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**Australasian Law Teachers Association - ALTA  
2006 Refereed Conference Papers**



**Australasian Law Teachers Association – ALTA  
Annual Conference**

**61<sup>st</sup> Annual ALTA Conference**

Victoria University, Melbourne, Victoria, Australia  
4 – 7 July 2006

*Legal Knowledge: Learning, Communicating and Doing*

**Published Conference Papers**

This paper was presented at the 2006 ALTA Conference in the  
'Environmental Law' Interest Group

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*Conference Papers published by the ALTA Secretariat  
2006*

Edited by Professor Michael Adams, Professor David Barker AM and Ms Samantha McGolrick  
Associate Editor Janet Fox

**ALTA Secretariat**

PO Box 222

Lindfield NSW 2070

AUSTRALIA

Tel: +61 (2) 9514 5414

Fax: +61 (2) 9514 5175

[admin@alta.edu.au](mailto:admin@alta.edu.au)

[www.alt.edu.au](http://www.alt.edu.au)

## **CORPORATE ENVIRONMENTAL ACCOUNTABILITY AND RESOPNSIBILITY**

**LAURA HORN\***

The aim of this paper is to explore the best method to regulate the activities of transnational companies (TNCs) so that they are accountable for the effects that their activities could have on surrounding environment. The traditional approach at international law is to regulate the rights and duties of states which, in turn, through their domestic legal systems, may place duties on corporations. However, as a result of the globalisation phenomenon, TNCs are gaining in political and economic influence whereas the system of international law has continued to be focused on states. Many areas of environmental protection could be undermined by non-state actors who do not consider themselves obliged to follow international treaties and conventions and could evade the provisions of environmental agreements.

The Plan of Implementation of the World Summit on Sustainable Development (WSSD) indicates that urgent action is required at all levels to promote corporate responsibility and accountability. A method of self-imposed responsibility that has been popular amongst companies is the adoption of codes of conduct. However these codes lack legal enforcement so it is necessary for new approaches to be adopted. One option would be to encourage states to adopt an international treaty (or convention) specifically directed to the obligations of companies to adhere to principles of corporate social responsibility. This agreement could also encompass other issues such as human rights and labour law as well as the protection of the environment.

Another possible option may be the refining and concurrent operation of national laws by states with specific direction to transnational companies operating within the jurisdiction of the state. So, in effect, these laws would have an extra territorial reach.

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\* (Dr) Laura Horn, Lecturer, School of Law, University of Western Sydney, Australia.

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This paper investigates these issues and the author argues that amendments to national legislation in Australia may provide an alternative solution.

## I INTRODUCTION

Many transnational companies (TNCs) have considerable financial resources and the ability to act beyond the jurisdiction of any one state. These companies can act in the international arena to some extent unregulated by domestic or international law. The phenomenon of globalisation has led to the improvement of technological, commercial and financial integration of domestic economies so that geographic and political boundaries are no longer significant barriers for trade in goods and services.<sup>1</sup> During the era of globalisation, the influence of TNCs has increased in local and international markets and now extends even further, to include the power to influence policy development of governments in both domestic and international affairs.

Corporate Social Responsibility:

describes the expectation that corporate operations and strategies be conducted ‘in ways that respect ethical values, people, communities and the environment’. The promotion and protection of human rights, labor standards and environmental sustainability are an important part of such responsibility.<sup>2</sup>

In this paper, corporate accountability is defined as the imposition of legally binding standards and obligations on companies.<sup>3</sup> These aspects are considered in this paper in relation to environmental social responsibility and accountability.

There is no multilateral treaty or regional treaty directly regulating the social responsibilities of TNCs. Some multilateral environmental conventions and protocols affect companies’ activities in specific areas for example *Vienna Convention for the Protection of the Ozone Layer*<sup>4</sup> and the *Montreal Protocol on Substances that Deplete*

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<sup>1</sup> Patrick Macklem, ‘Corporate Accountability under International Law: The Misguided Quest for Universal Jurisdiction’ (2005) 7(4) *International Law Forum* 281.

