Submission to the Joint Parliamentary Committee on Corporations and Securities inquiry into the

Corporate Code of Conduct Bill 2000.

Community Aid Abroad

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Introduction.

Community Aid Abroad (Oxfam Australia) welcomes the opportunity to present this submission to the Joint Parliamentary Committee on Corporations and Securities inquiry into the *Corporate Code of Conduct Bill 2000*.

Community Aid Abroad (Oxfam Australia) takes a rights based approach to its work on poverty, injustice and suffering. This approach reflects the view that poverty and suffering are primarily caused and perpetuated by injustice between and within nations, resulting in the exploitation and oppression of marginalized peoples.

This rights based approach to development further implies that States have obligations and citizens have rights, expressed through international covenants, agreements and commitments. These include, amongst others, the United Nations *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights* and International Labour Organisation conventions.

As a member of the Oxfam International global network of development agencies, Community Aid Abroad's program and advocacy work around the world aims to achieve the following five aims expressed in terms of rights;

- The right to a Sustainable Livelihood.
- The right to Basic Social Services.
- The right to Life and Security.
- The right to be heard: Social and Political Citizenship.
- The right to Equity; Gender and Diversity.

The Growing Impact of the Private Sector in Developing Countries.

Globalisation has witnessed the rise and rise of the economic power and global reach of multinational corporations. In 1999 alone, global foreign investment grew by 25 % to $US 827 billion.

One of the consequences of globalisation is increasing contact between the industrialised world and developing countries through multinational companies. Whilst multinational investment can be an important driver of economic growth and poverty reduction, it can also serve to undermine the basic rights of poor and marginalised people – such as rights to land, sustainable livelihoods and safe working conditions.

A number of cases of multinational corporations infringing the basic rights of communities have been highlighted in recent months. These include the devastating cyanide spill earlier this year at the Australian owned *Esmerelda* mine in Romania for which the Perth based company admitted no liability. Closer to home is BHP's admission that it's Ok Tedi mine will impact the Ok Tedi river system – and the 50,000 villagers dependent upon it – far more than previously thought. BHP now admits that none of the possible solutions it has investigated are feasible and has signaled its intention to sell its stake in the mine. And from nearby Indonesia and Vietnam have come revelations of appalling working conditions in factories manufacturing Nike products.

Two recent trends have increased the significance of multinational corporate activity in the developing world.

Firstly, foreign aid to developing countries is increasingly dwarfed by private sector investment. Funds from development agencies – aid agencies and development banks – accounted for nearly 70% of all capital inflows to developing countries at the beginning of the 1990's. By 1996 this had fallen to 25% - with 75% of capital inflows coming from private enterprise.

In many instances this investment is a vitally important driver of economic growth and poverty reduction. However, in the absence of proper regulation of private sector standards, some forms of private sector investment in developing countries have undermined human rights, exacerbated conflict and seriously damaged the environment.

Secondly, multinational corporations have become increasingly powerful relative to national governments, which are withdrawing from attempts to closely manage economies and from providing services to their citizens. Deregulation, privatisation and trade liberalisation have served to strengthen the power of multinational corporations relative to governments.

The increasing power of transnational corporations and dependence of developing economies on private sector investment can result in what many refer to as a "race to the bottom". In many instances, this race to the bottom involves transnational corporations choosing to invest in countries which provide the lowest cost of production and regulatory standards in areas such as environmental protection and workers rights.

Private investment into developing countries now directly impacts many communities with which Community Aid Abroad - Oxfam Australia has been working for some time, sometimes to their detriment. In response, Community Aid Abroad - Oxfam Australia is increasingly being requested to provide assistance to poor and marginalised communities in developing countries impacted by the operations of Australian based companies.

Case Study Aurora Gold Indo Muro mine - Indonesia.

The story of the Australian owned Indo Muro mine in Central Kalimantan in Indonesia is illustrative of what can happen when a mining company operates under the auspices of a corrupt and oppressive government and passively accepts the standards of that government.

Long before Perth based company Aurora Gold ever appeared in the Indo Muro area in Indonesia, local Dayak people knew of and were working gold-bearing deposits there. Small scale mining, with a pan in the river or using hand-dug shafts and tunnels, had become a major activity and a useful economic fallback for poor communities when agriculture was not paying well.

To clear the way for establishment of the new Australian owned mine in the 1980's, all local small-scale miners were declared illegal by the Indonesian Government and forced to move. Most refused to go, and when persuasion failed, the army and police were sent in, knocking down houses, shops and mosques in the mining settlements with bulldozers. What was left was then burnt, leaving nothing but burnt rubble:

> "The company burnt down my house, along with my household goods, and even my clothes. It was all destroyed in front of my eyes. I cried. It was really terrible. So much was burnt. I lost a lot of my possessions. All burnt. They didn't give me a new house." (A woman, who now sells vegetables door to door in Puruk Cahu, recalling what happened in 1989).

These evictions did not however mean the end of small-scale mining. There were still some deposits outside Aurora Gold's mine area worth working, and people returned to those whenever they could, risking arrest or worse. In a 1996 document, Aurora Gold estimated that there were 1,002 "illegal miners" in its lease area, and said it intended to:

> "Impress upon the Department of Mining and Energy and the Police (Mobile Brigade) the need to take steps to restore security and order……Show that the Local Government and the Company have rights and powers which must be maintained. If steps are not taken against illegal miners it will be considered as a sign of weakness and the problem will get worse."

