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**Human Rights and Australian Extractive Industries in Australia and  
the Asia-Pacific Region**

A case study of Rio Tinto's adherence to the construct of corporate social  
responsibility

Thesis submitted by  
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in February 2013

for the degree of Master of Laws  
in the School of Law  
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## ACRONYMS

ACCSR	Australian Centre for Corporate Social Responsibility
ACFOA	Australian Council For Overseas Aid
ACTU	Australian Council of Trade Unions
AIRC	Australian Industrial Relations Commission
ALP	Australian Labor Party
ALRI	Australian Legal Resources International
AMPA	Argyle Management Plan Agreement
AMPLA	Australian Mining and Petroleum Law Association
APEC	Asia-Pacific Economic Cooperation
ATSIC	Aboriginal and Torres Strait Islander Commission
AWA	Australian Workplace Agreements
AWU	Australian Workers Union
BIG	Bougainville Interim Government
BOC	Bougainville Copper Limited
BRA	Bougainville Revolutionary Army
BTG	Bougainville Transitional Government
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CLC	Carpentaria Land Council
COW	Contract of Work
CRC	Convention on the Rights of the Child
CRA	Conzinc Rio Tinto Australia
CRAE	Conzinc Rio Tinto Exploration
CSD	United Nations Commission on Sustainable Development

CSR	Corporate Social Responsibility
CZ	Consolidated Zinc Corporation
DSTP	Deep Sea Tailings Placement
ECOSOC	Economic and Social Council (United Nations)
GATT	General Agreement on Tariffs and Trade
G9	Group of Nine (European States)
HREOC	Human Rights and Equal Opportunity Commission (Aus)
HRC	Human Rights Committee (Aus)
HRC	Human Rights Council (UN)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILUA	Indigenous Land Use Agreement
ICJ	International Court of Justice
IMF	International Monetary Fund
ISO	International Organization for Standardization
LETAG	Lower Emissions Technology Advisory Group
LKMTL	Lembaga Kesejahteraan Masyarakat Tambang dan Lingkungan (Council for People's Prosperity, Mining and Environment)
MA	Millennium Ecosystem Assessment
MRET	Mandatory Renewable Energy Target
NGO	Non Governmental Organization
OPIC	Overseas Private Investment Corporation
PJC	Australian Parliamentary Joint Committee on Corporate and Financial Services
PNG	Papua New Guinea
PNGDF	Papua New Guinea Defence Force

PR	Public Relations
PT KEM	Kelian Equatorial Mining
REDD	Reducing Emissions from Deforestation and Forest Degradation in Developing Countries
RTC	Rio Tinto Company
RTZ	Rio Tinto Zinc
SAM	Sustainable Asset Management
SRSG	Special Representative to the Secretary-General
TNC	Transnational Corporation
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCTC	United Nations Permanent Committee on Transnational Corporations
UNCTAD	United Nations Committee on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNOMB	United Nations Observer Mission to Bougainville
WAHLI	Wahana Lingkungan Hidup Indonesia (Indonesian Forum for the Environment)
WTO	World Trade Organization

HUMAN RIGHTS AND AUSTRALIAN EXTRACTIVE INDUSTRIES  
IN AUSTRALIA AND THE ASIA-PACIFIC REGION: A CASE  
STUDY OF RIO TINTO'S ADHERENCE TO THE CONSTRUCT OF  
CORPORATE SOCIAL RESPONSIBILITY.

## ABSTRACT

In the last two decades, the international community of public and private actors have embraced corporate social responsibility (CSR) as a means of corporate governance by which to mitigate business malfeasance. Resistance from transnational corporations and states has led the United Nations and other multi-lateral organisations like the OECD to promote CSR in lieu of enforcing binding international laws developed to protect human rights and the environment. While both international human rights (IHRL) human rights law and environmental law (IEL) has broad acceptance among most states, many of these states have a poor record of enforcing their obligations, particularly when international human rights and environmental obligations impede the operations of powerful transnational corporations within states' territory. Despite CSR measures, human rights violations and ecocide continue to characterise the operations of many TNCs in many states.

The emergence of neo-liberalism as dominant paradigm of governance in the international political economy since the 1980s has coincided with increased rhetoric about states' commitments to uphold human rights and environmental protection. States have similarly reduced enforcement of these duties. The hegemony of neoliberalism galvanised a counter-hegemonic movement from civil society to try to combat human rights abuses and environmental destruction by TNCs. Civil society demands through NGOs to corporate abuses pose a serious challenge to the neo-liberal market. States and inter-governmental organisations (IGOs) faced with ignoring these demands and losing legitimacy with civil society, or enforcing their statutory and international law duties against TNCs and risk losing their investment and support, found relief in CSR. CSR is a compromise construct that enunciates human rights and environmental protection norms but allows TNCs to choose whether or not to comply under voluntary compliance regimes. CSR does the ideological work of cloaking TNCs in the mantle of good corporate citizenship. Further, TNCs argue that enlightened self-interest compels voluntary compliance with CSR initiatives so obviating the need for compulsory enforcement.

The neoliberal supremacy in state, international and corporate governance also coincides with the greatest growth in the number and power of TNCs, as well as with the greatest decline in biodiversity loss and rise of greenhouse gas emissions, in human history. This thesis therefore argues that current measures to curtail the human rights abuses and biodiversity degradation perpetrated by TNCs are inadequate.

The thesis contrasts Rio Tinto's stated commitment to human rights and environmental values in Australia and the region with its practices. Rio Tinto's commitment to CSR has not resulted in improved universal human rights and environmental outcomes when domestic legislation is weak or unenforced. This thesis extrapolates from the case study operations of Rio Tinto to generalise about activities of less well-known companies operating in a regulatory vacuum in third world states. The thesis concludes that CSR is only conducive to protecting human rights and environmental protection under the glare of publicity and civil society scrutiny as in Australia and is totally ineffective in disciplining corporations' operations in poor or corrupt states.

This thesis studies the activities of the UK-Australian joint listed transnational mining company Rio Tinto in Australia and its three mines the Asia-Pacific region. Rio Tinto is a consistent high performer in national and international CSR reports, promotes human rights activities in Australia and is a foundation member of the United Nation's Global Compact. Many huge mining projects are on Aboriginal people's traditional lands, and until 1995 their relationship was poor. After the Australian High Court held that Aboriginal and Torres Strait Islanders had radical title in *Mabo v Queensland [No.2]* in 1992, the federal government enacted the *Native Title Act 1993* (Cth) to codify *Mabo's* implications. The new Act was bitterly fought by mining companies for two years, but became a game changer with respect to Rio Tinto's relations with Aboriginal people, with whom Rio Tinto now has positive relations. In contrast, in developing states in the Asia-Pacific such as Indonesia and Papua New Guinea, high levels of official corruption and the legacies colonialism, Rio Tinto's operations are associated with gross human rights violations that are tantamount to genocide and ecological degradation on an ecocidal scale.

# CHAPTER I INTRODUCTION

## A BRIEF INTRODUCTION

Human rights law has been of international concern amongst nations since its inception as codified instruments against genocide adduced from the Nuremberg trials of 1945-6 and the twin covenants emanating from the Universal Declaration of Human Rights in 1966.<sup>1</sup> Over the last two decades, however, while transnational corporations and politicians have acted in concert advancing a neoliberal agenda through national and international institutions, human rights abuses have continued unabated and many of these human rights abuses are perpetrated by transnational corporations (TNCs) in third world states.<sup>2</sup> It is a ‘tenet of faith among politicians, financiers and academicians’ that ‘economic development enhances human rights conditions’<sup>3</sup> when evidence abounds of grave human rights abuses connected with massive mining projects that have lined the pockets of corrupt government members and officials in poorly governed states with weak rule of law.<sup>4</sup> At the same time, public and private international actors have embraced the concept of ‘corporate social responsibility’ as a means of corporate governance in lieu of abiding by binding human rights laws. Corporate social responsibility (CSR) as a business concept has arisen in response to growing community disquiet over corporate malfeasance in human rights abuses and environmental destruction. Corporations have used CSR to effect a veneer of concern for victims of corporate greed while maintaining the status quo of business as usual. In the past two decades, environmental destruction and human rights abuses have proliferated under CSR, demonstrating its failure as a mechanism to protect human rights and environment. Further, subsequent chapters demonstrate the CSR’s greenwashing power for corporate criminals while human rights conditions have worsened for many peoples in third world mining lease sites. One such corporation is

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<sup>1</sup> Anthony D’Amato, ‘Human Rights as part of customary international law: A plea for a change of paradigm’ (Faculty Working Paper No. 88, Northwestern University School of Law, 2010).

<sup>2</sup> See for example, William Meyer, ‘Human Rights and MNCs: Theory versus Quantitative Analysis,’ (1996) 18(2) *Human Rights Quarterly* 368.

<sup>3</sup> Ibid.

<sup>4</sup> See Chapter IV.



the Rio Tinto group, dual listed in Australia and the United Kingdom with extensive global operations. Rio Tinto is a consistent high performer in national and international CSR reports. The company promotes human rights activities in Australia and is a foundation member of the United Nation's Global Compact, but these accolades and reports belie grave human rights abuses and ecocide in Australia's neighbouring states. Clearly, Rio Tinto's CSR initiatives have not produced human rights and environmental standards envisaged by proponents of CSR.

The solution to human rights abuses and ecocide by complicit private and public actors can come about through the rule of international law – to paraphrase Geoffrey Robertson, through a criminal law that puts politicians who facilitate corporate human rights abuses and CEOs whose companies perpetrate them behind bars.<sup>5</sup> International law must go further, to retrace, adopt and ratify the *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, which sought enforce crimes against human rights and the United Nations Charter.

This thesis uses a case study of transnational mining giant, Rio Tinto, to ascertain the extent to which CSR promotes business practices consistent with universal human rights and environmental protection in accordance with the company's own policies. The thesis compares Rio Tinto's stated commitment to human rights and environmental values in Australia and the region, and finds that Rio Tinto's commitment to CSR has not resulted in improved universal human rights and environmental outcomes when domestic legislation is weak or unenforced. The thesis extrapolates the case study of operations of Rio Tinto to activities of less well-known companies operating in a regulatory vacuum in third world states, and concludes that CSR is not conducive to protecting human rights outside the glare of publicity in poor or corrupt states.

## *B Overview of International Law and the Rising Influence of Private Actors*

### *1. Origins Of International Human Rights And Environment Law*

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<sup>5</sup> Geoffrey Robertson, *Mullahs Without Mercy* (Random House, Sydney, 2012).

In order to understand the modus operandi of Rio Tinto in the first world (Australia) and third world (Papua New Guinea and Indonesia) the context needs to be explained in terms of the contemporary trend of globalisation based on the Washington-consensus model of political-economic governance. Globalisation has changed the paradigm of international relations from the state-centred model to a multi-centric and multi-layered model that has diluted the efficacy of international law in protecting human rights and environment. This is despite the massive growth in international human rights and environmental legislation since World War II. International law as champion of human rights is a post WWII ideal under assault from neo-liberal pragmatism in the early twenty-first century. This assault arose through the pervasive and ubiquitous permeation of neoliberalism into state, regional and international institutions once mandated to protect human rights and the environment through state-based governance guided by international treaties and conventions.

International law has its origins in rules laid down by the Holy Roman Empire in the fifteenth century. Subsequent mercantile laws were developed to protect plunder in the sailing ships of private trading companies from other state- and church-backed rival companies. The central tenet of inter-state relations, sovereign territoriality, was established at the Peace of Westphalia that concluded the Thirty Years War of 1616-1648.

The inter-state regime based on state sovereignty and feudalism adapted effectively to the rise of capitalism. For example, Dutch jurist Hugo Grotius' *Mare liberum* of 1608 delineated the law of the high seas to support the self-interest of the Dutch merchant navy as it sought to break into markets monopolized by Roman Catholic maritime powers. The Roman Catholic 1494 Papal Bull divided the known seas and subsequent conquests between the two Catholic maritime powers of Spain and Portugal.<sup>6</sup> *Mare liberum* justified the breaking of the Roman Catholic monopoly, which unsurprisingly opened to seas to all nations and led to a Dutch monopoly of the East Indies.<sup>7</sup> Over the last three centuries, international law has primarily been customary law (described more in Chapter V). Prior to the twentieth century, custom was mainly confined to delimitation of sovereignty and acquisition of territory. Human rights as international law first evolved in the early twentieth century under the aegis of the

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<sup>6</sup> Patrick Daniel O'Connell, *International Law of the Sea*, Vol 1 (Clarendon Press, Oxford, 1982) 2.

<sup>7</sup> ASERI, 'Hugo Grotius' (2006) 5(1) Crossroads 109.

International Labour Organisation, which operated alongside the League of Nations. The League of Nations (1919-1946) attempted to promote international co-operation, peace and security following World War I. One of the League's core goals was to regulate the treatment of national minorities and to prevent inter-state rivalry arising from such disputes over sovereignty over minorities. The League's spectacular failure to prevent such conflict and hence World War II led to its dissolution and replacement by the United Nations in 1945. The ILO has survived as a specialist agency of the UN.

## 2. *Changing Paradigm Of International Relations Under Globalisation*

Politically and economically powerful private actors have been protected by states<sup>8</sup> whose rulers typically derive from the same ruling classes. Challenges to this paradigm often result in *coups d'état* by vested interests from the ruling classes. Since the Peace of Westphalia, states have agreed to respect each other's territoriality and reserve the right to rule within their sovereign jurisdiction as they see fit, but this has been challenged by globalisation and the transnational historic bloc, as described in Chapter VII. The 'transnational historic bloc' is social domination exercised by transnational corporations and their elite class operating through states and other institutions creating consensual hegemony.<sup>9</sup> Antonio Gramsci coined the term 'historic bloc' to describe the mutually reinforcing and reciprocal relationships between socio-economic relations and political and cultural practices that together underpin a given order. The historic bloc becomes hegemonic through consent of values of the dominant group becoming accepted by subordinate groups.<sup>10</sup> The transnational hegemony has filtered through through class, culture, gender, civil society, economy, ethnicity and ideology and, it is argued in the thesis, a transnational historic bloc determining the modes of society. The previous Westphalian paradigm of inter-state relations altered with the establishment of United Nations, which provided for states to relinquish aspects of their sovereignty. For instance, states permit extra-territorial excursion in very limited circumstances, while the formulation of universal human rights covenants that have in part become customary international law. These extra-territorial excursions include the

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<sup>8</sup> See for example, *Factory at Chorzow (Germany v Poland) (Jurisdiction)* [1927] PCIJ (ser A) No. 9; *Barcelona Traction, Light and Power Company Ltd (Belgium v Spain) (Judgment)* [1970] ICJ Rep 3.

<sup>9</sup> William Robinson, "Gramsci and Globalisation: From Nation-State to Transnational Hegemony" (2005) 8(4) *Critical Review of International Social and Political Philosophy*.

<sup>10</sup> Stephen Hobden and Richard Wyn Jones, 'Marxist theories of International Relations', in John Bayliss and Steve Smith (eds) *The Globalization of World Politics* (Oxford University Press, 2<sup>nd</sup> ed, 2001)

right to international intervention to prevent genocide within a state.

Globalization has changed the nature of international governance to the extent that the enormous power wielded by transnational corporations has given them platforms and influence in international fora and decision-making processes traditionally reserved for states. The global extractive industry is one such ensemble of private actors that wields vast power in the international arena, the United Nations system, international political economy institutions, as well as in home and host States. International human rights, labour and environmental laws to date have held little impact in regulating the activities of transnational private actors, many of whom are accused and responsible for gross human rights violations in the host states in which they operate.

International law operates from a number of separate branches that are discussed in chapter V, these being customary and treaty law, the latter either 'hard' (binding) or soft (non-binding). The main international law system with respect to human rights, environmental law and the actions of transnational corporations is the United Nations framework. International trade law, which impacts upon human rights of many peoples, derives from the World Trade Organization and its predecessor GATT. Both institutions arose from the ashes of World War II as the industrialized nations sought an international order for peace and security, and the victors of WWII sought to consolidate and expand their power. The United Nations formed as a state-based governance regime after WWII. Global economic governance was also structured after WWII and was strongly influenced by the experience of the Great Depression that had formed part of the context for WWII. This regime consisted of the Bretton Woods Institutions that included the General Agreement on Tariffs and Trade (GATT), the International Monetary Fund (IMF) and the World Bank. These were specialist agencies of the UN. Recent evidence of the hegemony of neo-liberalism was the detachment of the GATT from the UN in order to free it from the constraints implied in UN status, such as human rights and environmental protection. The international trade governance regime is now based around the World Trade Organisation.

#### *a) The ILO*

The International Labour Organisation is a remnant from the League of Nations and was the first international organisation promoting and adjudicating labour standards and

human rights.<sup>11</sup> Throughout its history, the ILO has emphasized the importance of placing social justice at the heart of international economic and social policies, a policy only obliquely implied by the UN Charter and *entirely absent* from the WTO. Elements of ILO's Core Conventions have been incorporated as labour principles in the UN's business code of conduct, the Global Compact.<sup>12</sup>

#### b) *Transnational Corporations*

Corporations are not new phenomena. They date back to the British East India Company of the 17<sup>th</sup> to 19<sup>th</sup> centuries and effectively ruled and plundered the Indian subcontinent with its own private armies. The British East India company has parallels with today's corporatocracy that effectively rules state, regional and international institutions.<sup>13</sup> Corporations are products of public policy, created by the state and bestowed personhood, limited liability and armed protection by the state.<sup>14</sup> Limited liability allowed states to find investment to fund large public works, and legal personhood allowed corporations to sue or be sued and accrue and dispose of property and material wealth as if they were natural persons. This new status allowed some corporations to become more powerful than many states and enabled them to unduly pressure or topple governments who attempted regulation.<sup>15</sup> The enormous damage corporations have caused to communities and environment saw efforts for international regulation of transnational corporations in the early 1970s with the formation of the United Nations Centre on Transnational Corporations (UNCTC). Moves to regulate TNCs were quashed by the embrace of neoliberalism by Thatcher and Regan in the 1980s, stripping away regulations and producing conditions conducive to economic globalization<sup>16</sup> that became the Washington Consensus. As discussed above, the GATT was removed from the UN's aegis, and the UNCTC was disbanded and replaced by the

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<sup>11</sup> *International Labour Organization Constitution*, 1 April 1919, 15 UNTS 35 (entered into force 28 June 1919), preamble.

<sup>12</sup> The ILO has a progressive history and was one of the first international organisations to address the rights of exploited indigenous peoples. The ILO recognised the limitations of the conventional definition of 'indigenous' in protecting human rights, so Convention 169 was drafted to extend the definition of 'indigenous peoples' to include those people who are not 'indigenous' in the literal sense, such as descendants of African slaves living tribally in Central America.

<sup>13</sup> Jeffrey Sachs, *The Price of Civilization* (Vintage Books, 2012).

<sup>14</sup> Joel Bakan, *The Corporation* (Free Press, 2004), p 153.

<sup>15</sup> *Ibid.* For example, the Guatemalan coup that deposed popularly elected President Jacobo Arbenz in 1954 occurred because Arbenz redistributed unused corporate Chiquita Banana land to the poor, and led to massacres and fascist dictatorship. Similarly, when the progressive and hugely popular Iranian president Mohammed Mossadegh proposed to nationalize his country's oil, he was deposed in a US backed coup and the business-friendly Shah.

<sup>16</sup> *Ibid.*

TNC-friendly United Nations Committee on Trade and Development (UNCTD). The triumph of neo-liberalism has provided escalating power to TNCs such that 40 of the world's largest economies are TNCs.<sup>17</sup> The power of the largest corporations in the setting of a neoliberal international economic governance is demonstrated at the IMF, where the corporatocracy that is the United States<sup>18</sup> is veto-holder of IMF decisions, which in turn has large influence at the WTO. TNCs and state actors promoting the neoliberal agenda of the WTO and Bretton Woods institutions are afforded the same prioritized interest as the United States and are in a position to block moves towards respect for human and environmental rights.<sup>19</sup> Civil society has pressured for change to this situation, leading TNCs to assuage their collective angst with the promise of beneficial corporate action under CSR.

### c) *Discussing CSR*

The thesis highlights the limitations of international human rights, labour standards and environmental law to combat the activities of transnational extractive industries that violate human rights, labour standards and default on their environmental responsibilities. Such transnational corporations hold more political power than many states, but as non-state actors they are generally immune from the jurisdiction of international law. Consequently it is argued corporate interests, often supported by client states, trump human rights, labour rights and environmental protection and conservation duties. Further, either in the absence of, *or to avoid*, international regulation, transnational corporations complicit with the international community have adopted corporate social responsibility as a desirable form of corporate governance. CSR purports to ensure that TNCs are seen to act socially responsibly in as much as they respect the human, labour and environmental standards enshrined in international law, but as the thesis demonstrates, the reality is different.

This thesis uses a case study of transnational mining giant, Rio Tinto, to ascertain the extent to which CSR promotes business practices consistent with universal human rights and environmental protection in accordance with the company's own policies. CSR is

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<sup>17</sup> UNCTAD (2002) Press release, 'Are Transnationals bigger than countries?' TAD/INF/PR47, 12 August 2002. The oft-quoted ratio of 51 in 100 economies being larger than countries is equated differently, taking into account sales only.

<sup>18</sup> Sachs, above n 13.

<sup>19</sup> Larry Cata Backer, "Transnational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law," *Columbia Human Rights Law Review*, February 2006.

promoted as a means for transnational corporations to conduct themselves within specific internationally agreed standards to ensure social and environmental considerations are given weight and acted upon in business decisions. A separate CSR consultancy and advisory industry has emerged from the broad international consensus that CSR has provided positive outcomes to communities affected by multinational corporations.<sup>20</sup> However, many NGOs and commentators consider CSR to be a form of public relations<sup>21</sup> and ‘greenwashing’ to perpetuate business status quo and mute criticism in the face of international community disquiet at TNCs’ continuing human rights and environmental violations.

This thesis reviews recent CSR literature and conducts a case study of an Australian-based multinational mining company operating in both Australia and the Asia-Pacific region. The review and case study demonstrate that CSR is an unmonitored process with no sanctions for compliance failure, and as such is used as a corporate reputation-enhancing tool. While some managers are genuinely committed to a triple-bottom-line auditing approach whereby a company’s social and environmental performance are measured alongside the traditional financial bottom line,<sup>22</sup> all corporations are bound by law to consider *only* the shareholders’ interests as paramount. For many corporations, reputation is a valued and tradeable shareholder interest that is affected by public perceptions of CSR. CSR’s capacity as multinational corporate governance mechanism is in effect a chimera, and although technology and the globalization of communications and ideas has allowed environmental and human rights crimes to be documented and disseminated globally and in real time, thus driving better corporate practices through CSR to reduce reputational risk, many operations sites are remote and heavily guarded. The PNG and Indonesian case study sites were and are all heavily guarded and

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<sup>20</sup> In some instances, TNCs have co-opted some formerly critical NGOs, who are paid to design, monitor and report upon company CSR compliance. See, for example, BHP’s co-option of the North Queensland Environment Council <<https://www.dlswb.rmit.edu.au/conenv/envi1128/Groundwork%20website/publicat/gw/grnd301/gbhpqcc.htm>>; the World Wildlife Fund and agribusiness, fishing and forestry multinationals <<http://independentsciencenews.org/environment/way-beyond-greenwashing-have-multinationals-captured-big-conservation>>; and Greenpeace, Rainforest Action Network and Nature Conservancy to international logging corporations <<http://news.forestcouncil.org/2012/04/16/the-great-rainforest-heist-how-environmental-groups-gone-bad-greenwash-the-logging-of-the-earths-last-primarnative-old-forests-glen-barry/>>.

