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JOINT COMMITTEE ON CORPORATIONS AND SECURITIES

Reference: Corporate Code of Conduct Bill 2000

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JOINT COMMITTEE ON CORPORATIONS AND SECURITIES

Tuesday, 8 May 2001

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

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

Terms of reference for the inquiry:

Corporate Code of Conduct Bill 2000.

WITNESSES

BOELE, Mr Richard, Director, Australian Institute of Corporate Citizenship......................................142

BOSCH, Mr Henry (Private capacity) 158

COONEY, Mr Sean Thomas, Senior Lecturer, Law School, University of Melbourne 152

NAHAN, Dr Michael Dennis, Executive Director, Institute of Public Affairs Ltd..................................165

Committee met at 9.06 a.m.

CHAIRMAN—This inquiry was referred to the committee by the Senate on 5 October 2000, initially for report by 31 March 2001. However, the committee desired that as many people as possible have an opportunity to give evidence before it at public hearings. Consequently, the committee requested that the reporting date be 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, the secretariat can send a hard copy of the submissions to those who wish to obtain them.

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

[9.08 a.m.]

BOELE, Mr Richard, Director, Australian Institute of Corporate Citizenship

CHAIRMAN—I welcome Mr Richard Boele via phone link with London. We have before us your submission, which we have numbered 8. Do you wish to make an opening statement? If so, you may proceed. Following your statement, we will move to questions.

Mr Boele—Thank you, Mr Chairman. I would like to make a short opening statement. I would like to thank the committee for the opportunity to appear before you, disembodied as I am, and to summarise briefly the submission that the Australian Institute of Corporate Citizenship has made.

I would like to implore the committee to consider the significant developments internationally in the area of delivering better ethical conduct, greater transparency and ultimately sustainable development in the business sector. Particularly of note, in July last year, was the UK pension funds trustee law change, which required pension fund trustees in the UK to publicly report whether they considered, and to what extent they considered, ethical, environmental and social issues in making their investment decisions. In the last 12 months this requirement has had a significant impact both on the way UK pension funds have been run and on the considerations of the companies within which they invest, which are also now looking at the policies that they adopt in these areas.

I would also say that there is compelling evidence internationally, particularly across northern Europe and North America, in terms of polls and particular case studies such as Monsanto's attempt during the last two years to bring genetically modified organisms and foodstuffs into Europe, in terms of consumer pressure and very widespread public pressure for greater accountability, and certainly greater expectations in terms of corporate behaviour in the ethical, environmental and social areas.

What I would like to do is end my short statement by saying that there is a real challenge for Australian businesses in terms of responding to these international trends. While the Democrat bill is commendable in terms of its intentions, it may not be approaching achieving those intentions in the best way. That is why we have recommended in our submission that the committee consider mandatory reporting of whether Australian companies who are operating internationally have environmental, ethical and social policies and, if they have them, to publicly report what they are both in Australia and within the country in which they operate. We believe that that would actually be a major step towards an enabling environment that would actually deliver better behaviour in these areas, which at the end of the day is what the intention of the Corporate Code of Conduct Bill is. That is something that we wholeheartedly support. That is the end of my short statement.

CHAIRMAN—Could you perhaps enlighten me as to the membership of the Australian Institute of Corporate Citizenship and what activities you have been involved in up until now?

Mr Boele—It is a very young organisation. At this stage I would say that it is not a membership based organisation because we are so young. The intention is that it will become a membership based organisation. At the moment we have four directors: one in London, one of whom will soon be based in Sydney, but I am obviously still in London; one in Melbourne; and one in Adelaide. We are in partnership with the African Institute of Corporate Citizenship. I think that reflects that international relationship and very much reflects our international perspective on developments in this area. That is what we hope to deliver more of in terms of debate in Australia. The work that we have mainly done to date has been for international clients in terms of doing internationally based research in this area.

CHAIRMAN—Could you tell me who your clients have been thus far?

Mr Boele—Certainly. We have had the Body Shop Foundation and the Rockefeller Foundation. We have done work for South African based companies Gensec and Investec, which are all in the financial industry. We have just completed a major project for Anglo American, which is a large mining corporation. We have Normandy Mining as a major client in Australia, and the Deutsche Bank in South Africa. We have also done some work for the Save the Children Fund, which is a client in South Africa. Off the top of my head, those are the ones that come to mind. I hope that gives you a flavour in terms of it being in the retail sector, the mining sector and the financial sector, as well as also having done some work in the NGO sector and obviously for foundations as well.

CHAIRMAN—I note you offer two alternative approaches to the issue.

Mr Boele—That is correct.

CHAIRMAN—One is mandatory reporting on whether corporations choose to adopt codes, and the other is a mandatory adoption of codes. Do you have a preference as to which you as an organisation prefer?

Mr Boele—Our preference is certainly for the mandatory reporting if they have a code, and, if they do, what it may be. That reflects our work with business in terms of making these changes, if you like, as comfortably as possible for business. In our experience, from what we have seen here in the UK and in other countries, this sort of approach to mandatory reporting—whether you do or do not—is certainly something which has picked up momentum in Europe in the last 12 months. Changes have just occurred in France and Sweden. We are hoping—we are looking and watching—that they will actually occur shortly in Germany, and there is discussion of this at the European level as well. From our point of view, the more successful model has been the voluntary adoption of these policies or not, but certainly there should be mandatory reporting as to whether you have them or not, and I think that gives the greatest transparency for those who want to choose their business partners or their suppliers or the companies that they wish to purchase from.

CHAIRMAN—Are there any further questions?

Senator MURRAY—Thank you for a very comprehensive submission. One of the thoughts that I have is that in the current protests, the most recent being in Quebec, we are seeing almost a repetition of the environmental protests of the last 30 years. The shock troops are out in front,

sometimes with a fairly vigorous approach to meetings and issues, but they reflect a much broader community concern, and it is very unwise therefore to dismiss those protesters as extremists, anarchists, troublemakers or any of the other terms because there is wide community concern reflected by them. It seems to me your submission reflects that as well. One of the things I have been concerned about in the evidence I have heard to this committee is a kind of knee-jerk reaction from people who have not yet understood—to use the jargon of the protestors—that the civilising or democratising of capital is a major issue. I would like to ask you this question: is it better for governments and parliaments to lead or to follow in this matter? In other words, is it better for market and social pressures to really come through such that there is more corporate support for it or is it better for governments and parliaments to say to companies, 'Look, we're going to push you into this direction earlier than you would otherwise want to go'?

Mr Boele—I think that is a very pertinent question. Many of the companies that I have consulted with directly talk about the need for there to be, if you like, catch-up legislation. I think that is a process that we have seen in the last 15 years in environmental legislation. The societal norms and the expectations of environmental performance have always led the introduction of legislation that then raises the standard. From that point of view, my expectation is that that is exactly what we are seeing at the moment in those countries that have taken their first legislative steps in raising that bottom bar of social and ethical performance of corporations. I think that is very much following; I do not think that is leading.

The point I would make is that Australia has an opportunity now to make sure that that following actually happens. If we take the international developments as the lead, this is the opportunity now to raise that bar and make sure that Australian corporations perhaps are not left behind. While we do have those protests—and you are absolutely right, there has been a lot of knee-jerk reaction—perhaps developments have gone quicker here. When I say 'here', I mean in northern Europe and in northern America, and I talk about Canada and the US, where there have been significant legislative activity and, in a greater context, also support of voluntary measures such as codes of conduct and initiatives that have delivered greater transparency and better performance. That has all been, I think, a general response to the concerns in these areas.

Senator MURRAY—The bill of my colleague Senator Bourne—I do not know if it so much leads—certainly attempts to bring Australia up to some contemporary expectations in this area. However, your own recommendations are more gentle. They suggest a step-by-step approach before we go down the direction of Senator Bourne's bill. Is there a specific reason you prefer that? Do you think your route will get you better outcomes than Senator Bourne's bill, even if it needs to be amended and improved?

Mr Boele—Where it comes from is my work within business. I spent 3½ years being internationally responsible for the social and human rights performance of the Body Shop International, and it was my experience there that taught me that delivering behavioural change within a corporate environment, within a corporate culture, was something that was very difficult to achieve. Having the legal department running around and, if you like, beating you into compliance was one way of doing it, but what I saw in the Body Shop when I was trying to deliver that kind of human rights, that sort of social community relation in behavioural improvement, was people voluntarily looking at saying, 'Actually we want to be able to have a better relationship with these communities; we want to be able to better meet these human rights

standards.’ I think what was needed within the company was leadership and a space for people to be able to take that step.

