CHAPTER 3

EXAMINATION OF EVIDENCE

Overview of the Committee's Inquiry

3.1 The Committee found that there was a diversity of views on the Corporate Code of Conduct Bill 2000. Many submitters and witnesses, for instance, expressed the view that enacting the current Bill was warranted by the alleged failure of some Australian companies operating overseas to adhere to standards that members of the general Australian public would find acceptable.

3.2 The Mercy Foundation was typical in this regard. The Mercy Foundation cited in its submission the problems at the Baia Mare Mine in Romania in January 2001, and issues concerning the Ok Tedi Mine in Papua New Guinea, both of which were referred to in the Bill's second reading speech.[1] According to the Mercy Foundation such problems demonstrated a "need" for legislation such as the current Bill.[2]

3.3 Other witnesses and submitters, such as the Institute of Public Affairs, regarded the examples cited of Australian corporate failure overseas as nothing but a "scandal of unrelated diatribes".[3] The Institute's Executive Director, Dr Mike Nahan, pointed out that the examples cited were "few in number", provided no "hard evidence" of systemic failure, and therefore, according to Dr Nahan, did not justify the enactment of the current Bill.[4]

3.4 Mr Henry Bosch, currently Chairman of Transparency International and a former Chairman of the National Companies and Securities Commission, stated in evidence that the current Bill, if enacted, would impose costs on Australian companies, thereby disadvantaging them. The Bill even, according to Mr Bosch, may work to the detriment of those it ostensibly was seeking to aid if, as a result of increased cost structures, Australian companies withdrew investment from developing nations. Mr Bosch accordingly recommended that the Bill be "abandoned, buried and forgotten".[5]

3.5 There is, therefore, no consensus on whether or not the Bill should be passed by the Parliament. There is not even consensus on whether or not the Bill would prove useful to those whom it aims to benefit. The purpose of this Chapter is to discuss the

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1 Second Reading Speech, Senator V. Bourne, 6 September 2000, Senate Hansard, p 17,457.

2 Mercy Foundation, Submission No. 18.

3 Institute of Public Affairs, Submission No. 43, p 1.

4 Committee Hansard, 8 May 2001, p 165.

5 Committee Hansard, 8 May 2001, p 158.

issues regarding the Bill's operation raised before the Committee by both those in favour of the Bill and those who oppose it.

Objects of the Bill

Imposition of Standards

3.6 The Bill seeks to impose "environmental, employment, health and safety and human rights standards"[6] on the conduct of certain Australian corporations operating overseas. It is clear from the Bill's second reading speech that the Bill' objects are seen by the Bill's promoters as the means to forestall "unacceptable" conduct on the part of Australian corporations overseas, and allow an avenue for plaintiffs to seek redress when "unacceptable" conduct occurs.

3.7 The Australian Chamber of Commerce and Industry commented in its submission that the stated objects of the Bill assume that Australia has some sort of "moral ascendancy" in relation to standards of corporate conduct and that therefore Australian standards should be imposed everywhere. The Australian Chamber of Commerce and Industry likened this to a "one size fits all" mentality; a mentality which failed to take account of the "specific circumstances of individual (especially developing) countries".[7]

3.8 Ms Sharan Burrow, President, Australian Council of Trade Unions, a supporter of the Bill, commented in evidence that Australia's industrial relations legislation "is at odds with and falls far short of international law in recognising core labour standards, particularly the right to collective bargaining."[8] This tends to confirm the thesis put forward by the Australian Chamber of Commerce and Industry, that Australia possesses no "ascendancy" in the matter of standards. The Committee notes that, this being the case, caution must be exercised before Australia seeks to impose its standards elsewhere.

Scope of the Bill

3.9 The Bill aims to regulate "trading or financial" corporations formed within the limits of the Commonwealth, holding companies of such corporations, subsidiaries of such corporations, and subsidiaries of holding companies of such corporations.[9]

3.10 The Constitution states, at section 51(xx), that the Commonwealth has the power to make laws with respect to:

> Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.[10]

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6 Corporate Code of Conduct Bill 2000, subclause 3(1).

7 Australian Chamber of Commerce and Industry, Submission No. 1, p 2.

8 Committee Hansard, 14 March 2001, p 11.

9 Corporate Code of Conduct Bill 2000, clause 4.

3.11 The current Bill has quoted directly from this section of the Constitution, but the exact nature of the power conferred on the Commonwealth by section 51(xx) is unclear.

3.12 A foreign corporation may be readily identified as one which is incorporated in a jurisdiction outside the Commonwealth of Australia. Entities incorporated within Australia must be characterised as "trading or financial" corporations before they come within the purview of Commonwealth legislation. However, the precise meaning of the phrase "trading and financial" has never been elucidated by the judiciary.

3.13 In *R v Trade Practices Tribunal; Ex parte St George County Council* (1974),[11] the High Court held that the original purposes an entity was incorporated to achieve, as opposed to its current activities, determined whether or not that entity was a "trading" corporation. Despite this, in *R v Federal Court of Australia; Ex parte WA National Football League* (1979),[12] the High Court held that it was the current activities of an entity, not the purposes it had been formed for, that determined if it was a "trading" corporation. There would therefore seem to be some doubt as to how a "trading or financial" corporation might be discerned.

3.14 The difficulty in relation to the term "trading or financial corporation" is a long-standing definitional problem not specific to the current Bill.

3.15 Another problem, which is specific to the Bill, exists with the Bill's intended application. Mr Ross Cameron MP, noted that the Bill would apply to "proprietary companies as well as public companies".[13] The Bill may therefore apply to a considerable number of companies, especially if the threshold regarding the number of persons employed by a corporation (referred to below, paragraph 3.20), were to be lowered.

3.16 The scope of the Bill is thus very wide and, because of the operation of clause 4 of the Bill, its scope may be so wide as to be unworkable. Clause 4 of the Bill seeks to bring within the Bill's provisions:

> (a) a trading or financial company formed within the limits of the Commonwealth; or
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> (b) a holding company of such a corporation; or
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> (c) a subsidiary of such a corporation; or

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10 Constitution, section 51(xx).

11 *R v Trade Practices Tribunal; Ex parte St George County Council* (1974) 130 CLR 533.

12 *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190.

13 Committee Hansard, 15 March 2001, p 79.

(d) a subsidiary of a holding company of such a corporation.[14]

3.17 The holding company of an Australian company may not of course itself be an Australian company. Mr Benjamin McLaughlin, Member, Corporations Law Committee, Australian Institute of Company Directors, advised the Committee that, as a result of the way the Bill had been drafted, the Bill would seek to impose standards on, for example, General Motors, the large American corporation. Mr McLaughlin presumed that this was a "technical drafting error".[15]

3.18 The Committee is uncertain if this is an error or not. If it is not an error then the intended scope of the Bill is such that the Bill is unworkable since it basically would attempt to impose standards of behaviour on foreign companies operating in foreign jurisdictions.

3.19 Redrafting the Bill could obviate this problem but, and Mr McLaughlin made this evident to the Committee, any redrafting of the Bill to avoid it covering foreign corporations would produce a situation where "there would be fairly easy ways for companies to ensure they did not get caught by the Bill".[16] The most obvious, and also relatively easy, way for a corporation to then avoid the Bill would be to incorporate outside Australia.

Corporations with over 100 employees

3.20 The use by the Australian Chamber of Commerce and Industry of the phrase "one size fits all" (reported above at paragraph 3.7) may give the impression that the corporate regulations proposed in the Bill would apply universally. However this is not the case. The Bill would only apply to "Australian corporations or related corporations which employ more than 100 persons in a foreign country".[17] Many submitters and witnesses before the hearing took issue with this aspect of the Bill.

3.21 Senator Murray stated during the public hearing of 14 March 2001 that

> a core consideration of this Bill would be, firstly, that it is impossible to regulate or investigate small operations or even large operations, probably in many companies; and, secondly, that there are only certain companies that are equipped to be able to do this kind of reporting or that have a significant impact in the countries concerned.[18]

3.22 Ms Linda Rubenstein, Senior Industrial Officer, Australian Council of Trade Unions, suggested that the Bill at "first apply to at least reasonably sized

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14 Corporate Code of Conduct Bill 2000, clause 4.

15 Committee Hansard, 15 March 2001, p 121.

16 Committee Hansard, 15 March 2001, p 122.

17 Corporate Code of Conduct Bill 2000, subclause 3(1).

18 Committee Hansard, 14 March 2001, p 14.

businesses",[19] the apparent implication being that the Bill's purview would later be extended to smaller companies.

