

ACTING EXTRATERRITORIALLY TO TAME MULTINATIONAL CORPORATIONS FOR HUMAN RIGHTS VIOLATIONS: WHO SHOULD 'BELL THE CAT'?*

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[The continued impunity of multinational corporations ('MNCs') for human rights violations is driving the search for an effective as well as efficient regulatory model. Regulation of MNCs by home states through extraterritorial laws is a recent addition to the measures under review in this ongoing search. The presentation of a Bill in the United States House of Representatives on 7 June 2000 marked an attempt to adopt the extraterritorial model of regulation. This was soon followed by the introduction of a similar Bill in the Australian Senate on 6 September 2000. Though the fate of the US Bill remains undecided, in the case of the Australian Bill the Parliamentary Committee found it to be impracticable, unworkable, unnecessary and unwarranted. Within a theoretical framework of integrated legal responsibility, and in the context of multiple regulatory dilemmas, this article seeks to examine the provisions and the omissions of the two Bills. It argues that the legislative failures of the above Bills are instructive in at least three respects. Firstly, that it is legitimate for a state to impose and enforce internationally recognised human rights obligations upon the overseas activities of the corporations incorporated within its territory, as well as the overseas subsidiaries of such corporations, by enacting an extraterritorial law. Secondly, the failure of the Bills to become law should not be interpreted as a failure of the proposed model itself; if resort is to be had to any state-centric model of extraterritorial regulation, it is the 'home state' model of regulation which presents greater potential as compared to the 'host state' model. Thirdly, extraterritorial regulation of MNCs, essentially being a variation of the municipal regulatory model, is not self-sufficient due to this model's inherent limitations, and therefore needs to be supplemented by an international regulatory mechanism.]

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I INTRODUCTION: BACKDROP OF THE TWO FAILED ATTEMPTS

The debate on human rights is no longer confined to the ‘individuals–states’ matrix as many new actors, either as duty bearers or rights holders, have emerged, and are emerging, as part of the human rights paradigm.¹ In terms of duty bearers, one such addition is of corporations, though it is also suggested that they should be recognised as holders of human rights as well.² It is increasingly argued that corporations, though formed primarily to maximise profit, are under a legal as well as a moral obligation to respect and promote human rights.³ Given that this argument is not always accepted ‘in spirit’, nor internalised by all corporations, there is a need to regulate those of their activities that have the potential to impinge upon human rights. Such a need is most apparent in the case

¹ See Su-Ping Lu, ‘Corporate Codes of Conduct and the FTC: Advancing Human Rights through Deceptive Advertising Law’ (2000) 38 *Columbia Journal of Transnational Law* 603, 603–4; Douglas Cassel, ‘Corporate Initiatives: A Second Human Rights Revolution?’ (1996) 19 *Fordham International Law Journal* 1963, 1963–4; Scott Greathead, ‘The Multinational and the “New Stakeholder”’: Examining the Business Case for Human Rights’ (2002) 35 *Vanderbilt Journal of Transnational Law* 719, 721.

² Michael Addo, ‘The Corporation as a Victim of Human Rights Violations’ in Michael Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations* (1999) 187, 187–196. See also *Autronic AG v Switzerland* (1990) 178 Eur Court HR (ser A) 4; 12 EHRR 485.

³ See, eg, Steven Ratner, ‘Corporations and Human Rights: A Theory of Legal Responsibility’ (2001) 111 *Yale Law Journal* 443; Barbara Frey, ‘The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights’ (1997) 6 *Minnesota Journal of Global Trade* 153; Beth Stephens, ‘The Amoral Profit: Transnational Corporations and Human Rights’ (2002) 20 *Berkeley Journal of International Law* 45.

of multinational corporations ('MNCs'),⁴ simply because their organisational structure, modus operandi and sheer influence⁵ make them practically immune to conventional methods of regulation.⁶

The international community is still struggling to establish an effective regulatory regime of legal responsibility.⁷ Of the different models considered and attempted, one is that of regulation of MNCs by the 'home state'⁸ — as distinct from the 'host state'⁹ — through a law with extraterritorial operation.¹⁰ The presentation of the Corporate Code of Conduct Act ('US Bill') by Cynthia McKinney in the US House of Representatives on 7 June 2000 marked an attempt to adopt the home state model of extraterritorial regulation.¹¹ This was soon followed by the introduction of a similar Corporate Code of Conduct Bill

⁴ Despite the difference in terminology of MNCs and transnational corporations ('TNCs'), MNCs has been used throughout this article to encompass both entities. See generally David Korten, *When Corporations Rule the World* (1995) 125; Peter Muchlinski, *Multinational Enterprises and the Law* (1995) 12–15; Cynthia Wallace, *Legal Control of the Multinational Enterprise: National Regulatory Techniques and the Prospects for International Controls* (1982) 10–12.

⁵ A 2003 survey shows that of the 100 largest economic entities in the world, 72 are MNCs. Paul Sheehan, 'A Rising Force in Capital and Culture', *Sydney Morning Herald* (Sydney, Australia) 3–4 January 2004, 21. See also Erin Elizabeth Macek, 'Scratching the Corporate Back: Why Corporations Have No Incentive to Define Human Rights' (2002) 11 *Minnesota Journal of Global Trade* 101, 103–4; Sarah Anderson and John Cavanagh, *Top 200: The Rise of Global Corporate Power* (2000) Global Policy Forum <<http://www.globalpolicy.org/soecon/tncs/top200.htm>> at 1 May 2004.

⁶ Stephens, above n 3, 54 argues:

A review of the history and focus of the transnational enterprise demonstrates that the multilayered, multinational division of labour and responsibility of the modern corporation, its single-minded focus on economic gain, and its economic and political power all render multinational corporations a difficult regulatory target.

⁷ This article takes 'effective regulatory regime' to mean a framework which can pre-empt human rights violations, as well as offer timely and adequate remedies to victims in cases of violation.

⁸ The 'home state' of an MNC is the state in which the parent corporation of the concerned group is incorporated. See Phillip Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (1993) 169 for a definition of 'home country extraterritoriality' as the 'extension of the scope of the home country's laws to foreign subsidiaries that are subject as well to the laws of the host country under which they are incorporated or have their *siège*' (emphasis in original).

⁹ The 'host state' of an MNC is the state in which the activities of an MNC occur. Blumberg defines 'host country extraterritoriality' as the situation by which a 'host country applying enterprise principles to a domestic subsidiary of a foreign-based multinational group asserts jurisdiction over, or imposes liability upon, the foreign parent or affiliates of the group': *Ibid* (emphasis in original).

¹⁰ The operation is 'extraterritorial' in that the state exercises its jurisdiction to prescribe and enforce standards over corporate activities which occur outside its territory. In one sense, extraterritoriality reflects the failure of international law to adjust to the growing integration and interdependence of nation states and the issues concerning them. See Deborah Senz and Hilary Charlesworth, 'Building Blocks: Australia's Response to Foreign Extraterritorial Legislation' (2001) 2 *Melbourne Journal of International Law* 69, 71; Blumberg, *The Multinational Challenge to Corporation Law*, above n 8, 179. See also Claudio Grossman and Daniel Bradlow, 'Are We Being Propelled towards a People-Centered Transnational Legal Order?' (1994) 9 *American University Journal of International Law and Policy* 1.

¹¹ Corporate Code of Conduct Act, HR 4596, 106th Cong., § 3 (2000).

2000 (Cth) ('Australian Bill') in the Australian Senate on 6 September 2000.¹² Whereas the fate of the US Bill remains undecided after being referred to the House Subcommittee on International Operations and Human Rights,¹³ the Australian Bill has been found by the Parliamentary Joint Statutory Committee on Corporations and Securities ('Australian Parliamentary Committee') to be impracticable, unworkable, unnecessary and unwarranted.¹⁴ Thus it seems, at least at this stage, that both attempts to institute a home state model of extraterritorial regulation to make MNCs accountable for human rights violations have failed. Even more unfortunate, however, is that useful lessons do not appear to have been learned from such failures.

This article seeks to analyse and compare the provisions as well as the omissions of both Bills, and to examine the problems faced by an extraterritorial regulatory model.¹⁵ As no parliamentary report is available vis-à-vis the US Bill, the parliamentary report on the Australian Bill will be examined as being reflective of general apprehensions that may exist towards the home state model of extraterritorial regulation. This examination aims to test the desirability and viability of a home state model of extraterritorial regulation as compared to a host state model of extraterritorial regulation. This article argues that the failure of the two Bills is instructive in at least three respects. Firstly, it is possible in principle to defend a state's right to impose and enforce internationally recognised human rights norms on the overseas activities of corporations incorporated within its territory, as well as the overseas subsidiaries of such corporations, by enacting an extraterritorial law. Secondly, the failure of the two Bills to become law should not be interpreted as failure of the proposed extraterritorial model itself; if resort is to be had to any state-centric model of extraterritorial regulation, it is the home state model of regulation which possesses greater potential as compared to the host state model. Thirdly, no variation of the municipal model of regulation of MNCs — whether territorial or extraterritorial — is self-sufficient due to this model's inherent limitations, and therefore any municipal regulatory regime should be supplemented by an international regulatory mechanism.

This article expands and elaborates on this threefold argument. Part II explores four dilemmas concerning the regulation of MNCs' human rights violative activities: a brief analysis of these dilemmas is necessary as the defence of a home state model of extraterritorial regulation of MNCs should not be seen

¹² Corporate Code of Conduct Bill 2000 (Cth). The Dutch Government has also considered similar legislation: See Halina Ward, 'Securing Transnational Corporate Accountability through National Courts: Implications and Policy Options' (2001) 24 *Hastings International and Comparative Law Review* 451, 469.

¹³ Referred to the House Subcommittee on International Operations and Human Rights on 17 July 2000. See Center for Human Rights and Humanitarian Law, Washington College of Law, *Human Rights Brief* (2004) <<http://www.wcl.american.edu/hrbrief/08/1watch.cfm>> at 1 May 2004.

¹⁴ Parliamentary Joint Statutory Committee on Corporations and Securities, Parliament of Australia, *Report on the Corporate Code of Conduct Bill 2000* (2001) [3.3], [4.44]–[4.46].

¹⁵ Lu highlights a number of the shortcomings of direct extraterritorial regulation: Lu, above n 1, 609–10.

in isolation, but rather as part of an ‘integrated theory of legal responsibility’.¹⁶ Part III develops the justification for extraterritorial regulation and then evaluates the efficacy of home state extraterritoriality vis-à-vis host state extraterritoriality. The provisions and omissions of the two Bills are compared in Part IV. Part V then scrutinises the objections to home state regulation of MNCs raised by the Australian Parliamentary Committee in its report on the Australian Bill. Part VI of this article presents the final facet of the threefold argument, being that an international regime for the regulation of MNCs is imperative if the limitations associated with any regime of municipal regulation, whether territorial or extraterritorial, are to be addressed. Finally, Part VII summarises the three lessons that should be learned from the failure of the two Bills to become a part of the law of their respective nations.