In addition, land which had been used for growing rice, rubber, fruit and other crops was also appropriated by the mine. People who lost land and crops were given compensation, but the rate was set by government and was very low. Measurement of the land to be compensated for was carried out by a local government team, and owners had little or no input into the process. Many felt ignored and cheated. Some who protested felt the full force of police intimidation. The result was considerable anger, frustration and anxiety:

> "We are small people, we have nothing to live from except planting our fields, plantations and panning for gold. That's all. Since Indo Muro came, they have appropriated our fields.

> We are not allowed by them to mine for gold. So what will be our fate if it goes on like this." (Interview, Beringin, January 1998).

Residual resentment over unresolved claims and abuses by the police, together with the company's close identification with the Suharto government and its security apparatus, did Aurora Gold no good when that regime finally fell in 1998. Taking advantage of the looser political situation, large numbers of people swarmed back on to the mining lease area, bringing the company's operations to a halt.

Things might have been different for both the company and local people if Aurora Gold had been willing to respect internationally accepted standards of social and economic rights of those impacted by its operations - the right of landowners to determine what happens to their land; the right of those who lose the sources of their income to compensation that enables them to replace them; and the right of people to be free of violence and harassment.

Slipping through the net – the Private Sector and International Human Rights law.

The private sector is not legally obliged under international law to respect the international human rights framework as laid out in the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights.*

The UDHR calls upon "every individual and every organ of society" to play their part in securing the observance of the rights enshrined in it. However it is States, not companies, which ratify United Nations conventions and protocols, and which are accountable for compliance to the various monitoring bodies set up by the United Nations for this purpose.

It is only when aspects of international human rights law are subsequently incorporated into national legislation that companies become directly responsible for compliance. In this way, international human rights law becomes applicable to companies only when it cascades down into national legal systems. Whilst such national legislation is now relatively common in industrialised countries, it is comparatively rarely implemented in developing countries.

Many Australian transnational corporations operate in countries where governments have failed to implement national legislation consistent with the international human rights framework. Reasons for this vary and include fear of losing foreign direct investment and that some governments themselves are repressive and are guilty of human rights violations for political purposes. The practices of some current foreign direct investors mitigate against governments implementing legislation consistent with international standards. The dependence of developing economies on investment flows can result in what many refer to as a "race to the bottom" in which transnational corporations choose to invest in countries

which provide the lowest cost of production and regulatory standards in areas such as environmental protection and workers rights.

Whilst some transnational corporations have incorporated a specific commitment to upholding the rights enshrined in the UDHR in their business principles, the vast majority have not done so. In many instances such companies justify their actions in terms of compliance with domestic standards in cases where their corporate actions in developing countries have been reported to be inconsistent with international human rights standards.

Extraterritorial Legislation –An imposition of Australian values?

Community Aid Abroad believes that Australian extraterritorial legislation underpinned by the international human rights framework neither equates to the imposition of Australian values nor undermines the sovereignty of foreign governments.

The basis of international standards of human rights is the United Nations Universal Declaration of Human Rights (UDHR) which was established in 1948 after extensive international consultation. Initially adopted by 48 countries, it has now been subsequently adopted by a further 100 nations. No nation has ever publicly stated its opposition to the UDHR, which is indicative of its global acceptance.

The wide ranging consultation process in the development of the UDHR together with universal acceptance among UN member states demonstrate clearly that adherence to international human rights standards as proposed in *the Corporate Code of Conduct Bill 2000* is not the product of Australian imperialism. Inhumane and degrading treatment human beings is alien to all cultures, even if it used by some governments to achieve their political ends.

States with cultures as diverse as Sweden, China, Algeria, Saudi Arabia, Turkey and Kenya have endorsed the international human rights framework. 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.

Extraterritorial Legislation – is it workable?

Some industry groups argue that laws prescribing standards for Australians when overseas (referred to as extraterritorial laws) cannot be policed and that Australian courts have no jurisdiction when crimes are committed outside Australian territory.

Community Aid Abroad disagrees. The Australian Parliament has recently passed a number of workable extraterritorial laws. These include an amendment to the *Crimes Act* which allows for the prosecution of Australian citizens who commit child sex offences overseas and

legislation allowing for the prosecution of those who commit crimes against Australians serving overseas as United Nations personnel.

Similarly, extraterritorial legislation which is benchmarked against standards already accepted and agreed by Governments – standards such as the Universal Declaration of Human Rights and International Labor Organisation conventions – in no way undermines the sovereignty of national governments. Basic human rights are universal.

Alternatives to Regulation. Can Stakeholder Pressure meet the need?

The importance of corporate brand reputation to company financial performance is an increasingly important normative force driving adherence to acceptable environmental and human rights standards.

For many firms and industries, activities which lead to poor brand reputation can be quickly exposed and translate directly to consumer pressure for reform. Such pressure, especially if applied in the form of consumer boycotts of products, can in turn create significant shareholder pressure for reform. Multinational corporations including Nike, Nestle and Shell have been subject to these normative forces in recent years.

However, multinational enterprises and industries are not homogenous. There is great variation between industries as to the extent to which brand reputation and stakeholder pressure can drive reform. Some multinational corporations sell product direct to millions of potential customers every day and are thereby especially vulnerable to poor brand reputation inflicted as a result of environmental and human rights performance.