3.23 Mr James Ensor, Advocacy Manager, Community Aid Abroad – Oxfam Australia, stated that many of the corporations his organisation "engaged with in terms of the work of our mining ombudsman" employed "far smaller numbers of people" than 100.[20] Mr Ensor stated that these companies were engaged in extractive industries. This suggests to the Committee that even if mining companies are to be covered by the Bill then the threshold of 100 employees needs to be lowered.

3.24 In evidence Mr Brad Pragnell, Acting Director, Intellectual Capital, Australian Society of Certified Practising Accountants (CPA Australia), labelled the 100 employee threshold as "arbitrary".[21] A threshold of 50 employees is that established for the large/small test specified in the Corporations Law.[22] Mr Arthur Dixon, Director, Accounting and Audit, CPA Australia, noted "[t]here is nothing more confusing to business than to have 50 in one bit of legislation, 100 in another bit and 200 in another."[23] For the sake of consistency then one could argue that the threshold of 100 employees should be lowered to 50. CPA Australia itself made this suggestion in its submission.[24]

3.25 Community Aid Abroad also suggested that the threshold of 100 employees should be lowered to 50.[25] A threshold of only 20 employees, however, was suggested by Amnesty International Australia[26] and Fair Wear[27] among others.

3.26 Ms Lisa Wriley, Campaign Worker, Fair Wear, stated in evidence that the threshold needed to be lowered from 100 employees to 20 because the threshold of 100

> lets too many companies through the net which still have large-scale operations but, because of subcontracting, certainly do not have a huge number of employees overseas.[28]

3.27 The Bill deals with relatively weighty matters, for example, it requires corporations to "take all reasonable measures to prevent any serious threat to public

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19 Committee Hansard, 14 March 2001, p 14.

20 Committee Hansard, 14 March 2001, p 51.

21 Committee Hansard, 14 March 2001, p 64.

22 Corporations Law, section 45A.

23 Committee Hansard, 14 March 2001, p 68.

24 CPA Australia, Submission No. 29, p 1.

25 Community Aid Abroad, Submission 10, p 24.

26 Amnesty International Australia, Submission No 7, p 7.

27 Fair Wear Campaign, Submission No. 35, p 3.

28 Committee Hansard, 15 March 2001, p 85.

health".[29] It is hard to rationalise why the Parliament would legislate in such a way that only some Australian corporations operating overseas are required to refrain from threatening public health.

3.28 It is understandable, although nonetheless discriminatory, that larger rather than smaller corporations should be required to report on their activities because, as Senator Murray noted, larger corporations are better "equipped" to report on their activities. Perhaps therefore a threshold should be imposed in relation to a corporation reporting on its activities, but there should be no threshold in connection with corporations observing at least some of the standards of behaviour specified in the Bill.

3.29 Ms Wriley observed (reported above at paragraph 3.26), that a corporation can sub-contract its activities overseas. A corporation could thus avoid being subject to the measures in the Bill by the stratagem of ensuring that it never has more that 100 persons employed directly by it overseas.

3.30 The Bill apparently sought to defeat such a subterfuge by specifying that Australian corporations or "related corporations" which employed more than 100 persons would be subject to the Bill.

3.31 The Bill provides no direct definition of what is meant by "related", although it does expressly include within its operation holding companies of a corporation, subsidiary companies of the corporation and other subsidiaries of the holding company.[30] The subsidiaries of an Australian corporation operating overseas would thus be subject to the Bill if they in aggregate had more than 100 employees. It would therefore be futile for a corporation to attempt to avoid provisions of the Bill by dividing its workforce among a number of subsidiaries.

3.32 A contractual relationship between a corporation and a sub-contractor, by contrast, cannot be interpreted to mean that the corporation and its sub-contractor are "related", since if a purely contractual arrangement could evidence a relationship for the Bill's purposes then it is difficult to see how the Bill's application could be anything other than universal. Contracts between a corporation and its suppliers, for example, could be taken as meaning that the suppliers were "related" to that corporation, and the suppliers' employees should thus be counted among the employees of the corporation. This obviously cannot have been intended. Sub-contractors therefore would not be subject to the operation of the Bill.

3.33 The fact that sub-contractors are not covered by the Bill has its own set of problems. It could result in unintended consequences in that Australian corporations operating overseas might be encouraged to dismiss the workers that they employ

29 Corporate Code of Conduct Bill 2000, subclause 12(2).

30 Corporate Code of Conduct Bill 2000, clause 4.

directly and contract out the functions previously undertaken by those workers to sub-contractors who are under no obligation to abide by the measures in the Bill.

3.34 The corporations most likely to follow this course of action, regrettably, would be those most likely to be operating in a manner incompatible with the Bill's objects. The Bill therefore would not protect those workers and environments most at risk from unethical corporate behaviour.

3.35 Ms Linda Rubinstein, Senior Industrial Officer, Australian Council of Trade Unions, said in evidence that the Bill

> should also apply to Australian corporations that contract out their manufacturing to local bodies—by doing that, they should not be able to abrogate any responsibility for the activities of their subcontractors.[31]

3.36 The Committee suggests that it is difficult to avoid the conclusion that unless the application of the Bill is extended in the manner suggested by Ms Rubinstein, the Bill would be ineffectual at best. If the Bill is extended in the manner suggested, however, corporations appear to face significant costs in requiring, and ensuring, that their foreign sub-contractors comply with the Bill.

Extraterritorial Operation

3.37 Ms Sharan Burrow, President, Australian Council of Trade Unions, asserted that

> Australian corporations that are subject to laws in this country should be responsible enough and committed enough to decent and dignified operations to accept that those laws should operate internationally.[32]

3.38 The Committee notes, however, that Australian laws do not ordinarily "operate internationally", and the fact that this Bill would operate in such a way, was a cause of concern to many. Mr Wells of the Business Council of Australia testified that

> [f]rom an operational perspective, industry is concerned about the practicalities of complying with laws that have extraterritorial application. Were conflict to arise between the legal obligations of both the Australian and the host country jurisdictions, the process by which this would be resolved is unclear.[33]

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31 Committee Hansard, 14 March 2001, p 14.

32 Committee Hansard, 14 March 2001, p 9.

33 Committee Hansard, 14 March 2001, p 9.

3.39 The submission from BHP was more forthright than Mr Wells. It declared unambiguously that "[t]he extraterritorial nature of the legislation will give rise to conflicts and we believe it will prove unworkable in practice".[34]

3.40 The Committee believes that the extraterritorial operation of the Bill is its most problematic feature, and yet extraterritoriality is intrinsic to the Bill. Indeed, this Bill, unlike the vast majority of bills put before the Parliament, is designed to operate only "outside Australia".[35]

3.41 The Committee has decided, therefore, to discuss the issue of extraterritoriality, at some length, because of its centrality to the Bill, and because it was raised as an issue of concern by many submitters and witnesses without any consensus becoming apparent.

3.42 In some respects extraterritoriality already exists in relation to Australian corporate conduct overseas, and this, in certain circumstances, makes the current Bill superfluous. This Committee also discusses this issue below.

Development of Extraterritoriality

3.43 Each nation is generally assumed to be sovereign in that it has sole right to make law for those natural persons and corporate entities within its jurisdiction. The nature of extraterritoriality is that a nation claims jurisdiction over persons or corporations physically located in the territory of another nation.

3.44 English law was received formally into parts of Australia (namely New South Wales and Tasmania) in 1828,[36] and in English law it had long been affirmed, for example in the *Act in Restraint of Appeals 1533* (Eng.), that the "authority of ... foreign potentates" was null in England.[37] The legal system of the sovereign English nation therefore recognised no law in England but English law and therefore English courts would have rejected the notion that enactments of foreign powers could have any extraterritorial effect in England.

3.45 In *Somersett's Case* (1772), Chief Justice Mansfield found that slavery "must be recognised by the law of the country where it is used".[38] The failure of England's laws to recognise slavery therefore meant that a Jamaican slave in England was free. However, England's laws in no way operated to free slaves residing in Jamaica, even though Jamaica was a British colony. The decision in *Somersett's Case* thus indicates that extraterritoriality was not a feature of English law even where the different jurisdictions concerned were both under the British crown.

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34 BHP, Submission No. 39, p 1.

35 Corporate Code of Conduct Bill 2000, clause 4.

36 *Australian Courts Act 1828* (UK), section 24.

