The Parliament of the Commonwealth of Australia

REPORT ON THE CORPORATE CODE OF CONDUCT BILL 2000

PARLIAMENTARY JOINT STATUTORY COMMITTEE ON CORPORATIONS AND SECURITIES

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DUTIES OF THE COMMITTEE

Section 243 of the *Australian Securities and Investments Commission Act 1989* sets out the duties of the Committee as follows:

The Parliamentary Committee's duties are:

(a) to inquire into, and report to both Houses on:

(i) activities of the Commission or the Panel, or matters connected with such activities, to which, in the Parliamentary Committee's opinion, the Parliament's attention should be directed; or

(ii) the operation of any national scheme law, or of any other law of the Commonwealth, of a State or Territory or of a foreign country that appears to the Parliamentary Committee to affect significantly the operation of a national scheme law;

(b) to examine each annual report that is prepared by a body established by this Act and of which a copy has been laid before a House, and to report to both Houses on matters that appear in, or arise out of, that annual report and to which, in the Parliamentary Committee's opinion, the Parliament's attention should be directed; and

(c) to inquire into any question in connection with its duties that is referred to it by a House, and to report to that House on that question.

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CHAPTER 1

CONDUCT OF THE INQUIRY

Reference of the Bill to the Committee

1.1 On 6 September 2000 Senator Vicki Bourne introduced the Corporate Code of Conduct Bill 2000 into the Senate. On 5 October 2000 the Senate referred the provisions of the Bill to the Parliamentary Joint Statutory Committee on Corporations and Securities for inquiry and report by 31 March 2001.

1.2 The Committee resolved that the reporting date be extended to 24 May 2001 so that the Committee could have additional public hearings and thus as many persons as possible would have the opportunity of testifying before the Committee. The Senate agreed to this course of action on 27 March 2001. For similar reasons the Committee, with the agreement of the Senate, extended to reporting date to 28 June 2001.

The Committee's Inquiry

1.3 The Committee advertised the inquiry in the national press and on the Parliament's website, inviting interested parties to make submissions on the Bill. The Committee received forty-three submissions to the inquiry (see Appendix 1).

1.4 The Committee held public hearings on the Bill in Melbourne on 14 March 2001, in Sydney on 15 March 2001, and again in Melbourne on 8 May 2001. The witnesses who appeared at the hearings are shown in Appendix 2.

1.5 All submissions and the Hansard transcripts of the public hearings appear on the Committee's website at www.aph.gov.au/corps_securities. Hard copies are available from the Committee staff on corporations.joint@aph.gov.au, telephone (02) 6277 3580, and facsimile (02) 6277 5809.

1.6 The Committee thanks the individuals and organisations who made submissions and/or appeared as witnesses, sometimes at short notice. The Committee is grateful for this assistance.

CHAPTER 2

THE BILL

Part 1 - Preliminary

2.1 The Bill provides that it objects are:

> (a) to impose environmental, employment, health and safety and human rights standards on the conduct of Australian corporations or related corporations which employ more than 100 persons in a foreign country; and
>
> (b) to require such corporations to report on their compliance with the standards imposed by this Act; and
>
> (c) to provide for the enforcement of those standards.[1]

Background

2.2 The Bill expressly provides that it has extraterritorial operation.

Part 2 – Corporate Codes of Conduct

2.3 A corporation, to which the Bill applies, will be required under Part 2 of the Bill to:

- take all reasonable measures to prevent its activities causing "any material adverse effect on the environment" and monitor the environmental impact of its activities;[2]
- promote the health and safety of its employees;[3]
- not benefit from forced labour;[4]
- not benefit from the labour of children under 14 years of age;[5]
- pay its workers a "living wage";[6]
- not dismiss workers for reasons of illness or accident;[7]

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

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

3 Corporate Code of Conduct Bill 2000, clause 8.

4 Corporate Code of Conduct Bill 2000, subclause 9(1).

5 Corporate Code of Conduct Bill 2000, subclause 9(2).

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

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

- allow workers to associate and bargain collectively;[8]
- allow workers to submit complaints to "independent authorities";[9]
- observe minimum international labour standards;[10]
- except under certain circumstances, such as government sponsored policies to promote "greater equality", refrain from discriminating against persons in relation to employment on the basis of

  > race, colour, sex, sexuality, religion, political opinion, national extraction or social origin;[11]

- observe the tax laws of each country in which it operates;[12]
- ensure that its products meet the "required standards for consumer health and safety" in Australia and, simultaneously, the standards required in the overseas jurisdictions in which the corporation is operating; and[13]
- refrain from "misleading or deceptive conduct".[14]

Part 3 – Reporting

2.4 Part 3 of the Bill specifies the reporting required of the corporations to which the Bill applies. Each of these corporations will have to submit annually a comprehensive Code of Conduct Compliance Report to the Australian Securities and Investments Commission.[15]

2.5 Each Code of Conduct Compliance Report would require details of all of the following:

- the corporation's financial and operating results for the previous year;
- the members of the corporation's board of directors and their remuneration;
- the corporation's five "most significant executive officers" in each country the corporation operates in, except Australia, and the remuneration of these executive officers;
- the shareholders of more than 5% of the issued capital of the corporation;

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

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

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

11 Corporate Code of Conduct Bill 2000, clause 10.

12 Corporate Code of Conduct Bill 2000, clause 11.

13 Corporate Code of Conduct Bill 2000, clause 12.

14 Corporate Code of Conduct Bill 2000, clause 13.

15 Corporate Code of Conduct Bill 2000, subclause 14(1).

- the number of employees of the corporation in each country in which it operates, except Australia;
- the total remuneration paid to the corporation's employees in each country the corporation operates in, except Australia;
- the environmental impact of the corporation's activities in each country that it operates in, except Australia (the contents of this environmental impact section would be "prepared by an independent auditor");
- "foreseeable risk factors" that might arise as a result of the corporation's activities in each country it operates in, except Australia;
- the corporation's contraventions, if any, of standards or laws relating to the environment, employment, health, safety and human rights in each country in which the corporation operates, except Australia;
- the corporation's social, ethical and environmental policies; and
- "any other matter" relevant to the corporation's environmental, employment, health, safety and human rights standards.[16]

2.6 If a corporation already has provided in another mandatory report to the Australian Securities and Investments Commission information that is required to be included in a Code of Conduct Compliance Report, then such information may be omitted from that corporation's Code of Conduct Compliance Report.[17]

2.7 Any corporation which, "without reasonable excuse", does not lodge a Code of Conduct Compliance Report is "guilty of an offence punishable on conviction by a fine not exceeding 2000 penalty units".[18]

2.8 Where an executive officer of a corporation knew that, or was "reckless or negligent" regarding the fact that, the corporation would not submit its Code of Conduct Compliance Report, and this executive officer could have influenced the corporation to submit its Code of Conduct Compliance Report but failed to do so, then that executive officer is guilty of an offence and "liable, on conviction, to pay a fine not exceeding 1000 penalty units".[19]

2.9 The Bill, if enacted, would require the Australian Securities and Investments Commission to prepare an annual report on compliance with the provisions of this Bill and forward this report to the Treasurer by the end of each calendar year so that the Treasurer may table the report in each House of the Parliament.[20]

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

17 Corporate Code of Conduct Bill 2000, subclause 14(3).

18 Corporate Code of Conduct Bill 2000, subclause 14(4).

19 Corporate Code of Conduct Bill 2000, subclauses 14(5) and 14(6).

20 Corporate Code of Conduct Bill 2000, clause 15.

Part 4 - Enforcement

2.10 The Bill provides that an Australian corporation operating overseas, and to which this Bill applies, which contravenes Part 2 of the Bill will be "liable to proceedings for the recovery of a civil penalty".[21]

2.11 The Bill also provides that where an executive officer of a corporation knew that, or was "reckless or negligent" regarding the fact that, the corporation would contravene Part 2 of the Bill, and this executive officer could have influenced the corporation to submit its Code of Conduct Compliance Report but failed to do so, then that executive officer also will be deemed to have contravened Part 2 of the Bill.[22]

2.12 The Treasurer, the Attorney-General and the Chairperson of the Australian Securities and Investments Commission, within six years of a corporation or person contravening Part 2 of the Bill, will be allowed under the Bill to apply on behalf of the Commonwealth to the Federal Court of Australia for an order that the contravening corporation or person pay the Commonwealth a pecuniary penalty not exceeding 10,000 penalty units.[23]

2.13 The Bill also would allow persons, both natural and corporate, who have suffered loss or damage, or who are "reasonably likely to suffer loss or damage", or who are acting on behalf of persons who have suffered, or are likely to suffer, damage, from the activities of Australian corporations overseas, to bring actions in the Federal Court seeking injunctions and/or compensation.[24]

2.14 The last clause of the proposed Bill is a standard clause which would authorise the Governor General to make regulations for the "carrying out or giving effect to this Act".[25]

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21 Corporate Code of Conduct Bill 2000, subclause 16(1).