Admittedly, it could be suggested that these two Bills are not the parents of a home state model of extraterritorial regulation of MNCs’ human rights violative activities, since several prior legislative or executive mechanisms exist where this model was invoked.¹⁷ Although the existence of these initiatives cannot be denied, the two Bills remain unique in their scope. Not only do both disclose express extraterritorial legislative intent, but both also deal with human rights generally, as opposed to merely with the specificities of a single issue or country. For these reasons, the two Bills firmly establish for the first time a home state based framework for extraterritorial regulation of MNCs for human rights violations.

II DILEMMAS OF REGULATION: *WHO* SHOULD REGULATE *WHAT, WHERE* AND *HOW*?

Before exploring the desirability and viability of a home state model of extraterritorial regulation of MNCs — as represented in the two Bills — the dilemmas concerning regulation of corporate activities per se will briefly be examined. Arguably, there exist at least four regulative dilemmas.¹⁸ Firstly, *who* should regulate the activities of MNCs? Should it be states, international organisations, civil society organs such as the media, non-government organisations (‘NGOs’) or public-spirited lawyers and academics? Or should it be all of the above? Moreover, should the regulation be carried out by internal or external sources, or a combination of the two? Secondly, *what* are the exact areas or activities which are to be regulated? This question is important because MNCs’ executives and human rights activists, for example, may not concur on the precise parameters of regulation. Thirdly, *where* should the regulation take

¹⁶ The theory is *integrated* in that it emphasises the need for employing different modes of implementation (incentives, coercion and market mechanisms) and sanction (civil, criminal and social) at various levels of operation (institutional, national, regional and international), in order to develop an effective as well as efficient regulatory mechanism. The theory is *legal* in that it asserts the need for legally binding obligations and enforcement mechanisms.

¹⁷ See, eg, *Comprehensive Anti-Apartheid Act of 1986*, 22 USC § 5001 (2002); *Tariff Act of 1930*, 19 USC §§ 1304–1681 (2002). See also Lu, above n 1, 609; Frey, above n 3, 168–73.

¹⁸ This article assumes that the regulation of MNCs is necessary. Therefore, it does not address the ‘dilemmas’ surrounding the basic necessity of regulation, for example those that question the need to regulate the activities of MNCs when such regulation may result in a loss of profit. See also Macek, above n 5, 104–5.

place? Should it be at an institutional, municipal, regional or international level? Fourthly, *how* should regulation be enforced, that is, how should those MNCs that fail to respond to regulatory initiatives be dealt with?

The regulation of MNCs could flow from both ‘internal’ and ‘external’ sources.¹⁹ Though internal or self-regulation would seem to be the most desirable and most efficient way of ensuring that MNCs respect human rights,²⁰ it has proved to be an insufficient mechanism of regulation²¹ and hence the search for an efficacious method of external regulation continues. This is not to suggest however, that self-regulation — through voluntary codes of conduct — should no longer be pursued or promoted;²² it simply means that external regulation should supplement and support internal regulation. It is also increasingly apparent that external regulation flowing solely from states will be inadequate by virtue of the simple fact that MNCs operate beyond state boundaries, and may even act in connivance with states.²³ This explains why there has been more emphasis in recent times on regulatory initiatives at regional and international

¹⁹ ‘Internal’ regulation refers to the various corporate codes of conduct initiated by potential violators themselves, individually or collectively. ‘External’ regulation, on the other hand, flows from those organs of society that aim to protect human rights. See Macek, above n 5, 119, who refers both to consumer pressure which provides ‘an incentive for a corporation to voluntarily adopt a code of conduct’, and to examples of various external institutions which may be positioned to protect human rights, such as ‘the market itself, domestic legislatures, adjudicatory bodies, or international rule-making bodies’.

²⁰ See also Anne-Marie Slaughter, ‘A Liberal Theory of International Law’ (2000) *American Society of International Law: Proceedings of the 94th Annual Meeting* 240; Sol Picciotto, ‘Rights, Responsibilities and Regulation of International Business’ (2003) 42 *Columbia Journal of Transnational Law* 131. Slaughter, above this note, 244, notes that ‘states can allow private actors to develop their own codes of conduct and then incorporate those codes into official regulation, thereby purportedly ensuring the efficiency of the rules that are adopted’. Picciotto, above this note, 144–50, highlights the advantages of corporate codes and argues that ‘the sharp distinction between voluntary codes and binding law is inaccurate, undesirable, and unnecessary’.

²¹ See International Council on Human Rights Policy, *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies* (2002) 7–8; Stephens, above n 3, 66; Mark Baker, ‘Tightening the Toothless Vise: Codes of Conduct and the American Multinational Enterprise’ (2001) 20 *Wisconsin International Law Journal* 89, 137–40. See generally Kimberly Granatino, ‘Corporate Responsibility Now: Profit at the Expense of Human Rights with Exemption from Liability?’ (1999) 23 *Suffolk Transnational Law Review* 191; Ryan Toftoy, ‘Now Playing: Corporate Codes of Conduct in the Global Theater. Is Nike Just Doing It?’ (1998) 15 *Arizona Journal of International and Comparative Law* 905; Mark Baker, ‘Private Codes of Corporate Conduct: Should the Fox Guard the Henhouse?’ (1993) 24 *University of Miami Inter-American Law Review* 399.

²² See above n 20 and accompanying text.

²³ See Surya Deva, ‘Human Rights Violations by Multinational Corporations and International Law: Where from Here?’ (2003) 19 *Connecticut Journal of International Law* 1, 4–5, 48–9. Ratner, above n 3, 461, argues that ‘a system in which the state is the sole target of international legal obligations may not be sufficient to protect human rights’. Macek, above n 5, 103, also observes that ‘leaving the protection of human rights solely to individual governments is inadequate’.

levels,²⁴ and also why NGOs and the media have become increasingly involved in such initiatives. In light of the above, it is asserted that conjoint regulatory efforts on the part of diverse interest groups are required to ensure that MNCs respect their human rights obligations.

With respect to regulation, there is significant divergence in the expectations of MNCs and human rights activists, particularly pertaining to regulation by states acting individually or collectively at an international level. MNCs expect all-pervasive deregulation,²⁵ and plead for regulation only in those areas where deregulation hampers their capacity to maximise profit. Human rights activists, on the other hand, demand extensive regulation in matters affecting public interest, including human rights. They believe that only states can provide some form of level playing field to the otherwise unequal bargaining positions of MNCs and the general public, whether they be employees, consumers or otherwise.²⁶ This divergence acquires new relevance with the suggestion that states — or at least their sovereignty — are withering in an era of globalisation.²⁷

²⁴ At the World Economic Forum in Davos on 31 January 1999, United Nations Secretary-General Kofi Annan proposed an international initiative entitled the 'Global Compact'. See *The Global Compact*, United Nations Global Compact <<http://www.unglobalcompact.org/Portal/Default.asp>> at 1 May 2004. In 2000, both the Organisation for Economic Cooperation and Development and the International Labour Organization revised their guidelines for MNCs. See ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, 41 ILM 186 (2002); OECD, *The OECD Declaration and Decisions on International Investment and Multinational Enterprises: Basic Texts* (2000) <[http://www.oalis.oecd.org/olis/2000doc.nsf/c5ce8ffa41835d64c125685d005300b0/c125692700623b74c1256991003b5147/\\$FILE/00085743.PDF](http://www.oalis.oecd.org/olis/2000doc.nsf/c5ce8ffa41835d64c125685d005300b0/c125692700623b74c1256991003b5147/$FILE/00085743.PDF)> at 1 May 2004. On 13 August 2003, the UN Sub-Commission on the Promotion and Protection of Human Rights approved the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN ESCOR, 55th sess, Agenda Item 4, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (13 August 2003), and transmitted them to the Commission on Human Rights for consideration and adoption — together with comments received on them from governments, UN bodies, NGOs and other interested parties — at its annual meeting in March–April 2005: *Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN ESCOR, 55th sess, 52, UN Doc 2003/16,E/CN.4/Sub.2/2003/L.11 (13 August 2003).

²⁵ See, eg, Murray Dobbin, *The Myth of the Good Corporate Citizen: Democracy under the Rule of Big Business* (1998) 2. Dobbin paints the following picture:

corporations want more — more cuts to their taxes, more cuts to UI [unemployment insurance] and pension premiums, ever greater cuts to social programs, more repeals of environmental laws and protections for workers' health and safety, and more and better ways to squeeze more from their employees.

²⁶ Slaughter, above n 20, 244–5 (emphasis added), observes that:

state law is likely to be needed to regulate conflicts between different private actors in transnational society. *When one side or the other — corporations or NGOs — perceives a major power imbalance, it is likely to appeal for state intervention ... many corporations on the receiving end of NGO-organized consumer boycotts are likely to seek some kind of government redress.*

²⁷ See, eg, Grossman and Bradlow, above n 10; Sherif Seid, *Global Regulation of Foreign Direct Investment* (2002) 102–4; Dobbin, above n 25, 107–11. See generally Korten, above n 4. See also Noreena Hertz, *The Silent Takeover: Global Capitalism and the Death of Democracy* (2001); Cf Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization* (1996) 30, and generally 1–30. Sassen argues that a *loss* of sovereignty is not occurring, but merely a reconstitution of it: 'it seems to me that rather than sovereignty eroding as a consequence of globalization and supranational organizations, it is being transformed'.

It remains highly unlikely that the opinions of MNCs and human rights activists will converge in the near future on the issue of what should be regulated (or deregulated) by states, or that the debate regarding the erosion of states' sovereignty will be promptly resolved. Nonetheless, the initiation of a dialogue between business interests and human rights interests may be helpful in resolving some of the conflicts to the satisfaction of both parties.²⁸ Furthermore, there is no theoretical rationale for assuming that states, acting either at a municipal level or internationally, cannot or should not regulate those activities of MNCs which threaten to violate human rights. It is indeed critical that states are constantly reminded of their human rights obligations so as to prevent these obligations from ceasing to exist with respect to MNCs and their human rights violative activities.²⁹

Broadly speaking, there are four levels at which both internal and external regulation could be initiated: institutional,³⁰ municipal,³¹ regional,³² and international.³³ Alternatively, if the focus was solely on regulation involving states, the categorisation could be recast as consisting of unilateral, bilateral, multilateral and international regulation. Unilateral regulation, unlike the other three methods, does not contemplate an agreement or understanding with any

²⁸ See, eg, the land use agreement reached between Hammersley Iron Pty Ltd and the Gumala Aboriginal Corporation: Chris Burnup, 'Sharing the Benefits: Lessons in Regard to Mining and Native Title' in Stuart Rees and Shelley Wright (eds), *Human Rights, Corporate Responsibility: A Dialogue* (2000) 89, 89–101. See also Stuart Rees and Shelley Wright, 'Human Rights and Business Controversies' in Rees and Wright, above this note, 3, 5–8, 19–21.

²⁹ Upendra Baxi, *The Future of Human Rights* (2002) 136–7 (emphasis in original). Baxi questions:

for whom, and when the 'nation-state' has 'ended' ... [t]he so-called borderless world remains cruelly re-bordered for the violated victims ... Myanmar is thus borderless for Unocal, though not for Aung San Su Kyi and the thousands of Burmese people she symbolizes. India is borderless for Union Carbide and Monsanto but not for the mass disaster violated Indian humanity. Ogoniland is borderless for Shell but becomes the graveyard of human rights and justice for a Ken Saro Wiwa, and the people's movement martyred alongside him.

