nothing to them; they have lost their jobs.

Mr ROSS CAMERON—In relation to Bonds, for example, where people have recently lost their jobs, it is not a case of my rhetoric; it is because Bonds could not produce a singlet in Australia for a cost that could command a price that could pay the wages of the people in those factories. It is a cost related issue. There is only a certain price you can get for a white cotton singlet and the more you push up the cost structure the less chance there is to maintain Australian production of that white cotton singlet. It is because it is low value adding. That is why there is no job security.

Mr Cameron—That is exploitation.

Mr Maitland—This is not a bill about pushing up the cost of the Australian produced article; it is simply attempting to rectify some of the bad situations that exist in countries that take advantage of the fact that they do not have to comply with human rights and they do not have to look after the environment.

Mr ROSS CAMERON—Your argument is the best. The best argument for this bill is that it provides us with a positive opportunity to enhance the reputation of Australian companies. The rest of it I regard essentially as pretty questionable rhetoric, but that is the genuine value of this piece of legislation.

Mr Cameron—We've got him, so that will do us.

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

Proceedings suspended from 12.35 p.m. to 1.33 p.m.

BRAITHWAITE, Professor John Bradford, Australian National University

REDDEN, Mr Jim, Policy Director, Australian Council for Overseas Aid

CHAIRMAN—We have before us your submission which we have numbered 38. Are there any changes you wish to make?

Mr Redden—No.

CHAIRMAN—Do you wish to make an opening statement?

Mr Redden—Yes.

CHAIRMAN—Please proceed and, at the conclusion of that, we will ask some questions.

Mr Redden—First of all, on behalf of the Australian Council for Overseas Aid, thank you for inviting us here today to speak to the bill. We appreciate the opportunity to do so. You probably know that ACFOA is the umbrella peak body for all Australian international development agencies. I know some of our members have already presented to you—I think Community Aid Abroad, World Vision and Amnesty this morning. We represent a very broad church of NGOs—environmental NGOs and human rights, but mainly development NGOs, whether it be Red Cross, World Vision or CARE. All up, we have about 97 member organisations involved in international development. Today I have looked at some of our members' submissions as a way of summarising what we see as our key concerns about transnational corporations and their behaviour, and why we support this bill.

We came down from Canberra and, as usual, the taxi driver on the way here said 'Where are you going?' I told him what I was doing. It was interesting that his first reaction was that Australian companies should not embarrass us overseas but, at the same time, we should not dissuade Australian companies from being entrepreneurial and investing. I thought, like typical taxi drivers, he probably captured it in one sentence saying that Australians are embarrassed and do expect our corporations to act responsibly but, on the other hand, we have to be realistic and we have to encourage investment because that leads to growth and, hopefully, growth with equity. I thought that was amusing.

I say from the outset that ACFOA, on behalf of its members, is certainly not anti business and anti investment. We work very closely with a number of transnational companies. A number of our members are sponsored by transnational companies and indeed we work on joint projects to try and deal with some of the problems of poverty in the Asia-Pacific region. So I want to make it clear from the start that we see that we are on the side of business but our primary aim is to advocate on behalf of the poor globally. But we see that there is a marriage between the interests of transnational companies and the interests of the poor. I will highlight an example.

I have been doing a lot of work with the goldmining transnational, Placer Dome, which is a Canadian-Australian venture with a building just around the corner here. They have taken a very responsible approach to the problems of working in developing countries. They have a number of mines in Papua New Guinea and have had mines in the Philippines and in Australia.

They have developed a very comprehensive sustainable development policy and they have asked ACFOA representatives to meet with them in Papua New Guinea. They have a mine on a small island called Misima down at the end of Papua New Guinea. We have been working with that transnational company, as they go through a mine closure of a goldmine on Misima, to look at how they can close that mine in a responsible manner and in consultation with the community, and how they can work with aid agencies and the community so that when they leave that mine there is a healthy and productive community. That is an example for us of a company that is taking a responsible corporate attitude.

We talked to them about this code of conduct. In a sense, the representatives of the organisation laughed a bit and said, ‘What is outlined in this code of conduct, we would meet. We already do all of that. We would do more than what this bill outlines.’ I suppose, anticipating a couple of questions I heard in the last session, I do not think it would affect investment. I believe that responsible companies should already be implementing the sorts of criteria and objectives outlined in this proposed bill. I think that is an interesting case study. So we are working with business and transnational corporations and they do not see this bill as an issue in terms of discouraging investment.

However, to turn to the prime reason we are here today, we want to promote the fact that we think this is a responsible bill in terms of our ethical responsibilities overseas. We have all heard the statistics of the number of people falling into poverty—the World Bank has it as 1.3 billion under $2 a day. Whilst we think globalisation is improving poverty in some areas, it is uneven in the way it is applied across the globe. Our prime concern is with the plight of the poor. In our submission, we point out the environmental damage and the uncompetitive practices of transnational companies that have led to the patenting of medical aids, medical needs and drugs in Third World countries, to the problems of human rights abuses associated with the Freeport mine in West Papua and the Rio Tinto mine in Indonesia and also to the exploitative practices in terms of child labour.

Ultimately we feel the key reason that ACFOA is in support of this bill is that it gives some rights to the poor, gives a voice to the powerless, to be able to address the concerns about irresponsible transnational companies. Again I emphasise that we believe some transnational companies are extremely responsible and are doing the right thing. But against the exploitative practices of those who perhaps push too far just to make profits the poor and the powerless have no voice. We believe this legislation offers them some protection and some rights.

Our argument is principally based on ethical and humanitarian reasons. But, as we point out on page 3 of our submission, we include other dot points which we believe also reinforce the benefits of this bill. Apart from Australia being a leader as an ethical and responsible government in terms of promoting human rights and responsible corporate behaviour in the region, we believe there are other reasons, and some of them are pragmatic and I will refer to them briefly. We believe that the implementation of this bill can lead to savings to the taxpayer. We believe that as a result of the practices of companies where things have gone wrong, such as Rio Tinto in Bougainville or the BHP spill in the Fly River in Ok Tedi, it has cost us money by reparations through the aid budget—for example, we paid $100 million per year to Bougainville to try to restore some of environmental damage that has been done to Bougainville, and that is coming out of taxpayers’ money. We have also had a peacekeeping presence in Bougainville and in part—and of course I am not blaming the company entirely for the problems in

Bougainville—their practices have led to some of the conflicts that have arisen in Bougainville. That is an indirect way in which Australians are paying for the problems and the, as I called it, the negative externalities or the pollution that has been caused by Australian transnational companies.

Firstly, from a pragmatic level, we think there are savings there. Secondly, we believe that in terms of product pricing transnationals will build in the cost of pollution or the cost of social problems that may delay the operations of their mine. It gets built in to their product pricing and we believe that that therefore affects the short-term pricing of their products. This also then raises the bill for Australians. Thirdly, we believe there is a risk to shareholders if a company is losing its reputation, if it is not seen to be responsible by the local community in the countries it operates. That will lead to problems and, ultimately, shareholders may disinvest in that particular company. We believe the bill gives a body of legislation and accountability that gives greater surety to shareholders.

Fourthly, one of the points there—I guess it is the argument put forward by Placer Dome—is that smart companies are now seeing that, in the long-term, if they have a good reputation they will be more likely to succeed. They will be invited in by other developing country governments or, indeed, developed country governments. The best companies are pursuing world best practice and that means using the best technology available, using their best investment practices to be responsible, consulting with their communities and compensating properly where there has been displacement of populations. If they do that right then their mine will succeed and they will be able to minimise the cost of problems that will otherwise arise. We believe that in the long-term, not necessarily the short-term, it is in the interests of transnational companies and their own profitability to be more accountable. Lastly, we believe it is in Australia's foreign policy interests in terms of the problems and the arc of instability.

ACFOA is doing a round of lobbying around the volume of the aid budget—I know we visited you, Senator Chapman, but I am not sure we visited you, Senator Gibson—and I think everyone from the National Party to the Labor Party agrees that we have a very important role to play in regional stability. We want Australian companies to also be playing their role in that area. If we can improve the reputation of Australian companies, we believe that is good for market share and, more importantly, it is good for Australia's reputation in the region and helps contribute to stability rather than instability.

In conclusion, we do not think the bill is a major influence that is going to, for example, price out the investment opportunities of Australian companies wanting to invest abroad. We believe it is a small step in the right direction and will be marginal in terms of affecting the investment practices of Australian companies. However, the benefits are great and we believe it will principally give greater rights to the poor and the powerless and protect their interests. Also, it is in the interests of Australian companies in the long-term. The best companies would already be implementing this sort of practice and by enshrining it in legislation we are ensuring that the rest of the field catches up with the best of those companies. I commend this bill to you and thank you again for your time.