You are absolutely right: our recommendation is more gentle, and I think it is gentle in recognition of the challenges that businesses have in terms of moving the culture and the collective behaviour of the company towards a more ethical and a more responsible stand. I believe that will be more sustainable and more enduring if it is not in the initial instance compliance driven, but I would certainly argue in the longer term that there needs to be that compliance, there needs to be that legislative catch-up bar that ensures that those companies that, if you like, are off the radar screen and continue to behave the way they do—it may be irresponsible—will be brought up to at least a minimum standard. But there will always be the pioneers, and I think the pioneer companies and the leading companies are looking for a change much deeper than what a compliance driven change can deliver.

Senator MURRAY—Am I right in summarising your approach as in fact a three-step and not an alternative step—first, mandatory public reporting; second, mandatory adoption; and, third, legislative prescription?

Mr Boele—Yes, I would agree with that. That could be interpreted in that way, yes.

Senator MURRAY—My last question before my colleagues follow up with questions relates to your submission, page 8 at the top, where you say:

This Millenium Poll put Australia at the top of the ranking in terms of the majority of respondents looking to business to set higher ethical standards and help build a better society.

Did that Millenium Poll regard Australia as the top or as needing to get to the top? I could not quite understand that.

Mr Boele—It actually rated the public perception or, if you like, the public expectation of corporations as the highest. I believe it was 23 or 24 countries worldwide—I am sorry; I do not have it and I am not sure if I actually mention it in the report—and Australia was the top of those 23 in terms of the number of people that had that higher expectation in terms of social performance.

Senator MURRAY—So Australia carries a good international reputation; is that what you are saying?

Mr Boele—What I am saying is that the poll reflects the Australian public’s expectation that corporations behave in this way, rather than an international view. This was a public opinion survey. If you broke down that public opinion survey country by country, Australia actually came out top in terms of the public’s expectation that corporations will do more in terms of social and ethical performance.

Senator MURRAY—Must do more, yes.

Mr Boele—For the committee, what that would then suggest is that any move that the committee took in terms of recommending legislation in this area should gain considerable support amongst the Australian public.

Senator MURRAY—I am glad you explained that, because that was my instinct about what you meant. On pages 7 and 9, you refer to how far behind Australia is. In the second paragraph on page 7, you state:

Yet here in Australia Western Mining Corporation and The Body Shop are still the only notable Australian companies to have adopted this international approach.

On page 9 you state:

In Canada demand is growing strongly—

this is in regard to professional ethics management—

while in Australia it is an area that has only just begun with environmental investment products ...

That would confirm that corporate behaviour here lags behind community expectations. Is that the right interpretation?

Mr Boele—That is the correct interpretation.

Senator COONEY—Thanks for your submission, Mr Boele. I want to ask the following questions on the basis that you must have thought about these things considerably over the years. We can look at where corporate law has come from since the 19th century and into the 20th century, when judges said, ‘The obligations of the companies are to their shareholders,’ and a lot of things have resulted from that which you could no doubt tell us about. Have you thought about what sort of culture that law left and whether we ought to change it in some way, and, if so, with what expectations? I know that you have written statements in that general sense, but I would like to know whether you have thought specifically about that and whether that would make any difference to what sort of legislation should come through, and how quickly.

Mr Boele—We have thought about it quite a bit. My initial response is that there is a growing recognition that, if we acknowledge that the primary duty of the company’s managers is to deliver value to shareholders and increase the value of the company on behalf of the owners of the company, the shareholders, there is now a significant and I think very quickly broadening acceptance that ethical, environmental and social performance are a critical part of both assessing a company’s risk and ensuring long-term value and sustainable growth for a company. Companies that consider those three areas will, in the long term, be more successful companies in terms of longer life and improved share value.

Senator COONEY—Have you been looking at court decisions to see whether the courts are moving away from what would have been the situation in the 19th century? You may not have done so, but I would be interested to know whether you have.

Mr Boele—I cannot say specific research, but I would say that in the last 12 months, in both the UK and the US, there have been some significant decisions where extraterritorial cases have

been brought back to the home country. We have had a South African case involving asbestos mine workers who have been allowed to have their case heard here in the UK. In the US, there have been a number of cases. One which has recently been allowed to go ahead relates to Shell's possible or alleged involvement in the hanging of Ken Saro-Wiwa by the Nigerian military dictatorship. Both of those cases have jolted the indicator on the corporate law Richter scale in terms of saying, 'We may be held responsible for things we are doing overseas.' We may see more of those, particularly if corporations make more mistakes in terms of reputation. That would be an interesting one to see—managers being held to account for damage to a company's reputation. I am not sure whether that is going to happen, but it would be interesting if that did happen.

Senator COONEY—The other issue I want to discuss with you is the question of how much the community, I suppose through its legislative bodies, should be in control of the companies and how far the management—the board of directors, the chief executive officer, et cetera—can go. That might be a false dichotomy, but it seems to me that we have to look at that with regard to the way things are going. Clearly you have to run the companies well, but at the same time there are social obligations which become more and more important as time goes by and as the companies become more and more powerful internationally. Have you thought of any rule of thumb or any other sort of rule which would enable us to say, 'This is an area discrete to the people who actually own and run the companies, but this area here is the sort of thing that the community, through the law courts and through parliament, ought to have a say in'?

Mr Boele—I think there has definitely been an increase in terms of the rights of corporations. If we talk in a legal sense, I think corporations are seeing themselves more and more clearly defined as persons under law and, because of that, have actually managed to adopt the rights of people. So, in that sense, the corporate body has become a legal entity that increasingly holds the same rights as communities or individual human beings. In a sense, I think that a lot of the concerns of general society, particularly in areas of social responsibility, relate to maybe an interpretation or a feeling people are getting that corporations have, if you like, collected those rights, amassed those rights, but have not had the converse responsibilities.

Here in the UK there has been a very strong debate in the last two or three months about corporate manslaughter, because there have been very few cases—I think it is actually literally a handful—where corporate manslaughter charges have been brought against companies and the chief executives of companies for employees who have died in situations of negligence. That is quite interesting. There is a lot of debate about that. There is a general rebalancing that may go on and I think there would be a legitimate role for parliament and legislative moves in terms of saying, 'Corporations have now got a lot of rights and we do need to consider what some of the minimum responsibilities are.' I think that has happened in terms of environmental responsibilities.

I will go back to the previous senator's questions. He did a quick sketch about how we have travelled the road in terms of environmental performance and environmental legislative change and expectations of corporations. I think that is exactly the journey we are now beginning in terms of social expectations—that is, if you like, the shock troops on the streets of Quebec, Melbourne, Sydney and here in London. They are saying, 'We've done this journey with environment; now let's start talking about it and debating it.' Within the context of that debate and that political space, there is definitely a role for parliament and for the community to decide

whether the role of corporations needs some updating. That is what we had in the eighties and the nineties. We had some rather significant updating in terms of expectations around environmental performance. In the next 10 years we are going to have exactly the same debate and exactly the same journey in terms of social performance.

Senator COONEY—Do you know of any recent court cases in England or the United States that deal with this? If you do, do you have the references?

Mr Boele—Cases about what, specifically?

Senator COONEY—Particularly what the courts have said about the responsibility of corporations for the environment or for social obligations.

Mr Boele—Here in the UK there have been a number of inquiries. The Greenbury, Hampel and Cadbury inquiries have all directly addressed the need for legislative consideration of greater responsibility for social performance by company directors. I cannot answer that directly, but I am happy to answer that in writing, referring the committee to the specific cases I mentioned before and to some reference material that addresses those cases.

Senator COONEY—Thanks very much for that.

Senator GIBSON—When you answered Senator Murray earlier and talked about your experience with the Body Shop, you said that it was your view that persuasion and working within corporations was the most successful way to go in the long term, and that companies that do that therefore will have something to sell and will publicise what they are doing. I agree with you, but it leads me to ask: why do we need to have mandatory reporting of these issues? If companies have an advantage from doing whatever the dimension is, they will surely wish to make their communities aware of what they are doing.

Mr Boele—I will refer back to my personal experience from my time at the Body Shop. We used to get extremely irritated with what our competitors used to get away with just at a basic level. The investment internally in systems, training and supporting those suppliers that you are trying to raise the bar with is considerable. In the long term, you are going down that route because you believe it is best for the business and best for delivering to society a wealth creator, including sustainable livelihoods and employment, and respect for the environment. Working within the Body Shop, we definitely believed that there was a very strong case for having that bottom bar. I am talking about minimum standards being established that raise the sector. For us, it was very much looking at the cosmetics sector. I am thinking specifically of issues around animal testing. We found it extremely helpful when the European parliament approved the European directive for an end to animal testing in the cosmetics industry. That was something that the company were very passionate about, because we were investing a lot in alternatives. The return on our investment was to see that the option of testing on animals was closed down to the rest of the industry.

I think there is always a tension within business that you want to be ahead with something that is unique and that no-one else is doing but, in trying to keep ahead and trying to change, you are always anticipating that there will be some sort of legislative bar behind you that will make sure your competitors do not have to invest at all in those kinds of alternatives. If they do

not have to invest at all, although they will not get the same market as you—you hope your consumers will come to you because of your particular values and the way you communicate them—they will still capture a sector of the market. That will still in the long term erode your market, and they are able to do that through what we would consider to be unethical means.

