Corporate Code of Conduct Bill
Mineral Policy Institute
Submission to Senate Inquiry
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Contents

Summary

The Mineral Policy Institute would like to support the Corporate Code of Conduct Bill 2000. There is a clear need for a Bill like this. This need has been demonstrated throughout the year 2000.

In particular, mining accidents and the ongoing everyday impacts of Australian mining companies overseas highlight the reasons why it is necessary for the Australian government to regulate the operations of Australian corporations which undertake business activities in other countries.

This year has seen over one million kilogrammes of fish destroyed by a cyanide spill from Australian miner Esmeralda's Romania operation. The year has also seen renewed legal action against BHP for breach of the Ok Tedi out of court settlement. Rio Tinto likewise is in court in the USA for the operations of the then CRA mine on Bougainville.

Rio Tinto's human rights records continue to be the focus of much criticism. In particular its Indonesian operations at Grasberg and Kelian have documented human rights abuses.

While by no means a comprehensive list this short review of the problems and the realities of Australian mining operations offshore demonstrate the need for the Corporate Code of Conduct Bill. In particular the Bill addresses the current problems by looking at:

- The need for legislated and mandatory standards rather than the current voluntary code of conduct approach. The current voluntary approach does not work and some detailed information on the Minerals Council of Australia Code is presented below.

- Voluntary industry codes are by definition not binding and there is little enforcement, sanction, validation, or action taken against the companies for non-compliance.

- The Bill gives standing for legal action in Australia for affected people. This Bill clarifies and codifies already available rights (e.g. Ok Tedi style actions) and in doing so makes justice more accessible.

- The reputation of Australian companies is enhanced by good practices. Credible reputations for Australian companies increase the likelihood of future project access and approvals.

- In the medium to long-term this Bill will therefore generate competitive advantages for Australian companies (for example it is widely documented that clean production can result in win win solutions, that is a more efficient industry and less pollution).

- There is a strong moral argument for this Bill. Richer nations and peoples are more able to effectively regulate and monitor companies. In addition we are also obliged to take responsibility for the products and resources that we use in Australia. These products and resources often have their origins in unacceptable labour, human rights, environmental or social conditions.

We also note that the Australian Bill seeks to apply basic international standards. The Bill does not seek to override the national sovereignty of the countries in which Australian companies operate overseas.

This submission looks at company regulation overseas and the problems that are encountered which make a Bill like this necessary. The submission also looks at international regulation of companies by other international institutions of governments.

The submission also focuses on self-regulation which is widely promoted by the industry as an answer to these problems. The submission shows that such an approach is inadequate.

The submission looks at some of the key issues that are addressed by the Bill and the reasons why it is necessary to focus on these areas.

A Brief History Of Regulation

Transnational mining companies have been the objects of much criticism because of their record on human rights, environmental protection and social issues. These criticisms are acknowledged by industry leaders, like Sir Robert Wilson, Executive Chairman of Rio Tinto, who said (Wilson, 2000):

> *'Despite the efforts of companies and industry associations, the mining, metals and minerals industry has fallen into increasing public disfavour. It is seen as, at best, a necessary evil. It has become accepted thinking that the industry is incompatible with sustainable development….There is a gulf between the industry's self-perception and how it is seen by others.'*

In many countries, in particular in developing countries, national governments appear unwilling or unable to regulate or control the activities of mining companies.

At the national level, countries are reluctant to regulate, as they do not want to limit foreign direct investment. In fact, in many cases countries have legislated to actively encourage transnational mining company investment. For example, in the Philippines, prior to the 1995 Mining Act, there were only four mining projects that involved foreign corporations. Today most of the Philippines is covered by mining concession areas, mostly taken up by multinational corporations, or Filipino companies in partnership with multinational corporations. As well as weakening laws protecting the environment, labour and indigenous peoples, transnational mining companies are frequently offered a range of incentives such as tax holidays, removal of import duties, one hundred per cent foreign ownership, one hundred per cent repatriation of profits, removal of the need to employ local people, the granting of extensive land, water and other concessions and state protection against community opposition (Harris, 1998). As an example of the influence that transnational mining companies exert, the Papua New Guinean government passed a law, which BHP lawyers assisted to draft, which prevents PNG plaintiffs from suing an Australian company in an Australian court (Hawkes, 1996).