CHAIRMAN—Professor Braithwaite, do you want to add anything?

Prof. Braithwaite—No, thank you.

Senator GIBSON—In your submission you claim that public pressure for enforceable standards is growing globally and similar legislation is under consideration in America, Europe and other parts of the world. Do you know what is the status of those legislative proposals in those other countries? Have they been introduced? Are they likely to pass? Have you got any sense of what might be the outcome?

Prof. Braithwaite—I suppose the honest answer is pretty much the status of this one.

Senator GIBSON—Fair enough.

Prof. Braithwaite—They are still in there plugging away.

Mr Redden—Do you want to elaborate on the particular bill in the US?

Prof. Braithwaite—I think the US one is sitting there. The European Union one has actually passed through what they call the second reading process and then it goes over to the European Commission for some sort of deliberation and feedback, which takes quite a long time. So they are in process.

Mr Redden—The McKinney bill in the US Congress is at a similar stage. We believe there is growing support amongst the public but we have not heard the latest from the actual progress of that bill through the congress. I suppose all we can say is that you are debating a very topical issue at the moment that has international discussion. We feel that an international code of conduct of some sort is almost inevitable. It is probably a matter of the timing, when Australia enters into the debate and whether we are taking a lead in this debate or watch.

Senator GIBSON—I am pleased you actually went through the detail of the Placer Dome example. Doesn't that really mean that enlightened companies are in fact doing the right thing by the globe and the peoples of the globe? In fact, we have had evidence from the minerals industry that in, if you like, environmental reporting the majority of Australian companies report in fuller depth and in more detail that is basically set out by law. I am not sure whether you were there this morning, Mr Redden, but I asked other witnesses. It does seem to me that global communications are so good these days that it is very difficult for someone to go and hide and do some dastardly deed, either to the environment, to people or to whatever, without being exposed. Communications are going to improve, not go into reverse, so the chances of hiding are getting less and less. Global players or anyone who is large enough to play in several countries do not want the opprobrium of being tagged as a disgraceful citizen, wherever they are, either in the country in which they are operating or their home country. So I question the need for additional legislation in this direction, because it seems to me that we are actually witnessing success happening before our eyes now. At the same time we get criticism as legislators. In the Commonwealth parliament we get the reaction, 'What the hell. Another 10,000 pages of bloody legislation which even lawyers can't keep on top of because there is just that damn much of it. Is this really needed?'

Prof. Braithwaite—Most Australian corporations would agree with that analysis, and they would agree with it whether they were one of the large number of companies that set much higher standards than are in this bill and therefore do not have anything to worry about, or whether they are one of the companies that do not meet the standards in the bill. They would

both agree with that kind of analysis, but for different reasons. The companies that set higher standards, that do not go for the lowest common denominator ethical practice world-wide but that go for world's best practice, are companies that are not only being more ethical but also acting in their own commercial interests by doing that. That is their own analysis of what they are doing. They believe that, by having a reputation for being a responsible company, they are going to make higher profits, so why would they want the government to come along and require companies that have a different analysis and make a different judgment and try to make their profits by cutting corners on ethics, to come up to their standards? On the other hand, those companies that seek to make their money by cutting corners on environmental standards, who have yesterday's analysis of what makes for success in the world economy—dinosaur corporations that think they can go in, exploit a country and whip out and take their profits back and flourish that way—are actually wrong in that analysis, and the problem is that they do not only hurt themselves in the long run, they do not give themselves the best long-term future. Sometimes that is because they have CEOs with a short time horizon who just want to take their money and get out and move on to another organisation, or even strip the assets of the organisation and who do not have a long-term view about their own organisation. They certainly are not incorporating into their judgments the interests or the reputation of Australian companies. That is your job, to take that broader view, and that is the broader view we are asking you to take. As it happens, as Jim has argued, you get a convergence between the interests of the poor and the interests of Australia in that regard.

Senator GIBSON—I am sure there are odd examples—you have mentioned a couple of the environmental ones and you mention Fiji and CSR in your submission. We can all have hindsight and look back at decisions taken in the past and say that if we had been there with the same knowledge we would have done it differently. But in the last few years and looking ahead, I am yet to be persuaded that there is a serious problem with Australian companies.

Prof. Braithwaite—You do not think that groups like Esmeralda are damaging to Australia's reputation?

Senator GIBSON—They are damaging, and I am sure that that company has learned its lesson. It has been damaging to Australia. What has happened out of that example is that it has been a good lesson to other mining companies—to take that category of company—as to what not to do elsewhere in the world. It is a lesson for the directors and CEOs of any company operating abroad, and they have certainly taken that lesson to heart. No-one wants to get carved up in the global media as being improper citizens.

Mr Redden—I still see the legislation as important. I'll go back to Placer, but they are not here. At our last meeting in Papua New Guinea I was trying to press home to the company the need to do a soil analysis of the island because a lot of it has been damaged. The primary produce of the island is agriculture—basic crops—and it is mainly women who are involved in that. I said that we could help from Australia—I am using my farm contacts from the mid-north of South Australia, who are willing to be involved, so that has been very productive. Then I said, 'Who is going to pay?' I said to Placer, 'Someone is going to have to pay for this? An aid agency cannot; we need your support.'

That is where it gets down to: 'We are here to make a profit and we have to show returns to our shareholders. We cannot pay for every single thing that you think up.' I said, 'But the soil

analysis of this island is essential. The environmental destruction you have just made to about a quarter of the acreage of the island is significant and all that the people here are asking of you is to do a comprehensive soil analysis so they can determine where to grow crops in the future.' They will not come to that party. I have no recourse but to keep arguing with them. The stigma of the Placer example is a very good example of where, if I had some legal recourse, I might be able to push that more strongly.

Senator GIBSON—From our side, as legislators, an act of federal parliament is a very blunt instrument to deal with such institutions, as you were just saying. If it is to be made to work, it has got to be set not at world's best practice but at a lower standard so that it encompasses everybody and everyone can easily get through. We had evidence yesterday from people out of the industry that if a code were set in law that companies had to abide by that that would make some companies retreat to that standard rather than what happens at the moment where companies compete against one another to produce better standards. I take on board your Placer Dome example. I am surprised the company has not come to the party but, without knowing the ins and outs of it, we are not in a position to make any judgments about that, of course.

Mr Redden—Even if this bill were implemented, I still think there are those who see that, by having good community relations and good accountability, they still have a competitive advantage that would push the best companies to go to the top of the range. The other example mentioned at the start of our submission—you asked about the usefulness of codes, and I thought that this was worth raising—is ACFOA. Because of an incident some five or six years ago when there was a problem with the accountability of an aid agency about where the money went—the favourite question of every voter is: how do we know the money really gets there?—ACFOA had to take on the responsibility, after negotiating with the government, of enforcing a code of conduct on our own member agencies. I am not sure that I should say this if it goes into *Hansard*. We set up an independent committee. There is carrot and stick. Basically, if one of our member agencies does not conform to the code of conduct they will lose funding from the government. If it is made public by us that they are no longer signatories to the code, which means no-one can have faith that their money will get to where it is supposed to go, it is pretty damaging. So there is a lot of stick as well as the education carrot.

In the first year we implemented the code, and despite everyone saying—I imagine like every transnational would say—that they already met the standards, something like 23 per cent were complying with the accountability standards that we were asking, and they were reasonably basic. Sometimes, because it was a church agency that consisted of two volunteers down at the Anglican Church in the outer suburbs of Sydney, it took some effort for them to get up to the accountable standards but it does say something that only about 20 per cent of our own members were meeting the bottom line level of a code of conduct. Now I am happy to say that it is something like 97 per cent. We still have a bit of a way to go but a lot of it has been education and not stick. We think that is where the advantage is. If it is left to voluntary codes of conduct, we have volumes of experience to say that it does not work because it becomes totally up to each individual company, under the pressure of profit making and demands from shareholders to maximise profit. That is understandable but we do not believe a voluntary code works. I think we are living proof that if we could only get that amount of compliance from our own members—and we are in the business of aid—that it does need some sort of stick, if I can call it that, or an independent enforceability. That is one of our key arguments to bring to bear.

Prof. Braithwaite—The other point I would make about continuous improvement and regulation inhibiting it is that Michael Porter from the Harvard Business School, in his analysis in *Competitive Advantage of Nations*, finds that those companies that are securing that competitive advantage by keeping up with the kinds of demands that sophisticated markets are making on things like consumer protection, health standards, environmental protection and so on, have a philosophy of continuous improvement of environmental standards. That is precisely what they are doing. For that reason he suggests and, in general, sophisticated approaches to regulation these days incorporate into the statute a requirement to accomplish continuous improvement. They do not set a fixed formal standard but say that you need a process of continuously improving, for example, your environmental performance, your policies on equal opportunities for women and so on. They are two obvious examples where you do reap a benefit in economic performance and efficiency through continuous improvement.