<sup>2</sup> Isabella Bunn, ‘Global Advocacy for Corporate Accountability: Transatlantic Perspectives from the NGO Community’ (2004) 19 *American University International Law Review* 1265, 1266.

<sup>3</sup> *Ibid* 1270.

<sup>4</sup> *Convention for the Protection of the Ozone Layer*, opened for signature 22 March 1985, 1513 UNTS 323, 26 ILM 1529 (1987) (entered into force 22 September 1985).

*the Ozone Layer*<sup>5</sup> which regulate the production of ozone depleting substances. It is also possible that specific investment contracts may contain contractual provisions on corporate responsibilities however these would apply as indicated in the provisions of the contract and would only bind the parties to the contract.

Multilateral and regional environmental treaties are generally focused on the obligations of States rather than the role and responsibilities of TNCs. As these corporations are non-state actors they generally do not have standing or legal personality under treaty or customary international law. However it is arguable that international law is continuing to develop and that the nature of the subjects of international law will, in the future, depend upon the needs of the international community.<sup>6</sup>

The reliance on treaties to deal with environmental protection is often ineffective because of the following reasons. Ratification of the treaty is voluntary and many States may make reservations or refuse to adopt the provisions in a treaty.<sup>7</sup> States are the subjects of international law rather than non-state actors such as TNCs. So the obligations in treaties are generally directed to State governments and, if they agree to ratify and be bound, these States have the responsibility to enact further laws regulating the activities of TNCs within their domestic jurisdiction. Many provisions in conventions are widely drafted and may be so broad as to be unclear about what law or standard is applicable. Enforcement provisions in multilateral environmental treaties are used infrequently and in some treaties, the secretariat may not have any or adequate enforcement authority.<sup>8</sup>

Often, agreements for corporate responsibility and accountability are found in 'soft' law instruments. This paper refers to the role of TNCs in the achievement of

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<sup>5</sup> *Montreal Protocol on Substances that Deplete the Ozone Layer*, opened for signature 16 September 1988, 1522 UNTS 3, 26 ILM 1550 (1987) (entered into force 1 January 1989).

<sup>6</sup> Ilias Bantekas, 'Corporate Social Responsibility in International Law' (2004) *Boston University International Law Journal* 309, 316.

<sup>7</sup> Peggy Kalas, 'International Environmental Dispute Resolution and the Need for Access by Non-State Entities' (2001) 12 *Colorado Journal of International Environmental Law and Policy* 191, 222.

<sup>8</sup> *Ibid* 223.

sustainable development in two key sustainable development agreements and the attempts at encouraging TNCs to be responsible and accountable in soft law instruments in international law are listed. One possible solution to the lacuna in regulation, is to consider extending the operation of the domestic jurisdiction of states to cover the activities of corporations which may be acting through subsidiaries in other jurisdictions and taking advantage of the lack of an advanced legal regulatory system in that country. Finally, the Australian national position is briefly discussed with a view to suggesting possible changes.

## **II SOFT LAW AND THE DEVELOPMENT OF ENVIRONMENT RESPONSIBILITIES FOR TNCs IN INTERNATIONAL ENVIRONMENTAL LAW INSTRUMENTS**

The traditional sources of international law are called 'hard law'.<sup>9</sup> 'Soft law' refers to a variety of non-binding international instruments such as principles, guidelines, programmes of action, and declarations.<sup>10</sup> Treaties which contain weaker commitments and set out general aims rather than specific obligations are likely to be soft law treaties.<sup>11</sup> Other resolutions, declarations of principles and codes of conduct which are not binding are also soft law.<sup>12</sup> Not all lawyers accept 'soft law' as a method of making law through non-binding instruments.<sup>13</sup> However, it has been argued that particular areas of soft law should be recognised in order to allow international law to develop more effectively.<sup>14</sup> For example, soft law instruments have been used to develop the law in areas such as in international economics<sup>15</sup> and human rights.<sup>16</sup> Indeed, soft law plays an important role in the growth of international environmental law.<sup>17</sup> It can complement and improve international environmental law by leading to the emergence of new legal

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<sup>9</sup> See Patricia Birnie, and Alan Boyle, *International Law and The Environment* (2<sup>nd</sup> ed, 2002) 24.