You could probably translate that to, for example, the diamond trade and being able to source diamonds through reputable state approved mines or being able to source diamonds through guerilla armies. The diamonds are cheaper and of the same quality, but they actually fund conflict. In the Cambodian sense, it is about outdoor furniture. You can buy cheap outdoor furniture or you can go to a more reputable supplier. You pay a bit more but you know that it is coming from a sustainable forest instead of from what is illegally logged in a Cambodian forest, shipped through Vietnam and then sold in an Australian outdoor furniture store. The industry benefits from having those externalised costs, because that is what is happening when that sort of unethical behaviour occurs—the actual cost of making that piece of garden furniture is externalised to that forest in Cambodia. There will be a local community that pays a dreadful price in terms of having that resource transformed from a sustainable, food providing, shelter providing, firewood providing resource, into that garden chair in a Sydney store. They pay the price for someone being able to buy that cheaply in Sydney, whereas a reputable supplier goes through a proper supply chain which is ethical and environmentally sound. They have to internalise that and the customer pays more for that, but that is the fair price for having those costs internalised instead of externalised.

I believe that at the end of the day that is the way we are going to go. We are going to have to internalise more of those costs. That is the general acceptance within the best performing companies. If you look at Western Mining Corporation, Shell, BP and those other companies that have adopted the highest policies and standards in terms of social and environmental performance, I would beg the committee to ask them about it, but my conversations with them tell me that they are quite comfortable with a minimum legislative standard coming behind them. They are always thinking and they are always performing well ahead of any legislative changes anyway.

Senator GIBSON—I agree with that. I have a forest industry background myself, so I know about the example you gave of the Cambodian rainforest producing furniture for sale in Australia. The Australian forest industry has adopted a code of labelling which states that the wood they are using has come from sustainable forest operations. That line of persuasion within the industry, and then hopefully getting it down to market outlets for the final products, in the end is going to be more effective than a fairly crude mandatory requirement in the Corporations Law which tries to cover everything.

Mr Boele—Our suggestion is that, if you have got those policies and codes, everyone can put their cards on the table. If you choose not to adopt a particular code or a particular policy in terms of the environment, be transparent about it and let the consumer make the choice, with all that information on the table. That is why we have suggested the gentle approach, as it was characterised, because we believe that, having regard to those sectors and companies that make the changes that you suggested within that Australian forestry context, the companies that do not do so need to say that they have not.

CHAIRMAN—Can I take you back one step. Given the acknowledgment of the marketing advantages and so on that companies get from disclosure, why wouldn't you go back one step and allow the reporting of whether they have a code of conduct to be voluntary rather than mandatory?

Mr Boele—It is just the beginning of encouragement. If it is completely voluntary, then my sense for it is that—and this is borne out by what I have seen—the majority of companies will not report anything. That has been the single greatest surprise in terms of this UK experiment, the pension fund trustees law change, which asks them to make a mandatory report on whether they have any ethical, environmental or social considerations when they make investment decisions. It was considered a very gentle change in the law, and it has been quite surprising in terms of the space it has created to have a debate about what are appropriate environmental, ethical and social considerations for pension fund trustees to make when they are making investment decisions on behalf of their pension fund holders.

Within the Australian context, I would see that as a great opportunity to encourage Australian industry to catch up with where things are now at internationally. Comparing Australia to northern European and North American markets, we have probably got about four or five years catch-up to do at the moment if we want to be out there playing with them. The committee has an excellent opportunity for making a very gentle mandatory consideration—that is to say to companies, 'Just put your cards on the table. If you do not have any cards, that is fine. Just let us know that you have no cards.' That would create an environment and an opportunity in Australia for Australian businesses to, if you like, leapfrog. I am pretty confident that we can do better than a lot of the others in northern Europe and North America. My hope is that if we did something like this, within 10 years Australian businesses would be having some of the best international practice in terms of ethically and socially responsible performance.

CHAIRMAN—I asked that question because I noted in your submission the emphasis that you put on consultation and ownership in relation to introducing such a measure. I think it is fair to say that all the evidence we have received in our hearings and submissions from the business community at large, including their peak councils, has been that any such reporting requirements should be entirely voluntary. I asked that question in the context of you saying that it is important to get agreement from the business community and to consult with them as you move down this path. If their attitude is that it should be voluntary, is that the way we ought to go?

Mr Boele—I would say that at times we need a bit of vision. If I take an international perspective at the moment, there needs to be some vision shown, within the Australian context, of corporate social responsibility. You have got a handful—probably too small a handful—of visionary business leaders in Australia at the moment. I was a bit disappointed to see that—from the selection I have seen—there were not any individual companies that actually made submissions to the committee in terms of encouraging the committee to help the Australian business sector as a whole to make that catch-up. I cannot stress too strongly that, from where I am sitting here in London at the moment, it seems that we have fallen down on the job.

That is why I see this committee's opportunity as a great responsibility. They may say that it has all got to be voluntary, but I think we may live to regret that if we look back in five or 10 years time and see that we are even further behind in terms of international best practice and

corporate social responsibility. It is picking up momentum very quickly here in the Northern Hemisphere. Australia has an opportunity to be a leader of that in the Southern Hemisphere, although I would say that in South Africa at the moment it is motoring on at a pace—the debate and the discussion there, in terms of corporate social responsibility, are already ahead of Australia.

All I can say is that maybe we need to encourage the peak bodies to look to the visionaries and the leaders in the sectors that they are representing, not the slowest and the least responsive. That is always a challenge if you are an industry body representative. You need to represent the greatest selection of your industry—the lowest common denominator, if you like. I would say that what Australia needs in this area at the moment is some more vision.

CHAIRMAN—Thank you, Mr Boele. I thank you for appearing before us via telelink, and thank you for your evidence in answer to questions this morning.

Mr Boele—No problem; it was a pleasure. Thank you.

[9.51 a.m.]

COONEY, Mr Sean Thomas, Senior Lecturer, Law School, University of Melbourne

CHAIRMAN—We have before us the Law School's submission, which is authored by you and others. Do you wish to make an opening statement?

Mr Cooney—Yes, I do.

CHAIRMAN—You may proceed and we will follow with questions.

Mr Cooney—I am making this submission in two capacities. The Law School has received an Australian Research Council grant to look at the role of voluntary codes of conduct and labour standards, and I am the chief investigator in that study. I also have some expertise in the labour law of Asian countries, particularly China, and some of my concerns about the bill derive from that background.

I would like to begin by thanking the committee and the chairman for inviting me to give evidence today. I will be speaking primarily about the labour aspects of the bill. The bill has obviously polarised opinion. In my view, however, there is a middle way, which is neither a purely voluntary approach, as proposed in the submissions made by the industry groups, nor the inflexible approach reflected in the bill. I just caught the tail end of the previous submission, and it sounds like there might be some points in common.

I will begin by identifying the criticisms of the bill made by the Australian industry groups. They say that the bill imposes obligations inconsistent with those of foreign legal systems. They also say that it may prove counterproductive for foreign workers and that its enforcement provisions are problematic. They also suggest that it is too negative and it fails to promote innovation and improvement. I essentially agree with these arguments. The industry groups advocate voluntary codes. They say that such codes are the best way to try to improve the conditions of overseas workers employed by Australian corporations. They point out that voluntary codes are flexible and can be more context sensitive, they do not necessarily conflict with foreign legal systems, they allow for continuous improvement, they promote best practice and they permit industries to police themselves.

I agree, with some reservations, with these arguments. However, I think it is important to note that voluntary codes have their limitations. As I read it, the balance of the empirical evidence to date supports the claims to this effect made in many of the submissions by the non-governmental organisations and the trade unions. Many corporations refuse to sign up to voluntary codes, and some industries do not have them or have them in a very rudimentary way. Codes are often selective, omitting key rights such as freedom of association. They do not always establish transparent processes. Perhaps most problematically, many codes lack credible monitoring systems, even where they purport to have independent audits. Private monitors often face a conflict of interest, and many fail to interview workers away from the watchful eye of employers. This comes up again and again in the literature that is developing in this field.

The underlying problem is that, in the absence of compulsory disclosure requirements, rational profit maximisers have an incentive to use codes primarily as a public relations exercise rather than as a genuine means of improving working conditions. I am not saying that that is what codes essentially are. In most cases there is a genuine commitment to them. But, if one wants to use them in a cynical way, they are open to becoming not a credible mechanism for improving conditions. The question that I am interested in is: can we make voluntary codes more transparent, credible and comprehensive, as the NGOs and unions demand, without resorting to the prescriptive and punitive approach in the bill, which has been so sharply criticised by industry groups? Perhaps we can. Recent American work based on empirical evidence in several US states suggests a way forward. This way is based on the key principles of transparency, competition, continuous improvement and compliance incentives.