Senator GIBSON—I hear what you say. I agree, obviously. Most entities, be they government or in the private sector, are basically striving to improve their efficiency, their service and whatever their goals are by continuous improvement these days. I still have a problem with whether legislation is really required to achieve that end in this arena.

Prof. Braithwaite—I think it is. A good analogy is the Asian economic crisis, which is really changing our thinking about these matters. You might say, 'Well, banks collapsed in various parts of the world. It serves them right. They learnt their lesson. All the other banks are looking at them and will not have those slack prudential standards.' What is happening is that there is partly an examination of the nature of the prudential regulation of banks globally as a result. So one of the problems with our prudential regulation globally is that we will have capital adequacy standards. You have to have this much gold in the vault at the bank, you have to have this much in bonds of OECD governments these days—Korea was one of the OECD governments going down at the time. So fixed standards did not seem to be doing the job. What is happening now in that area is a movement towards requiring continuous improvement in your risk management system so that the regulator, be it the Basel committee internationally or a national prudential regulator, will go to them and say, 'Run for us your risk management software and show us what is going to happen if the yen falls by 40 per cent tomorrow, and prove to me that your bank is going to be solvent and over time show that you have continuous improvement in your risk management software development.' In that area, there is really critical regulation where banks have much more to lose through going bankrupt than any other area we can imagine and everyone agrees that there is a need for regulation that has international scope because we are all losers if some rogue trader starts paying fast and loose with derivatives on the world market in a self-interested way. It is not enough to trust the company.

Senator GIBSON—I know that the Japanese banks are still in trouble. So it is not as simple as that, is it?

Prof. Braithwaite—We are in the process of putting a more satisfactory, less fixed capital adequacy regime in place. This bill does not go to that but it brings the edge to this point that yes, you really do need the regulation to make sure that the corporate interest is more aligned with national interest and globally the interests of the poor.

Mr Redden—Putting aside the financial arguments, it is not the role of business to be anti or pro ethically accountable business, so do you see a need for government to intervene? It is not the job of business to alleviate poverty. If you like, it is our job, but we need government intervention and rules that govern the marketplace so that exploitation of the poor is not worsened. Our key argument is that voluntary codes and voluntary regulations do not work. We see it as a responsibility of government to intervene here to help us to create the right conditions so that the poor do not become worse off. I am wondering what your view is on that.

Senator GIBSON—It does not matter what our personal views are, the committee is here to accumulate information from submissions and from people coming along and talking to the submissions. We accumulate all the information and then, with the help of the secretariat, assemble a synopsis of that information and put it before the committee as a whole, not just the two of us who are here today, and we consider that. Where possible we try to come to a collective agreement about the position. Personally, I agree with what you are saying about what is happening with aid and about putting a bit of stick in there to make sure the aid agencies are performing as well as possible. That is a very good idea. I understand that where people are taking money from government it is an excellent idea to introduce a bit of competition in performance. Thank you.

CHAIRMAN—Thank you.

[2.05 p.m.]

HALL, Mr John, Chief Executive Officer, Australian Institute of Company Directors

McLAUGHLIN, Mr Benjamin, Member, Corporations Law Committee, Australian Institute of Company Directors

CHAIRMAN—Welcome. We have before us your submission, No. 30. Are there any alterations or additions to the submission?

Mr Hall—No.

CHAIRMAN—Do you wish to make an opening statement?

Mr Hall—The Australian Institute of Company Directors is the peak organisation representing the interests of company directors in Australia. We currently have over 15,000 members drawn from corporations of all sizes—large, small and medium—covering the public, the private and the not-for-profit sectors. Membership is on an individual basis rather than a company basis, and as such we represent the personal interests of members as directors. AICD is a federation of seven state divisions, and it has a national office in Sydney. The overall governance of the institute is in the hands of a national council which is its board, and comprises the seven division presidents, the national president, two national vice-presidents and a treasurer. We have a range of policy committees. The Corporations Law committee is the one that has prepared the submission for this hearing. As such, the organisation is actively involved in public debate on matters of interest to company directors.

Senator GIBSON—Mr Chairman, I should declare an interest. I am a fellow of the institute and a previous director of the institute—it was quite a long time ago. I will leave the questions to you.

CHAIRMAN—Having declared, you can ask questions. A lot of the witnesses we have had before the committee have argued that a voluntary code is inadequate and will not work, and that, unless you have legislative underpinning, then you are not going to get the standards required. What is your response to that view?

Mr McLaughlin—This bill is a balancing act. It is a bit of a cost-benefit analysis. While we very strongly support the proposition that Australian companies act appropriately overseas, we have to look at that benefit versus the cost of introducing such a bill. Our primary point in this regard is that we believe the government of a foreign country is primarily responsible for setting the standards prevailing in that country. The most cost effective way of ensuring that Australian companies operating in a country conduct themselves appropriately is for them to enact a voluntary code of conduct and to publicise that code where they have one. AICD has had examples of voluntary codes of conduct in the past, and they have been quite successful. We could mention a number of examples—corporate governance policies where, over time, the Australian stock exchange has introduced rules to require companies to disclose their corporate governance policy, which is quite a good compromise. The actual code they adopt is voluntary but they must disclose what it is that they have adopted. Similarly, with employee share plans, there is a code of best practice and, together with the Australian Shareholders Association, we have put out a document saying what we think the code of best practice is. Again, companies

can either chose to adopt it or not adopt it. Again, it becomes apparent as to whether or not they do. It then becomes a bit more market driven. If you are looking at the cost-benefit analysis it becomes a far cheaper and more sensible way of getting to the thrust of what it is we are trying to achieve.

CHAIRMAN—You indicate that the bill would increase costs for Australian companies and therefore potentially make them non-competitive against other companies operating in the same country overseas. Can you elaborate on where you see those cost increases being likely to occur, and what their nature is?

Mr McLaughlin—One of the problems we have with the bill is the extraordinary vagueness of the standards to be imposed and the extraordinary difficulty in actually working out the appropriate standard a company would have to follow. For example, they may decide the standard is the environmental laws prevailing in Australia and they have to introduce all the kinds of procedures necessary to ensure that there are no levels of pollution which would cause a violation of Australian environmental law, but, in fact, the standard in that particular country may not reach that—it may not be so onerous. That becomes an extra cost of doing business in that country which local companies in that country would not have to comply with, neither would any other foreign company.

CHAIRMAN—It has also been said that the bill attempts to usurp a foreign government's authority to legislate standards within its national boundary. Are you aware of the attitude of any foreign countries to the bill? Has there been any attempt to find out whether any foreign governments object to this legislation or regard it as a usurpation of their domestic legislation?

Mr Hall—We have not had any direct feedback about that, Senator.

Mr McLaughlin—I think it is the reverse onus. With respect to legislature in general, one guiding principle is 'first do no harm'. It is up to the proponents of the bill to demonstrate why this would assist those countries. For example, is there any evidence that the operation of foreign companies in developing countries has caused the poor in those countries to be worse off? Common sense would suggest that it is the opposite, but the proponents of the bill should be able to prove that proposition.

CHAIRMAN—Evidence we took yesterday indicated that there was a real fear among opponents of the legislation that it would cause Australian companies to move their head offices, their listing and so on, offshore. Have you considered that issue? Have you a view on it?

Mr McLaughlin—Yes, we do. In terms of Australian companies being disadvantaged we thought—to the extent of the disadvantage—once they weigh up the costs involved in compliance that would go into the mix. Every company that is primarily motivated by profit maximisation and benefits for shareholders will then look at ways to redress the issues. That could include not going overseas, restructuring operations to avoid compliance or shifting domicile. There are quite a few different things they could do. At the moment there is a technical drafting error in the bill—I presume it is a technical drafting error—so it would catch General Motors and every other—

CHAIRMAN—That one was raised this morning.

Mr McLaughlin—Yes. Presuming that was removed—as it would have to be—then there would be fairly easy ways for companies to ensure they did not get caught by the bill.

CHAIRMAN—So in effect you are saying there is scope for avoidance of the legislation and that active avoidance would be detrimental to Australia's interests because it would involve moving at least some of the operational aspects of the company away from Australia.

Mr McLaughlin—That is clearly the risk. If one looks at what seems to be happening in this area elsewhere in the world, the European or the American recent examples, the step is towards voluntary disclosure as a part of the process. I am sure that they would have considered the next step of compulsion and said that the risks of this are too high. I think there are real dangers from us being potentially seen as, if you like, taking a bigger step than the rest of the world when there is not a lot of evidence to suggest that Australian companies are in any way potentially the offenders in this area.