<sup>21</sup> See Peter Frankental, ‘Corporate Social Responsibility – A PR invention?’ (2001) 6(1) *Corporate Communications: An International Journal*, 18-23.

<sup>22</sup> Wayne Norman and Chris MacDonald, ‘Getting to the Bottom of “Triple Bottom Line”’ (2004) 14(2) *Business Ethics Quarterly* 263. Norman and Wayne argue ‘triple bottom line’ is inherently misleading jargon that is immeasurable and unquantifiable and largely limited to glossy reports ‘full of platitudinous text and soft focus people’ [13].

militarised. Independent journalists and aid agencies were and are forbidden, precisely because the companies have much to hide, as documented in Chapter IV. This thesis confirms the assertion by Amnesty International's Peter Frankental, that CSR can only have real substance if it embraces all the stakeholders of a company and makes binding changes to benefit social and ecological sustainability that can be independently benchmarked and audited with compliance and enforcement mechanisms in place.<sup>23</sup> Such a form of CSR would require binding and enforceable regulations, and would be redundant and irrelevant if states adequately upheld and enforced existing human rights conventions.

### *C Thesis Statement And Objectives*

Violation of international human rights and environmental law is a documented dimension of many TNCs' activities and it is indisputable that such breaches are illegal and unacceptable in Australia.

This thesis argues that there is a blatant gap between the rhetoric about Australia's upholding of its international human rights and international environmental law obligations and the meeting of these obligations with respect to home listed corporations. The Commonwealth tacitly accepts breaches of these obligations by Australian companies overseas yet little or nothing is done to sanction such corporate behaviour. Further, it is argued this gap between state ratified obligations and the actual enforcement of international law cannot be bridged by voluntary corporate CSR initiatives.

The Wikileaks 'Cablegate' releases<sup>24</sup> have demonstrated that those with real international power seldom pay much attention to the law. For those with power it is their actions that shape the laws that purport to control their actions, rather than international law being the code of conduct from which the powerful seek guidance.<sup>25</sup> This thesis seeks to investigate the extent an Australian listed transnational corporation

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<sup>23</sup> Frankental, above n 21.

<sup>24</sup> 'Wikileaks', The Guardian, <<http://www.guardian.co.uk/media/wikileaks>>; see also 'Cablegate: 250 000 USEmbassy Diplomatic Cables', on Wikileaks <http://213.251.145.96/> and 1885 sites (updated 2010-12-12 11:54 GMT) as at 14 December 2010 < <http://213.251.145.96/mirrors.html>> Arthur Watts, 'The Importance of International Law' in Michael Byers (ed) *The Role of Law in International Politics*, 2000.



abides by international human rights and environment law when business principles of maximizing shareholders' interests prevail in the national and international business arena. The thesis also discusses commitments to international human rights and environment law when corporate malfeasance is considered good business practice, to determine if CSR promotes business practices consistent with universal human rights values including the implied right to healthy environment.

## D Methodology

Due to the enormous scale of a project to study all Australian listed mining companies operating both in Australia and overseas, the methodology of this thesis is to conduct a case study of a major Australian TNC. The choice for this case study is Australian-British owned company Rio Tinto. Rio Tinto has headquarters in Melbourne and London, and enterprises in over 50 countries with assets of over \$81 billion.<sup>26</sup> The company itself was valued at over \$147 billion in 2008,<sup>27</sup> and in 2009 Rio Tinto was the fourth largest publicly listed mining company in the world.<sup>28</sup> Further, Rio Tinto is a signatory to the United Nations Global Compact, the UN policy initiative 'for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption.'<sup>29</sup> At the same time, Rio Tinto is fielding a protracted campaign against it by human rights and environmental activists and entities,<sup>30</sup> including the government of Norway,<sup>31</sup> due to concerns over human rights abuses and severe environmental degradation as part of Rio Tinto's operations. Rio Tinto has 14 mining operations in Australia and two in the region. As at 2011 these regional mines are the currently mothballed Panguna copper mine in Bougainville, the Grasberg copper and gold mine

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<sup>26</sup> Rio Tinto 2009 Chart Book, p 4.

<sup>27</sup> Jamie Freed, 'Chinese raid on Rio Tinto could thwart BHP', *Sydney Morning Herald*. 1 February 2008.

<sup>28</sup> Rio Tinto 2009 Chartbook.

<sup>29</sup> United Nations Global Compact, <<http://www.unglobalcompact.org/>>.

<sup>30</sup> See, for example, 'Rio Tinto: A shameful history of human and labour rights abuses and environmental degradation around the globe', London Mining Network, 10 April 2010, <<http://londonminingnetwork.org/2010/04/rio-tinto-a-shameful-history-of-human-and-labour-rights-abuses-and-environmental-degradation-around-the-globe/>>

<sup>31</sup> Norway blacklists miner Rio Tinto, *BBC News*, 10 September 2008, <http://news.bbc.co.uk/2/hi/business/7608097.stm>; Terry MacAlister, 'Investment: Norway offloads 500 of Rio Tinto shares over 'unethical' mine stake', *The Guardian*, 10 September 2008.

in West Papua. Rio Tinto decommissioned its Kalimantan Kelian PT gold mine in 2003 amid ongoing scandals caused by Rio Tinto's acknowledged complicity in human rights violations.<sup>32</sup>

My findings are that Rio Tinto operates according to its stated CSR principles in first world Australia, but departs substantially to the extent of severe breaches of international human rights, environment and labour laws when operating in the regulatory vacuum of poorly governed states. Rio Tinto is a highly respected company that invests heavily in its reputation, and I have extrapolated the Rio Tinto case study to conclude that lesser known and established companies have even less incentive to abide by universal human rights and environmental norms. My findings lead to the conclusion that CSR is a chimera embraced by the international public and private actors to maintain their power in the face of organised opposition.

### 1 *Rio Tinto As Case Study – Rationale*

The focus on Rio Tinto by this thesis is not to suggest Rio is somehow less compliant than other Australian or former Australian-based extractive industry transnational corporations. The activities of BHP-Billiton, Woodside and Clive Palmer's nickel interests could similarly be interrogated as to their stated corporate social responsibility commitments and adherence to international laws both in Australia and abroad. Rio Tinto represents a paradigm example of an Australian based TNC with an explicit commitment to CSR in action. Further, Rio Tinto has been chosen over other companies for a number of reasons. These are:

- The ostensible respect by Australian government and the public;
- Rio Tinto's sponsorship of various environmental programs and cultural institutions including sponsorship of the Royal Ballet since 2008, and its sponsorship of the Australian Human Rights Commission's (formerly the Human Rights and Equal Opportunity Commission 'HREOC') annual human rights award, titled the Rio Tinto Human Rights Medal;
- The Australian Human Rights Commission's website promotion of Rio Tinto as a

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<sup>32</sup> Rio Tinto, *Kelian* <[http://www.riotinto.com/media/news\\_4414.asp](http://www.riotinto.com/media/news_4414.asp)> 1 December 2004.

multinational with large operations in Australia and active on human rights in national and international spheres, and a constituent member of the Mining and Mineral's Working Group of the World Business Council for Sustainable Development that is developing and promoting the Global Mining Initiative.<sup>33</sup>

Rio Tinto's positive promotion by Australia's foremost governmental human rights agency is priceless public relations though it appears that the AHRC took no account the company's actions outside of Australia. These are investigated in Chapter V below and include allegations of genocide in Bougainville, rape and sexual assault in Kelian, murder and assault at Grasberg, and serious permanent environmental and cultural damage at all sites.

On the domestic level, Rio Tinto has been instrumental in building Indigenous capacity and setting workforce participation targets for Indigenous employees. The workforce of Rio Tinto's Argyle diamond mine is 25% Aboriginal employees, with high Indigenous retention rates throughout its operations. Rio Tinto has an Aboriginal and Torres Strait Islander Policy that was first developed in 1995 as a positive response to the *Native Title Act 1993* (Cth), and Indigenous employment rates in the company have risen from less than 0.5% in the mid-1990s to 8% by 2008. Rio Tinto believe many Aboriginal people take its commitment to Indigenous employment and social relations positively,<sup>34</sup> and a search through popular databases failed to find criticism of Rio Tinto's social policy towards Indigenous people since Rio's turn-around in policy post-*Native Title Act*. There is much positive to be said about Rio Tinto's operations in contemporary Australia, however these positive outcomes are not evident when considering its operations overseas. Human rights groups, environmental organisations and unions have condemned Rio Tinto for many years for its operations in Bougainville Panguna Mine, Kelian PT in Kalimantan, and Grasberg Mine in West Papua.<sup>35</sup>

In 2008 Norway blacklisted Rio Tinto from its sovereign wealth fund, citing serious

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<sup>33</sup> Australian Human Rights Commission, Dr Sev Ozdiewski, Australian Commissioner to the Asia Pacific Forum meeting Hong Kong, 'Economic, social and cultural rights in Australia - the roles of HREOC and the corporate sector', Panel presentation, 11 July 2001, <[http://www.hreoc.gov.au/about/media/speeches/human\\_rights/social\\_cultural.html](http://www.hreoc.gov.au/about/media/speeches/human_rights/social_cultural.html)>.

<sup>34</sup> Rio Tinto, *Developing Opportunities for Aboriginal People*, on Department of Resources, Energy and Tourism 'Working in Partnerships' <[http://www.ret.gov.au/resources/Documents/Programs/Working%20in%20Partnership/WIP\\_Case\\_Study\\_RioTinto.pdf](http://www.ret.gov.au/resources/Documents/Programs/Working%20in%20Partnership/WIP_Case_Study_RioTinto.pdf)>.

<sup>35</sup> See Chapter V for a detailed and referenced report from the many NGOs and union groups condemning Rio Tinto's actions.

environmental damage at Grasberg mine and “grossly unethical conduct,”<sup>36</sup> while the New York Times ran a nine page special about the serious and extensive environmental damage, social costs and human rights abuses caused by Rio Tinto’s joint venture at the same operation.<sup>37</sup> Rio Tinto has admitted to breaches of human rights at its now decommissioned PT Kelian Gold Mine,<sup>38</sup> and is being sued by plaintiffs from Bougainville under the US *Alien Tort Claims Act* alleging complicity in genocide, war crimes, and environmental damage so extreme as to violate rights to health under international law.<sup>39</sup> It is somewhat incongruous that a company with such a cloud over its operations be in the top four Australian-listed companies for ‘CSR Management Capabilities’ according to the Australian Centre for Corporate Social Responsibility’s *The State of CSR in Australia Annual Review 2010/2011*, and further more be praised for its commitment to CSR in the Australian Senate. Nearly all of Australia’s financial institutions are invested in Rio Tinto, and while the federal government’s \$60 billion Future Fund does not disclose where it invests, it is likely to include Rio Tinto.<sup>40</sup>

The next comparable company, BHP-Billiton, stands accused of environmental destruction of the Fly River downstream from the Ok Tedi mine in Papua New Guinea and has raised the ire of environmentalists for its expansion of the Roxby Downs Olympic Dam uranium site amongst others, but BHP-Billiton does not stand accused of the same level of egregious human right abuses as Rio Tinto. Notably both huge companies are members of the United Nations Global Compact, and both are foundation members of the World Business Council on Sustainable Development (‘WBCSD’). The WBCSD holds as its mission statement to be a ‘catalyst for change toward sustainable development,’<sup>41</sup> but was formed by the Secretary-General to the 1992 Rio Earth Summit and Swiss billionaire Stephan Schmidheiny to provide a platform for TNCs to co-opt environmental enthusiasm at the Earth Summit. The TNCs achieved resounding success when Earth Summit documents declared free and open markets to be necessary pre-requisite for achieving ‘sustainable development’<sup>42</sup> and crushed a proposal put forward

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<sup>36</sup> ‘Norway blacklists miner Rio Tinto’, *BBC News*, 10 September 2008.

Jane Perlez and Raymond Bonner, ‘Below a Mountain of Wealth, a River of Waste’, *The New York Times*, 27 December 2005.

<sup>38</sup> Rio Tinto, above n14.

<sup>39</sup> *Sarei et al v Rio Tinto, PLC*, US Court of Appeals for the Ninth Circuit, 28 October 2010.

<sup>40</sup> Nicolas Taylor, ‘Red River: The blacklisting of Rio Tinto’, unpublished, 26 August 2010.

<sup>41</sup> Mission statement, World Council on Sustainable Development, <<http://www.wbcsd.org/templates/TemplateWBCSD5/layout.asp?type=p&MenuId=NjA&doOpen=1&ClickMenu=LeftMenu>>.

<sup>42</sup> Kenny Bruno and Joshua Karliner, *EarthsummitBiz: The Corporate takeover of Sustainable Development* (Ford First Books, 2002).

by Sweden and Norway for regulation of TNCS in favour of ‘corporate environmentalism’ described by CSR.

## *2 Asia-Pacific As Sphere Of Influence*

The analysis in this thesis focuses Asia-Pacific area, typically and historically understood to be within Australia’s ‘sphere of influence,’ and because Papua New Guinea and Indonesia are literally Australia’s nearest neighbours. The United Nations Commission on Human Rights 2003 *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*<sup>43</sup> explicitly mentioned ‘spheres of influence’, but this phrase has been omitted in the subsequent document to the Norms, the UN ‘*Protect, Respect and Remedy*’ *Framework for Business and Human Rights*<sup>44</sup> due to the ambiguity of the term. In this thesis ‘sphere of influence’ is taken to mean in close proximity to Australia and those countries that are beneficiaries of substantial Australian overseas aid. The two greatest beneficiaries of Australian aid for 2010-2011 are Australia’s nearest neighbours, Indonesia and Papua New Guinea. Indonesia is the largest recipient at \$458.7 million, and Papua New Guinea second at \$457.2 million (the third highest is the Solomon Islands at \$225.7 million and Afghanistan is fourth at \$123.1 million),<sup>45</sup> and despite the level of aid and its natural resource wealth, PNG is at risk of becoming a ‘failed state’ and is at the bottom end of the UN’s Human Development Index. For all of Indonesia’s resources, much capital leaves the country while poverty levels remain high. The United Nations Human Development Index ranks Indonesia at 110 out of 169 reporting nations. The UN figures do not take into account disparities in provinces or indigenous groups - human development indices in West Papua are in the lowest three of thirty provinces. Genuine CSR and compliance to universal human rights laws by large resources companies could provide genuine environmental and social damage mitigation and allay the conditions that cause civil unrest as is seen at Kelian, Bougainville and West Papua.

## *3 Specific Methodology*

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<sup>43</sup> Sub-commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN ESC, 55<sup>th</sup> sess, Agenda Item 4, E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003).

<sup>44</sup> John Ruggie, *United Nations ‘Protect, Respect and Remedy’ Framework for Business and Human Rights*, UN CCPR/C, 8<sup>th</sup> sess, Agenda Item 3 A/HRC/8/5 (7 April 2008).

<sup>45</sup> Australian Government, *Australia’s International Development Assistance Program (2010)*, <<http://www.aisaid.gov.au/budget/budget/default.cfm>>.

The thesis reviews inter alia, recent CSR literature, emerging jurisprudence on corporate complicity, primary and seconding international human rights law sources and Rio Tinto's own publically accessible documentation, public relations materials and reports. Length is a limiting factor of an LLM, which restricts the method of study to desktop research rather than a more intensive approach of individual interviews with aggrieved peoples. A wealth of information from respected NGOs, is freely and publicly available, as are Wikileaks 'Cablegate' releases that are shedding new light on corporate governance.<sup>46</sup>

Qualitative research methods including a desktop document and international instrument analysis from both primary and secondary sources are used in this thesis. Primary sources include international laws and treaties applicable to the thesis. Company web sites and reports, along with scholarly discussion and general commentary from NGO publications and researchers in universities are compiled to draw conclusions to the specific objectives, and show that environmental protection is a universal human right and must be considered as such.

Reviews of recent news items and literature pertaining to Rio Tinto's activities in Papua New Guinea, West Papua, and Indonesia and parallel activities in Australia, and their stated objectives of Corporate Social Responsibility offshore and onshore are compared and contrasted with their recent activities in Australia through reviews of company websites, media releases, academic literature, NGO reports and United Nations Human Development Indices and labour standards inherent in the ILO conventions. International NGO reports of severe human rights abuses by Australian owned extractive companies are collated and reviewed for breaches under international human rights law and customary international law. Environmental harms are included in the review as gross harms negatively impact upon human rights, causing loss of life or

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<sup>46</sup> See for example David Smith, 'Wikileaks cables: Shell's grip file://localhost/Users/rebeccasmith/Pictures/Photo%20Booth/Photo%20on%202012-10-21%20at%2013.11%20%234.jpg on Nigerian state revealed'. The Guardian, 8 December 2010, in which Royal Dutch Shell senior executive told US diplomats that her company had seconded employees to every relevant department and knew 'everything that was being done in these ministries' and that Nigeria was unaware how much Shell knew of its deliberations. The Cable is found at <<http://213.251.145.96/cable/2009/10/09ABUJA1907.html>>. Another cable reported in The Age suggests that Rio Tinto 'privately gave Chinese security authorities incriminating evidence relating to jailed former staff, including senior executive Stern Hu, while the company was publicly fighting their prosecution on corruption charges' in 2009, Philip Dorling and Richard Baker, 'Stern Hu and Rio's Role', *The Age* (Melbourne), 11 December 2010.

livelihood, customary activities and ecosystem services upon which all humanity depends.

## E *Objectives*

The core objective of this thesis is to investigate the gap between Australia's commitment to its international human rights and environmental obligations with respect to Australian registered corporations and their activities overseas through a case study of dual Australian-British listed company Rio Tinto. In addition, the objectives of this thesis are to:

- (a) Compare and contrast extractive industry adherence to human rights and environmental laws in Australian onshore and offshore operations;
- (b) Identify possible reforms to the Australian regulatory regime to so as to create legally binding and enforceable obligations upon Australian companies that breach universal human rights abroad; and
- (c) Determine if moves to Corporate Social Responsibility on the national and international arena (soft law) can substitute for enforcement of international human rights and environmental laws.

## F *Chapter Outlines*

The introductory chapter provides an overview on international law and the rising influence of non-state actors. Non-state actors are not bound by the doctrine of state responsibility for international corporate wrongs, but national and international entities and agencies have embraced corporate social responsibility as a means of encouraging corporate entities to comply with social and environmental norms as well as business and economic norms. The chapter provides a rationale for the case study of a single mining company, Rio Tinto, and methodology used in this study.

Chapter II investigates corporate social responsibility, its recent genesis and

international popularity among big and small businesses alike. Market fundamentalism and neoliberalism has fostered CSR as a means of deferring state regulation and intervention, but this dogma has been challenged by researchers and detailed in Chapter VI.

Rio Tinto was chosen as a case study due to its extensive operations both in Australia and overseas. Chapter III details the history of Rio Tinto from ancient Spain until contemporary time with focus on the history of the company's relations with Australian Aboriginal people from the time of exploration through to the present day. Rio Tinto's record in Papua New Guinea and Indonesia is considered in Chapter IV. The chapter concludes with a discussion about Rio Tinto's relations with Indigenous peoples in its Asia-Pacific operation and compares these with the company's stated CSR principles in 'The Way We Work' and other related documents, its consistency with Global Compact principles and international human rights and environment laws.

Chapter V comparatively analyses the behaviour of Rio Tinto's practices impacting upon human rights and environment in its home-listed nation of Australia and its host nations of Indonesia and Papua New Guinea. International human rights and environment laws are considered alongside Rio Tinto's stated codes of conduct. The capture of international regulatory institutions by neoliberal market-fundamentalism is discussed in Chapter VI. This chapter critiques the international neoliberal paradigm as the cause of serious social and environmental harms and breaches of international laws designed to protect human rights and environment, and demonstrates that current neoliberal governance paradigms – including voluntary CSR - have failed to prevent serious human rights abuses and serious environmental damage amounting to ecocide.

The final chapter discusses the current international paradigm of self-governance and its inherent incompatibility with CSR. Chapter VII describes different models for regulating Australian based entities such that Australian and host state international human rights and environmental laws are complied with. The chapter discusses merits of differing forms of regulation and finds that a regulated model of CSR with enforcement provisions for non-compliance would be an appropriate tool to align the business interests of Australian companies with the national interest of security and human-wellbeing of peoples in neighbouring states if not for entrenchment of



neoliberalism in all decision-making agencies. Regulation becomes moot when the corporate foxes are in charge of the hen-house. The chapter concludes that neoliberalism has proven itself to be a major driver of human rights abuses and ecocide, and CSR is a neoliberal construction to continue on business as usual.

### *G Conclusion*

In short, this chapter details the thesis objective to investigate the gap between Australia's commitment to its international human rights and environmental obligations with respect to Australian registered corporations and their activities overseas through a case study of dual Australian-British listed company Rio Tinto. The chapter justifies the rationale for the study of a single corporate entity, specifically Rio Tinto, and the reasons for an apparent narrow study of only three international mining activities undertaken by the company in only two nation-states.

The rationale for qualitative desktop reviews of legal and other literature, Rio Tinto company reports and documents and international treaties and conventions is explained, and chapter outlines are provided. The following chapter describes differing doctrines of CSR and determines a single definition to be referenced throughout the thesis.

## CHAPTER II CORPORATE SOCIAL RESPONSIBILITY AS A CONSTRUCT AND ITS UPTAKE IN NATIONAL AND GLOBAL FORA

### INTRODUCTION

Corporate social responsibility is not a recent construct. It has its origins in 1930s United States and literature on the topic began appearing in the 1950s. Howard R. Bowen's landmark book *Social Responsibilities of the Businessman*<sup>1</sup> gave a definition of 'social responsibilities' of businessmen' as 'obligations....to follow those lines of action which are desirable in the terms of the objectives and values of our society'.<sup>2</sup> Bowen cited a Fortune magazine survey (1946, p 44) in which 93.5% of businessmen respondents agreed that they were responsible for the consequences of their actions.<sup>3</sup> CSR became more defined as a construct in the post Fordism years and coincides with globalisation and the rapid increase in number and operations of corporations. CSR corresponds with the rapid decline in ecosystem service provision, the rise of neoliberalism as a dominant economic order, and the parallel but dichotomous rise in environmental consciousness and human rights awareness. This chapter discusses differing definitions of CSR and investigates its uptake into United Nations discourse and agencies and its inception into domestic policy. The chapter ultimately concludes that CSR is a construct promoted by big business and its neoliberal proponents in international and national fora as a tool to avoid binding and enforceable supra and state governmental regulation. Public disquiet of business practices forces businesses to make changes to their operations, but as this chapter and Chapter IV demonstrate, genuine CSR is usually superficial while the major change appears to lie with the companies' public relations strategies.

Australian companies lag in their commitment to CSR compared to international

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<sup>1</sup> Howard Bowen (1953), *Social Responsibilities of the Businessman*.

<sup>2</sup> Ibid 6.

<sup>3</sup> Archie B. Carroll (1999), 'Corporate Social Responsibility: Evolution of a Definitional Construct', *Business Society*, 1999: 38: 268.

standards.<sup>4</sup> International standards are developing in the form of the *UN Framework Guiding Principles for Business and Human Rights*<sup>5</sup> that aim to provide more effective protection to individuals and communities against corporate-related human rights harm. Both the Australian Parliamentary Joint Committee on Corporate and Financial Services (“PJC”)(see below) and UN Framework promote CSR as voluntary initiative to achieve this aim. The PJC determined ‘enlightened self-interest’ would be the driving force to shape director’s duties to consider factors above those of responsibility to shareholders alone. The Committee dismissed the proposal of legislative change that required directors to take into account the interests of other stakeholders, as does the *Companies Act 2006* (UK),<sup>6</sup> and felt voluntary self-regulated CSR was an adequate directors' duty. This section looks at working definitions and the political genesis of CSR and its inception into the states and United Nations system. The latter has incorporated CSR into its programs to promote and protect human rights and environment under international soft and hard law, particularly through the UN Global Compact. Continuing concerns about transnational corporation malfeasance have led to growing questioning about the efficacy of CSR as policy to protect and promote human rights.