The problem is exacerbated by the reality that international law on human rights, the environment and labour is only binding on national governments. Transnational mining corporations cannot be bound by such laws, except where the national government implements and enforces international law through domestic legislation.

One of the critical deficiencies of international law is in the area of foreign direct liability. Specifically, there is the question of what action can be taken in situations where communities cannot (either due to an absence of appropriate legal mechanisms or because of fear that their lives, family or well-being will be harmed as a consequence) bring cases (either for compensation or for injunctions) in domestic cases.

There are a number of examples of cases that challenge the notion that foreign nationals cannot bring cases against companies in the corporation's home countries. The USA *Alien Tort Claims Act* allows foreign plaintiffs to bring tort claims in the United States. To

date, the Act has been narrowly interpreted, to apply in the main only to violations of *jus cogens*, which refers to the peremptory norms of international law that are recognised by the entire international community of nations and from which no derogation is permitted. These norms include the gravest violations of international law, such as slavery, genocide, murder and torture. (Del Villar, 2000; Greer, 1998).

Despite several unsuccessful cases such as *Amlon Metals Inc v FMC Corp, Aguinda v Texaco Inc* and *Torres v Southern Peru Copper Corp* (Rosencrantz & Campbell, 1999) there have also been claims that have been accepted and determined by the United States courts. One important recent case is that of *John Doe I, et al. vs. Unocal, et al.* In 1997 a United States Federal Court agreed to hear a case brought against Unocal and Total by fourteen victims of alleged human rights abuses arising out of the Yadana gas pipeline project in Burma (Greer, 1998). In this case the court stated that 'private actors can be held liable under international law if they are acting in partnership or conspire with a state actor'.

The plaintiffs alleged that Unocal was engaged with the state officials in using forced labour and committing human rights abuses. According to the court this allegation was sufficient grounds to support subject matter jurisdiction under the *Alien Tort Claims Act*. In September 2000, the case was dismissed based on the fact that whilst Unocal was cognisant of the crimes committed by the Burmese military, it did not exercise control over the military's decision to commit the abuses and did not engage in a conspiracy to commit the crimes. The plaintiffs intend to appeal this decision. The case is important as it establishes that cases can be taken.

The notion of foreign direct liability was also recently tested in the UK when the House of Lords gave leave to several thousand South African plaintiffs to take action in England against an English company Cape PLC for personal injuries. Cape PLC operated asbestos mines in South Africa, but the appellants made their claim against the parent company, located in the UK, claiming that Cape PLC was negligent in its duty to ensure that proper occupational health and safety standards were employed throughout the group. The House of Lords concluded that, if the case was heard in South Africa, there would not be sufficient access to justice. The absence of legal aid in South Africa to fund the litigation and the absence of a suitably experienced law firm who would be willing to take the case on a 'no win, no fee basis' could lead to a denial of justice (Ward, 2000).

Australian Corporation, BHP, has also had litigation against it in Australia in relation to the operation of the Ok Tedi mine in Papua New Guinea. The action, brought by seventy-one landholders representing 30,000 villagers living downstream of the mine, was settled out of court in 1995. The negotiated settlement provided some limited success to the community, namely compensation, dredging of the river and future containment of the tailings. However because it was settled out of court, the issues of standing and *forum non conviens* were not established and, therefore, the case has no precedent value for common law systems. Despite the agreement to curtail pollution, waste is still being dumped in the river each day. This has led to the landowners commencing further legal action against BHP in 2000.

International Regulation Of Companies By Governments And International Institutions

The EU Resolution

While the efforts to regulate the activities of transnational corporations have not met with great success, there are signs that at least some politicians are waking up to the need to act to prevent transnational corporations violating human rights and the environment.