For these firms –whether Nike, Nestle or Shell - there is often a close and immediate relationship between brand reputation and financial performance. Strategically, this relationship demands close attention to corporate environmental and human rights standards in any adequate overall financial risk analysis.

However, markets operate differently depending on the type and structure of the company and industry. Many multinational firms and industries are not as vulnerable to these normative forces – and it is especially for such industries that extraterritorial regulation is required. Firms within these industries generally do not sell their product to an individual end user consumer and are not in touch with a large number of customers.

Firms involved in offshore mining and extractive industries are one example. Generally these firms sell their product onto global commodities markets and in most cases the end product manufactured with the firm's mined resource does not identify the firm to the consumer. Generally speaking, such firms do not risk plummeting turnover due to poor brand reputation suffered as a result of poor environmental or human rights standards. Moreover, there is ample evidence that participation in or acceptance of practices inconsistent with

internationally accepted human rights and environmental standards can be financially beneficial for such firms.

Alternatives to Regulation. Can Codes of Conduct meet the need?

Effective company and industry based Codes of Conduct can go some way towards ensuring that Australian foreign direct investment respects the basic rights of host communities. Voluntary Codes of Conduct are not however a substitute for effective extraterritorial regulation pertaining to responsible corporate practice.

Industry groups such as the Minerals Council of Australia argue that voluntary Codes of Conduct are sufficient to ensure adequate Australian based industry standards overseas. Community Aid Abroad - (Oxfam Australia) disagrees. Whilst Codes of Conduct are a useful standard setting tool for industry, they are not sufficient in themselves to ensure the protection of the rights of poor and marginalised communities overseas.

Most Australian industry Codes of Conduct have five main deficiencies;

- Most industry codes of conduct are voluntary. A company can choose whether or not commit to the standards set out in the Code of Conduct. Those companies unable or unwilling to commit to the prescribed standards simply do not become signatories to the relevant codes.

- Industry Codes of Conduct rarely contain penalties or sanctions for those companies which, having signed up to a Code of Conduct, fail to meet the standards therein.

- Industry Codes of Conduct fail to provide opportunities for recourse for poor and marginalised communities whose basic rights are negatively impacted by Australian transnational corporations.

- Codes are rarely accompanied by independent monitoring and evaluation of their application nor monitoring which involves communities or workers directly affected by the operations of companies which are signatories to the Code.

- Codes are rarely based on existing international human rights architecture, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and core International Labour Organisation standards.

<u>Case Study - Esmeralada Exploration and the Minerals Council of Australia Code.of Environmental Management.</u>

In 1996, the Minerals Council of Australia developed a Code for Environmental Management with the aim of improving the Australian mineral industry's environmental performance and reputation. The Code was reviewed and updated in 1999.

The Code is centered on environmental performance and does not address human rights, labour rights and social impact issues. The seven principles incorporated by the Code are:

- Accepting environmental responsibility for all our actions
- Strengthening relationships with the community
- Integrating environmental management into the way we work
- Minimising the environmental impacts of our activities
- Encouraging responsible production and use of our products
- Continually improving our environmental performance
- Communicating our environmental performance

Nowhere are the deficiencies of reliance on Codes of Conduct better illustrated than in the recent case where Australian mining company Esmeralda Exploration denied responsibility for contamination of the Danube and other Eastern European rivers following a cyanide leakage from their mine in Romania. Up to 100,000 cubic metres of cyanide contaminated water spread through the Danube river catchment. In some places cyanide contamination was reported to have reached more than 700 times acceptable levels, cutting off the water supplies of more than two million people and reportedly killing 90% of fish life in the Tisza river alone.

Esmeralda Exploration was not a signatory to the Minerals Council of Australia Environmental Code of Conduct. Even if were a signatory to the Code of Conduct, Esmeralda Exploration would have;

- Faced no sanctions for the impact of its operations on the Eastern Eurpoean communities and industries of the region.

- Not been required to address the concerns of those Eastern Eurpoean communities and industries affected by the cyanide spill.

- Not been subject to independent monitoring or evaluation of their corporate conduct prior to and after the cyanide spill.

The ineffectiveness of the Minerals Council of Australia Code is due to many factors; the voluntary commitment of companies; allowing companies to 'self-assess' their commitment; the lack of concrete standards or procedures for compliance; the lack of sanctions for non compliance and the omission of human rights, labour rights and social impact standards..

In the absence of any adequate extraterritorial regulatory mechanism, Esmeralda Exploration were in a position where the company could deny responsibility for the damage caused to communities dependent on the river fisheries for their livelihoods and take measures to prevent legal action being taken against the company by those impacted.

It is clear that Australian companies such as Esmeralda Exploration will not take responsibility for the consequences of their actions unless there is an economic or legislative driver. There must therefore be legislation to ensure mandatory standards. This requires the Australian parliament to pass laws that compel Australian transnational corporations operating overseas to meet internationally accepted social and environmental standards.

Case Study – Nike and the Homeworkers Code of Practice.

The following case study of Nike and the Homeworkers' Code of Practice illustrates how Codes of Conduct are not a sufficient substitute for effective extraterritorial regulation pertaining to responsible corporate practice.

Community Aid Abroad-Oxfam Australia is part of an international network of organisations campaigning to persuade Nike to improve their labour practices and those of their suppliers.