### *A Corporate Social Responsibility – Defining The Chimera*

Chimera or Chimaera (kaɪˈ mɪərə) *n* **1.** A wild and unrealistic dream or notion  
Collins Concise Dictionary 3<sup>rd</sup> Edition

Chimera **Pronunciation:**/kaɪˈ mɪərə, ki-/  
(also **chimaera**) **2** a thing which is hoped for but is illusory or impossible to achieve:  
*the economic sovereignty you claim to defend is a chimera*  
Oxford Online Dictionary

### *1 Corporate Social Responsibility As Global Phenomenon*

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<sup>4</sup> Parliamentary Joint Committee on Corporate and Financial Services, Australian Government, *Corporate Responsibility: Managing risk and creating value* (2004), Executive Summary p xiii.  
<sup>5</sup> John Ruggie, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Guiding Principles on Business and Human Rights Implementing the United Nations “Protect, Respect and Remedy” Framework A/HRC/17/31* (21 March 2011).  
<sup>6</sup> Section 172(d) provides that directors must have regard to ‘the impact of the company’s operations on the community and the environment’.

The United Nations and the World Bank promote Corporate Social Responsibility (CSR) as good for business and good for development.<sup>7</sup> Many companies have found CSR has positive impacts on corporate profits, and are incorporating CSR programs into their general business.<sup>8</sup> As the PJC stressed in its 2005 report *Corporate Responsibility: Managing risk and creating value*,<sup>9</sup> reputation is a marketable commodity and therefore it is good business for businesses to promote industry as fulfilling the Triple Bottom Line of economic, environmental and social accountability. Other companies engage CSR to stave off potential regulatory measures and state this as an incentive to follow triple bottom line reporting.<sup>10</sup>

The World Business Council on Sustainable Development emphasizes in its literature that a coherent CSR strategy based on integrity, sound values and long-term approaches offer clear business benefits.<sup>11</sup> As a form of voluntary self-regulation by companies, CSR claims to bring the protection and promotion of human rights onto the corporate agenda.<sup>12</sup> It is against this claim that this paper is written, to ascertain the extent of the veracity of the claim, and to make recommendations to horizontally integrate human rights and its intertwined environmental protection into home states' corporations regulations.

#### (a) Seeking A Definition Of CSR

CSR takes on many definitions and as such is undefined to an internationally agreed standard. Some approaches encourage businesses to take into account the impact of their activities on stakeholders while balancing longer-term societal interests against short-term financial gain<sup>13</sup>, whereas the definition proposed by the World Bank 2003

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<sup>7</sup> Melsa Ararat, 'Corporate Social Responsibility Across the Middle East and North Africa' (Paper presented at the Mediterranean Development Forum, World Bank, Beirut, 1 April 2006).

<sup>8</sup> Piotr Mazurkiewicz, (2004) 'Corporate Environmental Responsibility: Is a common CSR framework possible?' (Paper presented with the IAIA Conference, Vancouver, May 2004).

<sup>9</sup> Parliamentary Joint Committee on Corporate and Financial Services, above n 4.

<sup>10</sup> See for example Laura Quinn and Jessica Bates, 'Leadership and the Triple Bottom Line – Bringing sustainability and Corporate Social Responsibility to Life', (Research White Paper, Centre for Creative Leadership, 2007); Gail Thomas and Margaret Nowak, 'Corporate Social Responsibility – a definition' (Working Paper No 62, Curtin University Graduate School of Business, 2006). Robert Holme and John Watts, 'Corporate social responsibility: Making good business sense' World Business Council for Sustainable Development (2000).

<sup>12</sup> Delphine Rabet, 'Human Rights and Globalization: The Myth of Corporate Social Responsibility?' (2009) 1

*Journal of Alternative Perspectives in the Social Sciences* 463, 464.

<sup>13</sup> Corporations and Markets Advisory Committee, Australian Government, *The Social Responsibility of*

conference on 'Public Policy for Corporate Social Responsibility' severed the second arm of the triple bottom line to define CSR as:

the business commitment to contribute to sustainable economic development, working with employees, their families, the local community and society at large to improve their quality of life, in ways that are good for business and good for development.<sup>14</sup>

Excising the 'environment' component voids the World Bank of a pertinent part of human wellbeing connected to the activities of business. As the Millennium Assessment shows, environmental health is intrinsically related to human well being. Issues such as reducing industry causes of climate change are neatly skewered by this definition. The World Bank's programs in the area of greenhouse gas reduction amount to establishing global carbon finance markets without addressing the causes and drivers of greenhouse gas production, namely globalised uber-consumption as discussed in Chapter VI.

*(i) Drivers of CSR*

CSR is taught in many business schools and is the subject of specialty university research centres and consultancy circuits.<sup>15</sup> Promoting CSR as win-win for business and society has become fashionable and a growing number of states are adopting CSR policies that vary in policy and form. The state policies generally encourage responsible business practices, including fostering understanding and respect for human rights.<sup>16</sup>

Other commentators take a different view of CSR. It is 'a misleading and a

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*Corporations* (2006).

<sup>14</sup> Cited in Florencia Roitstein, 'Analysis of Corporate Social Responsibility Training Initiatives in Multinational Enterprises: The challenge of localizing CSR', World Bank, Washington D.C. (2005). Jem Bendell, 'Barricades to Boardrooms: A Contemporary History of the Corporate Accountability Movement' United Nations Research Institute for Social Development, Geneva, June 2004, 14. For example, the Australian Centre for Corporate Social Responsibility is a auspiced by Latrobe University.

<sup>16</sup> John, Ruggie, *Promotion of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development; Business and human rights: Towards operationalizing the "protect, respect and remedy" framework; Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises* UN HRC, 11<sup>th</sup> sess, Agenda item 3, A/HRC/11/13 (22 April 2009) para 21.

distracting doctrine,' says Assistant Professor Jessica Ludescher,<sup>17</sup> because it obfuscates the real political issues confronting people in this era of corporate economic globalization. Ludescher points out that despite all the CSR activities corporations have engaged in, there have been major lapses in ethical conduct that have resulted in bankruptcies, bank failures, government bailouts and the Global Financial Crisis. The global financial system – and the economic security of billions of people – was 'placed in jeopardy by the supposedly socially responsible conduct of corporations.'<sup>18</sup> Other critics point out that the unprecedented growth in CSR is to avoid governmental regulation of the very proponents and beneficiaries of the current economic regime.<sup>19</sup> Doane gives four key drivers that would impel a company to adopt a CSR programme: managing risk and reputation; protecting human capital assets; responding to consumer demands; and avoiding regulation.<sup>20</sup> These drivers are at odds with claims of good corporate citizenry and lead to accusations of CSR as no more than window-dressing for business-as-usual by big corporations. Given the high profile polluting companies currently signed up to the UN Global Compact, including companies complicit in grand scale environmental destruction and human rights abuses (for example, Rio Tinto and BHP Billiton), the accusations appear to hold weight.

*(b) Working Definition Of CSR in Australia*

The Australian Centre for Corporate Social Responsibility uses the definition of the International Organization for Standardization on the Guidance Standard on Social Responsibility, ISO 26000, which defines 'social responsibility' as:

the responsibility of an organization for the impacts of its decisions and activities on society and the environment, through transparent and ethical behaviour that contributes to sustainable development, including the health and welfare of society; takes into account the expectations of stakeholders; is in compliance with applicable law and consistent with international norms of business behaviour and is

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<sup>17</sup> Jessica Ludescher, 'From Corporate Strategy to Global Justice' [2009] *Harvard International Review*.

<sup>18</sup> Ibid.

<sup>19</sup> Rabet (2009) above n 12. The PJC noted that efforts to avoid regulation is one of the driving factors of implementing CSR measures.

<sup>20</sup> Deborah Doane, 'Beyond corporate social responsibility: minnows, mammoths and markets' (2005) 37 *Futures* 215, 217.

integrated throughout the organization and practiced in its relationships.<sup>21</sup>

The Australian Centre for Corporate Social Responsibility (ACCSR) is a company that consults with business and government to increase CSR awareness and activities, and since 2007 has released a ranking of the best CSR performing companies in Australia. The ranking is based on self-assessment of the five management capabilities, being stakeholder engagement; stakeholder dialogue; integration of stakeholder values; ethical business behaviour and social accountability. 'Environment' is absent from the ACCSR Triple Bottom Line equation. More interesting too is two of the top scoring Australian companies in the Centre's State of CSR Annual Review 2009 are Lihir Gold Ltd and Rio Tinto at third and fifth place respectively.<sup>22</sup> Both Rio Tinto and Lihir Gold stand accused of grave human rights abuses in West Papua and Bougainville (Rio Tinto) and Papua New Guinea (Lihir Gold) while receiving accolades at home. Lihir Gold Pty Ltd has received highest honours in the Australian SAM<sup>23</sup> Sustainability Index for the past three years. The Australian SAM Sustainability Index notes that corporate sustainability performance is an 'investible concept'<sup>24</sup> and thus is an important component of many modern businesses, as described above by Doane.

(i) *Sustainable Mining – An Oxymoron*

CSR discourse refers to a concept termed 'sustainable mining'. The term 'sustainable mining' is an oxymoron because extractive industries are by definition unsustainable. Every mine has a finite quantity of ore that can be economically mined under prevailing technology. As geo-technical and metallurgical processes expand, and the price of particular ores rise, once spent mines have been reopened for a second lease of life. 'Sustainable mining' has its genesis in the co-option of the concept of sustainable development at the Rio Earth Summit, after which industry leaders sought to 'green' mining operations. The Global Mining Initiative ('GMI') of mining

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<sup>21</sup> Australian Centre for Corporate Social Responsibility, *CSR Annual Review 2009* <<http://www.accsr.com.au/html/stateofcsr2009.html>>.

<sup>22</sup> Ibid.

<sup>23</sup> SAM (Sustainable Asset Management) is a multinational boutique focussed on 'sustainable investing' based in Zurich.

<sup>24</sup> Australian SAM Sustainability Index 2009 <<http://www.aussi.net.au/html/sustainability/corpsustainability.html>>.

industry leaders was established at Rio Tinto's head office in London with the aim of incorporating a concept of 'sustainable mining' in the Rio+10 Johannesburg World Summit on Sustainable Development.<sup>25</sup> The World Commission on Environment and Development defined 'sustainable development' to mean the 'ability of current generations to meet their needs without compromising the ability of future generations to meet their needs.'<sup>26</sup> "Needs", however, were not defined, leaving the 'need' for overconsumption by the richest corporations and individuals untouched.<sup>27</sup> The legacy of mining operations can last for hundreds of years,<sup>28</sup> and the concepts of 'sustainable mining' vary widely according to which agency – government, industry, environmental or civic – is being advocated.<sup>29</sup> Due to the limitations of the term 'sustainable' when referring to a non-renewable resource that by definition cannot be renewed or replenished for future generations, the corporate and governmental concepts of sustainable mining focus on the two themes of resource depletion and availability, and the environmental and social impacts of mines.<sup>30</sup>

## 2 Background Of CSR And Its Inception In The UN Framework

Throughout the 1970s the United Nations was instrumental in exposing the 'abusive practices and ill-effects' of transnational corporations.<sup>31</sup> Fundamental global ideological shifts of the 1980s leading to the neo-liberal Washington Consensus of 1989<sup>32</sup> reversed the UN's policies on transnational corporations from 'perceived evil empires'<sup>33</sup> to legitimate partners and Non-State actors working in cooperation with the UN, states and other NGOs to promote sustainable development. States' regulatory powers receded and were superseded by corporate self-regulation and

<sup>25</sup> Andy Whitmore, 'The emperor's new clothes – sustainable mining?' (2006) 14 *Journal of Cleaner Production* 309.

<sup>26</sup> United Nations World Commission on Environment and Development *Our Common Future* (Oxford University Press, Australian Edition, 1990).

<sup>27</sup> Kenny Bruno and Joshua Karliner, *EarthsummitBiz: The Corporate takeover of Sustainable Development* (Ford First Books, 2002)

<sup>28</sup> Jose Azcue (ed), *Environmental Impacts of Mining Activities: Emphasis on Mitigation and Remedial Measures* (Springer-Verlag, 1999) 320.

<sup>29</sup> Gavin Mudd, *The Sustainability of Mining in Australia: Key Production Trends and Their Environmental Implications for the Future* (Monash University and Mineral Policy Institute, 2007).  
<sup>30</sup> Ibid.

<sup>31</sup> Anthony Judge, *Globalization: the UN's 'Safe Haven' for the World's Marginalized*. Union of International Associations, Laetus in Praeseus (2001) <<http://www.uia.org.documents/pub.php>>.

<sup>32</sup> John Williamson, 'A Short History of the Washington Consensus' (Paper presented at From the Washington Consensus towards a new Global Governance Conference, Barcelona, 24-25 September 2004) <<http://www.iie.com/publications/papers/williamson0904-2.pdf>>.

<sup>33</sup> Lisa Whitehouse, 'Corporate Social Responsibility, Corporate Citizenship and the Global Compact: A New Approach to Regulating Corporate Social Power?' (2003) 3 *Global Social Policy* 299.



voluntary initiatives to promote CSR, culminating in the UN Global Compact. The formation of the Global Compact was a personal quest by former UN Secretary General Kofi Annan to create a more responsible global economic community.<sup>34</sup> Some egregious environment destructive companies and serious human rights abusers<sup>35</sup> are among the Global Compact's over 5300 business partners,<sup>36</sup> and of these are some Australian multinationals with dubious records both at home and overseas. These are detailed further in the paper at Chapter IV.

### 3 Definition Of CSR Used In This Paper

CSR has largely been defined by Northern, first world interests and actors, and has failed to address the key development concerns of the South.<sup>37</sup> It lies in the framework of the market and does not question or challenge the global status quo of haves and have-nots, the dichotomy of North and South. Corporations too often ignore Indigenous and minority interests when they deal with weak or corrupt third world governments. The parameters of CSR are first world, to assuage first world shareholders and consumers, and as a result CSR is largely an exercise in public relations to enable corporations to project a socially responsible image while conducting socially irresponsible practices in many parts of the world.<sup>38</sup> For the purpose of this paper, CSR is defined as per Corporate Social Responsibility Newswire Service, as the 'integration of business operations and values whereby the interests of all stakeholders including customers, employees, investors and the environment are reflected in the company's policies and actions'.<sup>39</sup> The interests of

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<sup>34</sup> Ibid 306.

<sup>35</sup> By this I refer to Article 6 of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1973) and Article 3 of the *Universal Declaration on Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948) (right to life and security of the person), and various forms of Genocide as outlined in the *Convention on the Prevention and Punishment of the Crime of Genocide*, adopted by GA Res 260 (III)A, 78 UNTS 277 (9 December 1948) that prohibits genocide by States, individuals and private actors.

<sup>36</sup> United Nations Global Compact, *UN Global Compact Participants*, <<http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html>>.

<sup>37</sup> Whitehouse (2003), above n 31, 311.

<sup>38</sup> Ibid; Ludescher above n 17; Corporate Watch, 'What's wrong with Corporate Social Responsibility?' (2006); Joel Bakan *The Corporation – the Pathological Pursuit of Power and Profit* (Free Press, 2004); Nadja Valeria de Souza, 'The Corporate Social Responsibility model developed by the United Nations – The Global Compact' (Paper presented at the ABRI-ISA Annual Convention, Rio de Janeiro, 22-24 July 2009).

<sup>39</sup> Cited in Kim Kercher, 'Corporate Social Responsibility: Impact of globalisation and international business', *Corporate Governance eJournal*, (Bond University, 2007).

stakeholders are presumed to be those protected by international human rights and environment covenants and convention, as these are universal in character and cannot be dismissed as mere ‘Western values’ or cultural relativity.

## B *Environmental Rights As Human Rights*

### 1 *Ecosystem Services And The Millennium Ecosystem Assessment*

The argument of this thesis is that environmental rights are human rights. Protection of the environment protects ecosystem services for upon which all human rely. ‘Ecosystem services’ are defined by the Millennium Ecosystem Assessment (MA) as ‘the benefits people obtain from ecosystems.’ These include provisioning services, regulation services, cultural services and supporting services. Provisioning services are the products obtained from ecosystems, such as food, water, timber, and fibre, genetic resources, biochemical, natural medicines and fresh water. Regulating services are the benefits obtained from the regulation of ecosystem processes such as climate regulation, water regulation, erosion control, water purification, regulation of human diseases, biological control, pollination and storm protection. Cultural services are the nonmaterial benefits people obtain from ecosystems. These include cultural diversity, religious and spiritual values, knowledge systems, educational values, inspiration, aesthetic values, cultural heritage, recreation and ecotourism. Supporting services are those necessary for the production of other ecosystem services, such as primary production, soil formation and retention, and nutrient and water cycling.<sup>40</sup> The concept is anthropocentric, but the idea that healthy, functioning ecosystems are imperative to human health is gaining traction in governmental policy and decision-making.<sup>41</sup>

The MA was another initiative of former United Nations Secretary-General, Kofi

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<sup>40</sup> Millennium Ecosystem Assessment *Ecosystems and human well-being: the assessment series* (2005) (four volumes and summary).

<sup>41</sup> See for example The Department of Agriculture, Fisheries and Forestry <[http://www.daff.gov.au/brs/forest veg/Ecosystem\\_Services](http://www.daff.gov.au/brs/forest_veg/Ecosystem_Services)>; Land and Water Australia (Commonwealth agency) <<http://lwa.gov.au/products/pn30171>>; National Land and Water Resources Audit (Commonwealth agency) <<http://www.nlwra.gov.au/projects/3583>>; Department of Environment, Water, Heritage and the Arts <<http://www.environment.gov.au/biodiversity/publications/ecosystem-services-nrm-futures/index.html>> and the Queensland Department of Natural Resources and Mines <[http://www.regionalnrm.qld.gov.au/research\\_sips/sips/social\\_economic/pdf/stewardship\\_payments\\_ecoservices.pdf](http://www.regionalnrm.qld.gov.au/research_sips/sips/social_economic/pdf/stewardship_payments_ecoservices.pdf)>.

Annan. Over four years 1300 natural and social scientists and other experts from 95 countries reviewed already published scientific data and knowledge. They assessed the consequences of ecosystem change for human well-being, and the scientific basis for action needed to protect and enhance the conservation and sustainable use of those systems and their contribution to human well being.<sup>42</sup> Forty-four governments, nine scientific organisations and 600 scientists reviewed the MA, reflecting the consensus of the largest group of natural and social scientists assessing knowledge in the area of ecosystem change.<sup>43</sup>

(a) *Pricing Ecosystem Services*

Ecosystem services have value in the market-based economy. They contribute both directly and indirectly to human welfare, and therefore represent a part of the total economic value of the planet.<sup>44</sup> Costanza et al studied the seventeen ecosystem services in 16 biomes. The ecosystem services studied were gas regulation, climate regulation, disturbance regulation, water regulation, water supply, erosion and sediment retention, soil formation, nutrient cycling, waste treatment, pollination, biological control, refugia, food production, raw materials, genetic resources, recreation and cultural values.<sup>45</sup> Costanza and his team estimated the provision of these services to be worth between US\$16-54 trillion (10 to the 12<sup>th</sup>) per year, with an average of US\$33 trillion per year. Because of the range of uncertainties, this is a conservative estimate, but for comparison, the entire global gross national product at 1999 was US\$18 trillion a year.<sup>46</sup>

(b) *A Right To Environment?*

A universal right to environment is not enunciated as a human right in international law. The right to environmental protection is obliquely inscribed under the right to health at Art 12 of the *ICESCR*, that State parties will take all necessary steps to

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<sup>42</sup> Millennium Ecosystem Assessment, above n 38.

<sup>43</sup> Ezequiel Lugo, 'Ecosystem Services, the Millennium Ecosystem Assessment, and the Conceptual Difference between Benefits Provided by Ecosystems and Benefits Provided by People,' 23 *Journal of Land Use and Environmental Law* 243, 247.

<sup>44</sup> Robert Costanza, Ralph d'Arge, Rudolph de Groot et al, 'The value of the world's ecosystem services an natural capital' (1997) 387 *Nature* 253.

<sup>45</sup> *Ibid*, 254.

<sup>46</sup> *Ibid*, 259.

improve ‘all aspects of environmental and industrial hygiene.’<sup>47</sup> The lack of environmental focus in the Twin Conventions is hardly surprising given that they are creatures of 1966. More surprising is lack of ‘right to environment’ in the Rio Declaration. Negotiators at Rio rejected an enshrined right to environment as inconsistent with the human right to development.<sup>48</sup> The right to development is an inalienable human right but also implies the realization of all people to self-determination.<sup>49</sup> The right to development is inexorably linked to the human person,<sup>50</sup> as is human health. Human health and well-being is the cornerstone of ecosystem services and the Millennium Ecosystem Assessment, and hence all are linked into the human rights spectrum. This thesis demonstrates that environmental destruction in the form of ecocide or other large-scale degradation has direct impacts for human rights both at the site of the damage, downstream and in domestic policy.

## 2 CSR Industry Failure At Triple Bottom Line

Some CSR researchers believe environmental consciousness, green industry and initiatives such as the Kyoto Protocol has made industry more accepting of the environmental component of the triple bottom line, a concept described in the first chapter. At issue is the more difficult challenge for industry to be in harmony with people.<sup>51</sup> Professor James Gladwin’s research focuses on the intersection of environmentalism and globalism in relation to the activities of corporations and he feels that business organizations are comfortable with the economic bottom line, and increasingly comfortable with the environmental bottom line, but consideration of the third, the social, has so far eluded them. Incentives to green industry are increasingly strong, especially post-Kyoto. Gladwin's views ring hollow when one looks to, for example, the BP Gulf of Mexico environmental disaster that proves

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<sup>47</sup> ICESCR Art 12(2)(b).

<sup>48</sup> David Kinley and Junko Tadaki, ‘From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law (2004) 44 *Virginia Journal of International Law* 931.

<sup>49</sup> Declaration on the Right to Development, Adopted by General Assembly resolution 41/128 of 4 December 1986, Article 1.

<sup>50</sup> *Declaration on the Right to Development*, 97<sup>th</sup> plen mtg A/RES/41/128 (4 December 1986), Article 2(1).

<sup>51</sup> Thomas Gladwin, ‘Sustainability and Profitability: Conflict or Convergence?’ (Paper presented at Socio-economic Challenges of Social Sustainability, Third Senior Executives’ Seminar, HRH The Prince of Wales’ Business & the Environment Programme, Cambridge University, 15-19 September 1996).

environmental stewardship requires much more than a signed commitment and a green sunburst-daisy logo. Gladwin believed fewer incentives are in place for the social bottom line and for sustainability to be genuine it must also

Demand poverty alleviation, population stabilization, female empowerment, employment creation, human rights observance and opportunity redistribution on a massive scale.<sup>52</sup>

This form of sustainability demands a radical paradigm shift from economic efficiency to social equity.<sup>53</sup>

A genuine commitment to CSR would alleviate concerns about any of the prongs of the Triple Bottom Line trident. Gladwin's analysis signals the need for a paradigm shift from the neo-conservative Washington Consensus international political economic organization to a recommitment of global organization based upon the UN Charter and associated covenants and conventions.