37 *Act in Restraint of Appeals 1533* (England).

38 *Somersett's Case* (1772) (Lafft's Rep., 1; 20 Howell's State Trials, 79).

3.46 Despite the previous lack of legal consciousness of extraterritoriality, the idea of extraterritoriality gained adherents in the nineteenth century. The Supreme Court of the United States in *Dred Scott v Sandford* (1856),[39] which coincidentally also concerned slavery, found that persons who were slaves in one state could not become free by residing in a state that expressly forbade slavery. The laws of the slave states thus reached extraterritorially into free states.

3.47 The decision in *Dred Scott v Sandford* (1856) was not an isolated manifestation of extraterritoriality. Indeed the notion of extraterritoriality gained considerable currency in the latter half of the nineteenth century. During this period it became common for westerners residing in various countries, mainly in Asia, to be subject extraterritorially to the laws of the nations of which they were citizens, not the laws of the nations in which they actually were located.[40]

3.48 An expression of the rise of extraterritoriality is the 1885 treatise on British constitutional law by A.V. Dicey which asserted that Parliament had

> the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.[41]

3.49 Following Dicey, the Parliament of the United Kingdom could make laws that operated extraterritorially and the English legal system would take no cognisance of the laws of other nations which might attempt to override England's extraterritorial laws.

3.50 Late nineteenth century legal theorists had no doubt that the British Parliament could enact laws which operated extraterritoriality, but there was also no doubt that British colonies did not share this power. The case of *Macleod v Attorney-General of New South Wales* [1891][42] demonstrated this.

3.51 *Macleod v Attorney-General of New South Wales* [1891] concerned one John Macleod who had married in Sydney in 1872. While his wife still lived Macleod married again in the United States. The Privy Council held that Macleod, although ostensibly a bigamist, could not be prosecuted under New South Wales law because the law of the colony of New South Wales was inoperative everywhere outside its territorial limits. The legal system of New South Wales thus could take no cognisance of a marriage contracted in an American jurisdiction.[43]

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39 *Dred Scott v Sandford* 60 U.S. 393 (1856).

40 For example, the Treaty of Bogue (8 October 1843) between the United Kingdom and Chinese Empire required British subjects in China to be subject to English law and never to Chinese law.

41 Albert Venn Dicey, *A Digest of the Law of England: with Reference to the Conflict of Laws*, second edition, 1908.

42 *Macleod v Attorney-General of New South Wales* [1891] AC 455.

43 *Macleod v Attorney-General of New South Wales* [1891] AC 455.

3.52 It was only by virtue of the *Australia Act 1986* (Cth) that the former British colonies in Australia, now states of the Commonwealth, were given the power to enact laws with "extra-territorial operation".[44] As a result of the Australia Act there is now no doubt that all Parliaments in Australia have that power that Dicey indicated the Imperial Parliament had in the late nineteenth century, namely the power to legislate extraterritorially.

3.53 The latter half of the nineteenth century was the high point of European imperialism. Mr Brent Davis, Director, Trade and International Affairs, Australian Chamber of Commerce and Industry, perhaps alluding to nineteenth century European imperialists, and the use they made of extraterritoriality, labelled the Bill currently under examination as "basically a form of cultural imperialism".[45] Similarly Dr Nahan of the Institute of Public Affairs termed the Bill a "blatant act of imperialism".[46]

3.54 According to Mr Davis the Bill's rationale unmistakably implied that "the Australian way is the best way and others should ostensibly conform with [Australia's] view of the world."[47]

3.55 Mr Davis stated that

> [t]he bill says to foreign nations that, 'We do not regard your standards as adequate, and we will ensure our firms do better than you require of them. We will mandate higher standards than you will for yourselves'.[48]

3.56 Mr Wells of the Minerals Council of Australia concurred with the view of Mr Davis, stating that the provisions in the Bill were clearly "implying that local standards are either inferior, inadequate or somehow inappropriate."[49] Mr Bosch went so far as to advise that he would not be surprised if the Bill were regarded overseas as "arrogant, patronising, paternalistic and racist".[50]

3.57 Other witnesses, such as Mr James Hobbs, Chief Executive Officer, Oxfam Community Aid Abroad, specifically rejected as "specious" the suggestion that the Bill was a manifestation of imperialism. According to Mr Hobbs the Bill was about ensuring that Australian companies were "behaving properly" overseas. Mr Hobbs, moreover, declared the Bill to be desired by persons who had been negatively affected

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44 *Australia Act 1986* (Cth), subsection 2(1).

45 Committee Hansard, 14 March 2001, p 29.

46 Committee Hansard, 8 May 2001, p 166.

47 Committee Hansard, 14 March 2001, p 29.

48 Committee Hansard, 14 March 2001, p 32.

49 Committee Hansard, 14 March 2001, p 16.

50 Committee Hansard, 8 May 2001, p 159.

by the activities of Australian companies overseas because, according to Mr Hobbs, those people "want protection from irresponsible company behaviour."[51]

Perceptions of the Bill's extraterritoriality

3.58 During the Committee's hearings several witnesses commented on whether the Bill effectively would diminish the national sovereignty of other nations, with Australia legislating to determine what constitutes "behaving properly" in other countries so as to protect persons who are citizens of, and resident in, other nations.

3.59 Senator Murray was adamant in asserting that Australia's enactment of a Bill that "requires that appropriate health and safety or environmental standards are maintained in [an Australian] company" would not infringe the national sovereignty of other nations. Senator Murray pointed out that the current Bill in no way would affect "the sovereign right of nations to use DDT or pour cyanide into their rivers or whatever", it merely would prevent Australian companies from taking part in such dubious activities.[52]

3.60 Likewise Senator Cooney made the point that the Bill does not attempt to disturb the legal regimes of other nations, but merely seeks to set minimum standards for Australian companies.[53]

Australian perceptions of extraterritoriality

3.61 Mr Davis stated that the Australian Government had opposed the attempts of other nations to impose their standards extraterritorially for the past "25 years". Mr Davis claimed that Australians "bridle at" the thought that they should have to abide by the extraterritorial laws of other nations.[54] Mr Davis is correct, except in that Australia's opposition to other nations proclaiming extraterritoriality in Australian jurisdictions goes back further than 25 years.

3.62 Mr Frank Brennan MP, the member for Batman, stated in the House of Representatives on 28 May 1942 that the then recent

> trial of a person accused of murder in this country before a tribunal set up by a foreign country caused a severe shock to every thinking person who is interested in the maintenance and integrity of the British legal system.[55]

3.63 Mr Brennan went on to say that as the offence in question was alleged to have been committed in Australia against Australian citizens, the offence was therefore committed "against the peace, order, and good government of this country

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51 Committee Hansard, 14 March 2001, p 49.

52 Committee Hansard, 14 March 2001, p 32.

53 Committee Hansard, 8 May 2001, pp 170-171.

54 Committee Hansard, 14 March 2001, p 29.

55 Parliamentary Debates, House of Representatives, 28 May 1942, p 1792.

[Australia]". Those seeking justice thus were "entitled to look for the vindication of our law."[56]

3.64 Mr Archie Cameron MP, the member for Barker, disagreed with Mr Brennan. Mr Cameron pointed out to the House of Representatives that if his colleague's objections were heeded, and foreign citizens who committed crimes in Australia were tried always under Australian law, then it followed that Australians who committed crimes in other jurisdictions would be subject to the law of those jurisdictions. Mr Cameron pointed out that, for example, Australians in Egypt who were alleged to have committed crimes would be subject to trial by Egyptian law, an outcome that Mr Cameron asserted "would be absolutely preposterous."[57]

3.65 Mr Cameron's aversion to subjecting Australians to the rigours of Egyptian law implies a view that Egyptian law was somehow inferior to Australian law. This supports Mr Wells' contention that intrinsic to the notion of extraterritoriality is the idea that the laws of some nations are "inferior, inadequate or somehow inappropriate".[58]

3.66 Mr Brennan's reaction in 1942 to the laws of a foreign power operating extraterritorially in Australia indicates that Australians, as Mr Davis remarked, "bridle at" attempts by other nations to impose their laws extraterritorially in Australian jurisdictions, because implicit in such attempts is the notion that Australian laws are "inferior, inadequate or somehow inappropriate".