FairWear and the Textile, Clothing and Footwear Union of Australia are campaigning to persuade companies who have clothes made in Australia to sign the Homeworkers' Code of Practice, so that independent monitors can check whether or not their clothes are being made by homeworkers and, if so, whether those workers are being paid wages which comply with Australian law.

The Homeworkers Code of Practice has been signed by 120 companies producing apparel in Australia, including Nike's main competitors, Reebok and Adidas. Nike refuses to sign on the basis that it has a policy of not allowing suppliers to use homeworkers and hence "see no value in signing onto a standard for a system we do not use".

Over the more than eight years in which NGOs have been tracking Nike's labour practices they have repeatedly found labour practices in Nike's production chain to be markedly different from Nike's stated policies. Nike is well aware that other companies who have a policy against homework have freely agreed to sign the Code so that their policy can be independently verified. In contrast, Nike continues to stonewall in the face of a long-running campaign urging the company to sign.

Since 1995 Community Aid Abroad has been calling on the company to ensure that workers making Nike products are freely allowed to form unions and negotiate collectively (a right enshrined in ILO conventions 87 and 98), are allowed to refuse overtime and are paid at a rate which allows them to earn enough in a standard working week to provide

themselves and their families with an adequate diet and housing and to pay for basic necessities such as health care.

We also believe Nike should:

- Work with international unions and human rights organisations to establish a program of factory monitoring by credible organisations which are independent of (ie not selected by) the company. Such monitoring should include worker education to ensure that workers are aware of their rights.

- Make the reports of that monitoring public.

- Establish a confidential complaint mechanism to a credible independent body which can be accessed by workers who claim that their rights are not being respected.

- Make public the addresses of all factories producing for the company and the levels of orders from each factory,

The Value of Codes of Conduct.

This is not to say that there is no value to company or industry Codes of Conduct. The process of companies and industries consulting on the development of Codes of Conduct provides an opportunity for NGO's and trade unions to raise concerns and reflect the perspectives of poor and marginalised communities and workers. Codes of Conduct also provide a statement of corporate intent that can be monitored against practice.

To be genuinely effective, Community Aid Abroad believes that Codes of Conduct should be developed in such a way that;

- Targets and objectives must be transparent and clearly defined. Wherever practicable, targets should be quantitative rather than qualitative. In addition, targets should deal with the expected outcomes, not just with the implementation or process. Ideally, intermediate objectives should be established to enable progress to be tracked and evaluated over time.

- Codes are based on existing human rights architecture, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and core International Labour Organisation standards. In the context of work in developing countries this helps to clarify what a company or industry considers its responsibilities to be - both morally and legally - in situations where national legislation or practice falls short of these international standards.

- Codes are accompanied by independent monitoring and evaluation of their application. This should involve the communities or workers directly affected. Vital to ensuring that a code is more than a public relations exercise and has credibility with the public and shareholders is a mechanism by which independent information about actual performance against Code standards is made publicly available. One way of doing this is by using independent outside monitoring organisations established or commissioned for the purpose. This is already starting to happen in some industries - particularly clothing and footwear - where there is concern about exploited or sweatshop labour.

- The independence of monitors is guaranteed. Mechanisms to achieve this include monitors being 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. Such non-profit organisations should not be funded by the industry for which they will be selecting monitors.

- Codes should not be an excuse to avoid compliance with existing international standards or for effective legislative regulation of industry.

Alternatives to Regulation. Can Complaints Mechanisms meet the need?

Effective independent complaints mechanisms can go some way towards ensuring that Australian foreign direct investment respects the basic rights of host communities. However, like industry Codes of Conduct, complaints mechanisms are not a substitute for effective extraterritorial regulation pertaining to responsible corporate practice.

A number of Australian industries have in recent years established formal complaints mechanisms as an avenue of recourse primarily for consumers of industry products and services. Notable among these mechanisms are the Telecommunications Industry Ombudsman and the Banking Industry Ombudsman.

However, many of Australia's industries with the longest track record in undermining the basic rights of poor and marginalised communities in developing countries have no complaints mechanisms whatsoever. Hence, reliance on industry complaints mechanisms is not of itself sufficient to ensure adequate extraterritorial corporate practice.

<u>The Telecommunications Industry Ombudsman (TIO).</u>

The TIO was established at the direction of the Australian Government in 1993 to resolve disputes between telecommunications companies and residential and small business customers. In 1997 the TIO's jurisdiction was extended to include complaints about internet

service providers (ISPs). The TIO operates independently of of telecommunications companies, consumer groups and government, and is a free service to consumers.

Part 6 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* requires all telecommunications carriers and eligible service providers to be members of the TIO. This includes companies who directly supply telephone and internet services or who act as intermediaries involved in reselling these services.

The TIO scheme is extraterritorial in that it may accept and investigate complaints from residents of countries other than Australia who are customers of TIO member companies. It is funded by its members on the basis of the number and comparative percentage of complaints made to the TIO. There is no initial joining fee. The TIO is governed by a Board which represents members and is responsible for corporate governance functions, and a Council, with an independent chairman, comprising equal numbers of member and consumer group representatives.