*(a) Australian Inquiry Into CSR and Outcomes*

The Australian Parliamentary Joint Committee on Corporations and Financial Services ('PJC') held an investigation into Corporate Responsibility and Triple Bottom-Line reporting following amendments to the British *Companies Act 2006*. The British amendments legislated a director's duty to take into account stakeholders and environment along with shareholder interests. The PJC's terms of reference included investigating the extent to which corporate decision-makers have an existing regard for the interests of stakeholders other than shareholders, what extent they should have regard to these interests, what extent the current legal framework governing directors' duties encourages or discourages them from having regards to stakeholders other than shareholders, and if the corporations law should be amended to encourage regard for the broader community.<sup>54</sup> The Committee comprised four Liberal Senators, four ALP Senators and a Democrat Senator. It conducted hearings in capital cities and invited comment, receiving 146 submissions from business, legal, human rights and environment groups among others, and ultimately

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<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> PJC Corporate Responsibility Report, Terms of Reference, above n 4.

recommended promotion of voluntary initiatives and no change to the directors' duties in corporations law.

The Committee's Report, 'Corporate responsibility: Managing risk and creating value'<sup>55</sup> outlines the history and background to the *Corporations Act 2001* and collates the hearings and submissions. The Report recognizes that it is 'impossible to provide a comprehensive list of strong corporate performers [in CSR] without the risk of omitting a committed company,'<sup>56</sup> but notes Rio Tinto and BHP Billiton<sup>57</sup> as two of three 'very strong performers in the field of CSR and corporate citizenship'<sup>58</sup> on the basis of corporate behaviour needed to obtain ongoing mining approvals. These two companies have a stark record of environmental damage and social dislocation and discord in Papua New Guinea (4 km from the Australian border at Saibai Island) and West Papua (less than 150 km from Australia), and have a mixed reception in Australia.

In their Supplementary Report, the Labor members noted that today's corporations are larger, own more assets and are more influential than ever, and have not only economic but social, cultural, environmental and political impacts.<sup>59</sup> They recognized that external impacts of corporations are now greater and have costs as well as benefits to society, and this is at a time when 'a number of critical environmental and social conditions are emerging as a significant threats', including climate change, biodiversity loss and intergenerational poverty, and that these directly or indirectly affect Australian businesses. Exculpating corporations of any responsibility, the Labor Senators stated that 'corporations are not to blame for these growing environmental and social challenges'<sup>60</sup> but must be part of an effective response to these problems as the corporations are significant contributors to Australia's prosperity and development.

The inconsistency of the Labor Senators claim that Rio Tinto and BHP Billiton are the top performers in CSR and corporate citizenship, without reference to Rio-

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<sup>55</sup> Ibid,

<sup>56</sup> Ibid, section 2.55.

<sup>57</sup> Gianni Zappala, Submission No 2 to Parliamentary Joint Committee on Corporations and Financial Services, *Corporate Responsibility: Managing risk and creating value* (2004), section 2.56.

<sup>58</sup> 'Corporate citizenship' is different concept to CSR and has been criticized as a 'watered down' concept of CSR, and is described further in the paper.

<sup>59</sup> Above n 4, Labour Supplementary Report, 1.3.

<sup>60</sup> Ibid.

Tinto's implication of human rights abuses and environmental destruction, is axiomatic of the problem of CSR. Breaches of international human rights and environmental instruments (including the *Convention Against Genocide*) at the Freeport-Grasberg mine in West Papua, and BHP Billiton's record of environmental waste and corruption involving the State legal process stemming from Papua New Guinea's Ok Tedi mine belie the words of the Committee.

## C CSR And Control Of Common Pool Resources

### 1 Market Fundamentalism And CSR

Milton Friedman famously said that 'the social responsibility of business is to increase its profits.'<sup>61</sup> In Friedman's view (which was adopted by market fundamentalism and the Washington Consensus and pervades through the Global Financial Crisis to today), the concept of social responsibility reinforces the view that the 'pursuit of profits is wicked and immoral and must be curbed by external forces.'<sup>62</sup> The 'external forces' feared by Friedman are not 'social consciences,' but the 'iron fist' of Government bureaucrats, notwithstanding that the Government is, in a social democracy, composed of representatives of the wishes of the people. Friedman's ideal free market rests on private property, with no coercion and only voluntary cooperation. In Friedman's ideal free market there are no values or "social" responsibilities other than the shared values and responsibilities of individuals. As echoed by Margaret Thatcher's most famous quote, 'there is no such thing as society,'<sup>63</sup> society is viewed by the free-market fundamentalists as a collection of individuals and the various groups they voluntarily form.<sup>64</sup> Friedman neglected to mention that some property is a common pool resource that has historically been owned collectively. One such common pool resource is minerals under the ground, as articulated by Ken Henry, Secretary to the Treasury and

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<sup>61</sup> Milton Friedman, 'The Social Responsibility of Business is to Increase its Profits', *The New York Times Magazine* (New York) 13 September 1970.

<sup>62</sup> Ibid

<sup>63</sup> Margaret Thatcher, interviewed by Douglas Keay in 'Aids, education and the year 2000!', *Women's Own Magazine* 31 October 1987. Paraphrasing Friedman, the following sentence is "There are individual men and women, and there are families...."

<sup>64</sup> Friedman, above n 58.

architect of the Rudd Government's resources super profit tax proposal.<sup>65</sup>

(a) *Critiquing Efficient Allocation of Resources – Moving From Hardin's Tragedy Of The Commons*

Common pool resources are public goods with finite benefits. The more one person uses, the less remain for others. Typically mines dramatically alter ecosystems and the ecosystem services provisioned. Mining operations in regions of high biodiversity can affect the provisioning of ecosystem services for hundreds of kilometres downstream from catchments or in toxic dust-cloud fallout. Serious depletion of biodiversity, fresh water provisioning and land stabilization in areas prone to erosion effect human well-being and human rights. Genuine adherence to CSR is imperative to prevent social unrest and its variants, including a matter considered to be against the national interest, the exodus of asylum seekers from regions of unrest to seek asylum in Australia.<sup>66</sup>

As a common pool resource, it is incumbent on all companies purporting to abide by principles of CSR to take into account the effects of non-renewable resource depletion on the entire community, and that includes the community's ecosystem services. Common pool resources are typically subject to depletion (fisheries) or degradation if not stewarded correctly.<sup>67</sup> Hardin's seminal work, 'Tragedy of the Commons',<sup>68</sup> was originally understood to mean that unless there is private ownership of resources or governmental control of them, environmental tragedy is inevitable.<sup>69</sup> Hardin used the analogy of the medieval village green to pose for a

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<sup>65</sup> Stephen Long, Interview with Ken Henry (PM, *ABC Radio National*, 18 May 2010).

<sup>66</sup> The arrival of 43 West Papuan refugees at Mapoon, North Queensland, on 18 January 2006 caused a diplomatic incident whereby the Australian government attempted to pass the *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* specifically aimed at preventing West Papuan refugees from making a valid refugee claim so as to appease Indonesia. The Bill was hastily withdrawn on the 18 August 2006 when it was apparent a number of Liberal and National party senators would cross the floor and defeat the legislation. The Jakarta appeasement imperative was reported widely, and is described in the International Commission of Jurists (Australia) analysis, 'Asylum Seeker Policy in Australia', < <http://www.icj-aust.org.au/content/view/35/1/>>. The Howard government negotiated a restrictive treaty, the *Agreement Between the Republic of Indonesia and Australia on the Framework for Security Cooperation* (the 'Lombok Treaty') ratified by the Rudd government on 8 February 2008. Article 2(3) commits the Australian government to preventing anybody in Australia from 'encouraging' separatism in Indonesia. The Hansard records show that silencing Australians over West Papua was the specific aim of that clause: Official Committee Hansard, Joint Standing Committee on Treaties, 26 March 2007.

<sup>67</sup> Robert Wade, 'The management of common property resources: collective action as an alternative to privatization or state regulation' (1987) 11 *Cambridge Journal of Economics*.

<sup>68</sup> Garret Hardin 'The Tragedy of the Commons' (1968) 162(3859) *Science* 1243.

<sup>69</sup> Nobel Economics Prize winner Elinor Ostrom, cited in Karlson Hargroves and Michael Smith (eds) *The Natural Advantage of Nations (Vol. I): Business Opportunities, Innovation and Governance in the*



common good resource. As long as population was small, villagers could graze their cattle without diminishing the green. As a rational being, each herdsman seeks to maximise his gain and adds one more cow to the herd. The positive function is an extra animal for the cowherd, the negative extra impact on the village green. Each extra animal benefits a single individual, but is detriment to the entire commons, which ultimately affects all herdsmen. In Hardin's view, human rational thought (i.e. self interest) had only one outcome – ruination of the common property resource in the absence of private property or governmental regulation. Governments encouraging market-based solutions in a free-market economy have embraced the message that private property rights are the solution for protecting scarce resources. The United Nations has, in recent years, placed more emphasis on market-based solutions to environmental problems.<sup>70</sup> This mode neglects to consider the rights of Indigenous people to their ancestral lands, or their capacity of stakeholders to pay market prices to protect their interests, or even have an input into decision-making processes surrounding operations on their land. Those minorities who wish to have legitimate grievances over land and resources can now be labelled 'terrorists' and repressed with global impunity. NGO Minority Rights Group International says that the 'war on terror' has provided a convenient cover for many States to evade their human rights obligations and engage more easily in attacks on minorities.<sup>71</sup> Marginalised and criminalized people are not in the position to enter the marketplace and purchase private property under market conditions.

The notion that scarce resources are best protected by private property rights erases from history the neo-colonialism that brought corporate power and weak and corrupt governance together. Neo-colonialism has decisively guided the Invisible Hand to the camp of the powerful, the corporations and governments ready to disregard human rights and processes for life (clean water, forests-as-lungs) for profits for the few. Social democracy demands people to have power to determine their own

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*21st Century* (Earthscan, 2006).

<sup>70</sup> United Nations Environment Program and World Conservation Union (IUCN), *Developing International Payments for Ecosystem Services* <[http://www.unep.ch/etb/areas/pdf/IPES\\_IUCNbrochure.pdf](http://www.unep.ch/etb/areas/pdf/IPES_IUCNbrochure.pdf)>; Anantha Kumar Duraiappah, United Nations Environment Program 'Markets for Ecosystem Services, A Potential Tool for Multilateral Environmental Agreements' (2006) <[http://www.iisd.org/pdf/2007/economics\\_markets\\_eco\\_services.pdf](http://www.iisd.org/pdf/2007/economics_markets_eco_services.pdf)>.

<sup>71</sup> Minority Rights Group International, 'Global 'war on terror' has become a global war on minorities' (Press Release, 8 September 2006) <<http://www.minorityrights.org/669/press-releases/global-war-on-terror-has-become-a-global-war-on-minorities.html>>.

governance. The rise of corporate power and the retraction of government regulation (see BP in the Gulf of Mexico) has led to the perverse situation where private transnational companies with allegiances to only their shareholders have more power than many states themselves. Franklin D. Roosevelt cautioned against this phenomenon as tending towards the unthinkable:

Unhappy events abroad have retaught us two simple truths about the liberty of a democratic people. The first truth is that the liberty of a democracy is not safe if the people tolerate the growth of a private power to a point where it becomes stronger than the democratic state itself. That, in its essence, is fascism - ownership of government by an individual, by a group, or by any other controlling private power.<sup>72</sup>

As will be seen later, the activities of some Australian companies in the Asia-Pacific region with the collusion of the State and its security forces has amounted authoritarianism, the antithesis of social responsibility.

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<sup>72</sup> Franklin D Roosevelt quoted in 'Industry: Anti-monopoly', *Time* (New York), 9 May 1938.

### III RIO TINTO – A CASE STUDY OF AN AUSTRALIAN LISTED GLOBAL GIANT

#### *Introduction*

Rio Tinto is the world's third largest mining company by market value with earnings in 2010 of over \$6.3 billion, and profit of over \$14 billion.<sup>1</sup> It is a dual listed company combining Rio Tinto plc, a public listed company headquartered in London, and Rio Tinto Limited, headquartered in Melbourne and listed on the Australian Stock Exchange. The two companies are joined as a single economic entity, called the Rio Tinto Group. Most of Rio's assets are in Australia and North America, but they also operate in Asia, Europe and Africa. It is a truly global operation. Rio Tinto proclaims to have a focus on sustainable development to maintain its 'highly regarded reputation' that ensures 'ongoing access to people, capital and mineral resources.'<sup>2</sup>

#### *A History Of Rio Tinto*

##### *1 From Antiquity Until The 19<sup>th</sup> Century*

Rio Tinto, the Red River in Huelva, Spain, was named for the copper-stained water from the ancient copper mine that previously supplied Phoenicians, Ancient Greeks, Carthaginians and the Roman Empire from about 5000 years ago.<sup>3</sup> The site was so rich in copper that it was the cradle of the Copper and Bronze Ages. The mine is also reputedly the fabled mine of King Solomon, so much so that the area is known as Cerro Salomon and nearby villages Zalamea la Vieja (now Nerva) and Zalamea la Real. The mine was abandoned after the Roman era, reopened and subsequently abandoned by Visigoths and Moors.<sup>4</sup> The tides of

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<sup>1</sup> Rio Tinto, 2010 Annual Report, Group Income Statement, Years ended 31 December 2010, < [http://www.riotintio.com/annualreport2010/financial\\_statements/index.html](http://www.riotintio.com/annualreport2010/financial_statements/index.html)>.

<sup>2</sup> Rio Tinto 'Our Strategy' < [http://www.riotinto.com/ourapproach/our\\_strategy.asp](http://www.riotinto.com/ourapproach/our_strategy.asp)>.

<sup>3</sup> Nicholas A.J.Taylor, 'Red River: The blacklisting of Rio Tinto' (2010) Unpublished.

<sup>4</sup> Coles JM and Harding AF *The Bronze Age in Europe* (1979) cited in A. Davis Jr. 7 A.T. Welty 7 J. Borrego 7 J.A. Morales 7 J.G. Pendon 7 J.G. Ryan, 'Rio Tinto estuary (Spain): 5000 years of pollution' (2000) 39(10) *Environmental Geology* 1108.

history washed away the ancient mining operation until 1556 when the Rio Tinto copper and sulphide mine was rediscovered. More than a century and a half elapsed before the rediscovered mine was reopened by the Spanish king in 1724. The Spanish government tried unsuccessfully to exploit the mine, and in 1873 the government sold the mine for well below value to a British-German consortium.<sup>5</sup>

## 2 *Establishing The Mining Company*

Eager to relieve Spain of burdensome obligations and seeking foreign investment, the pre-eminent Spanish economic liberals set the reserve price for the most prized national assets, the Rio Tinto Mines, at 4,086,000 pounds sterling (103,0669,000 pesetas) in May 1871. The European business community was luke-warm towards the sale, as few businesspeople or consortiums had the funds necessary to purchase the mine and equip it for commercially viable exploitation. One who was convinced of the enormous riches to be made was German mining entrepreneur Heinrich Doetsch, who had interests in southern Spain mining cupreous pyrites. Doetsch realized the Rio Tinto Mine had higher quality and seemingly endless supplies of cupreous pyrites, and shrewdly anticipated the rumbling civil disorder of pre-revolution Spain would likely prove advantageous for buying the mine at well below asking price.<sup>6</sup> Spruiking around London for financiers to invest in the Mines, Doetsch was introduced to one of the most capable and influential businessmen of the time, Hugh Mackay Matheson, who needed little persuading that the mine was worth pursuing. Matheson had extensive successful experience in engaging in risky ventures and was a respected city figure and leading member of the Chamber of Commerce through which he knew several merchant bankers. Matheson was able to obtain finance through these and the Deutsch Bank, and in 1872 made a bid of 3,680,000 pounds sterling (92,800,000 pesetas) for the unutilised mine. This price was substantially under the reserve price and conditional on the Mines being ceded in perpetuity and the authorities forever relinquishing the right to claim royalties. In the absence of better offers, the Spanish government accepted the bid in February 1873.<sup>7</sup> The consortium named itself after the copper stained river, Rio Tinto.

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<sup>5</sup> Taylor, above n 3.

<sup>6</sup> Charles E. Harvey, *The Rio Tinto Company: An economic history of a leading international mining concern, 1873-1954* (Alison Hodge Publishers, 1981).

<sup>7</sup> Ibid.

The rapid growth of the European pyrites market opened a new era of prosperity for Rio Tinto for over a decade. Pyrites (iron sulphide) was used to make sulphuric acid for the European Industrial market for which the Rio Tinto Company had a near monopoly on production. New mining and metallurgical methods made copper mining a viable option for the company in the late nineteenth century, but without a monopoly, Rio Tinto was unable to fix prices as it could with its near monopoly in pyrites. Early on Rio Tinto contributed little to the Spanish economy and did 'everything possible' to minimize benefits accruing to the host nation.<sup>8</sup> The company used paternalism to control the native workforce and keep wages depressed, and when this failed it displaced the local elites to become the main political power in the region.<sup>9</sup>

*(a) Challenges of the Spanish Civil War and retreat from Spain*

The Spanish Civil War of 1936-9 posed greater challenges to Rio Tinto Company. Disenfranchised miners who had expressed discontent with Rio Tinto's conditions were executed by Franco's troops. Rio Tinto director at the time, Sir Auckland Geddes, is reported as saying at Rio Tinto's 1937 annual general meeting that, "since the mining region was occupied by General Franco's forces, there have been no further labour problems... Miners found guilty of troublemaking are court-martialled and shot."<sup>10</sup>

Surprisingly, the company found working with the Republicans less difficult than working with Franco's nationalist Spain, because when they claimed victory in February 1939, the Nationalists requisitioned half of all the mines outputs despite international contracts to be filled. This caused Rio Tinto a further setback with the crushed morale of the miners severely affecting production - most of the miners had supported and fought with the Republican cause for the duration of the war and were barely subsisting under the yoke of General Franco's dictatorship. While trying to mobilize their workforce, it became clear to Rio Tinto's British

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<sup>8</sup> Adrian Schubert, 'Reviews on Spanish History Article: Charles E. Harvey, The Rio Tinto Company: An Economic History of a Leading International Mining Concern, 1873-1954' [1984] *European History Quarterly*.

<sup>9</sup> Ibid.

<sup>10</sup> Attributed to Geddes, London Mining Network, 'Rio Tinto: A shameful history of human and labor rights abuses and environmental degradation around the globe', 10 April 2010 <<http://londonminingnetwork.org/2010/04/rio-tinto-a-shameful-history-of-human-and-labour-rights-abuses-and-environmental-degradation-around-the-globe/>>.

board that, General Franco's ally Germany was stockpiling what Rio Tinto considered British property for the purpose of its own expansion and looming war. The Rio directors suspended pyrites deliveries to Germany due to their importance in Germany's arms industry, only to be instructed by the British Foreign Office to continue German sales because ceasing supply was an 'unfriendly act' against a technically 'friendly' country.<sup>11</sup> This was an instance of a corporation attempting to be 'socially responsible' to put the safety and national interest of Great Britain ahead of its own profits. After WWII, nationalist Spain became a pariah state in the international community attracting little foreign investment and causing its economy to contract sharply. Difficulties in production led Rio Tinto to sell its Spanish operations to Spanish banks in 1954.

*(b) International Expansion – Globalization Of Rio Tinto, Global Giant*

The early directors of the Rio Tinto Company were leading British establishment financiers. Copper smelting plants were built in South Wales, and superphosphate operations opened in America. By the end of the 1920s, diversification was no longer viewed as a means of solving problems but as a legitimate business strategy in itself. In 1929 Rio Tinto bought a substantial share in Minerals Separation, a major Rhodesian copper mine, and this led the directors to realize the rich rewards that could be gained by mineral exploration. Within 18 months of the Rhodesian copper acquisition, Rio Tinto Company had engineers and geologists surveying 26 prospects of gold, lead, tin, copper, zinc, wolfram, pyrites and copper in Britain, Australia, Africa, Latin America and Canada, although this led to few commercially viable ventures.<sup>12</sup> While the Spanish operations were in decline, the returns on the Northern Rhodesian copper operations more than compensated for the setbacks and laid the foundations for Rio Tinto's emergence as a modern multinational enterprise.<sup>13</sup> In 1962 Rio Tinto Company (RTC) merged with Consolidated Zinc Corporation (CZ) to form RTZ (Rio Tinto Zinc). Consolidated Zinc was formed in 1904 to extract zinc the tailing piles of Broken Hill's famous silver and lead mines, and was achieving similar success levels as RTC from diversification into Weipa bauxite at the time of merger. RTZ quickly

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<sup>11</sup> David Avery, *Not on Queen Victoria's Birthday, the story of the Rio Tinto mines* (Collins, 1974) 377-383.

<sup>12</sup> Harvey, above n 6, 215.

<sup>13</sup> Funding Universe, Rio Tinto PLC, <<http://www.fundinguniverse.com/company-histories/Rio-Tinto-PLC-Company-History.html>>.

rose to prominence in the extractive industry, and joined a partnership with Kaiser Aluminium forming the Commonwealth Aluminium Company Limited (Comalco) to exploit the Weipa bauxite reserves.

The company rapidly expanded and developed a number of large-scale mining projects in the years 1962 – 1968. Along with the Weipa bauxite mine development, RTZ established the Palabora copper projects in South Africa (joint owned with Anglo American PLC and public float), Hamersley Iron in the Pilbara, Argyle Diamonds in the Kimberley, and Tarong (coal) in Queensland. It also had large-scale operations in Papua New Guinea (Bougainville, copper), Namibia (uranium) and Indonesia (Kelian, gold, and coal). For the seventeen years between 1968 and 1985, Rio Tinto diversified into other fields, including cement, oil and gas, and manufacturing products for the automotive and construction industries. The company undertook a major strategic review in 1987-88 and took a decision to re-focus on mining and other mine related interests such as smelting. In 1989 Rio Tinto purchased all of BP's mineral operations spread over 15 countries in a \$4.3 billion deal that elevated Rio to one of the world's largest mining companies. The deal came with a portfolio that included the world's largest open-cast copper mine and the largest producer of titanium dioxide feedstock, 13 per cent of zircon, 15 per cent of industrial diamonds, 14 per cent of vermiculite, eight per cent of talc, and five per cent or more of uranium, copper, and molybdenum. It also ranked among the world's largest producers of tin, bauxite, silver, iron ore, gold, lead and zinc.

*(i) Bougainville Misadventure*

In this same year of the BP acquisition, Rio Tinto was forced to cease operations in Bougainville due to ongoing attacks by indigenous militants fighting a secessionist war with the Papua New Guinea government. The conflict in Bougainville led to the deaths of over 20 000 people<sup>14</sup> over a nine year period,

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<sup>14</sup> Alexander Downer, *The Bougainville crisis: an Australian perspective*, (Canberra, Department of Foreign Affairs and Trade, 2001). This figure includes the 1000 revolutionaries killed, extrajudicial executions that happened on both sides, and people who died as a result of lack of medical assistance, medicines and food during the PNG embargo. It is disputed by some, including the lawyer who represented Bougainville parties in peace negotiations, Anthony Regan, ABC Radio National, 'Report claims 20,000 people died in Bougainville crisis', *The World Today*, 21 November 2001 (Anthony Regan). Regan believes any estimates of over 10 000 deaths are 'probably fanciful', and that official higher figures were inflated to denote a more serious conflict successfully managed by Australian and

and was directly related to Rio Tinto's huge Panguna copper mine. Bougainville landowners are in a protracted legal battle against Rio Tinto under the United States' *Alien Torts Claim Act*, alleging crimes including complicity in genocide, war crimes, environmental harm and racial discrimination.<sup>15</sup> Two decades after the closure of its Panguna mine, Rio Tinto subsidiary Bougainville Copper Limited ('BCL') is in discussions with the Bougainville President with hopes of reopening in the near after feasibility studies indicate more gold, silver and copper in the mine than has previously been extracted.<sup>16</sup>

*(c) Merger and Dual-Listing of Rio Tinto*

London-based RTZ merged with Rio's Australian entity, CRA (Conzinc Rio Tinto Australia) in December 1995 to become a dual-listed company and the then world's largest mining company. It is directed by a common board of directors and operated as a single entity but with separate shareholder lists in the UK and Australia. RTZ Corporation PLC changed its name to Rio Tinto plc and CRA Limited became Rio Tinto Limited, known together as the Rio Tinto Group two years later.