3.67 Several witnesses suggested that the current Bill therefore could cause other nations to "bridle at" what might be perceived as Australian paternalism. This perception of Australian paternalism may cause difficulties for Australian companies overseas. Mr Bosch even suggested that other nations might actively retaliate against Australian interests overseas.[59]

3.68 Ms Ingrid Barnsley, however, in her submission on behalf of the Centre for International and Public Law, Australian National University, specifically rejected the idea that the Bill was "paternalistic".[60] Ms Barnsley argued that

> [t]he standards embodied in the Corporate Code of Conduct Bill are based upon fundamental principles of human and labour rights and environmental protection (the [Universal Declaration of Human Rights], the [International Labour Organisation's] Declaration on Fundamental Principles and Rights at Work and the Agenda 21 Principles). These standards have been accepted

56 Parliamentary Debates, House of Representatives, 28 May 1942, p 1792.

57 Parliamentary Debates, House of Representatives, 28 May 1942, p 1798.

58 Committee Hansard, 14 March 2001, p 16.

59 Committee Hansard, 8 May 2001, p 162.

60 Centre for International and Public Law, Australian National University, Submission No. 36, p 47.

> by a vast majority of the world's countries. They are not radical or unusual and are certainly not unique to Australia or our value system.[61]

3.69 Ms Barnsley therefore maintained, and she was not alone in expressing such a viewpoint, that because there was an "international legal basis for the standards that the Corporate Code of Conduct Bill seeks to impose",[62] the current Bill could not be regarded as the imposition of Australian values on foreign nations.

3.70 Ms Barnsley remarked that the United Nations' High Commissioner for Human Rights has declared that

> it is well established that the Universal Declaration of Human Rights is now a part of customary international law and therefore creates binding obligations on all states.[63]

3.71 The Committee notes, however, that if the "vast majority of the world's countries", adhered in deed as well as word to the "binding obligations" of documents such as the Universal Declaration of Human Rights, then the current Bill would be superfluous.

3.72 The Committee also notes that the existence of the Universal Declaration of Human Rights, and similar pronouncements, means that, if the current Bill is passed, Australian courts may be put in the invidious position of having to determine if another sovereign nation, which is a signatory to the Declaration, allowed the Declaration to be breached in its territory by an Australian company. In effect Australian courts implicitly will have to judge the actions of other nations. Regardless of where the standards of the current Bill are derived from, such action will be regarded as "paternalistic" in some quarters.

Current Commonwealth legislation with extraterritorial application

3.73 Fear of being perceived as being "paternalistic" has not deterred Australia in the past from enacting legislation with extraterritorial application. Ms Jagjit Plahe, Policy and Campaigns Officer, Global Economic Issues, World Vision Australia, after alluding to examples in other countries, reported to the Committee that extraterritoriality "is … not new in Australia."[64]

3.74 Ms Plahe cited as examples of Australian Commonwealth legislation with extraterritorial effect the

- Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1999,

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61 Centre for International and Public Law, Australian National University, Submission No. 36, p 48.

62 Centre for International and Public Law, Australian National University, Submission No. 36, p 48.

63 Centre for International and Public Law, Australian National University, Submission No. 36, p 48.

64 Committee Hansard, 14 March 2001, p 29.

- *Crimes (Child Sex Tourism) Amendment Act 1994*,
- *Environment Protection and Biodiversity Conservation Act 1999*,
- *Environment Protection (Sea Dumping) Act 1981*, and
- *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*.[65]

3.75 Ms Plahe's point that Australia does not shrink from enacting legislation with extraterritorial application is correct, and indeed the list of acts Ms Plahe cited is not even exhaustive, for example, it might have also included such legislation as the *International War Crimes Tribunal Act 1995*, and bills like the Criminal Code Amendment (Slavery and Sexual Servitude) Bill 1999.

3.76 Senator Murray pointed out that the acts referred to by Ms Plahe, and especially the *Environment Protection and Biodiversity Conservation Act 1999,* were "specific and quite detailed responses to particular perceived problems". The current Bill differed from these acts in being "generic".[66]

3.77 Mr Pragnell of CPA Australia, asserted that this difference was a "dichotomy" between the current Bill and "existing extraterritorial legislation".[67] Mr Pragnell elaborated by saying that existing acts with extraterritorial application

> are aimed at specific behaviours, they are in the Criminal Code, they are in that sense very targeted and very focused; and … about trying to address behaviours that would be viewed as reprehensible throughout the entire community. The concern we have about the broad generic legislation, the corporate code of conduct, is the wide casting of the net ….[68]

3.78 BHP also expressed concern about the current Bill's "generic" nature. BHP submitted that

> [u]nilateral extraterritorial legislation on such a broad front, as distinct from legislation focussed on a specific issue such as foreign corrupt payments which is underpinned by multilateral commitments, is not warranted in principle or likely to be workable in practice.[69]

65 Committee Hansard, 14 March 2001, p 47.

66 Committee Hansard, 14 March 2001, p 68.

67 Committee Hansard, 14 March 2001, p 69.

68 Committee Hansard, 14 March 2001, p 69.

69 BHP, Submission No. 39, p 1.

3.79 Mr Pragnell made the point that

> the issues that were raised in Senator Bourne's second reading speech were looking at environmental issues within specific industries, such as mining, oil and gas exploration.[70]

3.80 Mr Pragnell went on to suggest to the Committee, and it should be noted that Mr Pragnell emphasised that it was only his own personal suggestion, that legislation

> must be focused on what are the specific behaviours that need to be addressed rather than focusing on those specific behaviours and then generalising across a whole range of categories and areas.[71]

3.81 Mr Pragnell therefore indicated that the current Bill should be redrafted so that it specifically focused on problems in industries such as "mining, oil and gas exploration". This might be a way of overcoming BHP's concerns about the current Bill not being "likely to be workable in practice", although BHP's comment (reported at paragraph 3.78) that the current Bill is not "warranted" is less easy to overcome.

3.82 BHP's comment undoubtedly meant to infer that a Bill as "generic" as the current Bill is, was not warranted since, as Mr Pragnell noted, the problems mentioned by Senator Bourne in her second reading speech on the Bill seemed to be specific to certain industries.[72] Developments in case law, however, possibly mean that the Bill, or at any rate a part of it, may not be warranted at all.

Current Australian case law on exterritoriality

3.83 In response to a suggestion that the current Bill might be a "bit premature", Ms Sarah Joseph, Associate Director, Castan Centre for Human Rights Law, Faculty of Law, Monash University, informed the Committee that

> In Britain at the moment cases are being brought against UK companies for their actions in South Africa. … [T]he jurisdictional issue has been decided—that is, that British courts can hear claims against British companies for alleged abuse of workers, particularly with regard to health and safety, in South Africa. As Australian law is often very similar to British law … it could well be that some of these obligations already exist [in Australian law].[73]

3.84 In fact there does exist Australian case law which would allow foreign plaintiffs to pursue Australian companies for damage suffered as a result of the companies' actions overseas.

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70 Committee Hansard, 14 March 2001, p 69.

71 Committee Hansard, 14 March 2001, p 69.

72 Committee Hansard, 14 March 2001, p 69.

73 Committee Hansard, 14 March 2001, p 7.

3.85 In *British South Africa Co v Companhia de Mocambique* [1893][74] (the *Mozambique Case*) England's Appeal Court held that no English court had the jurisdiction to hear a case involving, as this one did, an alleged trespass by the defendant in the South African mine owned by the plaintiff. The Appeal Court's reasoning was that no English court had the ability to enforce a ruling that touched on the possessory title to foreign land.

3.86 In 1994 several citizens of Papua New Guinea brought actions against BHP and Ok Tedi Mining Limited in the Supreme Court of Victoria. The plaintiffs asked for compensation for damage that they claimed to have suffered as the result of mining activities at Ok Tedi. One of these actions was *Dagi and Others v BHP Minerals Pty Ltd and Ok Tedi Mining Ltd*, 1994 (the *Dagi Case*).[75]

3.87 In the *Dagi Case* Byrne J followed the principle set out in the *Mozambique Case* and ruled that

> the Court will refuse to entertain a claim where it essentially concerns rights, whether possessory or proprietary, to or over foreign land, for these rights arise under the law of the place where the land is situate and can be litigated only in the courts of that place.[76]

3.88 Accordingly Byrne J ruled that the Supreme Court of Victoria was unable to judge claims in the *Dagi Case* that related to trespass because to hear arguments on trespass would require the Court to judge the possessory title of foreign land.

