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7 September 2005

The Secretary
Parliamentary Joint Committee on Corporations and Financial Services
Suite 5G.64
Parliament House
Canberra ACT 2600

Dear Sir/Madam,

Please find attached the ACTU Submission for the inquiry into corporate responsibility.

If the committee requires any further information the two contact officers for the ACTU Submission are:

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Yours sincerely

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Nixon Apple
ACTU Industry and Investment Policy Adviser

Australian Council of Trade Unions

Parliamentary Joint Committee on

Corporations and Financial Services

Inquiry into Corporate Responsibility

September 2005

D No.

Introduction

The ACTU welcomes the Joint Committee's inquiry into Corporate Responsibility. The terms of reference in part reflect issues currently before the Corporations and Market Advisory Committee (CAMAC) on directors' duties.

These in turn reflect the issues raised in the U.K *Draft Company Law Reform Bill (2005)* concerning directors' duties and the concept of "enlightened shareholder value."

This ACTU submission is divided into two sections. In Section One we briefly consider the issue of "enlightened shareholder value" and its capacity to encourage directors' to take a longer term view as well as take into account the interests of stakeholders.

Section One also raises the key issue from the James Hardie case concerning the need for reform to limited liability laws in relation to death or injury.

Section Two goes to those parts of the Committee's terms of reference dealing with voluntary measures that may enhance considerations of stakeholder interests by incorporated entities and / or their directors. We do this by considering three sets of international standards that are relevant to the social responsibilities of business. These include:

a) ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (ILO MNE Declaration);
b) OECD guidelines for Multinational Enterprises;

c) UN Norms in the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights.

Section Two Appendix A explains the content of these three sets of international standards as they relate to corporate social responsibility. We take this Appendix as read when the Committee considers our short summary of the strengths and weaknesses of such standards in the text of Section Two.

Section One

In March 2005 the Commonwealth referred an inquiry into directors' duties to the Corporations and Markets Advisory Committee (CAMAC). This inquiry followed developments in the U.K where in March 2005 the *Draft Company Reform Bill* incorporated into directors' duties the concept of "enlightened shareholder value."

In explaining this concept Deliotte provided the following summary:

> *"Directors duties would be summarised in a statutory statement which would replace existing common law and equitable rules and embed the concept of 'Enlightened shareholder value'. This would entail making it clear that directors must promote the success of the company to benefit of its shareholders as a whole, and that this can only be achieved by taking due account of both the long term and the short term. Factors such as relationships with employees, customers and suppliers and effects on the community and environment would also need to be considered.* ***An issue which directors would need to***

review is how they would demonstrate their performance in this area."[1]

A similar explanation of this concept of 'enlightened shareholder value' was provided by the U.K. Government:

> *"…the objective of directors should be to generate maximum value for shareholders, as this is most likely to maximise overall competitiveness and wealth and welfare for all. At the same time, we recognise that directors cannot do this if they focus on the short term financial bottom line and fail to build long-term relationships. The Bill will therefore require directors to take a properly balanced view of the implications over time, and to take account of wider interests, such as the company's need for effective relationships with employees, customers and suppliers, and in the community more widely."*[2]

Concerns about this concept have been expressed in a number of ways. The U.K. Association of Investment Trust Companies (AITC) pointed out:

> *"One problem is the danger of vexatious complaints by minority shareholders pursuing their own personal agenda's which might conflict with the Boards wider duties to all shareholders. The AITC would prefer the Government to enact separate legislation to address stakeholder issues (such as environmental concerns).*

[1] Deloitte: *Corporate Governance Update*, March 2005.
[2] U.K DTI: *Company Law Reform White Paper; Frequently Asked Questions.,* Sourced from www.dti.gov.uk/cld/doc31.doc, accessed 6/9/05

The AITC is also adamant that, if this proposed duty of a director is to be adopted, the legislation should make it clear that the duty to deliver enlightened shareholder value relates to operational decisions made by company boards. It should not be a mechanism that would enable challenges of investment decisions by investment trusts, which would only have a financial interest in the underlying company – not an operational responsibility."[3]

From another perspective, organisations such as OXFAM suggest that "enlightened shareholder value" will be unenforceable as a concept because of the ambiguity attached to phrases such as "…where relevant and as far as reasonably practical." [4]

The ACTU welcomes the intention behind the concept of "enlightened shareholder value." However, like OXFAM we find it suffers from ambiguity. In addition the U.K. white paper determined to leave it to the courts to interpret. In Australia's case the courts, in interpreting directors' duties, usually focus on the decision making process taken by directors rather than the merits of the decision. This may leave both directors' and the courts wondering what decision making processes are appropriate to take the longer term view as well as the interests of stakeholders into account. Without substantive rules or more specific guidance on how directors' are to demonstrate performance of their duties in relation to stakeholders it is possible that considerable uncertainty would be created.

[3] AITC: *Political Regulatory News,* Issue 3, 15 July 2005.
[4] OXFAM's submission to the DTI in Response to the Company Law Reform Bill White Paper – June 2005.

In addition, one of the weaknesses of the U.K approach is that it is predicated on the assumption that change in directors duties by itself can address the deficiencies in the financial system that lead to "short-termism" and a lack of attention to broader stakeholder issues. Organisations such as the World Economic Forum (WEF) in its "*Mainstreaming Responsible Investment"* project are quite emphatic that a broad range of changes to the incentives, competencies and information/education of all financial market participants (not just company directors) would be required to give substance to the issue of "enlightened shareholder value." Their recommendations are highlighted in Box 1 on the following page. The ACTU concurs with the World Economic Forum's assessment that more far reaching change would be required if directors are to be expected to take a longer term view as well as more directly taking into account the views of stakeholders.

We would commend the WEF Report to the Committee .In our assessment, it represents the most considered system wide assessment of the changes that would be required over time to give real meaning and practical expression to the valuable intentions embedded in the concept of " enlightened shareholder value".