<sup>10</sup> Birnie and Boyle, above n 9, 25; See Phillippe Sands *Principles of International Law* Vol 1 (2<sup>nd</sup> ed, 2003) 123..

<sup>11</sup> Christine M Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *International and Comparative Law Quarterly* 850, 851.

<sup>12</sup> *Ibid.*

<sup>13</sup> Birnie and Boyle, above n 9, 25.

<sup>14</sup> Hiram Chodosh, 'Neither Treaty nor Custom: The Emergence of Declarative International Law' (1991) 26 *Texas International Law Journal* 87, 124.

<sup>15</sup> Chinkin, above n 11, 852.

<sup>16</sup> Michael Bothe, 'Legal and Non-Legal Norms - A Meaningful Distinction in International Relations' (1980) 11 *Netherlands Yearbook of International Law* 65, 77; Also see Chinkin, above n 11, 860.

<sup>17</sup> Birnie and Boyle, above n 9, 26.

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norms. So soft law has a significant role because it reveals the likely progress of binding norms in international environmental law and it lays down generally accepted rules of behaviour which may become rules of customary law.<sup>18</sup> Soft law can also assist the more rapid development of principles of environmental law.

Other means used by States in the international community such as breaking off economic and cultural relations and alerting the public to the breaches of commitments by the offending State (or States) can result in a loss of reputation for the particular State (or States) and also to the particular TNC involved in the environmental destruction.<sup>19</sup> An example of the emphasis on the cooperation and responsibility of TNCs in order to achieve sustainable development are found in the following provision of the soft law instrument, *Agenda 21*, a global program aimed at achieving sustainable development:

Business and industry, including transnational corporations, should recognise environmental management as among the highest corporate priorities and as a key determinant to sustainable development.<sup>20</sup>

The vital role that business and industry play in the achievement of the social and economic development and environmental management in a country is pointed out in *Agenda 21*.<sup>21</sup> One contribution that transnational corporations can make is to adopt free market mechanisms where the prices of goods and services include the environmental costs incurred in their development, production, use and recycling costs.<sup>22</sup> The other roles of industry and business are to improve their systems of production to use resources efficiently and to reduce wastes and also to encourage the development of new ideas to achieve these efficiencies.<sup>23</sup>

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<sup>18</sup> Sands, above n 10, 124.

<sup>19</sup> Bothe, above n 16, 88.

<sup>20</sup> *Report of the United Nations Conference on Environment and Development (UNCED) [hereinafter Agenda 21]*, UN Doc A/CONF.151/26 (1992) 30.3.

<sup>21</sup> *Ibid* [30.1].

<sup>22</sup> *Ibid* [30.3].

<sup>23</sup> *Ibid* [30.4].

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In 2002 the focus on the participation of corporations in sustainable development was emphasised in the Johannesburg Declaration on Sustainable Development at the World Summit on Sustainable Development (WSSD). The WSSD Plan of Implementation indicates that action should be taken at all levels to 'enhance corporate and environmental social responsibility and accountability'.<sup>24</sup> This requires action to promote the improved social and environmental performance of industry through measures such as codes of conduct, environmental management and public reporting on social and environmental matters.<sup>25</sup> Financial institutions should also incorporate sustainable development when making decisions.<sup>26</sup>

Finally, The Plan of Implementation indicates that urgent action is required at all levels to:

Actively promote corporate responsibility and accountability, based on the Rio principles, including through the full development and effective implementation of intergovernmental agreements and measures, international initiatives and public-private partnerships and appropriate national regulations, and support continuous improvement in corporate practices in all countries.<sup>27</sup>