Senator GIBSON—I would like to you expand a bit on the points you have made in section 4 of your submission, 'Australian companies disadvantaged'. In 4.2 you say that your compliance requirements are both onerous and expensive and also make the very good point that the bill as proposed would put reporting obligations on private companies, which is in contradiction to what currently exists under Corporations Law. The same thing applies with regard to the independent auditor of an environmental impact report. Could you expand on that?

Mr McLaughlin—I am not sure whether I can expand greatly, other than to say that under Australian law private companies have limited reporting obligations and public companies have onerous reporting obligations. This bill does not really take account of that difference.

Senator GIBSON—What about 4.4, where you make the point that it is difficult for Australian corporations to identify the relevant requirements, such as the labour standards that apply in a particular country?

Mr McLaughlin—This is raised in a number of submissions, and in some submissions they have gone through it in quite a lot of detail. We found it very difficult to actually work out what standard would be appropriate in any given situation. Almost certainly you would have two regimes applying to the same act. There might be two penalties or there might be one penalty and one lawful. It is quite unusual.

CHAIRMAN—Have you examined the submissions of the supporters of the bill?

Mr McLaughlin—We have read them.

CHAIRMAN—Are there any other issues raised there that you would like to respond to?

Mr McLaughlin—There is very little empirical evidence. People make statements without much support for them. We say companies will be disadvantaged because we think they probably will be, and others say that they will not be. Our proposition is that the proponents of the bill should be able to show that companies will not be disadvantaged and that, in fact, people are being harmed by what Australian companies are doing. There should be that empirical evidence there to go through and analyse to see why this bill is necessary.

CHAIRMAN—There was a view put this morning from, I think, the FairWear group, which is mainly concerned with the clothing manufacturing industry, that Australian companies should be required to pay employees in offshore companies what they call a 'living wage' as distinct from a survival wage—I think that was the term they used. I do not know how the living wage then related to wage costs in Australia. In the course of the discussion the issue was raised as to whether, if a living wage made their operation less competitive than other operators in that country, their investment would remain there. If it departed, are the people that had been employed there and the country better off or worse off?

Mr Hall—The other dilemma with that is actually achieving an understanding of what is a living wage. Do we require a commission or an authority in Australia to be able to travel to all these places to determine what is a living wage? It is a very complex area. There is an obligation in any legislative process to look to the implementation and whether it is achievable. There are so many areas of this bill that leave that issue unsaid. The dilemma for business in some of the issues associated with the bill is that there is enormous sympathy and empathy for the issues and the fundamental tenets behind the bill, but the practical application of them leaves a lot to be desired. We are aware that there is a global move, if you like, to protect the interests of underprivileged, disadvantaged and exploited people in developing nations.

The OECD has now issued guidelines for multinational organisations and they are all predicated on largely voluntary arrangements which require disclosure and, if you like, the imposition of an ethical standard on the companies and the shareholders of those companies, and the community making judgments about whether these organisations are good corporate citizens in a global sense. That is where the state of knowledge is at the present time, globally. Australian enterprises are prepared to buy into that process here, but to be leaders in a sense of charting waters that are very hazardous involves a real potential risk.

Mr McLaughlin—One more point on the counterproductive issue was raised in another submission which was generally in support of the bill. The example was the Nike factory in Cambodia, and it said that if you give a so-called 'living wage' to the Nike workers—and this is apparently happening—they are paying their workers a lot more than other workers in similar factories are getting. They are finding that doctors are giving up the practice of being in medicine and moving to work in the factory because they make more money. The question is: is that a good thing for Cambodia?

CHAIRMAN—Another issue that has been raised, and I suppose you have alluded to this in a sense, is that if you legislate this so-called minimum standard, then companies will comply with that and go no further. Whereas if it is left to a voluntary code of conduct there will be a process of continuous improvement in the area. Have you got a feel for the validity of either of those arguments?

Mr Hall—There is a real dilemma in a lot of this stuff. We are actually trying to regulate for the lowest common denominator in some respects, and they are always looking for the loophole, whatever it is. In a sense that makes life very difficult. If people knew that there was a statement of best practice, be it OECD or whatever, most companies who meet that would trumpet the fact; it would be in their annual reports. But with the good corporate governance standards that we propose here in Australia, companies say, 'We comply with these standards'

as part of the statement of their position in the community. That is what we should be encouraging, I think—the line that the institute takes.

Mr McLaughlin—In relation to the international cooperation issue—and I know you asked the last presenters where they are up to—our latest is that the McKinney bill, the US bill, has gone to three committees: the International Relations Committee, the Government Reform Committee and the Banking and Financial Services Committee. That bill is quite different from this one, in the sense that the only real penalty is lack of government work; that is, if it went ahead the government would not give work to the people who were not complying with a particular code. The EU bill, as I understand it, effectively establishes a monitoring agency which would receive reports on government practices under different voluntary codes. So again it is more voluntary code focused. We think that if they were to proceed on this basis, it would be more by way of the OECD and what we did with the anti-bribery legislation. That would be the appropriate way forward.

Mr Hall—My final comment is that it is very difficult to impose upon companies, particularly international companies, a standard which you are actually trying to impose upon the sovereign governments of a lot of these countries which, by default or design, allow their people to be put in a position where they are potentially exploited. To make an Australian company responsible for that is a very difficult link to make.

CHAIRMAN—So what you are saying is that this legislation is trying to make Australian companies responsible for the shortcomings of the governments of other countries.

Mr Hall—It means Australia itself is a signatory to virtually every good practice standard that exists in the world, be it OECD, WHO or any of the other international agencies.

Mr McLaughlin—A special form of tax or subsidy.

CHAIRMAN—Thank you very much for appearing before the committee.

[2.33 p.m.]

DIVECHA, Mr Simon, Campaign Coordinator, Mineral Policy Institute

CHAIRMAN—I now welcome Mr Simon Divecha from the Mineral Policy Institute. We have before us your submission, which we have numbered 24. Are there any alterations or additions you wish to make?

Mr Divecha—No, it stands as it is.

CHAIRMAN—I invite you to make an opening statement, at the conclusion of which we will move to questions.

Mr Divecha—Part of this session was planned to be taken up by Ms Zsuzsanna Kocsis-Kupper from the Hungarian Prime Minister's office. Ms Kocsis-Kupper is the lawyer involved in preparing the case for the Hungarian government's legal action in Australia on the Esmeralda issue. Ms Kocsis-Kupper should be ready at 3 o'clock to talk to the committee.

The Mineral Policy Institute is a small environmental and human rights NGO. We work on the mining industry, as that is our field of expertise. The environment and human rights are the particular parts of this bill that I propose to focus on. I want to look at why the bill is needed, why voluntary regulation is not enough and some of the smokescreens that have been put up in opposition to the bill in other submissions to this inquiry.

Before I do that, I would like to draw your attention to some of the things that international multinational corporations say in respect of social responsibility. This is a report about profits and principles. It states:

We hope, through this Report and by our future actions, to show that the basic interests of business and society are entirely compatible—that there does *not* have to be a choice between profits and principles.

The principles that this company is referring to are things like 'to conduct business as responsible corporate members of society; to observe the laws of the countries in which they operate; to express support for fundamental human rights in line with the legitimate role of business; and to give proper regard to health, safety and the environment consistent with their commitments to contribute to sustainable development.' These are very similar things to issues that the bill takes up and tries to legislate for. The company involved in writing this report, which is about two years old now, is Shell. In regard to how they see their operations today, there are many similar examples of statements by Australian companies which have moved substantially from viewing the only criterion of success as a profit bottom line.

I have been told that there has been some discussion of why this bill is needed and whether there are just one or two isolated examples of Australian companies operating overseas and flouting what would be regarded as basic environmental standards and human rights. I want to deal with a few examples of Australian mining companies overseas and some fairly gross violations of human rights and environmental standards. The first one I want to mention is Aurora Gold, an Australian based company from Western Australia which operates in

Indonesia. That company has been implicated in human rights abuses, specifically in instructing and encouraging security forces to take very strong responses against legitimate local protests.

Normandy is a fairly large Australian mining company that has faced significant protests in Turkey over the Bergama mine operation. Bergama is a cyanide mine and it is strongly opposed by the local people in Turkey to the extent that the local people managed to get a High Court ruling to stop the mine proceeding. But they have been frustrated in working on this issue by their lack of access to basic types of information that would be available to Australian people who are facing an Australian mine proposal in Australia.