³⁰ A number of image conscious corporations have adopted internal codes of conduct. See, eg, Nike, *Code of Conduct* (1991) <<http://www.nike.com/nikebiz/nikebiz.jhtml?page=25&cat=code>> at 1 May 2004; Unocal, *Code of Conduct* (2004) <http://www.unocal.com/ucl_code_of_conduct/> at 1 May 2004. There also exist codes pertaining to specific issues or industries rather than being limited to a single corporation. See, eg, Social Accountability International, *SA8000* (1996) <<http://www.cepa.org/SA8000/SA8000.htm>> at 1 May 2004; Clean Clothes Campaign, *Code of Labour Practices for the Apparel Industry Including Sportswear* (1998) <<http://www.cleanclothes.org/codes/ccccode.htm>> at 1 May 2004.

³¹ Besides the use of the *Alien Tort Claims Act*, 28 USC § 1350 (2003) in US courts, liability is also located under tortious principles in some jurisdictions. See Jordan Paust, 'Human Rights Responsibilities of Private Corporations' (2002) 35 *Vanderbilt Journal of Transnational Law* 801, 802–10; Danwood Chirwa, 'Obligations of Non-State Actors in Relation to Economic, Social and Cultural Rights under the South African Constitution' (2003) 7 *Mediterranean Journal for Human Rights* 29, 50–4.

³² See, eg, Commission of the European Communities, *Promoting a European Framework for Corporate Social Responsibility (Green Paper)* (18 July 2001) <http://europa.eu.int/eur-lex/en/com/gpr/2001/com2001_0366en01.pdf> at 1 May 2004.

³³ See above n 24 and accompanying text.

other state.³⁴ Under the unilateral model, which can further be divided into home state regulation and host state regulation, a state could impose and enforce *internationally recognised* human rights standards on MNCs.³⁵ The two Bills under scrutiny in this article are examples of the home state model of unilateral regulation. The bilateral model involves an agreement between two states to impose and enforce human rights obligations upon MNCs and their subsidiaries operating from the concerned countries.³⁶ If such an agreement is reached amongst various states, it could be described as a multilateral, and possibly also regional, model of regulation. The international model, on the other hand, envisages an international body assuming responsibility for establishing and enforcing human rights obligations on MNCs. This article argues that regulatory initiatives at both municipal and international levels will be most conducive to the development of an effective and efficient mechanism for controlling human rights violations by MNCs.³⁷

The question of how the regulation of MNCs should be supported then arises. As it is extremely likely that some MNCs will not be willing to comply with human rights obligations, the question of how to regulate the behaviour of these deviant MNCs is an important one. Many measures are currently at various stages of development including: government incentives,³⁸ civil liability, consumer/investor pressure,³⁹ naming and shaming and criminal sanctions.⁴⁰ It is reiterated that multiple enforcement techniques should be employed to make the regulation both effective and cost-efficient. Although debating the relative efficacy of different modes of enforcement serves a purpose, the simultaneous invocation of varied coercive and incentive based techniques does not hinder the

³⁴ It should be noted that the 'unilateral' model, as it is used here, would not allow a state to impose and enforce any human rights obligations it wishes. As the exact contours of certain human rights differ from country to country, a state cannot impose its country-specific parameters on corporations operating in other states. Doing so would be extremely controversial, and arguably indefensible.

³⁵ See Universal Declaration of Human Rights, GA Res 217A(III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/RES/217A(III) (1948); *International Covenant on Civil and Political Rights*, opened for signature 26 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR') and related international instruments for an indication of internationally recognised human rights standards. See Oscar Schachter, *International Law in Theory and Practice* (1991) 331–3 for discussion regarding the 'internationalisation of human rights' and 'internationally recognised human rights'. See also Louis Henkin, *The Rights of Man Today* (1979) 27–30 regarding the emergence of universal acceptance of human rights in the second half of the 20th century.

³⁶ See Macek, above n 5, 103.

³⁷ It may be noted that a liberal theory of international law perceives national and international spheres as 'inextricably linked' rather than separate. See Slaughter, above n 20, 241.

³⁸ For example, as part of its 'Profiting from Cleaner Production Industry Partnership Program', the New South Wales Environment Protection Authority has offered A\$5 million over the next two years to help industry implement cleaner production. See *Funding for Cleaner Production: Industry Partnership Program*, New South Wales Department of Environment and Conservation, (2003) <http://www.epa.nsw.gov.au/cleaner_production/ippintro.htm> at 1 May 2004.

³⁹ Macek examines the extent to which consumers could influence corporations to adopt and follow codes of conduct: Macek, above n 5, 110–18.

⁴⁰ See Deva, 'Human Rights Violations by Multinational Corporations and International Law', above n 23, 43–6.

regulatory process, and it cannot be asserted that either of these methods is completely ineffectual in bringing compliance.

This article's response to all four of the regulatory dilemmas discussed above is based upon an 'integrated theory of legal responsibility'.⁴¹ This theory envisages the integration of different variables at all stages of the dilemmas, with the aim of maximising efficacy and efficiency. This integration is essential for removing the gaps and establishing an effective and efficient regulatory mechanism. It should be noted that the establishment of such a mechanism will also protect the interests of MNCs, by reducing the risks of multiple proceedings and unpredictable outcomes which exist under the current regimes of accountability.

III EXTRATERRITORIAL REGULATION OF MNCs: TWO POSSIBILITIES AND TWO ATTEMPTS

As mentioned above, state-based extraterritorial regulation of MNCs offers two possibilities: home state regulation and host state regulation.⁴² The two Bills, both of which were proposed in 2000, represented the home state model of regulation. There is no comparable Bill or Act in existence which seeks to institutionalise the host model of regulation in order to impose liability on MNCs for human rights violations.⁴³ This situation can most likely be attributed to the fact that extraterritorial regulation by a host state is not only more complex, but also more susceptible to failure than home state models.⁴⁴ This fact is examined in more detail below. Firstly however, a brief description of the response of international law to extraterritorial legislative initiatives shall be provided.

A Basis of Extraterritorial Regulation of MNCs

The principles of international law have traditionally been built upon the assumption of the equal and exclusive sovereignty of states over their respective

⁴¹ See above n 16 and accompanying text.

⁴² Blumberg, *The Multinational Challenge to Corporation Law*, above n 8, 169 states: 'Extraterritoriality falls into two basic classes, depending on whether enterprise principles are being applied to a parent corporation or to a subsidiary'. See also Stephens, above n 3, 82.

⁴³ It is possible to argue that the *Alien Tort Claims Act*, 28 USC § 1350 (2003) is a fusion of both home state regulation and host state regulation; for example one could sue in the US courts, the French subsidiary of a US-based MNC as well as the US subsidiary of a French-based MNC. See generally Robert McCorquodale, 'Human Rights and Global Business' in Stephen Bottomley and David Kinley (eds), *Commercial Law and Human Rights* (2002) 89, 102–3. However, it appears that the US Government is not in support of the *Alien Tort Claims Act* being used to make US corporations liable for human rights violations abroad. For example, on 8 May 2003 the US Justice Department, in an amicus curiae brief submitted in the *Unocal* case before the Court of Appeal for the Ninth Circuit, questioned the very basis of judicial invocation of the *Alien Tort Claims Act* against US-based MNCs as a means of redressing human rights violations abroad: Brief for the United States of America as Amicus Curiae, *Doe v Unocal*, 963 F Supp 880, (9th Cir, 8 May 2003) (Nos 00–56603, 00–56628). The brief is available at <<http://www.hrw.org/press/2003/05/doj050803.pdf>> at 1 May 2004.

⁴⁴ Blumberg, *The Multinational Challenge to Corporation Law*, above n 8, 177 observes that, 'of the two areas of extraterritoriality ... the more prominent is the imposition of legal mandates by the home country of the group's parent corporation upon its foreign subsidiaries'.

territories,⁴⁵ and ‘the exercise of jurisdiction by a state over activities occurring outside its borders’ has been ‘seen to impinge upon the sovereignty of the country in which the conduct took place’.⁴⁶ Thus, as a matter of policy, extraterritoriality is permitted only on limited grounds,⁴⁷ and even then several states have resorted to ‘blocking’ legislation.⁴⁸ Extraterritorial regulation, either by home or host state, is not an ideal regulatory framework as it raises several complicated questions related not only to conflict of jurisdiction and law, but also to national interests and priorities. Despite this, states have enacted laws with extraterritorial operation in several areas.⁴⁹

Although extraterritorial regulation of MNCs is problematic, states are still able, in principle, to regulate the conduct of MNCs in order to ensure the respect and promotion of human rights. In fact, a number of relatively strong justifications exist to support the extraterritorial regulation of the human rights obligations of MNCs, at least four of which deserve consideration. Firstly, the extraterritorial model does not encompass regulation of all MNCs, rather only those possessing a certain nexus with the concerned state. The two Bills presently under consideration were aimed at regulating the overseas activities of the ‘corporate hands’⁵⁰ of their nation’s corporations.⁵¹ The enterprise theory, as distinct from the entity theory, could provide the required jurisprudential underpinnings to such an ‘extended reach’ of a national law.⁵² Picciotto states that:

the law need not be blind to business reality. Obligations that extend to the worldwide activities of the firm can be placed on the parent company and its

⁴⁵ See Ian Brownlie, *Principles of Public International Law* (5th ed, 1998) 289. See generally Grossman and Bradlow, above n 10.

⁴⁶ Senz and Charlesworth, above n 10, 70. See also Jamie Cassels, *The Uncertain Promise of Law: Lessons from Bhopal* (1993) 273.

⁴⁷ The permitted parameters of extraterritoriality are discussed by Blumberg, *The Multinational Challenge to Corporation Law*, above n 8, 171–7. See also Muchlinski, above n 4, 123–6.

⁴⁸ See Senz and Charlesworth, above n 10, 78–9; Muchlinski, above n 4, 126.

⁴⁹ See, eg, *Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996*, 22 USC §§ 6021–6091 (2002); *Crimes (Child Sex Tourism) Amendment Act 1994* (Cth); *Environment Protection and Biodiversity Conservation Act 1999* (Cth); *Criminal Code Amendment (Offences Against Australians) Act 2002* (Cth); *International Criminal Court Act 2002* (Cth).

⁵⁰ ‘Corporate hands’ is taken to include subsidiaries, affiliate sister concerns, contractors, joint ventures and other business partners of similar identity.

⁵¹ See Part IV(A) of this article.