22 Corporate Code of Conduct Bill 2000, subclause 16(2).

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

24 Corporate Code of Conduct Bill 2000, clause 17.

25 Corporate Code of Conduct Bill 2000, clause 18.

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

(b) a holding company of such a corporation; or

(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

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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]

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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

<u>Duty to observe tax laws</u>

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.

CHAPTER 4

CONCLUSIONS AND RECOMENDATIONS

Introduction

4.1 The Committee is grateful to those organisations and individuals who made submissions on, or testified regarding, the Corporate Code of Conduct Bill 2000.

4.2 The Committee noted that a number of submissions, such as those from the Australian Chamber of Commerce and Industry, and Community Aid Abroad were of particular assistance to the Committee because, as Senator Murray remarked, they contained “detailed commentary … on weaknesses and shortcomings in the bill”.[1]

4.3 A number of submissions and witnesses had mostly negative criticisms. The Committee notes Senator Murray’s statement regarding the usefulness of the “positive” criticisms, of which there were also a number, such as those by Mr Sean Cooney.[2] The Committee is assisted by negative criticisms in deciding whether to recommend rejecting a bill, but regards positive criticisms as helpful in devising ways to remedy deficiencies in proposed legislation.

4.4 The Committee is aware that no piece of legislation is perfect, and it aids the legislation process greatly to have potential flaws in draft legislation set out succinctly and have suggestions put forward as to how to remedy these flaws.

Summary of findings regarding the Bill

4.5 The current Bill may have been drafted with the best of intentions. The protection of workers and consumers is undeniably a laudable goal. The Committee’s task was to determine if the current Bill would achieve this goal. Regrettably, for a variety of reasons discussed below, the Committee believes that the Bill is impracticable and unwarranted.

<u>100 employee threshold</u>

4.6 The Bill’s scope, as noted by Mr Ross Cameron MP, encompasses “proprietary companies as well as public companies”.[3] The Bill thus seeks to regulate a large number of corporate entities.

4.7 Several submitters and witnesses suggested lowering the current 100 employee threshold specified in the Bill.[4] This would have the effect of increasing the number of corporate entities subject to regulation by the Bill.

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1 Committee Hansard, 14 March 2001, p 63.

2 Committee Hansard, 8 May 2001, p 154.

3 Committee Hansard, 15 March 2001, p 79.

4.8 The Committee concludes that regulating the many corporations that would be covered by the Bill, even as currently drafted, presents, as Mr Bosch stated, a "heavy burden" for the Australian Securities and Investments Commission.

4.9 The Committee finds that this Bill may do more harm than good and therefore the extra regulation required by the Bill would constitute an unacceptable "burden" for the Australian Securities and Investments Commission. The Committee therefore concludes that the regulatory regime the Bill would create would be unworkable.

Threats to Public Health

4.10 The Bill requires corporations to "take all reasonable measures to prevent any serious threat to public health".[5]

4.11 The Bill does not apply to all Australian corporations operating overseas, however, but only to those with more than 100 employees. The Committee finds it unacceptable that any legislation should imply that only certain corporations should refrain from threatening public health.

4.12 Moreover, the Committee believes that this part of the Bill is unnecessary. Common Law rights relating to negligence would already allow foreign litigants in most circumstances to sue in Australian courts for damage suffered from negligent behaviour. The Committee considers it unwise to interfere with these Common Law rights.

Foreign holding companies

4.13 The Bill would regulate Australian corporations with over 100 employees overseas and

> (b) a holding company of such a corporation.[6]

4.14 Such a holding company may not be an Australian corporate entity. The Bill would therefore seek to regulate, for example, as Mr Benjamin McLaughlin of the Australian Institute of Company Directors testified, America's General Motors.[7]

4.15 It would be an unusual extension of the principle of extraterritoriality if the Australian Parliament enacted legislation that sought to regulate the activities of foreign corporations in foreign jurisdictions.

4.16 The Bill could be redrafted to remove this anomaly, but any such redrafting to remove foreign corporations from the purview of the Bill would allow Australian

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

5 Corporate Code of Conduct Bill 2000, clause 12(2).

6 Corporate Code of Conduct Bill 2000, clause 4.

7 Committee Hansard, 15 March 2001, p 121.

corporations to avoid being subject to the Bill by having themselves incorporated in a foreign jurisdiction.

4.17 The Committee therefore unanimously finds that it cannot contemplate the Australian Parliament enacting a Bill that ostensibly regulates foreign corporations, if those corporations have Australian subsidiaries.

Generic nature of the Bill

4.18 The Bill would impose "environmental, employment, health and safety and human rights standards"[8] on some Australian corporations with 100 employees overseas.

4.19 The Committee accepts that the Parliament has enacted numbers of acts with extraterritorial application. The Committee, however, agrees with Mr Pragnell of CPA Australia that such existing legislation can be distinguished from the current Bill by the fact that it is "targeted and very focused", while the current Bill is "generic".[9]

4.20 The Committee concludes that as presently drafted the Bill is so "generic" as to be vague to the point of being unenforceable. One example in this context is the requirement that corporations provide their employees with "satisfactory sanitary conditions"[10].

4.21 The Committee is aware that regulations may be made under clause 18 of the Bill, which may define what is meant by terms such as "satisfactory". Nevertheless, the Committee finds itself unable to recommend a Bill, the provisions of which are so vague as to cause considerable uncertainty to industry.

Living Wage

4.22 The Bill requires an Australian corporation to pay its workers a "living wage".[11] This term is derived from a case decided in Australia's Commonwealth Arbitration Court in 1907.[12] The Committee finds it anachronistic to suggest that an Australian concept from 1907 should be applied extraterritorially in the twenty-first century.

4.23 The difficulties in determining the "living wage" would involve corporations in considerable expense and there is no certainty, despite a corporation's best efforts, that, in the event of litigation, an Australian court would find that it had been paying its workers a "living wage". Australian corporations would therefore always operate under the threat of litigation.

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

9 Committee Hansard, 14 March 2001, p 69.

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

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

12 *Ex parte H.V. McKay* 2 C.A.R. 1 (the *Harvester case*).

4.24 The Committee concludes that the Bill's requirement that a corporation be required to determine a "living wage" in all of the jurisdictions in which it operates is unreasonable and impractical.

4.25 Senator Murray agrees that the definition of a living wage is problematic, and either needs to be withdrawn or significantly amended.

Human rights standards

4.26 The Bill, at clause 10, would require Australian corporations operating overseas to avoid discriminating in its employment practices

> on the basis of race, colour, sex, sexuality, religion, political opinion, national extraction or social origin.[13]

4.27 The Committee in no way endorses discrimination. It is evident, however, from the submission of the Melbourne Practitioners of Falun Dafa,[14] that this clause of the Bill could be a source of friction with other nations. Friction could result from Australian corporations being required either to hire persons belonging to religions and political parties considered illegal in the jurisdictions in which they operate, or else face litigation in Australian courts.

4.28 The Committee finds itself unable to recommend a Bill that has the potential to unnecessarily damage Australia's foreign relations.

Duty to observe tax laws

4.29 Clause 11 of the Bill requires Australian corporations to obey the tax laws of the jurisdictions in which they operate. The Committee in no way condones tax evasion. Nevertheless, there are manifest difficulties in any legislation that would require Australian courts to adjudicate cases involving Australian corporations allegedly breaching foreign taxation laws in foreign jurisdictions to the detriment of the consolidated revenue of foreign nations. The correct place for such litigation is the foreign states concerned.

4.30 The Committee unanimously concludes that, as a matter of principle, it is inappropriate for the Australian Parliament to enact legislation requiring companies to obey the laws of sovereign foreign nations.

Duty to observe consumer health and safety standards

4.31 Clause 12 of the Bill requires Australian corporations, producing goods and services overseas, to simultaneously satisfy both Australian health and safety standards and the health and safety standards of the jurisdiction in which they operate.

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

14 Melbourne Practitioners of Falun Dafa, Submission No. 5.

4.32 Amending the Bill so that Australian corporations are required to adhere to Australian standards only could be equivalent to encouraging Australian corporations to flout the laws of foreign jurisdictions. Amending the Bill so that Australian corporations had only to observe the standards of the jurisdiction in which they operated would be tantamount to requiring corporations in foreign jurisdictions to comply with foreign laws, which is clearly a matter for the foreign jurisdiction.