*B Relations With Aboriginal People And The Effect Of Mabo And The Native Title Act*

Prior to 1992, the mining industry in Australia had very poor relations with Aboriginal people. Some of these conflicts are documented below with respect to Rio Tinto. Successive State and Territory governments facilitated large-scale mining because mining is one of the few industries in which the State or Territory governments can raise money in the form of royalties. Most major mineral deposits are conferred special legislative status to expedite their exploration, and at times police and brutal methods have been employed to remove protesting Aboriginal peoples. Until the *Mabo* decision, the State (federal and state) expedited mining operations by force or, as seen in the cases below, by passing or

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New Zealand governments for political gain.

<sup>15</sup> *Sarei et al v Rio Tinto, PLC*, US Court of Appeals for the Ninth Circuit, 28 October 2010.

<sup>16</sup> Bougainville Copper Limited Chairman, Peter Taylor, Annual General Meeting Address, Crowne Plaza Port Moresby, 29 April 2010.



amending laws even after affirmative decisions had been handed down by state supreme courts.

The Australian mining industry was shaken by the outcome of *Mabo v Queensland (No 2)*,<sup>17</sup> when the High Court upheld the claims of the plaintiffs that Australia was occupied by Aboriginal and Torres Strait Islanders who had their own laws and customs and whose 'native title' to land had survived the Crown's annexation. Following the decision, the government passed the *Native Title Act 1993* (Cth) which simultaneously conferred land rights to some Aboriginal people in certain parts of Australia while extinguishing native title on all freehold title and leases that made up the majority of settled Australia. Prior to passage of the *Act*, the peak lobby group for the mining industry, the Mining Council of Australia, made voracious attacks including full-page advertisements in newspapers claiming people's backyards were at risk of being claimed under the *Native Title Act*.<sup>18</sup> These statements whipped hysteria and generated One Nation type sentiments expressed in popular media.<sup>19</sup>

### *1 Industry Reaction To The Wik People's Native Title Claim*

The Wik peoples' claims for native title rights over leasehold land lodged in the Federal Court in June 1993 again caused discontent amongst mining companies, particularly CRA. Its Weipa Comalco mine was within the boundaries of the land claim. The managing director and CEO of CRA, John Ralph, put pressure on the Queensland government to legislate against Aboriginal interests in a television interview, and the following day Queensland Premier mooted requesting overriding federal legislation to protect CRA's Queensland investments. CRA had its operations at Weipa, and linked the Wik people's claim to its \$1.75 billion expansion plan for its Gladstone smelter, nearly 2000 km from Weipa. In a clear case of a single mining company dictating policy, Ralph warned that CRA would

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<sup>17</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1; see Damien Short, *Reconciliation and Colonial Power: Indigenous Rights in Australia* (Ashgate Publishing Limited, 2008), pp 45-65.

<sup>18</sup> Australian Broadcasting Corporation, 'What's yours is mine', *Four Corners*, broadcast 7 June 2010.

<sup>19</sup> Rio Tinto was again one of a consortium of mining companies placing full-page advertisements in national media against the Government's proposed Resource Super Profits Tax in 2010. A 'war chest' of \$100 million was earmarked to campaign against such and spearheaded by Rio Tinto CEO Tom Albanese and BHP Billiton chairman Marius Kloppers.

scrap or defer the \$1.75 billion projects unless the Wik claim was resolved.<sup>20</sup>

Ralph again pushed CRA's weight with a letter sent to all key ministers before the final Federal Cabinet Wik meeting, saying "You will appreciate that we cannot enter into any consultations with the Wik people until we have an assured position regarding title and absence of liability for any compensation arising out of the invalidity". Former Minister for Aboriginal Affairs, Robert Tickner, considered CRA's posturing as old-style bullying, and noted the positive changed direction of CRA once Leon Davis replaced Ralph as CEO. Tickner appreciated CRA's change in policy following the enactment of the *Native Title Act*, believing it 'to be a very welcome new direction towards social responsibility in the Australian mining industry'.<sup>21</sup>

## 2 *A Change In Policy, In Australia*

Protracted and bitter and disputes between Aboriginal Traditional Owners and mining companies cost companies millions of dollars in lost production and litigation costs. Aboriginal opposition at Hamersley, Argle and Century Zinc mines caused the company millions of dollars in delays, legal challenges and security to CRA (later Rio Tinto). Added mining industry costs and delays from mandatory negotiation provisions in the *Native Title Act* preceded a change in policy for Rio Tinto in the mid-1990s and moved the company to implement tenets of corporate social responsibility into their operations. In a landmark 1995 speech, Rio Tinto's (as CRA) then CEO Leon Davis gave his 'satisfaction' with the main tenets of the native title legislation. Davis told the Australian Securities Institute that

'in CRA, we believe there are major opportunities for growth in outback Australia which will only be realized with the full cooperation of all interested parties.'

Davis went on to add that the *Native Title Act*

'laid the basis for better exploration access and thus increased the probability that the next decade will see a series of CRA operations developed in active partnership with Aboriginal people.'<sup>22</sup>

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<sup>20</sup> Robert Tickner, *Taking a Stand - Land Rights to Reconciliation* (Allen & Unwin, 2001) 142.

<sup>21</sup> *Ibid*, 163.

<sup>22</sup> Leon Davis, 'New Directions for CRA' (Speech delivered to the Securities Institute Australia,

A month later, Davis added to this change in business policy, telling the managing directors of CRA of his desire to move away from a litigious framework and open channels to forge some common ground with those parties not favourably disposed to CRA.<sup>23</sup>

Rio Tinto continued to diverge and differentiate itself from the rest of the mining industry, taking CSR leadership on the issue of exploration and mining on Aboriginal land. Davis was forthright in telling the Australian Institute of Company Directors the old argument of the mining industry – that it had unrestricted access to Australian broadacres – would no longer wash.<sup>24</sup> In promising a new deal for Aboriginal people, Davis elaborated

[o]ur starting point is that Aboriginal people who live near our exploration or mining areas are stakeholders in our venture. So too are Aboriginals who no longer live there but retain a connection to the land.<sup>25</sup>

While this reflects acceptance and adherence to the *Native Title Act*, Davis' speeches articulated changing company policies in light of changing social values, creating a benchmark to be followed by other mining companies including the world's then largest, BHP Billiton.<sup>26</sup>

### 3 *Rio Tinto's Aboriginal and Torres Strait Islander Policy*

In line with Rio Tinto's 1995 decision and policy shift to work positively with Aboriginal people, Rio developed a comprehensive Aboriginal and Torres Strait Islander policy.<sup>27</sup> The principles of the policy are that:

- in all exploration the company will consider Aboriginal and Torres Strait Islander people's issues;
- where there are traditional or historical connections to particular land or

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Sydney, March 1995).

<sup>23</sup> Leon Davis, 'New Competencies in CRA' (Speech delivered to CRA Annual Company Conference, Townsville, April 1995).

<sup>24</sup> Leon Davis, 'The New Competence in Mining' (Speech delivered to the Australia Institute of Company Directors, Melbourne, 3 October 1995).

<sup>25</sup> Leon Davis, (Speech delivered at Kormilda, Speech Darwin, 14 November 1995).

<sup>26</sup> At the time of writing (2011), the three largest mining companies are (in order), Vale, BHP Billiton and Rio Tinto.

<sup>27</sup> Rio Tinto, *Aboriginal policy and programs in Australia, 2011*, <[http://www.riotinto.com/documents/ReportsPublications/RT\\_Policyand Prog.pdf](http://www.riotinto.com/documents/ReportsPublications/RT_Policyand Prog.pdf)>.

waters, the company will engage with Aboriginal and Torres Strait Islanders to find mutually beneficial outcomes;

- Beneficial outcomes will be ascertained by listening to the affected peoples;
- Economic independence will be provided through direct employment and training schemes, plus the development of sustainable economic activity once Rio Tinto has left the area.

The policy recognizes that Aboriginal and Torres Strait Islanders have been disadvantaged and dispossessed, have a special connection to land and waters and have native title rights recognized at law.<sup>28</sup>

The main thrust of the policy is economic development and economic capacity building. The policy document highlights benefits of increased Indigenous employment, and to this end are committed to employing Aboriginal people in their operations. For example, in the mid 1990s less than 0.5% of Rio's Australian workforce was Indigenous. By 2008 the figure had risen to 8%, and 25% at Rio's Argyle diamond mine in the Kimberleys, Rio's ERA Ranger uranium mine has 20% indigenous employees. Rio Tinto is the entity with the highest Indigenous employment outside government, and has an Indigenous employment target of 20% of the entire Australian company operations by 2015.<sup>29</sup> To this end, Rio provides training programs including supporting Indigenous tertiary students in the fields of law, environmental science, commerce, archaeology, anthropology, geology, engineering, human resources, occupational therapy, medicine and public affairs.

Rio Tinto is a part of the National Aboriginal Employment Covenant, an industry-led initiative to create and fill 50 000 jobs for Indigenous people. Rio Tinto has recently criticized the Federal government for not playing a more significant role in Indigenous education and training programs, as currently this responsibility lies largely with mining companies in the remote regions.<sup>30</sup> Rio Tinto acknowledges the need to enhance its reputation to create positive global investments, and as such there lies reputational and negotiating advantage to offer training programs

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<sup>28</sup> Ibid 22.

<sup>29</sup> Rio Tinto, 'Rio Tinto's Indigenous Employment Strategy – Making a Difference' (Presentation delivered at AMPLA State Conference, Maritime Museum, Fremantle, Friday 20 March 2009).

<sup>30</sup> ABC News, 'Government's Indigenous employment strategy slammed', *ABC News Online* (24 January 2011).

for marginalized Indigenous people living in the same remote communities in which the company wishes to conduct business.

Rio's Aboriginal and Torres Strait employment initiatives and 'mutually beneficial outcomes' for intractable cultural or traditional problems are not without criticism. Some of these projects will be looked at below. These include pre-*Native Title Act* operations, such as the Comalco aluminium and Argyle Diamond mines; and post *Native Title Act*, post- Aboriginal and Torres Strait Islander Policy projects in the Hamersley Ranges, Century Zinc and Jabiluka uranium mines.

#### *4 The Way We Work - Rio's Global Code Of Business Conduct*

On a global level, Rio Tinto has a business code of conduct titled 'The Way We Work'. This 2009 document for Rio Tinto directors, officers and employees, its subsidiaries and related companies is a guide to Rio's CSR policy and importantly, reputational management. Consultants, agents, contractors and suppliers are equally expected to comply with the policy. Rio's Chairman Jan du Plessis and CEO Tom Albanese understand the importance of reputation and see it as critical for business success and their continued ability to generate shareholder value.<sup>31</sup> The two senior executives find reputation stems from the company's four 'core values' of accountability, respect, teamwork and integrity.<sup>32</sup> The practical manifestation of these values are at odds with the United States Overseas Private Investment Corporation (OPIC - the United States government finance investment agency) and Norway's government sovereign wealth fund which cut ties with Rio Tinto in 1995 and 2008 respectively. Both cited severe environmental damage, and in the case of Norway, grave human rights abuses. OPIC, an export credit agency with typically lenient insurance underwriting guidelines, refused to insure Rio Tinto and its joint venture partner Freeport McMohan against risk from the Grasberg mine operations, while the Norwegian divestment occurred after Rio Tinto had rebranded itself as a good corporate citizen with its CSR policy<sup>33</sup> and membership of the UN's Global Compact and

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<sup>31</sup> Rio Tinto, *The way we work, our global code of business conduct* (2009) 2.

<sup>32</sup> *Ibid.*

<sup>33</sup> 'The way we work' was first released in 1997 and revised in 2003 to keep in line with changing and developing notions of CSR. The policy was reissued in 2009 to reflect Rio Tinto's stated commitment

the World Business Council on Sustainable Development.

‘The way we work’ purports to reaffirm Rio Tinto’s commitment to corporate responsibility. It expects its principles to be universally applied in all dealings with joint venture partners and non-controlled companies in which it operates.

The main tenets of the document are as follows:

- Rio Tinto personnel are expected to comply with the host nation’s laws.

Ignorance of the law is not an acceptable reason for non-compliance. Personnel confronted with business decisions must ask themselves:

- Is it legal?
- Are my actions consistent with ‘The way we work’ and associated company policies?
- Will there be any direct or indirect negative consequences for the company?
- What would my family, friends or neighbours think of my actions?
- Would I prefer to keep this secret?
- Would I want my actions reported on the front page of the newspaper?<sup>34</sup>
- Violating state laws can lead to dismissal by employees or directors, and termination or non-renewal of contracts.<sup>35</sup>
- Anonymous free phone line for employees to raise serious issues of fraud, discrimination, violence, regulatory violations or environmental issues. Employees in nations prohibiting anonymous reporting must abide by local reporting laws.<sup>36</sup>
- Hazard identification, risk management and workplace health and safety policies.
- Respect for rights of employees at the workplace with prohibition on discrimination based on race, gender, national origin, religion, age, sexual orientation or politics.
- Respect for employees right to join – or not join – a union and seek to bargain collectively.<sup>37</sup>
- Protection of human rights – Rio Tinto supports and respects human rights consistent with the Universal Declaration of Human Rights and actively seeks

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to integrity based on CSR.

<sup>34</sup> Rio Tinto, ‘The way we work’, 7.

<sup>35</sup> Ibid 8.

<sup>36</sup> Ibid 10.

<sup>37</sup> Ibid 12.

not to be complicit in human rights abuses committed by others. Where human rights of families and communities in which Rio Tinto operates are threatened, the company seeks to have international standards upheld and avoid situations that could be interpreted as tolerating human rights abuses.<sup>38</sup>

## 5 Critique Of Rio Tinto's Aboriginal And Torres Strait Islander Policy

'The Way We Work' and Rio Tinto's Aboriginal and Torres Strait Islander Policy have laudable objectives, and in Australia the objectives of both have been committed by the company through policy and through the industry-led National Aboriginal Employment Covenant. Rio Tinto currently employs over 1500 Indigenous people on its projects, and has committed to employing 40% Indigenous labour at its Argyle Diamond mine in the Kimberleys by 2010.<sup>39</sup> Employment can make a significant contribution to addressing Indigenous disadvantage, however, this strategy is not without criticism.

Firstly, many Indigenous people have had to fight hard to have their land rights recognized. The *Native Title Act* provides onerous requirements to prove ongoing connection or spiritual connection with country,<sup>40</sup> yet such connection is often incompatible with mining as extractive industries disrupt connection and are incompatible with maintaining custom.<sup>41</sup> Secondly, mining does not provide for sustainable livelihoods for many Indigenous people after mine closure. Whereas non-Indigenous (and non local Indigenous) people can simply relocate to the next mine, local Indigenous people are left with no further mine-based income and loss of cultural connection to country.<sup>42</sup> Thirdly, the mining industry predicates all indicators of social welfare upon economic growth via employment opportunities. For example, Rio Tinto's Indigenous Employment Strategy emphasizes the 'significant contribution employment can make to redress Indigenous disadvantage', and many Indigenous people embrace this opportunity to join the

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<sup>38</sup> Ibid 14.

<sup>39</sup> Rio Tinto, above n 27, 10.

<sup>40</sup> *Native Title Act 1993* (Cth), s 223.

<sup>41</sup> Jon Altman, 'Indigenous rights and economic levers' in Jon Altman and David Martin (eds) *Power, Culture, Economy – Indigenous Australians and Mining* (Research Monograph No. 30, Centre for Aboriginal Economic Policy Research, Australian National University, 2009).

<sup>42</sup> Ibid.

mainstream economy.<sup>43</sup> The dominant development discourse of statistical equality with non-Indigenous Australians links remote community development to personal income, a discourse which is supported by some Indigenous groups and people and opposed by others.<sup>44</sup> Young Indigenous people seeking to engage in the mainstream economy may have values that conflict with their elders who often have stronger cultural ties to country and tradition and view the neo-liberal economic system as alien. Indigenous engagement in the mining sector can also disrupt the continuous connection and maintenance of culture and custom necessary to make a valid native title claim, hence creating a dilemma for kinship communities where people's values are in conflict. Mining can bring in big dollars, but risks scuttling the basis for a native title claim.

Most major mining operations are in remote Australia on Aboriginal land<sup>45</sup> where Indigenous people have little choice but a job in the mining sector or welfare dependency. Altman's analysis of statistical social indicators of health, education, employment and housing collected from eight remote regions<sup>46</sup> indicates that mining does make a difference in outcomes, although the evidence showed that non-Indigenous people in these same areas were clearly better off. The statistics also showed that at individual mine sites Indigenous workers did not do as well as non-Indigenous workers.<sup>47</sup> Historical neglect, poor health, poor housing and education make Indigenous economic and social integration into the mining sector extremely difficult. Rio Tinto's Aboriginal Policy is silent on rectifying this state of affairs.

## 6 *Rio Tinto's Relations With Aboriginal People*

In 1995 Rio Tinto changed from being an antagonist with respect to Aboriginal issues, to a company that broke ranks with the rest of the mining industry to respect the High Court's *Mabo* decision of native title rights and the on-flowing *Native Title Act*. Prior to the *Native Title Act*, Rio Tinto's operations were often

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<sup>43</sup> Rio Tinto, 'Aboriginal policy and programs in Australia' (2008).

<sup>44</sup> Altman (2009) 'Indigenous communities, miners and the state in Australia, above n 41.

<sup>45</sup> Rio Tinto, above n 27.

<sup>46</sup> The eight regions are: Gove/Groote Eylandt/Jabiru/East Kimberley/West Cape York/Borroloola/Gulf/Pilbara respectively operated by Alcoa/BHP Billiton (GEMCO)/Rio Tinto (ERA)/Rio Tinto (Argyle Diamond Mine)/Rio Tinto (Comalco)/Xstrata/Zinifex/Rio Tinto (Pilbara Iron), BHP Billiton, Woodside.

<sup>47</sup> Altman (2009), above n 41. Data was taken from the Australian Bureau of Statistics, 2004.



fraught with conflict with Aboriginal people. Argyle Diamonds in the Kimberley, Hamersley iron in the Pilbara, Ranger and Jabiluka uranium mines in Kakadu and Comalco's bauxite mine in Weipa are examples of mines where major conflict both pre-and post *Native Title Act* occurred. Under states' mining acts, all minerals vest in the Crown,<sup>48</sup> and states have been enthusiastic in facilitating mining on traditional lands by means of enabling legislation fast-tracking development. The Commonwealth *Native Title Act* provides for right to negotiate,<sup>49</sup> but not a right to veto development on culturally significant land. Rio Tinto's documents describe 'mutually beneficial agreements' with respect for culturally significant sites. For example, scarred trees at the Weipa bauxite mine were removed and relocated at the behest of Traditional Owners due to their cultural significance. The trees themselves have now become monuments, but Indigenous worldviews encompass country as a dynamic and interconnected entity that relocated trees cannot replicate or replace. Indigenous Australians have no right to veto development on culturally significant lands, but must find alternatives that are agreeable to government and the mining industry. The restricted right to negotiate and negation of right of veto was a part of the Howard government's response to the High Court's finding of co-existence of native title and some leases in the *Wik* case.<sup>50</sup> The ensuing amending legislation, the *Native Title Amendment Act 1998* (Cth), extinguished right of veto and right to negotiate in certain areas (for example, gold operations) and was condemned by the United Nations Committee on the Elimination of Racial Discrimination (CERD) on grounds that it breached the UN Convention of the same title.<sup>51</sup>

(a) *Comalco's Weipa Bauxite Mine*

Rio Tinto as partial and subsequent full owners of Comalco has a tainted history in Weipa. As was customary for any mining operation on Indigenous traditional lands prior to the *Native Title Act*, the government and industry viewed Indigenous people and their traditions an impediment to business and

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<sup>48</sup> *Mineral Resources Act 1989* (Qld), s 8; *Mining Act 1978* (WA), ss 8a, 9; *Minerals (Acquisition) Act* (NT), s 3.

<sup>49</sup> *Native Title Act 1993* (Cth), Subdivision P, ss 25 - 44.

<sup>50</sup> *The Wik Peoples v State of Queensland & Ors*; *The Thayorre People v State of Queensland & Ors* (1996) 187 CLR 1.

Committee on the Elimination of all forms of Racial Discrimination, *Findings on the Native Title Amendment Act 1998* (Cth), UN Doc ERD/C/54/Misc.40/Rev.2 (18 March 1999).

development, particularly when high profits were at stake.

The bauxite reserves are on Wik people's land, around Weipa and Mapoon. To facilitate exploration and mining, the Queensland government of the day passed the *Comalco Act (Commonwealth Aluminium Corporation Pty Ltd Act 1957 (Qld))* that excised 8000 square kilometres from the Mapoon mission reserve.

Queensland Police were engaged by the Queensland government to forcibly remove the Aboriginal residents at gun point. On 15 November 1963, the Mapoon community was arrested in the dead of night and everything — their homes, the school, the shops — was burnt to the ground.<sup>52</sup> The people were relocated by boat to the empty streets of Bamaga in the northern tip of Cape York.<sup>53</sup> Wik people who protested about their dispossession were threatened with expulsion from New Marpoon and prevented from returning to Old Marpoon. The few tens who remained living off the bush organized to take civil action in the courts.

Old Man Peinkinna<sup>54</sup> took the fight to the High Court in *Peinkinna & Ors v Director of Aboriginal and Islander Advancement*.<sup>55</sup> His case was won in the Queensland Supreme Court on the grounds that the bauxite mining agreement by the Queensland Director of Aboriginal and Islander Advancement and Comalco was a breach of trust, because the terms of the agreement allowed profits to go to the Director on behalf of the Aboriginal people. This decision was overturned on appeal in the Privy Council in 1978 on the basis that the Director of Aboriginal and Islander Advancement was under no obligation to make subsequent provision to the community.<sup>56</sup> When the Wik people lodged their land claim in the Federal Court in 1993, CRA informed Queensland State and Federal Cabinet members that it would renege from a major purchase and expansion of the Gladstone smelter if the Federal government did not legislate for certainty. To its credit, the Federal government refused to buckle to mining industry and state government pressure.

#### *(i) The Western Cape Communities Co-existence Agreement*

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<sup>52</sup> Roger Moody, *Plunder!* (Partizans, 1991).

<sup>53</sup> Neva Collings, 'The Wik: A History of their 400 Year Struggle' [1997] *Indigenous Law Bulletin* 4; see also testimony of forcibly-removed person, Mr Edwin Ralph Woodley at the Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Parliament of Australia (4 July 2000).

<sup>54</sup> 'Old Man' is customary use for a man who has since died in this community.

<sup>55</sup> Unreported decision.

<sup>56</sup> *Director of Aboriginal and Islander Advancement v Peinkinna & Ors* (1977) 17 ALR 129.