Box One: WEF Proposed Initiatives For Encouraging Responsible Investment

Modify Incentives

- Establish an international set of good governance principles for pension funds — a voluntary Fund Governance Code – that ensures accountability (disclosure of votes, policies, and management relationships) and professionalism (training, representation) on the part of boards of trustees. The aim of these principles would be to ensure the representation of long term beneficiary interests in intent, capability and practice.
- Modify pension fiduciary rules which discourage or prohibit explicit trustee consideration of social and environmental aspects of corporate performance.
- Increase the average duration of asset manager mandates to lend momentum to current experimentation with fund manager compensation arrangements linked to superior long-term performance.
- Increase disclosure of fund manager compensation structures to encourage better linkage between pay and long-term performance.
- Develop new business models for research on non-financial issues by analysts and incorporate this into the current regulatory review of the sell-side analyst function in diversified investment houses.
- Require analysis of material non-financial factors to be included in pension fund mandates to asset managers.
- Re-evaluate the relationship and relative organizational standing of buy-side analysts and portfolio managers in order to cultivate a more attractive long-term career path for analysts, allowing for the accumulation of necessary expertise.
- Develop new performance assessment models that enable trustees to support long-term investment strategies while complying with fiduciary obligations.

Build Competencies

- Pay, train, and empower pension fund trustees more like corporate directors in order to increase the capacity of boards of trustees to exercise independent judgment in the long-term interests of beneficiaries.
- Create a specific professional competency for non-financial analysis either through increased training of existing investment analysts or the establishment of a new category of specialists.
- Increase the emphasis on non-financial aspects of corporate performance in graduate business schools and mid-career analyst educational programmes.

Improve Information

- Improve the consistency of the content, collection and assurance of material non-financial information.
- Refine the concept of materiality and the basis for measuring and communicating its application to the links between financial performance and social and environmental performance.
- Expand the dialogue between analysts and corporate investor relations officers on the need for greater consistency in the content, collection and assurance of non-financial information.

Source: World Economic Forum; *Mainstreaming Responsible Investment;* January 2005 page 10.

While the ACTU will follow with interest the debate about "enlightened shareholder value" we feel there is another pressing issue that needs to be addressed now by this inquiry.

The James Hardie case has again raised the issue of the corporate veil of limited liability. It is our assessment that changes are required to limited liability in the case of death or injury. In such circumstances limited liability should not be allowed to be used as a device to establish one corporate entity with insufficient assets to meet its liabilities and to quarantine in another entity the ongoing profit generating assets that are effectively out of the reach of legal redress. We turn now to consider this issue.

Liability of corporations in respect of death and injury

While not proposing widespread legislative reform in respect of corporate social responsibility, the ACTU endorses calls to amend State criminal codes, and the *Corporations Act* in respect to conduct by corporations resulting in death or injury.

Criminal Offences

The ACTU acknowledges that the Commonwealth amended the Criminal Code from December 2001 by modernising the tests associated with culpability of corporations. The ACTU supports such legislative measures that introduce the concept of corporate culture of compliance in assessing fault of a body corporate for the conduct of its employees, agents and officers.

However the ACTU is concerned that the Commonwealth has adopted a different approach in respect of workplace deaths. We note that the government has legislated to exempt the Commonwealth government and agencies as employers from the *Crimes (Industrial Manslaughter Amendment Act 2003 (ACT),* and any future similar offences created in other States or Territories.

The purpose of industrial manslaughter legislation is to overcome existing barriers to the prosecution of corporate employers for recklessly or negligently causing workplace deaths. Industrial manslaughter legislation is generally designed to ensure that corporate employers do not escape the scope of the general criminal law on manslaughter due to the difficulties in proving a company (as opposed to a natural person) has been or intended to be reckless.

Such laws address criminally reckless or negligent conduct by an employee of an employer, or senior officer of an employer where that person's conduct causes a workplace death. They to focus on the culpability of the corporation, and act as a deterrent where other forms of regulation have failed to alter behaviour.

One stated purpose of industrial manslaughter legislation is to create equal obligations between small, unincorporated employers who can be successfully prosecuted for manslaughter, and larger employers where attributing liability to individuals is frustrated by the requirement to prove the person was "directing the mind and will" of the company.

Thus, while the Commonwealth on the one hand has been willing to legislate to ensure corporations are able to be prosecuted in the event of offences against Commonwealth laws, it has acted to frustrate the intention of similar laws in the States.

The ACTU urges the government to support and encourage all the States and Territories to ensure that the criminal laws relating to intentionally negligently or recklessly causing injury or death are enforceable against corporations.

Tortious conduct

In light of the ACTU's recent experiences involving the James Hardie group of companies, the ACTU proposes that the Corporations Act be amended to ensure that the application of the principle of limited liability be amended in cases involving personal injury or death. In these circumstances, liability should not be limited to the company responsible, but should extend to all members of a group of corporations.

This reform should be retrospective, so that it covers corporations that were once members of the same group of companies, but are no longer.

Such an amendment is justified on the following grounds:

- It is unconscionable that companies can choose to limit their liability by simply establishing subsidiary companies. This allows companies to separate risks from capital, and to effectively determine the limit of the capital exposure.

- Without such an amendment companies can be operated without making provision for any costs associated with wrongful death or causing injury to its employees or customers. There is no effective mechanism to deter potentially risky conduct.
- The principle of limited liability is premised on the assumption that all the members of the company, or parties contracting with the company, have accepted the risk of limited liability. This is not the case with victims of tortious actions, who are generally not able to access information about the nature of the risk to which they are exposed. Unlike creditors, victims of tortious conduct do not voluntarily assume the risk of the related corporation being unable to meet its financial obligations.

It is not unknown for the statute law to treat a group of companies as a single entity for certain purposes: under the Workplace Relations Act 1996 (Cth) related corporations may be treated as a single employer (see s170LB(2)(b)); and related companies are grouped for the purpose of assessing taxes such as land tax (see for example s 29 Land Tax Management Act 1956 (NSW)), and payroll tax (see for example s. 9A of the Payroll Tax Act 1971 (Vic)).