3.89 Byrne J, however, also stated in the *Dagi Case* that the principle in the *Mozambique Case* applied only where the "gravamen" of a cause of action was a claim to possession of foreign land.[77] This meant that some of the claims for damages in the *Dagi Case*, against BHP and Ok Tedi Mining Limited, could be heard by the Supreme Court of Victoria, specifically those claims relating to loss of amenity or enjoyment of land, that is the claims which equated to pure economic loss and therefore were not dependent on arguing possession of title to foreign land.[78]

3.90 In *Perre v Apand Pty Ltd* (1999)[79] the High Court held that the Australian defendant owed the plaintiffs, foreign potato growers, a duty of care not to act negligently so as to destroy their livelihood. The *ratio decidendi* of this case would seem to allow most foreign plaintiffs who suffer harm as the result of the activity of Australian corporations to seek redress in Australians courts. For example, fishers

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74 British South Africa Co v Companhia de Mocambique [1893] AC 602.

75 *Dagi, Shackles, Ambetu and Maun v The Broken Hill Pty Co Ltd and Another* [1997] 1 VR 428 at 441.

76 *Dagi, Shackles, Ambetu and Maun v The Broken Hill Pty Co Ltd and Another* [1997] 1 VR 428 at 441.

77 *Dagi, Shackles, Ambetu and Maun v The Broken Hill Pty Co Ltd and Another* [1997] 1 VR 428 at 441.

78 *Dagi, Shackles, Ambetu and Maun v The Broken Hill Pty Co Ltd and Another* [1997] 1 VR 428 at 451.

79 *Perre v Apand Pty Ltd* (1999) 64 ALR 606.

living downstream of a tailings dam spill would be able to claim damages for the economic loss they suffered as a result of fish stocks being depleted.

3.91 Clearly then, foreign litigants already are permitted, in certain circumstances, to seek redress in Australian courts for wrongs suffered by them overseas at the hands of Australian companies.

3.92 In New South Wales the *Jurisdiction of Courts (Foreign Land) Act 1989* (NSW) states that the

> jurisdiction of any court is not excluded or limited merely because the proceedings relate to, or may otherwise concern land or immovable property situated outside New South Wales.[80]

3.93 In effect the principle in the *Mozambique Case* has been over-ridden by statute in New South Wales. Moreover, the combined effect of New South Wales statute law and cross-vesting legislation might mean that even before the Victorian Supreme Court a plaintiff could argue that the extraterritoriality principle in the *Mozambique* case did not apply.[81] The plaintiffs in the *Dagi case* did not avail themselves of this argument and so it is a moot point as to whether it would have succeeded.

3.94 Existing case law would not of course assist plaintiffs in situations where the defendant corporation went into receivership but, as Dr Nahan pointed out, the Bill would do nothing to alleviate that problem.[82]

3.95 There is also an important limitation in Australian case law, which is relevant to the issue of extraterritoriality, and that is the principle of *forum non conveniens*. This principle was stated in *St Pierre v South American Stores* [1936] as being that a court may not decline to hear a case unless to do so

> would work an injustice because it would be oppressive or vexatious to [the defendant] or would be an abuse of process in some way.[83]

3.96 In *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988)[84] the High Court found that the *forum non conveniens* principle worked in such a way that

> the onus lies on the defendant to satisfy the local court in which the particular proceedings have been instituted that it is so inappropriate a

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80 *Jurisdiction of Courts (Foreign Land) Act 1989* (NSW), section 3.

81 Jan McDonald and Letizia Raschella, 'The Domestic Liability of Australian Mining Companies for International Environmental Harm', in *Australian Mining and Petroleum Law Association Yearbook: 2000*, Australian Mining and Petroleum Law Association Limited, 2000, p 41.

82 Committee Hansard, 8 May 2001, p 165.

83 St Pierre v South American Stores [1936] 1 KB 383.

84 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197.

> forum for their determination that their continuation would be oppressive and vexatious to him.[85]

3.97 Essentially the High Court found that the plaintiff had the right to select the court in which to proceed,[86] particularly in cases where the law of a foreign jurisdiction provided no effective remedy.[87]

3.98 Proceedings instituted in Australian courts against Australian companies for alleged wrongs committed in foreign jurisdictions would therefore proceed unless the defendants could show that the hearing of the proceedings in Australia were "oppressive and vexatious" to them. An Australian court would be especially reticent to stay proceedings in Australia where the plaintiffs in the relevant case claimed that the law of a foreign jurisdiction was ineffective.

3.99 The Committee notes, however, that the hearing of a case regarding an alleged wrong committed in a foreign jurisdiction by an Australian court will not avoid the law of the foreign jurisdiction.

3.100 Brennan J in *Breavington v Godleman* (1988)[88] stated that

> [a] plaintiff may sue in the forum to enforce a liability in respect of a wrong occurring outside the territory of the forum if – 1. The claim arise out of circumstances of such a character that, if they had occurred within the territory of the forum, a cause of action would have arisen entitling the plaintiff to enforce against the defendant a civil liability of the kind which the plaintiff claims to enforce and 2. By the law of the place in which the wrong occurred, the circumstances of the occurrence gave rise to a civil liability of the kind which the plaintiff claims to enforce.[89]

3.101 Brennan J thus indicated that for plaintiffs to be successful they would have to show that the *lex loci delecti*, the law of the place where the alleged wrong occurred, and the *lex fori*, the law of the place where the court hearing the case was located, had both been breached.

3.102 Plaintiffs seeking redress in Australian courts for wrongs suffered in foreign jurisdictions therefore would find their Common Law negligence claims defeated if the defendants in those cases could demonstrate that statutes or regulations in the relevant foreign jurisdictions allowed the conduct being complained of.

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85 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 247.

86 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 239 and 252.

87 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 254.

88 *Breavington v Godleman* (1988) 169 CLR 41.

89 *Breavington v Godleman* (1988) 169 CLR 41 at 110-111.

3.103 The current Bill, if enacted, would allow Australian courts to disregard the statutes and regulations of foreign jurisdictions which would otherwise have provided a defence for those accused of committing wrongs in foreign jurisdictions.

3.104 It is difficult to see how the enactment of a piece of legislation that would allow Australian courts to set aside the laws of foreign jurisdictions could be viewed as anything other than paternalistic.

3.105 It is in fact a principle of the Common Law, a principle germane to the issue of extraterritoriality, that one nation should not judge the laws, or lack of laws, of another nation. Byrne J followed this principle in the *Dagi Case* when he stated that Papua New Guinea's mining legislation and agreements between the Papua New Guinea Government and mining companies were not justiciable in Australian courts because they

> had the hallmarks of an act of government, and it was not for a court of a foreign state to intrude into this activity.[90]

3.106 This is an important limitation on extraterritoriality. The two most often quoted examples of environmental damage referred to in this inquiry concerned the Baia Mare Mine in Romania and the Ok Tedi Mine in Papua New Guinea. In the former example an Australian company was operating the mine as a joint venture with a Romanian Government company.[91] In the latter example the Papua New Guinea Government was a part owner of the Ok Tedi Mine.[92] A defence based on the wrong committed being an "act of government" would thus be available to the defendants in both the Baia Mare and Ok Tedi cases.

3.107 The current Bill, if enacted, would make an "act of government" defence unavailable, but the result would be that Australian courts might have to pronounce judgment on the behaviour of foreign governments where such governments, or their companies, were the partners of Australian companies in the alleged wrongful incidents.

3.108 The Committee believes that an Australian court's judgment of a foreign government's behaviour would be regarded as patronising and would be resented as such.

3.109 Since it is clear that litigants can seek redress in Australian courts for wrongs committed in foreign jurisdictions, and since the over-riding of Common Law is problematic, one might wonder why the current Bill is being proposed. The answer lies in the fact that the current Bill addresses a wide range of issues which cannot be

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90 *Dagi, Shackles, Ambetu and Maun v The Broken Hill Pty Co Ltd and Another* [1997] 1 VR 428 at 441 at 454.

91 See report at www.csmonitor.com/durable/2000/02/16/p1s1.htm.

92 See company statement at www.oktedi.com/overview/overview.htm.

dealt with under the Common Law. An examination of some of the standards that the Bill seeks to impose makes this evident.

Standards to be imposed by the Bill

3.110 Part 2 of the Bill is a delineation of the standards to the Bill seeks to impose on Australian corporations operating overseas. These various standards are dealt with in turn under the headings used in the Bill.

Environmental standards

3.111 The Bill, at subclause 7(1), requires Australian corporations undertaking "any activity" overseas to "take all reasonable measures to prevent any material adverse effect on the environment".[93]

3.112 This requirement would move little beyond the existing Common Law of negligence and would therefore seem to be superfluous.