The next mine I will mention is the Kelian mine in Indonesia, operated by Rio Tinto. There has been a very significant scandal around human rights at this mine—specifically, sexually harassed and raped women and other human rights abuses. These abuses happened over a 10-year period leading up to 1997 and they are the subject of an investigation and an independent report which was released in January 1999, which basically confirmed the allegations and the extent to which the company did not act to prevent the abuses.

The next mine is one that you have heard a little about—the Freeport mine in West Papua. The Freeport mine has a long history of human rights and environmental abuse. A recent case around the Freeport mine was the collapse of its waste dam. There was an early warning system in place which was supposed to warn villagers when there was a flood coming down from the waste dam. The early warning system—according to what WALHI's lawyers deputation put before the Indonesian courts—only sounded 30 minutes after the flood had reached the village. They further state that:

> An environmental report by Freeport had said that Wanagon Lake was prone to accidents. This did not stop the defendant from dumping huge amounts of overburden in the lake. Therefore, the defendant knowingly and deliberately increased the risk of accidents.

The Freeport mine also puts waste directly into the river system. They in fact put more waste into the river system than the neighbouring well-known case at Ok Tedi. This is again a practice that would not be allowed in Australia.

Rio, and Lihir, is also a subject that another miner wants to talk about briefly. Lihir is a goldmine operated off Papua New Guinea. The Lihir mine puts its waste directly into the ocean via a submarine tailings disposal pipeline. It also has a very significant impact on the fringing coral reef. That impact is documented in its environment plan—'there will be a severe to extremely severe impact on the local reef fringing the island as a result of the operations of the mine.' Again, if Rio was operating this mine in Australia it would not be allowed to have a significant impact on any section of coral reef, let alone nearly 30 per cent of the island's coral reefs.

A smaller company that you would have heard of, possibly in the middle of last year, is Dome Resources, which operates the Tolukuma mine, again in Papua New Guinea. It came to notoriety, if you like, with the accidental drop of a cyanide pallet from a helicopter while it was being transported up to the mine. This particular mine also puts its waste directly into the river. The documentation from this mine states that the mine is expected to 'obliterate fish life' for a significant section of the river which it dumps its waste into. It is also expected to wipe out all frog life in that river system, as well, for at least the first 30 kilometres. These are impacts that

the people report from on the ground, and correlate with the expected impacts from the documentation produced and accessed by the mine.

The Gold Ridge mine in the Solomons is a good example of a mine that is a signatory to the Minerals Council of Australia's corporate code of conduct. Part of this code of conduct requires the companies to release their environmental impact statements, or environmental plans, which is something that we have asked Ross Mining, now Delta, to release since 1996. Ross, and now Delta, have consistently refused to release an environmental impact statement, which is fairly basic information that should be required of any company. It is information that is required to be released under the Minerals Council of Australia's code of conduct to which they are signatories.

The last mine I was going to mention is Ok Tedi, which you have heard a lot about over the last day and a half. I wanted to make a couple of fairly specific points on Ok Tedi rather than go over the very large scale environmental damage and destruction that has been caused by this mine. The first point is in regard to the very intense media pressure that this mine has faced. It has without a doubt been one of the best publicised environmental impacts from a mining operation anywhere in the world. Yet today you can go up there and find very easy housekeeping issues, that would be easy to fix, not being paid any attention to. These are things like the mine washes its copper concentrates off the loading dock in Kiunga directly into the Fly River. There is no need for this.

They do not clean up properly after their pipeline breaks and sends copper concentrates spilling down into local creeks and rivers which are used by the local people as their drinking water source. They have a pumping station which, as part of its design, overflows into the local creek system. You can go down to the bottom of the hill from the pumping station and see the creek glowing green. These problems are nothing on the scale of 80,000 tonnes of waste every day into the river, but they are very much on a scale which could have and should have been easily remedied but have not been, despite the intense media pressure on the company.

Monitoring data and the availability of data are very much subjects looked at by this bill. In fact, the environmental criteria in the bill really deal only with public reporting of data. One of the things people would like for Ok Tedi is access to the monitoring data. I was recently in Tabubil and I specifically asked for a range of monitoring data—common data that you would expect to be able to access for any Australian company: for example, copper concentrations and various sample locations that are done for the heavy metal concentrations down the river system. I was refused access to this information, as have the Papua New Guinea people and affected landowners who have asked for that information.

I was talking a little earlier about hindsight. The Ok Tedi example is an excellent example of what people might say is hindsight. However, documentation and testimony from as early as 1978 show that the company knew it was going to have a very major and unacceptable impact on the Fly River and yet continued to press ahead regardless. In fact, according to a number of people who worked in the Papua New Guinea government at the time, they actively lobbied and sought to oppose the government in imposing a reasonable standard on the operations of the mine.

So is voluntary regulation enough? This seems to have been one of the core themes being talked about at the inquiry. Our submission says that voluntary regulation on its own is inadequate. It is not going to achieve the objective of reasonable minimal environmental and human rights standards. I have already talked about the Ross-Delta Gold Ridge operation and how, despite the fact that they are a signatory to the Minerals Council code of conduct, they have not released their environmental impact assessment. A second voluntary system I thought I might pick up on is the global mining initiative, which you might have heard mentioned as minerals, mining and sustainable development. To illustrate the narrow scope of this process—they are looking at a process that is mostly self-serving—despite what is said about how effective it is going to be, the sorts of questions that the MMSD process is looking at are: Can the industry assure its own long-run sustainability? To what extent can industry direct developments of national economies? How can industry improve its environmental record? How can we keep pace with the information revolution and ensure meaningful access to information for all stakeholders? These are not the more fundamental questions of: is our operation sustainable and what sorts of changes should we be making to our operations?

The other area I wanted to look at is the area of smokescreens. A number of statements have been made in submissions to this inquiry that do not really go to the substance of what is trying to be done here. If the problems with the bill are of a technical nature, then we should fix them. If the problems with the bill are of a fundamentally philosophical nature, then I can accept that people will oppose it. However, I do not think that the basic minimal standards that are being proposed by the bill are something that any responsible company should seek to oppose. These smokescreens are things like: it is not the responsibility of Australian companies to look after lax standards in other countries. Australian companies are, in fact, responsible for their own operations and have a moral, ethical obligation to ensure that they do not impact adversely on the environment or contravene basic human rights standards. Australian companies can do this without finding themselves regulating on behalf of a country overseas.

Another point that has been made is that this legislation is paternalistic. These are Australian companies we are seeking to regulate. We are not seeking to change laws of overseas countries or apply Australian laws to overseas citizens. In addition to this, the double standards that are in evidence in our experience overseas with the stakeholders we work with—the communities who are impacted by mining—are raised as very substantial problems and as reasons why these communities want to see legislation like this enacted in Australia. There are similar issues to that around the issue of reducing sovereign rights of other countries. Again, this is legislation that applies to Australian companies. It does not set Australian legislative standards on other countries.

There has been a lot of talk as well along the lines of, ‘Companies will retreat or stop innovating and go to the minimum basic standards that are set out in this legislation.’ This is really a case of looking at what happens in Australia. In Australia, we have legislation. We have minimum standards and we also have companies that are seeking to go past those minimum standards. There are certainly many companies in Australia that view themselves as having ethical and social responsibility. For example, BHP has just announced a $2½ million wetlands program in Australia. These are programs that are going past the minimum basic legislative requirements. These companies are willing to go past these basic standards in Australia; they will be willing to go past them in their overseas operations as well. I should say that the BHP example is in and of itself a bit of a double standard given that their operations at Ok Tedi have

had a very major and significant impact on a wide section of the wetlands of the Fly River flood plain.

There has been a little bit of talk about the precautionary principle not being sound science. There is a wide body of scientific literature explaining why the precautionary principle is in fact necessary, relevant and appropriate. The precautionary principle is reflected in various international and national fora. It is in the Rio declaration; it is part of an Australian Commonwealth heads of government statement—OSPAR is the example we use in the Mineral Policy Institute submission. It is widely recognised as an appropriate way of addressing environmental impacts.

What we get down to is that this is legislation that seeks to take away protection and to not protect the bottom feeders in the industry or the people who seek to hide behind corporate and voluntary codes of conduct and merely use them as public relations masks. It adds a little bit of stick. Sure, it does not address all of the problems overseas but it is very necessary and timely legislation.

CHAIRMAN—Can you tell me a bit about the Mineral Policy Institute itself? What is it and what is its role?

Mr Divecha—We are, as I said, a very small non-government organisation that works with communities overseas who are affected by Australian mining and also more widely with operations of mines in Asia and the Pacific. Our roles are advocacy, capacity, building support and research and information.