⁵² See Blumberg, *The Multinational Challenge to Corporation Law*, above n 8, 168–97. See also Phillip Blumberg, ‘Asserting Human Rights against Multinational Corporations under United States Law: Conceptual and Procedural Problems’ (2002) 50 *American Journal of Comparative Law* 493; Phillip Blumberg, ‘The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporation Liabilities’ (1996) 28 *Connecticut Law Review* 295; David Aronofsky, ‘Piercing the Transnational Corporate Veil: Trends, Developments, and the Need for Widespread Adoption of Enterprise Analysis’ (1985) 10 *North Carolina Journal of International Law and Commercial Regulation* 31; Stephens, above n 3, 88–90. Muchlinski, above n 4, 124, also contemplates a number of situations, based on the nationality principle, where the home state of an MNC could regulate the activities of an overseas unit.

directors, to the extent that these activities are under the parent company's de facto control.⁵³

Secondly, since an extraterritorial law imposing human rights obligations on MNCs seeks to implement an international rather than a national policy,⁵⁴ it has a stronger foundation than extraterritorial laws which seek to promote, for example, national foreign policies.⁵⁵ Moreover, the realisation of human rights is no longer considered an internal or municipal matter. One might question how the many instances of state intervention — in blatant disregard of municipal sovereignty — in internal affairs of other states to uphold human rights, can be distinguished from states acting extraterritorially to redress human rights violations abroad by corporations incorporated in their own territory.⁵⁶ In fact, one must ask whether the second situation is not less interventionist than the first.

Thirdly, it can be argued that the extraterritorial regulation of MNCs is actually far less extraterritorial in nature than first impressions indicate. In essence, such regulation affects only the parent corporation incorporated within the territory but operating abroad through its corporate hands.⁵⁷ Such a law would promote compliance with best human rights practices internationally⁵⁸ and limit the tendency toward double standards. It would send a message to MNCs: 'do in "Rome" as you would do at "home"'.⁵⁹

⁵³ Picciotto, above n 20, 148.

⁵⁴ The promotion of human rights could be regarded as an international policy, despite the fact that some states have either not ratified all the core international conventions, or not implemented the mandates undertaken. See Schachter, above n 35, 335–45. See also McCorquodale, above n 43, 101–2.

⁵⁵ See McCorquodale, above n 43, 100.

⁵⁶ For example, the North Atlantic Treaty Organisation intervention in Kosovo and the US intervention in Iraq. Gibney and Emerick argue that '[i]f extraterritoriality translates into violations of sovereignty, then sovereignty is already infringed with near impunity': Mark Gibney and R David Emerick, 'The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards' (1996) 10 *Temple International and Comparative Law Journal* 123, 144. Gibney and Emerick, above this note, 127, further assert:

Rather than hiding behind the idea that the extraterritorial application of U.S. law violates the sovereignty of other countries — a principle that is violated with impunity in many areas when it serves U.S. purposes to do so — we take the position that neither the U.S. government nor U.S. multinational corporations should engage in practices overseas that would be illegal if carried out in this country.

⁵⁷ Andreas Lowenfeld, *International Litigation and the Quest for Reasonableness: Essays in Private International Law* (1996) 106. Lowenfeld argues:

Regulation by one state in respect of the activity of a corporate parent, subsidiary, or other member of a multinational group is often not in the first instance extraterritorial, because enforcement is typically directed to the member of the group established in the territory of the regulating state.

However, he cautions that:

the effect of national regulation of a multinational enterprise may well be multinational — i.e., extraterritorial, and states are required to consider the potential or actual effect on other states of their exercise of regulatory jurisdiction.

⁵⁸ Picciotto, above n 20, 149.

⁵⁹ Gibney and Emerick, above n 56, 145 (emphasis added), refer to this tendency:

Fourthly, it is beyond dispute that states, both home and host, are under an obligation in international law — and also under their respective constitutions in the majority of cases — to respect and promote human rights.⁶⁰ This includes ensuring that all entities within their territory or control comply with human rights standards.⁶¹ However, in order to fulfil this obligation effectively, a law with at least some degree of extraterritorial operation is necessary.⁶² In the absence of such a law, MNCs could easily bypass the mandate of municipal law by transferring or relocating their business operations offshore where human rights obligations are less stringent.⁶³ Given this, states will simply be acting in pursuance of their obligations if they enact an extraterritorial law to reach the overseas activities of corporations incorporated within their territory. In doing so, home states have the potential to extend a helping hand to host states that may be willing, but are unable to enforce human rights mandates against corporations operating within their territory.⁶⁴ Seen in this context, extraterritoriality becomes a matter of cooperation amongst states rather than a source of conflict and friction.

On the basis of the above analysis, one can say that, although not ideal, an extraterritorial regulatory model of MNCs' accountability for human rights

There is one set of standards — legal and moral — in domestic operations; but a completely different and much lower set of standards when these same entities are operating abroad, particularly in much poorer countries. *This dichotomy is wrong, and the governments in the industrialized world have the means of preventing it: by applying extraterritorially many of the domestic and international standards that are adopted and enforced at home.*

See generally Surya Deva, 'Human Rights Standards and Multinational Corporations: The Dilemma of "Home" and "Rome"' (2003) 7 *Mediterranean Journal for Human Rights* 69.

⁶⁰ *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, as contained in *Report of the International Law Commission on the Work of its 53rd Session*, UN Doc A/55/10 (2000) ('*Draft Articles*'). See generally James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002).

⁶¹ Courts have held that the failure of a state to prevent human rights violations by private persons, including corporations, within its territory amounts to a violation of the state's mandate under the international conventions. See, eg, *Guerra v Italy* (1998) I Eur Court HR 210; 26 EHRR 357. See also David Kinley, 'Human Rights as Legally Binding or Merely Relevant?' in Stephen Bottomley and David Kinley (eds), *Commercial Law and Human Rights* (2002) 25, 38–42; Ratner, above n 3, 470; Chirwa, above n 31, 43–9.

⁶² Jonathan Turley, "'When in Rome": Multinational Misconduct and the Presumption against Extraterritoriality' (1990) 84 *Northwestern University Law Review* 598, 664. Turley, referring to the attitude shown by US courts interpreting the presumption against extraterritoriality in 'nonmarket statutes', concludes:

The presumption against extraterritoriality stands as a judicially maintained barrier to worker and environmental protections, behind which American multinationals can essentially turn back the clock on corporate responsibility.

⁶³ *Ibid* 643–4. See also Grossman and Bradlow, above n 10, 8.

⁶⁴ Such inability might arise due to various factors, for example, the phenomenon of the 'race to the bottom' which arises from the competition between states for investment. Macek, above n 5, 104, refers to the situation by which

[i]n order to attract investment, many nations, particularly developing ones, will acquiesce to a corporation's needs. For example, many of these nations will establish a corporate-friendly legal environment. As a result, because of their size and power, TNCs have the potential to influence a country's social and economic policies.

violations is defensible academically. It is, however, likely that despite this defence, few states will show the political will to enact such laws and establish the necessary legal framework.⁶⁵ One explanation for this could be that the 'political will' for an extraterritorial regime will vary with the subject matter:⁶⁶ the likelihood of extraterritorial regulatory regimes relating to human rights being instituted is far less than those pertaining to areas such as national security, taxation and trade.⁶⁷ It is also likely that MNCs and/or their representative bodies will resist any further moves by states to institute extraterritorial regulatory regimes.

B *Home State versus Host State Regulation: A Balance Sheet*

If no theoretical barrier exists to prevent states from instituting an extraterritorial regulatory regime for MNCs' human rights responsibilities, then which model — home or host state — might prove more viable? It appears that if resort is to be had to any state-centric model of extraterritorial regulation, the home state model possesses greater potential than the host state model.⁶⁸ Firstly, the bargaining power of host states — a majority of which are developing and in competition with each other for the investment from MNCs — is significantly less than that of home states throughout the entry and operation of MNCs.⁶⁹ As host states look for even more investment-driven development, they are willing to barter their 'power' of regulation in exchange for short-term economic gains.⁷⁰

⁶⁵ See, eg. Stephens, above n 3, 83, who suggests that the 'regulation by the United States is often suspect, given the well-grounded suspicion that the US only intervenes when such regulation is in the self-interest of the US economy'.

⁶⁶ See, eg. Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423, 464, who refer to the 'shifting attitude towards international legal norms' that has seen the executive branch of the Australian Government become 'sceptical about the applicability of international human rights law to Australia, yet ... prepared to embrace its commitments under international trade law'.

⁶⁷ Turley, above n 62, 601, 638–9 demonstrates how US courts, in interpreting national legislation, have developed and applied fundamentally different tests to judge the extraterritoriality of 'market statutes' (for example, antitrust and securities laws) as opposed to 'nonmarket statutes' (for example, employment and environmental protections), and have shown a bias in favour of market interests. See also Gibney and Emerick, above n 56, 140–2

⁶⁸ See McCorquodale, above n 43, 99; Stephens, above n 3, 83. See also Sarah Joseph, 'Taming the Leviathans: Multinational Enterprises and Human Rights' (1999) 46 *Netherlands International Law Review* 169, 176–8.

⁶⁹ Stephens, above n 3, 82–3 states that:

the unequal division of economic power within the global economy makes such regulation difficult for developing countries. Unequal bargaining power makes it difficult if not impossible for host countries to enforce restrictions on corporate activity.

⁷⁰ See Kwamena Acquah, *International Regulation of Transnational Corporations: The New Reality* (1986) 66; Ratner, above n 3, 462; McCorquodale, above n 43, 89, 97–8. See also Stephens, above n 3, 57–8; Muchlinski, above n 4, 104–7.

This ‘race to the bottom’ often compels these states to further lower their human rights standards and regulatory rules.⁷¹

Secondly, attaining effective jurisdiction over corporations based overseas is fundamental to the success of any model of extraterritorial regulation. It is easier to reach a subsidiary through the parent rather than vice versa, as it is the parent corporation which exercises control over its subsidiaries and/or affiliate sister concerns.⁷² The home state model would therefore prove far stronger in ensuring that overseas corporations submit to the jurisdiction of legal process.

Thirdly, given that a developed legal system and the availability of resources are prerequisites for the operation of extraterritorial regulation, home states, which generally possess these preconditions,⁷³ are better placed to implement the extraterritorial model.⁷⁴ Conversely, in most cases the host states of large MNCs are developing countries — both economically and in terms of legal systems and institutions — and are thus less likely to challenge the will of developed countries outside their territorial boundaries.

Fourthly, chances of conflict arising out of extraterritoriality are greatly reduced if a home state model is adopted, because the economic, social and legal structures of home states provide that human rights standards are defined at a higher level in these states than they are in host states.⁷⁵

Thus, the above brief analysis indicates that the home state model of regulation is undoubtedly more viable than the host state model.⁷⁶ However, one should not lose sight of the inherent limitations faced by any municipal system, whether territorial or extraterritorial, in regulating the activities of MNCs. Some of these limitations, and the consequent need for an international framework, are highlighted in Part VI of this article.

⁷¹ See Macek, above n 5, 104; Clare Duffield, ‘Multinational Corporations and Workers’ Rights’ in Stuart Rees and Shelley Wright (eds), *Human Rights, Corporate Responsibility: A Dialogue* (2000), 194; Mahmood Monshipouri, Claude Welch Jr and Evan Kennedy, ‘Multinational Corporations and the Ethics of Global Responsibility: Problems and Possibilities’ (2003) 25 *Human Rights Quarterly* 965, 973; Ariadne Sacharoff, ‘Multinationals in Host Countries: Can They Be Held Liable under the *Alien Tort Claims Act* for Human Rights Violations?’ (1998) 23 *Brooklyn Journal of International Law* 927, 931–2.