In this approach, firms are permitted to develop their own codes and monitoring systems on the condition that they make their results subject to public evaluation through a public agency or through organisations certified by public agency. The agency or the certified organisations would systemically compare the performance of firms and in some cases rank them, taking into account submissions from workers, NGOs and unions. The agency would do this by reference to benchmarks established initially by reference to minimum international standards, but then more importantly by best practice. These benchmarks need not be the same for all industries or all countries, because clearly the position of a multinational enterprise in China is very different from one in a developed country. The benchmarks should be used to assess the extent to which a corporation has succeeded in implementing or improving upon international labour standards relative to its previous performance and to the performance of similar corporations. So it is a relative measure, not an absolute measure, which is a major problem I have with the bill. This system would arguably create an incentive structure in which firms would vie with each other for continuous improvement. It would also greatly improve the availability of information for consumers, stockholders and concerned citizens on what corporations are doing to address labour problems in the countries in which they invest.

Our previous submissions have already referred to movements in the Northern Hemisphere in this direction, but I also want to point to two Australian examples of these kinds of arrangements. One of them is the equal opportunity for women in the workplace amendment act, which has the support of the major political parties and which successfully passed through a review in 1998. That has many elements of the scheme that I am proposing. It is also similar to the scheme recently set up under the Privacy Act for regulating the private sector.

To conclude, liberalisation of trade and investment has linked the businesses and citizens of developed countries, including Australia, together with their counterparts in developing nations. More and more consumers, shareholders and workers want these relationships to be based on ethical foundations. I believe that this is best achieved not through traditional forms of regulation but by maximising credible information about Australian business practices. This is what the system I propose seeks to do.

CHAIRMAN—Thank you, Mr Cooney.

Senator MURRAY—Thank you, Mr Cooney, for a very thoughtful submission. I should make it clear that Senator Bourne has made it clear that, as this is a working draft, she would be very keen to adapt and amend it to meet legitimate criticisms of it. I mean ‘criticisms’ in the

positive sense, which is what I gather you are engaged in. I want to make one point before I get into the questions. In paragraph 3.8 of your submission, which refers to the living wage element, you say:

I find this aspect of the Bill somewhat paternalistic, even though it is well intended.

I can see that that interpretation could be put on it. The intention of the author of the bill was to avoid Australian wage expectations and standards being implied in the bill. In other words, wages should be relevant to the conditions in the country. That, as you know, is very difficult to define.

Mr Cooney—Yes.

Senator MURRAY—And most countries do not in fact have a living wage measure. So it had that intent, and if you thought it was designed to be more prescriptive, it was not; it was designed to give the companies flexibility. But I think that does illustrate a danger that a strict legal interpretation of the bill would take a different perspective.

I want to return to one of your core beliefs in your submission. In that, you have a real link with the previous submission, which is a most interesting one—I do not know if you have had a chance to look at it—from the Australian Institute of Corporate Citizenship.

Mr Cooney—I did read their submission. Is that the one that proposed two models, A and B?

Senator MURRAY—That is right.

Mr Cooney—The copy of the submission that I had did not expand on those models, but I was very interested in that because it seemed to be quite similar to what I was suggesting.

Senator MURRAY—What you have said in your item 4.1 is similar in that you have said that firms should be permitted:

... to develop their own codes and monitoring systems *on the condition that* they made their results subject to public evaluation ...

And their submission says—it is in several places, but as a reference you can find it on page 3 in the executive summary—that they want mandatory public reporting where a corporation adopts those standards. What do you mean when you say that would be subject to public evaluation 'through independent, accreditation organisations'? It seems to me that those accredited organisations that have had great sway in the corporate world were not initiated as a result of legislation. I am thinking of organisations like Standard and Poor's or Dun and Bradstreet that do ratings and monitoring. How do you think this kind of organisation could be established and funded?

Mr Cooney—I am looking at two different sorts of agencies here. One should be a public agency similar to the agency for equal opportunity for women in the workplace or to the Privacy Commissioner. In relation to the other agencies, some of them already exist, particularly in the Northern Hemisphere, where you have groups like SA 8000 and various others. Sometimes they

consist of NGOs. Sometimes they are accountancy firms that have developed an expertise—for example, PricewaterhouseCoopers conducts a lot of audits itself. I was looking at drawing on those sorts of agencies which to some extent are already conducting work, and then authorising them to do that in Australia, helping to distribute the evaluations they make and also making sure that those auditing organisations comply with certain minimum thresholds. Indeed, in some of the literature that I am drawing on it is proposed that there be a competition not only between base level firms but also between monitoring agencies, and that they should be evaluated themselves in terms of which produced the most credible monitoring systems.

I suppose there is a problem in Australia, relative to the Northern Hemisphere, in that some of these monitoring groups are not so well established, although I know that some of them do operate in Australia. In that case you might initially want the publicly funded agency to directly receive submissions, at least on a trial basis, before it can then accredit outside agencies to operate.

Senator MURRAY—How would such an accredited organisation be set up and funded?

Mr Cooney—Do you mean the federal agency or the private sector agencies?

Senator MURRAY—The private sector agencies are what I think you refer to in 4.1.

Mr Cooney—Yes. With the private sector agencies which already exist, such as SA 8000, some are established in the NGO sector, and that one is an example, and some, as I said, are established in the private sector, such as PricewaterhouseCoopers, which is a major accountancy firm which takes on auditing for many of its clients. I am not particularly concerned whether they are established in the NGO sector or whether they are established in the private sector, as long as they are competent monitors. As I said, some of them already operate in Australia, but it should be open to new monitoring agencies being established. I am not sure whether I am answering your question.

Senator MURRAY—You probably are from your perspective. The difficulty I face is that, if there is a strong community desire for corporations to be more visibly responsible in these areas, and they would expect that to have some legislative force, it is surely better for agencies which are well established and resourced to have the compliance requirement rather than to set it up with some vague, underfunded or perhaps not even democratic organisation. Many NGOs lack basic accountability within their own structures.

Mr Cooney—Absolutely.

Senator MURRAY—I am one of those who actually thinks that the NGO sector needs more regulation, not less. Isn't it better to look at organisations which are set up to adjudicate in these areas, such as the ACCC, ASIC and the Industrial Relations Commission—which you mentioned? The bill chooses ASIC because it has the broad corporate responsibility—rather than the competition authority or the labour authority.

Mr Cooney—I am not wedded to either alternative. I would look at it essentially in a pragmatic way and say that, if it is the case in Australia that we do not have any private sector organisations of sufficient standing, whether in the NGO sector or in the private or commercial

sector, then it would be appropriate that a government agency conduct that task. That is really an empirical question as to the status of some of those organisations in Australia, but I do not have any problem with the central authority being primarily a government body.

The other alternative is that you can initially set it up as a government body and then, as more and more companies make these sorts of reports and various NGOs and private sector agencies establish their own monitoring organisations to do that, at a later stage the public agency could say, 'Okay, we accept that you are a credible organisation, that you are democratic or that you are financially sound and that your monitoring processes are credible, and therefore we authorise you to conduct this monitoring.' That could be at a later stage of the process.

Senator MURRAY—The bill, yourself and the previous witness—Mr Boele from the Australian Institute of Corporate Citizenship—all focus, and rightly so, on the reporting mechanism. Essentially, the bill says that by requiring Australian corporations to report—and you say 'by requiring to report' and the institute says 'by requiring to report'—you will create market pressure. Investment analysts, ethical analysts and so on will pin those companies which are not doing the job. To give an example, a decade or more ago Hugh Morgan and his Western Mining Corporation were quite often vilified in the green world whereas today they are not. In my view, much of the reason for that has been that they have gone on the front foot with internal management of these issues and the proper reporting against them, and they are now in fact leaders in reporting on environmental and social issues. It is for that reason that ASIC would always seem to me to be the better authority because ASIC concerns itself, as one of its main functions, with whether corporations report against the law and how well they do that. After that, it is up to other people to judge.

Mr Cooney—I accept that with some reservations. I suppose my reservations about ASIC are that in the area of labour standards, which is the one that I am particularly concerned with, I do not see it as having particular expertise. Perhaps the solution there would be to require some kind of consultancy with the Industrial Relations Commission, perhaps a joint agency or one in which at least there was input from other governmental agencies that have more expertise in the area. That is why in my submission I am a little chary about ASIC. I am not sure that it really has the complete expertise to undertake the general coordinating role that is proposed in these disclosure schemes.

Senator MURRAY—That is at the nub of my questioning of you. If you have more of an enforcement mentality about this bill, more of a prescriptive, 'We're going to make you do things' approach, once you are into enforcement, it seems to me that you will often need to move towards those agencies which are most equipped to attend to the biggest area of concern. However, if you were into a reporting mentality, which is therefore directed at market mechanisms and pressures, it would seem to me that you are best to stay with ASIC. I am well aware that ASIC has enforcement capabilities and you have a bias on the labour side. To me it would depend on how strongly you wish to enforce performance in foreign countries. The Industrial Relations Commission has actually no experience in that.

