

# Submission to the Inquiry into Corporate Responsibility by the Parliamentary Joint Committee on Corporations and Financial Services

September 2005

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# Table of contents

<b><u>1.</u></b>	<b><u>THE PUBLIC INTEREST ADVOCACY CENTRE</u></b>	<b><u>1</u></b>
1.1	ABOUT THE PUBLIC INTEREST ADVOCACY CENTRE	1
1.2	PIAC'S EXPERTISE AND RELEVANT WORK	1
<b><u>2.</u></b>	<b><u>SUMMARY OF RECOMMENDATIONS</u></b>	<b><u>3</u></b>
<b><u>3.</u></b>	<b><u>TERMS OF REFERENCE</u></b>	<b><u>4</u></b>
3.1	DEFINITIONS	4
3.2	STRUCTURE OF THE SUBMISSION	4
<b><u>4.</u></b>	<b><u>THE SOCIAL IMPACT OF CORPORATIONS</u></b>	<b><u>5</u></b>
4.1	CORPORATE REGARD FOR STAKEHOLDERS	5
4.2	A HUMAN RIGHTS FRAMEWORK: CORPORATE AND GOVERNMENT RESPONSIBILITY	6
4.3	THE ISSUE OF EXTRATERRITORIALITY	7
<b><u>5.</u></b>	<b><u>DIRECTORS' DUTIES</u></b>	<b><u>9</u></b>
5.1	CONCEPTUALISING DIRECTORS' DUTIES	9
5.2	THE STANDARD FOR DIRECTORS' DUTIES	10
5.3	OPERATION AND PENALTIES	10
<b><u>6.</u></b>	<b><u>OTHER LEGAL MECHANISMS TO REGULATE CORPORATIONS</u></b>	<b><u>11</u></b>
6.1	CORPORATE CODES OF CONDUCT	11
6.2	SAFEGUARDING SHAREHOLDER ACTIVISM	12
<b><u>7.</u></b>	<b><u>REPORTING REQUIREMENTS</u></b>	<b><u>13</u></b>
7.1	TRANSPARENT AND MANDATORY	13
7.2	THE CORPORATIONS ACT AND ASX RECOMMENDATIONS	13
<b><u>8.</u></b>	<b><u>IMPLEMENTATION AND CAPACITY-BUILDING</u></b>	<b><u>16</u></b>

# 1. The Public Interest Advocacy Centre

## 1.1 About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (**PIAC**) is an independent, non-profit legal and policy centre. PIAC provides legal advice and representation, public policy programs and advocacy training to promote rights and enhance accountability, fairness and transparency in government decision-making. PIAC's key goal is to undertake strategic legal and policy interventions in public interest matters in order to foster a fair, just and democratic society and empower citizens, consumers and communities.

PIAC's work extends beyond the interests and rights of individuals; it specialises in working on issues that have systemic impact at both a NSW and National level. PIAC's clients and constituencies are primarily those with least access to economic, social and legal resources and opportunities. PIAC provides its services for free or at minimal cost.

Wherever possible, PIAC works co-operatively with other public interest groups, community and consumer organisations, Community Legal Centres, private law firms, professional associations, academics, experts, industry and unions to achieve its goals.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only, broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Centre Funding Program. PIAC generates approximately forty per cent of its income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

## 1.2 PIAC's expertise and relevant work

PIAC has a long-standing and demonstrated interest in the public debate on corporate regulation and social responsibility. PIAC has consistently advocated that corporations should be legally bound to abide by internationally recognised human rights and environmental standards.

In 1998, PIAC made a submission to the Joint Standing Committee on Treaties Inquiry on the Multilateral Agreement on Investment (**MAI**), a proposed set of legally binding international investment rules. In that submission, PIAC argued that the MAI would place unreasonable restrictions on the right of governments to regulate investment to achieve local development and social policy goals.<sup>1</sup>

In 2000, PIAC made a submission to the review of the Organisation for Economic Cooperation and Development Guidelines on Multinational Enterprises (**OECD Guidelines**). PIAC has been an active representative in the consultation processes on the OECD Guidelines, conducted by the Australia National Contact Point for the OECD Guidelines. In addition, PIAC organised a public seminar in 2000 on Human Rights and Corporate Responsibility and has contributed papers on the issue to international conferences and journals.<sup>2</sup>

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<sup>1</sup> PIAC, *Submission to the Joint Standing Committee on Treaties Inquiry into the Multilateral Agreement on Investment*, 1998.

<sup>2</sup> See, for example, P Ranald, 'Human rights and corporate responsibility: a pendulum swing to regulation?' (Paper presented at the PIAC Seminar on Human Rights and Corporate Responsibility, Sydney, 30 October 2000); and P Ranald, 'Global corporations and human rights: the regulatory debate in Australia' (Paper presented at the Royal Institute of International Affairs Conference on the Legal Dimensions of Corporate Responsibility, London, November 2001).

PIAC also made a submission to the Joint Statutory Committee on Corporations and Securities on the Provisions of the Corporate Code of Conduct Bill 2000. In that submission, PIAC supported the major proposals of the Corporate Code of Conduct Bill to create legally binding reporting requirements and standards of conduct on human rights and environmental standards for Australian corporations operating overseas.<sup>3</sup>

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<sup>3</sup> PIAC, *Submission to the Joint Committee on Corporations and Securities Inquiry into the Corporate Code of Conduct Bill 2000*, Sydney, 2001.