⁷² See, eg, *In Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F Supp 842 (SDNY, 1986); affirmed as modified *In Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984*, 809 F 2d 195 (2nd Cir, 1987) (*‘Bhopal Case’*). In the *Bhopal Case*, it is difficult to conceive how an Indian law with extraterritorial operation could have ensured jurisdiction over the US-based Union Carbide Corporation (‘UCC’) through its subsidiary, Union Carbide India Ltd, located in India. It must however be noted that UCC and its officials are still successfully avoiding the criminal proceedings pending against them in Bhopal, despite a condition imposed by Keenan J to submit to the jurisdiction of Indian courts.

⁷³ See Duffield, above n 71, 193. See also Joseph, above n 68, 177.

⁷⁴ Commenting on the litigation in *Lubbe v Cape plc* [2000] 1 WLR 1545, Stephens, above n 3, 85, (emphasis added), in fact goes one step further and argues that

citizens of the developing world have a *right* to bring their claims in the more highly developed legal systems where the corporate defendants are based and where those defendants’ assets are available for satisfaction of an eventual judgment.

⁷⁵ See Joseph, above n 68, 178.

⁷⁶ McCorquodale, above n 43, 105, is optimistic that ‘despite the practical and legal difficulties involved, it is clear that in the next few years, there will be an increase in regulation of TNCs by home states ... in relation to human rights matters’.

IV TWO (FAILED) ATTEMPTS: COMPARING THE PROVISIONS AND OMISSIONS OF THE US AND AUSTRALIAN BILLS

This section compares and contrasts the provisions and omissions of the US and Australian Bills in order to ascertain the intended scope of these legislative measures. The comparison is conducted with respect to the following five particulars: targeted objects, covered subject matters, intended beneficiaries, proposed implementation and enforcement measures, and omissions. The omissions are examined in consideration of the argument that they promised to seriously hamper the viability of these two Bills, should they have become law in their respective countries.

A *Targeted Objects*

Both Bills had an extraterritorial operation in that they intended to apply to certain US or Australian nationals and corporations operating abroad. The US Bill applied to a US ‘national’⁷⁷ that ‘employs more than 20 persons in a foreign country, either directly or through subsidiaries, subcontractors, affiliates, joint ventures, partners, or licensees’.⁷⁸ The Australian Bill, on the other hand, covered a ‘trading or financial corporation formed within the limits of the Commonwealth’ if it ‘employs or engages the services of 100 or more persons in a country other than Australia’, and extended to the holding, subsidiary and sister concerns of such a corporation.⁷⁹

The US Bill was broader in scope than the Australian Bill and its target group was more encompassing. Firstly, its scope was not limited to corporations or partnerships but also included citizens doing business abroad in any other conventional way. Secondly, the US Bill required a far lower employee threshold than the Australian Bill. Also, being alive to the working traits of modern business, the US Bill proposed that persons employed through subsidiaries, affiliates or (sub)contractors would be counted in determining whether or not a particular ‘national’ reached the prescribed employee threshold.⁸⁰ The Australian Bill, although it used the phrase ‘engages’ — which could be taken to include persons hired through independent contractors — did not establish whether persons employed or engaged by a corporation’s subsidiaries would be taken into account in calculating the proposed figure of 100 employees. This ambiguity provided a potential escape route for Australian corporations operating abroad.

B *Subject Matters Covered*

The US Bill proposed a code of conduct which covered a wide range of human rights obligations. Corporations were obliged, for example, to: provide a safe and healthy workplace; provide fair employment — including prohibition of the use of child and forced labour, and the right to collective bargaining; promote

⁷⁷ ‘National’ is defined in the Corporate Code of Conduct Act, HR 4596, 106th Cong, § 3(c)(5) (2000) as: ‘a citizen of the United States’ or ‘a corporation, partnership, or other business association that is organized under the laws of the United States’.

⁷⁸ Corporate Code of Conduct Act, HR 4596, 106th Cong, § 3(a) (2000).

⁷⁹ Corporate Code of Conduct Bill 2000 (Cth) s 4.

⁸⁰ Corporate Code of Conduct Act, HR 4596, 106th Cong, § 3(a) (2000).

good governance and business practices; comply with worker rights and labour standards; respect minimum international human rights standards and uphold responsible environmental protection and environmental practices.⁸¹ In many cases the obligations were prescribed in the Bill itself,⁸² while in other instances they were to be deduced by reference to the international conventions referred to therein.⁸³

The Australian Bill, in brief, mandated that the covered corporations comply with international standards relating to environment, health and safety, and employment and human rights.⁸⁴ In addition, it imposed a duty to: observe the taxation laws of the country of operation; observe the consumer health and safety standards and laws of both Australia and the host state; and desist from indulging in unfair or anti-competitive trade practices.⁸⁵ In order to make the above standards operational, the Bill defined certain key terms, such as: ‘anti-competitive agreement’, ‘basic needs’, ‘ecosystem’, ‘environment’, ‘forced or compulsory labour’, ‘living wage’, and ‘minimum international labour standards’.⁸⁶

Comparing the above related provisions of the two Bills, one can draw a number of inferences regarding the relative strengths and weaknesses of each. Firstly, as compared to the US Bill, the human rights standards envisaged by the Australian Bill were relatively narrow in scope — in effect they were confined to non-discrimination provisions.⁸⁷ Secondly, although both Bills made provisions for corporations adhering to health and safety standards, the Australian standards were both better defined and broader in scope than those under the US Bill. Unlike the US Bill, which merely imposed obligations for a ‘safe and healthy workplace’,⁸⁸ the Australian Bill attempted to lay down specific health and safety obligations.⁸⁹ Further, the scope of the Australian Bill was more expansive

⁸¹ Corporate Code of Conduct Act, HR 4596, 106th Cong, § 3(b) (2000).

⁸² See, eg, the obligation to ‘[p]rohibit mandatory overtime work by employees under the age of 18’: Corporate Code of Conduct Act, HR 4596, 106th Cong, § 3(b)(2)(B) (2000); see also §§ 3(b)(2)(A), 3(b)(2)(C).

⁸³ See, eg, the obligations relating to compliance with ‘internationally recognized worker rights and core labor standards’ and ‘minimum international human rights standards’: Corporate Code of Conduct Act, HR 4596, 106th Cong, §§ 3(b)(4)(B), (b)(6) (2000). However, it is interesting to note that seemingly certain international human rights conventions — even if vital — were not referred to merely because they were not ratified by the US Government. For example, Corporate Code of Conduct Act, HR 4596, 106th Cong, § 3(c)(3) (2000), which defines ‘minimum international human rights standards’, does not make a reference to *ICESCR*, above n 35; nor to the *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

⁸⁴ Corporate Code of Conduct Bill 2000 (Cth) ss 7–10.

⁸⁵ Corporate Code of Conduct Bill 2000 (Cth) ss 11–13.

⁸⁶ Corporate Code of Conduct Bill 2000 (Cth) s 6. It seems that the Australian Bill almost adopted verbatim the definitions of ‘basic needs’ and ‘minimum international labour standards’ from the Corporate Code of Conduct Act, HR 4596, 106th Cong, §§ 3(c)(1), 3(c)(4) (2000).

⁸⁷ Corporate Code of Conduct Bill 2000 (Cth) s 10.

⁸⁸ Corporate Code of Conduct Act, HR 4596, 106th Cong, § 3(b)(1) (2000).

⁸⁹ For example, it was laid down that an overseas corporation must not require its employees to work for more than ‘five consecutive hours without a break of at least twenty minutes’, nor to work more than ‘twelve hours each day’: Corporate Code of Conduct Bill 2000 (Cth) ss 8(2)(c), 8(2)(d).

than that of the US Bill in that the health and safety obligations under the Australian Bill were not limited to the 'workplace' alone but also ensured that corporate activities did not harm the health and safety of consumers and society as a whole.⁹⁰ Lastly, the Australian Bill was more sophisticated than the US Bill in imposing environmental standards, as it advocated the adoption of a 'precautionary principle',⁹¹ which pre-empted potential environmental degradation in certain situations.

C *Intended Beneficiaries*

The two Bills differed significantly in terms of the intended beneficiaries of the proposed regulatory measures. Given that the US Bill aimed to implement a code of conduct 'with respect to the employment of those persons',⁹² employees were conceived of as the primary beneficiaries of the Bill. However, it should not be ignored that some provisions of the US Bill did extend to persons other than employees,⁹³ and that an investigation for non-compliance could be initiated on the petition of any person or even *suo motu*.⁹⁴ The Australian Bill, on the other hand, did not limit the scope of its beneficiaries to employees. It not only made specific provisions for the benefits of consumers and general public,⁹⁵ but also conferred *locus standi* on any aggrieved person or NGO.⁹⁶ Therefore, the Australian Bill reflected a much more pragmatic approach, both in its range of intended beneficiaries and in its involvement of civil society organs.

D *Measures for Reporting, Implementation and Enforcement*

The two Bills also differed in terms of the techniques invoked to implement and enforce the prescribed obligations. The US Bill primarily relied upon the use of incentives, such as preference in the award of contracts and foreign trade and investment assistance, to induce corporations to comply with the obligations imposed by the Bill.⁹⁷ These incentives would have been suspended or withdrawn if a corporation was found not to be in compliance with the code of conduct.⁹⁸ In addition to incentives, the US Bill also provided that a person or corporation in violation of any obligation would be liable for damages.⁹⁹

The Australian Bill, on the other hand, proposed that all corporations within the ambit of the Bill submit an annual compliance report to the Australian

⁹⁰ Corporate Code of Conduct Bill 2000 (Cth) s 12.

⁹¹ Corporate Code of Conduct Bill 2000 (Cth) s 7(2)(g). 'Precautionary principle' is defined in s 6 to mean 'that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage'.

⁹² Corporate Code of Conduct Act, HR 4596, 106th Cong, Preamble § 3(a) (2000).

⁹³ Corporate Code of Conduct Act, HR 4596, 106th Cong, §§ 3(b)(3), 3(b)(5) (2000).

⁹⁴ Corporate Code of Conduct Act, HR 4596, 106th Cong, §§ (5)(b)(1), 3(c) (2000).

⁹⁵ Corporate Code of Conduct Bill 2000 (Cth) ss 7, 11–13.

⁹⁶ Corporate Code of Conduct Bill 2000 (Cth) s 17.

⁹⁷ Corporate Code of Conduct Act, HR 4596, 106th Cong, § 4 (2000).

⁹⁸ Corporate Code of Conduct Act, HR 4596, 106th Cong, §§ 5–6 (2000).

⁹⁹ Corporate Code of Conduct Act, HR 4596, 106th Cong, § 8 (2000).