Health and safety standards

3.113 The Bill, at subclause 8(1), requires Australian corporations operating overseas to "take all reasonable measures to promote the health and safety of its workers".[94]

3.114 Subclause 8(2) of the Bill goes on to provide specific examples of what corporations must not do, for instance, a corporation must

> not require its employees to work for more than 5 consecutive hours without a break of a least 20 minutes.[95]

3.115 This is a very specific example of what constitutes an appropriate, according to the Bill, health and safety standard. Other standards the Bill seeks to impose, such as the requirement to "provide satisfactory sanitary conditions"[96] are so vague as to be a source of contention. Certainly it would be extremely difficult to determine if a corporation was in breach of this particular clause.

3.116 The Committee is cognisant of the fact that regulations may be made under clause 18 of the Bill, so presumably some of the vaguer expressions in the Bill could be enlarged upon in regulations, thus removing uncertainty for industry.

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93 Corporate Code of Conduct Bill 2000, subclause 7(1).

94 Corporate Code of Conduct Bill 2000, subclause 8(1).

95 Corporate Code of Conduct Bill 2000, subclause 8(2).

96 Corporate Code of Conduct Bill 2000, subclause 8(2).

Employment standards

3.117 The current Bill requires an Australian corporation to pay its workers a "living wage",[97] a term defined in the Bill as being

> A wage sufficient to meet the basic needs of a family of two adults and three children in the country or region they are resident in.[98]

3.118 This would seem to be derived almost directly from the case of *Ex parte H.V. McKay* (1907) (the *Harvester case*) in which Justice Higgins of the Commonwealth Arbitration Court ruled that an unskilled labourer should receive a minimum of seven shillings for an eight-hour working day, enough to sustain himself and his wife and three children in "frugal comfort".[99]

3.119 The judgment in the *Harvester case* established the concept of the basic wage in Australia and as a result the judgment has achieved almost iconographic status in some quarters in Australia.

3.120 This was evident in the submission from the Australian Manufacturers Workers' Union which stated that the Union

> supports the pursuit of a living wage for workers in developing countries and we propose the use of purchasing parities to define such a wage. We recognise the different levels of development of countries and the differing cost of living. However, working people anywhere in the world should be able to earn a minimum wage that enables them to live in "frugal comfort" as was enshrined in Australian industrial law with the Harvester agreement in 1907.[100]

3.121 It is a matter of conjecture as to how relevant a 1907 judgment from the Commonwealth Arbitration Court is to Australian corporations operating overseas in the twenty-first century. It would be difficult, time consuming and expensive to determine what the "living wage" was in foreign countries and the suggestion of the Australian Manufacturers Workers Union that "purchasing parities" be used to define a "living wage" only serves to evidence the definitional difficulty.

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97 Corporate Code of Conduct Bill 2000, subclause 9(3).

98 Corporate Code of Conduct Bill 2000, clause 6.

99 Ex parte H.V. McKay (1907) 2 C.A.R. 1.

100 Australian Manufacturers Workers Union, Submission No. 9, p 4.

Human rights standards

3.122 Clause 10 of the Bill seeks to prevent Australian corporations overseas discriminating in its employment practices

> on the basis of race, colour, sex, sexuality, religion, political opinion, national extraction or social origin.[101]

3.123 The intent of this clause of the Bill is to prevent unjustifiable discrimination. The Committee supports the intent of this clause but notes that if this clause remains in the Bill, and the Bill is enacted, unintended and unfortunate consequences may result for Australian corporations trying to operate overseas. This is illustrated by the submission received from the Melbourne Practitioners of Falun Dafa.

3.124 The Submission from the Melbourne Practitioners of Falun Dafa took issue with this clause 10 of the Bill. Specifically the Melbourne Practitioners of Falun Dafa stated that Practitioners of Falun Dafa in the People's Republic of China were enduring "persecution" but, because Falun Dafa was not a religion but a "non-religious spiritual practice", Practitioners in China would not be aided by the enactment of this Bill.[102]

3.125 What constitutes a religion in Australia was set out by the High Court in *Church of The New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983).[103] In that case the High Court held that essential to a religion was the

> belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief.[104]

3.126 The Committee did not reach a conclusion on whether Falun Dafa does or does not meet the definition of a religion in Australia. If Falun Dafa does not meet the definition of a religion then it is not covered by Australian laws forbidding religious discrimination or probably by any other anti-discrimination laws.

3.127 The Committee believes that it would be incongruous to amend the Bill so that those who practised a "non-religious spiritual practice" were accorded protection in dealing with Australian corporations overseas while the same persons were not afforded similar protection if they were in Australia.

3.128 The Committee recalls that as recently as 1988 Australians rejected at referendum the idea of clarifying and extending religious freedom in Australia. As matters currently stand the Australian Federal Government has wide powers to

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101 Corporate Code of Conduct Bill 2000, subclause 10(1).

102 Melbourne Practitioners of Falun Dafa, Submission No. 5, p 1.

103 *Church of The New Faith v Commissioner of Pay-Roll Tax* (Vic) (1983) 154 CLR 120.

104 *Church of The New Faith v Commissioner of Pay-Roll Tax* (Vic) (1983) 154 CLR 120 at 136.

suppress religious groups. In *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943)[105] Rich J of the High Court stated that

> freedom of religion may not be invoked to cloak and dissemble subversive opinions or practices and operations dangerous to the common weal.[106]

3.129 Precisely what constitutes "opinions or practices and operations dangerous to the common weal" is a matter of speculation. It is, however, the case that sovereign nations assert the right to suppress movements, including religious and quasi-religious movements, that they deem to be "dangerous".

3.130 Clause 10 of the Bill could work in such a way that Australian companies overseas might face the unenviable choice of incurring the wrath of the government of the jurisdiction in which they are operating by hiring members of a group officially regarded as "dangerous", or being prosecuted in Australian courts for failing to hire such persons.

Duties imposed by the Bill

Duty to observe tax laws

3.131 Clause 11 of the Bill would require an Australian corporation operating overseas to "comply with the tax laws of in each country in which it operates".[107] Some submissions, for example, the Australian Tibet Council, referred to the existence of "well-known" tax havens.[108] Corporations headquartered in foreign jurisdictions which were tax havens could comply with the Bill's stipulation regarding paying tax in overseas jurisdictions and yet still not actually pay any tax.

3.132 The Committee notes that, even where a foreign jurisdiction is not a tax haven, there are practical difficulties in the way of enforcing legislation which requires Australian corporations to obey the tax laws of foreign jurisdictions.

3.133 Clause 11 of the Bill, in conjunction with clause 17, would allow "any person who suffers loss or damage"[109] as a result of an Australian company not paying tax in a foreign country to bring a case against that company in an Australian court. Possibly the "any person" might be anyone in the foreign country, the tax revenue of which had been diminished. This could result in a large number of possible litigants.

3.134 Aside from the number of litigants, another problem is the fact that a case brought in an Australian court, as a result of clause 11 of the Bill, would require an Australian court to decide if a corporation had complied with foreign taxation law. If,

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105 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116.

106 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 at 149-150.

107 Corporate Code of Conduct Bill 2000, clause 11.

108 Australia Tibet Council, Submission No. 19, p 4.

109 Corporate Code of Conduct Bill 2000, clause 17.

however, a corporation did breach the taxation laws of a foreign country one would expect that country to take action against the corporation concerned. It seems an unusual extension of the doctrine of extraterritoriality to suggest that Australia should allow litigation in Australian courts concerning breaches of foreign laws when the foreign jurisdictions concerned have taken no action.

3.135 The difficulty in prosecuting and defending cases relating to breaches of clause 11 of the Bill is also an obstacle to the Bill.

Duty to observe consumer health and safety standards

3.136 Clause 12 of the Bill requires a corporation, to which the Bill applies, to ensure that the goods and services it produces satisfy

> the required standards for consumer health and safety for those goods or services in Australia and in any country in which it undertakes activities.[110]

3.137 Australian corporations operating overseas therefore would have to satisfy, simultaneously, both Australian health and safety standards and the standards of the jurisdiction in which they were operating. It is entirely possible, even with something as simple as labelling requirements, that it would not be possible to satisfy the requirements of two different jurisdictions. This would put Australian corporations in an invidious situation.