<u>The Banking Industry Ombudsman.</u>

The Australian Banking Industry Ombudsman Scheme (ABIO) is a self-regulatory scheme providing an accessible alternative to other proceedings to users of bank services who have disputes with their banks where those disputes fall within the Ombudsman's jurisdiction. The ABIO is extraterritorial in that residents of countries other than Australia may bring complaints to the Ombudsman.

The aim of the scheme is to provide an independent and prompt resolution of disputes against the criteria of law, good banking practice and fairness in all the circumstances.
To ensure the independence of the Ombudsman, a Council consisting of equal numbers of customer and Bank representatives and an independent Chairman stands between the Ombudsman's office and the Member banks.

The Ombudsman's decision is binding on a bank only if an applicant accepts the decision. It always remains open for the applicant to reject a decision of the Ombudsman and to proceed with any other remedy which may be available.

The Scheme is a free service for applicants with disputes about personal banking services. Costs of the Scheme are met by Member Banks.

<u>Complaints Mechanisms Lacking in Key Australian Industries.</u>

Such complaints mechanisms are not however found in many of the Australian industries with the greatest potential to undermine the basic rights of poor and marginalised

communities in developing countries. Notable among these are our natural resource based extractive industries including the mining and forestry sectors.

Despite recent controversies surrounding the impact of offshore Australian mining operations including BHP's Ok Tedi mine, Aurora Gold's Indo Muro mine and Rio Tinto's Kelian and Grasburg mines, the Australian mining industry has failed to establish a complaints mechanism for those who claim their basic rights have been infringed by Australian mining companies.

Australia-based mining companies are increasingly operating in the countries and regions where Community Aid Abroad works. Their impacts on the poor are not always positive. Mining can benefit local people by increasing employment and other economic opportunities, providing infrastructure like roads, schools and health clinics, and injecting cash into economy. But its negative effects can include:

- Loss of agricultural land to the mine, often without proper compensation.

- Loss of other important income sources, like small-scale mining.

- Pollution of rivers, so they can no longer be used for washing, bathing or drinking, and so that fish - often central to the diet of local communities - and other fauna disappear from waterways.

- Human rights abuse: local communities, standing up against the loss of their land or livelihood, have suffered violence at the hands of the police or armed forces.

The Community Aid Abroad Mining Ombudsman.

In recent years Community Aid Abroad has received an increasing number of reports and requests for support from communities in developing countries who believe their rights or standard of living have been undermined by Australian mining companies. In the absence of a mining industry complaints mechanism to refer such inquiries to, Community Aid Abroad took the unprecedented step of establishing a Mining Ombudsman in February 2000.

The role of the Community Aid Abroad Mining Ombudsman is;

- To assist communities in developing countries whose basic economic or social rights are being threatened by the operations of Australian based mining companies, through raising their cases directly with the companies concerned in Australia in order to get a fair negotiated resolution.

- To assist communities who are, or might be, affected by a mining operation to understand their rights as established by international conventions and industry best practice.

- To further enhance the capacity of the Australian mining industry to operate in such a way that the basic rights of landowners and affected communities are better protected.

The Mining Ombudsman receives cases through Community Aid Abroad's networks in Asia, the Pacific, Africa and Latin America. The basis of each case must be that the internationally recognised rights of the landowners or affected communities have not been respected. These include the right to control the use of their lands, to have a say in whether and/or how mining proceeds on their lands, the right to clean water, a safe environment, a livelihood, a place to live and to be free of intimidation and violence.

All cases referred to the Ombudsman are initially investigated to test their veracity. Where advice to the Ombudsman resulting from such investigations is that there is evidence to suggest that the grievances of landowners or affected communities are genuine, the Ombudsman takes the issue(s) to the company concerned for a response initially and in the longer term for a resolution.

The Community Aid Abroad Mining Ombudsman does not "adjudicate" on these issues. The Ombudsman seeks to ensure that the process by which companies deal with local communities and claimants is a fair and equitable one which respects the fundamental rights of landowners and affected communities. It is the process that the Ombudsman is concerned about more than the outcome, on the assumption that a fair process will lead to a fair outcome.

Clearly it not sustainable in the long term for Community Aid Abroad to maintain this complaints mechanism for an entire Australian industry. Hence one of the aims of the CAA Mining Ombudsman initiative is to encourage the industry, in conjunction with the Australian Government, to establish its own extraterritorial complaints mechanism.

World Bank Complaints Mechanism.

The World Bank is involved in large scale infrastructure projects which can impact on poor and marginalised communities in ways similar to mining and other extractive industries. The World Bank has in recent years found it necessary to establish a complaints mechanism and an Ombudsman.

In 1993 it established an 'Independent Inspection Panel' in response to increasing opposition and complaints from local communities to a number of its large scale infrastructure projects, particularly large dams. The Panel is a semi-independent body to which aggrieved groups can take their complaints. The basis of these complaints must be

that, in the implementation of a World Bank funded project, the Bank did not adhere to its own standards or policies as set down in its operational directives.

More recently, in April 1999, the Bank established a Complaints Advisor / Ombudsman for its private sector agencies, the International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA) that provide finance and assistance to, amongst other things, mining projects in developing countries. According to the Bank this was in order to "find a workable and constructive approach to dealing with environmental and social concerns and complaints of people directly impacted by IFC and MIGA projects".