Securities and Investment Commission ('ASIC').¹⁰⁰ Moreover, a corporation and/or its executive officers who contravened the obligations imposed by the Bill could be liable for fines or civil penalties, as well as for compensation in a civil action initiated by an aggrieved person.¹⁰¹ A further notable feature of the Australian Bill was its recognition of a *pro bono publico* action, potentially by an association or group of persons 'whose principal objects include protection of the public interest'.¹⁰²

Lack of practical and effective implementation and enforcement techniques is the most problematic aspect of the global search for corporate accountability for human rights violations. Therefore, it was imperative that any new initiative — in this case home state extraterritorial regulation — offered an improvement on the existing enforcement strategies in order to justify its existence. It is however doubtful, on the basis of the above analysis, whether either of the Bills — particularly the US Bill — fulfilled what was both expected and essential. These legislative initiatives could undeniably have adopted more robust enforcement measures, including provisions for criminal sanctions, and 'naming and shaming'.

E Omissions

After comparing the provisions of the two Bills, it is worthwhile considering certain omissions which may have seriously hampered the viability of the Bills should they have become law. Firstly, the Bills lacked an adequate construction of core human rights standards in terms of their applicability to MNCs. Instead of making mere reference to the state-focused international human rights treaties, it is important that the norms for MNCs are actually deduced from such treaties, as effective enforcement is dependant on the presence of guidable standards.¹⁰³ By and large both Bills failed in this objective. Secondly, both Bills were silent on the question of the liability, if any, of a parent corporation for the conduct of its subsidiaries¹⁰⁴ — the absence of which makes it extremely difficult to exercise jurisdiction over overseas corporations.

Thirdly, the two Bills did not give adequate attention to two other crucial components of extraterritoriality:¹⁰⁵ adjudication of disputes, and enforcement of orders and judgments.¹⁰⁶ Prescriptive extraterritorial jurisdiction does not

¹⁰⁰ Corporate Code of Conduct Bill 2000 (Cth) s 14. By virtue of s 15, ASIC was in turn supposed to prepare an annual compliance report and forward it to Parliament.

¹⁰¹ Corporate Code of Conduct Bill 2000 (Cth) ss 16–17. The court is also empowered to grant an injunction to prevent any further loss or damage: Corporate Code of Conduct Bill 2000 (Cth) s 17(3)(a).

¹⁰² Corporate Code of Conduct Bill 2000 (Cth) s 17(6).

¹⁰³ See Macek, above n 5, 124.

¹⁰⁴ See generally Ward, above n 12, 469–70; Blumberg, 'Asserting Human Rights against Multinational Corporations under United States Law', above n 52, 495–501.

¹⁰⁵ Muchlinski, above n 4, 126: 'A state's legal [extraterritorial] jurisdiction can be divided between the jurisdiction to prescribe laws, to adjudicate disputes and to enforce legal orders and judgments'.

¹⁰⁶ Both the Bills however, made provisions conferring jurisdiction on the respective municipal courts to hear cases dealing with breaches of obligations: Corporate Code of Conduct Act, HR 4596, 106th Cong, § 8(b)(2) (2000); Corporate Code of Conduct Bill 2000 (Cth) s 17.

guarantee jurisdiction either of adjudication or enforcement,¹⁰⁷ and in the absence of these the effectiveness of the prescriptive jurisdiction is jeopardised.¹⁰⁸ Therefore, it was necessary that the Bills provided a basis for exercising extraterritorial jurisdiction over related overseas corporations regarding the adjudication of disputes and the enforcement of judgments.¹⁰⁹ Fourthly, an issue closely related to extraterritorial adjudication and enforcement, is the doctrine of *forum non conveniens*. Despite the fact that MNCs have successfully raised the plea of *forum non conveniens* to delay or avoid liability in the majority of cases filed to date for human rights violations,¹¹⁰ both Bills failed to address this issue. Although the Bills conferred jurisdiction on the courts of respective countries to hear actions of aggrieved persons,¹¹¹ there were no guidelines for how the courts should respond to the abuse of the doctrine of *forum non conveniens*.¹¹² Fifthly, neither of the Bills contained a provision for criminal sanction, which had the potential to be relatively effective in certain cases of delinquent corporations and/or their officers.¹¹³ Finally, both Bills failed to utilise the important role that consumers,

¹⁰⁷ See Lowenfeld, above n 57, 107–8; Turley, above n 62, 635–6.

¹⁰⁸ Muchlinski, above n 4, 144, points out:

Where a legal system has accepted jurisdiction to prescribe laws concerning the activities of non-resident units of MNEs [multinational enterprises], the effectiveness of such a policy must ultimately depend on its ability to enforce any judgments made against the non-resident.

¹⁰⁹ See Blumberg, *The Multinational Challenge to Corporation Law*, above n 8, 197–9.

¹¹⁰ Cassels, above n 46, 144, observes that the ‘doctrine shields multinationals from liability for injuries abroad’. See also *Dow Chemical Company and Shell Oil Company v Domingo Castro Alfaro*, 786 SW 2d 674, 680 (Tex, 1990). In that case, brought by the farm workers of Costa Rica against Shell Oil and Dow Chemicals, Doggett J, in rejecting the plea of *forum non conveniens*, observed that ‘what is really involved is not convenience but connivance to avoid corporate accountability’. See generally David Robertson, ‘*Forum Non Conveniens* in America and England: “A Rather Fantastic Fiction”’ (1987) 103 *Law Quarterly Review* 398; Upendra Baxi (ed), *Inconvenient Forum and Convenient Catastrophe: The Bhopal Case* (1986) 1–30; Jacqueline Duval-Major, ‘One-Way Ticket Home: The Federal Doctrine of *Forum Non Conveniens* and the International Plaintiff’ (1992) 77 *Cornell Law Review* 650.

¹¹¹ Corporate Code of Conduct Act, HR 4596, 106th Cong, § 8(b)(2) (2000); Corporate Code of Conduct Bill 2000 (Cth) s 17.

¹¹² A more positive judicial attitude is visible in some recent cases. See, eg, *Connelly v RTZ Corp plc* [1997] 4 All ER 335; *Lubbe v Cape plc* [2000] 1 WLR 1545. However, it remains unclear whether this represents a uniform policy shift throughout the world. See generally Peter Prince, ‘Bhopal, Bougainville and Ok Tedi: Why Australia’s *Forum Non Conveniens* Approach is Better’ (1998) 47 *International and Comparative Law Quarterly* 573; Malcolm Rogge, ‘Towards Transnational Corporate Accountability in the Global Economy: Challenging the Doctrine of *Forum Non Conveniens* in *In Re: Union Carbide, Alfaro, Sequihua and Aguinda*’ (2001) 36 *Texas International Law Journal* 299; Winston Anderson, ‘*Forum Non Conveniens* Checkmated? — The Emergence of Retaliatory Legislation’ (2001) 10 *Journal of Transnational Law and Policy* 183.

¹¹³ See generally Stephens, above n 3, 64–7; Brent Fisse and John Braithwaite, ‘The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability’ (1988) 11 *Sydney Law Review* 468; Vikramaditya Khanna, ‘Corporate Liability Standards: When Should Corporations Be Held Criminally Liable?’ (2000) 37 *American Criminal Law Review* 1239.

investors, NGOs and the media could play in ensuring MNCs comply with their human rights obligations under the Bills.¹¹⁴

It is evident from the above comparison of the two Bills, that despite being based upon broadly similar themes, there were significant differences between the two. In spite of the wider spectrum of targeted objects and human rights obligations of the US Bill, the Australian Bill was more promising than the US Bill as an experiment with the home state model of extraterritorial regulation. It should be noted, however, that the Australian Bill did have the advantage of the US Bill's existence, which may have contributed to its improvement to some extent.

V ENCOUNTERING THE APPREHENSIONS AND OBJECTIONS RAISED BY THE AUSTRALIAN PARLIAMENTARY COMMITTEE

Any academic defence of the model put forth by the two Bills must take cognisance of, and respond to, the possible apprehensions or objections to the viability of such a model. The report of the Australian Parliamentary Committee is a good source of such objections and apprehensions.¹¹⁵ As no parliamentary report is available with respect to the US Bill, and accepting that both Bills are broadly similar in their intent and scope, the report of the Australian Parliamentary Committee will be taken as representative of the possible objections and apprehensions against a home state model of extraterritorial regulation of MNCs. In brief, the Australian Parliamentary Committee concluded that the Australian Bill was unnecessary and unwarranted, in addition to being impracticable and unworkable.¹¹⁶ The inherent weaknesses in the Australian Parliamentary Committee's findings will now be exposed to closer scrutiny.

A *Unnecessary and Unwarranted*

The Australian Parliamentary Committee contends that the Australian Bill is unnecessary and unwarranted because the incidents of Australian companies' inappropriate behaviour are so 'few in number' that there is no 'systemic failure'.¹¹⁷

It is difficult to agree with the suggestion that 'the Parliament should legislate *only* where there is a demonstrated systemic failure in the *status quo*'.¹¹⁸ Conversely put, the argument is that the Parliament should not act unless significant Australian corporations indulge in human rights violations. Besides the fact that the legislature does not always wait, or need to wait, for systemic failures before legislating, the suggestion compromises a basic postulate of human rights law: if the realisation of human rights protection is considered an important pursuit, every single violation of human rights should be taken

¹¹⁴ See McCorquodale, above n 43, 110–13; Greathead, above n 1, 725–7; Eric Engle, 'Corporate Social Responsibility (CSR): Market-Based Remedies for International Human Rights Violations?' (2004) 40 *Willamette Law Review* 103, 109–11. See Part V(B)(1) of this article.

¹¹⁵ Parliamentary Joint Statutory Committee on Corporations and Securities, above n 14.

¹¹⁶ *Ibid* [3.81], [4.5], [4.53].

¹¹⁷ *Ibid* [3.3], [4.44]–[4.46].

¹¹⁸ *Ibid* [4.45] (emphasis added).

seriously and redressed, rather than waiting for systemic violations to occur. The Parliament should, in fact, anticipate and pre-empt human rights violations by enacting law, rather than be seen by society — including possible violators — as acquiescing to breaches of human rights. This is besides the fact that there is now substantial documentation of Australian corporations indulging in human rights violations abroad.¹¹⁹

B *Impracticable*

The Australian Parliamentary Committee further contends that the Australian Bill is impracticable because it: (i) puts Australian companies at a disadvantage;¹²⁰ (ii) imposes Australian standards on other countries thus asserting ‘moral ascendancy’;¹²¹ and (iii) is discriminatory as it allows small companies to violate human rights by excluding them from the operation of the Bill.¹²²

1 *Business Disadvantage*

It is probable that Australian corporations would be required to outlay capital in order to comply with human rights standards, but it is not necessarily a corollary that such expenditure would put those companies at a competitive disadvantage vis-à-vis non-Australian companies which may not respect human rights obligations.¹²³ It is increasingly accepted that few companies can afford to openly disregard¹²⁴ human rights in view of socially conscious decisions made by consumers and investors,¹²⁵ and the pressure emanating from NGOs and the

¹¹⁹ See, eg, Stuart Kirsch, ‘Mining and Environmental Human Rights in Papua New Guinea’ in Jedrzej George Frynas and Scott Pegg (eds), *Transnational Corporations and Human Rights* (2003); Oxfam Community Aid Abroad, *Mining Ombudsman Annual Report 2001–2002* (2002) <<http://www.caa.org.au/campaigns/mining/ombudsman/2002/>> at 1 May 2004. See also Mineral Policy Institute, *Globalise Corporate Regulation* <<http://www.mpi.org.au/campaigns/corps.html>> at 1 May 2004; Geoff Evans, ‘Where Giants May Tread, Rumbblings Will Follow’, *Sydney Morning Herald* (Sydney, Australia), 2 November 2001.