Mr Cooney—I do not quite see it in that way. I do not see it as a question of enforcement; I see it mainly as a question of learning, particularly learning from best practice. I think all of us are a little bit at sea in this area because it is very new. We really need to draw on as much knowledge as we can. Why I am suggesting that ASIC might need to refer to other agencies like

the Industrial Relations Commission is not to enforce codes but to perhaps understand some of the material that we are getting in, to make suggestions and to draw on Australian experience which may also be relevant to interpreting the measures that particular corporations are taking and so on.

That is why I would suggest some link to the IRC, not as an enforcement strategy but as part of a learning strategy to draw on existing knowledge about these areas. As I have already said, I am not happy with using punitive or enforcement measures in this type of bill. I certainly would not be suggesting using equivalent provisions to those which exist in the Workplace Relations Act. It is more simply looking at the IRC as a body with a particular expertise in this area.

Senator COONEY—I thought that was a most lucid and comprehensive dissertation, so I have no questions.

Mr Cooney—I have learned at the hands of the master.

CHAIRMAN—I do not have any questions, Mr Cooney, so thank you very much, as Senator Cooney said, for a very comprehensive presentation to the committee. In your presentation and your responses to Senator Murray you probably answered the questions that others would have had, so thank you very much for appearing before the committee.

Mr Cooney—Thank you for giving me the opportunity.

Senator MURRAY—I had hoped that the two Cooneys would have had a domestic for us.

[10.14 a.m.]

BOSCH, Mr Henry (Private capacity)

CHAIRMAN—We have no written submission from you, Mr Bosch, so we would ask you to address the committee, and at the conclusion of that we will proceed to questions.

Mr Bosch—May I do so quite briefly. My experience is relevant to the work of the committee in two respects. First, during the period 1972 to 1980 I was responsible for the international operations of John Lysaght Australia Ltd, which set up a significant number of subsidiary and joint venture manufacturing companies in Papua New Guinea, Indonesia, Malaysia, Singapore, the Philippines, Fiji and New Caledonia. I therefore have first-hand experience of carrying out the sorts of investments that would be affected by this bill. My second piece of relevant experience is that I was for five years, between 1985 and 1990, Chairman of the National Companies and Securities Commission, the predecessor of ASIC.

I regard the bill as unfortunate and I recommend that it be abandoned, buried and forgotten. It seems to me to be wrong in principle. I would like to make six points—two economic, two political and two regulatory. My first economic point is that the costs of operating subsidiaries would rise significantly if the bill was implemented. Low cost is a major reason why people invest in foreign parts. I perceive that if the bill were introduced there would be reduced incentives to invest in such countries as I mentioned and there would be a reduction of investment that would adversely affect the economic growth and consequently the standard of living of the countries in which the investment might otherwise be made. It seems to me that those who wish to see a closing of the gap between rich and poor would be bound to oppose the principle of the bill. It would in fact harm those it purports to help.

My second economic point is that Australian companies that have already invested in such countries will be disadvantaged compared with those companies from countries which have not passed equivalent legislation. There would consequently be economic pressure on Australian companies to scale down their operations and perhaps abandon the subsidiaries that they have set up. Those are my economic points.

I have two political points. The bill attempts to override the legal authority of foreign governments to legislate within their own national boundary and therefore sets an unfortunate precedent for foreign countries which may wish to see their writ run in Australia. There have been occasions in the past when other countries have sought to make extraterritorial legislation effective here—I think particularly of the United States—and we have resisted that, and I believe rightly resisted it. I suspect that it will occur again, and if we have established a principle in which we think it is appropriate for Australia to legislate in this way I am sure we will find that argument used against us. I therefore think the passage of a bill like this would undermine the supreme authority of our parliament in this country. That would be unfortunate.

My second political point is that there may well be—in fact, almost certainly would be—conflicts between local laws of host countries and the extraterritorial Australian law. One example that comes immediately to mind is that, in Malaysia, there is legislation discriminating in favour of Bumiputras. I operated five companies under that legislation. It seems to me that it conflicts with clause 10 of this bill, 'Human rights standards'. I cannot tell which law would prevail, but I predict that there would be a good deal of unpleasantness while we found out. It

I predict that there would be a good deal of unpleasantness while we found out. It would be entirely open to countries such as Malaysia, in which Australian companies wish to invest, if they portrayed the bill as arrogant, patronising, paternalistic and racist. That is the end of my political points.

I have two regulatory points. The reporting and enforcement provisions would place a heavy burden on ASIC. It has little or no expertise in areas of health and safety, employment conditions, environment or human rights. Its resources are already severely stretched because it is not adequately funded. It is unable already to do the things that it would wish, and which I think the business community and the public would wish, in the protection of Australian investors and in the enhancement of our financial markets. Over the past few years it has been asked to do more with less, and the passage of this bill would probably weaken Australian investor protection.

My final regulatory point is that the investments covered by the bill would be in distant places and in countries whose law and circumstances are very diverse. The administrative task of policing the law would be complex and difficult. I do not think that ASIC or any other Australian regulator would be very good at it. There is a real risk that their credibility, the credibility of the regulators, would be compromised, and that situation would be made worse by clause 17(6), which permits groups of activists to define the public interest in whatever way they choose. I foresee that if that were in operation we would have a chaotic situation in which the regulator would be asked to intervene, again on very unsure ground. I therefore feel that the bill is basically unfortunate.

CHAIRMAN—Thank you very much, Mr Bosch, for that presentation.

Senator COONEY—Thank you for coming along and contributing once again to the development of corporate life I suppose—it is not just the law but corporate life. I think that this bill was developed as an attempt to improve corporate and, I suppose, civil life within which corporations operate generally. It is a bill—and Senator Murray can correct me here—that attempts to take things forward and lead to discussion and to some development which would get over the problems that it tries to face. Have you got alternatives to the sorts of things that are suggested? I understand what you say about the reaction that the bill might cause in Malaysia and the difficulty of enforcing it overseas, but nevertheless there is an attempt here to get, as I say, things better than they presently are. Have you any thoughts about alternatives to the suggestions in the bill?

Mr Bosch—Yes, I have thought quite a lot. I presume that the basic intent is to narrow the gap between rich and poor, and I am sure that we are all in favour of that. Quite a lot of things can be done in that direction. You will know that I am heavily involved in the fight against corruption in these areas, where I think we are making quite considerable progress. That is one limited thing that one might be able to do.

Perhaps the most important thing is the increase in investment in these places. While the standards, which now apply to workers in Australian subsidiaries overseas, are less—and often substantially less—than those applying in Australia, they are always a good deal better than the alternatives. There is no slavery and people are not forced to go and work for these companies; they do it because it is better than the alternative. By moving in and making an economic offer,

one cranks the thing up a bit. I would like to see a lot more of that. What we did in Lysaghts in the seventies not only increased our wealth but increased the standards of living of many thousands of people who worked for us in various places.

It would also be desirable to do a variety of things, such as establish a proper rule of law in some of these places so people could rely on what was happening. The answer to the question is that an enormous amount could be done to raise living standards in these places, most of which has to be done by the host countries—the national governments. We can help and guide them, as we are doing in the area of corruption. I do not think that a massive amount can be done in Australia and I fear that, by rushing at the fences, we will knock them over.

Senator COONEY—In addition to the bill's objective you told us about of trying to improve things overseas, there is the concept of ethical, proper conduct at home. That is affected by the way in which we see transnational companies operating. In that context, the Joint Standing Committee on Treaties is considering the World Trade Organisation and the International Criminal Court which have the concept of nations combining to achieve good standards and good trade flowing around the world. Do you see this bill covering that area or does it have no direct relationship to those sorts of things?

Mr Bosch—It is certainly related. It obviously seeks to take a very bold step. I recall Shakespeare's remark: 'Wisely and slow; they stumble that run fast.'

Senator COONEY—So this is rushing at the fence a little?

Mr Bosch—I think so.

Senator COONEY—You are not saying that we should not ultimately clear the fence but that we should not rush to do that?

Mr Bosch—Yes. I slightly despair of seeing any degree of equality between countries in the lifetime of anyone present in this room, but I think we can narrow the gap. Of course, the gap has been widened in most of my lifetime. There are various things that can be done. If we were to help these people to establish a proper rule of law, which is the basis of commerce, and that includes the business of reducing—I could not say eliminating—corruption, that would be an enormous step forward. We have to do all we can to encourage companies to go out and invest there. Even the worst of the so-called exploiters are likely to be a good deal better than what is going on there now. If we do that, we can get a bit of useful momentum, but trying to legislate in this way will just make it less likely that we will achieve the aim.