In 2001, Comalco signed the Western Cape Communities Co-existence Agreement<sup>57</sup> with traditional owners and their families, acknowledging past practices including the communities' forcible removal and relocation. The Agreement is a registered ILUA (Indigenous Land Use Agreement)<sup>58</sup> that provides for economic development of indigenous communities and increased representation in consultations, establishment of a charitable trust and cultural awareness fund, the transfer of a Comalco owned station and transfer of land leases no longer required by the company to the Traditional Owners. The Agreement specifies that the right to negotiate for future acts - a tenet of the *Native Title Act* - is excluded, native title extinguished, and any further rights surrendered.<sup>59</sup>

The mine is expected to be in operation for forty more years, and at production of 19.42 million dry product tonnes in 2008, it is one of the largest bauxite mines in the world.<sup>60</sup> Currently a Wild Rivers Declaration under the *Wild Rivers Act 2006* (Qld) has prevented mine expansion near the Wenlock River in the north west of Cape York. The Kaanju people are the traditional owners of the Wenlock River area and applaud the Declaration. The Kaanju prefer to see their country and unpolluted waterways protected than receive compensation and royalties from digging up their traditional lands.<sup>61</sup> For many Indigenous people, training programs and job opportunities are not the sole measure of wealth, but under Rio Tinto's 'Indigenous Booklet', employing Aboriginal people is the company's preferred strategy of transferring wealth from mining into Indigenous communities. It could be argued that Rio Tinto, other mining companies and government use increased Indigenous employment as a mechanism to stifle opposition from within the communities themselves, and amongst the wider community concerned with environmental destruction. The issue of Indigenous employment and escape from welfare dependency is compelling to both government and the mainstream society, neither of which holds close cultural ties to the areas earmarked for mining.

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<sup>57</sup> Comalco, Signing of the Western Cape Communities Co-existence Agreement, Keith Johnson, Acting Chief Executive, Comalco Ltd, Weipa 14 March 2001.

<sup>58</sup> Native Title Tribunal File No: QIA2001/002.

<sup>59</sup> Ibid.

<sup>60</sup> Rio Tinto Alcan, *Weipa 2008 Sustainable Development Review* (2008).

<sup>61</sup> Brian Williams, 'Wild Rivers case on 'shaky ground'', *The Courier-Mail* (Brisbane) 10 June 2010.

(b) *Hamersley Iron (now Rio Tinto Iron)*

Hamersley Iron has a confrontational history with both industrial relations and Indigenous relations. The lease is in the remote Pilbara region of Western Australia has been recently granted approval for a \$500 million, 16 year expansion despite criticism and concern that the Marandoo mine is located in a national park and its operations necessitate open cut mining below the water table.<sup>62</sup>

The Pilbara region of north Western Australia contains one of the world's largest iron ore deposits. The fortunes of this part of remote Australia have risen and fallen with the commodities market, and in 2011 Australia was riding its second mining boom after the first leveled out in the mid-1990s. Mt Tom Price is the largest and oldest of Hamersley Iron's (now Rio Tinto Iron) operations, having been first commercially exploited in 1965. The Western Australian government passed the *Iron Ore (Hamersley Range) Agreement Act 1963* to expedite construction and exploitation of the resource, which began in 1966 without regard for the local Indigenous inhabitant's wishes. In the late 1980s, Hamersley Iron (a Rio subsidiary, now fully operated by Rio Tinto) insisted the Marandoo deposit within the Hamersley National Park (now Karijini National Park) was imperative to maintain their operations.<sup>63</sup> Many Indigenous communities and environmentalists objected and formed an alliance against the mine, but Hamersley pursued the development regardless of opposition using adversarial and litigious tactics to force the mine's approval and development.<sup>64</sup>

Under the *Aboriginal Heritage Act 1972* (WA), Hamersley could not proceed until it had identified significant anthropological and archaeological sites. The company refused to conduct the required identifications and cited a 1974 study as adequate. The 1974 study had found no significant sites. When the Western Australian government finally commissioned a study, it found four culturally

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<sup>62</sup> Razak Musah Baba, 'Rio Tinto's Marandoo iron ore mine to get 16 more years', *The Australian* (Sydney) 9 February 2011.

<sup>63</sup> See B. Hextall, 'CRA clear to mine in national park', *The Sydney Morning Herald* (Sydney) 16 November 1990; M. Stevens, 'Showdown at Marandoo', *Business Review Weekly* (Melbourne) 6 December 1991.

<sup>64</sup> Katherine Trebeck, 'Social sustainability through civil regulation and social responsibility?' in Altman (ed) (2009) above n 41, 132.

significant sites, with two of those on top of the ore body.<sup>65</sup> Not all Indigenous people were opposed to mining per se, but supporters still wanted sacred and cultural sites preserved. Further delays led the Lawrence State government to pass the *Marandoo (Aboriginal Heritage) Act 1992* (WA) that excluded the Marandoo mine from the application of the 1972 *Act*. Rio Tinto executive Peter Eggleston acknowledged the excision was a ‘low point’ in Aboriginal relations with the company that left a legacy of ‘deep distrust and bitterness’ in the communities.<sup>66</sup> The adversarial process was expensive and harrowing even for Hamersley staff. Litigiousness caused more than two years of delay, and Hamersley and its parent company Rio Tinto saw the benefit in improved Indigenous relations even before the *Mabo* decision forced industry change. Rio Tinto now actively seeks to avoid risk of delay, litigation and NGO scrutiny by developing a reputation as ‘Indigenous Australia’s preferred development partner.’<sup>67</sup>

(c) *Jabiluka And Ranger Mine Uranium Mines*

The uranium mines within the boundaries of Kakadu National Park have been a bane for Indigenous traditional owners since the Ranger mine was forced upon unwilling traditional Aboriginal people in the late 1970s. The traditional landowners and the Northern Land Council were put under extraordinary duress to agree to uranium mining. The Northern Land Council told traditional owners that if they did not agree to the government’s terms for Ranger Uranium mine, the newly enacted *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) was at risk of being repealed and all Northern Territory Aboriginal people would lose out.<sup>68</sup> This modus operandi has its parallels in 2011 Western Australia, where the Kimberley Land Council and traditional owners were forced to agree to a massive gas liquefaction plant on traditional and sacred law-man land at James Price Point before the State Government compulsorily acquired the site.<sup>69</sup>

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<sup>65</sup> Ibid.

<sup>66</sup> Peter Eggleston, ‘Gaining Aboriginal Community Support for a new mine development and making a contribution to sustainable development’ (Speech delivered at the Energy and Resources Law 2002 Conference, Edinburgh, Scotland, 14 – 19 April 2002).

<sup>67</sup> Trebeck (2009), above n 64, 137.

<sup>68</sup> See Tom O’Lincoln, ‘“If we all stand together” – Aboriginal Struggles in the 1970s and 1980s’, in *Years of Rage: Social Conflict in the Fraser Era* (Bookmark Books, 1993); also Gundjemi Aboriginal Corporation’, ‘“We are not talking about mining” – The history of duress and the Jabiluka Project’ (July 1997), 6; Mirrar Gundjenmi, ‘The History of Binninj Opposition to Uranium Mining’ <<http://www.mirrar.net.history>>.

<sup>69</sup> ABC Kimberley, ‘Traditional owners green light Kimberley gas hub’. 6 May 2011.

The Fox Inquiry<sup>70</sup> was commissioned by the federal government to pave the way for uranium mining around what is now the World Heritage listed Kakadu National Park. As early as 1977, the Inquiry reported that uranium mining could have negative social impacts on Indigenous people, and heard evidence that Aboriginal people had the mine forced upon them by methods recognized as duress.<sup>71</sup> Traditional owners of the Ranger site were pressured to sign an agreement for Ranger Mine at seemingly unending meetings<sup>72</sup> that ultimately induced despair and futility with the negotiation process. The traditional owners knew that their ‘no mining’ stance was not on the company and government agenda and objections to mining could be overridden by the Commonwealth government under the ‘national interest’ provisions of the *Aboriginal Land Rights Act*.<sup>73</sup> The ‘agreement’ included the creation of Stage One of Kakadu National Park and a settled land claim<sup>74</sup> and covered issues including royalty flows and employment on the mine, along with infrastructure normally provided by government.

Nearly three decades after uranium mining, Altman (2005) found little evidence of sustainable economic benefits from Ranger mine. The mine’s life has been extended beyond 2020 due to an increase in the market price of uranium oxide and inexpensive methods of obtaining uranium oxide from low grade ores. Ranger mine has a long history of mishaps and radioactive spills,<sup>75</sup> which may be related to high cancer rates in the region documented by noted anthropologist Charles Tatz.<sup>76</sup>

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<sup>70</sup> Russell Fox, Graeme Kelleher, and Charles Kerr, *Ranger Uranium Environmental Inquiry, Second Report*, Australian Government Printing Service (Sydney, 1977).

<sup>71</sup> Duress undergone by the Aboriginal Traditional Owners is documented in the Gundjemi Aboriginal Corporation’s detailed report “‘We are not talking about mining’ – The history of duress and the Jabiluka Project’ (July 1997).

<sup>72</sup> Gundjemi Aboriginal Corporation (1997), above n 68.

<sup>73</sup> *Aboriginal Land Rights Act* (NT), s 40(b) An exploration licence shall not be granted to a person in respect of Aboriginal Land unless (b) the Governor-General has, by proclamation declared that the national interest requires the licence be granted.

<sup>74</sup> Fox et al, above n 70.

<sup>75</sup> See Senate Environment, Communications, Information Technology and the Arts Committee, Australian Parliament Appendix 6 - Environmental Incidents at Ranger (2003); *Regulating the Ranger, Jabiluka, Beverly and Honeymoon uranium mine*; Jon Altman, ‘Indigenous communities, miners and the state in Australia’, Altman et al (2009) above note 41.

<sup>76</sup> Charles Tatz, Cass, A., Condon, J. and Tipett, G. ‘Aborigines and uranium: Monitoring the health hazards’ (AIATSIS Research Discussion Paper No. 20, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2006).

*(i) Environmental Implications Post Rio Buy-Out Of North Limited*

Energy Resources Australia Limited (ERA) was majority owned by North Limited until 2000, when Rio Tinto bought North Limited. Rio Tinto now owns a 68% controlling share of ERA.

Environmental implications of mining on traditional peoples' lands have the potential to seriously impact on their livelihoods and health. Many traditional people supplement their economy with bush-tucker and wildlife hunting. Tailings spills and leachate can poison streams and kill flora and fauna downstream, which has immediate impacts upon subsistence peoples. Uranium tailings have the more insidious effect as they emit radioactivity as well as containing heavy metals. In 2009 Rio Tinto submitted an Environmental Impact Statement<sup>77</sup> for its proposal to recover uranium oxide from low-grade uranium ore by acid leaching.

The Mirrar people are implacably opposed to uranium mining on their land, and oppose the proposed Acid Heap Facility. The Mirrar have endured continued contamination of their country, including a release of six million litres of contaminated water into creeks flowing into Kakadu National Park in 2009.<sup>78</sup> Senior Traditional owners are saddened that uranium from Ranger was likely used in the Fukushima nuclear facilities that suffered meltdown after the March earthquake and tsunami.<sup>79</sup>

*(ii) Acid Heap Leaching*

Acid heap leaching is a process of obtaining mineral from low-grade ore, often spent tailings with mineral content unrecoverable by other processing methods. Uranium ore is piled into five metre heaps and sprayed with sulphuric acid, with the resulting percolated mix collected in a liner and sent to a processing plant. Risks include leachate permeating the liner and contaminating groundwater, radon gas, and reaction with sulfites in the ore after long after processing. Rio

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<sup>77</sup> Department of Natural Resources, Environment, The Arts and Sport (Northern Territory), Guidelines for Preparation of an Environment Impact Statement, Ranger Uranium Mine – Heap Leach Facility - Energy Resources Australia, September 2009.

<sup>78</sup> Larine Statham, 'Kakadu owners want to stop uranium mining,' *Sydney Morning Herald* (Sydney) 7 April 2011.

<sup>79</sup> Ibid.

Tinto intends to process 10 million tonnes of low-grade ore every year, creating the need for another one square kilometre tailings pond and 650 evaporation ponds.<sup>80</sup> Internationally, acid heap leaching of uranium ore has been linked to serious deficiencies in environmental regulation, including the spill of 5 million litres of radioactive leachate at Rio Tinto's Caetite Mine in Brazil in 2000.<sup>81</sup> The litany of serious incidents reported at Ranger,<sup>82</sup> combined with the continuous seepage of between 100 000 and 150 000 litres of tailings material every day for the past 30 years, do not give the Mirrar much optimism for the integrity of the uranium processing. The uranium concentration in the billabong surrounding the mine is about three to five parts per billion, but the uranium in the processed water that is seeping every day for 30 years is a highly radioactive 27 000 parts per billion.<sup>83</sup> The Office of the Supervisory Scientists does not know where this water has been and still is leaking.<sup>84</sup>

The Senate Inquiry into Environmental Regulation of Uranium Mining (2003) found a pattern of underperformance and non-compliance, unreliable data to measure contamination, and Territory and Federal government reliance on self-regulation of the industry. The Office of the Supervisory Scientists, established by the Federal Government to monitor impacts of the Ranger uranium mine on the surrounding World Heritage Area, is accused of being complicit in under-enforcement of regulatory breaches. The Senate Estimates Committee found the Office of the Supervising Scientists' monitoring lacks vigour and independence, and the results of monitoring are insufficient to assess intermittent and cumulative impacts. The State has facilitated poor company practice by setting limited scientific guidelines for its official scientists to lend a veneer of public safety and confidence in an environmentally and socially damaging mining practice. The Traditional Owners and environmentalists are opposed to Acid Heap Leaching of

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<sup>80</sup> Australian Conservation Foundation, 'Acid Test: The impacts of Energy Resources of Australia's proposed Acid Heap Leach facility and related expansion plans at the Ranger Uranium Mine in Kakadu' (Briefing Paper, Australian Conservation Foundation, April 2011).

<sup>81</sup> Ibid.

<sup>82</sup> See Senate report, above n 75.

<sup>83</sup> Emma Masters, 'Uranium mine leak '5400 times normal level' *ABC News* (online) 9 February 2010. The Senate estimates committee heard from the Office of the Supervising Scientist regarding uranium concentration in the leaking tailings dam. The Senate estimates report is at Additional Estimates 2010-2011 - (February 2011) <[http://www.aph.gov.au/Senate/committee/ec\\_ctte/estimates/add\\_1011/index.htm](http://www.aph.gov.au/Senate/committee/ec_ctte/estimates/add_1011/index.htm)>

<sup>84</sup> The Supervising Scientist for Ranger uranium mine admitted to the Senate Estimates Committee that he had no knowledge as to where the radioactive water has been seeping, see Estimates Transcripts, Senator Scott Ludlum, < <http://greensmps.org.au/content/transcript/office-supervising-scientists>>.



uranium, a process that has never been tested in monsoonal regions. Kakadu's rainfall is between 200 – 300 per cent higher than all current uranium acid heap operations, indicating substantial risk to the surrounding World Heritage Area if the process is approved.<sup>85</sup>

*(iii) Suspended Operations And Company Lobbying For Lifting Environmental Regulations*

Ranger mine suspended operations in January 2011 until July 2011 because an unusually wet season swelled the tailings dam to within 10 cm of the tailings dam wall. In an effort to avoid having to release contaminated water into a pit already holding 3.6 billion litres of water above a high grade ore deposit, ERA tried to lower regulatory standards and had submitted a plan to remediate damage to a local aquifer in which it has proposed to release contaminated water.<sup>86</sup> Since September 2010, ERA has already obtained permission from regulators to vary regulations to avoid regulatory penalty for breach. Ranger mine continues to be vehemently opposed by the traditional owners on cultural, spiritual, social and environmental grounds.

*(d) The Jabiluka Mine*

*(i) History*

The history of the Jabiluka uranium lease ran parallel to the lease of the Ranger uranium mine until 1991. Energy Resources Australia Ltd (ERA) owned the Ranger Mine while Pancontinental Mining Ltd owned Jabiluka's lease. The companies' histories converged in 1991 when ERA bought the lease for \$125 million. At the same time the NLC ratified the 1982 Ranger Agreement with ERA to extend to the Jabiluka lease, 22 km from Ranger. ERA was 68.4% owned by North Ltd, a major mining company originating from North Broken Hill. Rio Tinto bought out North Ltd in 2000 and now has majority control of the Kakadu uranium mining operations.

Uranium was first discovered at the Jabiluka site in 1971, and the site signed for approval as a mine by statutory authorities in 1982. Contemporary law required

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<sup>85</sup> Australian Conservation Foundation (2011), above n 80.

<sup>86</sup> Lindsay Murdoch, 'Radioactive water threatens Kakadu', *The Sunday Age* (Melbourne) 16 April 2011.

consent of traditional owners, with such consent obtained under a cloud of contention by the Northern Land Council.<sup>87</sup> Development of the mine was stifled because export approval for uranium concentrates could not be obtained under the Hawke Labor Government's 'three mine policy', so ERA temporarily renamed the site 'North Ranger' and claimed it to be a part of the Ranger mine to fall within policy, but ERA was unsuccessful in their bid to have the mine included as Ranger mine.

The Jabiluka mine was revitalized with the election of the Coalition Government in 1996 that did not hold such ideological objections in-party to uranium mining. Both Northern Territory and Federal Governments supported the Jabiluka uranium mine, despite its location in the World Heritage listed Kakadu National Park and adjacent to Ramsar listed wetlands, and against the objections of traditional owners. ERA could mine Jabiluka and process the ore on-site, but this was not cost-effective at a time of depressed uranium prices, especially as a uranium ore milling and processing site existed a short distance away at Ranger mine. Transporting ore 25 km to Ranger Mill required traditional owner consent. The traditional owners refused, and Jabiluka was mothballed.

The traditional owners of the Jabiluka lease are the Mirrar Gundjemi people, who at the time of the dispute numbered 27 adults. The senior traditional owner was a quietly spoken woman, Yvonne Margarula. Ms Margarula and Gundjemi Aboriginal Corporation Executive Officer Jacqui Katona led a successful international campaign to stop the Jabiluka mine by engaging national and international alliances with environmental groups, shareholder activism, visits to UNESCO World Heritage Committee in an effort to have Kakadu World Heritage Area listed as 'World Heritage in Danger'. The latter resulted in the UNESCO Kakadu Mission 1998, and over 5000 people from all over Australia blockaded the mine site in solidarity with the Mirrar people. In 1999 the Mirrar's effort to protect country and culture gained increasing international recognition when they received the Goldman Environmental Prize and the Friends of the Earth International Environment Award.<sup>88</sup>

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<sup>87</sup> Gundjemi Aboriginal Corporation (1997), above n 68.

<sup>88</sup> David Sweeney, Bali PrepCom IV, The Fourth Preparatory Committee Meeting, Minister Level for the World Summit on Sustainable Development – Case Study: Jabiluka Uranium Project, Kakadu Region, Australia, April 2002).

*(ii) Rio Tinto's Buy-Out Of North Limited, Subsequent Relations With Traditional Owners*

When Rio Tinto bought out North Ltd, they bought with it the Jabiluka lease. Shareholder activism targeted Rio Tinto's AGMs in London and Melbourne in 2000, where former Rio Tinto Chairman Sir Robert Wilson committed that no mining would occur at Jabiluka without traditional owner consent. This commitment was formalized as the *Jabiluka Long-Term Care and Maintenance Agreement* in 2005. The formal Agreement states that no mining activity will be conducted on the lease without the informed written consent of the Mirrar.<sup>89</sup> Mirrar representatives attended Rio Tinto's AGM in London in April 2011 seeking to start good faith negotiations to incorporate the mine into Kakadu National Park,<sup>90</sup> but Rio Tinto's website and ERA continue to hope traditional owners can reach agreement consenting to mining.<sup>91</sup>

The outcome of the Jabiluka mine is the first and only time where traditional owners have seen a former agreement (made under duress) rescinded and replaced with an agreement that requires informed and written consent before any mining can proceed.<sup>92</sup>

The Jabiluka dispute contrasts the corporate behaviour to Indigenous opposition between North Limited and Rio Tinto. North Limited adopted Western-centric notions that favoured its mineral extraction imperative; while Rio Tinto gave value to Indigenous traditional ownership based upon Aboriginal culture and responded to the concerns of the Mirrar. Rio Tinto and ERA have not acceded to Mirrar requests to incorporate the lease into the national park, holding out hope of a mutual agreement to recommence developing the mine.

*(e) Century Zinc Mine*

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<sup>89</sup> Agreements Treaties and Negotiation Settlement, *The Jabiluka Long-Term Care and Maintenance Agreement* (1 January 2005) < [http://www.atns.net.au/agreement\\_print.asp?EntityID=1988](http://www.atns.net.au/agreement_print.asp?EntityID=1988)>.

<sup>90</sup> Matt Chambers, 'Du Plessis sidesteps questions on Jabiluka uranium', *The Australian* (Sydney) 16 April 2011.

<sup>91</sup> Rio Tinto, 'Jabiluka conflict concluded' <[http://www.riotinto.com/ourapproach/17194\\_features\\_4252.asp](http://www.riotinto.com/ourapproach/17194_features_4252.asp)>.

<sup>92</sup> Altman (2005) above n 41, 42.

The Century Zinc mine is the second largest zinc mine in the world, located 250 km northwest of Mt Isa and 150 km from the Gulf of Carpentaria. The region is one of the most sparsely populated in Queensland,<sup>93</sup> and in 1990 (when the zinc deposit was discovered), the region was home to about 6000 Aboriginal people with the lowest literacy rates all the Queensland ATSI regions. Sanitation and water supply was inadequate or non-existent, and there was an acute housing shortage. The enormous size of the mine and its potential wealth for the state saw the government perceive it to be a panacea for the social and economic problems endemic to the Gulf.

CRA Exploration (CRAE), a subsidiary of CRA, was granted an exploration permit in 1987 and began drilling soon after discovery of zinc ore in 1990. The company planned to mine the zinc onsite and transport it in slurry form through a 300km pipeline to Karumba in the Gulf of Carpentaria to ship to overseas markets. CRAE was under no legal obligation to negotiate with traditional owner groups, but undertook consultations to obtain support. While the Mabo decision had not yet been handed down, the company was mindful that any decision might have ramifications for the region.<sup>94</sup> CRA embarked upon a program of positive interactions with Aboriginal groups in the mine area, but broke down when the Carpentaria Land Council insisted on consultations with all Gulf communities, including those who would be impacted by the slurry pipeline.<sup>95</sup>

The CLC had been in operation since 1985, under the leadership of Mr Phil Yanner. When Mr Yanner died in 1992, his ABC cadet-journalist son Murradoo returned to the region and took over leadership. The younger Yanner was educated and articulate, with both governmental and media experience. He quickly realized that similarly educated Aboriginal people in the Gulf region were concerned about the environmental impacts upon their traditional lands.<sup>96</sup> Yanner

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<sup>93</sup> G. Crough and D. Cronin, Aboriginal people and the Century Project: The 'Plains of Promise' Revisited? A Report to the CLC, Burketown, commissioned by Century Zinc Limited through Kinhill Cameron McNamara.

<sup>94</sup> R Blowes and D Trigger, 'Negotiating the Century Mine Agreement: Issues of Law, Culture and Politics' *Regional Agreements in Australia 2: Case Studies* (1995), 89-90.

<sup>95</sup> Marcus Lane and Stuart Cowell, 'Land and Resource Planning and Indigenous Interests' in Oren Yiftachel et al (eds) *The Power of Planning: Spaces of Control and Transformation* (Kluwer Academic Publishers, 2001), 162.

<sup>96</sup> Catherine Howlett, *Indigenous Peoples and Mining Negotiations: The Role of the State. A case Study*

found that uneducated and illiterate people were signing off on agreements without understanding their content. Through the efforts of the CLC, the negotiators increased the initial offer of \$70 000 cash, to a \$60 million package.