Nor it is unknown for the law to impose liability upon related companies in relation to torts committed by a group. The law does permit recourse to the parent in limited circumstances, ie where the relationship between the companies is one of agency or partnership or trust. It also occurs where the parent company owes a simultaneous duty to the plaintiff, and where the

plaintiff can demonstrate a reasonable and proximate relationship between the parent and the plaintiff.

But these exemptions to the doctrine of limited liability turn on their facts and require plaintiffs to prove a level of day to day control by the parent company over the subsidiary. The evidentiary burden is a difficult one for plaintiffs to bear.

Legislation is required to give plaintiffs certainty that the corporate veil can be pierced in the event of tortious liability, so that liability is not restricted to the tortfeasor company, but expanded to include the group of related companies.

In making this case the ACTU acknowledges that the Hardie case raises many issues related to the duty of directors .For example, the foundation of properly functioning markets is based on the full, timely and accurate disclosure of information by companies that the market requires to make informed decisions.

However, in the Hardie case this did not happen. Mr. Jackson QC, who led the Hardie inquiry, made this point when he talked about:

> *"…the quite misleading statements made on behalf of JHIL at the time of separation, and the culture of denial adopted as the shortcomings of the Foundations funding began to emerge.*
>
> *For nearly thirty years in this country we have had standards for business communications. Such communications are not to be misleading or deceptive. Those standards appear in the* Trade

Practices Act 1974 *and in its state equivalents, in the* Corporations Law *and in the* Corporations Act 2001*. They have been maintained by Governments of all political colours. In my opinion they were not here observed."*

This may raise issues about the regulation and enforcement of disclosure obligations. But more importantly it raises the ethical and moral issues associated with the duties of directors and company officers. After what we saw at Enron, World Com, HIH and James Hardie it is clear that there are issues of corporate culture and the implied duty of directors to do the right thing that require attention.

As Justice Owen said in his report on the HIH case:

> ***"From time to time as I listened to the evidence about specific transactions or decisions, I found myself asking rhetorically: did anyone stand back and ask themselves the simple question -- is this right?***
>
> ***Right and wrong are moral concepts and morality does not exist in a vacuum. I think all those who participate in the direction and management of public companies, as well as their professional advisors, need to identify and examine what they regard as the basic moral underpinnings of their system of values.***

The ACTU acknowledges that we cannot legislate corporate morality. However the changes we propose to limited liability would provide an important supporting mechanism to reinforce the basic moral underpinnings of directors duties and the system of corporate responsibility the nation requires and that stakeholders, including employees, are entitled to expect.

Section Two

Appendix A to this submission provides a summary of three international agreements sponsored by the International Labour Organisation, the United Nations and the OECD. As the reader will note in reading the material in the Appendix, these international agreements cover a number of issues such as human rights, labour standards and environmental protection that are central concerns to the debate about firms and their directors taking into account stakeholder concerns and those of the broader community.

To this, one could add the voluntary UN Global Compact, which has led nearly 2,000 transnational companies and their CEO's to commit to ten principals of corporate governance dealing with the environment, human rights, labour standards and combating corruption

There are a number of strengths of such international standards.

1. They provide a global framework to guide corporate behaviour.
2. They can encourage the spread of best practice in terms of global businesses taking into account the economic, social and environmental consequences of their activities.

3. Those like UN Global Compact have the advantage of going directly to the top of a firms decision making structure by requiring the commitment to be made by the company CEO.
4. As the United Nations pointed out in its report *Principles for Responsible Investment:*

   "Compliance with international norms may actually be in the company's best interests:

   - *Breaches of such norms may be a source of business risk (regulatory/reputation/consumer backlash)*
   - *Compliance may be less costly than cleanup costs or litigation that may result from the harm"*[5]

However, the voluntary nature of many components of these international agreements also have significant limitations. As the UNEP Expert Group Issues Paper *Principles for Responsible Investment* has pointed out:

- *"Some international norms are not specific enough for investors to use as tools for engagement-many are designed for countries, not companies of investors;*
- *norms conflict and overlap*
- *implementing international norms may come up against fiduciary duty- it depends how they are implemented and on what grounds*
- *some norms are expensive for companies to comply with in the short term."*[6]

[5] UNEP: *Principals for Responsible Investment: Expert Group Issues Paper*, April 2005

So, how do we get the best possible outcomes from these mainly voluntary international initiatives to promote corporate responsibility?

To answer this question the ACTU would make the following points. In the process of expanding free trade in the global economy, the Australian Government, the Australian Business Community, the Union Movement and Civil Society should publicly declare their intention to accurately define and uphold Corporate Responsibility commitments. The Australian Government should encourage compliance by Australian Corporations and Multinationals operating in Australia with the current international standards and frameworks that establish Corporate Responsibility commitments. It is relevant for this Parliamentary Joint Committee to consider how well this is being done.

The ACTU maintains that voluntary initiatives must be accompanied by appropriate legal regulations. Voluntary initiatives have a crucial, but only partial, role to play in developing the framework for responsible corporate actions.

The ACTU regards the following as key priorities for developing standards of corporate responsibility:

1. The Australian Government should ensure that a corporation's activities are consistent with the needs of the society where it operates and under whose laws it is established or permitted to operate.
2. Incorporated entities should obey national laws, respect international standards and honour their voluntary commitments.

[6] UNEP: *Principals for Responsible Investment: Expert Group Issues Paper*, April 2005, page 30

3. The basis for any successful Corporate Social Responsibility project must be how well it promotes engagement and dialogue between companies and stakeholders. Stakeholders are individuals or groups who are affected by corporate actions, decisions, policies, practices or goals. The effects of corporate activity can be indirect or direct.
4. Corporations should, in their social dialogue, address all stakeholders, including workers, suppliers, the local population, consumers, social organizations and public authorities. This approach will reflect good management practices by the corporation. This engagement with stakeholders goes to the heart of " enlightened shareholder value"
5. The ACTU welcomes voluntary initiatives that recognize workers and their representatives as an equal partner in building an accurate and fair picture of workplaces. According with these commitments, ***the International Labour Organization Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*** (ILO MNE Declaration) makes a significant contribution towards economic and social progress in this scenario (See Appendix A).
6. The ILO MNE Declaration is the most universally applicable and authoritative statement concerning the relationship of business to social development. This instrument reflects an agreed understanding between governments, employers and workers. Although ILO Conventions and Recommendations address the responsibilities of governments and they are intended to be applied by governments, many of the underlying principles of these instruments can be applied

by business as well.[7] Such an application would strongly support the concept of " enlightened shareholder value".