The European Parliament passed a resolution entitled *'Resolution on EU standards for European enterprises operating in developing countries: towards a European Code of Conduct'* in January 1999. The Resolution calls on the European Commission to establish legally binding requirements on European transnational corporations, to ensure that these corporations comply with international law relating to the protection of human rights and the environment when operating in developing countries. Specifically, the Resolution requires transnational corporations to comply with the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, the OECD Guidelines on Multinational Enterprises, the ILO Core Conventions on labour rights, basic human rights protection as embodied in the Universal Declaration on Human Rights and subsequent covenants on human rights, the Rio Declaration, the UN Convention on Biodiversity and other applicable UN and European Community environmental and public health protection instruments, the OECD anti-bribery convention and the UN Code of Conduct for Law Enforcement Officials.

The Resolution proposes that European transnational corporations be monitored by a panel comprising independent experts and representatives from European business, international trade unions, environmental and human rights NGOs and from the developing world. The Resolution calls on the European Commission to ensure that transnational corporations acting on behalf of, or financed by, the European Union act in accordance with basic requirements for human rights and environmental protection and that companies failing to meet these requirements should not be entitled to receive further funding from the European Union. Whilst the EU code is not yet fully implemented, the European Commission is required to respond to every point contained in the Resolution within six months and it is also obliged to hold annual hearings, which serve to highlight good and bad corporate practice. In November 2000, Rio Tinto was held under the spotlight.

The Resolution represents an important step forward in introducing an international regulatory regime for transnational corporations. It also challenges several well-worn arguments, not least of which is that a regulatory regime will diminish a corporation's competitive advantage where they are competing against companies that are not subjected to mandatory codes of conduct. However, it is relevant to note that forty-two of the top one hundred companies are based in Europe with a further thirty-five in the USA (Howitt, 1998). The North American Free Trade Association (NAFTA) already has a mechanism whereby trade unions and civil society can bring complaints against companies. Given this European companies can hardly be seen to suffer disadvantage compared to a significant number of other corporations. Likewise the Corporate Code of Conduct Bill will not place Australian companies at a significant competitive disadvantage.

The EU code was designed to act as an exemplar (Howitt, 1998). It recognises its limitations as well as the potential for using the EU's influence, for example in terms of its own procurement policies. It is seen very much as an increment in an ongoing and

developing campaign. In the short term, the economic sanctions will relate to European Union-funded projects but it is likely that there will also be pressure on institutions such as the World Bank to support this position when making funds available for projects in developing countries. Clearly, the longer-term implication is that to obtain capital and insurance, transnational corporations will need to ensure their human rights and environmental records meet the standards defined by the European Union.

OECD Guidelines

The OECD Guidelines are recommendations by Governments to help ensure that transnational enterprises act in harmony with the policies of countries in which they operate and with societal expectations. The guidelines came into existence as part of the 1976 OECD Declaration on International Investment and Multinational Enterprises. They are not legally binding but are promoted by signatory governments to transnationals (OECD, 2000).

There have been several reviews of the Guidelines since 1976, which have resulted in minor adjustments. In November 1998 a major review was launched which culminated in the adoption of a new set of guidelines in Paris in June 2000 (OECD, 2000). The review was notable because of its depth and breadth and also because for the first time a consultation process was instigated which included the points of view of civil society through the representations of non-government organisations.

The Guidelines provide voluntary principles and standards for business conduct, in particular for transnational enterprises. As the only multilaterally endorsed and comprehensive code that governments are committed to promoting, they deserve close scrutiny. Indeed, for many years, the Guidelines have represented the only normative expression of expectations of transnational enterprises. Although non-binding, they have acquired a stature simply by virtue of their broad acceptance, at least by the member countries of the OECD.

The Guidelines cover eight major areas, namely disclosure, employment and industrial relations, environment, combating bribery, consumer interests, science and technology, competition and taxation.

The scope and content of the Guidelines has broadened to encompass issues such as the elimination of child labour and forced labour, the protection of human rights has been introduced, the prevention of corruption, environmental and emergency management and social and environmental accountability. Despite these improvements, the content of the revised Guidelines is extremely disappointing and, in many areas, represents a regression in the manner in which transnationals are to be treated. On most of the issues described above, the Guidelines require little more than that consideration be given to addressing specific issues. However, as is the case for much of the Guidelines, there are few specific objectives or outcomes defined, nor do the Guidelines say how any targets can be independently measured and assessed. The loosely written text with its emphasis on recommendations rather than binding requirements means that there is far-reaching discretions in how these clauses are to be interpreted with the consequence that there are no binding obligations on transnationals.