CHAIRMAN—In your evidence you said that this legislation was not attempting to impose standards on overseas countries or governments or whatever and therefore was not paternalistic; that it deals with Australian companies. Isn't that the very point? The reason that you are seeking to introduce this legislation in relation to Australian companies operating offshore is some perceived shortcoming in the standards that are applied in those countries. Isn't it really up to the governments of those countries to apply adequate standards?

Mr Divecha—This is the real world, and in the real world the resources of a company like BHP are very much greater than the resources of Papua New Guinea or Indonesia. If you go and visit the environment department in Papua New Guinea you will see it comprises a few people on one floor and you have trouble getting copies of information because they are afraid the toner in their photocopier is going to run out. Indonesia faces similar sorts of issues. There is a very small environment department dealing with a vast number of proposals across the entire country. The fundamental difference of power is very large. I do not see that there is a paradox there. We are able to regulate Australian companies and we should regulate Australian companies because they are Australian.

CHAIRMAN—Then you will have companies from other countries that are not regulated, operating in accord with those shortcomings in those countries.

Mr Divecha—Absolutely. You can only regulate the Australian companies and then seek to use such legislation as a vehicle for promoting a multilateral tool or a regional tool to promote it

more widely. As a first step, and as a very minimal step, that is not going to fix every single problem—I am certainly not saying that it is going to—but it is a very valuable one.

CHAIRMAN—If you have a standard that impacts on Australian companies but does not impact on companies from other countries because you do not have that multilateral structure, are you then placing the Australian companies at a disadvantage?

Mr Divecha—Most of the Australian companies would say—and indeed there is evidence—that they are already seeking to get to what is in the bill as a minimal set of standards. Already BHP's environment policy is to:

comply with all applicable laws, regulations and standards; uphold the spirit of the law; and where laws do not adequately protect the environment, apply standards that minimise any adverse environmental impacts resulting from its operations, products and services;

This is what the company wants to do, anyway, and seeking to code it into legislation so that companies that do not want to do this are also pulled in the right direction is a valuable thing to do. While we leave it simply to voluntary regulation we are never going to achieve change at the rate that is necessary, or stop the totally unacceptable impacts from happening to people overseas as a result of the operations of Australian companies.

CHAIRMAN—Even for those companies that have a code, you are adding the cost of compliance reporting, and so on.

Mr Divecha—This cost issue is quite an interesting issue. It has come up a number of times. On the one hand companies say, 'We already report to a far higher degree than is contained in this bill,' and on the other hand they say, 'This is going to impact on us with an unacceptable cost regime.' They cannot have it both ways. Again, from my experience in environmental and human rights areas, it seems the environmental sections of the bill seek fairly basic reporting standards. Is the company having an unacceptable environmental impact? What are your objectives for looking at what the environmental impact is? Once you have set those objectives, report them. If any company is not doing this, then it is in the interests of the company to do it, anyway, because without that sort of basic information they are probably operating very inefficient systems and finding themselves in situations of waste. There has been a lot of work done on so-called win-win solutions, especially with environmental issues, especially around clean production and looking at how companies can benefit from minimising their impacts through gaining efficiency benefits. It is very well detailed that the majority of companies that recognise this will report in this way already, certainly for environmental and human rights standards. Internally, the advantage of this bill is that it will ensure that people can, where the company chooses not to report in this way, access that as public information as well.

CHAIRMAN—The textile and clothing people suggested this morning that, under this legislation, companies operating offshore should be required to pay their employees what they called a living wage rather than what they termed a survival wage or a subsistence wage in a subsistence economy. How do you define what is a living wage in those countries without some fairly detailed and costly investigation and a determination that then might be subject to argument and debate?

Mr Divecha—It is not an area that the Mineral Policy Institute has experience with. It primarily focuses on mining, human rights and the environment. That is better addressed by the organisations which do have experience with it. There are naturally social justice issues involved with mining, especially, for example, social justice issues involved when food supplies are significantly impacted. One of the best examples of impacts on food and sustainability of supplies is along the Fly River system where we are looking at 'a large proportion, if not all, certainly in the upper half of the Fly, of the sago dying and a possible total collapse of the fisheries'—they are the words of BHP's own scientists. That is a very real social problem created by mining companies for a large number of people, maybe up to 30,000. That is obviously an example of where legislation like this would help a little in allowing access to the information earlier. Living and sustainable wage issues tend not to be such an issue with the mining companies that we have investigated, but I would certainly not say that it is not an issue with every single mining company in Australia. We have just not come across it and cannot give you a specific example.

Mr ROSS CAMERON—My understanding is that BHP would quite like to get out of Ok Tedi. By contrast, the PNG government is very keen that they remain in Ok Tedi.

Mr Divecha—The PNG government is a shareholder to the mine and wants to see the mine continue to operate. I think that is a fair assessment. BHP are aware that they are going to find it increasingly more difficult to access new finance for new mines. We are also told that they are aware that Ok Tedi is having negative impacts on their share price, which is an issue for the company as they are seeking to raise more money in the US, or dual list in the US this year at some point. BHP definitely want out of Ok Tedi; the issue is what sort of commitment BHP are going to make to the people and the environment of the Western Province for the next 100 years-plus while the damage from their mine continues. How are they going to try to address issues of food security and what people are going to eat in the next 20 or 30 years? Where are their building materials and basic food stuffs going to come from once their sago is dead? What is going to happen, say, in 20 years time if there is a significant and total collapse of a fishery that one particular community is very reliant on? These are all issues which really require substantial commitment of money, time and effort and this is a commitment that BHP are yet to make, even in principle.

Mr ROSS CAMERON—This underscores the issue that the chairman raised. I am sure that you will be delighted if BHP get out of Ok Tedi, and there is a bunch of NGOs that will jump up and down and give each other a pat on the back and hold a victory celebration. But isn't there a risk that we, at this distance and in the comfort of our quality of life, form a view about what is good for the people of PNG? I am not defending BHP—clearly they have not handled the environmental implications of the venture in the way they could have or should have—but we, from the luxury of a First World, stable, high income democracy, naturally have a prism through which we see the problems of a Third World unstable, poor country that looks like it is about to implode, in part because of a lack of domestically generated revenue. You would want to be pretty confident that your view from here in Sydney should be preferred to the PNG government's view about what is good for the people of PNG.

Mr Divecha—I have at no stage said that the mine should close. The mine should operate in a way that does not have unacceptable impacts on the people and the environment.

Mr ROSS CAMERON—But the operator wants to get out—we know that BHP wants to get out.

Mr Divecha—The Mineral Policy Institute and most PNG NGOs would not be dancing with delight if BHP pulled out: what they would be dancing with delight about would be if BHP committed to a real and effective program to clean up the damage it has caused and to looking after the people and the environment for the time over which the damage lasts. People in PNG expect BHP to be out of there and for there to be no recourse for them in the future as they face a whole host of problems that are not predicted today. People, including OTML managers—Ok Tedi mining managers—expect that BHP will not even be located in Papua New Guinea after it is out of Ok Tedi to protect themselves against any renewed legal action in Papua New Guinea. What is important with Ok Tedi is social and environmental justice and a social and environmental justice commitment made over the next century plus. That has not happened, that has not come to pass. To call them environmental issues defines them in the terms that as you say Sydney people, a rich democracy, define them. These are issues of survival for a lot of people in the western province. These are issues of where their food and building material comes from. They really cannot be separated out neatly into environmental and social issues.

Mr ROSS CAMERON—We are talking about a country on the precipice here. When we do our risk assessments, on a narrowly defined Australian national interest perspective, the stability of PNG is essentially No. 1 or No. 2. That is very largely because they are virtually entirely reliant on foreign aid. They have not develop domestic industries. They have this vast population of highlander men who converge on Port Moresby, because there is no employment for them in the highlands, and create an environment approaching anarchy. You have one major foreign investor after another pulling out. We want to be very confident that we are not bringing a heavy-handed instrument to a difficult problem.

Mr Divecha—I think it is a very good example of why a bill like this 20 or 30 years ago would have been a very valuable thing. It could have reduced the sorts of problems that people in the western province, and in other mining affected communities, are facing today. It would have greatly enhanced prospects for stability and, hopefully, consequently, have had a roll on impact into other areas of Papua New Guinea society. I am not trying to say that this bill would have stopped Ok Tedi; it might have helped. It is just one piece of a picture in a whole range of things that need to change in our attitudes and in company attitudes about how to approach developing countries. As a positive step, it can only encourage appropriate development in Papua New Guinea rather than inappropriate development. There is nothing to be lost, if a development is appropriate, from reporting the objectives and goals that the company is trying to achieve and publicly disclosing them.

Mr ROSS CAMERON—Clearly, there seems to be a difference of view about what is appropriate between the Mineral Policy Institute and the government of Papua New Guinea.