## 2. Summary of Recommendations

PIAC makes the following recommendations:

- Recommendation 1:** Corporations that are registered in Australia or that conduct activities in Australia should be responsive and accountable to the interests of stakeholders and that the level of accountability should be referable to the benchmarks established in the UN Norms.
- Recommendation 2:** All laws, regulations and policies designed to regulate corporations should apply to the extraterritorial operations of Australian corporations.
- Recommendation 3:** That section 181 of the *Corporation Act 2001* (Cth) be amended to place a positive duty on directors and officers of corporations to consider broader stakeholder interests and the environmental and social impacts of their decisions.
- Recommendation 4:** That the benchmarks established in the UN Norms define the content of the directors' duty in section 181 of the *Corporations Act 2001* (Cth) to consider broader stakeholder interests.
- Recommendation 5:** That any breach of the proposed directors' duty to consider broader stakeholder interests should attract the full range of penalties under the *Corporations Act 2001* (Cth).
- Recommendation 6:** That the Inquiry support the Corporate Code of Conduct Bill 2005 and recommend the introduction of similar legislation to regulate the conduct of corporations in Australia.
- Recommendation 7:** That the 100 Shareholder Rule and related tools of shareholder activism are not removed from the *Corporations Act 2001* (Cth).
- Recommendation 8:** That a set of uniform reporting requirements be developed that require corporations to periodically report on their impacts on stakeholders and on any breaches of environmental and social standards and that these standards be defined by the UN Norms.
- Recommendation 9:** That any reporting made under the uniform reporting requirements be publicly available and independently audited.
- Recommendation 10:** That the Australian Stock Exchange Listing Rule 4.10.3 be amended to provide that corporations must comply with Australian Stock Exchange best practice recommendations 3 and 10.
- Recommendation 11:** That the Australian Securities and Investment Commission compile and make public, on an annual basis, a list of corporations that fail to meet the Australian Stock Exchange best practice standards.

## 3. Terms of reference

PIAC thanks the Committee for the opportunity to participate in the Inquiry into Corporate Responsibility. This submission provides an evaluation of the current legal and policy framework for corporate regulation in Australia and makes a number of recommendations to improve corporate accountability to stakeholders.

### 3.1 Definitions

In this submission, PIAC uses the term ‘**corporate accountability**’ to mean holding corporations accountable and responsible for the social and environment impacts of their decisions and practices. This includes the impacts, both direct and indirect, on human rights, labour rights, the broader community and the environment.

PIAC defines ‘**stakeholders**’ as any individuals or groups affected, either directly or indirectly, by the activities of corporations. Stakeholders include shareholders, employees, consumers, neighbouring communities, Indigenous peoples and others.<sup>4</sup>

It is PIAC’s understanding that this Inquiry will examine Australian corporations and their activities both within Australia and overseas.

### 3.2 Structure of the submission

Part 4 of this submission addresses the extent to which organisational decision-makers have and should have regard for the interests of stakeholders and the broader community: **Terms of Reference a and b**.

Part 5 of this submission addresses the current legal framework governing directors’ duties: **Terms of Reference c and d**.

Part 6 of this submission addresses alternative legal mechanisms to enhance consideration of stakeholder interests and the effectiveness of these mechanisms: **Terms of Reference d and e**.

Part 7 of this submission addresses the appropriateness of reporting requirements associated with corporate accountability: **Term of Reference f**.

Part 8 of this submission addresses issues of implementation and capacity building. Regulatory and policy approaches in other countries are included in the submission where relevant.

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<sup>4</sup> This definition is based on the definition of stakeholders contained in the *Commentary on the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/Sub.2/2003/38/Rev.2 (2003) at para 22.

# 4. The social impact of corporations

## 4.1 Corporate regard for stakeholders

PIAC submits that corporations should be accountable and have regard for stakeholders affected by corporate decisions and practices. This view is echoed in public opinion surveys, which consistently show that the majority of people in Australia believe that corporations should abide by recognised standards in human rights, labour standards and environmental standards.<sup>5</sup>

Corporations can be powerful players in society and their influence extends beyond their immediate employees, shareholders and customers. Their decisions and actions have the potential to impact both positively and negatively on a broad range of stakeholders through, for example, their employment practices, their environmental policies and their engagement with local communities. PIAC submits that there is an imbalance between the expanded legal rights and privileges granted to corporations, such as legal personhood and perpetual succession, and the minimal legal obligations placed on corporations to ensure they abide by recognised human rights, labour and environmental standards.

More specifically, PIAC is concerned that the existing legal framework does not allow corporate directors to take account of broader social responsibilities. Two recent examples highlight this constraint. In January 2005, Stephen Matthews, Chairman of the Australian Shareholders Association, stated that directors ‘have no mandate to make corporate donations in response to the Boxing Day tsunami’.<sup>6</sup> Similar concerns were raised by the Chairperson of James Hardie, Meredith Hellicar, who called for an extension of directors’ duties under the *Corporations Act 2001* (Cth) (**Corporations Act**) to protect decisions by directors that take into account broader stakeholder interests.<sup>7</sup>

PIAC acknowledges that corporations and governments have taken a number of positive steps to recognise and enforce the broader obligations of corporations. Over the past decade, there has been a proliferation of initiatives focusing on corporate accountability. Specifically, there has been the development of codes of conduct and principles, such as *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (**UN Norms**)<sup>8</sup>, the *UN Global Compact*, the *OECD Guidelines for Multinational Enterprises* (**OECD Guidelines**)<sup>9</sup> and the *ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (**ILO Tripartite Declaration**).<sup>10</sup> There are sectoral initiatives, such as the *Apparel Industry Partnership Agreement*<sup>11</sup>, and, in Australia, the *Homeworkers Code of*

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<sup>5</sup> For example, see Australian Institute of Corporate Citizenship, *Submission to the Joint Committee on Corporations and Securities Inquiry on Corporate Code of Conduct Bill 2000*, Sydney, 2001, 97.

<sup>6</sup> Quoted in P Gosnell, ‘Backdown over corporate donors’, *Daily Telegraph* (Sydney) 8 January 2005.

<sup>7</sup> Quoted in B Phesant, ‘Directors need a safe harbour: Hellicar’, *Australian Financial Review* (Sydney) 17 March 2005.

<sup>8</sup> *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

<sup>9</sup> *OECD Guidelines for Multinational Enterprises* (2000) Organisation for Economic Cooperation and Development

<[http://www.oecd.org/document/28/0,2340,en\\_2649\\_34889\\_2397532\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/28/0,2340,en_2649_34889_2397532_1_1_1_1,00.html)> at 20 September 2005.