Clearly more needs to be done in order to achieve corporate responsibility and accountability in environmental protection. Soft law instruments are not adequate to promote the protection of the environment by TNCs. These instruments have some advantages, soft law instruments could form evidence of customary law in a dispute before the International Court of Justice (ICJ) and may be instructive in other methods of dispute resolution as well as in national municipal courts. Judicial resolution is often not appropriate to determine environmental disputes because of the delay involved, so the abovementioned difficulty with soft law may not be a major disadvantage. However the failure to adequately develop environmental law to ensure that States adhered to their

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<sup>24</sup> *Report of the World Summit on Sustainable Development Plan of Implementation* (WSSD POI) [18] <[http://www.un.org/esa/sustdev/documents/WSSD\\_POI\\_PD/English/POIToc.htm](http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm)> at 28 February 2007.

<sup>25</sup> *Ibid* [18(a)].

<sup>26</sup> *Ibid* [18(c)].

<sup>27</sup> *Ibid* [49].

commitments is detrimental, as it can lead to a lack of certainty about the extent of State responsibility and a lack of binding obligations and accountability on the part of TNCs. The position concerning non-state actors raises more problems because they are not the subjects of international law and it would be difficult to obtain compensation in circumstances where they breach international obligations. This failure could in turn lead to delay in the resolution of environmental disputes and so increase the likelihood of continuing environmental damage.

### **III INTERNATIONAL INSTRUMENTS THAT ENCOURAGE TNCs TO ADOPT ENVIRONMENTAL RESPONSIBILITIES**

The following are some initiatives taken to encourage corporate social responsibility:

1. Organisation for Economic Cooperation and Development (OECD) Guidelines.<sup>28</sup>
2. European Union (EU) proposed Green Paper.<sup>29</sup>
3. UN Draft Code of Conduct on Transnational Corporations.<sup>30</sup>
4. UN Global Compact with the business community<sup>31</sup>
5. *Sub-Commission on the Promotion and Protection of Human Rights*<sup>32</sup>
6. *Codes of Conduct*<sup>33</sup>

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<sup>28</sup> *The OECD Guidelines for Multinational Enterprises* (2000 Revision)  
<<http://www.oecd.org/dataoecd/15/43/33914891.pdf>> at 27 February 2007.

<sup>29</sup> *Green Paper Promoting a European Framework for Corporate Social Responsibility*  
<[http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001\\_0366en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0366en01.pdf)> at 28 February 2007.

<sup>30</sup> *United Nations Draft International Code of Conduct on Transnational Corporations* 23 ILM 626 (1984). This code was never voted upon.

<sup>31</sup> *United Nations Global Compact* <<http://www.un.org/Depts/ptd/global.htm>> at 27 February 2007.

<sup>32</sup> E/CN.4/Sub.2/2003/12(2003)  
<<http://www.ohchr.org/english/bodies/subcom/index.htm>> at 27 February 2007.

<sup>33</sup> See Macklem, above n 1, 285.

**IV FAILURE OF INTERNATIONAL LAW TO ADEQUATELY ADDRESS CORPORATE  
ACCOUNTABILITY AND RESPONSIBILITY AND RESPONSIBILITY FOR ENVIRONMENTAL  
PROTECTION**

This reliance on 'soft' law initiatives and voluntary codes of conduct presents problems because there is no means of enforcing adherence to these agreements. It would also be difficult to gain sufficient agreement amongst States to develop a convention on corporate accountability as indicated in the failure of States to vote upon the UN Draft Code of Conduct on Transnational Corporations. Due to the unreliability of 'soft' law the consequences are that there are a lack of binding obligations requiring TNCs to adhere to acceptable standards of corporate responsibility and accountability. So many standards remain unclear and ambiguous and there are few procedures available to make corporations accountable or to provide redress for a failure by TNCs to adhere to these standards.