Mr Divecha—And that difference is?

Mr ROSS CAMERON—I do not know. It is just that the government of Papua New Guinea is clearly saying that they want the investment to proceed.

Mr Divecha—I think everybody wants the investment to proceed but not at the expense of the people bearing the costs. As with most mine developments, when they are happening you want them to proceed in the most social, environmentally, and human rights responsible manner that is possible and this has manifestly not been the case with a lot of mining developments in Papua New Guinea. Hopefully, this is something the bill will help to address through public reporting and disclosure.

Mr ROSS CAMERON—You are talking about the real world; the real word is BHP wants to pull the pin. You are saying we should load them up with an additional set of obligations—which is somehow going to make the deal more attractive to them?

Mr Divecha—BHP's stated values are very much in line with the bill. I am happy to photocopy them. There is one page on the environment—and you can enter it into *Hansard* rather than reading it all out now. As such, we really cannot see why BHP would have a problem with the bill, unless of course they want to selectively release information when it is favourable to them and hold it back when it is not favourable to them, or unless this policy is printed as a public relations smokescreen rather than as a real commitment. Nobody is trying to pretend that this bill is going to solve the awful mess that Ok Tedi is or answer all of the problems for villagers living downstream and living with the consequences for the next six to 10 decades. That very much is an issue which the Mineral Policy Institute and affected communities and the people who are currently taking a class action against BHP see as an issue that BHP has to address, because it is a direct result from the operation of BHP's mine.

Mr ROSS CAMERON—My final two cents worth is it seems to me a long-term interest of all of those affected people—everyone in the water catchment—must be that the one economic engine, the one source of wealth creation in the region, remains viable, because once you kill the goose that lays the golden egg effectively you have got no recourse.

Mr Divecha—There is no doubt that Ok Tedi is a very profitable mine from here on in. The issue is should BHP be responsible for the damage it has created, whatever the profits of the mine, whether the mine is operating or not, and people down that catchment would absolutely say, 'Yes, they should be', as would the Mineral Policy Institute. The question of whether the mine can operate and remove its tailings from the river is certainly something that BHP themselves in the past, in 1996 and 1997, have said in their own documentation is quite possible and practical, and video evidence would show that as well. That is the subject of the legal action now in Victoria, trying to enforce those standards, which are fairly basic—stop putting your tailings waste into the river, something which is accepted practice anywhere in Australia; you do not do it. So certainly it seems that the mine could be viable, given the broad numbers, the profits expected from the mine, and not put the waste into the river.

CHAIRMAN—The committee had discussed yesterday your request for a hook-up, and we did not think we would be able to do it. What is the purpose of this hook-up?

Mr Divecha—The quarter past three talk was as part of my presentation originally. It was intended to take the majority of my presentation, but obviously it could not happen until quarter past three.

CHAIRMAN—It certainly will not take the majority. It will be very brief, if we have it at all.

Mr Divecha—Suzanne has asked to talk to the committee about the provisions in the bill that relate to codifying the ability of overseas individuals or organisations to take legal action in Australia, specifically because the Esmeralda example is one where the Hungarian government is trying to get redress for the damage that has been done by an Australian company.

CHAIRMAN—I think we will stick with our original decision.

Proceedings suspended from 3.15 p.m. to 3.28 p.m.

BAXT, Professor Robert, Deputy Chairman, Business Law Section, and Deputy Chairman, Specialist Law Committee, Law Council of Australia

CHAIRMAN—We have before us the Law Council's submission, which we have numbered 40. Are there any alterations or additions you wish to make to the submission?

Prof. Baxt—No.

CHAIRMAN—If you want to make an opening statement, we welcome that, and from there we will proceed to questions.

Prof. Baxt—Thank you. Tomorrow I will be giving a paper at a conference which is being organised by the University of Melbourne in honour of the 80th birthday of Emeritus Professor Harold Ford, who is one of Australia's leading corporate law academics. He has certainly been one of the best teachers in the area in the last century. At that particular conference I will be giving a paper on the issue which I think is linked very directly to the subject matter of this proposed bill and generally to corporate law behaviour and conduct in this country. It is about the business judgment rule and how it is likely to operate in the context of the 21st century.

The theme I have developed in that paper is that probably the way in which the Corporations Law is structured at the moment means that directors in this country are adequately protected in the context of the way forward, but there is a danger that with legislation such as this and other proposals that are floating around, including those made from time to time by politicians of both major political perspectives, companies and directors will owe a broader obligation in untested and unwritten terms to sections of the community. I think it is very important that we understand that corporations do have to behave as corporate citizens; they do have to do the right thing, et cetera, but they do operate, like the rest of us, within a legal framework. That legal framework has been carefully thought about by parliament. We need to be careful that we do not start, at times when it looks like it is a good idea to do so, imposing obligations—stated very generally and that sound like a great idea at the time, and sometimes that are enacted into legislation but have not been thought through—on them to do something beyond what is in that framework. That creates tensions and difficulties that I think are extremely hard for both the business community and the law-makers of the country to finally come to grips with because, if those laws that are enacted cannot be properly regulated, cannot be properly pursued by the regulator, then we all get into a state of, 'Well, bloody regulators are useless, politicians are useless and the companies are useless so really we need to do something more,' so we develop a passion for passing new laws. I would like very much to see legislation like this—and this is the Law Council's view—subject to proper cost-benefit analysis, really tight cost-benefit analysis. I think it is something that the Fraser government back in the 1970s introduced; I think that is when it came in as a feature of law. It has tended to fall into disrepute a bit. There is lip-service given to that particular issue. We really need to be careful that we do not jump onto pieces of legislation that sound like a good idea and that finish up creating dreadful problems for the community.

One issue that is not addressed, by the way, in any of the submissions I have read—and I have not been able to read all of them; it is certainly not addressed in ours because I think it probably was not even thought of—is: if this bill is enacted and if corporations and directors are

penalised a million dollars and penalties are collected, where will that money go to? Who is it being collected for? Is it going straight into consolidated revenue or do we give it to the people who are the alleged victims of the conduct that is the subject of the so-called illegal behaviour, or to the countries, or what? I just think that the principles behind this bill, whilst one cannot be unsympathetic to the reasoning behind it, are not the right way to go about dealing with the issues. I think it will create enormous tensions for the business community and for those who sit as directors, and they will stop being directors because they will say, ‘Well, we just can’t cope. We will be unable to fulfil our obligations in running companies and in exercising our duties as corporate officers.’

Those are by way of preliminary comments. That is a theme of the paper I am going to give tomorrow. It has links into this proposed legislation. I can cite other pieces of legislation which, when they were introduced, were thought of as great ideas, but whilst they do achieve some good I think they create more difficulty than good. There is a tendency, I suppose, for politicians to say, ‘Well, we’ve passed the legislation; now it is up to you, ASIC, ACCC, APRA or whoever. You go and enforce it. Don’t blame us, guys; it’s the bloody regulators who haven’t done the job.’ We are in that sort of difficulty.

CHAIRMAN—Thank you very much, Professor Baxt. You mentioned that there were other examples. Could you perhaps enlarge on that?

Prof. Baxt—Certainly. Section 52 of the Trade Practices Act is an example of a piece of legislation that, when enacted by the Labor Party in 1972, was done so in the context of a very clear purpose. Remember the late Lionel Murphy’s language at its introduction about protecting consumers from the evil companies that do not behave in relation to misleading and deceptive conduct. Who is it used by now? It is used by big companies against other big companies, proliferating litigation. It is used in every piece of litigation that you have in the courts on contract disputes, et cetera. That is the basis of it being used; it is hardly ever used by the ACCC and it cannot be used by small people. The most recent occasion that it was used as intended was in the McDonald’s case where a class action was run based on that and other provisions. They lost. That is a rare example of the section being used as it was intended. But it is used by big business against big business. It is a wonderful boon for lawyers, but I do not think that it achieves the results that were intended. The same problem can come from other legislation of the same kind. The unconscionable conduct provisions of the Trade Practices Act can, I think, sometimes be used in the wrong way and can be the basis of some rather cheap litigation tactics in scenarios that were not intended.

Senator GIBSON—Would you want to see those provisions removed from the Trade Practices Act?

Prof. Baxt—No, not at all. I think that they serve a purpose, but I think that the act needs to be amended to make sure that they are used appropriately. It seems to me that what has happened with section 52, in particular, is that it has, as Justice Bob French has said, just replaced the common law rules of tort and contract. Now, in every case that is pleaded, there is a section 52 claim. As a lawyer, you would be negligent if you did not plead it. The same thing is going to happen with unconscionable conduct. That is a real worry, because it means that people who want to avoid the expense and delays of litigation will say, ‘Gee, we’ve got a claim here that looks like it may have a 20 per cent or 30 per cent chance of success. Do we risk it?