7. Workers and their representatives will increasingly strive to enforce the moral commitments of corporations, building managerial expertise in implementing those commitments, and promoting social discussion for corporate accountability. National and international standards for consulting workers, their representatives and trade unions should govern such dialogues and consultation.
8. As a result, the ACTU regards the ILO MNE Declaration as a fundamental standard for any project to develop or monitor corporate responsibility.
9. The ACTU welcomes especially those initiatives that establish enforcement mechanisms at a national level in order to strengthen and consolidate Corporate Governance and Corporate Social Responsibility in the Australian Business Community and abroad. In this regard, the ACTU recognizes the advancements achieved with the ***OECD Guidelines for Multinational Enterprises*** (See Appendix A).
10. In the search for international legal enforceable corporate responsibilities, the ACTU appreciates as an advanced initiative the ***UN Norms on the Responsibilities of Transnational Corporations and***

[7] The ILO MNE Declaration should be understood in the broader context of the International Labour Organization. The ILO has a number of other mechanisms that enhance the use and accountability of the Declaration. The Committee on Freedom of Association is the one most widely used and is competent in dealing with complaints raising the issue of a State failing to uphold workers' rights to Freedom of Association and Collective Bargaining. Workers' organization under this mechanism may address issues with specific companies showing that ILO Conventions n° 87 and n° 98 (respectively on Freedom of Association and the Right to Organize; and Right to Organize and Collective Bargaining) are being violated.

Other Business Enterprises with regard to Human Rights (See Appendix A).

The ACTU acknowledges that the government and the international community have responsibility to ensure that corporate activities are consistent with the needs of the society under whose laws a corporation is established or permitted to operate. Nonetheless, incorporated entities should take account of the impact of their activities on all of those affected by their enterprises.

The ACTU is acutely aware of the relevance of Civil Society participation in the enforcement of voluntary initiatives in Corporate Governance and Corporate Social Responsibility. Without the requisite stakeholder involvement in the process of accountability, any initiatives that have been developed by multilateral collaborations and corporations will not consolidate the outcomes that the Australia Community desires.

The ACTU considers that the most relevant elements for supporting further advancements in the use of voluntary frameworks are as follows:

1. Collective bargaining remains the most important private means to ensure that business activity has a positive social impact. In order to achieve these benefits, the government should ensure that the rights of workers to collective bargaining are respected by the employer.
2. Without a supporting legal framework, collective bargaining may not realize its great potential to enhance the social outcomes of the business community.

3. Trade union involvement will lead to positive collaborations with business and government to resolve issues of private standard-setting in the social area, the challenges associated with rating companies, and determining what companies should report to the public.
4. Workers and trade unions have been actively involved in the process of corporate governance accountability for a long time. For workers and trade unions, fair financial information is the necessary basis for collective bargaining, industrial accountability, and for making investment decisions related to pension funds.
5. As a member of the wider civil society, workers and unions promote through their participation in the workplace the essential transparency of financial information that protects the integrity of the financial system as a whole.
6. The trade union movement, nationally and internationally, provides an independent system of monitoring workplaces. Trade union representatives ensure that standards and practices effectively honour the social responsibilities of incorporated entities.
7. The ACTU recognizes that a substantial proportion of global production is produced through sub-contracting, and that services are often delivered in several countries with different legal systems. This means that Global Union Federations can play a significant role to guarantee the effectiveness of voluntary Corporate Social Responsibilities initiatives.
8. Global Union Federations represent worldwide organizations of workers in a specific industry or sector. They have become the

appropriate trade union organization to negotiate with companies concerning their labour practices. In this respect, Global Union Federations have already made progress in working with Multinational Enterprises on the labour commitments of their transnational operations.

9. Framework Agreements have consolidated those commitments by Multinational Enterprises. As basic shared principles they are intended to recognize the space for workers to organise and bargain. They do not seek to substitute in any way local or national collective bargaining but they are a formal recognition that a company with multinational operations will engage with the relevant trade unions to discuss local and international issues of concern to both parties.
10. In conclusion, the vital contribution of shareholders in company decisions, support for representation by trade unions, and attention to civil society participation can help to facilitate the social responsibilities of business enshrined in Corporate Social Responsibility codes.

This concludes the ACTU's submission to the Parliamentary Joint Committee. We would emphasise that these voluntary approachs to Corporate Social Responsibility, if pursued systematically and in good faith, have the potential to give real meaning and substance to both the letter and the spirit of what is meant by the concept of "enlightened shareholder value".

Section Two – Appendix A

Appendix A International standards of social Responsibilities of Bussiness

International Labour Organization Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (ILO MNE Declaration)

Employment (promotion, equality of opportunity and treatment, security of employment, training), conditions of work (wages, benefits, work conditions, safety and heath considerations) and industrial relations should always be main issues of concern.[8] Consequently The ACTU regards the **ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy** as a fundamental standard for any project to develop or monitor corporate responsibility. The ILO MNE Declaration was adopted by the Governing Body of the International Labour Office at its 204th Session, Geneva, November 1977.

The ILO MNE Declaration is the most universally applicable and authoritative statement concerning the relationship of business to social development. This

[8]The **first** section addresses general policies and urges respect for national sovereignty, laws and policy objectives of the host country. Equality of treatment by governments of MNEs and national enterprises is advocated and tripartite consultation - consultation between labor, business and government. The **second** section calls on MNEs to play a key role in generating and expanding opportunities for stable and secure employment, to use appropriate technologies, and to pay attention to employment policies. The **third** section focuses on the training, retraining, and promotion of workers in all occupational categories. The **fourth** section recommends the provision of living wages, benefits, and conditions of work with special emphasis on the importance of setting and maintaining high standards of occupational safety and health. In the **fifth** section, business and government are urged to respect freedom of association and the right to organize and collective bargaining as the principles that guide their actions in all matters related to industrial relations.

instrument reflects an agreed understanding between governments, employers and workers. Although ILO Conventions and Recommendations address the responsibilities of governments and they are intended to be applied by governments, many of the underlying principles of these instruments can be applied by business as well.