4.33 The Committee does not however subscribe to the 'lowest common denominator' view. That is to say, if a foreign jurisdiction has less rigorous standards than Australia (say on mine safety, as an example), then the Committee would be surprised if an Australian corporation does not try to maintain the standards it maintained at home. However, the Committee finds that attempting to legislate this, as expressed in clause 12 of the Bill, is a fundamental defect in the Bill.

Duty to observe consumer protection and trade practices standards

4.34 Subclause 13 of the Bill requires that Australian corporations operating overseas refrain from "misleading or deceptive" [15] conduct. Considering the vast amount of litigation that a similar section in the *Trade Practices Act 1974* (Cth) has inspired, the Committee is concerned that Australian courts may be swamped by corporations bringing actions against each other. The Committee is not convinced that such litigation would be productive.

4.35 The Committee finds itself unable to recommend legislation, the effect of which would be to dramatically increase the caseload of Australian courts with corporations suing other corporations in order to gain a commercial advantage.

Reporting

4.36 The Committee acknowledges that reporting may be an essential part of ensuring compliance with some laws. The Committee notes advice from the Australian Institute of Corporate Citizenship that reports produced by corporations should be publicised, since publicity "encourages continuous improvement".[16]

4.37 The Committee concludes, however, that the reporting requirements required by the Bill would be both "onerous and expensive",[17] and are inconsistent with best practice. In addition the Committee accepts the contention of CPA Australia and the Institute of Chartered Accountants in Australia, that the deadline of 31 August for corporations to lodge Code of Conduct Compliance Reports, presents corporations with a "more onerous time frame than applies for other annual report information".[18]

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

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

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

18 CPA Australia and the Institute of Chartered Accountants in Australia, Submission No. 31, p 2.

4.38 The Bill would require the Australian Securities and Investments Commission to report on corporations' compliance with the Bill.[19] The Committee agrees with the assessment of Mr Sean Cooney that the Commission lacks the expertise to evaluate whether corporations have complied with the terms of the Bill.[20]

4.39 The Committee concludes that the reporting requirements of the Bill are unwieldy to the point of being impossible to implement without significant costs being incurred by both corporations and the Australian Securities and Investments Commission. The Committee finds that any supposed benefits to be derived from the reporting regime would not compensate for the loss suffered due to the imposition of associated costs.

Enforcement

4.40 The Bill requires corporations to report on their compliance with the Bill to the Australian Securities and Investments Commission, which in turn would prepare a report for the Commonwealth Parliament.[21] The Bill also will allow civil penalties to be applied to, and civil action to be taken against, corporations which breach the Bill's provisions.[22]

4.41 The Committee is grateful for the advice from the Environmental Defender's Office Ltd that the civil penalties to be imposed by the Bill differ from those specified in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) even where the offences are similar.[23]

4.42 The Committee believes that, as a general rule, similar offences should attract similar penalties. The Committee is unable to discern any rationale for the penalties specified in the Bill and unanimously concludes that enacting the Bill would lead to unwarranted confusion in the corporate world, unless the Bill's provisions were made consistent in these respects.

The *Status Quo*

4.43 Various submitters and witnesses stated that the *status quo* was unacceptable because it was tantamount to allowing Australian corporations overseas to degrade the environment and abuse the rights of foreign workers.

4.44 The Committee in no way endorses inappropriate behaviour on the part on Australian corporations. The Committee notes, however, that the evidence of inappropriate corporate behaviour which was presented to it almost invariably concerned the same incidents. The Committee therefore concludes that Dr Nahan of

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19 Corporate Code of Conduct Bill 2000, clause 15.

20 Committee Hansard, 8 May 2001, p 156.

21 Corporate Code of Conduct Bill 2000, clauses 14 and 15.

22 Corporate Code of Conduct Bill 2000, clauses 16 and 17.

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

the Institute of Public Affairs was correct when he testified that such incidents were "few in number".[24] The Committee therefore concludes that there is no evidence of systemic failure regarding Australian corporate behaviour.

4.45 As a general rule the Committee believes that the Parliament should legislate only where there is a demonstrated systemic failure in the *status quo*. Since there is no evidence of systemic failure in the *status quo* the Committee questions the necessity of enacting such a wide-ranging and generic piece of legislation as the current Bill.

4.46 The Committee concludes that there is no demonstrated need for the current Bill.

Australia's Reputation and Extraterritoriality

4.47 The Committee does not accept that the Bill would enhance Australia's corporate reputation. The Committee is unable to see any way that the Bill's extraterritorial imposition of Australian standards on corporations operating within the territory of sovereign, foreign nations will be interpreted as anything other than implying that local standards are inferior.

4.48 Any kudos gained by Australian corporations appearing to adhere to high standards of behaviour will be lost if Australia is perceived as suggesting that the laws of other nations are deficient.

4.49 The Committee notes that Australians in the past have resented foreign nations applying their laws extraterritorially within Australia. It is probable that the governments and numbers of citizens of foreign nations will similarly resent any attempt by Australia to apply its laws extraterritorially within their jurisdictions. This is particularly so in relation to the current generic Bill as opposed to, for example, legislation which specifically targets child sex tourism. The Committee therefore agrees with Mr Bosch that there is reason to believe the Bill will be viewed overseas as "arrogant, patronising, paternalistic and racist".[25]

4.50 The Committee also notes that existing case law provides avenues for foreign plaintiffs to seek redress for wrongs committed by Australian corporations overseas.

4.51 The Committee therefore concludes that the Bill is not only largely superfluous from the viewpoint of protecting the environment and enhancing the conditions of foreign workers, but also has a very real potential for offending foreign nations.

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24 Committee Hansard, 8 May 2001, p 165.

25 Committee Hansard, 8 May 2001, p 159.

Conclusion

4.52 Mr Bosch reminded the Committee of the exchange between the Shakespearian characters Friar Laurence and Romeo

> Romeo: O, let us hence; I stand on sudden haste.
> Friar Laurence: Wisely and slow; they stumble that run fast.[26]

4.53 The Committee agrees with this assessment. The Australian Parliament should not move hastily to legislate in this area lest the result be more harm than good. The current Bill appears to have been drafted, in the main, as a reaction to unrelated incidents overseas of environmental damage. The Bill, however, would not necessarily result in fewer incidents of environmental damage and abuse of workers' rights, but rather could cause Australian corporations to incorporate outside Australia, withdraw from their operations overseas, and even involve Australia in acrimonious exchanges with other nations about imperialism.

Recommendation

The Committee recommends that the Bill not be passed because it is unnecessary and unworkable.

Senator Grant Chapman

Chairman

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26 William Shakespeare, *Romeo and Juliet*, Act 2, scene III; referred to by Henry Bosch, Committee Hansard, 8 May 2001, p 160.

COMMENTS BY LABOR MEMBERS ON THE CORPORATE CODE OF CONDUCT BILL 2000

INTENT OF BILL

The Corporate Code of Conduct Bill 2000 seeks to have Australian companies, operating overseas, act in accordance with decency, rectitude, and high ethics. It contemplates they will do this while carrying on business in an efficient, profitable and professional way. It looks to the well being of workers, of residents, of the environment, and of the society generally in those foreign countries where Australian companies have a presence.

The objectives of this Bill are noble ones and need realisation with due dispatch. The issue in contention is the means by which they can be achieved.

PRESCRIPTIVE LEGISLATION

Legislation pertaining to the regulation of companies in Australia is extensive. Should further laws be enacted prescribing how they are to conduct themselves while operating offshore? If the present Bill is passed how effective will it be in gaining for people overseas what it seeks to accomplish?

Evidence given to the Committee told of the formidable problems to be encountered in enforcing prescriptive regulations on Australian companies in respect of their overseas operations. Submissions to the Committee recommended as an alternative that the objectives of the Bill be pursued by requiring companies to make public both the principles according to which they operate abroad, and an ongoing account of how they adhere to them. To ensure that corporations properly abide by these requirements an audit should be undertaken regularly by an independent body. If this strategy proves ineffective others can then be tried.

AUSTRALIAN CORPORATIONS AND PRINCIPLES

The principles according to which Australian corporations ought conduct themselves overseas is a fundamental issue for resolution in this matter. Should a company act solely in the interests of its shareholders? Should it take heed only of the law of the jurisdiction in which it operates? Should it, as the Bill requires, take account of the well being of its workers, of the environment, of consumers, and of people generally in the foreign country where it is carrying on business? Answers to those questions depend upon what responsibilities a company ought bear.