<sup>10</sup> *ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, (1977) International Labour Organization

<<http://www.ilo.org/public/english/standards/norm/sources/mne.htm>> at 20 September 2005.

<sup>11</sup> United States Department of Labor, *Apparel Industry Partnership Agreement and Workplace Code of Conduct* (1997) International Labour Organization International Training Centre

<<http://www.itcilo.it/english/actrav/telearn/global/ilo/guide/apparell.htm>> at 20 September 2005.

*Practice*<sup>12</sup> to safeguard labour rights in the textiles industry. There are also reporting initiatives such as the Global Reporting Initiative and Australian Corporate Responsibility Index. Many corporations have engaged with these initiatives and have embraced corporate accountability.

PIAC notes, however, that these initiatives have a number of common structural deficiencies, which impede their ability to hold corporations accountable to stakeholders. In 2004, the United Nations Commission on Human Rights (UNCHR) asked the Office of the High Commissioner for Human Rights (OHCHR) to prepare a report on the scope and legal status of existing corporate social responsibility initiatives.<sup>13</sup> The OHCHR's report criticised the existing initiatives for being voluntary, of limited applicability, failing to meet minimum standards and neglecting to include independent monitoring mechanisms.

## 4.2 A human rights framework: corporate and government responsibility

Corporations have explicit responsibilities to be accountable to stakeholders in a human rights framework. Specifically, the *Universal Declaration of Human Rights* calls on 'every individual and every organ of society' to respect, protect and promote universal human rights.<sup>14</sup> Every corporation is an 'organ' of society and therefore has a responsibility to contribute to the promotion and protection of human rights within their sphere of activity and influence. As Amnesty International argues, '[a]ll companies have a direct responsibility to respect human rights in their own operations'.<sup>15</sup>

PIAC submits that the UN Norms should be used to define the extent of obligations owed by corporations. The UN Norms were approved by the UN Sub-Commission for the Promotion and Protection of Human Rights in August 2003 and are broadly recognised as the most comprehensive and authoritative standard on corporate responsibility.<sup>16</sup> The UN Norms require that corporations:

... promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognised in international as well as national law ... including the rights and interests of indigenous peoples and other vulnerable groups.

The full text of the UN Norms is annexed to this submission for the Committee's reference, marked Annexure A. In summary, the UN Norms benchmark standards and obligations across the following issues:

- the rights to equal opportunity and non-discriminatory treatment;
- the right to security of the person;
- the rights of workers;
- respect for national sovereignty and human rights;
- obligations with regard to consumer protection; and
- obligations with regard to environmental protection.<sup>17</sup>

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<sup>12</sup> *Homeworkers Code of Practice*, No sweat shop <<http://www.nosweatshoplabel.com/code.htm>> at 20 September 2005.

<sup>13</sup> United Nations High Commissioner on Human Rights, *Report on the responsibilities of transnational corporations and related business enterprises with regard to human rights*, UN Doc E/CN.4/2005/91.

<sup>14</sup> UN, *Universal Declaration of Human Rights*, General Assembly resolution 217A (III), 1948, preamble.

<sup>15</sup> Amnesty International, *Human Rights Principles for Companies*, 1998, AI Index: ACT 70/01/98. This is further confirmed in the preamble to the UN Norms: 'corporations are responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights'.

<sup>16</sup> For example, see Arvind Ganesan, *UN: New standards for corporations and human rights* (2003) *Human Rights Watch* <<http://www.hrw.org/press/2003/08/un081303.htm>> at 20 September 2005.

<sup>17</sup> PIAC notes that the environmental regulations may be inadequate and refers the Committee to the submission of the Australian Conservation Foundation for more detailed environmental standards.



## Recommendation 1:

Corporations that are registered in Australia or that conduct activities in Australia should be responsive and accountable to the interests of stakeholders and that the level of accountability should be referable to the benchmarks established in the UN Norms.

The international human rights framework places the primary responsibility to respect, protect and fulfill the rights and freedoms of people within a State Party's jurisdiction upon the government of that State Party. Similarly, the primary duty-holder in relation to environmental standards is government. Accordingly, PIAC submits that the Commonwealth Government is obliged to enact domestic policy and legislation that ensures that corporations are accountable for their social and environmental impacts. As explained by Steiner and Alston:

The human rights obligations assumed by each government require it (or should require it) to use all appropriate means to ensure that actors operating within its territory or otherwise subject to its jurisdiction comply with national legislation designed to give effect to human rights.<sup>18</sup>

### 4.3 The issue of extraterritoriality

Transnational corporations present a distinct challenge to corporate accountability as their operations cross nation-state boundaries and exceed the regulatory capacities of national legal frameworks. PIAC is concerned that, with the trend in global capital movements, corporations move their operations from developed countries with more rigorous legal systems to developing countries to take advantage of lower labour and environmental standards. Research by Kinley and Joseph describes a dissonance between the globalisation of human rights and the globalisation of the economy: 'international trade law essentially grants numerous rights to multinational corporations and very few enforceable duties, and few of any apparent significance in respect of human rights'.<sup>19</sup>

PIAC is concerned that Australian corporations may engage in conduct in their overseas operations, and through overseas subsidiary corporations, that would be unlawful in Australia. There are a number of well-documented examples in the mining industry of Australian corporations and their overseas subsidiaries having caused serious social harm and environmental pollution of land and rivers in other countries. High profile examples are the environmental devastation caused to the Ok Tedi and Fly rivers by BHP's Ok Tedi copper mine in Papua New Guinea<sup>20</sup>, and the cyanide leak into Hungary's second largest river, the Tisza, from Baia Mare gold mine in 2000. Baia Mare gold mine in Romania was a joint venture involving Australian corporation, Esmeralda Exploration.<sup>21</sup> PIAC understands that there was no legal action taken against Esmeralda Exploration in Australia.