The parties to which the Declaration is commended (governments, workers, employers and MNEs) should contribute to the realization of the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up.

The Declaration is the object of regular reviews and there is a procedure for examining disagreements concerning its application by means of an interpretation of its provisions. In 1980, the Committee on Multinational Enterprises was established to monitor implementation of the Declaration by Governments. One of the tasks of this Committee is to interpret the Declaration through a dispute procedure; however, this procedure is not judicial.

The ILO MNE Declaration should be understood in the broader context of the International Labour Organization. The ILO has a number of other mechanisms that enhance the use and accountability of the Declaration. The Committee on Freedom of Association is the one most widely used and is competent in dealing with complaints raising the issue of a State failing to uphold workers' rights to Freedom of Association and Collective Bargaining. Workers' organization under this mechanism may address issues with specific companies showing that ILO Conventions n°87 and n°98 (respectively on

Freedom of Association and the Right to Organize; and Right to Organize and Collective Bargaining) are being violated.

The ACTU regards the following sections of the ILO MNE Declaration as significant points for consideration:

1. The ILO MNE Declaration regards international corporate accountability instruments as additional frameworks that *…"encourage the positive contribution which multinational enterprises can make to economic and social progress and to minimize and resolve the difficulties to which their various operations may give rise."*[9]
2. The ACTU shares the understanding of the role of Multinational Enterprises expressed in the ILO MNE Declaration: "*Multinational enterprises play an important part in the economies of most countries and in international economic relations. This is of increasing interest to governments as well as to employers and workers and their respective organizations. Through international direct investment and other means such enterprises can bring substantial benefits to home and host countries by contributing to the more efficient utilization of capital, technology and labour.*" [10]
3. The ACTU underscores the importance of governmental regulation, described in the ILO MNE Declaration, for enhancing the social outcomes of multinational enterprises: "*Within the framework of development policies established by governments, [Multinational Enterprises] can also make an important contribution to the promotion*

[9] ILO MNE Declaration s.2
[10] ILO MNE Declaration s.1

of economic and social welfare; to the improvement of living standards and the satisfaction of basic needs; to the creation of employment opportunities, both directly and indirectly; and to the enjoyment of basic human rights, including freedom of association, throughout the world."[11]

4. The ACTU regards the ILO Declaration as an important means to consolidate progress towards corporate responsibility. It seeks a common effort from governments, employers' and workers' organizations of home and host countries, and from multinational enterprises themselves. [12]
5. The ACTU endorses the ILO MNE Declaration's description of the relationship that Multinational Enterprises should establish with host counties: "*Multinational enterprises should take fully into account established general policy objectives of the countries in which they operate. Their activities should be in harmony with the development priorities and social aims and structure of the country in which they operate. To this effect, consultations should be held between multinational enterprises, the government and, wherever appropriate, the national employers' and workers' organizations concerned.*" [13]
6. As described in the ILO MNE Declaration, the ACTU considers employment as the paramount contribution of a responsible Multinational Enterprises operating in Australia or abroad: "*Multinational enterprises, particularly when operating in developing countries, should endeavour to increase employment opportunities and*

[11] Ibid.
[12] ILO MNE Declaration s.4
[13] ILO MNE Declaration s.10

standards, taking into account the employment policies and objectives of the governments, as well as security of employment and the long-term development of the enterprise."[14]

7. In accordance with the ILO MNE Declaration, the ACTU considers that multinational enterprises should strive to improve standards and conditions of employment, regardless of the nation in which they are operating. A crucial attribute of responsible corporate behaviour by Multinational Enterprises is appropriate recognition for and cooperation with representatives of their workers: "*Multinational enterprises should give priority to the employment, occupational development, promotion and advancement of nationals of the host country at all levels in cooperation, as appropriate, with representatives of the workers employed by them or of the organizations of these workers and governmental authorities.*" [15]
8. In accordance with the ILO MNE Declaration, the ACTU considers that employment promotion and advancement are essential for sustainable development initiatives by socially responsible corporations: "*Multinational enterprises, when investing in developing countries, should have regard to the importance of using technologies which generate employment, both directly and indirectly. To the extent permitted by the nature of the process and the conditions prevailing in the economic sector concerned, they should adapt technologies to the needs and characteristics of the host countries. They should also,*

[14] ILO MNE Declaration s.16
[15] ILO MNE Declarations.18

where possible, take part in the development of appropriate technology in host countries. [16]

9. The ACTU further maintains that: "*To promote employment in developing countries, in the context of an expanding world economy, multinational enterprises, wherever practicable, should give consideration to the conclusion of contracts with national enterprises for the manufacture of parts and equipment, to the use of local raw materials and to the progressive promotion of the local processing of raw materials. Such arrangements should not be used by multinational enterprises to avoid the responsibilities embodied in the* [ILO MNE Declaration]*.* [17]

10. As endorsed by the ILO MNE declaration, the ACTU considers equality of opportunity and treatment in employment as a primary factor in the development and appraisal of corporate responsibility. In order to secure such an outcome, the ACTU considers that: "*Multinational enterprises should accordingly make qualifications, skill and experience the basis for the recruitment, placement, training and advancement of their staff at all levels.*" [18]

11. The ACTU considers that security of employment is a priority for developing and assessing corporate responsibility. The ACTU shares the ILO MNE Declaration's concern for security of employment: "*Governments should carefully study the impact of multinational enterprises on employment in different industrial sectors. Governments, as well as multinational enterprises themselves, in all countries should*

[16] ILO MNE Declarations.19
[17] ILO MNE Declarations.20
[18] ILO MNE Declarations.22

take suitable measures to deal with the employment and labour market impacts of the operations of multinational enterprises."[19]