USA

In June 2000, Congresswoman Cynthia McKinney introduced a bill into the US House of Representatives designed to force United States companies to implement a corporate code of conduct. The requirement applies to any national of the United States that

employs more than 20 persons in a foreign country (McKinney, 2000). McKinney's bill covers areas such as occupational health and safety, freedom from discrimination on the basis of race, gender, religious affiliation, pregnancy (or potential for pregnancy) the right to organise and minimum wages. It also addresses environmental standards as well as requiring that organisations comply with core ILO standards. The bill extends down the supply chain and includes contractors. It also gives the US administration the power to give contracts to companies that comply with the bill.

An independent congressman, Bernie Sanders introduced a similar bill, incorporating some of McKinney's principles, but also requiring a tax on international currency transactions, a global investment fund to meet pressing needs in developing countries, debt cancellation for the poorest countries and a reworking of the International Monetary Fund and the World Bank. The Code would require companies in their overseas operations to pay a living wage, ban specific practices (eg mandatory overtime for workers under 18), respect identified international labour standards (including the right to organise, minimum wage guarantees and protections for occupational safety and health) and provide extensive information on employment and environmental practices. It is envisaged that enforcement would be achieved through the US government giving preference to complying corporations in contracts and in export assistance and allowing the victims of violations of the bill, including non-US citizens, to sue US companies in US courts.

Other attempts at Regulation

Other attempts at regulation include bilateral government initiatives such as a USA and United Kingdom program which is currently formulating a set of voluntary principles that can provide a model and practical guidance for companies to avoid human rights abuses whilst pursuing corporate security requirements (Freeman, 2000)

Self Regulation

Self-regulation may be defined as a process whereby an organised group regulates the behaviour of its members (Gunningham & Sinclair, 1999). Recent years have seen a range of initiatives at the national and international levels to define codes of conduct for the mining industry, including the Australian Minerals Council's Code of Environmental Management (Minerals Council of Australia, 2000), and the International Council of Metals and the Environment's Environmental Charter**.** Individual mining companies have also embraced the concept of self-regulation by developing their own codes of conduct or policy statements on issues such as human rights and the environment.

More recently, there has been the Global Mining Initiative (GMI), initiated by CEOs of some of the world's largest mining companies at the World Economic Forum meeting in Davos in 1999. The GMI is sponsored by the World Business Council for Sustainable Development and managed by the International Institute for Environment and Development (IIED). The Mining, Minerals and Sustainable Development project of the Global Mining Initiative aims to 'identify how mining and the minerals industry can best contribute to the global transition to sustainable development' (IIED, 2000). However, many mining-focused NGOs, like Mining Watch Canada and Jaringan Advokasi Tambang Kaltim ((JATAM - Indonesian Mining Advocacy Network) are critical of the project, seeing it at best ill-conceived in its scope, and at worst 'greenwashing' designed to promote the industry's self regulation agenda.

Benefits of Self-Regulation

The supporters of self-regulation cite benefits such as speed, flexibility, sensitivity to market circumstances and lower costs. It is argued that, because industry sets the standards and is responsible for identifying breaches, this will lead to more practicable standards that can be more effectively policed. It is argued that industry peer pressure offers the potential for improving the rate of compliance over traditional regulatory regimes. In addition, it is frequently suggested that self-regulation, through the adoption of standards beyond legal compliance may significantly raise standards of behaviour and environmental performance.

In addition to the specific objectives defined for self-regulatory regimes, self-regulation may provide other benefits such as awareness raising, providing new fora for the discussion of specific issues, providing a focus for management efforts and developing an industry-wide normative framework (ie a set of principles which defines 'right' conduct in the context of the industry's behaviour and operations).