Senator GIBSON—Thank you for coming along to the committee and making those six key points. I could not agree more—you have put very well the likely impact of this on investment in poorer countries than here. I just wanted to make sure that you knew that I was very pleased that you went to the trouble of coming in and seeing us.

Mr Bosch—Thank you.

Senator MURRAY—In that exchange, you both put your hearts on the table. I have not before had the opportunity publicly to put on the record my personal appreciation for the work that you and your colleagues have done on corruption.

Mr Bosch—Thank you very much.

Senator MURRAY—I come from parts of the world where corruption is an awful blight. I congratulate you: you have had an immense effect. Let us put that aside and move on to the bill.

There are two classes of attitude applying to those who promote this sort of bill or direction. One is the view that foreign companies in foreign countries are manipulators of bad laws and bad practices, and exploiters of those countries—carpetbaggers. Much of the antagonism now expressed in the protest movements of the world has that flavour to it; therefore such movements wish to say to those companies, through countries such as ours, 'We are going to promote laws that force you to do the right thing.' In a sense, your own movement on corruption has that side to it as well—laws are passed to say, as they have recently in Australia, that you may not bribe a foreign official, so everybody has an understanding of that aspect.

Then there is the other side of the intent, which says that, if you encourage foreign companies in foreign countries to be islands of decency, ethics, good practice, no corruption and good standards, they can create or help to create an environment that will eventually change the culture of that country, because they operate as great examples in those countries. I think we have to take both streams of thought into account.

Given your record, it is regrettable that you dismiss the bill in such a comprehensive manner, because something has to be done. You attend to the corruption area, but there are also the environmental and human standards areas, and so on. One of your statements caught my attention—this is my summary, because I did not write down your exact words—and it was that the bill will override foreign legislation. I am not sure that it will in its intent or in its actuality.

I want to give you an example with Australian legislation already in place. That is the sex legislation which prohibits Australians from indulging in paedophilia in foreign countries—sex tourists, sex with children. There are certain countries where the age of sexual consent is way lower than Australia's. I understand that Spain, for instance, has the age of sexual consent at 12 for both heterosexuals and homosexuals. The Australian legislation on sex tourism has universal support and could be seen to override legislation elsewhere, and yet to me is an utterly moral and ethical way to go. Surely there are circumstances where it is right to set a standard. If in your example in Malaysia they discriminate against women, nothing you nor I can do is going to change that except pressure of cultural change over decades as the modern world influences it. But is it still not right to say to a company, 'You must not discriminate against women unless you have absolutely no alternative.' That is a mitigating circumstance. In that clause of the bill which says you should not discriminate because of gender or sex, surely the better approach would be to say that in law you would be able to do so if there were no other option for you, if otherwise you could not employ people.

Mr Bosch—I was thinking more particularly about the Malaysian legislation that forces the employment of certain proportions of Bumiputras—Malays—as opposed to ethnic Chinese in particular factories. We had operations in Malaysia before that came into effect. We had to

adjust to it when it did come into effect. When we started off there was no legislation. We preferred the Chinese as workers because they worked harder. Our places were largely staffed by Chinese. We were forced to take on considerable numbers of Malays as a result of their legislation. That was a cost raiser and a significant problem for us. That legislation, I believe, is still in force and it is a requirement for positive discrimination against everybody who is not Malay. I think that was unfortunate legislation. It was one of Dr Mahathir's, but there it is. Whether this is assisted by Australia saying. 'Well, we have got some legislation that we want to apply so resist the Malay thing wherever you can,' I am not at all sure. This is likely to cause problems, friction and ill feeling. We can safely predict that if Mahathir is still in power there will be a torrent of abuse when people try to apply this down the road. I am not sure whether it will do much good.

Senator MURRAY—I know you to be a clever and experienced man but I get the impression you overstated that point. Really it is about affirmative action, positive discrimination, which exists in a number of countries' laws. The United States had it and may still have it for all I know.

Mr Bosch—They are backing off, but they still have it.

Senator MURRAY—Yes. They have it in law. South Africa now has it. A number of former colonies have it. I think any judge looking at the human rights standard clause 10.1 would say, 'This is affirmative action. This is positive discrimination. This has an international precedent. It does not contradict the intent of that human rights standard.' And it is an arguable point. That is the point I put.

Mr Bosch—I defer to you on that. If that is right, that weakens one of my points.

Senator MURRAY—Yes. I am not sure you should defer to me, but I am just saying that it is an arguable point. My concern is this: you are a person with considerable moral and personal authority—whether you accept that or not—by virtue of your reputation and your background. Your absolute dismissal of the bill and its intent in the way that you outlined it is, I think, contradictory to your own moral and professional campaigns in other areas. It really relates back to the question Senator Cooney put to you—if not this, what else? With those two streams I outlined to you earlier, there is strong community concern and campaign for these sorts of things to be attended to. In an earlier remark—you were not here—I said, 'The people in Quebec and elsewhere are the shock troops who reflect a broader community concern.' It is like the early environmental days when the people who were really protesting did not represent a minority; they represented the majority. Their actions may have made people uncomfortable, but their concerns did not. I am concerned that you are dismissing too easily a concern which we, as the Democrats, believe has to be met in the longer term.

Mr Bosch—I am surprised to hear you say that. I think of the people in Quebec as a bunch of minority larrikins, doing no good whatever, and probably doing some harm. I doubt whether there is a majority or even a significant minority of support for them. It seems to me that the cry of, 'This is ethical,' has become much louder in recent years. I used to make speeches about ethics back in the 1980s when I was trying to change community attitudes to the paper entrepreneurs like Bond, Skase and Connell and so on, whom you might remember were folk heroes in those days.

Senator MURRAY—And I praised your attack on them, I must say.

Mr Bosch—I could not prove that what they were doing was illegal because the burden of proof beyond reasonable doubt is enormously difficult. I was pretty sure that what they were doing was having very adverse consequences. I used the word ‘ethical’ in those days in terms of honesty, telling the truth, fulfilling the specific obligations that one has—the fiduciary obligations established by the law. It was a fairly limited thing. Since the eighties, I have seen the argument swing around. A great many other things have been brought into the so-called ethical debate, and this worries me.

The excellent report from that Senate committee which Senator Cooney led made the very important point that a lot of these different advocates are in fact contesting. We all want consumer protection and high standards for consumers, and they of course want low costs, high quality and so on. We all want people to have good wages and so on, but they want high costs and so on. There is a conflict. The Cooney report very properly said that, if you make business accountable to all of these things at once, the businessmen are accountable to no-one. If you say, ‘You didn’t do that,’ they say, ‘Oh, yes, but I was in fact looking after this constituency over here,’ and it will be easy for them to find a constituency to which they can attribute whatever action they like.

I therefore have a lot of problems about what has become the modern ethical debate. Because I think the things that are called ethical these days are badly funded, this will turn out to be just a passing fashion. I therefore see that the demands that are made at least on the extremes of this movement are impractical and probably counterproductive, and I am sorry if I have disappointed you.

Senator MURRAY—No, you never disappoint me. I am delighted to be able to have the conversation; in fact, I would like to have much more of a conversation, but I cannot. So thank you very much.

Senator GIBSON—One point you made was your first political point with regard to outside foreign governments. You made reference to some examples from USA entities trying to impose their requirements here in Australia. Could you give us some examples?

Mr Bosch—I am sorry, I cannot really do that. I must admit that I came to this issue yesterday when I put my notes together, and I tried to think of some good examples and I could not. If I go back and turn my mind to it, perhaps I could.

Senator GIBSON—That would be fine. If you could recall some and let us know, we would be pleased.

Mr Bosch—That does lead me to say one more thing in response to Senator Murray. I had considerable worries about supporting the Australian extraterritorial legislation with regard to corruption. I am grateful for his support and all of your support because it was a unanimous thing. I think it was on balance right to say that we ought not have Australians bribing foreign officials, and certainly not claiming them as tax deductions. It worries me because, if we do these things and set this sort of example, others will say that it is all right for them too. When

we come to say, 'We elect an Australian parliament and we want it to legislate for us,' it is going to be much harder to mount that argument. I will try to find some examples for you.

Senator GIBSON—Thank you.

CHAIRMAN—As there are no further questions, thank you very much for your appearance before the committee. The answers you have given to questions have been very helpful for our deliberations.

Mr Bosch—Thank you very much for hearing me.

[10.50 a.m.]

NAHAN, Dr Michael Dennis, Executive Director, Institute of Public Affairs Ltd

Dr Nahan—As we have only a very few moments, I will be very quick in my briefing here. The IPA believes that the Corporate Code of Conduct Bill 2000 is fundamentally flawed and should be rejected outright. There are four points that I would like to make. First, the proponents of the bill in the second reading speech failed to provide hard evidence of systemic inappropriate behaviour by Australian corporations offshore. The examples provided in the bill are limited in number, based on assessments which lack rigour and objectivity and, in some cases, do not support the bill itself.