GROWTH OF CORPORATE POWER AND ITS CONSEQUENCES

Corporations began as a vehicle for economic gain. Their owners derived wealth through their operation. Since then a great deal of law has developed to ensure these owners a just return for their investments. Today people who manage companies are obliged to do so for the good of those organisations and accordingly for the benefit of shareholders. But there are other matters that ought be taken into account.

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Adolf A Berle and Gardiner C Means first published "The Modern Corporation and Private Property" in 1932. They prepared a revised edition in 1967 from which the following quote is taken.

> "The institution (the corporate organisation) here envisaged calls for analysis, not in terms of business enterprise but in terms of social organisation. On the one hand it involves a concentration of power in the economic field comparable to the concentration of religious power in the mediaeval church or of political power in the national state. On the other hand it involves the interrelation of a wide diversity of economic interests, - those of the 'owners' who supply capital, those of the workers who 'create', those of the consumers who give value to the products of enterprise, and above all those of the control who wield power.
>
> Such a great concentration of power and such a diversity of interest raise the long-fought issue of power and its regulation – of interest and its protection. A constant warfare has existed between the individual wielding power, in whatever form, and the subjects of that power. Just as there is a continuous desire for power, so also is there a continuous desire to make that power the servant of the bulk of individuals it affects. The long struggles for the reform of the Catholic Church and the development of constitutional law in the states are phases of this phenomenon. Absolute power is useful in building the organisation. More slow, but equally sure, is the development of social pressure demanding that the power shall be used for the benefit of all concerned. This pressure, constant in ecclesiastical and political history, is already making its appearance in many guises in the economic field.
>
> Observable throughout the world, and in varying degrees of intensity, is this insistence that power in economic organisation shall be subject to the same tests of public benefit which has been applied in their turn to power otherwise located". (pp.309, 310)

The power and influence of corporations around the world has grown to the point where society needs to ensure that they operate for the true benefit of people globally. Accordingly, interests in addition to those of the shareholders must be looked to as a matter of equity, justice and societal well-being. The activity of companies is so vital to the well-being of nations that they must work and be seen to work in the legitimate interests of people in all those countries in which they have a presence.

NEED FOR RIGHT CONDUCT

Later in their work Berle and Means wrote the following paragraph.

> "The rise of the modern corporation has brought a concentration of economic power which can compete on equal terms with the modern state–economic power versus political power, each strong in its own field. The state seeks in some aspects to regulate the corporation, while the corporation, steadily becoming more powerful, makes every effort to avoid such regulations. Where its own interests are concerned it even attempts to dominate the state.

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> The future may see the economic organism, now typified by the corporation, not only on an equal plane with the state, but possibly even superseding it as the dominant form of social organization. The law of corporations, accordingly, might well be considered as a potential constitutional law for the new economic state, while business practice is increasingly assuming the aspect of economic statesmanship". (p.313)

At this point in time, what is the best way of having an Australian company operating overseas act for the true well being of the people in those countries in which it is carrying on business? That it has a responsibility for doing so should not be in contention.

POLITICS AND CORPORATE GOVERNANCE

In a free and democratic society it is usual and befitting for political action to be taken to see to it that the affairs of corporations are properly ordered. In 1994 Mark J Roe wrote "Strong Managers Weak Owner: The Political Roots of American Corporate Finance". In his preface the author says:

> "I show that politics – democracy in general, and American democracy in particular – affected the organisation of the large firm. The interaction between firms and financiers was, and still is, mediated partly by politicians, and that mediation in a democratic society is a central – and neglected – explanation for the organisational forms we observe. Were the title not already taken, a good one for this book would have been "The Visible Hand", because the visible hand of politics affected the structures of financial intermediaries, which in turn affected the structure of the large public firm". (p.x)

And again:

> "I have a good focus for this book – the interaction between politics and corporate governance – and people with a focus can exaggerate their subject's importance. While corporate governance is one of the matters on the list of what determines economic success or failure, it is only one, and it is probably a good way down the list of importance. Similarly, while politics is one of the determinants of corporate governance, it is only one, although, as it turns out, an important one". (p. xi)

It is open to Parliament to legislate about the way Australian companies should comport themselves overseas. Should it do so?

CODE OF CONDUCT

Companies carrying out their functions in a foreign place should conduct themselves decently and in a manner that does good and not harm to the people living there. They should have a code of conduct aimed at achieving this. Such a code needs to be developed and then adhered to in a way which is both apt and beneficial to the host country. It would be difficult, and perhaps impracticable, for an Australian legislature to effectively institute specific and prescriptive laws for companies to obey as a means of achieving this end. On the other hand, Parliament could appropriately and usefully pass legislation requiring corporations operating overseas to publish a code of conduct by which they are to act, and, then to furnish a periodical account of how they have measured up to that code.

O.E.C.D. GUIDELINES

The Organisation for Economic Co-operation has set out guidelines for multinational enterprises. These provide a basis for a code of conduct for Australian companies operating in other countries. They are appropriate principles for good corporate behaviour, both at home and overseas. They are advanced here in the context of a discussion about the way multinational enterprises should behave abroad.

NEED TO ACT WELL AND ACCORDING TO CODE

Once companies establish their codes of conduct they need to operate in accordance with them to achieve their purpose: that is to act not only profitably but also with decency, with efficiency, with energy, with rectitude, and to the benefit of the society within which they work.

Corporations will operate in this way if the people running them are men and women of ability, informed with a culture of integrity, and determined to have their companies succeed both economically and ethically. Government regulation would not be an issue were this the situation throughout the corporate sector: where it is not the question arises.

In any event Australian companies operating overseas ought report at home on how they adhere to their codes of conduct. This allows the community here to ascertain the way in which they go about their tasks in a world where this nation is not only a participant in trade and commerce but a global citizen.

Corporation ought give an account of the profits and losses they make, of the wages and conditions they provide, of the impact they have on the environment, of whether they have advantaged or disadvantaged the civil life in the foreign countries within which they work.

AUDIT BY GOVERNMENT

The reports provided by corporation ought be regularly audited by a Government department or departments (for example the Department of Employment, Workplace Relation and Small Business) as determined by ASIC having regard to the content of the code and the competencies of the department.

AUSTRALIA'S RESPONSIBILITIES AND AUSTRALIAN'S STANDING AND GOVERNMENT INVOLVEMENT

Government represents society and society is entitled to know how a company based in Australia is conducting itself when carrying on business abroad. The various parts of the world community are more and more impacting on each other and governments are incurring increasing responsibility for how their citizens and organisations conduct themselves overseas. Australia as a leading exponent of the rule of law, both at home and abroad, and accordingly needs to look to the way its companies comport themselves in other countries. Moreover it is right and proper that Australians seek to ensure that their international standing is high.

RACE TO THE TOP

The phrase “race to the top” may well be used to encapsulate the thought that were Australian companies operating overseas obliged by law to develop codes of conduct, and to give a regular account to a government authority about how they adhered to them, the competition which would thereafter develop to become the best would lead to a marked improvement in the comportment of such corporations generally.

GOVERNMENT ACTION

The intent of the Corporate Code of Conduct Bill 2000 is right and proper. In so far as its strategy is to establish a set of prescriptive regulations as a means of realising this intent, its time has not yet come. At this stage the best way for Parliament to deal with the matter is to:

1. require Australian companies operating overseas to develop appropriate codes of conduct which are to encompass in them the relevant O.E.C.D. guidelines.

2. require those companies to give a regular account of how they adhere to those codes.

3. have the codes developed by the companies and the accounts given by them of how they adhere to those codes audited by a relevant government department.

Mr Bob Sercombe, MP	Senator Stephen Conroy
Senator Barney Cooney	Mr Kevin Rudd, MP

Senator Andrew Murray: Australian Democrats

Minority Report on the Corporate Code of Conduct Bill 2000

1. Evidence and submissions gathered during the Committee's inquiry into the Corporate Code of Conduct Bill 2000 represents a diversity of opinion. There were both strong supporters and strong opponents of the Bill. However many improvements to the Bill were suggested.

2. Whilst accepting that the issue is controversial and there is disagreement on whether the Bill is necessary, workable or wise, the Report gives more weight to those opposing the Bill.

3. This Bill was always going to be controversial because it introduces a concept that is not universally accepted as requiring legislation. In her second reading speech Senator Vicki Bourne referred to other instances of similar attempts to introduce such legislation, which while seen as inevitable by some, is still being developed.

4. The debate was always destined to polarise opinion. Mr Maitland outlined what was at stake when he made the following comment to the committee

> As Australian legislators, it is within your power to act to safeguard and improve the lot of workers and communities dependent on Australian companies and safeguard and improve the environment in which Australian companies operate. We can make the world a better place to live. The question for the committee is whether it chooses to assist or frustrate the process.[1]

5. This minority report attempts to assist the process of review by providing balance to the debate as presented in the Report and also to give consideration to some of the suggestions made to improve the content of the Bill.