¹²⁰ Parliamentary Joint Statutory Committee on Corporations and Securities, above n 14, [3.4], [3.137], [3.155].

¹²¹ *Ibid* [3.7]–[3.8].

¹²² *Ibid* [3.27]–[3.28], [4.11].

¹²³ The argument of ‘competitive disadvantage’ is based upon the ‘prisoners’ dilemma’, that is, when it is unclear how other competitors are going to respond to human rights obligations, it is advantageous to disregard human rights. See Deva, ‘Human Rights Standards and Multinational Corporations’, above n 59, 82–3.

¹²⁴ Aseem Prakash, *Greening the Firm: The Politics of Corporate Environmentalism* (2000). Prakash examines the theoretical foundations upon which firms adopt ‘beyond-compliance’ environmental policies.

¹²⁵ See Lu, above n 1, 607, 613, 624; Scott Pegg, ‘An Emerging Market for the New Millennium: Transnational Corporations and Human Rights’ in Frynas and Pegg, above n 119. But see Macek, above n 5, 110–15, who evaluates the efficacy of consumer pressure.

media.¹²⁶ Compliance with human rights is now taken more as an investment for future goodwill rather than as a cost of running business.¹²⁷ Any short-term economic disadvantage, if incurred, would be far outweighed by the long-term gains generated by doing not just business but *just* business.¹²⁸ In fact, it is possible that, in the near future, compliance with human rights obligations will not only be treated as an integral part of business risk management, but also as an important determinant of competitive market advantage.¹²⁹

2 Australian Standards

It is misleading to suggest that the Australian Bill imposed Australian standards on foreign countries. As noted but not approved in the report of the Australian Parliamentary Committee itself, the obligations contained in the Bill were deduced with reference to internationally agreed and recognised human rights standards.¹³⁰ The human rights standards set out in the Bill were either beyond local fluctuations, or contained an element of subjectivity which allowed them to be moulded to the specific needs of the concerned state. For example, it is difficult to see how an obligation to ‘take all reasonable measures to promote the health and safety of its workers’,¹³¹ or an obligation not to ‘use or obtain the benefit of any forced or compulsory labour’¹³² can be classified as an imposition of Australian standards. Similarly, an obligation that ‘an overseas corporation

¹²⁶ See Monshipouri, Welch and Kennedy, above n 71, 986–9; Cassel, above n 1, 1976; Pegg, above n 125, 23–4; OECD, *Foreign Direct Investment, Development and Corporate Responsibility* (1999), 14–15. See also Frieda De Koninck, Social Alert, ‘How Can We Influence the Practices of Transnational Actors? The “Clean Clothes” Campaign: How Can We Fight for Economic and Social Rights When Faced by Transnational Actors?’ in *Economic, Social and Cultural Rights: A Challenge for Peace and Development in a Global World* (2002) 58 <<http://www.paxchristi.net/PDF/DE06E02.pdf>> at 1 May 2004.

¹²⁷ Simon Williams, ‘How Principles Benefit the Bottom Line: The Experience of the Co-Operative Bank’ in Addo, above n 2, 63–8. See generally John Harrison et al, *Ethics for Australian Business* (2001) 1–9. See also Corporate Social Responsibility Europe, *CSR Facts and Figures* <http://www.csreurope.org/aboutus/CSRfactsandfigures_page397.aspx> at 1 May 2004.

¹²⁸ Lawrence Mitchell, *Corporate Irresponsibility: America’s Newest Export* (2001). Mitchell argues that the primary cause of the irresponsibility of American corporations is their drive to maximise short-term profits, while keeping the long-term objectives out of sight.

¹²⁹ Australian Government: Department of the Environment and Heritage, *Corporate Sustainability – An Investor Perspective: The Mays Report* (2003) 25 (emphasis added). The *Mays Report* concludes: ‘A number of companies undertook sustainability initiatives despite the absence of a sustainability policy. *Sustainability in these cases proved to be good business practice by minimising risk exposure or maximising exploitation of opportunities*’. See generally Tom Tauli, ‘Ethics and Due Diligence’ (2003) 11(3) *The Corporate Governance Advisor* 19; David Grayson and Adrian Hodges, *Everybody’s Business: Managing Risks and Opportunities in Today’s Global Society* (2001). Cf Joshua Margolis and James Walsh, *People and Profits? The Search for a Link between a Company’s Social and Financial Performances* (2001), which suggests that the academic research indicating a positive relationship exists between social performance and financial performance must be treated with caution.

¹³⁰ Parliamentary Joint Statutory Committee on Corporations and Securities, above n 14, [3.68]–[3.72].

¹³¹ Corporate Code of Conduct Bill 2000 (Cth) s 8(1).

¹³² Corporate Code of Conduct Bill 2000 (Cth) s 9(1). ‘Forced or compulsory’ labour is defined by s 6, not in an Australia-specific sense but as understood generally under international law.

must, as a minimum, pay all its workers a living wage¹³³ was not a requirement for the payment of Australian wages in other countries. Rather, the Australian Bill laid down only standards widely held throughout the international community. The Bill was nothing more than a national enforcement of international standards. It simply mandated that MNCs with a connection to Australia should observe international human rights standards whether operating in Australia or abroad — whether at ‘home’ or in ‘Rome’.¹³⁴

3 *Discriminatory*

It is doubtful that the Bill could be characterised as discriminatory merely because it sought to impose and enforce human rights standards only on certain corporations, namely those employing 100 or more persons. Obviously, all corporations, large or small, national or multinational, should ideally observe human rights standards. However, it is an accepted legislative device for the ultimate policy objective to be achieved incrementally, starting with the most pressing area. Therefore, in view of potential monitoring and enforcement difficulties, it was perfectly legitimate for Parliament to prioritise regulation of larger corporations as the immediate focus of legislation.

C *Unworkable*

Finally, the Australian Parliamentary Committee contends that the Australian Bill is unworkable because it: (i) has an excessively wide scope, such as regulation of foreign holding companies;¹³⁵ (ii) proposes undefined and generic standards;¹³⁶ (iii) creates a situation of conflict and friction because of extraterritoriality;¹³⁷ (iv) does not overcome the problems posed by conflict of laws, *lex loci delicti*, or the defence of an act of state;¹³⁸ and (v) relies upon defective reporting and enforcement mechanisms.¹³⁹

1 *Unworkably Wide Scope*

Admittedly, the Australian Bill’s apparent intention to regulate even foreign holding companies of Australian companies¹⁴⁰ was excessive in its scope. In fact, any such proposal would be outside the ambit of the home state model of regulation defended in this article. Bearing in mind that it is the holding company which controls the subsidiary and not vice versa, it is difficult to conceive how

¹³³ Corporate Code of Conduct Bill 2000 (Cth) s 9(3)(a). ‘Living wage’ is again defined under s 6 in a reasonably general way: ‘a wage sufficient to meet the basic needs of a family of two adults and three children in the country or region they are resident in’ (emphasis added). *Contra* Parliamentary Joint Statutory Committee on Corporations and Securities, above n 14, [3.117]–[3.121].

¹³⁴ See generally Deva, ‘Human Rights Standards and Multinational Corporations’, above n 59.

¹³⁵ Parliamentary Joint Statutory Committee on Corporations and Securities, above n 14, [3.15]–[3.18], [4.6], [4.14]–[4.17].

¹³⁶ *Ibid* [3.76], [3.82], [3.115], [3.121], [3.123], [4.20], [4.22]–[4.24].

¹³⁷ *Ibid* [3.40], [3.72], [3.103]–[3.105], [4.27]–[4.28], [4.47]–[4.51], [4.53].

¹³⁸ *Ibid* [3.99], [3.105]–[3.108].

¹³⁹ *Ibid* [4.8], [4.9], [4.37]–[4.39], [4.41]–[4.42].

¹⁴⁰ *Ibid* [3.17].

the host state of a subsidiary could exercise effective control over the parent situated in another jurisdiction.¹⁴¹

2 *Vague and Generic Standards*

In addition to being paradoxical,¹⁴² criticisms of the Australian Bill which assert its standards to be too ‘vague and generic’ are unduly harsh. In this context it is necessary to draw a distinction between ‘aspirational’ and ‘operational’ standards of human rights. The former signify general objectives whereas the latter translate those objectives into concrete *measurable units*. Given that the aim of the Australian Bill was to regulate corporate activities throughout the world, it was only feasible for it to lay down broad parameters or aspirational standards. The task of establishing the exact contours of these standards is left to either rule-making bodies or to the courts, based on particular factual situations.

3 *Extraterritoriality and the Fear of Friction and Conflict*

It is true that the possibilities of friction and conflict between foreign states and their laws are inherent in the operation of extraterritorial law. However, this has not previously prevented states — including the US and Australia — from enacting extraterritorial laws wherever considered necessary and within permissible parameters of international law.¹⁴³ In the present case, not only are there strong grounds for extraterritorial regulation of MNCs,¹⁴⁴ but also, the fears of conflict are more illusory than substantial in nature. The fact that the Australian Bill sought to impose international rather than Australian standards on the overseas activities of Australian corporations undoubtedly lessened the likelihood of conflict. The differences between countries and their laws are not necessarily problematic, nor do they necessarily result in conflict.¹⁴⁵ Moreover, conflicts ordinarily arise when the host state proscribes what the home state prescribes or vice versa. For example, few imaginable host states would mandate — though they may acquiesce to — a corporation employing child or forced labour, or manufacturing potentially harmful substances, or paying less than living wages, or polluting the environment — something which the home state’s extraterritorial law may prohibit.¹⁴⁶

¹⁴¹ See *In Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F Supp 842 (SDNY, 1986); affirmed as modified *In Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December, 1984*, 809 F 2d 195 (2nd Cir, 1987).

¹⁴² Parliamentary Joint Statutory Committee on Corporations and Securities, above n 14, [4.18]–[4.21], [3.76]–[3.77], appears to have held the view that the standards would have become ‘Australian’ if they had been specific, and that in their ‘vague and generic’ form they merely laid down general guidelines.

¹⁴³ See above n 49.

¹⁴⁴ In addition to the justification advanced in Part III(A) of this article, see McCorquodale, above n 43, 99–105.

¹⁴⁵ Gibney and Emerick, above n 56, 143–4.

¹⁴⁶ This is not to deny, however, that this ‘may provoke opposition from host states, arguing that western efforts to impose higher labour and environmental standards will cost them jobs’: Stephens, above n 3, 83. However, it is not beyond the capacity of western developed states, if they are genuinely committed to the promotion of human rights everywhere, to address such apprehensions.