All the mines—the Ok Tedi mine in PNG, the Freeport mine in Irian Jaya, the Kelian mine in Kalimantan, the Lihir mine in PNG and Esmeralda's mine in Romania—were put forward as examples justifying the bill, and I believe they do not do so. On reflection, all the mines mentioned were subject to rigorous environmental and social impact assessments prior to construction. Their operations have been subject to significant scrutiny in the host country and elsewhere, and they have been subject to the laws of the country they have dealt with. I would first note that they are few in number, but I would also look at the outcome. Esmeralda's mine, which had in place a tailings dam based on Australian standards, was closed by the Romanian government as being in breach of local pollution laws for failing to report and stop pollution leaking into a river. The mine was closed down and Esmeralda, the company, is now in receivership. This bill would do no more.

BHP is fully aware of the environmental problems of Ok Tedi. It probably would have closed the mine some time ago or done something significantly different, except that its joint venture partner, a company fully owned by the PNG government, has told it to do otherwise. The PNG government is fully aware of the problems but has made a choice—a choice similar to the one Australia made with the Snowy River scheme some decades ago. That is that the economic benefits of the continuing operation of the Ok Tedi mine currently outweigh the environmental damage. The Freeport mine does have significant environmental impacts but, again, the government in the country made the trade-off. As for the Kelian and Lihir mines, the claims of extensive environmental damage by the proponents of the bill are simply open to debate.

A second point: the bill will undermine, rather than enhance, the adoption of sound environmental, social and workplace conditions in the undeveloped countries to which many of the firms locate. First, the bill will introduce a new set of assessment procedures and standards that will, firstly, potentially conflict with and override the standards in place in the host country; no mention is made of those standards and procedures. Secondly, and importantly, they are not tailored to the conditions of the host country but those of Australia—and the conditions in Indonesia, Malaysia or wherever differ significantly from Australia. Third, and most importantly, they are administratively complex and operationally difficult, if not impossible. A living wage is impossible to determine in Australia, let alone amongst poor peasants in Indonesia. Finally, they rely on organisations for implementation that simply do not have the capacity or the credibility to assess them.

My third point is that the bill will undermine the sovereignty and rule of law in the host nations and, quite rightly, will antagonise many countries. The bill seeks to impose Australian jurisdiction over the operations of firms in foreign countries, and it seeks to do so without any explicit reference to involvement of the host countries in the establishment and enforcement of those standards. In short, it is a blatant act of imperialism and violates the human rights and self-determination of nations. The fact that so many human rights organisations are supporters of the bill only serves to highlight the need for scepticism about these organisations. Such action is not done at the behest or the agreement of the host countries. Developed nations have repeatedly and clearly stated their disapproval of this type of action. The Seattle meeting of the WTO failed not because of the actions of affluent rioters but because Third World leaders refused to accept the demands of the rioters and some First World government to impose labour, environmental and human rights conditions on trade arrangements—essentially what this bill tries to encapsulate. Many of the Third World leaders are democratically elected and represent their people, and they have said, 'No.' We must listen to them.

Clearly, many underdeveloped countries have difficulties in setting and enforcing proper standards. They lack skilled people, information and technology. Many countries are rife with corruption, disenfranchisement of minorities and weak political institutions. There are severe problems that must be addressed. However, the way to overcome these problems is by providing technical assistance, skills and technology; by facilitating investment by standard setting companies, such as Australians; but, most importantly—and all the literature shows this—by respecting and bolstering local institutions and decision making. You do not improve things by overriding them.

The fourth point I would like to make is that the bill increases the power and responsibilities of third parties. Part 4, section 17 of the bill provides an association of persons whose principal objective includes protection of 'the public interest' to bring action against a corporation based on very vague standards. The problem is that this is essentially a code word for NGOs—which I represent one of, the Institute of Public Affairs. The question is: who are these third parties? Do they act in the public interest? In the interest of what public: the public of Australia or that of the host countries? Are their interests narrow or broad? Do they share the values of the wider community? Are they open and accountable? Do they have credible expertise? After all, the request to assess or determine what is a living wage in Indonesia requires a great deal of expertise. Do they have the required financial and institutional capabilities? These are all questions that must be raised and effectively dealt with prior to even considering the public interest in organisations role in this bill—and I am afraid we do not know this information.

We—the Australian parliament, the proponents of the bill, the Australian community, the government and the community—cannot answer these questions. There is strong evidence that many of the public interest organisations who support the bill and who see themselves playing a role in its implementation are far from suitable. Evidence was given to the committee earlier: when members asked for evidence of inappropriate behaviour, many of the proponents admitted, quite rightly—and some of these are very well-known organisations—that they do not have the research or expertise to determine if that is the case. Then how are we going to be able to go to Indonesia and assess whether we have a firm that operates and provides a living wage and then take action against them?

The bill therefore provides access to organisations to take actions as third parties and to participate as to the vetting of these organisations that do not necessarily have the capacity to do so; but, more importantly, we are allowing third parties to become involved in the regulation of behaviour in countries who, in that process, will significantly undermine the political institutions and the decision making in those countries.

In summary, firstly, the bill is based on an unsubstantiated premise that there is systemic failure in Australian firms; and I do not think there is substantial evidence for that. Secondly, it attempts to usurp the rights of sovereign nations, which we should violate with great reluctance. Thirdly, the bill gives roles and powers to organisations which are not necessarily transparent and do not have the capacities and skills to undertake those roles. As such, I think that the bill should be rejected.

CHAIRMAN—Thank you very much, Dr Nahan.

Senator MURRAY—Could you let us know who your membership is, or how you are funded, or what the basis of your NGO status is?

Dr Nahan—We have been around since 1943. We are a nonprofit organisation. We have 2,500 members. Our membership base is very diverse. We do receive money from many large corporates but we also receive money from many individuals and small firms. No firm provides us with over seven per cent of our funding. No sector provides us with over 15 per cent of the total funding base.

Senator MURRAY—I do not like tags, but you have a public reputation of being on perhaps the laissez-faire side of economic thinking—very market orientated and so on.

Dr Nahan—That is a fair statement.

Senator MURRAY—In which case, your philosophical direction would incline you against this kind of legislation anyway. The question that members of the committee are asking witnesses is: are there problems of the kind that are identified by this bill; and, if there are and you accept that there are, do you see that perhaps there are alternative means of dealing with them? For instance, an earlier witness today said a preferred method would be a mandatory reporting of codes of conduct, where they existed. If you did not have them, it did not matter. However, if you did have them, you would have to report on it. Others, such as Mr Bosch himself, have pursued particular aspects of international behaviour, such as corruption. So they recognise the problem but only deal with part of it. With regard to those areas which this bill attends to—which in the index are listed as environmental standards, health and safety standards, employment standards, human rights standards—are there any areas at all that you acknowledge Australian legislation should have regard to?

Dr Nahan—Human rights, the issues of corruption, perhaps the issue that you raised earlier of sexual exploitation: yes, you could come up with issues where Australian laws should govern the activities of corporations and Australian individuals. However, this bill goes way beyond that. For instance, it says that firms should be required to pay a living wage—defined as providing an income for a family of four, I believe. This would be very difficult for a firm that does assembly work on electronic goods or assembles shoes, where the employer is a single

woman who has no family responsibility and is actually contributing in a minor way to the family back home, perhaps in the kampong or village. This would conflict with the employment of those people and would greatly undermine her livelihood and wellbeing, and violate her human rights.

I think the IPA's major submission is that Australians should assist in providing improved work conditions—labour, wage rates, human rights and environmental conditions are essential issues. Transfer of technology is a major area, but not done by the heavy hand of Australian regulations overriding the behaviour and the sovereignty of nation states: the best way to do it and the way we have traditionally done it is to provide technical aid, both in terms of human capital and technology, and to provide leading companies to do that. In other words, the problem lies in the countries overseas, and that is where the problem should be solved. We know that the major source of corruption is inadequate political institutions and the disenfranchisement of people, not so much in Australia but offshore. We have to bolster those directly, not override them by laws in Australia, and have those facilitated by public interest organisations that have no direct involvement or association with the political milieu of those countries.

Senator MURRAY—Why is it all right for Australian law to say it is not legal and not right for an Australian citizen in a foreign country to have sexual relations with a child between, say, the ages of 12 and 16, when that country may say it is all right to have sexual relations with a child of between 12 and 16? Isn't that, in your phraseology, trying to override the sovereignty of that country? Aren't critics of this sort of approach being overly selective about the areas where it is right to enforce standards on Australians and those where it is not?

Dr Nahan—As you said earlier, I think, you have to draw boundaries on these things. As for murder, or sexual exploitation of children, many of the countries actually do have laws about these but they are just not enforced: in the Philippines, for instance. Other types of activities governments say are out of bounds clearly. But the bill here deals with issues that are not subject to debate. They are issues about wages and conditions of employment that Australia would expect to regulate by itself, without the laws of another nation impinging on them. We should respect the rights of Indonesia, the Philippines and other places to determine these types of issues by themselves.