Examination of Evidence

Overview of the inquiry

6. The majority of the Committee believes that the Bill is impracticable and unwarranted. I conclude that the Bill cannot proceed without amendment; however, I disagree with rejecting the Bill outright. I intend recommending to the author of the Bill that amendments that recognise valid suggestions

[1] Mr Maitland, Hansard, Thursday 15th March 2001, Page CS 102.

and criticisms should be made. I believe there are difficulties with the Bill, as it stands, but not that the Bill itself is unwarranted.

7. The inquiry into the Bill identified a diversity of views. Businesses are seldom leaders in progressive policy in my experience, not because individual business people are not progressive, but because collectively businesses understandably fear regulation and consequent costs. Therefore as expected business interests were vehemently against the Bill in its entirety whereas other organisations and individuals, including NGOs, academics and lawyers were supportive in the whole, in part or with technical changes.

8. Mr Bosch (paragraph 3.4) believed the Bill should be abandoned because of increased costs to Australian business, which would disadvantage them. However a submission from the Castan Centre, whilst acknowledging the Bill must not amount to "protectionism", stated that

> It is not a legitimate competitive advantage for human dignity to be sacrificed to such an extent that corporations can be attracted by wage rates which are far below a living wage….[2]

9. It was also clear from some evidence that some in the Australian community have an expectation that companies should be held responsible for their activities. Mr Cameron from the AMWU said in evidence that

> In Australia only eight percent of those polled said that the role of companies should be to make profit, pay taxes, create jobs and obey all laws. Forty Five percent of Australians said companies should set higher ethical standards and help build a better society, and 43 percent said companies should operate somewhere between the two positions. Unfortunately many of our key politicians and political parties adopt the view of those polled in Kazakhstan where 48 per cent say a company's role is to make profits and only 18 per cent say they should set higher ethical standards.[3]

10. Others expressed views similar to Mr Hogan from Amnesty International who supported the Bill and said that it was necessary to legislate

> [B]ecause the influence of companies, as we all know, has really accelerated over the last few years and we all need to say that every actor in society has an obligation for human rights protection.[4]

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[2] Castan Centre for Human Rights Law submission, p2

[3] Mr Cameron, Hansard, Thursday 15th March 2001, Page CS 97.

[4] Mr Hogan, Amnesty International, Hansard Thursday 15th March 2001, page CS81.

Objects of the Bill

<u>Imposition of Standards</u>

11. The issue of whether the Bill would impinge on the national sovereignty of other nations and whether it is an unwarranted imposition of Australian values on others was clearly an important issue in the debate.

12. The Report gives significant weight to those who saw the Bill as paternalistic. However other evidence submitted to the committee strongly disagreed with this point of view. This evidence acknowledged that the standards being imposed are underpinned by International Conventions and are universal values. Community Aid Abroad referred to the legitimacy of the Universal Declaration of Human Rights and said

> International Human Rights instruments represent a set of fundamental and universal rights over which there is broad international consensus transcending political, cultural and religious interpretation.[5]

13. It is true that Australia possesses no ascendancy in the matter of standards, particularly in relation to labour rights (paragraph 3.8). The author of the Bill recognised the possibility of Australian legislation failing to meet international obligations and the Bill states that a corporation

> … is not required to take any action to meet the requirements of its operations in a foreign country that it would not be required to take in respect of its own operations in Australia.[6]

14. Evidence was given that supported the view that the standards and human rights the Bill seeks to uphold are universal and not peculiar to Australia. Dr Wansborough in evidence spoke about her experience in Asia and asserted that basic labour rights are very much an issue for the Asian women with whom she works through a journal called “In Gods Image”. She said that

> What comes through in that, certainly from the women who provide material and the women they work with, is that women are saying they think labour standards matter.[7]

15. Dr Wansborough also drew attention to comments she attributed to the General Secretary of the National Council of Churches in the Philippines, who made comments to the effect of

> You’ve got to do something about it. It is not good enough that you let Australian Companies operate in our country in a way that treats us

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[5] Community Aid Abroad submission, p7

[6] Corporate Code of Conduct Bill 2000, clause 3:2

[7] Dr Wansborough, Hansard, Thursday 15th March 2001, Page CS 86.

> like this, that damages our environment and treats employees badly and so on.[8]

Scope of the Bill

16. The Report raised several issues concerning the scope of the Bill (paragraph 3.109). There followed a useful explanation of the some of the problems associated with the definitions used in the Bill, which it noted are issues not confined to this Bill.

17. Of greatest difficulty is defining the scope of the Bill, particularly as it relates to foreign corporations and holding companies. The author of the Bill has advised me that the Bill was not intended to regulate foreign companies operating in foreign countries. As the Report suggested this was a drafting error (paragraph 3.17).

18. It is not clear from evidence given that there is a clear option, however I do not concur with the conclusion reached in the Report that because there are difficulties we should not legislate at all (paragraph 3.27). Of course as legislators we have a responsibility to ensure legislation is unambiguous, but this does not excuse us from taking decisions just because finding the right definition is difficult.

Recommendation: I recommend that Senator Bourne seeks further advice on this issue.

Corporations with 100 employees and the issue of subcontractors

19. Convincing evidence was provided that the threshold of 100 employees would not provide sufficient safeguards. Several submissions suggested lowering the threshold to 50 or 20 employees. I think it needs to be consistent with other legislation. For that reason 50 is probably a desirable threshold.

20. The Report identified that subcontractors would not be subject to the provisions of the Bill (paragraph 3.35). Several submissions also identified this as a problem and commented on the need to deal with the issue of subcontractors. This is an important omission from the Bill and needs to be addressed.

21. To be effective responsibility must be extended down the supply chain to subcontractors. Tim Connor in his submission suggested defining subcontracting by using a definition used by the Fair Labor Association in the US. That definition extends to

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[8] Dr Wansborough, Hansard, Thursday March 15, Page CS87.

> any contractor or supplier engaged in a manufacturing process, including cutting, sewing, assembling and packaging, which results in a finished product for the consumer.[9]

22. The Report concluded that the cost of including the subcontractors was substantial (paragraph 3.36). No factual evidence was presented to the Committee, which supported this assumption.

Recommendation: I recommend to Senator Bourne that the employee threshold is lowered to 50 employees and that the Bill should be extended to include subcontractors.

Extraterritorial Operation

23. The extraterritorial nature of this Bill is significant and rightly requires close attention. I commend the Committee on the section in the Report on the Development of Extraterritorial legislation (paragraph 3.43). It is a most useful and informative section. However the analysis of the importance of the extraterritorial application of the Bill failed to include crucial evidence provided to the Committee.

24. Those in favour of the Bill asserted that, in this case, extraterritorial legislation simply implements Australia's responsibilities under various treaties.[10]

25. Many of those who claimed that the extraterritorial application of the Bill was most problematic and paternalistic did not present factual evidence to substantiate this claim. For instance the Australian Institute of Company Directors in their submission said, "to mandate standards that are not required by the citizens of a nation is a form of economic and political imperialism."[11]

26. When questioned by the Chair of the Committee as to whether any attempt had been made to find out whether foreign governments do object to the legislation, Mr Hall, CEO of the Australian Institute of Company Directors replied "We have not had any direct feedback about that …."[12] Mr McLaughlin, Member of the Corporations Law Committee, Australian Institute of Company Directors continued

> It is up to the proponents of the Bill to demonstrate why this would assist those countries. For example, is there any evidence that the

[9] Tim Connor, Submission No 2, page 3

[10] Environmental Defender's office Ltd, Submission no. 14, p3.

[11] Australian Institute of Company Directors, Submission 30, page 3.

[12] Committee Hansard Thursday 15th March 2001, pCS121

> operation of foreign companies in developing countries has caused the poor to be worse off?[13]

27. Proponents of the Bill did cite several examples, which evidenced the necessity of the Bill. I also raised the question

> Does this bill merely balance up the drive by Australian Corporations to support globalisation in other economic areas such as copyright laws, capital movements and international tax harmonisation – those sorts of things?