A similar process is needed for the Australian mining industry - an 'arms length' body to receive complaints and act as a forum for mediation and dispute settlement. While funded by the industry, or possibly the Australian government or both, it would retain as much independence as possible and be staffed by people from outside the industry with perhaps a legal or community development background. This would we believe have significant advantages for both affected communities and the industry.

The Value of Complaints Mechanisms.

Although not a substitute for extraterritorial regulation, Community Aid Abroad believes that there is significant value in industry based complaints mechanisms. Indeed, complaints mechanisms are badly needed for a number of Australian industries which remain without such mechanisms despite ongoing controversy regarding the impact of their activities on poor and marginalised communities.

Complaints mechanisms provides an opportunity for an independent arbiter to assess the complaints of consumers or those adversely affected by the activities of an industry member and to obtain resolution. To be genuinely effective, Community Aid Abroad believes that complaints mechanisms should be established in such a way that;

- They are embedded in the international human rights framework.
- All Australian companies and their subsidiaries within a given industry be compulsorily required to be subject to the industry complaints mechanism.
- They are established as bodies independent of industry members.
- They have the power to impose binding sanctions on companies found to be in breach of industry standards.
- They are extraterritorial and provide the opportunity for third parties to have cases investigated (ie not only employees or customers, but also those individuals or communitiies who are affected by the activities of an Australian firm)

- The availability of the mechanism is promoted, it is easily accessible to complainants and does not involve cost or danger to complainants.

- The results of investigations should be made public, with provision for non disclosure of the identity of individual complainants where complainants fear retribution.

Extraterritorial Standards Emerging Overseas.

Growing international recognition of the need for minimum environmental, labour and human rights standards for transnational corporations is being reflected in a range of initiatives around the world.

<u>The 1999 European Parliament Resolution.</u>

In January 1999, the European Parliament passed a resolution to create a legally binding framework for regulating European transnational corporations operating in developing countries. If implemented, this will expand the reach of important principles of international human rights to transnational corporations.

The resolution asks the European Commission and the European Council to create a legal basis for reaching the extra territorial activity of european transnational corporations. It envisages that any form of regulation will adopt existing international standards as a starting point. These include core standards of the International Labour Organisation, OECD Guidelines on Multinational Enterprises and the basic hauan rights protections embedded in the Universal Declaration of Human Rights.

By relying on and combining these existing instruments, a European Code of Conduct will enhance their legal status and benefit from the extensive jurisprudence already available on these protocols.

The resolution requests the European Commission to set up an independent monitoring body to promote observance of the proposed European Code of Conduct, identify best practices and receive complaints about corporate conduct from interested parties. This body would consist of independent experts and corporate, trade union and NGO representatives and would set an important precedent for expanding the scope of international human rights law to accommodate the growing influence of transnational corporations.

The most significant aspect of this development is that it is indicative of the political will that exists within the European Union to ensure that transnational corporations operate to internationally recognised standards.

The Mc Kinney Bill.

In June 2000 United States Congresswoman Cynthia Mc Kinney introduced a *Corporate Code of Conduct Bill* into the United States House of Representatives. This Bill has similar aims to that of the Bill currently before this joint parliamentary committee and proposes that United States nationals employing more than 20 persons in a foreign country implement a Corporate Code of Conduct for which the Bill prescribes minimum standards.

Section 2(1) of the Mc Kinney Bill refers to opinion polling conducted in the United states in October 1999 which found strong community support for international regulation of US firms in the areas of environmental standards and labour rights.

Under the Mc Kinney Bill, each Code of Conduct must abide by internationally recognised environmental standards and minimum international human rights and labour standards.

The Mc Kinney Bill defines minimum human rights standards as those contained in existing instruments including;

- The Universal Declaration of Human Rights
- The International Covenant on Civil and Political Rights
- The International Covenant on Economic, Social and Cultural Rights
- Convention on the Elimination of All Forms of Discrimination Against Women
- The Convention on the Rights of the Child
- The Declaration on the Elimination of Violence Against Women
- The Draft Declaration on the Rights of Indigenous Peoples

The Mc Kinney Bill defines minimum international labour standards as those contained in the following International Labour Organisation (ILO) conventions;

The Freedom of Association and Protection of the Right to Organise Convention (No 87)
- The Right to Organise and Collective Bargaining Convention (No 98)
- The Forced Labour Convention (No 29)
- The Abolition of Forced Labour Convention (No 105)
- The Discrimination (Employment and Occupation) Convention (No 111)
- The Equal Remuneration Convention (No 100)
- The Minimum Age Convention (No 138)
- The Occupational Safety and Health Convention (No 155)

Under the Mc Kinney Bill, firms must at its own cost implement and monitor compliance with a Code of Conduct consistent with these and other principles. Noteworthy within the monitoring requirements of the Mc Kinney Bill is a requirement for firms to have procedures

for independent monitoring of the code and for auditing the effectiveness of compliance monitoring.

The Mc Kinney Bill also requires firms to have procedures for disciplinary action in response to violation of the principles and to ensure that steps are taken to prevent similar violations from occurring in future.

The Mc Kinney Bill proposes reports of firms' compliance with the Corporate Code of Conduct Bill be tabled annually in the United States Congress and that penalties for failure to comply with the Bill include liability for compensation in a civil action initiated in a United States District Court by any person or their heirs who proves failure of compliance.