Senator MURRAY—What I hear when you describe it that way is a criticism of the content of the bill; but in your written submission you seem to dismiss the intent of the bill. I would suggest to you that, in the way you express yourself, you would accept a narrower version of this in areas which might prove appropriate. We have started with sex and murder, which are really rules of law. But there are other rules of law which are internationally acceptable. If we deal with labour standards, for instance, I understand very clearly your criticisms of the living wage, and there is much validity to what you express there, because of the difficulty of enforcement, analysis—we understand all of that. For instance, on page 5 of the bill, it says:

> ***minimum international labour standards*** means standards contained in the following International Labor Organization Conventions as agreed under Australian law ...

And it lists eight of them. Those are conventions which the international community has agreed to and Australian law has ratified. All this bill is saying is that those International Labor

Organisation conventions agreed by international law and ratified by Australian law should be applied in those corporations. Would you disagree with that, and why?

Dr Nahan—If those agreements are ratified by Australia and then by many nations, and ratified by the country where the operation takes place, I see no problem with that. In fact, it is redundant. If, in fact, for whatever details, the host country has not ratified it, I see no reason why Australian rules should override the operations in that country.

Senator MURRAY—Why would it be redundant, to use the sex example again—and I use that because it is a very easy one to relate to—if it is a question of enforceability? Isn't it the case that in many countries they have laws which they do not enforce, which a company could quite easily do itself because it is a matter of proper employee practice, for instance, and that sort of thing?

Dr Nahan—Again, with respect to the way to solve the lack of enforcement, there is the issue: does the country have adequate protection? There is the issue of self-determination: if it does not have adequate laws or, more importantly, enforcement, particularly through corruption, the way to deal with that is to bolster the political institutions in that country and not override them. By overriding them, you undermine them and you also, through these types of legislation, inhibit them.

I go back to the central point. Our complaint about the bill is that, essentially, there are issues where perhaps a nation needs to regulate the behaviour of their corporations and people offshore. This bill focuses on areas that largely should be determined by the nation state itself. Yes, there are international agreements that many nations adhere to, and if they have signed them they should accept them. There is a problem of enforcement and corruption, but the way to deal with that is directly in the country by bolstering their local institutions, not overriding them.

Senator MURRAY—Another example is the corruption example. I would expect that nearly all countries have laws against corruption—against bribery, for instance—yet the Australian parliament and the Australian government, quite rightly, in my view, and that of advocates such as Mr Bosch, said, 'Regardless of the fact that in theory corruption is outlawed everywhere, we know it isn't and we want to stop Australian companies bribing foreign officials; or, if they are going to do so, at least they're not going to get a tax deduction for it.' I would assume—perhaps you can answer in the negative if that is so—your institute said, 'Well, that's a fair enough approach to take.'

Dr Nahan—Yes.

Senator MURRAY—The difficulty is never with the good corporate citizen. I think people who promote these sorts of bills say that there are bad corporate citizens, and they do take the opportunity, where there is non-enforcement of environmental laws, labour laws, human rights laws, or corruption laws, to take advantage of them, and the only way to sort them out is to have some Australian legislation. Is it your view that not one of the fields outlined here deserves that sort of attention?

Dr Nahan—Some of the statements in some of the areas are very wide ranging. I would have to go through all the various international agreements that they refer to in certain cases. But the central point is that the focus of the bill deals with issues outside sex exploitation, corruption, murder and other issues that should be dealt with explicitly and appropriately by themselves. This deals with issues of environmental assessment, work relations, work and safety, which should be dealt with on the ground in the specific firms, in the country at hand, and adjudicated by the process of law in those countries, not by another nation state, and not by independent organisations who have questionable accountability, representative status and capacity and skills.

Senator COONEY—As I understand it, this bill is not trying to override the laws of the overseas country. It is just trying to impose heavier obligations on a company than those countries might do. In other words, it is domestic in the sense that it deals with Australian companies in respect of actions that they do overseas. That is true, but they deal with them in Australia. I was wondering: if that were the situation, how can we say that this is trying to impose our laws on countries overseas? It is imposing our laws on companies that are overseas and making it more onerous for them than the local laws do, but it is not really imposing laws on another country, is it?

Dr Nahan—It is imposing Australian laws on companies operating in a different country and by setting a higher standard, as you say, by overriding the existing ones. Take the Ok Tedi project. BHP has made it quite clear that they would like to pull out or shut down. They are reluctant to do so because their joint venture partner, the PNG government, has made a decision that it will continue to operate the mine with or without them—that is, the same outfit. This one would, I think, quite clearly, argue that BHP should pull out. In other words, it was an attempt to impose on that company—BHP—Australian rules rather than PNG rules. There is a debatable point. Clearly the Ok Tedi mine is creating pollution in the Fly River. There is no doubt about it. But the PNG government—a democratically elected government that is supported with $300 million a year by the Australian government—has made a decision that the pollution is worth the trade-off for economic value, particularly given that the mine itself provides 30 per cent of the country's exports. You can go into one example after another of some of the examples put forward in reference to this bill. Another issue is that, in Indonesia and other places, they have certain types of conditions about minimum wages, sometimes not adhered to. Nonetheless, they might be on a firm by firm or industry by industry basis. This bill specifically refers to a living wage, which is not a concept, to my knowledge, in any of those countries. It will try to impose on Australian employers conditions specified in Australia that are against, and conflict with, the minimum wages or conditions provided in those countries at hand.

Senator COONEY—Yes, but it wouldn't overrule the laws, would it, because any penalty that is imposed on the companies is imposed in Australia? Are you saying that the effect of these laws would be to make different standards for the companies to operate under than for other companies and that therefore that is bad for the country, bad for the company or bad for both?

Dr Nahan—Yes. It is specifying conditions that apply to Australian companies overseas that potentially differ from the rules and laws in those countries and the Australian company is required to adhere to Australian laws rather than domestic laws. In certain cases some of the conditions in those countries might even be above the Australian standards. You would expect

that in Singapore for environmental reasons. Therefore, there would probably be no binding issue. The simple intent is to say whether the laws themselves and the governance of laws overseas are up to Australian standards and to impose Australian standards on those operations. That is the intent. The effect, to the extent that it has any effect, will be to override the rules and conditions applied in those countries.

Senator COONEY—It would not override so much as have an effect on the Australian companies. Isn't that the position—that it is harsher than the other non-Australian companies in that country would have to put up with? I am not sure that I can see that it overrides the country itself.

Dr Nahan—It will override the laws as applied to the Australian company—for instance, minimum wage laws is one. This bill would undoubtedly provide a higher minimum wage bill for employees in Indonesia and, therefore, for Australian companies, the effective minimum wage bill would be higher than if they applied domestic laws.

Senator GIBSON—I should declare my interest as a member of Mike's organisation. Congratulations to you and Gary Johns for putting a submission to the committee and thank you for coming this morning.

Senator COONEY—I think Senator Gibson should go down there and subject himself to questioning!

CHAIRMAN—I also thank you for the submission. It puts a very strong and effective point of view. This morning, in earlier evidence, we had two options put to us by the Australian Institute of Corporate Management. One was what is envisaged in this bill, whereby you legislate standards and have them imposed by legislation. Their alternative model was that you legislate to require companies to report on whether they do have a code of standards, but the actual code of standards is not made mandatory. Obviously, a third option is to leave the whole area as a voluntary situation. Could you highlight which of the three options you think is the most practical and effective.

Dr Nahan—First there is the issue of the broad coverage of this bill. Let us take the environment. I support the large corporations declaring in full the assessment of their environmental impact statements—which most of them do—and making that readily available to the public. I think there is a question about access; I think that is an issue. Then there is the issue of how they assess those and how they operate according to standards. My own argument is that voluntary is the best and the most malleable approach, and it is much more flexible. In this process you also have to take in the conditions, the different environments and the trade-offs in the country at hand. For instance, in Irian Jaya, the amount of environmental impact that a project can allow is different from in New South Wales, mainly because there is nothing in Irian Jaya except the natural state, and the environment has a greater capacity to absorb things.

The second thing is that the people in Irian Jaya have fewer opportunities, fewer alternatives and less potential economic growth and, therefore, are probably more willing to take a trade-off on environmental damage. Codes of conduct have to allow for local decision making and the consideration of local issues. If we get into the business of mandating those, we get into the business of overriding those, particularly when we have codes of conduct for Europe, North

America, Australia and a whole range of other countries. In other words, I think it really is up to the industries and the companies themselves to determine those things, and to make sure that they are flexible and take care of the local conditions. The best way to make sure they do not exploit that is disclosure and debate.

CHAIRMAN—As there are no further questions, I thank you for your appearance before the committee and for the submission you presented on behalf of the Institute of Public Affairs.

Committee adjourned at 11.18 a.m.