(i) *Lobbying for a mining outcome*

CRAE purchased large pastoral leases surrounding the lease area to buffer against potential native title claims,<sup>97</sup> and favoured negotiations privileging certain traditional owner groups over others, in a divide and conquer approach often taken by large companies facing community dissent. These actions made Aboriginal groups mistrusting about company claims about environmental protection and damage.<sup>98</sup> Following the *Mabo* decision and the statutory establishment of Native Title Representative Bodies under the *Native Title Act*, the CLC was afforded legal status as the peak negotiating body for native title issues the Century Mine lease. As the negotiations stalled, the Queensland government offered to enact legislation to by-pass Aboriginal concerns.<sup>99</sup> This offer was rejected by CRA, whose ground managers realized litigious pathways did make for harmonious community relations, but rather created potential protracted risk through injunctions and delays.<sup>100</sup> It appears this enlightened procedure came from the senior employees on the ground and not any directive from CRA's head office in Melbourne.<sup>101</sup> The Queensland government, however, declared the mine a 'significant project' under s 27 of the *State Development and Public Works Organization Act 1973* (Qld), shifting the decision-making and assessment process from the Mining Warden to the powerful Coordinator General with a 'fast tracked' approval system allowing for less rigorous impact assessment than under the state's *Mining Act*. The Queensland government was accused of sidelining traditional owners opposed to the mine, and along with the newly elected conservative Federal government, actively employing divide and conquer techniques familiar to the Ranger and Jabiluka mines, above. The Queensland government threatened overriding legislation if the mine was not approved. It also tied traditional owner approval for the mine to gazettal with full native title rights

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*of the Century Zinc Mine in the Gulf of Carpentaria* (PhD Thesis) Griffith University, 2007).

<sup>97</sup> Peter Wear, 'Problems in the pipeline' *The Bulletin* (Sydney) 14 May 1996.

<sup>98</sup> Howlett, above n 96.

<sup>99</sup> Ibid.

<sup>100</sup> Trebeck, 'Corporate responsibility and social sustainability', in Altman (ed) 2009, 133.

<sup>101</sup> CRAE incorporated as Century Zinc Limited in 1994.

of the nearby Lawn Hill National Park.<sup>102</sup> At the same time, the Federal government pressured the Aboriginal governing body ATSIC (Aboriginal and Torres Strait Islander Commission) with dissolution and withdrawal of financial support if they could not provide a workable outcome to negotiations. Mirroring the NLC's fear the *Land Rights Act* would be scrapped if it did not gain approval for the contentious Ranger mine, ATSIC feared the newly elected Coalition government would repeal or amend the *Native Title Act* if Aboriginal people could not reach a negotiated settlement with Century Mine.

CRA, ATSIC commissioners and both levels of government deemed a vote in the Gulf communities' representative body of 12/11 in favour of the mine 'broad community support'. Intransigence by the Queensland government to issue a Right to Negotiate notice under the *Native Title Act* saw the process draw out for many more months as the Waayni People took a claim to the High Court and obtained a ruling that they be part of the negotiating process,<sup>103</sup> thereby invalidating previously issued state government leases. The Queensland government brought enormous pressure to bear upon Gulf community leaders and was determined to proceed with the mine development, and refused to assist the Indigenous people in equitable negotiations.

The Federally appointed mediator between CZL and the Gulf communities, the Hon Hal Wotton, believed the company acted in good faith in negotiating with the communities, but recognized the former's vast resources compared with the traditional owners. CRA had lawyers on hand to assist with overriding Federal legislation to approve the mine, but pulled back when it was apparent any 'anti-Aboriginal' Bill would not pass through the Senate. Ultimately, the Queensland government forced a 'negotiated outcome' with a deadline for decision on 13 February 1997. As before with Ranger Mine, and later with James Price Point in the Pilbara, Indigenous communities have been threatened with special enabling and overriding legislation with bare compensation if they do not 'agree' to the terms of extractive industries that leave permanent scars on their traditional lands.

(ii) *Outcomes Of The Century Mine Dispute*

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<sup>102</sup> See Howlett's detailed discussion, Chapter 5, above n 96.

<sup>103</sup> Howlett, above n 96, 127.

CRA sold Century Mine to Pasminco for \$345 million in 1997. The sale occurred the day after the Queensland Government put a halt on the development of all mining leases in response to the High Court's *Wik* decision that found native title was not automatically extinguished by mining or pastoral leases. CRA said the *Wik* decision was not a factor in its sale.<sup>104</sup> Pasminco went into receivership in 2002 and sold Century Zinc to relieve part of its \$2.6 billion debt. The company reformed as Zinifex, and is now owned by Chinese conglomerate 'Minerals and Metals.' All conditions and agreements contained in the original Gulf Communities Agreement remain. The \$60 million package provides benefits to communities the three native title groups in the region, wherever they live, and to residents of Doomadgee, Burketown, Mornington Island and Normanton. Benefits include employment opportunity and training programs for employment at Century Zinc mine, training for participation in native title processes, resources to establish small business, cultural heritage management and access to relevant native title groups to pastoral leases held by the company.<sup>105</sup>

Two major outcomes came of the protracted negotiations conducted amidst apparent subterfuge and mistrust, and the State standing ready to facilitate capital with the threat of retracting the much celebrated (and contentious) *Native Title Act*. A very negative effect was ill-feeling and mistrust between pro- and anti-mining Indigenous groups in the Gulf. More positive for the traditional owners was that the delays impinged upon commercial standing and company reputation, which ultimately forced the company to agree to increase the offer of compensation by 850%, a demonstrable community benefit.

(f) *The Argyle Diamond Mine*

The Argyle Diamond mine is the largest supplier of diamonds in the world.<sup>106</sup> It is 100% controlled by Rio Tinto Ltd since 2000, and prior to 2000 it was majority owned by Rio Tinto. The mine is situated in remote north-eastern Western

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<sup>104</sup> *The Financial Review*, 10 January 1997, 1.

<sup>105</sup> B. Scambary, *My Country, Mine Country: Indigenous People, Mining and Development Contestation in Remote Australia* (PhD Thesis) ANU 2007, in David Martin, 'The governance of agreements between Aboriginal people and resource developers: Principles for sustainability', in Altman (ed) 2009, above n 94.

<sup>106</sup> Rio Tinto, Argyle Diamond Mine, <[www.argykediamonds.com.au/index\\_product.html](http://www.argykediamonds.com.au/index_product.html)>.

Australia, approximately 120 southwest from Kununurra on country traditionally owned by the Gidja and Mirriuwung peoples, and the Malignin and Woolah people. The lucrative Argyle Diamond deposit<sup>107</sup> was located directly on one of the regions' most sacred sites, the women's dreaming site of Barramundi Gap (*daiwul*). This site was destroyed by the company with the connivance and assistance of the Western Australian government in the early 1980s.

(i) *Legislating Away Rights, Bulldozing Sacred Sites*

The Western Australian parliament enacted the *Aboriginal Heritage Act 1972* to protect sites of significance to Aboriginal people across the state and gave the Western Australian Museum responsibility for the Act's administration. Specifically, s 17 of the Act made it an offence to disturb or destroy an 'Aboriginal site', defined by s 5(b) to include:

any place, including any sacred, ritual or ceremonial site, which is of importance or of special significance to persons of Aboriginal descent.

CRA discovered diamondiferous kimberlite pipes in the West Kimberley in 1978, and at the same time further south, the Yungngora community at Noonkanbah lodged objections to exploratory mining on a pastoral lease for fear sacred sites would be threatened.<sup>108</sup> The mining warden recommended approval for CRA's activities subject to investigation under the *Aboriginal Heritage Act*, and where necessary, appropriate action to protect sites of significance while otherwise dismissing the Yungngora's objections. The Western Australian government stated 'areas of influence' could not be labelled 'sacred sites' and therefore not be accorded protection,<sup>109</sup> swaying public opinion by repeatedly proclaiming its commitment to protect 'genuine, identified' sacred sites, and thus inferring Aboriginal people had sought to have non-genuine, non-identified sites protected. CRA's bulldozers damaged the identified Devil-Devil Springs before CRA was aware of their significance, so no recompense was available. In May 1980, the

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<sup>107</sup> At the time of signing of the *Argyle Participation Agreement* in 2005, the diamond mine had generated \$800 million in royalties and \$5 billion for the Western Australian economy.

<sup>108</sup> M. C. Dillon, "A Terrible Hiding..." *Western Australia's Aboriginal Heritage Policy* (1983) XLII(4) *Australian Journal of Public Administration*, 486.

<sup>109</sup> From pamphlet issued by WA Government, 'Noonkanbah: The Facts', September 1980, cited in Dillon, above.



local Indigenous people became aware that their extremely sacred Women's Dreaming site, or *daiwul*<sup>110</sup> had been damaged and was about to be mined. The Warum community took legal action that relied upon the precise date the initial damage occurred (i.e., after receiving official notification) in order to succeed. As CRA refused to furnish the information and the Museum would not join as co-complainant, the Warum were forced to withdraw. CRA continued to damage Devil-Devil Springs and the *daiwul* while the Museum Trustees refused to take any action against them, so the Warum raised the issue of the Museum's failure to comply with its statutory duties with the Parliamentary Commissioner for Administrative Investigations in July 1980. While the complaint was still before the Commissioner, the Western Australian Parliament amended the *Aboriginal Heritage Act* to narrow the definition of an Aboriginal site under s 5, and enable the Minister or Museum Trustees to determine what was or was not a site of 'special significance'.<sup>111</sup> The Minister determined Devil Devil Springs (outside of CRA's lease) to be of special significance, but the most important and sacred site, the *daiwul*, was not.

*(ii) Moves To Positive Relationships With Traditional Owners*

Unsurprisingly, Argyle Diamond's relations with the Traditional Owners and local Aboriginal people were strained for many years. In 1998, a new managing director determined to build rapport with the Traditional Owners, prompted by both a native title claim spanning the mine, and by growing community support for reconciliation. Negotiations took three years and cost \$9 million, of which \$6 million was borne by Rio Tinto. The ensuing ILUA and Argyle Management Plan Agreement (AMPA) are regarded as one of the most comprehensive arrangements made between a resource company and Indigenous people in Australia.<sup>112</sup> The company prepared for negotiation in a progressive manner, recognizing and co-operating between Western law and Indigenous law, and addressing the implicit power imbalance with interpreters, visits to the mine site and various

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<sup>110</sup> This site is commonly known as the Barramundi Gap, but is also known as *daiwul*, *daywul*, and Barramundi Dreaming, and is the range and gap formed in traditional narrative by an ancestral barramundi.

<sup>111</sup> Dillion, above n 108, 494-5.

<sup>112</sup> Gelganyem Trust and Kilkayi Trust, Correspondence with Aboriginal and Torres Strait Social Justice Commissioner, 17 November 2006, in HREOC, *Native Title Report 2006*, Chapter 5: The Argyle Participation Agreement.

visual strategies. The early meetings carried no formal agenda, but served to allow the Traditional Owners to tell of their grief, pain and hurt at Rio Tinto's past actions. The Traditional Owners reciprocated with sharing Indigenous negotiation techniques and traditional law with Rio Tinto staff.

*(iii) The Argyle Diamond Mine Participation Agreement*

The Argyle Diamond Mine Participation Agreement was signed in 2005, and comprises of two parts. The first is the legally binding ILUA formalizing financial and other benefits the traditional owners will receive, and protects native title rights. The second part is the Argyle Management Plan Agreement containing eight management plans upon which Rio Tinto and the traditional owners agree to work together to achieve certain objectives, including environmental protection and preservation, Aboriginal site protection, and recruitment, training and retention of Indigenous employees, with a commitment for 40% local Indigenous employment by 2012. A plan exists for Indigenous employment strategies after mine closure in 2018.<sup>113</sup> Aboriginal site protection includes the company respecting traditional customs, for example, smoking ceremonies to ensure the Women's Dreaming sites are placated by the presence of male employees.<sup>114</sup>

The Argyle Agreement is considered by HREOC to be the most comprehensive and culturally sensitive mine agreement in Australia. Its importance is exemplified by the presence of key high profile Reconciliation figures and the Governor-General of Australia in attendance the Signing Ceremony and corroboree.<sup>115</sup>

The Agreement reflects Rio Tinto's understanding that in twenty-first century Australia, companies require a social licence to operate. Costs of doing business without a social licence can be high, with community dissent causing significant delays and waste of money. In the backdrop of negotiations for the Agreement was Argyle Diamond's intention to expand the mine underground at the *daiwul* site, which without an agreement with traditional owners, the company may have

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<sup>113</sup> Ibid.

<sup>114</sup> Personal communication, former Argyle mine employee, 9 June 2011.

<sup>115</sup> Argyle Diamonds, 'Breaking New Ground – The Argyle Participation Agreement,' 2005.

faced substantial operational and financial risks as happened at Century mine.<sup>116</sup>

## *7 Discussion Of Rio Tinto's Relations With Aboriginal People*

An analysis of Rio Tinto and its subsidiaries indicate that social responsibility towards Aboriginal Australia has come only after federal legislation has conferred enforceable rights upon Aboriginal people. The nature of states' royalty systems means state governments have been more likely to legislate to minimize or nullify Indigenous rights to favour mining corporations' access to Aboriginal peoples' traditional lands.

The Queensland state government enacted the *Comalco (Commonwealth Aluminium Corporation Pty Ltd) Act 1957* (Qld) to excise Aboriginal mission land and allow for the residents to be marched off at gunpoint.

The Western Australian government facilitated Hamersley Iron's advance into traditional Aboriginal lands with the passage of the *Iron Ore (Hamersley Range) Agreement Act 1963* (WA), and when the company wanted to expand into the adjacent National Park, the state Labor government passed the Orwellian-named *Marandoo (Aboriginal Heritage) Act 1992* (WA). The government passed the law to exclude the application of the *Aboriginal Heritage Act 1972* (WA) from the Marandoo mine following two years of legal challenges and set-backs by Indigenous peoples wanting sacred and cultural sites preserved, and environmentalists outraged that a National Park was to be mined.

The Western Australian government was similarly obliging to mining companies in the Kimberley when diamonds were discovered in 1978. Aboriginal communities lodged objections to mining near and at sacred site of extreme significance, the state government amended the *Aboriginal Heritage Act 1972* (WA) to narrow the definition of sites of 'special significance' and facilitate the complete destruction of the Women's Dreaming site, the Barramundi Gap, where the diamond deposit was located.

### *(a) Mining And Land Rights*

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<sup>116</sup> Ciaran O'Faircheallaigh, 'Negotiating Cultural Heritage? Aboriginal-Mining Company Agreements in Australia' (2008) 39(1) *Development and Change, Cultural Heritage* 25, 29.

As part of his election pledge in 1972, Labor leader Gough Whitlam committed his party to legislating for Aboriginal land rights, but upon election chose to establish a land rights precedent in the Commonwealth-controlled Northern Territory. The government established an inquiry into appropriate ways to recognize land rights in the Northern Territory, and a Bill was introduced based substantially upon the Inquiry's recommendations<sup>117</sup> The dissolution of Parliament on 11 November 1975 meant the Bill did not pass as drafted, and despite committing to retain the Bill as originally drafted, the incoming Frazer government passed an amended Bill with bipartisan support in December 1976. The *Land Rights Act* (NT) gave Aboriginal people the promise of concrete land rights, but the pressure imposed on traditional owners to consent to large mining operations showed the *Act* up as a chimera – mining companies and all levels of government resorted to duress to obtain the consent required, and if not, the *Act* provided for a utilitarian 'national interest' which could be invoked to dispense with the requirement for consent. In the background was the power of the Commonwealth to revoke the *Act*, which would have affected all Northern Territory Aboriginal people. Negotiations to obtain traditional owner for consent to mine uranium at Ranger were conducted in a manner constituting duress. Traditional owners signed the Ranger Agreement after being compelled to attend countless meetings amid major power imbalance between Aboriginal traditional owners, multinational mining companies and Territory and Federal governments. The devious carrot-and-stick approach was used as a divide-and-conquer tool, and has been employed in subsequent impasses between Aboriginal land rights and native title holders and the Mining Industry and government. In the context of Ranger Uranium Mine, the traditional owners of the Kakadu area were promised a National Park in return for their consent, while the Northern Land Council was threatened by the State (the Federal Minister) that the Federal government might repeal the nascent and hard fought land rights laws if consent was not forthcoming. This pattern has been repeated at Century mine, Hammersely Iron and James Price Point (mentioned briefly above) when Aboriginal people have resisted moves to irrevocably change the landscape of their country by large

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<sup>117</sup> The Woodward Inquiry, chaired by Mr Justice Woodward, released its final report in 1974. Mr Woodward took into account what he described as 'sectional vested interests', meaning the mining and pastoral industries, but recommended mining and development only take place on Aboriginal lands with the consent of the traditional owners, unless the mine was deemed to be in the national interest. This provided a convenient opt-out clause for government.

extractive processes. In the examples of Century, Hammersley and James Price Point, the Queensland and Western Australian Governments gave the Aboriginal negotiating bodies a deadline to reach agreement, with the threat that agreement were not reached, overriding state legislation would be enacted to deny specific rights.

*(b) Reputation Matters*

Large mining companies are aware that brand reputation is an essential element of business. Prior to the Mabo decision and *Native Title Act*, extractive industries in Australia have been shown to be ambivalent at best in their relationships with Aboriginal people. Public opinion favouring reconciliation with Aboriginal people grew after *Mabo* and the *Native Title Act* – a response to both the Mining Council and others’ advertising claims that Indigenous native title rights would destroy Australian Industry, and growing manifestations of racism following the Member for Oxley’s maiden speech in parliament. With ‘Seas of Hands’ outside Parliament House and other public centres providing visual proof of wide community support for reconciliation, and ‘bridge walks’ over the Sydney Harbour bridge in favour of reconciliation and improved respectful relations with Indigenous people attracting over 200 000 people,<sup>118</sup> the mining industry knew the public mood had swung in favour of reconciliation and negotiation. Rio Tinto was the first major mining company to change its policies from litigation and antagonism to negotiation to find ‘mutually beneficial outcomes’ for itself and the communities upon which it held leases. This policy shift from an industry giant was rapidly followed by BHP Billiton and is now a recognized cost of doing business for mining companies in Australia. Rio Tinto remains committed to attain its Indigenous workplace targets, which in the case of Argyle mine is 40% of the workforce to be filled by local Indigenous people.

It is apparent that Rio Tinto is a leader in Indigenous relations in Australia, however, the current stand-off over the Jabiluka mine indicates that while the company is committed to obtaining traditional owner consent before it reopens the mine, the company is not committed to abiding by the wishes of the traditional

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<sup>118</sup> Australian Broadcasting Corporation, ‘Howard stands firm after reconciliation walk’, *7.30 Report*, 29 May 2000.

owners when enormous profits are involved.<sup>119</sup> It appears that the company is holding out for the time it can convince enough traditional owners to consent reopening the Jabiluka mine. To date, Jabiluka is the only success story for Aboriginal people who wanted to preserve their traditional way of life while staring down the barrel of millions of dollars compensation and government inducements. People power and low uranium prices at the time of the dispute swayed Rio Tinto to sign a registered agreement requiring informed consent of traditional owners before mining can occur on their land.

Rio Tinto in Australia has complied on paper with its Indigenous policies in that it considers ATSI issues, attempts to find mutually beneficial outcomes and is committed to Indigenous employment since the change in policy in 1995.

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<sup>119</sup> At 2011 prices, the mine is worth \$18.5billion, in Lindsay Murdoch 'Jabiluka's sacred power 'must never be disturbed' *The Age* (Melbourne) 7 April 2011.

## CHAPTER IV – RIO TINTO IN THE ASIA PACIFIC REGION

Rio Tinto has over forty mine sites across the globe. Of these, one is currently operational in Indonesia at West Papua, while Kelian Mine in Kalimantan was decommissioned in 2003 and Panguna mine is in suspended operations since 1989 when the Bougainville civil war began. The mines in West Papua, Kalimantan and Bougainville are mired in controversy around corruption, serious human rights abuses and environmental harm of entire ecosystems. Villagers from Rio Tinto's mining operations in these areas are in the protracted process of taking legal action against the company under the United State's unique *Alien Tort Claims Act*.

This chapter investigates Rio Tinto's extractive operations in the Asia-Pacific region and the company's compliance to its own stated goals in its business code of conduct, 'The Way We Work'. As a signatory and founding member of the United Nations Global Compact,<sup>1</sup> Rio Tinto is expected to adhere to principles in the Compact which are reflected in Rio Tinto's '*The way we work*' document, and its policy, standards and guidance documents. At the launch of a human rights working group for business, Rio Tinto's Australian Managing Director stated the company is committed to 'respecting and supporting human rights consistent with the Universal Declaration of Human Rights' and 'actively seeking to ensure [Rio Tinto is] not complicit in human rights abuses committed by others.'<sup>2</sup> This chapter looks at Rio Tinto's operations in Papua New Guinea (Panguna mine in Bougainville), and Indonesia (Kelian PT at Kalimantan, Grasberg mine in Papua). The chapter investigates human rights and environmental damage associated with these mine sites and compares the company's commitment to its stated values with its activities in its host states.

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<sup>1</sup> Rio Tinto, *UN Global Compact*, <[http://www.unglobalcompact.org/system/attachments/11499/original/www\\_riotinto\\_com\\_ourapproach\\_17212\\_united\\_nations\\_global\\_com.pdf?1312276427](http://www.unglobalcompact.org/system/attachments/11499/original/www_riotinto_com_ourapproach_17212_united_nations_global_com.pdf?1312276427)>: Global Compact Network Australia, 'Inaugural Human Rights Network launched in Australia' (Media Release) 10 December 2010.

<sup>2</sup> Rio Tinto Managing Director David Peever speaking at the launch of the Human Rights Working Group for Business, Melbourne, 10 December 2010. Also in attendance were the Australian Human Rights Commission, the Reverend Tim Costello of World Vision Australia, The Department of Prime Minister and Cabinet, the investment community, and businesses including ANZ, BHP Billiton, Origin Energy, Rio Tinto, Telstra and Woolworths.

## A *Panguna Copper Mine At Bougainville*

### 1 *Brief History Of The Island Of Bougainville – Pre-Civil War*

Bougainville is a province of Papua New Guinea with a very troubled recent past. It comprises two per cent of PNG's total area at almost 10 000 square kilometres in the islands of Bougainville (8,646 square kilometres), Buka (598 square kilometres), five atolls and 166 smaller islands.<sup>3</sup> Bouga lies 900 km from mainland PNG, 1500 km from Australia and only 20 km from the ecologically and geographically identical nation-state, the Solomon Islands.<sup>4</sup> About half the land area of Bougainville is forested mountain with peaks rising between 1500 and 2500 metres and includes active and dormant volcanoes. The vegetation is thick jungle, cold mountain plains, swamps and flat grassland on the coastal plains. Humans are believed to have arrived in Bougainville 28 000 years ago from New Ireland, and while language and custom varied from settlement to settlement, a strong matrilineal system remained everywhere except Buin and the Atolls.<sup>5</sup> The Panguna open-cut copper mine was once the largest copper mine in the world and financed Papua New Guinea independence from Australia. The mine fractured the long-held matrilineal society when the mining company negotiated with the non-landowning men while ignoring the women's customary role as landowners. As at 2000 the population of Bougainville was 175,160 people.

The French explorer Louis de Bougainville, who gave the island its name, sighted Bougainville in 1768. The islands, along with New Britain, New Ireland and all of the Solomon Islands, were later annexed by the German New Guinea Company. An agreement of 1899 with Germany and Great Britain separated Bougainville to Germany and the Solomons to Great Britain. The local people were not part of negotiations and were resentful of this artificial division from their kinspeople.<sup>6</sup>

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<sup>3</sup> Yash Ghai and Anthony Regan, 'Bougainville and the Dialectics of Ethnicity, Autonomy and Separation', in Yash Ghai (ed) *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-ethnic States* (Cambridge University Press, 2000).

<sup>4</sup> United Nations Environment Program, 'Islands of Papua New Guinea', Island Directory, <<http://islands.unep.ch/IHD.htm>>.