The effective implementation of sustainable development requires the active involvement and commitment on the part of TNCs. In view of the increasing power of the TNCs during the era of globalisation these corporations should be subject to binding legal regulation on environmental responsibility and accountability. One option may be for States to enact national laws based upon universal international guidelines which could both further progress the development of customary international law and also bind TNCs to national regulatory schemes.

Another option is to consider the possible extraterritorial operation of the domestic laws of States. Companies operate within the boundaries of States so their governments can regulate their operations through national laws and regulations. The difficulty is that TNCs may breach environmental obligations in a foreign jurisdiction for example where one of the companies forms part of a production chain or pursues an investment opportunity through mining natural resources in a developing country. Attempts have been made to introduce legislation to require TNCs to adhere to corporate responsibility requirements in the state of their head office and to apply these standards beyond the boundaries of state jurisdiction. The difficulty is that the

State's ability to legislate on behalf of its citizens is restricted by the boundaries of the state.<sup>34</sup>

## V THE AUSTRALIAN POSITION

In Australian corporate law, directors have tended to owe duties primarily to the company so the issue is whether these duties should be expanded so that directors owe duties to the wider community to protect the environment. If these duties are expanded the difficulty would be whether these duties are capable of adequate definition in order to be enforceable.

If the approach was adopted in Australia that a more specific drafting of directors duties was appropriate some guidance could be found in UK attempts. A UK corporate responsibility section extends directors duties indicating that:

- (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in so doing, having regard (amongst other matters) to:
  - (a) the likely consequences of any decision in the long term
  - (b) the interests of the company's employees,
  - (c) the need to foster the company's business relationships with suppliers, customers and others,
  - (d) the impact of the company's operations on the community and the environment,
  - (e) the desirability of the company maintaining a high reputation for high standards of business conduct, and
  - (f) the need to act fairly as between members of the company.<sup>35</sup>

The approach in this legislation emphasises that corporate social and environmental responsibility are part of everyday decision-making and a personal responsibility for

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<sup>34</sup> Ibid 283.

<sup>35</sup> Companies Act 2006 (UK) s 172.

directors to display good corporate governance.<sup>36</sup>

The Australian Parliamentary Joint Committee on Corporations and Financial Services Report 'Corporate Responsibility: Managing Risk and Creating Value' did not recommend any changes to the directors duties provisions in the *Corporations Act* 2001.<sup>37</sup> Some commentators have argued that director's duties under the current system impose a duty on directors to adhere to environmental laws.<sup>38</sup> However the position is uncertain and the provisions could be clarified in the legislation to include a specific duty on the part of directors to ensure that the company's activities do not cause harm to the environment. Even if the action is available under the existing directors duties in the *Corporations Act* 2001(Cth) and at common law the remedies are limited to shareholders (if a derivative action is available) and the company itself rather than interested individuals or environmental non-governmental organisations (NGOs). There is limited access for individuals in Australia to have standing to ensure that companies take environmental matters and sustainable development into account in their corporate governance. The main forms of regulation occur within public law through criminal regulation or through environmental and planning law administered by the appropriate authorities. So reliance upon directors' duties would not be adequate to monitor whether companies are attempting to achieve the goals of sustainable development.

In Australia there is a mandatory reporting requirement for all public companies. The requirements for reporting entities provide that the directors' annual report must include the details about the entities' performance in relation to any particular and

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<sup>36</sup> See Adam McBeth, 'A Look at Corporate Code of Conduct Legislation' (2004) *Common Law World Review* 222, 241.

<sup>37</sup> Parliamentary Joint Committee on Corporations and Financial Services, Commonwealth Senate, *Corporate Responsibility: Managing Risk and Creating Value* (2006) <[http://www.aph.gov.au/senate/committee/corporations\\_ctte/corporate\\_responsibility/report/report.pdf](http://www.aph.gov.au/senate/committee/corporations_ctte/corporate_responsibility/report/report.pdf)> at 23 February 2007.