28. Ms Burrow agreed and added that if people had access to their basic rights such as freedom to bargain collectively then

> they themselves will set the appropriate labour costs in the context of economies and affordable rates within the specific industries. That is the basis. It is about human rights and labour standards, along with environmental standards. It is not about us dictating that there should be a common minimum wage or whatever the other fallacies are that people like to promote.[14]

29. Instructive direct foreign evidence relating to the necessity of the Bill was from witnesses from Papua New Guinea. These witnesses gave unequivocal support for such a Bill. They found that Australian companies operating in PNG were practicing "double standards".[15]

30. Ms Koma, PNG NGO Mining Coordinator, NGO Environment Watch Group, PNG, said

> It would be very good if a corporate code of conduct was encouraged so that Australian companies working in Papua New Guinea were able to do what they practice overseas in their own country if our legislation is weaker than theirs.[16]

31. Mr Ase, PNG NGO Mining Coordinator, NGO Environment Watch Group, PNG, said

> In Australia they would not dump waste or tailings into the river system or the marine system. But in PNG that is not the case because our government is not able to enforce the laws, so the companies are dumping waste into the river system.[17]

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[13] Committee Hansard Thursday 15th March 2001, pCS121

[14] Burrow, Committee Hansard, Wednesday 14th March 2001, Page CS13

[15] Committee Hansard, Wednesday 14th March 2001, p CS56

[16] Committee Hansard, Wednesday 14th March 2001, pCS56

[17] Committee Hansard, Wednesday 14th March 2001, pCS56.

32. It was disappointing that the Committee decided not to proceed with an arranged phone hook up to Ms Zsuzsanna Kocsis-Kupper from the Hungarian Prime Minister's office. Ms Kocsis–Kupper is the lawyer involved in preparing the case for the Hungarian Government's legal action in Australia on the Esmerelda issue. (It is particularly regrettable that Ms Kocsis–Kupper was inconvenienced as it was 5.00 am in Romania where she was waiting for the call).

33. In addition the Committee commented that insufficient evidence was presented which either expressed a need for the legislation or that satisfied them that Foreign Governments would not be concerned about the Bill impinging on their sovereignty. Yet when the Committee was presented with an opportunity to hear evidence from a Foreign Government they declined. [18]

34. The Report expresses a concern that this Bill could interfere with the political and legal processes of other countries (paragraph 3.72). However I still believe what I said at the hearing is apposite

> it merely requires them to ensure that people are paid properly, that they are in a healthy and safe environment and that they are not discriminated against as employees on the grounds of gender, race or ethnicity – those sorts of things. It is not asking Australian companies to become participants in the political process of a foreign country.[19]

35. Notwithstanding the complexity of the issue of extraterritoriality, there does seem to be some inconsistency with the Government's previous stance on extraterritoriality in this instance. The Centre for International and Public Law at the ANU in their submission discussed the issue of extraterritoriality and referred to comments made by the Attorney General Mr Daryl Williams in his second reading speech on the Slavery and Sexual Servitude Bill 1999. They said,

> Importantly, the Attorney General also made reference to the fact that the Bill if passed would be furthering Australia's obligations to prevent slavery in persons as contained in the UDHR, CEDAW and the Convention on the Rights of the Child.[20]

36. This Bill is based on the same principle of furthering Australia's obligations under the International Instruments as listed in the Bill. The Report also concluded that implementing International Documents such as the Universal Declaration of Human Rights is superfluous (paragraph 3.71). This conclusion fails to take into account some very real problems some

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[18] Committee Hansard, 15th March 2001, Page CS 134

[19] Senator Murray, Hansard, Wednesday 14th March 2001. Page CS 51

[20] Centre for International and Public Law, ANU, Submission No. 35, page 46.

countries may have with implementing international conventions due to lack of resources.

37. Evidence from the witnesses from PNG highlights the problems that some host countries have, for a variety of reasons, in implementing, monitoring or enforcing their own laws. [21]

38. Mr Divecha, from the Minerals Policy Institute, commented on the lack of resources, which he said make it very difficult for some countries to take action to implement the laws. He said that

> If you go and visit the environment department in Papua New Guinea you will see it comprises a few people on one floor and you have trouble getting copies of information because they are afraid the toner in their photocopier is going to run out.[22]

39. The Committee also commented that previous legislation that applied extraterritorially was far more confined in its scope, i.e. it usually had only one subject as its object, for example bribery and corruption (paragraph 3.77). BHP also raised concerns about the more generic nature of this Bill (paragraph 3.78). In response the Report gave weight to Mr Pragnell's view that the Bill should be redrafted to focus on specific behaviours which would overcome BHP's concerns about the current bill not being workable in practice (paragraph 3.81). I make the obvious point that this Bill was not designed to target one sector or indeed one company such as BHP.

Current Australian Case Law on extraterritoriality

40. The analysis of the current Australian case law on extraterritoriality in the Report usefully places the Bill in context. In addition the discussion of the principle of the *forum non conveniens* was very useful (paragraph 3.95). Establishing the appropriate *forum* has been central to many of the cases brought against multinational corporations around the world. Senator Bourne refers to several examples of these cases in her second reading speech.

41. For completeness the Report should acknowledge the limitations to the ability of foreign citizens to bring action in Australia. The Report says "existing case law provides avenues for foreign plaintiffs to seek redress for wrongs committed by Australian Corporations overseas" (paragraph 4.50).

42. This conclusion fails to acknowledge the practicalities of the current state of affairs. Claimants have to bear considerable cost and power imbalances in trying to prove that Australia is the appropriate forum to hear the case. As commented elsewhere in this report, often those who are victims of

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[21] Committee Hansard, 14th march 2001, p60

[22] Mr Divecha, Hansard, Thursday 15th March 2001, page CS 129

environmental degradation and human rights abuses simply do not have the resources to bring their cases to Australia and first have to prove that Australia is the appropriate forum for the case to be heard.

Local Law Defence

43. Some questions were raised about what would happen if local laws conflicted with requirements of the Bill - which would prevail, or would companies face duplicate fines in different jurisdictions? Professor Kinley explained that the "local law defence" could prevail. He said in evidence that

> It is only where, with respect to certain human rights the local law requires it – where obligatory for the corporation to limit or curtail a particular human right. If they are then to continue to invest in that country they must say that they recognised this was a compulsory local law, but they must disclose the fact that they are continuing because this law is compulsory.[23]

Recommendation: I recommend to Senator Bourne the addition of a "local law defence" clause to the Bill.

Standards to be imposed by the Bill

General Comments on standards

44. Some people put to the Committee that companies would move off shore to avoid such onerous obligations as they implied this Bill would engender. Mr Colley in evidence suggested that other factors such as access to the global capital markets would play a far greater role as would "political stability, access to resources, good geology, a skilled work force and so on."[24]

45. Another issue was that of cost. Mr Ross Cameron commented that because of the onerous costs involved the effect of the Bill would be to "change the operators in the environment, and those who would be removed will be the Australians". [25]

46. However Mr Colley queried Mr Ross Cameron's argument by asking,

> Are you saying that the competitive advantage of Australian Companies operating in China is that they succeed by not paying a

[23] Committee Hansard, Wednesday 14th March 2001, page CS 2.

[24] Mr Colley, Hansard, Thursday 15th March 2001, CS106.

[25] Mr Cameron, Hansard, Thursday 15th March 2001, Page CS110.

> living wage and by not respecting human rights, and that is essential for their competitive success?[26]

47. Ms Burrow also raised the issue of companies moving off shore and relocating to export processing zones, claiming,

> that will raise all sorts of questions about safety, treatment and access to International law, whether it concerns human rights or labour standards that we know are breached everyday in those export processing zones. So this is a very important piece of legislation for us because it will provide a basis at least for transparency and prosecution where companies are not behaving as they should in this country.[27]

48. Mr Redden in evidence commented that in his dealings with corporations he was being told by these corporations that they are already meeting the requirements and in some cases exceeding them. He said "…we are working with business and transnational corporations and they do not see this Bill as an issue in terms of discouraging investment."

49. Senator Gibson expressed concern that legislation could be a blunt instrument and that it would set a low standard, which would encourage companies to retreat to the lower standard.[28] Professor Braithwaite in response referred to analysis by Michael Porter from Harvard Business School who asserts that the companies who are securing competitive advantage are

> those companies keeping up with the kinds of demands that sophisticated markets are making on things like consumer protection, health standards, environmental protection and so on, have a philosophy of continuous improvement of environmental standards.[29]

50. Professor Braithwaite encouraged the adoption of a clause, which requires continuous improvement.

Recommendation: I recommend to Senator Bourne a clause seeking continuous improvement.

Health and Safety Standards

51. The Report criticised the Bill for being too vague. The intention of the author of the Bill was to provide principles rather than prescriptions.

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[26] Mr Colley, Hansard, Thursday 15th March 2001, Page CS110.

[27] Ms Burrow, Hansard Wednesday 14th March 2001, CS 11

[28] Senator Gibson, Hansard, Thursday 15th March 2001, Page CS117.

[29] Professor Braithwaite, Hansard, Thursday 15th March 2001, Page CS118.