Duty to observe consumer protection and trade practices standards

3.138 Subclause 13 of the Bill states that

> An overseas corporation must not, in any country in which it undertakes activities, engage in any conduct that is misleading or deceptive or which is likely to mislead or deceive.[111]

3.139 Subsection 52(1) of the *Trade Practices Act 1974* (Cth) provides that

> A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.[112]

3.140 The inspiration for clause 13 of the Bill therefore appears to be the *Trades Practices Act 1974*. That particular piece of legislation, however, has not always had the effect desired by policy makers.

3.141 Professor Bob Baxt, Deputy Chairman, Business Law Section, and Deputy Chairman, Specialist law Committee, Law Council of Australia, stated in evidence that the Trade Practices Act "is an example of a piece of legislation that, when enacted

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110 Corporate Code of Conduct Bill 2000, subclause 12(1).

111 Corporate Code of Conduct Bill 2000, subclause 13(1).

112 *Trade Practices Act 1974* (Cth), subsection 52(1).

…, was done so in the context of a very clear purpose", namely to protect consumers from disreputable conduct on the part of companies.[113]

3.142 Despite its aims, with which few would disagree, the Trade Practices Act, as Professor Baxt noted, has not been used for its original "clear purpose", rather it has been used "by big business against other big business". Professor Baxt even went so far as to assert that the Trade Practices Act "is used in every piece of litigation that you have in the courts on contract disputes".[114]

3.143 Certainly actions under the Trade Practices Act, particularly section 52, are very common. The reason for this is that, for example, Company A can legitimately claim that it has suffered damage if its competitor, Company B, used "misleading or deceptive" conduct to lure customers to buy its goods rather than those of Company A. Company A may therefore bring an action under section 52.

3.144 There is every reason to expect that clause 13 of the Bill would be used in the same way as section 52 of the *Trade Practices Act*, that is, it would be used by corporations against other corporations. This situation would lead to, what Professor Baxt described as, "proliferating legislation".[115] The effect on the already hard working court system of this proliferation is unknown.

3.145 The Committee notes, however, that although clause 13 of the Bill would be used by corporations to sue other corporations, the effect may be that corporations would refrain from engaging in "misleading and deceptive" conduct. It is a moot point as to whether or not this end is justified by a means which may well see the Australian court system clogged.

Reporting

3.146 Part 3 of the Bill requires all corporations to which the Bill applies to lodge comprehensive reports annually with the Australian Securities and Investments Commission. The reporting requirements specified in the Bill were among the Bill's most contentious issues.

3.147 The submission from Mr John Nevill, a private citizen interested in the Bill, stated that corporations reporting on the "environmental and social outcomes of their activities" was essential to the Bill being successful.[116] Implicit in this statement is the idea that without reporting the Bill will be honoured in the breach, and therefore be ineffective.

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113 Committee Hansard, 15 March 2001, p 136.

114 Committee Hansard, 15 March 2001, p 136.

115 Committee Hansard, 15 March 2001, p 136.

116 John Nevill, Submission No. 42, p 1.

3.148 This same idea was doubtless behind the suggestion of Mr Tim Connor, another private citizen interested in the Bill, that the Bill's current reporting requirements were insufficient. Mr Connor submitted that

> The bill only requires independent auditing of the company's environmental impact. This should be extended to require independent auditing of the company's labour and human rights practices. Independent auditing should also be required of suppliers who produce "finished products for the consumer" for Australian companies.[117]

3.149 While some submitters and witnesses agreed with Messrs Neville and Connor, others disagreed. Mr Brad Pragnell of CPA Australia, for example, stated that he had a general concern with generic legislation in that, by its very nature, it entailed "considerable reporting" to be undertaken by companies, the "vast majority" of which, according to Mr Pragnell, were "probably conducting themselves well".[118]

3.150 The Australian Institute of Corporate Citizenship also suggested that the drafters of the Bill's reporting requirements erred in not requiring corporations to make their reports public. The Institute stated that

> Best international practice in this area shows that public reporting through avenues such as the world-wide-web, demonstrates greater transparency …. It allows the company's stakeholders to engage directly on the company's performance - again a factor that encourages corporate continuous improvement.[119]

3.151 The Australian Institute of Company Directors submitted that "[c]ompliance with the reporting requirements of the Bill [would be] both onerous and expensive".[120] The Institute moreover indicated two possible conflicts between clauses of the Bill

3.152 The first of these conflicts was that reporting requirements of Part 3 of the Bill "potentially places public company reporting obligations upon private companies"[121] despite the fact that subclause 3(2) of the Bill states that no corporation to which the Bill would apply would be

> required to take any action to meet the requirements of the [enacted Bill] in respect of its operations in a foreign country that it would not be required to take in respect of its operations in Australia.[122]

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117 Tim Connor, Submission No. 2, p 3.

118 Committee Hansard, 14 March 2001, p 69.

119 Australian Institute of Corporate Citizenship, Submission No. 8, p 18.

120 Australian Institute of Company Directors, Submission No. 30, p 2.

121 Australian Institute of Company Directors, Submission No. 30, p 2.

122 Corporate Code of Conduct Bill 2000, subclause 3(2).

3.153 The second possible conflict[123] concerns a corporation's requirement to annually obtain an environmental impact report, "prepared by an independent auditor",[124] regardless of whether or not the corporation is obliged to comply with section 299 of the Corporations Law (which sets out what must be contained in annual directors' reports).[125] This reporting requirement would again seem to be in conflict with subclause 3(2) of the Bill.

3.154 The submission from the Australian Institute of Company Directors went on to state that it would be difficult to comply with the reporting requirements of the Bill because of a lack of expertise on the part of corporate employees. The Bill, for example, requires a corporation to "comply with minimum international labour standards". The Institute pointed out, however, that such

> standards are contained within numerous treaties. The requirements of the treaties are given effect when incorporated into the laws of countries signatory to the treaty. An Australian company firstly would be required to determine whether the countries in which it operates are signatories to the treaty and, if so, the particular requirements in each country. This illustrates the uncertainty of the proposed structure.[126]

3.155 It should be noted, however, that although the legal systems of different nations diverge widely, nevertheless, Australian corporations operating overseas devote resources to discovering the intricacies of, for instance, the law of contract in each jurisdiction they operate in. Australian Corporations could therefore comply with the reporting requirements in the Bill. The fact that such compliance would involve expense is undeniable. The Committee is not in a position to determine this cost of compliance but it could be considerable and could place Australian corporations at a disadvantage relative to their foreign competitors.

3.156 CPA Australia and the Institute of Chartered Accountants in Australia, in their joint submission, submitted that the requirement for a Code of Conduct Compliance Report to be submitted to the Australian Securities and Investments Commission by 31 August each year presented corporations with a "more onerous time frame than applies for other annual report information".[127]

3.157 Subclause 14(3) of the Bill, according to this joint submission, would provide no relief to corporations since it excludes from a Code of Conduct Compliance Report only information which a corporation "has provided" to the Australian Securities and Investments Commission. Since the deadline for submission of a Code of Conduct

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123 Australian Institute of Company Directors, Submission No. 30, p 2.

124 Corporate Code of Conduct Bill 2000, subclause 14(2).

125 Australian Institute of Company Directors, Submission No. 30, p 2.

126 Australian Institute of Company Directors, Submission No. 30, p 2.

127 CPA Australia and the Institute of Chartered Accoutants in Australia, Submission No. 31, p 2.

Compliance Report precedes the deadline for the submission of other annual report information, the Bill effectively

> requires Australian based corporations covered by the Bill to lodge their annual financial statements no later than 30 August.[128]

3.158 The joint submission also remarked that clause 15 of the Bill would require the Australian Securities and Investments Commission to lodge an annual report with the Treasurer regarding Code of Conduct Compliance Reports by 31 December each year.[129]

3.159 The four months between 31 August and 31 December, as well as the fourteen sitting days allowed to the Treasurer to table the report from the Australian Securities and Investment Commission in Parliament, was regarded by CPA Australia and the Institute of Chartered Accountants in Australia as being inconsistent with the short deadline allowed for corporations to produce Code of Conduct Compliance Reports.[130] The Committee was unable to discern any compelling reason for this inconsistency.

3.160 The Chamber of Minerals and Energy of Western Australia, in its submission, after also labelling the Bill's reporting requirements as "onerous", advised that because the Bill required corporations subject to its provisions to report to the Australian Securities and Investments Commission, the Bill in essence would require the Australian Securities and Investments Commission

> to become an expert on environmental performance, human rights, workplace health and safety and a myriad of other issues in order to assess the reports it received.[131]

3.161 The Committee believes this is an accurate assessment, since if the Australian Securities and Investments Commission is to receive Code of Conduct Compliance Reports it will have to have some expertise in evaluating them, if for no other reason than determining if the reports submitted fulfil the reporting requirements of the Bill.