<sup>38</sup> Shelley Bielefeld, Sue Higginson, Jim Jackson and Aidan Ricketts, "'Directors' Duties to the Company and Minority Shareholder Environmental Activism' (2004) 23 *Companies and Securities Law Journal* 28, 39.

significant environmental regulation.<sup>39</sup> Austin and Ramsay comment that the information required by s 299 *Corporations Act 2001*(Cth):

can be supplied, for the most part, in a relatively constrained fashion. It is not equivalent to prescribing that the directors give a discursive 'management discussion and analysis' of the kind one finds in some other countries including the United States.<sup>40</sup>

A study on the effectiveness of this reporting during the 1999 and 2002 concluded that companies were 'including only the most minimal of comment that may be well short of details that could be considered useful to shareholders'.<sup>41</sup> Obviously this is inadequate reporting and gives little indication to shareholders about the effect of the environmental regulation on the companies and whether the regulation has been complied with.

It is well recognised now that stakeholders incorporate a wide grouping comprising shareholders, creditors, bankers, employees, the public, contractors and suppliers and these stakeholders have an expectation that companies are transparent in their operations and report annually on their environmental performance.<sup>42</sup>

One method of improving corporate responsibility to achieve sustainable development would be to strengthen the reporting requirements under the legislation.

## **VI EXTENDING TERRITORIAL REACH**

Three bills in different jurisdictions<sup>43</sup> illustrate that it would be possible to draft national corporate responsibility legislation that has an extra-territorial reach. They were all drafted in order to regulate companies within the jurisdiction of the

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<sup>39</sup> *Corporations Act 2001* (Cth) s 299(1)(f).

<sup>40</sup> Robert Austin and Ian Ramsay, *Ford's Principles of Corporations Law* (13<sup>th</sup> ed, 2007) 554.

<sup>41</sup> Karen Bubna-Litic and Imelda Williamson, 'The thin green line: embedded? 2002 annual environmental reporting under s 299(1)(f) of the Corporations Law' (2004) 21 *Environmental and Planning Law Journal* 466, 481.

<sup>42</sup> *Ibid.*

<sup>43</sup> The Corporate Code of Conduct Bill 2000 (USA), the Corporate Responsibility Bill 2003 (UK) and the Corporate Code of Conduct Bill 2000 (Cth).

legislating state and the proposed legislation also sought to regulate related companies operating overseas. The aim of this legislation is to cover corporate groups, joint ventures and other legal forms in order to deal with the total enterprise rather than with separate legal companies.<sup>44</sup>

When drafting appropriate legislation, the goal is to ensure that the operations of companies and business enterprises carrying out activities within the jurisdiction of the legislating state are covered as well as the members of corporate groups. Parent companies should ensure that all other members of that corporate group are obliged to comply with the corporate responsibility obligations. The preferable remedies would be injunctive or declaratory relief to prevent environmental damage from occurring. Alternatively, if for example, a subsidiary company failed to protect the environment the parent could be liable to pay compensation even where the damage has occurred in another jurisdiction.

If the definition of ‘sustainable development’ continues to be vague and general, one possibility would be to adopt in national legislation the core aspects of sustainable development based upon international agreements such as the *Rio Declaration*. The proposed legislation should ensure that civil litigation in the legislating State could be brought by any person or group suffering loss or damage whether resident of the legislating State or from another jurisdiction.<sup>45</sup> The advantage of ensuring access by complainants to state courts is that this may overcome the failure to provide adequate dispute resolution for private parties in the international jurisdiction.

## VII CONCLUSION

Lessons from the past indicate it would be unrealistic to argue that TNCs will adopt practices to prevent environmental degradation<sup>46</sup> without the incentive provided by binding legal obligations. The environment is continuing to deteriorate and unless all

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<sup>44</sup> See McBeth, above n 35, 226.

<sup>45</sup> Ibid 246.

<sup>46</sup> See Kalas, above n 7, 243.

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TNCs play their part in environmental protection it is unlikely that sustainable development and protection of the environment for future generations will be achieved.