12. According to the ILO MNE Declaration, the relevance of security of employment should be extended to national enterprises: "*Multinational enterprises equally with national enterprises, through active manpower planning, should endeavour to provide stable employment for their employees and should observe freely negotiated obligations concerning employment stability and social security. In view of the flexibility which multinational enterprises may have, they should strive to assume a leading role in promoting security of employment, particularly in countries where the discontinuation of operations is likely to accentuate long-term unemployment.*" [20]

13. In the event of a corporation engaging in major operational changes, the ACTU considers dialogue regarding these changes with government, workers and workers' representatives as an expression of corporate responsibility: "*In considering changes in operations (including those resulting from mergers, take-overs or transfers of production) which would have major employment effects, multinational enterprises should provide reasonable notice of such changes to the appropriate government authorities and representatives of the workers in their employment and their organizations so that the implications may be examined jointly in order to mitigate adverse effects to the*

[19] ILO MNE Declarations.24
[20] ILO MNE Declarations.25

greatest possible extent. This is particularly important in the case of the closure of an entity involving collective lay-offs or dismissals."[21]

14. Commitment to security of employment should be upheld by governments and corporations alike, and should include a mechanism for income protection for workers whose employment has been terminated. The ILO MNE Declaration states that: "*Governments, in cooperation with multinational as well as national enterprises, should provide some form of income protection for workers whose employment has been terminated.*" [22]

15. In accordance with the ILO MNE Declaration, the ACTU considers that employment opportunities provided by multinational enterprises should include appropriate levels of training, and opportunity for skill development: "*In their operations, multinational enterprises should ensure that relevant training is provided for all levels of their employees in the host country, as appropriate, to meet the needs of the enterprise as well as the development policies of the country. Such training should, to the extent possible, develop generally useful skills and promote career opportunities. This responsibility should be carried out, where appropriate, in cooperation with the authorities of the country, employers' and workers' organizations and the competent local, national or international institutions.*" [23]

16. When operating abroad, the ACTU considers that Australian incorporated entities and multinationals: "*… should participate, along with national enterprises, in programmes, including special funds,*

[21] ILO MNE Declarations.26
[22] ILO MNE Declarations.28
[23] ILO MNE Declarations.30

encouraged by host governments and supported by employers' and workers' organizations. These programmes should have the aim of encouraging skill formation and development as well as providing vocational guidance, and should be jointly administered by the parties which support them. Wherever practicable, multinational enterprises should make the services of skilled resource personnel available to help in training programmes organized by governments as part of a contribution to national development." [24]

17. The ACTU regards wages, benefits and employment conditions as an essential part of any project to develop or monitor corporate responsibility. The ACTU endorses the ILO MNE Declaration's affirmation that: "*Wages, benefits and conditions of work offered by multinational enterprises should be not less favourable to the workers than those offered by comparable employers in the country concerned.*"[25]

18. According to the aspiration for sustainable development expressed by the ILO MNE Declaration, the ACTU maintains that: "*When multinational enterprises operate in developing countries, where comparable employers may not exist, they should provide the best possible wages, benefits and conditions of work, within the framework of government policies. These should be related to the economic position of the enterprise, but should be at least adequate to satisfy basic needs of the workers and their families. Where they provide*

[24] ILO MNE Declarations.31
[25] ILO MNE Declarations.33

workers with basic amenities such as housing, medical care or food, these amenities should be of a good standard." [26]

19. The ACTU regards the standards for occupational health and safety described in the ILO MNE Declaration as basic operational requirements for multinational enterprises and governments. These requirements are core commitments for any project that aims to promote or to assess corporate responsibility: *"Multinational enterprises should maintain the highest standards of safety and health, in conformity with national requirements, bearing in mind their relevant experience within the enterprise as a whole, including any knowledge of special hazards. They should also make available to the representatives of the workers in the enterprise, and upon request, to the competent authorities and the workers' and employers' organizations in all countries in which they operate, information on the safety and health standards relevant to their local operations, which they observe in other countries. In particular, they should make known to those concerned any special hazards and related protective measures associated with new products and processes. They, like comparable domestic enterprises, should be expected to play a leading role in the examination of causes of industrial safety and health hazards and in the application of resulting improvements within the enterprise as a whole."*[27]

20. Industrial relations are a key feature in the development of corporate responsibility. In the area of industrial relations, the ACTU endorses the

[26] ILO MNE Declarations.34
[27] ILO MNE Declarations.37

position of the ILO MNE Declaration that: "*Multinational enterprises should observe standards of industrial relations not less favourable than those observed by comparable employers in the country concerned.*" [28]

21. Freedom of association and the right to organize must be recognized and protected by initiatives to develop and to assess corporate responsibility. According to the ILO MNE Declaration: "*Workers employed by multinational enterprises as well as those employed by national enterprises should, without distinction whatsoever, have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorisation. They should also enjoy adequate protection against acts of anti-union discrimination in respect of their employment.*"[29]
22. The ACTU affirms that freedom of association and the right to organize should be always protected according to the ILO MNE Declaration: *Organizations representing multinational enterprises or the workers in their employment should enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration*."[30]
23. In view of their commitment to adequate protection of the freedom of association and the right to organize, Australian incorporated entities that operate abroad should take into account the ILO MNE Declaration provision that: "*Where governments of host countries offer special incentives to attract foreign investment, these incentives should not*

[28] ILO MNE Declarations.40
[29] ILO MNE Declarations.41
[30] ILO MNE Declarations.42

include any limitation of the workers' freedom of association or the right to organize and bargain collectively."[31]

24. Within the framework of corporate responsibility, the ACTU affirms that: "*Representatives of the workers in multinational enterprises should not be hindered from meeting for consultation and exchange of views among themselves, provided that the functioning of the operations of the enterprise and the normal procedures which govern relationships with representatives of the workers and their organizations are not thereby prejudiced.*" [32]