However I accept concerns that these standards could be too vague to be reliable for business.

Recommendation: I recommend to Senator Bourne further consideration of the Report's comments on health and safety standards.

Environmental Standards

52. The Committee considers that requiring a corporation to take all reasonable measures to prevent any material adverse effect on the environment is superfluous as the Common Law of negligence would be adequate (paragraph 3.112).

53. Without adequate legal advice either in the Report or from evidence this is difficult to ascertain. Some evidence did however identify unacceptable vagueness in the clause. Suggestions were made to strengthen and clarify the clause. The submission by World Vision Australia summarises the concerns of many submitters. It claims that the Bill should specify the following international agreements:[30]

- Convention on Biological Diversity
- Montreal Protocol on Substances that Deplete the Ozone Layer
- United Nations Framework Convention on Climate Change
- Kyoto Protocol to the 1992 UN Framework Convention on Climate Change
- United Nations Convention to Combat Desertification
- Basel Convention on the Control of Trans-boundary Movement of Hazardous Wastes and Their Disposal
- Convention on Persistent Organic Pollutants
- Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.

54. Other evidence suggested that requiring the implementation of a comprehensive environmental management system should strengthen the environmental requirements. [31]

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[30] World Vision, Submission No. 37, page 10

[31] Australian Conservation Foundation Submission No. 33, page 3.

55. The EPA suggested in their submission that Sub clause 7(f) of the Bill is too vague in its wording.[32] They suggest setting basic minimum standards using the best practice requirements in the National Environmental Defenders Office Network's submission on the consultation paper issued by Environment Australia: "Regulations and guidelines under the EPBC Act 1999".

56. Other suggestions made by the EPA include changing the wording in sub clause 7(g) rather than stating companies should "have regard to the precautionary principle," it should state a requirement to "act in accordance with the precautionary principle". [33]

57. It was also suggested that penalties for breaches should come into line with Australian domestic penalties for such offences. ACFOA also suggested that penalties be in line with Australian Competition Law.[34]

Recommendation: I commend these suggestions to Senator Bourne and suggest their incorporation through amendments.

Employment standards

58. There was significant debate during the hearings about employment standards.

59. The Australian Manufacturers Workers Union made the point that Corporations who pay low wages in order to maintain their competitive advantage are

> … demanding that working people in Australia should be competing with workers who are getting paid one, two or less dollars an hour, and at the same time are driving down the wages and conditions of workers here.[35]

60. The impression that some witnesses gave is that 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.

61. In evidence Ms Wriley from the Fairwear campaign drew attention to the difference between a living wage and a survival wage, she said

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[32] EPA Submission no 14, page 5.

[33] EPA, Submission No 14, Page no. 5.

[34] ACFOA, Submission No. 38, Page 13.

[35] AMWU submission No. 9, page 9

> apart from a roof over your head and food, we know that there is a lot more to a living wage and good quality of life.[36]

62. Community Aid Abroad who suggested that the reporting requirements should include a requirement for corporations to produce

> a statement of whether the rate at which employees are paid in each country, other than Australia, is consistent with a living wage in that country.[37]

63. Mr Hobbs also made the point in evidence that the process of identifying a living wage is important. He said

> If labour is coerced into below acceptable standards that is clearly in contravention of the human rights standards that we referred to.[38]

64. Without detracting from the need for a more definitive concept, I accept that the definition of a "living wage" is too rigid and would not lead to a practical outcome. Mr Sean Cooney offered an alternative in his submission called Ratcheting Labor Standards, which allows a more flexible standard with transparent monitoring. [39].

Recommendation: I recommend to Senator Bourne further investigation of the "Ratcheting Labor Standards" form of wage setting. In addition I recommend seeking further advice on a workable definition of a living wage.

65. World Vision also recommends that ILO Convention 182 on the Worst Forms of Child Labour should be added. [40] It was always intended to include this Convention and its omission was an error.

Recommendation: I recommend the inclusion of ILO Convention 182 by amendment.

Human Rights Standards

66. Some submissions criticised the Bill for not referring directly to human rights instruments. The author of the Bill agreed that the Bill should make

[36] Wriley, Hansard Thursday 15th March 2001, Page CS85.

[37] Ensor, Hansard, Wednesday 14th March 2001, Page CS 47.

[38] Hobbs, Hansard, Wednesday 14th June 2001, Page CS 51.

[39] Sean Cooney, Submission No. 20, page 5.

[40] World Vision Australia, Submission No. 37, Page 10.

explicit reference to and require compliance with the following human rights standards[41]:

- Universal Declaration of Human Rights 1948
- International Covenant on Civil and Political Rights 1966
- International Covenant on Economic, Social and Cultural Rights 1966
- The Convention on the Elimination of Racial Discrimination
- The Convention on the Elimination of All forms of Discrimination Against Women
- The Convention on the Rights of the Child

67. The Committee gave detailed consideration to the submission from Falun Dafa, which made the claim that the Bill would not apply to persecution of Falun Dafa practitioners because they are not a religion. In the paragraph above it is stated that direct reference to other Human Rights Charters should be more explicit, which would protect Falun Dafa practitioners.

68. The Report explains, in response to Falun Dafa concerns, that the Bill should not be amended to include 'non religious spiritual practice' as that would be incongruous with Australian Law (described in paragraph 3.127). However to then conclude that sovereign nations assert the right to suppress movements that are deemed "dangerous" (paragraph 3.129) and so therefore Australia should not legislate because it is in conflict with that right, is not acceptable. This Bill seeks to reinforce universal human rights and Australia should not resile from the promotion of such rights.

Tax Laws

69. This clause should be removed. Whilst adherence to taxation laws is essential, it is not the main focus of the desired outcome of this Bill.

Recommendation: I recommend that section 11; duty to observe tax laws is removed.

Duty to observe consumer health and safety standards

70. I agree with the Report that there is a fundamental defect here.

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[41] Amnesty International Submission No. 7, World Vision Australia, Submission No. 37, page 11.

Recommendation: I recommend to Senator Bourne that she seek further advice on this clause.

Duty to observe consumer protection and trade practices act

71. The majority of the Committee finds itself unable to recommend legislation which might dramatically increase the caseload of Australian courts with corporations suing other corporations in order to gain a commercial advantage. I do not agree with the Committee's assumption that Australian courts would be 'swamped', no evidence having been offered to justify that conclusion.

Reporting

72. The Committee makes the claim that the reporting requirements are amongst the most contentious issues (paragraph 3.146). They are also the most essential part of the report. The aim of this Bill is to make corporations more transparent and accountable.

73. The Bill as it stands does not clarify its intention to make the reports public. International best practice in reporting is public reporting which allows a greater degree of transparency (paragraph 3.150).[42] The timing of such public reports must be consistent with present reporting cycles. International best practice indicates that a biannual reporting cycle should be achievable.

Recommendations: I recommend to Senator Bourne that the reporting requirements be amended to require corporations to make reports available directly to the public. I also recommend a biannual reporting cycle that coincides with existing Australian reporting cycles.

74. With the proviso of the above, the views put by several opposers of the Bill that the reporting requirements would be too onerous and expensive are not accepted. In fact I found the argument inconclusive as no real evidence other than opinion was presented. Many opponents from industry representatives claimed that Australian companies are already achieving these standards so therefore legislation is irrelevant.

75. If these standards were already in place, then reporting on them would not be onerous and would in fact facilitate the companies' competitive

[42] AMWU, Hansard, Thursday 15th March, Page CS99.

advantage by presenting to the public the high standards that they already achieve.

76. I also believe that the community is willing to bear some costs. As I said

> successive governments of whatever persuasion have agreed that those standards are appropriate for Australia. That obviously affects our exporting costs and our ability to compete with importers who might come from lower standard countries. I would think it logical given our acceptance as a society that we be prepared to accept a cost for higher standards.[43]

77. Mr Divecha stated in evidence that

> On one hand the companies say, 'we already report to a far higher degree than is contained in this bill,' on the other hand they say, 'this is going to impact on us with an unacceptable cost regime,' they cannot have it both ways.[44]

78. It should also be remembered when talking about costs that the costs in failing to perform to proper standards may be higher in the long run, but the benefits may not show up on the bottom line immediately.

79. Obviously companies are cognisant of the benefits of high standards. The CFMEU summed up the argument concisely in their evidence when they state that many companies are already claiming high standards. Thus

> if these statements by the (mining) industry are true and their reports are genuine, then the additional requirements sought by the Bill are minor.[45]

80. I also accept criticism that there is a lack of detail with regard to social auditing in the Bill. For instance as Ms Wriley stated in evidence "there is a complaint mechanism for workers, but in the reporting there is no request for that to be provided in a document stating the policy for complaints mechanisms for workers."[46]

81. Mr Connor suggested in his submission that the reporting requirements should be extended so that companies must reveal the addresses of production facilities and offices. This would facilitate independent investigations into the conditions of such facilities.[47]

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[43] Committee Hansard, Wednesday 14th March 2001, CS12.