Limitations of Self-Regulation

The reality is that self-regulation often fails to fulfil its promise and efforts at self-regulation are regarded with scepticism by conservationists, consumer organisations and other parties interested in the externalities associated with the performance of industry (Gunningham & Rees, 1997). Self-regulatory standards are seen as weak, enforcement is generally ineffective and punishment is secret and mild (eg see Spar (1998)). Furthermore, self–regulation is seen as lacking many of the strengths of conventional regulation in terms of visibility, credibility, accountability and compulsory application. A broader concern is that self-regulatory regimes are designed to give the appearance of regulation and thereby ward off government intervention or regulation (Gunningham & Rees, 1997).

There are a number of specific limitations associated with self-regulation, namely 'free riding', the emphasis on process rather than outcomes, regulatory capture, lack of access to third parties, monitoring and verification and enforcement. Each of these is considered briefly below.

Free-Riding

A major problem with industry self-regulation is that, although each individual enterprise may benefit from collective action if other enterprises participate, each will also benefit even if it does not participate, provided that others do participate (and the free-rider is not caught) (Gunningham & Rees, 1997). There are two main forms of free-riding. The first is where all parties agree to the terms and conditions of the self-regulatory regime, but some merely feign compliance. The second is where part of the relevant industry simply refuses to sign on to self-regulatory scheme.

In the context of the mining industry, an important example is the response of the Australian mining industry to the cyanide spill in North West Romania in January 2000, at a mine owned and operated by the Australian company, Esmeralda Exploration. The Australian mining industry has a well-established Code of Environmental Management and many of the major Australian mining companies are signatories to the Code. The industry was at pains to point out that Esmeralda was not a signatory to the Code, nor was Esmeralda a member of the Minerals Council of Australia. The subtext to the argument was that the Code had not failed but that the Baia Mare spill was the result of an organisation that did not conform to the industry's self-defined norms of good

corporate behaviour. That is, the industry's primary response was aimed at protecting the reputation of the Code signatories rather than acting to either help remedy the damage caused or to move to improve the performance of the Code signatories. In the context of the concerns that have been expressed about self-regulation in the mining industry, this example indicates the inability of voluntary approaches to deal with free-riders (or, perhaps more relevantly, the existence of the Code provides no guarantees regarding the performance of the industry).

Target based or Implementation based

Self-regulatory regimes may be in one of two forms. That is they may define the specific targets to be met ('target based') or they may define the means whereby external targets are to be met ('process based') (OECD, 1999). The distinction between the two types is critical in terms of the credibility of the voluntary agreement with external parties. Specifically, in target based regimes, the targets set are generally lower than the targets that would have been set by government. The reason is that industry-defined targets tend to only take into account the interests of the polluter rather than the public interest in general.

Where the self-regulatory regime is process based, the meeting of the process specifications is taken as ensuring the success of the regime. For example, the signatories to the Australian Minerals Industry Code for Environmental Management (Minerals Council of Australia, 2000) are required to implement the Code, produce an annual public environment report, completion an annual code implementation survey and have the survey results verified, by an accredited auditor, at least once every three years. Beyond these activities, no specific performance obligations are imposed on Code signatories beyond complying with statutory requirements and continuous improvement in environmental performance. While the Code does refer to terms such as sustainable development, these terms are not defined nor are specific performance measures defined for these.

A further issue is that while self-regulatory regimes can be successful in meeting their specified targets, the fact that targets are achieved is of limited relevance if such targets would have been met even without an agreement in place (ie if the targets simply represent 'business as usual'). The evidence that is available indicates that, in terms of actual performance improvements, self-regulatory regimes generally do not provide many significant benefits beyond those that would have occurred anyway.

Regulatory Capture

It is commonly suggested that voluntary approaches result only in cosmetic effects on corporate behaviour. One of the reasons for this concern is the dominant role of industry in the process of setting and implementing such approaches. Industry is frequently suspected of using voluntary approaches to capture public policy (OECD, 1999). Capture may occur as a consequence of the industry being required to meet lower standards than would otherwise have been the case or through avoiding or obstructing more stringent regulations.