25. The ACTU considers collective bargaining to be an essential process in industrial relations. Access to collective bargaining should be guaranteed by corporate responsibility initiatives. As stated in the ILO MNE Declaration: "*Workers employed by multinational enterprises should have the right, in accordance with national law and practice, to have representative organizations of their own choosing recognized for the purpose of collective bargaining.*"*[33]*

26. The ACTU regards the development and promotion of mechanisms for collective bargaining as a highly desirable outcome of corporate responsibility initiatives. In accordance with the ILO MNE Declaration, the ACTU affirms that: "*Measures appropriate to national conditions should be taken, where necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers'*

[31] ILO MNE Declarations.45
[32] ILO MNE Declarations.46
[33] ILO MNE Declarations.48

organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements."[34]

27. In the arena of industrial relations, the ACTU considers formal mechanisms for dialogue and decision-making between the representatives of management and workers as an important feature of responsible corporate practice: "*Multinational enterprises should enable duly authorized representatives of the workers in their employment in each of the countries in which they operate to conduct negotiations with representatives of management who are authorized to take decisions on the matters under negotiation.* "[35]

28. A core feature of responsible corporate behaviour is that negotiations between the representatives of workers and management should take place in a spirit of good faith. According to the ILO MNE Declaration: "*Multinational enterprises, in the context of bona fide negotiations with the workers' representatives on conditions of employment, or while workers are exercising the right to organize, should not threaten to utilize a capacity to transfer the whole or part of an operating unit from the country concerned in order to influence unfairly those negotiations or to hinder the exercise of the right to organize; nor should they transfer workers from affiliates in foreign countries with a view to undermining bona fide negotiations with the workers' representatives or the workers' exercise of their right to organize.*" [36]

29. The implementation of appropriate, fair and effective mechanisms to resolve disputes about collective agreements are an important feature

[34] ILO MNE Declarations.49
[35] ILO MNE Declarations.51
[36] ILO MNE Declarations.52

of corporate responsibility: "*Collective agreements should include provisions for the settlement of disputes arising over their interpretation and application and for ensuring mutually respected rights and responsibilities.*" [37]

30. As part of their commitment to transparency and to ensure equitable outcomes of collective bargaining negotiations, the ACTU maintains that: "*Multinational enterprises should provide workers' representatives with information required for meaningful negotiations with the entity involved and, where this accords with local law and practices, should also provide information to enable them to obtain a true and fair view of the performance of the entity or, where appropriate, of the enterprise as a whole.*" [38]

31. The ACTU considers that governments have an important role in creating and maintaining an industrial relations environment in which equitable and effective collective bargaining can take place. In accordance with the ILO MNE Declaration, the ACTU affirms that governments: "*..should supply to the representatives of workers' organizations on request, where law and practice so permit, information on the industries in which the enterprise operates, which would help in laying down objective criteria in the collective bargaining process. In this context, multinational as well as national enterprises should respond constructively to requests by governments for relevant information on their operations.*"[39]

[37] ILO MNE Declarations.53
[38] ILO MNE Declarations.54
[39] ILO MNE Declarations.55

32. As endorsed by the ILO MNE declaration, the ACTU recognizes the importance of consultation between the workers and management of a corporation. The ILO MNE Declaration establishes that: "*… in multinational as well as in national enterprises, systems devised by mutual agreement between employers and workers and their representatives should provide, in accordance with national law and practice, for regular consultation on matters of mutual concern. Such consultation should not be a substitute for collective bargaining.*" [40]

33. The implementation of fair and effective processes for the investigation and resolution of grievances is a core feature of good corporate governance. The ILO MNE Declaration states: **"***Multinational as well as national enterprises should respect the right of the workers whom they employ to have all their grievances processed in a manner consistent with the following provision: any worker who, acting individually or jointly with other workers, considers that he has grounds for a grievance should have the right to submit such grievance without suffering any prejudice whatsoever as a result, and to have such grievance examined pursuant to an appropriate procedure. This is particularly important whenever the multinational enterprises operate in countries which do not abide by the principles of ILO Conventions pertaining to freedom of association, to the right to organize and bargain collectively and to forced labour.*" [41]

34. Equitable and effective settlement of industrial disputes should be a central commitment of good corporate practice. According to the ILO

[40] ILO MNE Declarations.56
[41] ILO MNE Declarations.57

MNE Declaration: "*Multinational as well as national enterprises jointly with the representatives and organizations of the workers whom they employ should seek to establish voluntary conciliation machinery, appropriate to national conditions, which may include provisions for voluntary arbitration, to assist in the prevention and settlement of industrial disputes between employers and workers. The voluntary conciliation machinery should include equal representation of employers and workers.*"[42]

[42] ILO MNE Declarations.58

OECD Guidelines for Multinational Enterprises

Australia is already committed to the implementation, promotion and use of the OECD Guidelines for Multinational Enterprises. The ACTU recognizes the OECD Guidelines as complementary to, and consistent with, the ILO MNE Declaration.

According to the principles of the Guidelines, the Australian government has the major responsibility to promote and uphold human rights law. Although the Guidelines are recommendations, and are not legally binding, they are applicable to all enterprises that fall within their scope. Therefore, the Guidelines are the authoritative expectations of the Australian government.

The ACTU considers the Guidelines to be a practical, ongoing project to develop a set of global standards for corporate governance and corporate social responsibility.

The ACTU considers that the following items of the Guidelines are particularly relevant to the current discussion:

1. The Australian National Contact Point is responsible for promoting the Guidelines and is obliged to contribute to the solution of problems that are brought to its attention.
2. The Guidelines apply to companies from non-adhering countries with operations inside Australia.
3. The procedure established in the Guidelines allows trade unions, and other concerned parties, to raise a case concerning the behaviour of an enterprise with respect to the Guidelines.