These examples show that the current legal framework has not to date adequately regulated the conduct of Australian corporations overseas. PIAC notes that there are encouraging signals from Australian courts to hear proceedings against locally based transnational corporations with regard to the activities of their foreign subsidiaries. For example, the Victorian Supreme Court heard a class action in relation to BHP's activities at the Ok Tedi mine in Papua New Guinea.<sup>22</sup>

<sup>18</sup> H Steiner and P Alston, *International human rights in context: Law, politics and morals* (2<sup>nd</sup> ed, 2000) 1349.

<sup>19</sup> D Kinley and S Joseph, 'Multinational corporations and human rights: Questions about their relationship' (2002) 27(1) *Alt LJ* 1, 8.

<sup>20</sup> For more information, see *Ok Tedi smoking gun documents* (2004) Mineral Policy Institute <<http://www.mpi.org.au/regions/pacific/png/>> at 5 September 2005.

<sup>21</sup> *Australians share blame for Hungarian cyanide disaster* (2000) ABC News in Science <<http://www.abc.net.au/science/news/stories/s98714.htm>> at 1 September 2005.

<sup>22</sup> *Dagi & ors v BHP and Ok Tedi Mining Ltd (No 2)* [1997] 1 VR 428.

**Recommendation 2:**

All laws, regulations and policies designed to regulate corporations should apply to the extraterritorial operations of Australian corporations.

# 5. Directors' duties

## 5.1 Conceptualising directors' duties

The Corporations Act establishes the governance framework for corporations in Australia and places obligations on corporations and on directors of corporations. Section 181 of the Corporations Act provides that directors and officers of a corporation must exercise their powers and discharge their duties in good faith in the best interests of the corporation and for a proper purpose.

The 'best interests of the corporation' has been interpreted at common law to mean the financial interests of the shareholders as a collective body.<sup>23</sup> This means that the scope of interests that directors can take into account is limited to the interests of the corporation's shareholders. Accordingly, corporations can only have regard to and act in the interests of the broader stakeholders in so far as those interests impact positively on the financial interests of the shareholders. PIAC acknowledges that many decisions taken to further social and environmental interests will be in the best interests of shareholders. However, PIAC notes that the current legal interpretation does not allow for situations where directors pursue decisions that favour social or environmental interests, where these decisions may adversely impact on shareholders' financial interests.

This tension is illustrated by the NSW Special Commission of Inquiry into the Restructure of the James Hardie Group headed by David Jackson QC in 2004. The Board of James Hardie had approved a series of restructures with the effect of limiting payment of compensation to victims of asbestos-related illness by separating the parent company from a subsidiary company that had incurred the liabilities. The Inquiry found that the restructuring of the company left the subsidiary company with insufficient funds to compensate the victims. The Inquiry also found that the restructure did not breach the duties of the directors of James Hardie.

PIAC advocates that it is in the public interest to extend directors' statutory duties to consider, act, mitigate and report on any negative impacts of the corporation's decisions or activities on other stakeholders. Furthermore, this obligation should be a positive duty to consider stakeholder interests, rather than a permissive power to consider stakeholder interests. That is, not just an obligation that would allow directors to take the interests of stakeholders into account, but one that would proscribe that directors *must* take broader stakeholder interests into account, even where those interests conflict with the financial interests of shareholders. To this end, PIAC draws the Committee's attention to the proposed UK *Company Law Reform Bill 2005*, which places a positive duty on directors to consider the impact of its operation on the community and the environment.<sup>24</sup>

PIAC submits that this directors' duty should be owed to stakeholders directly and actionable by stakeholders where a breach occurs.

### Recommendation 3:

That section 181 of the *Corporation Act 2001* (Cth) be amended to place a positive duty on directors and officers of corporations to consider broader stakeholder interests and the environmental and social impacts of their decisions.

<sup>23</sup> H Ford, R P Austin and I Ramsay, *Ford's Principles of Corporations Law* (12<sup>th</sup> ed, 2005) 341; *Woolworths v Kelly* (1990) 4 ACSR 431.

<sup>24</sup> *Company Law Reform White Paper* (2005) UK Department of Trade and Industry <<http://www.dti.gov.uk/cld/WhitePaper.htm>> at 1 September 2005.

## 5.2 The standard for directors' duties

PIAC submits that the UN Norms should define the content of the directors' duty to consider broader stakeholder interests. As detailed above in section 4.2, the UN Norms provide a comprehensive enumeration of the relevant human rights and environmental standards.

### **Recommendation 4:**

That the benchmarks established in the UN Norms define the content of the directors' duty in section 181 of the *Corporations Act 2001* (Cth) to consider broader stakeholder interests.

## 5.3 Operation and penalties

Any breach of the proposed directors' duty to consider broader stakeholder interests should attract the full range of penalties under the Corporations Act. This includes prison sentences and a ban on holding directorships for serious or repeated breaches of the directors' duty to consider broader stakeholder interests.

### **Recommendation 5:**

That any breach of the proposed directors' duty to consider broader stakeholder interests should attract the full range of penalties under the *Corporations Act 2001* (Cth).

# 6. Other legal mechanisms to regulate corporations

## 6.1 Corporate codes of conduct

Corporate codes of conduct are important vehicles to comprehensively set out the standards of conduct and reporting requirements for corporations. These codes are useful to broaden the scope of decision-making by consumers, shareholders and directors to include the impact of corporate decisions on stakeholders.

PIAC notes, however, that most codes of conduct are voluntary codes and consequently suffer from a lack of legal enforceability. They effectively privatise the implementation of national legislation and the application of international human rights standards.<sup>25</sup> Many corporations do not adopt voluntary codes. Redmond comments that rarely is there independent reporting or evaluation of compliance with voluntary codes, and that most codes lack an implementation mechanism.<sup>26</sup> These characteristics make it difficult to know whether the codes are being implemented, or to compare the performance of different corporations. Further, the material impacts of such voluntary codes are limited. For example, both Esmeralda and BHP were subscribed to the Minerals Industry Code of Conduct when the environmental disasters occurred at their mines in Romania and Papua New Guinea.