[44] Mr Divecha, Hansard, Thursday 15th March 2001

[45] CFMEU Submission no. page 178

[46] Ms Wriley, Hansard, Thursday 15th March, Page CS85.

[47] Tim Connor, Submission No, 2, page 3

Recommendation: This is accepted and the Bill should be amended to require this.

82. ACFOA also suggested in their submission that the reporting requirements should be extended to specify a compliance report for every country in which the company operates and that they should be compiled by an independent auditor.[48]

Recommendation: This is accepted and the Bill should be amended accordingly.

83. The Committee found that the extra regulation required by the Bill would constitute an unacceptable burden for the Australian Securities and Investments Commission. I dissent from this view and think that an amended bill can address some of the criticisms concerning the practicality of regulation in this field. I do not agree that any 'burden' being placed on the Australian Securities and Investments Commission is a reason not to support the Bill, and think that parliament has never flinched from increasing the workload of regulators if it considers that in the national interest.

Independence

84. The Bill fails to give a definition of independence as pointed out in Mr Connor's submission. Mr Connor offers the following definition:

> Independent auditing refers to audits conducted by organisations selected by a body set up for the purpose of accrediting and selecting monitors. Such a body should include majority representation by non profit organisations whose main purpose is the promotion of labour rights, human rights and/or environmental standards. Those non profit organisations should not be funded by the industry for which they will be selecting monitors and should receive no more than ten per cent of their funding from corporate donors.[49]

85. ACFOA in its submission suggested that ASIC should set up a tripartite committee of government, business and NGO representatives to hear complaints.[50]

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[48] ACFOA, Submission No, 38, Page 13.

[49] Mr Conor, Submission No, 2, page 4.

[50] ACFOA submission no, 38, page 12

Recommendation: A workable definition of independence should be included in the Bill and ACFOA's suggestion should also be accepted.

Incentives

86. Some of those who gave evidence suggested that the Bill lacks enough incentive for companies. This criticism is accepted. Ms Plahe suggested that companies who are compliant with the Bill should get preferential treatment from Government Agencies when awarding contracts.[51]

87. The Victorian Council for Civil Liberties also supported this point of view in terms of preference, but also said

> if a company repeatedly violates the rights of citizens of foreign countries it should not receive tax-payer funded assistance or government endorsement.[52]

Recommendation: The Bill should be amended to reflect these suggestions.

Australia's Reputation and Extraterritoriality

88. The majority of the Committee concludes that the Bill will be viewed overseas as "arrogant".[53] I disagree with this judgment as a sweeping generalisation and predicating a uniform viewpoint by foreigners. As in Australia where opinions vary widely, foreigners have as many differing opinions, and many can be expected to view the Bill positively based on its pursuit of universal values.

Conclusion

89. The majority of the Committee concludes that there is no demonstrated need for the current Bill. I disagree and believe that, while the current Bill needs amendment, there is a demonstrated need for it.

Senator Andrew Murray

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[51] Plahe, Hansard, Wednesday 14th March 2001, Page CS48

[52] Victorian Council for Civil Liberties, Submission No. 23, page 5.

[53] Committee Hansard, 8 May 2001, p 159.

APPENDIX 1

LIST OF SUBMISSIONS

Submission Number	Submitter
1	Australian Chamber of Commerce and Industry
2	Mr Tim Connor
3	The Chamber of Minerals and Energy of WA Inc
4	Castan Centre for Human Rights Law
5	Melbourne Practitioners of Falun Dafa
6	Australian Centre for Organisational Governance
7	Amnesty International Australia
8	Australian Institute of Corporate Citizenship
9	Australian Manufacturing Workers Union
10	Community Aid Abroad
11	Public Interest Advocacy Centre
12	Mr Christopher R Smalley
13	Construction Forestry Mining Energy Union
14	Environmental Defender's Office
15	Ms Kirrily Jordan
16	Victorian Chamber of Mines
17	Centre for Employment and Labour Relations Law, University of Melbourne
18	Mercy Foundation
19	Australia Tibet Council
20	Law School University of Melbourne
21	Minerals Council of Australia
22	Mr Richard Mochelle
23	Victorian Council for Civil Liberties
24	Minerals Policy Institute
25	Aviva Imhof
26	Department of Employment, Workplace Relations and Small Business
27	Centre for Public Administration, University of Queensland
28	The National Enviromental Law Association Limited, Victoria Division
29	CPA Australia
30	Australian Institute of Company Directors
31	CPA Australia and the Institute of Chartered Accountants in Australia
32	Equal Opportunity Commission Victoria
33	Australian Conservation Foundation
34	Australian Council of Trade Unions
35	FairWear Campaign

36	Centre for International and Public Law, Australian National University
37	World Vision Australia
38	Australian Council for Overseas Aid
39	BHP Limited
40	Law Council of Australia
41	PNG NGO Environment Watch Group
42	Mr Jon Nevill
43	Institute of Public Affairs

APPENDIX 2

WITNESSES AT HEARINGS

Wednesday, 14 March 2001 - Melbourne :

Castan Centre for Human Rights Law
Professor David Kinley, Director
Ms Sarah Joseph, Associate Director

Australian Council of Trade Unions
Ms Sharan Burrow, President
Ms Linda Rubinstein, Senior Industrial Officer

Minerals Council of Australia
Richard Wells, Executive Director
Steven Münchenberg, Assistant Director

Australian Chamber of Commerce and Industry
Mr Brent Davis, Director, Trade and International Affairs
Mr Andrew Tytherleigh, Senior Adviser, Environment

Victorian Chambers of Mines
Mr Chris J. Fraser, Executive Director
Mr Andrew Komesaroff, Chair, Legislation Committee

Oxfam Community Aid Abroad
Mr Jeremy Hobbs, Chief Executive Officer
Mr James Ensor, Advocacy Manager

World Vision Australia
Mr Greg Thompson, Manager, Advocacy Network Australia
Ms Jagjit Plahe, Policy and Campaigns Officer, Global Economic Issues

Australian Conservation Foundation
Mr Michael Kerr, Legal Adviser
Mr Damien Ase, PNG NGO Mining Coordinator, NGO Environment Watch Group, PNG
Ms Matilda Koma, PNG NGO Mining Coordinator, NGO Environment Watch Group, PNG
Ms June Kosmas, World Wide Fund for Nature

Certified Practising Accountants Australia (CPA Australia)
Mr Jim Dixon, Director, Accounting and Audit
Mr Brad Pragnell, Acting Director, Intellectual Capital

Thursday, 15 March 2001 - Sydney :

Amnesty International Australia
Mr Des Hogan, Campaign Coordinator
Ms Nicola McGuire, Business Team
Mr Rory Sullivan, Business Team

Fair Wear
Ms Lisa Wriley, Campaign Worker
Rev Dr Ann Wansbrough, Member, Fair Wear Management Committee

Public Interest Advocacy Centre
Dr Patricia Ranald, Principal Policy Officer

Construction, Forestry, Mining, Energy Union
Mr John Maitland, National Secretary
Mr Peter Colley, National Research Director

Australian Manufacturing Workers' Union
Mr Doug Cameron, National Secretary
Ms Natasha Holmes, Research Officer

Australian Council for Overseas Aid
Mr Jim Redden, Policy Director
Professor John Braithwaite, Law RSSS, Australian National University

Australian Institute of Company Directors
Mr John Hall, Chief Executive Officer
Mr Ben McLaughlin, Member, Corporations Law Committee

Minerals Policy Institute
Mr Simon Divecha, Campaign Coordinator

Law Council of Australia
Professor Bob Baxt, Deputy Chairman, Business Law Section, and Deputy Chairman of Specialist Corporate Law Committee

Wednesday, 8 May 2001 - Melbourne

Australian Institute of Corporate Citizenship
Mr Richard Boele, co-Founder

University of Melbourne, Law School
Mr Sean Cooney, Senior Lecturer

Mr Henry Bosch AO, former Chairman of the National Companies and Securities Commission, current chairman of James Stroud (Australia), Natural Resource Systems, Transparency International Australia and the Working Group on Corporate Practices and Conduct. Mr Bosch is also a member of the boards of the Victorian Casino and Gaming Authority and the Victorian Education Foundation.

Institute of Public Affairs
Mr Mike Nahan, Executive Director