In this context, it is should be understood why regulatory bodies at the national or international level would support voluntary approaches. One situation is where policy makers see voluntary approaches as speeding up the regulatory process (OECD, 1999). Another situation is where voluntary approaches can save on budget resources. Voluntary approaches can enable some of the costs associated with regulation and the administration of regulations to be passed to industry. In the broader context, the

general pressures (in particular, from business interests) for government to withdraw from many areas of social policy creates pressure on regulatory bodies to be seen to be assisting industry and not imposing unwarranted costs or other impositions on business. Through the creation of 'an impression of regulation', self-regulatory regimes are frequently used as a justification for no regulation or control.

Access to third parties

As self-regulatory regimes are generally developed outside the standard regulatory framework, it is generally the case that some or all elements of the regime are not transparent and open to all stakeholders. This raises issues in terms of defining targets/objectives, monitoring programmes, reporting and interpretation, etc. The involvement of external stakeholders (eg community groups, NGOs) may help limit the risk of regulatory capture. However, the reality with self-regulatory regimes is that much of the stakeholder consultation is designed to legitimise the goals and objectives and process rather than lead to any significant changes in the scope or content of the self-regulatory regime.

Monitoring and Verification

One of the key issues with self-regulation is the manner in which data on performance is collected and assessed. Many of the largest transnational mining corporations, such as Placer Dome, BHP and WMC have actively sought to engage NGO and community critics in monitoring and verification of their environmental and social performance. These 'partnership projects' can provide a mechanism for independent scrutiny of corporate activity and accountability to NGO and community aspirations. However, for under-resourced or unwary communities and NGOs, engagement in corporate controlled monitoring and verification processes, where the terms of reference, selection (both of the issues to be considered and of the NGOs to be involved in the process) and resources are controlled by corporations, the record has been that the contribution of NGOs and community groups has frequently been limited to rubber stamping the status quo and identifying issues that can be managed on corporate terms. A particular limitation of these groups is that they are predicated on the assumption that mining will proceed and the discussion is then 'how should such mining be carried out?' rather than 'If such mining should be carried out' (Sullivan, 1999).

Peter Sandman, a US-based consultant to corporations on how to manage 'community outrage' noted that establishing consultative processes, advisory committees and panels involving NGO critics can lead to (Sandman, 1998):

> *'erstwhile troublemakers let onto the panel start learning about the industry's problems and limitations, acquire a sense of responsibility to give good advice, and pretty soon they are sounding a lot like industry apologists.'*

Along the same lines, Ben Woodhouse, a former external relations manager for US chemical giant DuPont, and now a director of the Australian 'corporate sustainability consultants' Ecos Corp, and advisor to BHP on how to manage the NGO-engagement aspects of the Ok Tedi disaster, noted that community advisory panels are a way of (Woodhouse, 1998):

> *'handing over some control or feeling of power to the community because if you do that the community gives it back to you in spades'*

Woodhouse also recommended:

'…use the core members of [the community advisory group] to draft the terms of agreement and to recruit members…In every panel we put together we'd select the first three people and we'd let them tell us who the rest of the membership should be and then we'd say fine, go out and sell your idea, and it became their panel, not our panel."

While an inner circle of external monitors can give a rubber stamp to self-regulation, others who are marginalised due to geography, culture, gender or political opposition tend to be left on the outside of the process.

Enforcement

A critical question is what, if any, can be imposed for non-compliance with a system of self-regulation. First of all, heavy sanctions, such as the withdrawal of licences, are unlikely to be available. Much of the literature on self-regulation has been quite cynical about the role and purpose of industry associations (eg see Gunningham & Rees, (1997)). The reality is that industry associations or other professional groups, are unlikely of themselves, to be able to effectively regulate of their members, given that the primary purpose of such associations is to serve the needs and interests of their members. While industry peer group pressure has been cited as providing an alternative to stronger penalties for non-compliance, the reality is that there are few, if any, options available to address non-compliance with self-regulatory regimes.

Case Study - MCA Code

In 1996, the Minerals Council of Australia developed the 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.