Indeed, some commentators argue that voluntary codes may actually impede corporate accountability as they can be used to counter criticism of poor corporate practices and as a substitute for legal regulation. The UN Research Institute for Social Development comments that:

... there is a danger ... of codes being seen as something more than they really are, and used to deflect criticism, reduce the demand for external regulation and undermine the position of trade unions.<sup>27</sup>

Similarly, Picciotto and Mayne write that:

... to date the great majority of corporate codes have been little more than public relations exercises – fig leaves for exploitation – the latest in a long title of efforts by firms to escape responsibility for the production condition from which they profit.<sup>28</sup>

The most widely recognised set of voluntary standards for corporate behaviour are the OECD Guidelines. Originally developed in 1976, the OECD Guidelines were reviewed in 2000 following the debate about the Multinational Agreement on Investment. The OECD Guidelines were revised to include more detailed references to human rights, labour rights and environmental standards, and new provisions were added on corruption and consumer protection. The OECD Guidelines also now contain more specific recommendations for National Contact Points on implementation and complaints processes. However, the OECD Guidelines are voluntary and not legally enforceable. They remain at the discretion on national governments, and there are no penalties for non-compliance.

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<sup>25</sup> Steiner and Alston, above n 18, 1358.

<sup>26</sup> P Redmond, 'Sanctioning corporate responsibility for human rights' (2002) 21(1) *Alt LJ* 1, 26.

<sup>27</sup> *Corporate Social Responsibility and Business Regulation* (2004) United Nations Research Institute for Social Development  
<[http://www.unrisd.org/unrisd/website/document.nsf/\(httpPublications\)/F862A71428FAC633C1256E9B002F1021?OpenDocument](http://www.unrisd.org/unrisd/website/document.nsf/(httpPublications)/F862A71428FAC633C1256E9B002F1021?OpenDocument)> at 22 August 2005.

<sup>28</sup> Quoted in Steiner and Alston, above n 18, 1358.

PIAC submits that these voluntary codes of conduct are not sufficient to regulate corporations and recommends that a mandatory code of conduct is introduced in Australia. To this end, PIAC draws the Committee's attention to the Corporate Code of Conduct Bill 2005. The Australian Democrats introduced this Bill into the Federal Parliament by the Australian Democrats. It builds on the Corporate Code of Conduct Bill 2000. It proposes legally binding reporting requirements and standards of conduct in relation to internationally recognised human rights, labour and environmental standards for Australian companies operating overseas. The Bill also provides for legal remedies in the event that standards are breached.

PIAC supports the Corporate Code of Conduct Bill 2005. As this Bill applies specifically to overseas operations of Australian corporations, PIAC also advocates that a similar code of conduct be legislated to cover corporate conduct in Australia.

### **Recommendation 6:**

That the Inquiry support the Corporate Code of Conduct Bill 2005 and recommend the introduction of similar legislation to regulate the conduct of corporations in Australia.

## **6.2 Safeguarding shareholder activism**

Shareholder activism is a useful tool that enables shareholders to hold corporations more broadly accountable for their social and environmental impacts.

Shareholder activism is often facilitated through section 249D of the Corporations Act, which allows shareholders to requisition a meeting, on the condition that those shareholders control at least 5% of the votes that may be cast at a general meeting or that the request comes from at least 100 shareholders who are entitled to vote at a general meeting (**the 100 Shareholder Rule**). The 100 Shareholder Rule allows shareholders to call a general meeting to ventilate questions or move resolutions questioning the corporation's social and environmental practices.

PIAC is aware that the Government has repeatedly attempted to amend or repeal the 100 Shareholder Rule from the Corporations Act. The Corporations Amendment Bill 2002 sought to remove the 100 Shareholder Rule, but was defeated by the Senate. Currently, the Corporations Amendment Bill (No 2) 2005 seeks to remove the 100 Shareholder Rule. This Bill also seeks to reduce the threshold allowing members' resolutions to be brought to Annual General Meetings (section 249N) and to reduce the threshold for distribution of members' statements by the corporation along with the notice of meetings (section 249P). PIAC submits that sections 249D, 249N and 249P are important tools to assist shareholders to hold corporations accountable for their social and environmental impacts.

### **Recommendation 7:**

That the 100 Shareholder Rule and related tools of shareholder activism are not removed from the *Corporations Act*.

# 7. Reporting requirements

## 7.1 Transparent and mandatory

Reporting requirements are an important mechanism for ensuring that corporations integrate broader social and environmental concerns into their corporate planning and for evaluating the performance of corporations against social and environmental considerations. Reporting also encourages a level of transparency of a corporations conduct.

There are a number of international and national reporting initiatives that encourage corporations to produce reports on their compliance with social and environmental standards. These reporting initiatives are generally voluntary self-assessment tools.

The chief international standard for reporting is the Global Reporting Initiative (**GRI**) *Reporting Framework*.<sup>29</sup> The GRI produces globally applicable sustainability reporting guidelines and encourages corporations to use its framework to develop and report on policies and procedures to evaluate and address environmental outcomes, labour practices, human rights issues and other social issues. The GRI produces sector specific supplements. The State of Victoria, the Commonwealth Department of Family and Community Services, and the City of Melbourne have all adopted the GRI public sector reporting framework.

In the Australian private sector, the most recognised reporting benchmark is the Corporate Responsibility Index.<sup>30</sup>

These various reporting initiatives have been important in encouraging and measuring corporate accountability. However, there are a number of structural deficiencies in these initiatives that limit their effectiveness. Specifically, PIAC notes that the majority of these initiatives are voluntary and therefore reliant on the good faith of corporations to involve themselves and answer honestly. Further, there are no penalties for poor performance and no requirement that reports be made publicly available. For example, corporations using the GRI can chose whether or not to be publicly listed as part of the reporting initiative and are not obliged to provide their reports to the GRI Secretariat.

PIAC submits that, to be effective, reporting must be mandatory, publicly available and independently audited.