As well as prescribing penalties for non compliance, the Mc Kinney Bill also offers incentives for United States firms compliance with the Corporate Code of Conduct Bill. These include that;

- In entering contracts for the provision of goods and services, United States government agencies are to give preference to firms that adopt and enforce the Corporate Code of Conduct.

- Preferential trade and investment assistance is to be provided by the United States Department of Commerce to firms that have adopted the Corporate Code of Conduct.

- The United States foreign investment insurance, credit and guarantee agencies - the Overseas Private Investment Corporation and the Export - Import Bank of the United States - are is to give preferential treatment to firms that have adopted the Corporate Code of Conduct.

The OECD Guidelines for Multinational Enterprises.

The Organisation for Economic Development and Co-operation (OECD) recently adopted a series of guidelines for the conduct of Multinational Enterprises of OECD countries.

The OECD Guidelines are recommendations to companies made by the governments of OECD member countries. They are part of the Declaration on International investment and Multinational Enterprises adopted by the OECD in 1976 and their aim is to ensure that multinational enterprises operate in harmony with the policies of the countries where they operate.

The basic premise of the OECD Guidelines is that internationally agreed principles can help to prevent misunderstandings and build an atmosphere of confidence and predictability between business, labour, governments and society as a whole. Standards in the OECD

Guidelines deal with issues such as information disclosure, competition, taxation, employment, industrial relations and the environment.

Although providing a useful common framework for the corporate, government and union sectors, Community Aid Abroad believes that the OECD Guidelines contain three fundamental deficiencies:

- The Guidelines are framed within the 1976 OECD Declaration on International Investment and Multinational Enterprises, which itself is not grounded in international human rights instruments. The 1976 OECD Declaration is primarily aimed at providing national treatment to foreign owned enterprises, promoting investment co-operation between governments and minimising the imposition of conflicting requirements on multinational enterprises by governments of different countries.

- The OECD Guidelines are not binding or legally enforceable and as such cannot have a significant impact on business conduct.

- The Guidelines lack any effective monitoring and verification mechanism.

The London Stock Exchange Requirements for Managing Risk.

The London Stock Exchange has recently informed all United Kingdom based companies that they will be required to take account of "environmental, reputation and business probity issues" when considering internal controls. From 2000 it is a listing requirement of the London Stock Exchange for companies to create systems to identify, evaluate and manage their risks and to make a statement on risk management in their annual report.

This requirement has arisen from the recommendations of the Turnbull Committee charged with developing proposals for implementing the Combined Code of the Committee on Corporate Governance, published in 1998. A key thrust of the Turnbull Committee's recommendations is that companies consider not only narrow financial risks, but all major risks – including those to intangible assets such as their brand and reputation.

The Turnbull Committee recommendations will require many companies to give considerably more attention to identifying their exposure to human rights and exploring how this exposure can be managed. Human rights issues often hit companies hardest at the risk management level as there are few things more damaging to a company's reputation than disclosure of complicity in human rights violations. Companies operating in close co-operation with governments with poor human rights records are particularly vulnerable under the Turnbull Committee recommendations.

The United Nations Global Compact.

The United Nations has recently called for the private sector to commit to social responsibility and human rights. At the World Economic Forum in Davos in January 1999, Kofi Annan presented companies with a challenge to join the United Nations in a 'global compact of shared values and principles which will give a human face to the global market'.

Annan called upon the private sector to embrace, support and enact a core set of values in the areas of human rights, labour standards and environmental practices. While not legally binding, Annan's call to companies to play their part in upholding universal rights adds greater momentum to the case for extraterritorial regulation of business.

Kofi Annan laid out nine principles forming the basis of the United Nations Global Compact. These include;

- Businesses should support and respect the protection of internationally proclaimed human rights and make sure thay are not complicit in human rights abuses.
- Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining.
- The elimination of all forms of forced and compulsory labour.
- The effective abolition of child labour
- Eliminate discrimination in respect of employment and occupation.

The United Nations office of the High Commissioner for Human Rights is charged with engaging the private sector in pursuit of the first principle and the International Labour Organisation with the other four principles.

The Corporate Code of Conduct Bill 2000.

The Case for Extraterritorial Regulation.

Although Australian transnational investment in developing countries can be an important driver of economic growth and poverty reduction, Community Aid Abroad's experience suggests that both small and large Australian private sector firms have established a track record of undermining the basic rights of poor and marginalised people in developing countries – such as rights to land, sustainable livelihoods and safe working conditions.

Given our experience and analysis of the inadequacy of alternative private sector mechanisms to secure the basic rights of poor and marginalised communities, Community Aid Abroad supports extraterritorial regulation of Australian firms operating overseas.

Specifically our experience and analysis indicates that;

- Increasing involvement in developing countries and the lack of adequate standards for Australian companies operating overseas is leading to an increasing number of cases of Australian based multinational corporations infringing the basic rights of communities.

- Various existing industry based codes of conduct have proven to be fundamentally inadequate solutions to the problem.

- The lack of mandatory, independent and extraterritorial complaints mechanisms in key Australian industries with the greatest potential to undermine the basic rights of poor and marginalised communities in developing countries serves to bolster the case for extraterritorial regulation.

- Australian extraterritorial legislation underpinned by the international human rights framework neither equates to the imposition of Australian values nor undermines the sovereignty of foreign governments.