4 *Disparaging Foreign States and Laws*

The issues associated with conflict of law have the potential to complicate legal proceedings in the home state. Again, however, one must consider that the courts in the home state will need to adjudicate — as far as possible — the question of human rights violations with reference to the principles of international law as they are conceptualised by the law of the home state, not as they are by the host state. Nor would the determination of such disputes necessarily require the court in the home state to pronounce on the adequacy of the law of the host state. Finally as far as the potential defence of an ‘act of state’ is concerned, it is not an all-pervasive or unqualified defence that could not be overcome.¹⁴⁷

Despite the possibilities for a conciliatory approach to be adopted by the courts of a home state, one should not underestimate the problematic issues inherent in any extraterritorial application of law. The difficulties relating to adjudication of disputes, and enforcement of orders and judgments may still arise and subsist. One approach that could be taken to mitigate the hardships posed by a conflict of laws is to invoke alternative enforcement techniques. It is worth examining the extent to which initiatives on the part of investors, consumers, NGOs, and the media could be institutionalised and integrated with judicial enforcement, to ensure that MNCs respect and promote human rights. Evidently, these measures — which have forced corporations to change their stance on human rights issues on many occasions in the past¹⁴⁸ — would avoid the problems faced by the home state judiciary.

5 *Reporting and Enforcement*

It is undeniable that the reporting and enforcement procedures contained in the Australian Bill required significant improvement if it was to be effective and efficient. For example, rather than requiring all covered corporations to lodge an annual compliance report with ASIC,¹⁴⁹ civil society organs could have been involved in monitoring the day-to-day conduct of corporations. Adequate use could also have been made of information technology,¹⁵⁰ for example by requiring corporations to publish an account of their compliance with human rights obligations imposed by the Australian Bill on the internet. Although the enforcement procedure proposed by the Australian Bill was both reasonable and workable, it could undoubtedly have been strengthened by incorporating certain

¹⁴⁷ In fact, a Federal District Court in the US rejected an argument that it should decline jurisdiction on the ground of conduct being an ‘act of state’: *Doe v Unocal*, 963 F Supp 880, 892–5 (Cal CD, 1997). See John Cheverie, ‘United States Court Finds Unocal May be Liable for Aiding and Abetting Human Rights Abuses in Burma’ (2002) 10(1) *Human Rights Brief* 6, 7.

¹⁴⁸ See John Anderson, ‘Respecting Human Rights: Multinational Corporations Strike Out’ (2000) 2 *University of Pennsylvania Journal of Labor and Employment Law* 463, 472–4.

¹⁴⁹ Corporate Code of Conduct Bill 2000 (Cth) s 14.

¹⁵⁰ Greathead, above n 1, 721: ‘actions of multinational corporations in remote places can be known and disseminated throughout the world in a matter of minutes or hours’. See also Pegg, above n 125, 10, referring to Spar’s account of the emerging ‘spotlight effect’: Debora Spar, ‘The Spotlight and the Bottom Line: How Multinationals Export Human Rights’ (1998) 77(2) *Foreign Affairs* 7, 7.

changes. For example, provision for criminal sentences for executive officers of delinquent corporations who made decisions resulting in human rights violations may have proved effective in certain cases.

VI WILL EXTRATERRITORIAL REGULATION ALONE PROVE TO BE ADEQUATE?

Although the extraterritorial regulation of MNCs by home states espoused by the US and Australian Bills has been defended throughout this article, this defence is partial and qualified. Extraterritoriality is not necessarily the most suitable or effective and efficient framework, but merely one of the options which could, and should, be tried by home states to tame the activities of MNCs. The evolution of extraterritorial regulation of MNCs should be viewed as part of a broader spectrum, or an integrated structure, which combines multiple regulatory models.

As the extraterritorial model of MNC regulation is essentially a state-centred method of regulation, it faces inherent limitations as a consequence of MNCs' nature, structure, influence and modus operandi. MNCs 'have long outgrown the legal structures that govern them, reaching a level of transnationality and economic power that exceeds domestic law's ability to impose basic human rights norms'.¹⁵¹ A number of the factors that contribute to the inadequacy of state-based extraterritorial regulation of MNCs are worthy of mention. First and foremost, the extraterritorial model of regulation of MNCs may in fact be a non-starter. Despite the optimism expressed by some scholars,¹⁵² it is improbable that a sizable number of states will establish an extraterritorial regulatory framework.¹⁵³ States might, for example: lack the political will,¹⁵⁴ give higher priority to the creation of an investment-friendly environment than to promotion of human rights,¹⁵⁵ succumb to pressure from powerful corporate interests,¹⁵⁶ or act in connivance with MNCs.¹⁵⁷

¹⁵¹ Stephens, above n 3, 54.

¹⁵² See, eg. McCorquodale, above n 43.

¹⁵³ Joseph, above n 68, 181 argues:

Home states are not currently liable in international human rights law for the delinquencies of their MNEs. Unfortunately, in the absence of such a legal obligation, home states have been reluctant to regulate the extraterritorial activities of their MNEs.

¹⁵⁴ Ibid 186.

¹⁵⁵ See above n 69–70 and accompanying text.

¹⁵⁶ Richard Peet, *Unholy Trinity: The IMF, World Bank and WTO* (2003) 15 (emphasis added), argues:

When big corporations pay millions of dollars to political parties in return for the promise of access to the president, they do so in the expectation that their donations will influence future governmental policy. *Money buys influence, especially on policy.*

See also the recent stand taken by the US government in regard to the *Alien Tort Claims Act*, 28 USC § 1350 (2003), above n 43.

¹⁵⁷ Deva, 'Human Rights Violations by Multinational Corporations and International Law', above n 23, 8–9. For a discussion of the actions of Enron in India, see Human Rights Watch, *The Enron Corporation: Corporate Complicity in Human Rights Violations* (1999) <<http://www.hrw.org/reports/1999/enron>> at 1 May 2004. See also Andrew Clapham and Scott Jerbi, 'Categories of Corporate Complicity in Human Rights Abuses' (2001) 24 *Hastings International and Comparative Law Review* 339, 341–9, which refers to three

Secondly, a municipal system will invariably face difficulties in reaching the *real* violator,¹⁵⁸ or the power centre of an MNC, the absence of which provides victims with only superficial justice.¹⁵⁹ The existing judicial approach to MNCs' resort to the doctrine of *forum non conveniens* and the two vintage principles of corporate law — separate personality and limited liability — also, by and large, help MNCs in evading the 'reach' of municipal regulatory regimes.¹⁶⁰ It is therefore necessary that activities of 'de-nationalised' or 'stateless' MNCs¹⁶¹ be regulated by a framework which is not solely tied to states or their sovereignty.

Thirdly, MNCs operate within a complex multi-layered web and can easily evade national regulatory regimes by relocating their resources or operations from one country to another.¹⁶² Fourthly, a number of states, especially developing states, do not possess the legal or economic capacity to tame MNCs' human rights violations.¹⁶³ Finally, 'states are notoriously inconsistent in their respect for and enforcement of international human rights',¹⁶⁴ and it would be unrealistic to expect that a majority of states would show any greater 'consistency' in enforcing human rights obligations on MNCs.

In view of the above brief account, it is not merely desirable, but essential, that an international regulatory regime supplements the municipal initiatives — extraterritorial or otherwise — aimed at enforcing the human rights

categories of corporate complicity: direct, indirect and silent. See generally Anita Ramasastry, 'Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations' (2002) 20 *Berkeley Journal of International Law* 91. The potential for states to act in connivance with MNCs is bound to continue. For example, in the context of India, allegations exist that the central government has not taken, and is not taking, the required steps to extradite Warren Anderson, former CEO of UCC from the US, against whom a criminal case is pending in a court in India for his alleged responsibility for the Bhopal gas tragedy.

¹⁵⁸ Some parent corporations deliberately conduct their most hazardous business through financially weaker subsidiaries and thus keep *distance by design* in order to exploit the principles of separate personality and limited liability. See Nina Mendelson, 'A Control-Based Approach to Shareholder Liability for Corporate Torts' (2002) 102 *Columbia Law Review* 1203, 1205, 1239–47, and the material cited in notes 179–82 therein. See also Al Ringleb and Steven Wiggins, 'Liability and Large-Scale, Long-Term Hazards' (1990) 98 *The Journal of Political Economy* 574.

¹⁵⁹ Stephens, above n 3, 88:

national law is ill-structured to regulate multinationals, whose operations, by definition, straddle many countries. Domestic judicial systems may be unable to obtain jurisdiction over the piece of the multinational that actually sets human rights policies and that has the resources to satisfy a judgment.

¹⁶⁰ See above nn 109, 110, 112 and accompanying text.

¹⁶¹ Stephens, above n 3, 59; see also Grossman and Bradlow, above n 10, 6–9.

¹⁶² Grossman and Bradlow, above n 10, 8. See also Ratner, above n 3, 463, who points out that:
 many of the largest [MNCs] have headquarters in one state, shareholders in others, and operations worldwide ... [MNCs] can also shift activities to states with fewer regulatory burdens, including human rights regulations.

¹⁶³ Ratner, above n 3, 461:

Corporations are powerful global actors that some states lack the resources or will to control. Other states may go as far as soliciting corporations to cooperate in impinging human rights. These realities make reliance on state duties inadequate.

¹⁶⁴ Cristina Baez et al, 'Multinational Enterprises and Human Rights' (1999–2000) 8 *University of Miami International and Comparative Law Review* 183, 220.

obligations of MNCs.¹⁶⁵ However, equally important is the requirement that such an international framework does not exclusively, or even excessively, rely upon states to enforce obligations,¹⁶⁶ for doing so would resurrect those very infirmities of the state-centric municipal model that an international mechanism seeks to remedy.

VII CONCLUSION: LESSONS TO BE LEARNED

Regulation of MNCs by the home state through a specific extraterritorial law is a relatively recent addition to the measures under consideration in the ongoing search for an effective and efficient model for MNCs' accountability for human rights violations. Taking the US and Australian Bills as reflective of this model, it has been argued that at least three lessons should be learned from the (already forgotten) failure of the Bills to become law. Firstly, it is legitimate and justified for a state to impose and enforce internationally recognised human rights obligations on the overseas activities of corporations incorporated within its territory, as well as the overseas subsidiaries of such corporations, by enacting an extraterritorial law. Secondly, it is the home states of MNCs which should 'bell the cat' by taking extraterritorial regulatory initiatives because, as compared to the host state model, the home state model of regulation has greater potential to be both viable and effective. Thirdly, it is imperative that the regulation of MNCs' activities not be exclusively linked and limited to a state-based municipal model of regulation which suffers from inherent limitations in controlling a *stateless* entity — an international regulatory mechanism should supplement municipal regulatory regimes.

It is hoped that by learning the above lessons, the international community might move toward developing a more consistent approach to extraterritoriality. It is also hoped that extraterritorial regulation of the overseas activities of corporations will come to be justified not only when such activities harm the interests of the home state, but also when they adversely affect the interests — local or international — of the host state.¹⁶⁷ Only this can transform the failure of the Bills and the resultant despair into progress.

¹⁶⁵ See Jonathan Charney, 'Transnational Corporations and Developing Public International Law' [1983] *Duke Law Journal* 748, 749.

¹⁶⁶ See Deva, 'Human Rights Violations by Multinational Corporations and International Law', above n 23, 48–9.

¹⁶⁷ See Gibney and Emerick, above n 56, 141–2.