PIAC refers the Committee to France's *New Economic Regulations (NRE)*.<sup>31</sup> The NRE came into force in January 2002 and requires French multinational corporations to provide reports on their human rights and environmental records in foreign countries.

## 7.2 The Corporations Act and ASX Recommendations

PIAC acknowledges the recent amendments to the Corporations Act to encourage disclosure on corporate accountability issues, namely:

- section 299(1)(f), which requires corporations to include details of breaches of environmental laws and regulations in their annual reports; and

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<sup>29</sup> Available at <<http://www.globalreporting.org/guidelines/menu.asp>> at 28 August 2005.

<sup>30</sup> For more information, see <<http://www.corporate-responsibility.com.au>>.

<sup>31</sup> French Law No 2001-420. For an explanation, see W Baue, *New French Law Mandates Corporate Social and Environmental Reporting* (2002) CSRwire <<http://csrwire.com/sfarticle.cgi?id=798>> at 20 September 2005.

- section 1013(a)-(f), which require providers of financial products with an investment component to disclose the extent to which labour standards or environmental, social or ethical considerations are taken into account in investment decision-making.

PIAC notes, however, that these provisions have been criticised as unclear and allowing directors too much subjectivity in determining what matters will be disclosed.<sup>32</sup> Accordingly, the Corporations Act should be amended to require that corporations report fully on their environmental and social impacts and on any breaches of environmental or social standards.

### **Recommendation 8:**

That a set of uniform reporting requirements be developed that require corporations to periodically report on their impacts on stakeholders and on any breaches of environmental and social standards and that these standards be defined by the UN Norms.

### **Recommendation 9:**

That any reporting made under the uniform reporting requirements be publicly available and independently audited.

PIAC also acknowledges advances in the Australian Stock Exchange (ASX) Listing Rules to improve reporting. Listing Rule 4.10.3 requires that all corporations listed on the ASX must include a statement in their annual report disclosing the extent to which the corporation has followed the best practice recommendations set by the ASX Corporate Governance Council.<sup>33</sup> Relevantly, the best practice recommendations include:

- Recommendation 3: That corporations establish a code of conduct to promote ‘ethical and responsible decision-making’, which sets out corporate responsibilities to shareholders, clients, customers and consumers, employees, the community and individuals.<sup>34</sup>
- Recommendation 10: That corporations establish and disclose a code of conduct to guide compliance with legal and other obligations to legitimate stakeholders.

PIAC commends these advances but notes that these best practice recommendations suffer from the fact that they are not mandatory. ASX Guidance Note 9A states that the best practice recommendations ‘are not prescriptions’ but rather ‘aspirations of best practice’.<sup>35</sup> Listing Rule 4.10.3 requires that corporations must identify any of the best practice recommendations that have not been followed and give reasons for not following those recommendations. This ‘if not, why not’ model allows corporations the flexibility to choose which corporate accountability mechanisms they will implement and imposes no penalty for failure to comply.

To overcome these shortcomings, ASX rule should be mandatory and corporations failing to meet ASX best practice standards should be penalised. Accountability would also be improved by establishing a publicly available list of the corporations that fail to meet the ASX best practices recommendations. PIAC also recommends that the UN Norms define the standards set in the ASX best practice recommendations 3 and 10.

<sup>32</sup> J Nolan, ‘Human rights, the environment: what corporate lawyers need to know’ (2004) 42(6) *Law Society Journal* 1, 68.

<sup>33</sup> Australian Stock Exchange, Listing Rule 4.10.3

<sup>34</sup> Australian Stock Exchange, Guidance Note 9A, 12.

<sup>35</sup> As above, at 5.



**Recommendation 10:**

That the Australian Stock Exchange Listing Rule 4.10.3 be amended to provide that corporations must comply with Australian Stock Exchange best practice recommendations 3 and 10.

**Recommendation 11:**

That the Australian Securities and Investment Commission compile and make public, on an annual basis, a list of corporations that fail to meet the Australian Stock Exchange best practice standards.

## 8. Implementation and capacity-building

PIAC acknowledges that the recommendations contained in this submission represent a major shift for many corporations. Careful thought therefore needs to be given to how to implement the measures PIAC proposes.

PIAC believes that regulation of corporations should be customised according to the sector or industry in which the corporation is active. Customised regulation means that corporations are not subject to more regulation than is necessary, are subject to regulation that is relevant to their practices, and are therefore engaged in a regulatory framework that is meaningful to their activities and that provides useful guidance.

One possible means of achieving customised regulation is to develop, through stakeholder fora, industry or sector specific standards, based on the UN Norms. Corporations are assigned one or more Australian Business Numbers (ABN) that relate to the Australian and New Zealand Standard Industrial Classification (ANZSIC). Those classifications describe the activities of the corporation. It is possible that a corporation may conduct a number of businesses and hold multiple ABNs relevant to the different ANSZIC classes that apply. In this instance, PIAC submits that the corporation should be subject to different regulation depending on the activities being undertaken.

This approach provides a means to harness an already existing framework to customise regulation.

PIAC submits that the default position should be that corporations are bound by the UN Norms in a way that is appropriate for the class of corporation to which they belong, using the ABN classification as a guide. Corporations should be permitted to apply for a three-year exemption if they can show on the balance of probabilities that their activities do not and are not likely in the next three years to have social or environmental impacts. Applications for exemptions should be subject to a public notice period during which stakeholders should have the opportunity to make representations as to the impact or likely impact of the corporation's activities. Exemptions should be subject to review during the three-year exemption period on application by the regulator, or by stakeholders. PIAC submits that an independent standards setting and monitoring capacity should be established outside the Australian Securities and Investment Commission to steer this process.

Currently, corporations may not have the expertise necessary to comply with the UN Norms as PIAC suggests. PIAC submits that moves to implement the regulatory model PIAC outlines in this submission must be accompanied by well-resourced education, outreach, and capacity-building programs to build understanding of the objectives of the UN Norms, how the standards will be developed and applied in an industry-specific manner, the standards as they will apply in practice, and the mechanisms that will operate to implement, monitor and enforce the standards.