- Despite it's growing impact and influence on the developing world, the private sector is not legally obliged under international law to respect the international human rights framework as laid out in the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights.*

Accordingly, Community Aid Abroad broadly supports the *Corporate Code of Conduct Bill 2000* introduced to the Senate by the Australian Democrats in September 2000 with the aim of imposing standards on the conduct of Australian corporations which undertake business activities in other countries.

The Bill aims to:

- Impose environmental, employment, health and safety and human rights standards on the conduct of Australian corporations which employ more than 100 persons in a foreign country.

- Require such corporations to report in Australia on their compliance with the standards imposed.

- Provide for the enforcement of the standards.

Strengths of the Bill.

Key elements of the Bill strongly endorsed by Community Aid Abroad include that;

- The Bill requires companies to take all reasonable measures to limit their impact on the *environment* and to undertake environmental impact assessments of all new developments. Similarly, the Bill requires Australian corporations employing workers overseas to take all reasonable measures to promote the *health and safety* of its workers through providing a safe, healthy workplace and regulating the working hours of employees.

- The Bill prohibits the use of forced or compulsory labour, including child labour and requires Australian companies to adhere to *minimum labour standards* as contained in the International Labour Organisation Conventions. The Bill would also prohibit discrimination based on race, colour, sex or social origin.

- In Australia, the Bill proposes companies report to the Australian Securities and Investment Commission (ASIC) against the above standards and disclose any contraventions of the standards. ASIC would prepare an annual report for the Parliament, to be tabled by the Treasurer.

- Finally – and crucially - the Bill proposes that company directors be held accountable for contravening these standards through allowing any person who suffers loss or damage to bring action in the Federal Court of Australia - including people living overseas who are directly impacted.

Improvements to the Bill.

Extraterritorial Operation.

Community Aid Abroad recommends the following additions to section 4 of the Bill;

- That the threshold for compliance with the standards outlined in the Bill be lowered from employment of more than 100 persons in a foreign country to employment of more than 50 persons in a foreign country.

- That application of the Act specifically apply to joint venture activities of Australian corporations.

Human Rights Standards.

Community Aid Abroad recommends the following additions to section 10 of the Bill;

- That the section require an overseas corporation to take all reasonable measures to ensure that its business activities are conducted in a manner which is consistent with

international human rights standards as defined by the following international human rights instruments;

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

- That the anti discrimination requirements in section 10(1) specifically include indigenous populations and ethnic populations.

Reports to Australian Securities and Investment Commission.

Community Aid Abroad recommends the following additions to section 14 of the Bill;

- Section 14(2) to require Code of Conduct Compliance Reports to include a statement of the social impact, prepared by an independent auditor, of the activities of the corporation in each country (other than Australia) in which the corporation undertakes activities. Such a statement must disclose corporation activities inconsistent with the UN Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and core International Labour Organisation conventions.

- Section 14(2)(f) to require a statement of whether the rate at which employees are paid in each country (other than Australia) is consistent with a living wage in each country.

- Section 14(2)(h) to specifically define risk factors as extending beyond direct financial risk to include social and environmental risk together with risk analysis for intangible assets such as their brand and reputation.

- It is not clear in section 14(1) that Code of Conduct Compliance Reports lodged with the Australian Securities and Investment Commission will be made available to the public. Such reports should be made public to increase public pressure on Australian companies to improve their environmental and human rights performance.

Civil Penalties.

Community Aid Abroad recommends the following additions to section 16 of the Bill;

- That a reputational disincentive for non compliance with the Act be added to the direct financial disincentive in section 16 of the Bill in such a way that civil penalties for non compliance with the Bill provide for widespread public disclosure of a corporation's breach of the Act. Mandatory public disclosure of wrongdoing reflects the fact that a significant proportion of the equity of many companies is tied up in the reputation of the brands rather than in their tangible assets.

Preferential Treatment.

Community Aid Abroad recommends that a new section be added to the Bill providing incentives for corporate compliance with the Bill in a manner consistent with section 4 of the Mc Kinney Bill currently before the United States House of Representatives.

This section would require the Australian Government to provide incentives for Australian firms compliance with the Corporate Code of Conduct Bill. Such incentives could include that;

- In entering contracts for the provision of goods and services, Australian government agencies are to give preference to corporations in compliance with the Corporate Code of Conduct Act.

- Preferential trade and investment assistance be provided by Austrade and other relevant Australian Government agencies to corporations in compliance with the Corporate Code of Conduct Act.

- That the Export Finance Insurance Corporation be prohibited from providing assistance to corporations not in compliance with the Corporate Code of Conduct Act.

Coverage of Suppliers.

One area of potential downside with the Bill as currently drafted is that the Bill does not cover the activities of suppliers of Australian companies. For some industries this creates the danger that Australian companies will avoid the necessity for compliance with the legislation by outsourcing production. Factories currently owned by Australian clothing labels in China, for example, could be closed and the production outsourced to firms not subject to the Bill. In some situations such an outcome could actually lead to the Bill facilitating lower corporate standards.

International attempts to regulate the overseas operations of corporations have recognised the importance of extending that regulation to cover suppliers. Thus the Fair Labor Association in the US (a joint industry/NGO body set up to regulate labour practices of US

companies sourcing production overseas) includes within its jurisdiction contractors and suppliers of participating companies. The definition extends to "any contractor or supplier engaged in a manufacturing process, including cutting, sewing, assembling and packaging, which results in a finished
product for the consumer."

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