3.162 Mr Sean Cooney, Senior Lecturer at the Law School of the University of Melbourne, whose work is "particularly concerned with" labour standards, suggested in evidence that, at least with regard to labour standards, the Australian Securities and Investments Commission lacks expertise.[132]

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128 CPA Australia and the Institute of Chartered Accoutants in Australia, Submission No. 31, p 2.

129 CPA Australia and the Institute of Chartered Accoutants in Australia, Submission No. 31, p 2.

130 CPA Australia and the Institute of Chartered Accoutants in Australia, Submission No. 31, p 2.

131 Chamber of Minerals and Energy of Western Australia, Submission No. 3, p 2.

132 Committee Hansard, 8 May 2001, p 156.

3.163 The Australian Securities and Investments Commission could acquire additional staff with the necessary expertise to review Code of Conduct Compliance reports. Mr Bosch, however, commented that the Commission was "not adequately funded" at present.[133]

3.164 The submission of the Chamber of Minerals and Energy of Western Australia also commented on funding for the Australian Securities and Investments Commission, stating that it was "not clear where funding for this significant expansion of responsibility would come from".[134]

Enforcement

3.165 Ms Plahe, of World Vision Australia, testified that "codes of conduct tend to work when there is some sort of enforcement mechanism that deals with violations".[135] The drafters of the current Bill evidently agree with Ms Plahe, and accordingly corporations to which the Bill applies will be subjected to various penalties for non-compliance with the provisions of the Bill.

3.166 Subclauses 14(4) and 14(6) of the Bill provide for penalties for corporations and executive officers that are responsible for failing to lodge a Code of Conduct Compliance Report. In their joint submission CPA Australia and the Institute of Chartered Accountants in Australia remarked that "no information has been provided on the rationale for the penalty levels".[136] The same observation could be made of the civil penalty provisions specified in the Bill at subclause 16(3).

3.167 The submission from the Environmental Defender's Office Ltd also expressed an interest in the rationale of penalties to be imposed by the Bill. That submission noted that subclause 16(2) of the Bill, specifying the criteria for a corporation's executive officer to be judged to have contravened Part 2 of the Bill, was "almost identical" to section 494 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). A breach of this latter Act, however, could

> attract a pecuniary penalty of 5,000 penalty units for an individual, and 50,000 penalty units for a corporation.[137]

3.168 Breaching Part 2 of the current Bill, by contrast, would incur a penalty of no more than 10,000 penalty units for both individuals and corporations.[138] The Committee was unable to discern the rationale for this difference.

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133 Committee Hansard, 8 May 2001, p 159.

134 Chamber of Minerals and Energy of Western Australia, Submission No. 3, p 2.

135 Committee Hansard, 14 March 2001, p 47.

136 CPA Australia and the Institute of Chartered Accoutants in Australia, Submission No. 31, p 2.

137 Environmental Defender's Office Ltd, Submission No. 14, p 5.

138 Corporate Code of Conduct Bill 2000, subclause 16(3).

Australia's Reputation

3.169 During one of the Committee's public hearings, a member of the Committee, Mr Ross Cameron MP, stated that the

> best argument for this Bill is that it provides a positive opportunity to enhance the reputation of Australian companies. The rest of it I regard essentially as pretty questionable rhetoric.[139]

3.170 Various submitters and witnesses who appeared before the Committee would disagree with Mr Cameron's assessment that improving Australia's corporate reputation was the "best" reason for enacting the current Bill, but there was widespread concurrence with Mr Cameron's view that one of the most cogent reasons in favour of the current Bill being passed was that it would generally enhance the reputation of Australia's corporations, and for that matter, the reputation of Australia itself.

3.171 Enhancing corporate reputation is not an activity that is inherently pursued to the detriment of the profit motive. Mr Rory Sullivan, Business Team, Amnesty International, stated in evidence that the managers of corporations recognised that the future of their corporations depended directly on the quality of the employees they could attract to work for them. Mr Sullivan suggested that corporations had come to "increasingly recognise that to attract the best people requires … a good reputation".[140]

3.172 Ms Nicola McGuire, Business Team, Amnesty International, cited an example of a corporate reputation being tarnished when a corporation became known for purchasing gems from a rebel movement in Africa, the members of which were noted for human rights violations. That company then publicly resolved to cease purchasing gems from such sources and went to some, presumably costly, lengths to assure consumers that the gems it sold originated from legitimate sources.[141]

3.173 If the current Bill were enacted, consumers worldwide could be assured that Australian companies were not involved in activities which are detrimental to the environment, workers' and human rights. An altruistic Bill which enhanced Australia's corporate reputation may therefore have some non-altruistic benefits in that it could give Australian industry in general a comparative advantage over less scrupulous competitors.

3.174 Mr Doug Cameron, National Secretary, Australian Manufacturing Workers Union, referred to the Millennium Poll on Corporate Social Responsibility which was conducted by Environics International Ltd in cooperation with the Prince of Wales Business Leader Forum and the Conference Board in mid-2000. The Poll surveyed

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139 Committee Hansard, 15 March 2001, p 111.

140 Committee Hansard, 15 March 2001, p 73.

141 Committee Hansard, 15 March 2001, p 74.

some 25,000 people in 23 different countries and found that, among other things, over one in five consumers were

> either rewarding or punishing companies in the past year based on their perceived social performance and almost as many [were] considering doing so.[142]

3.175 These are not insignificant numbers of consumers and a Bill which gave Australian corporations credibility with socially and environmentally aware consumers would have significant benefits for the Australian economy as a whole.

3.176 Consumers are not the only ones to take an interest in a company's environmental and human rights record. The same persons surveyed in the Millennium Poll may well have been shareholders in various companies. Shareholders who look with disfavour on their company's environmental and human rights performance will seek to divest themselves of its shares. Even shareholders who take no interest in anything other than a company's profits may react with concern over the fact that their company's share price will fall as other shareholders abandon the company and consumers boycott its products.

3.177 The media plays an important role in publicising the failures of corporations, Australian and foreign, which degrade the environment and abuse human rights. Although a minority, these poorly performing corporations capture media, and therefore public, attention, and as Senator Gibson succinctly said "[n]o-one wants to get carved up in the global media as being improper citizens."[143]

3.178 Before the recent problems at the Baia Mare Mine in Romania it is doubtful if many average Australians could have named any Australian company involved in mining in Romania. Now, regrettably many persons worldwide would be able to name the Australia company associated with the mining venture at Baia Mare.

3.179 The submission from the Institute of Corporate Citizenship implied that there was a link between "a significant rise in public expectations of Australian companies operating overseas" and the incidents at Baia Mare and Ok Tedi.[144] Certainly there is no doubt that there was considerable publicity of incidents at those locations.

3.180 Mr John Maitland, National Secretary of the Construction, Forestry, Mining and Energy Union, after referring to the incident at the Baia Mare Mine, went on to say that such incidents gain a "bad reputation"[145] for all Australian corporations and that this restricts the ability of Australian corporations generally to invest in countries such as Romania.

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142 Committee Hansard, 15 March 2001, p 98.

143 Committee Hansard, 15 March 2001, p 116.

144 Australian Institute of Corporate Citizenship, Submission No. 8, p 12.

145 Committee Hansard, 15 March 2001, p 108.

3.181 Mr Jim Redden, Policy Director, Australian Council for Overseas Aid, said

> if they have a good reputation they will be more likely to succeed. They will be invited in by other developing country governments or, indeed, developed country governments.[146]

3.182 Mr Redden advised that the current Bill could assist in giving Australian corporations a reputation that will cause consumers worldwide to seek out products and services produced by Australian corporations. To quote Mr Redden, it would be "good for market share"[147] if the reputation of Australian companies were enhanced.

3.183 Several witnesses referred to corporate codes of conduct which were being considered by legislators in Europe and the United States.[148] They advised that it could prove damaging to Australia's reputation if Australia was seen to lag behind overseas developments in corporate regulation. The Committee notes, however, that the codes of conduct referred to were, like the current Bill, only under consideration.

146 Committee Hansard, 15 March 2001, p 114.

147 Committee Hansard, 15 March 2001, p 114.

148 For Example, Amnesty International Australia, Submission No 7, pp 6 and 7.