# Attachment:

## United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights<sup>36</sup>

### *Preamble*

*Bearing in mind* the principles and obligations under the *Charter of the United Nations*, in particular the preamble and Articles 1, 2, 55 and 56, *inter alia* to promote universal respect for, and observance of, human rights and fundamental freedoms,

*Recalling* that the *Universal Declaration of Human Rights* proclaims a common standard of achievement for all peoples and all nations, to the end that Governments, other organs of society and individuals shall strive, by teaching and education to promote respect for human rights and freedoms, and, by progressive measures, to secure universal and effective recognition and observance, including of equal rights of women and men and the promotion of social progress and better standards of life in larger freedom,

*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*,

*Realizing* that transnational corporations and other business enterprises, their officers and persons working for them are also obligated to respect generally recognized responsibilities and norms contained in United Nations treaties and other international instruments such as the *Convention on the Prevention and Punishment of the Crime of Genocide*; the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; the *Slavery Convention* and the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*; the *International Convention on the Elimination of All Forms of Racial Discrimination*; the *Convention on the Elimination of All Forms of Discrimination against Women*; the *International Covenant on Economic, Social and Cultural Rights*; the *International Covenant on Civil and Political Rights*; the *Convention on the Rights of the Child*; the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*; the four Geneva Conventions of 12 August 1949 and two Additional Protocols thereto for the protection of victims of war; the *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*; the *Rome Statute of the International Criminal Court*; the *United Nations Convention against Transnational Organized Crime*; the *Convention on Biological Diversity*; the *International Convention on Civil Liability for Oil Pollution Damage*; the *Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment*; the *Declaration on the Right to Development*; the *Rio Declaration on the Environment and Development*; the *Plan of Implementation of the World Summit on Sustainable Development*; the *United Nations Millennium Declaration*; the *Universal Declaration on the Human Genome and Human Rights*; the International Code of Marketing of Breast milk Substitutes adopted by the World Health Assembly; the Ethical Criteria for Medical Drug Promotion and the 'Health for All in the Twenty-First Century' policy of the World Health Organization; the *Convention against Discrimination in Education* of the United Nations Education, Scientific, and Cultural Organization; conventions and

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<sup>36</sup> UN Doc E/CN.4/Sub 2/2003/12/Rev 2 (2003).

recommendations of the International Labour Organization; the Convention and Protocol relating to the Status of Refugees; the *African Charter on Human and Peoples' Rights*; the *American Convention on Human Rights*; the *European Convention for the Protection of Human Rights and Fundamental Freedoms*; the *Charter of Fundamental Rights of the European Union*; the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* of the Organization for Economic Cooperation and Development; and other instruments,

*Taking into account* the standards set forth in the *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* and the *Declaration on Fundamental Principles and Rights at Work* of the International Labour Organization,

*Aware of* the *Guidelines for Multinational Enterprises* and the Committee on International Investment and Multinational Enterprises of the Organization for Economic Cooperation and Development,

*Aware also* of the United Nations Global Compact initiative which challenges business leaders to 'embrace and enact' nine basic principles with respect to human rights, including labour rights and the environment,

*Conscious of* the fact that the Governing Body Subcommittee on Multinational Enterprises and Social Policy, the Committee of Experts on the Application of Standards, as well as the Committee on Freedom of Association of the International Labour Organization, which have named business enterprises implicated in States' failure to comply with Conventions No 87 concerning the Freedom of Association and Protection of the Right to Organize and No 98 concerning the Application of the Principles of the Right to Organize and Bargain Collectively, and seeking to supplement and assist their efforts to encourage transnational corporations and other business enterprises to protect human rights,

*Conscious also of* the Commentary on the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, and finding it a useful interpretation and elaboration of the standards contained in the Norms,

*Taking note of* global trends which have increased the influence of transnational corporations and other business enterprises on the economies of most countries and in international economic relations, and of the growing number of other business enterprises which operate across national boundaries in a variety of arrangements resulting in economic activities beyond the actual capacities of any one national system,

*Noting* that transnational corporations and other business enterprises have the capacity to foster economic well-being, development, technological improvement and wealth as well as the capacity to cause harmful impacts on the human rights and lives of individuals through their core business practices and operations, including employment practices, environmental policies, relationships with suppliers and consumers, interactions with Governments and other activities,

*Noting also* that new international human rights issues and concerns are continually emerging and that transnational corporations and other business enterprises often are involved in these issues and concerns, such that further standard-setting and implementation are required at this time and in the future,

*Acknowledging* the universality, indivisibility, interdependence and interrelatedness of human rights, including the right to development, which entitles every human person and all peoples to participate in, contribute to and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realized,

*Reaffirming* that transnational corporations and other business enterprises, their officers—including managers, members of corporate boards or directors and other executives—and persons working for them have, *inter alia*, human rights obligations and responsibilities and that these human rights norms will contribute to the making and development of international law as to those responsibilities and obligations,

*Solemnly proclaims* these Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights and urges that every effort be made so that they become generally known and respected.

### **A. General obligations**

1. States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.

### **B. Right to equal opportunity and non-discriminatory treatment**

2. Transnational corporations and other business enterprises shall ensure equality of opportunity and treatment, as provided in the relevant international instruments and national legislation as well as international human rights law, for the purpose of eliminating discrimination based on race, colour, sex, language, religion, political opinion, national or social origin, social status, indigenous status, disability, age—except for children, who may be given greater protection—or other status of the individual unrelated to the inherent requirements to perform the job, or of complying with special measures designed to overcome past discrimination against certain groups.

### **C. Right to security of persons**

3. Transnational corporations and other business enterprises shall not engage in nor benefit from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage-taking, extrajudicial, summary or arbitrary executions, other violations of humanitarian law and other international crimes against the human person as defined by international law, in particular human rights and humanitarian law.

4. Security arrangements for transnational corporations and other business enterprises shall observe international human rights norms as well as the laws and professional standards of the country or countries in which they operate.