4. The ACTU, as a member organization of the international trade union movement, gives high priority to using the established procedures.
5. Through the National Contact Point, the Australian Government should ensure that the Guidelines are respected in public procurement. Only companies that observe the Guidelines should be eligible for public subsidies into the form of supported export credit.
6. The Guidelines protect fundamental labour rights, namely freedom of association and the right to collective bargaining, the abolition of child labour, the elimination of all forms of forced or compulsory labour, and freedom from discrimination in employment and occupation.[43]

[43] The section IV, Employment and Industrial Relations states: *Enterprises should, within the framework of applicable law, regulations and prevailing labour relations and employment practices:*
1. a) Respect the right of their employees to be represented by trade unions and other bona fide representatives of employees, and engage in constructive negotiations, either individually or through employers' associations, with such representatives with a view to reaching agreements on employment conditions;
b) Contribute to the effective abolition of child labour;
c) Contribute to the elimination of all forms of forced or compulsory labour;
d) Not discriminate against their employees with respect to employment or occupation on such grounds as race, colour, sex, religion, political opinion, national extraction or social origin, unless selectivity concerning employee characteristics furthers established governmental policies which specifically promote greater equality of employment opportunity or relates to the inherent requirements of a job.
2. a) Provide facilities to employee representatives as may be necessary to assist in the development of effective collective agreements;
b) Provide information to employee representatives which is needed for meaningful negotiations on conditions of employment;
c) Promote consultation and co-operation between employers and employees and their representatives on matters of mutual concern.
3. Provide information to employees and their representatives which enables them to obtain a true and fair view of the performance of the entity or, where appropriate, the enterprise as a whole.
4. a) Observe standards of employment and industrial relations not less favourable than those observed by comparable employers in the host country;
b) Take adequate steps to ensure occupational health and safety in their operations.
5. In their operations, to the greatest extent practicable, employ local personnel and provide training with a view to improving skill levels, in co-operation with employee representatives and, where appropriate, relevant governmental authorities.
6. In considering changes in their operations which would have major effects upon the livelihood of their employees, in particular in the case of the closure of an entity involving collective layoffs or dismissals, provide reasonable notice of such changes to representatives of their employees, and, where appropriate, to the relevant governmental authorities, and co-operate with the employee representatives and appropriate governmental authorities so as to mitigate to the maximum extent practicable adverse effects. In light of the specific

7. The Guidelines concerning employment include other important clauses on general employment opportunities and conditions, such as training, handling of complaints, prior notice to workers regarding major operational changes, and an imperative against double standards.
8. The ACTU is acutely aware the Guidelines currently lack provisions regarding working hours, conditions and duration of employment contracts, and award wages.

circumstances of each case, it would be appropriate if management were able to give such notice prior to the final decision being taken. Other means may also be employed to provide meaningful cooperation to mitigate the effects of such decisions.
7. In the context of bona fide negotiations with representatives of employees on conditions of employment, or while employees are exercising a right to organise, not threaten to transfer the whole or part of an operating unit from the country concerned nor transfer employees from the enterprises' component entities in other countries in order to influence unfairly those negotiations or to hinder the exercise of a right to organise.
8. Enable authorised representatives of their employees to negotiate on collective bargaining or labour-management relations issues and allow the parties to consult on matters of mutual concern with representatives of management who are authorised to take decisions on these matters.

UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights

The ACTU perceives that fundamental rights at work have become the main component of Corporate Social Responsibility initiatives. While the ACTU recognizes that the human rights' obligations of governments are different to those of business, the responsibilities of business to workers nonetheless involve the rights established in the Universal Declaration of Human Rights. This commitment is clearly framed in the Norms:

> Recognizing *that even though States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights.*

The ACTU considers the **UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights**[44] to be an advanced international standard for corporate responsibility for human rights. A consolidation of the UN Norms will improve the social outcomes of incorporated entities.

[44] Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003). Approved August 13, 2003, by U.N. Sub-Commission on the Promotion and Protection of Human Rights resolution 2003/16, U.N. Doc. E/CN.4/Sub.2/2003/L.11 at 52 (2003).

In the context of current discussion about corporate social responsibility and standards for corporate governance, the ACTU regards the following aspects of the UN Norms to be particularly noteworthy:

1. The Preamble of the UN Norms explicitly refers to human rights' instruments such as the UNDHR, the UN Charter and all major UN Conventions. Additionally, the Preamble refers to the ILO MNE Declaration, the OECD Guidelines and the Global Compact.
2. The Norms reaffirm the principle that States have the primary responsibility to secure, to respect, to ensure the respect of, and to protect human rights.
3. These obligations extend to corporations only as regards their spheres of activity and influence.
4. The UN Norms states that businesses should refrain from activities that directly or indirectly violate human rights, or benefit from human rights violations. Businesses should use due diligence and do no harm.
5. Corporations shall contribute to the promotion of economic, social and cultural rights as well as civil and political rights.
6. The labour standards endorsed in the UN Norms include provisions regarding:
    a. Forced and compulsory labour
    b. Child labour
    c. Occupational health and safety
    d. Remuneration of workers, requiring a fair compensation under local standards.
    e. Freedom of association and the right to collective bargaining

7. The ACTU notes that the UN Norms explicitly cite fair compensation as a basic requirement of corporate responsibility for human rights. This clause is lacking in many international Corporate Social Responsibility initiatives.
8. The UN Norms also include provisions regarding environmental aspects, national sovereignty, bribery and corruption and obligations with regard to consumer protection.
9. The ACTU regards the inclusion of general guidelines for implementation as a key positive feature of the UN Norms. The Norms recommend that companies adopt, disseminate and implement internal rules of operation in compliance with the Norms. Furthermore, corporations shall periodically report on and take further action to implement the Norms, and provide for the prompt implementation of the protection set forth in the Norms.
10. The UN Norms have an explicit reference to supply chain responsibility. Each company shall apply and incorporate Norms in their contracts or other arrangements with their supply chain to ensure respect for and implementation of the Norms.
11. The ACTU is acutely aware that the UN Norms are not a treaty that States ratify, producing binding legal obligations. While the Norms are also not customary law, the Norms have a solid basis in international law. All of the substantive human rights provisions in the UN Norms are drawn from existing international law and standards.

12. The ACTU and the international union movement continue to support any efforts that advance the UN Norms through the United Nations system.