No, settle and rewrite the contract.' That is a cost to business and business should not be faced with those sorts of interruptions. In the long term, it is the consumer that suffers, because businesses' costs have to be passed on. So, if the consumer thinks that he or she is better off as a result of his, I think they are sadly mistaken.

CHAIRMAN—In the evidence that has been put before us over the last two days, those who support the bill have said that a lot of companies meet and exceed the standards that are envisaged in this legislation and, therefore, if you legislate, everyone will simply fall back to the minimum requirement, which will militate against ongoing improvement in their practices. On the other hand, those that are supporting the legislation have said, 'Well, if they are already exceeding the standards of the legislation, the legislation will not have any detrimental effect on them and, therefore, why not have it there for the recalcitrant ones?' How do you respond to those two arguments?

Prof. Baxt—Let us take the latter one first. I find it very hard to understand what business it is of the Australian government to, in effect, start intervening in the affairs of other countries. What if a country had a particular policy in relation to the environment—chopping down trees and so on and so forth—and said, 'We need to pursue that because we need industry in this country to pursue that particular line of development'? It is all very well for Australia and others to say, 'Yeah, well, we've achieved that and therefore we should hold back,' and for the Australian regulator, whoever the regulator is—and that is an interesting question—to say, 'You're breaking what we believe to be the standards in Australia,' but those are not the standards that are set in that particular country. I think that is a very weird and bizarre way for us to try to help those particular countries. I would like to see those companies that continue to exceed those standards continue to improve. By the way, by the end of this year, the criminal conduct code, which was supposed to come into effect last year, will kick in. It will create an obligation on corporations to have a culture of compliance with the failure to have that automatic proof that the company is going to be liable. It was delayed because of all of the events of last year—the GST, year 2000 bug, the Olympics and who knows what else. It will ensure that we have that standard of corporate compliance. We can do it through codes.

When codes are regarded as so important that they should become part of the law, they can be mandated. There are provisions now in the Trade Practices Act for that to occur. That to me is the appropriate way for this to go—not to try through the back door to force this on people. It will just create an extra cost. I think it will force companies that see this as an imposition where penalties are imposed, if there is a slip-up in an area where they are behaving pursuant to a code, alleging, 'Australia is becoming a very difficult country to do business in,' 'The taxes are too high,' 'These laws are no good,' 'That is no good,' et cetera, et cetera. 'We will seek to do business elsewhere.' We will lose more and more companies and Australia will suffer. The beauty of this law, if it did have any beauty, would be undermined significantly. Whereas if the encouragement is done through codes Australia will lead the way in ensuring that these corporations lead by example. That will create the environment that you need.

There are going to be examples of where something dreadful happens and there may need to be specific intervention in those sorts of situations. But we would need to be very careful that we do not, as a result of that one terrible mistake, suddenly say, 'We are going to force everyone to the lowest common denominator'—or the highest common denominator—'in relation to this area.' That is the tendency at times for governments—when they get a couple of bad examples

of things going wrong there are knee-jerk reactions and broad brush legislation comes in which then has to be carved back.

Senator GIBSON—What with modern communications and travel today, companies cannot hide—no entity can hide—regardless of what part of the world they are in. So, if something goes wrong or they do something which we judge to be not in the people's best interests, it is generally exposed. Looking ahead in the future, one would expect that the communications are going to improve in quality and frequency, not regress. I wonder why we have to bother about considering the legislation when virtually all of the examples that have been before us today and yesterday—mostly environmental ones and some others—have been exposed globally. Most of the companies, as far as I can judge, have responded appropriately. Other companies, which have not been involved, have taken the lesson on board—'We must make sure that it does not happen with my operations in country X.' So why bother to have another pile of legislation to add to?

Prof. Baxt—I could not agree more. I think that kind of behaviour—the moral pressure and the pressure of your peers—is a very important factor. A few companies and a few examples are nominated in Senator Bourne's second reading speech, or background paper. Clearly, those companies get the financial and other press to talk about their activities and they respond. One of them is a client of mine whom I know is very conscious of the negative exposure and is always saying, 'If we are doing these sorts of things, we are trying to get rid of that sort of thing and we will change.' There are going to be situations where it is very difficult to change overnight. I do not think legislation like that will necessarily achieve that result, in any event. In fact, what you have are people going back and trying to find ways of avoiding the legislation. That can have a negative impact.

Senator GIBSON—Do you see this proposal as an attempt to establish a legislative base whereby interested parties can have a chance at chasing damages from Australian companies for activities offshore?

Prof. Baxt—It could well be seen as a wonderful opportunity. The way the legislation is drafted in the latter sections, it certainly is an invitation to some well-known law firms who will be becoming more inventive and successful in doing that sort of thing to do exactly that. It is a worry that legislation like this—hopefully it will not come in—is being encouraged in this way. I think there are much more effective ways of achieving all those results. Leave for legislation the very severe, nasty cases where it is clear that you cannot legislate to stop it. You cannot rely on self-enforcement to deal with that sort of conduct.

CHAIRMAN—Another issue that has been raised is the impact the legislation could have on companies either maintaining or moving their headquarters to Australia. It is argued that if this legislation came in Australian companies would seek to shift their corporate headquarters and their listings offshore so that they were not subject to the legislation and equally that the government's attempts to attract more head offices into Australia would be thwarted or diminished by the legislation.

Prof. Baxt—I think that is a valid argument, and it is an argument that the Australian Institute of Company Directors, which has also made a submission today, is running in Victoria at the moment in relation to the industrial manslaughter legislation that the Victorian

government wants to introduce. Again, the idea behind the legislation is not unsound. We do not want companies to get away with behaving irresponsibly, and you may want to change the level of punishment where companies behave irresponsibly, but if you pass legislation which goes to the lowest common denominator it will simply create—as we have put to the Victorian government—a situation where you force companies not to do business in Australia. It is going to be too expensive. There are risks, accidents happen, and it is unfortunate that people do sometimes get careless, but they are not careless intentionally. You are punishing all sorts of people as a result of that one careless act. You just have to be careful in how you frame these things.

We have a law of negligence and many people rue the day that the House of Lords handed down Donoghue and Stevenson. They say it has been one of the greatest disasters to hit the common law system, because it creates enormous opportunities for activities by lawyers to seek damages in situations. Against that you balance the fact that you need to protect people who are vulnerable. You have to protect the vulnerable, there is no question about it. The question is: do you do it by creating some broad brush approach or do you try to do it through education or other ways. A mixture of these things sometimes works. Sometimes you do need criminal or semicriminal type legislation. I do not think this is a good example of where you do need it.

CHAIRMAN—I do not have any further questions.

Senator GIBSON—Could I make one request. The paper that you referred to that you are giving tomorrow—

Prof. Baxt—I would be happy to send it to you.

Senator GIBSON—Would you?

Prof. Baxt—It is a draft. Perhaps I should have mentioned as well that there is a section in our Corporations Law which has very fine intentions that says that where there is a breach of any of the provisions in the statute then ASIC or any person whose interests are affected can seek an order from the court for an injunction or the court can order damages. That is broadly speaking. Throughout the act we have more and more direct duties imposed on directors. The question arises: who can seek to enforce those statutes? ASIC—yes, that is clear—and you would think the shareholders, the people for whom the company is really being run, but now more and more people are saying, ‘No, hold on a second, they are the creditors, they are impacted.’ When you say a company should not engage in insolvent trading, insolvent trading affects creditors. There is that legislation that was passed last year by the government because they felt that employees needed to be protected in certain scenarios—employees to whom directors owe duties, or at least creditors, in that particular context.

If you introduce this sort of legislation there are all sorts of groups that could come in and say, ‘Here is a statutory duty that has been breached. We have an interest that is affected. We can come to the court and seek a remedy.’ What is the court supposed to do in that situation? The judges have said, ‘Look, this section is drafted very widely.’ Justice Ken Hayne, when he was in the Victorian Supreme Court, said, ‘I cannot read this section narrowly. If people can legitimately show that they have interests, I have to listen to their claim. I may not give them the remedy, but once they are in court they have achieved half or three-quarters of what they

want to achieve.' That is the problem, and we are becoming very American in the way in which we have become very litigious. Thank heavens we do not yet formally have contingency fees, but more and more people are putting on pressure and saying, 'Take us on for a spec.'

CHAIRMAN—I think we have exhausted our questions, so thank you very much for appearing before the committee.

Prof. Baxt—It was my pleasure. Good luck in preparing your report. I look forward to reading it.

CHAIRMAN—The committee stands adjourned.

Subcommittee adjourned at 3.50 p.m.