Although forty-six companies are signatories to the Code, incidences of environmental and social devastation are still very frequent. This is demonstrated by the two damaging cyanide spills in Romania and Papua New Guinea in the first two months of 2000. Signatory mining companies and non-signatories alike have caused long-term and irreversible damage overseas.

The Code narrowly defines 'environment' as the physical surroundings, neglecting the important aspects of the social environment, including human rights and protection of local economies. 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; and
- Communicating our environmental performance.

Despite this powerful use of environment statements in this framework, the recent cyanide poisonings of international waterways by Australian mining companies calls into

question the effectiveness of this Code. The ineffectiveness of the Code is likely due to voluntary commitment of companies; allowing companies to 'self-assess' their commitment; there are no concrete standards or procedures which companies have to comply with; there are no sanctions on companies if they do not comply with the code.

Following is a list of some of the environmental and social impacts caused by Australian mining companies, most of which have occurred since the introduction of the Code in 1996. The list includes Australian companies that have and have not committed to the MCA's Code.

The Record of Signatory Mining Companies

Aurora Gold, 1998-:

Human Rights Abuses and environmental pollution in Kalimantan, Indonesia (MPI 2000:1)

BHP, 1984-:

Ok Tedi: Long-term destruction impacting on livelihoods and environment for 30,000+ landowners. BHP has announced its intention to pull out of the mine but has made no commitment to the long-term damage that it has caused or the people you will have to survive with the legacy of world scale mining destruction. (MPI 2000:2)

ERA / North Limited, 1997-2000 now Rio Tinto:

Uranium Mining in World Heritage National Park Against the Wishes of the Traditional Landowners (MPI 2000:6)

Rio Tinto :

Freeport and Lihir: Social and Environmental Abuses, river and ocean dumping, human rights abuse. Rio has been widely condemned for human rights abuses and recently failed to properly report cases of sexual abuse at its Kelian Indonesian mine. (MPI 2000:3)

Ross Mining NL, 1997-now Delta Gold:

Contamination threatens rivers in Solomon Islands, Ross refuse to release environmental impact study in direct contradiction with MCA code which stated signatories would "provide to the community technical information about potential effects of operations, products, waste and rehabilitation practices." (MPI 1998:1)

WMC Limited, 1997-2000:

Manipulation of community consent processes as Indigenous People Oppose Mine on their Land, Tampakan, Phillipines. (MPI 1998:2)

Non-signatory Mining Companies and their record:

Dome Resources NL, 2000 now Durban Roodeport Deep:

Helicopter Drops One Tonne of Cyanide Pellets into PNG forest, also several months later diesel fuel accident from helicopter. (MPI 2000:4)

Esmeralda Exploration, 2000:

Cyanide Spill into rivers of Hungary, Romania and Serbia, killing one million kilogrammes of fish, contamination stretches into the Danube. (MPI 2000:5)

Highlands Pacific, 1999-:

Plan to dump mine waste into the Coral Reef-rich Astrolabe Bay (MPI 1999)

Self-Regulation in the Policy Framework

The reality is that self-regulatory regimes are non-binding (Kenneth Bart & Baetz, 1998) and can all too easily be flouted by less scrupulous organisations. Many organisation's policies and objectives on issues such as human rights and the environment are extremely limited, contain few concrete commitments and, in many cases, represent little more than 'business as usual'. There has been a marked reluctance on the part of transnational corporations to open their operations and activities up to independent monitoring or verification.

In practice, in the absence of effective legislation, many transnational corporations do not even meet the minimum standards specified in international law on issues such as human rights.

Key Issues Addressed By The Bill

Standing for communities and civil society

Legal standing empowers communities to negotiate on their own behalf terms and conditions of access and returns to communities. They also ensure that communities and their representative organisations have independent advice to enable them to make informed decisions.

Companies 'licence' to operate

Companies acknowledge that they must now seek their 'licence to operate'. A licence to operate has both the 'formal' legal element of maintaining a corporate entity that can legally conduct business and thereby gain legal access to land and capital, as well as an 'informal' element, which is goodwill granted by communities based on perceptions of good citizenship.