### **D. Rights of workers**

5. Transnational corporations and other business enterprises shall not use forced or compulsory labour as forbidden by the relevant international instruments and national legislation as well as international human rights and humanitarian law.

6. Transnational corporations and other business enterprises shall respect the rights of children to be protected from economic exploitation as forbidden by the relevant international instruments and national legislation as well as international human rights and humanitarian law.

7. Transnational corporations and other business enterprises shall provide a safe and healthy working environment as set forth in relevant international instruments and national legislation as well as international human rights and humanitarian law.

8. Transnational corporations and other business enterprises shall provide workers with remuneration that ensures an adequate standard of living for them and their families. Such remuneration shall take due account of their needs for adequate living conditions with a view towards progressive improvement.

9. Transnational corporations and other business enterprises shall ensure freedom of association and effective recognition of the right to collective bargaining by protecting the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without distinction, previous authorization, or interference, for the protection of their employment interests and for other collective bargaining purposes as provided in national legislation and the relevant conventions of the International Labour Organization.

### ***E. Respect for national sovereignty and human rights***

10. Transnational corporations and other business enterprises shall recognize and respect applicable norms of international law, national laws and regulations, as well as administrative practices, the rule of law, the public interest, development objectives, social, economic and cultural policies including transparency, accountability and prohibition of corruption, and authority of the countries in which the enterprises operate.

11. Transnational corporations and other business enterprises shall not offer, promise, give, accept, condone, knowingly benefit from, or demand a bribe or other improper advantage, nor shall they be solicited or expected to give a bribe or other improper advantage to any Government, public official, candidate for elective post, any member of the armed forces or security forces, or any other individual or organization. Transnational corporations and other business enterprises shall refrain from any activity which supports, solicits, or encourages States or any other entities to abuse human rights. They shall further seek to ensure that the goods and services they provide will not be used to abuse human rights.

12. Transnational corporations and other business enterprises shall respect economic, social and cultural rights as well as civil and political rights and contribute to their realization, in particular the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion and freedom of opinion and expression, and shall refrain from actions which obstruct or impede the realization of those rights.

### ***F. Obligations with regard to consumer protection***

13. Transnational corporations and other business enterprises shall act in accordance with fair business, marketing and advertising practices and shall take all necessary steps to ensure the safety and quality of the goods and services they provide, including observance of the precautionary principle. Nor shall they produce, distribute, market, or advertise harmful or potentially harmful products for use by consumers.

### ***G. Obligations with regard to environmental protection***

14. Transnational corporations and other business enterprises shall carry out their activities in accordance with national laws, regulations, administrative practices and policies relating to the preservation of the environment of the countries in which they operate, as well as in accordance with relevant international agreements, principles, objectives, responsibilities and standards with regard to the environment as well as human rights, public health and safety, bioethics and the precautionary principle, and shall generally conduct their activities in a manner contributing to the wider goal of sustainable development.

## **H. General provisions of implementation**

15. As an initial step towards implementing these Norms, each transnational corporation or other business enterprise shall adopt, disseminate and implement internal rules of operation in compliance with the Norms. Further, they shall periodically report on and take other measures fully to implement the Norms and to provide at least for the prompt implementation of the protections set forth in the Norms. Each transnational corporation or other business enterprise shall apply and incorporate these Norms in their contracts or other arrangements and dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the transnational corporation or business enterprise in order to ensure respect for and implementation of the Norms.

16. Transnational corporations and other businesses enterprises shall be subject to periodic monitoring and verification by United Nations, other international and national mechanisms already in existence or yet to be created, regarding application of the Norms. This monitoring shall be transparent and independent and take into account input from stakeholders (including non governmental organizations) and as a result of complaints of violations of these Norms. Further, transnational corporations and other businesses enterprises shall conduct periodic evaluations concerning the impact of their own activities on human rights under these Norms.

17. States should establish and reinforce the necessary legal and administrative framework for ensuring that the Norms and other relevant national and international laws are implemented by transnational corporations and other business enterprises.

18. Transnational corporations and other business enterprises shall provide prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by failures to comply with these Norms through, inter alia, reparations, restitution, compensation and rehabilitation for any damage done or property taken. In connection with determining damages in regard to criminal sanctions, and in all other respects, these Norms shall be applied by national courts and/or international tribunals, pursuant to national and international law.

19. Nothing in these Norms shall be construed as diminishing, restricting, or adversely affecting the human rights obligations of States under national and international law, nor shall they be construed as diminishing, restricting, or adversely affecting more protective human rights norms, nor shall they be construed as diminishing, restricting, or adversely affecting other obligations or responsibilities of transnational corporations and other business enterprises in fields other than human rights.

## **I. Definitions**

20. The term ‘transnational corporation’ refers to an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries - whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively.

21. The phrase ‘other business enterprise’ includes any business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity. These Norms shall be presumed to apply, as a matter of practice, if the business enterprise has any relation with a transnational corporation, the impact of its activities is not entirely local, or the activities involve violations of the right to security as indicated in paragraphs 3 and 4.

22. The term ‘stakeholder’ includes stockholders, other owners, workers and their representatives, as well as any other individual or group that is affected by the activities of transnational corporations or other business enterprises. The term ‘stakeholder’ shall be interpreted functionally

in the light of the objectives of these Norms and include indirect stakeholders when their interests are or will be substantially affected by the activities of the transnational corporation or business enterprise. In addition to parties directly affected by the activities of business enterprises, stakeholders can include parties which are indirectly affected by the activities of transnational corporations or other business enterprises such as consumer groups, customers, Governments, neighbouring communities, indigenous peoples and communities, non governmental organizations, public and private lending institutions, suppliers, trade associations, and others.

23. The phrases 'human rights' and 'international human rights' include civil, cultural, economic, political and social rights, as set forth in the International Bill of Human Rights and other human rights treaties, as well as the right to development and rights recognized by international humanitarian law, international refugee law, international labour law, and other relevant instruments adopted within the United Nations system.