A record of bad corporate citizenship, gained through abuse of environmental and human rights is a major obstacle that transnational mining corporation leaders are increasingly recognising and acknowledging. For example, Hugh Morgan, of Western Mining Corporation, recently said (Morgan, 2000):

> *'Our reputation is tarred by those who have gone before us, by those who have been unable to handle some of the dramas which come along from time to time.'*

Clearly, the issue for the mining industry is one of legitimacy. As Rio Tinto's Sir Robert Wilson noted:

'Unless the major players in the global mining and minerals industry can present a convincing case that their activities are conducted in line with [sustainable development] principles then their long term future is in jeopardy'.

Directors Personally Responsible For The Actions Of Their Corporations

The due diligence argument that is increasingly part of health and safety and environmental law is correctly applied to human rights and environmental activities of transnational companies by the bill. Historically, common law has separated the acts of corporations from the acts of individuals working for the corporation, making assigning liability for pollution offences problematic.

In recent years, however, this difficulty has been addressed with domestic legislation now assigning the responsibility for such offences to both organisations and individuals working for organisations. For example, all of the Australian States now have environmental legislation which imposes liability on corporate directors and managers for the offences of their corporations. The penalties that can be imposed may be up to one million dollars for corporations and $250,000 for individuals. In addition, prison sentences can be imposed on individuals. It is usual for such legislation to incorporate a defence based on the concept of due diligence or the taking of all reasonable and practicable measures to prevent environmental harm (see, for example, Duncan & Traves (1995)).

Making the directors and managers of a TNC personally responsible (and liable) for the actions of their organisation represents a potentially powerful means of focussing the attention of corporate leaders on the environmental, human rights and social impacts of their decisions.

The Precautionary Principle

Many Australian mines operating overseas discharge waste directly into rivers and oceans. This waste is usually toxic and contains persistent and bio-accumulative chemicals, in particular heavy metals and other chemical agents used during processing.

The discharge of chemicals like this has led many governments and international forums around the world to adopt strong statements outlining the need for precautionary action. In particular this sort of waste is likely to cause a significant impact, and the impacts may very well be irreversible.

For example the declaration from the 1992 United Nations Conference on Environment and Development, also known as Agenda 21 uses the following definition:

> *"In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." (UN 1992)*

The OSPAR Convention For The Protection Of The Marine Environment Of The North-East Atlantic defines the precautionary principle:

> *"the precautionary principle, by virtue of which preventive measures are to be taken when there are reasonable grounds for concern that substances or energy introduced, directly or indirectly, into the marine environment may bring about hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, even when*

there is no conclusive evidence of a causal relationship between the inputs and the effects;" (OSPAR 1992)

Such a definition is clearly appropriate to the operations of Australian mining companies overseas. The precautionary principle is also recognised within Australia.

The current definition within the corporate code of conduct bill for the precautionary principle should be rewritten to reflect the world's best practice and international standards in the applications of this principle. The OSPAR definition is an appropriate guide. Section 6 lines 28 to 31 should become:

> ***precautionary principle*** *means preventive measures are to be taken when there are reasonable grounds for concern that substances or energy introduced, directly or indirectly, into the environment may bring about hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, even when there is no conclusive evidence of a causal relationship between the inputs and the effects;*

In addition to this section 7 which deals with environmental standards needs to state that the precautionary principle will be applied for paragraphs a to f (Part 2 Section 7 Subsection 2). Lines 26 and 27 should become:

> *(g) apply the precautionary principle in carrying out the actions mentioned in paragraphs (a) to (f).*

Conclusion

Despite the limitations of traditional regulatory approaches, the core message of this submission is that transnational mining companies can and should be regulated and controlled. The current mix of voluntary self-regulation and weak standards and enforcement of legislation in poorer countries, particularly countries which do not belong to the OECD, makes it imperative for the Australian government to act.

Ultimately, corporations know that their long-term survival is contingent on the support of communities and civil society. This support means companies must act to protect and enhance the environment, human rights and economic, social and cultural rights. The opportunity exists for the Australian government to act and give Australian companies a long term competitive advantage.

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