<sup>5</sup> Donna Pearson, 'Matrilineal System in Bougainville: The cultural solution to land tenure and security for women', (Presentation delivered at the Global Seminar/Workshop: Indigenous Women, Climate Change and Reducing Emissions from Deforestation and Forest Degradation (REDD+), Tebtebba, Philippines, 18-19 November 2010).

<sup>6</sup> Kramer Gillin and Bill Moseley, 'For Bread and Dignity: Complicating the Bougainville "Resource



After the defeat of Germany in World War I, former German territories became Mandate territories of the League of Nations and in 1920 were placed under Australian administration.<sup>7</sup> The Germans ruled with a heavy hand but provided the same infrastructure to Bougainville as they did to the rest of New Guinea. The Australians, on the other hand, neglected the Bougainvilleans and provided no services while abandoning their infrastructure and allowing it to deteriorate. World War II saw fierce fighting when Japan occupied Bougainville in 1942 until liberation by the US in 1944, when it was placed again in trust of Australia as a United Nations Trust Territory.<sup>8</sup>

Copper was first discovered on Nasioi land in central Bougainville in 1960. Australian Conzinc Rio Tinto Australia began developing the mine as Bougainville Mining Limited in 1969 and began producing copper in 1972. Nasioi have extremely complicated land ownership agreements<sup>9</sup> and were neither consulted about the massive open-cut mine to be developed, nor provided any form of compensation.<sup>10</sup> Nasioi people practised swidden gardening on a subsistence base, with division of labour determined by gender. Men did heavy work including clearing forests, building houses and fencing gardens, while women produced crops and bred small herds of pigs. They were matrilineal clans in which the Chief Lady was the major decision-maker.<sup>11</sup>

The Panguna mine was operated by Bougainville Copper Limited, a joint venture of Australian company Consolidated Zinc Australia Pty Ltd of Broken Hill and the Rio Tinto Company. When the Australian and British Rio Tinto unified in 1995, Conzinc Rio Tinto became Rio Tinto Limited in 1997. Bougainville Copper Limited is still listed on the Australian Stock Exchange as BOC, and is held 53% by Rio Tinto, 19% by the PNG government, 4% by European Shareholders of Bougainville Copper and the remaining 23% of shares owned by individuals, some of whom live in Bougainville.

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Conflict”” Capstone paper, Macalester University, 2006.

<sup>7</sup> Unrepresented Nations and Peoples Organization, History of Bougainville' <<http://www.unpo.org/article/34>>.

<sup>8</sup> Ibid.

<sup>9</sup> Don Vernon, 'The Panguna Mine' in Anthony Regan and Helga Griffin (eds) *Bougainville before the conflict* (Pandanus Books, 2005).

<sup>10</sup> Gillin, above n 6.

<sup>11</sup> Eugene Ogan, 'Copra came before copper: the Nasioi of Bougainville and plantation colonialism 1902-1964', (1996) 19(1) *Pacific Studies*.

No environmental impact study was carried out prior to the establishment of the Panguna mine, and the impacts of the mine are described below.<sup>12</sup> The mine was intended to bankroll Papua New Guinea independence from Australia in September 1975 - sixty-two per cent of profits from the mine were remitted to the PNG government, 33% to the foreign mining company, 4% to the Bougainville Provincial Government and 1% to the local landowners. As mentioned above, due to the complex land tenure system, many landowners were left out of all negotiations with the mining company and received no compensation for permanent damage to their ancestral lands and subsistence plots. During its years of production, Panguna mine provided 44% of PNG's exports<sup>13</sup> that demonstrated its importance to the PNG economy and was a primary reason why Bougainvilleans constant calls for secession<sup>14</sup> fell on deaf ears. As in many developing nations, the lucrative copper mine did not raise the standards of living of the poor and subsistence peoples, but asymmetrically distributed wealth to rich nations and increased the gap between developed and underdeveloped nations.<sup>15</sup>

*a) Initial And Ongoing Environmental Impacts Of The Panguna Mine*

The Nasioi people were like most Bougainvilleans in that they practised subsistence swidden and slash-and-burn agriculture. Any serious impacts upon the environment had and continue to have serious impacts upon Nasioi and Bougainvillean health and well-being.

The Panguna copper mine was the world's third largest open-cut copper mine in the world until it suspended operations in 1989 on account of the Bougainville civil war.<sup>16</sup> It is a porphyry copper type ore type that produced 55% of Papua New Guinea's total exports in 1974, and despite later mining and logging concessions throughout PNG in subsequent years, Panguna was still producing 44% of PNG's exports at the time of closure 15 years later.<sup>17</sup> In its last full year of operation in

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<sup>12</sup> Unrepresented Nations and Peoples Organization, above n 7.

<sup>13</sup> Volker Borg, 'Mining, Environmental Degradation and War: The Bougainville Case', in Mohamed Suliman (ed) *Ecology, Politics, and Violent Conflict*, (Zed Books, 1999).

<sup>14</sup> Unrepresented Nations and Peoples Organization, above n 7, Gillin, above n 6.

<sup>15</sup> M J Brown, 'A Development Consequence – Disposal of Mining Waste on Bougainville, Papua New Guinea' (1974) 18 *Geoforum*.

<sup>16</sup> Mineral Policy Institute, 'Panguna, Bougainville', <<http://www.mpi.org.au/1new-page.aspx>>

<sup>17</sup> Timothy Hammond, 'Conflict Resolution in a Hybrid State: The Bougainville Story', *Foreign Policy*

1988, Panguna mine produced 166,000 tonnes of copper and 445,000 oz of gold worth US\$1 billion at 2009 prices.<sup>18</sup>

Before mining could begin in 1972, 220 ha of tropical rainforest had to be cleared and a large mass of volcanic ash removed to expose the orebody. The vegetation was cleared by aerial poisoning of forest and spraying herbicide on the undergrowth. The volcanic overburden was hydraulicked and 18 million cubic metres of waste rock and sediment dumped directly into the Kawerong River.<sup>19</sup> A port-mine access road needed to be built, and as the mountain faces are steep and unstable, another 11 million cubic metres of rock was excavated and cast into the Pinei river, inundating a village and destroying a coconut grove. 150 000 tonnes of toxic tailing were dumped each day into the two primary rivers of Bougainville (Jaba and Kawerong) killing plant and marine life. Conditions downstream were rendered so toxic that they destroyed all fish and fish habitat, a problem for humans who depend on fish in a subsistence culture.<sup>20</sup> The Panguna Landowners' Association claimed the mine caused the extinction of the flying fox, killed off pigs and possums and caused birth defects in children.<sup>21</sup>

Sediment silted up the river system but those who were able to use the poor flows to irrigate their crops found that the agricultural productivity had significantly decreased.<sup>22</sup> A recent report found that the Kawerong River is still lifeless 20 years after the riverine tailings dumping stopped, and children still get weeping skin lesions after swimming in their village's only water supply which continues to deposit blue copper solids along the rocks in the riverbank.<sup>23</sup>

When Bougainville Copper Limited's untreated tailings killed all aquatic life in the river systems, carp fish were brought in to provide food for the women fishers.<sup>24</sup> Riverine tailings disposal is not permitted in Australia. Tailings disposal is always problematic in environments of high rainfall, steep terrain and often weak

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*Journal*, 22 April 2011.

<sup>18</sup> 'Panguna still has plenty of copper', Mining Journal Online, 11 February 2009, <<http://www.mining-journal.com/exploration--and--development/panguna-still-has-plenty-of-copper>>.

<sup>19</sup> Brown, above n 15, 20.

<sup>20</sup> Volker, above n 13.

<sup>21</sup> Sean Dorney, *The Sandline Affair* (Australian Broadcasting Commission, 1<sup>st</sup> ed, 1998).

<sup>22</sup> Gillin, above n 6.

<sup>23</sup> SBS, 'Blood and Treasure' *SBS Dateline*, 26 July 2011 (Brian Thompson).

<sup>24</sup> Unrepresented Nations and Peoples Organization, 'Environmental Costs in Bougainville', <<http://www.unpo.org/article/7503>>

geomorphic substrate. In these situations, mining companies typically argue that containment of tailings as practised in Australia is not feasible.<sup>25</sup> An indirect impact of the mine was fisheries collapse in other nearby waters caused by over-reliance on a single economic activity. With fish stocks downstream long gone, Bougainvilleans began fishing unsustainably to supplement their subsistence lifestyles after the mining operation was suspended.<sup>26</sup> Over the years of operations, a billion tonnes of pollutant run-off containing copper, mercury, lead and arsenic destroyed entire river systems and left the water unusable for humans and toxic to the environment. BCL has removed over a billion tonnes of land over 400 hectares, of which 99% is unrehabilitated wasteland.<sup>27</sup>

## *2. The Bougainville Civil War – More Than A Resource Curse*

Bougainvilleans long have had aspirations for independence, including a unilateral declaration of independence of the Republic of North Solomons on 1 September 1975, sixteen days before PNG was due to become independent from Australia.<sup>28</sup> This act was duly ignored, as too were prior secessionist representations to the United Nations officials in 1953 and 1962.<sup>29</sup> The decade long civil war that caused thousands of deaths and implicated Australia and Rio Tinto in atrocities. The war had its genesis in secessionist desires of the Bougainville people, environmental destruction and disruption of traditional culture, and unequal distribution of mine royalties mired in inadequate negotiation with rightful traditional landowners, Bougainvillean women.

In 1988, Francis Ona of the Panguna Landowners Association decided that peaceful negotiation regarding the environmental impacts of the mine had proved ineffective for too long, so he along with some young Bougainvilleans, stole the mining

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<sup>25</sup> Glen Banks, 'Mining and the Environment in Melanesia: Contemporary Debates Reviewed' (2002) 14 *The Contemporary Pacific* 36.

<sup>26</sup> Ibid.

<sup>27</sup> Hammond, above n 17; Dorney, above n 221

<sup>28</sup> Yash Ghai and Anthony Regan, 'Constitutional accommodation and conflict prevention', in A Carl and L Garasu (eds), *Weaving Consensus: the PNG-Bougainville peace process*, Accord 12, Conciliation Resources (2002), <<http://www.c-r.org/accord/boug/accord12/constitutional/shtml>>.

<sup>29</sup> Gillin, above n 6. In 1962 Bougainvilleans did not ask for independence or annexation to the Solomon Islands, but for US control of their affairs, likely a result of comparatively good treatment they received from US soldiers in WWII.

company's mining explosives and began destroying strategic company structures.<sup>30</sup> This movement grew into a militant force called the Bougainville Revolutionary Army led by Ona, and it demanded increased compensation for landowners and greater Bougainville ownership of the mine. The BRA attracted secessionist support with anti-foreigner and ethno-nationalist sentiments, with the aim of forging a 'traditional, idyllic, egalitarian society'.<sup>31</sup> The BRA broadened their attacks to include government offices and non-Bougainvilleans. PNG quickly deployed Riot Squad Police and in March 1989 sent three companies of PNGDF (Papua New Guinea Defence Force), which arbitrarily destroyed villages, and raped, tortured and killed innocent civilians including women and children.<sup>32</sup> The BRA was also responsible for arbitrary killing and hostage taking.<sup>33</sup>

In 1990 the PNGDF retreated to PNG after failing to quell the resistance, and with the withdrawal came a complete cessation of government services to the island. The Bougainville Interim Government (BIG) affiliated with the BRA unilaterally declared independence in May 1990, and was immediately followed by a complete economic and communications blockade of Bougainville. All food, fuel and medicines were prevented from entering the island, causing up to 20 000 deaths from starvation and preventable illness.<sup>34</sup> The PNG navy routinely shot at humanitarians who attempted to bring in medical supplies by boat from the nearby Solomon Islands.<sup>35</sup> By 1991, PNGDF troops returned to Bougainville and resumed fighting in spite of ceasefires and amnesties.<sup>36</sup> At one point between 50 000 and 70 000 Bougainvilleans from a population of 180 000 – 200 000<sup>37</sup> were placed in 'care centres' in the PNGDF-controlled areas where rape and other abuses by the PNGDF were common.<sup>38</sup>

(a) *International Mercenaries – The Sandline Affair*

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<sup>30</sup> Ibid.

<sup>31</sup> Conciliation Resources, 'Profiles', Accord 12, above n 28.

<sup>32</sup> Amnesty International, 'Bougainville: The Forgotten Human Rights Tragedy', 1 February 1997, ASA/34/01/97 <<http://www.unhcr.org/refworld/docid/3ae6a9874.html>>.

<sup>33</sup> Ibid.

<sup>34</sup> See footnote n 14 in Chapter III.

<sup>35</sup> Rosemarie Gillespie, *Running with Rebels – behind the lies in Bougainville's hidden war* (Ginibi Productions, 2009).

<sup>36</sup> Amnesty International, above n 32.

<sup>37</sup> Department of Foreign Affairs and Trade, Bougainville Peace Process, History of the Peace Process, <[http://www.dfat.gov.au/geo/png/bougainville\\_peace\\_process.html](http://www.dfat.gov.au/geo/png/bougainville_peace_process.html)>.

<sup>38</sup> S. McMillan 'Bringing peace to Bougainville' (1998) 23(3) *New Zealand International Review* 2; Ruth Saovana-Spriggs 'Christianity and women in Bougainville' (2000) *Development Bulletin* 58.

By 1997 the PNG government was under pressure from Rio Tinto and the Australian government to crush the rebels uprising at the Panguna mine and reopen the mine. To effect this, the PNG government contracted a British mercenary outfit, Sandline, for a fee of \$36 million. Sandline sub-contracted to the South African mercenary company 'Executive Outcomes' and 100 heavily armed mercenary soldiers flew into PNG<sup>39</sup> to fight BRA rebels wielding WWII rifles and driving vehicles running on coconut oil.<sup>40</sup> The PNG Brigadier-General Jerry Singirok supported the original contract with Sandline, but he balked at the inclusion of Executive Outcomes, which supplies mercenaries to corporations and governments in central and western Africa and collects a significant share in resources operations it secures. Executive Outcome's nickname is 'the diamond dogs of war', as it has legitimised itself as a lucrative business operation after securing diamond mines in Sierra Leone.<sup>41</sup> Sandline was armed with helicopter gun-ships and advanced artillery, and had the unstated objectives of assassinating the three highest-ranking BRA officials and re-opening of the Panguna mine.<sup>42</sup>

The Sandline operation was anticipated to remain secret. A clause in the contract between Sandline and PNG stipulated that the international community would only be informed of the operations if 'deemed necessary due to internal interest' and with Sandline's consent as to the wording of any forthcoming information.<sup>43</sup> The Sandline contract was entered into on 31 January 1997, and in February 1997 the shares in Rio Tinto's BCL stocks rose dramatically on the Australian Stock exchange to more than 460 000, ten times higher than normal, suggesting an element of insider trading.<sup>44</sup> As over 100 Sandline contracted mercenaries arrived in PNG, the operation was leaked to the Australian press. Brigadier-General Singirok defied the Prime Minister and forcibly expelled Sandline and Executive Outcomes from the country while detaining Sandline organiser and mercenary Tim Spicer on weapons charges. At the

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<sup>39</sup> Alex Harris, 'Rio Tinto controlled the government of PNG: Bougainville revisited' Reputation Report, 26 June 2011, <<http://www.reputationreport.com.au/2011/06/rio-tinto-controlled-the-government-of-png-bougainville-revisited/>>.

<sup>40</sup> Hammond, above n 17.

<sup>41</sup> Simon Sheppard, 'Foot soldiers of the New World Order – the rise of the corporate military' (1998) *New Left Review* March-April.

<sup>42</sup> Desh Gupta, 'Sandline episode: Economic Impact and Implications' (1997) 32(3) *The Journal of Pacific History* 65.

<sup>43</sup> Agreement for the provision of military assistance dated this 31 day of January 1997 between the Independent State of Papua New Guinea and Sandline International. John Braithwaite and Hilary Charlesworth, *Reconciliation and Architecture of Commitment – sequencing peace in Bougainville* (ANU E-Press, 2010).

same time, Australian officials detained helicopter gun-ships in Darwin contracted by Sandline for mercenary use.

Singirok outed himself as leaker of the contract to the Australian press, which he did partially due to his nationalist tendencies, but also due to the expense of the operation that exceeded PNG's entire military budget. In order to pay for Sandlines' services, PNG was forced to cut spending in its own military and in health and education amongst others, causing further unrest.<sup>45</sup> Singirok was sacked the day after his defiance against the government, but the ensuing stand-off between soldiers loyal to Singirok and the Prime Minister Sir Julius Chan led to Chan and two colleagues standing down pending the outcome of an inquiry into the circumstances surrounding the Sandline contract.<sup>46</sup> Julius Chan was initially unrepentant, and chose a new colonel to replace Singirok. This man, Ixo Nuia, had been sacked earlier after telling an ABC TV reporter that troops under his command had used Australian-supplied Iroquois helicopters to dump the bodies of dead rebels at sea.<sup>47</sup> Crowds of people outraged that high tech mercenaries had been contracted to massacre subsistence Bougainvilleans forced the PNG government to hold inquiry, and also paved the way for a negotiated peace process.<sup>48</sup> The collapse of the Sandline deal effectively ended any option of a military solution for Bougainville, and peace talks were effected in New Zealand in October 1997.<sup>49</sup>

*(b) More Than A Resource Curse*

The Bougainville civil war and ongoing tension regarding possible re-opening of the Panguna mine is deeper than a simple struggle for wealth-seeking by PNG and Bougainvilleans, and a narrow analysis renders any future mining operations fraught with the possibility of fostering the same conditions that led to the decade-long civil war. While monetary compensation was not paramount in the minds of Bougainvilleans, the landowners futilely sought compensation in the early days of

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<sup>45</sup> Sinclair Dinnen, 'The money and the gun mercenary times in Papua New Guinea (1997) 32(3) *The Journal of Pacific History* 52.

<sup>46</sup> Ibid.

<sup>47</sup> These allegations have been supported by former PNG Prime Minister Rabbie Namiliu reported in Rowan Callick, 'Battle intensifies over Bougainville copper', *The Australian*, (Sydney) 16 July 2011, see also Gupta, above n 42.

<sup>48</sup> Standing Committee on Foreign Affairs, Defence and Trade, Australian Parliament, *Bougainville: the peace process and beyond* (1999)

<[http://www.apf.gov.au/house/committee/jfadt/bougainville/bv\\_chap2.htm](http://www.apf.gov.au/house/committee/jfadt/bougainville/bv_chap2.htm)>.

<sup>49</sup> Ibid.

the mine while Australia still was the colonizing power. In the early 1960s, Bougainvillean landowners complained to the Australian government about the handling of the mine's proceeds. The case went to the High Court where it was found the compensation was inadequate under Australian law, but because PNG was an external territory, PNG was not guaranteed the same standards as the Australian mainland.<sup>50</sup> The issue of compensation has remained a festering sore ever since. Another issue was apparent re-colonisation by PNG.

Bougainvilleans were keen to shed the colonial yoke, and the influx of over 4000 relatively well-off 'red skins' (Papua New Guineans) who came with the Panguna mine exacerbated locals' feelings of an 'us' and 'them' mentality.<sup>51</sup>

Martin Miriori from the Bougainville Information Office in the neighbouring Solomon Islands summed up the Bougainvilleans grievances as:

- the environmental destruction caused by the mine;
- the increasing loss of identity with the influx of PNG mine workers;
- cultural breakdown and the growing power of PNG built on Bougainville blood, and
- environmental and societal dislocation.<sup>52</sup>

The mine affected Bougainvillean life by jeopardizing the productivity of subsistence farms and changing the economy of the island, marginalizing the local peoples. The degradation of land was of paramount concern – as with many indigenous peoples, Bougainvilleans had deep connections with the land and saw themselves as part of the land. Disruption of land tenure caused intergenerational conflict and undermined the traditional matrilineal inheritance practice, fraying the social fabric of Bougainvillean culture maintained over 28 000 years.<sup>53</sup>

*(c) Rio Tinto involvement? Sarei v Rio Tinto*

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<sup>50</sup> *Bennong v Bougainville Copper Pty Ltd* 1(1971) 124 CLR 47.

<sup>51</sup> Gillin, above n 6.

<sup>52</sup> Martin Miriori, 'Bougainville, A sad and silent tragedy in the South Pacific' (1996) in *Do or Die – Voices from the Ecological Resistance* magazine, Issue 5, 1996.

<sup>53</sup> Anthony Regan, 'The Bougainville Conflict: Political and Economic Agendas' in Karen Ballentyne and Jake Sherman (eds) *The Political Economy and Armed Conflict: Beyond Greed and Grievance* (Lynne Rienner Publishers, 2003).



Rio Tinto has long denied any involvement in the Bougainville civil war.<sup>54</sup> In 2000, a class action of 20 Bougainville landowners led by a former Catholic priest launched a class action against Rio Tinto under the *Alien Tort Claims Act* in the United States Federal Court, alleging:

- Rio Tinto was complicit in war crimes and crimes against humanity committed by the PNGDF during the secessionist conflict in Bougainville;
- environmental impacts from Rio Tinto's Panguna mine on Bougainville harmed their health in violation of international law; and
- Rio Tinto engaged in racial discrimination against its black workers at Panguna.

The twenty plaintiffs alleged that the improperly dumped tailings and waste rock harmed the island's environment and the residents' health, that Rio Tinto racially discriminated against black (Bougainville) workers by paying them lower wages than those paid to 'redskins' (PNG mainland residents) and white workers, and that when the civil war ensued as a result of grave environmental damage and discrimination, Rio Tinto was complicit in war crimes and crimes against humanity.<sup>55</sup> The plaintiffs allege that Rio Tinto induced the PNG to impose a military blockade preventing medical supplies from entering the island and resulting in thousands of civilian deaths, and that the PNGDF committed acts of torture, killing, bombing and rape – all violations of international law.<sup>56</sup>

Rio Tinto sought dismissal and gained dismissal of the case, but on appeal the case was remanded to the district court. The case has been weaving through the court system culminating in the 26 October 2010 referral to another judge to explore the possibility of mediation.<sup>57</sup>

Unsurprisingly, Rio Tinto denies the allegations against it as untrue and defamatory.<sup>58</sup> Rio Tinto's website dismisses the claims of the plaintiffs and suggests

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<sup>54</sup> Rio Tinto, Bougainville, 9 July 2007, <[http://www.riotinto.com/media/news\\_6472.asp](http://www.riotinto.com/media/news_6472.asp)>

<sup>55</sup> *Sarei v Rio Tinto*. Only a handful of the original plaintiffs are still alive.

<sup>56</sup> Legal Adviser William J Taft IV to the Assistant Attorney-General, United States Department of Justice, Washington DC, 31 October 2001, <<http://www.state.gov/documents/organization/16529.pdf>>.

<sup>57</sup> *Sarei v Rio Tinto*, PLC625 F. 3d 561 (2010).

<sup>58</sup> Rio Tinto, Bougainville, above n 53.

US lawyers acting upon contingency basis are pursuing the action.<sup>59</sup>

*(i) The Somare Affidavit*

Rio Tinto has strenuously denied any wrongdoing in the Bougainville civil war, however new evidence sheds light upon Rio Tinto's denials and turns the spotlight on the corporation's practices overseas and its involvement in CSR forums and human-rights initiatives.

In June 2011, *SBS Dateline* program<sup>60</sup> obtained an explosive affidavit from the continuing *Sarei* case in the United States. The sworn affidavit was written in 2001 by the then PNG Opposition leader Sir Michael Somare. At the time of broadcast, Sir Somare was convalescing in a Singapore hospital and was the PNG Prime Minister. Until the *Dateline* program was broadcast, the powerful support the people of Bougainville had when they launched their class action against Rio Tinto had not been revealed.<sup>61</sup>

Micheal Somare is widely regarded as PNG's founding father<sup>62</sup> and stated in his affidavit:

Because of Rio Tinto's financial influence in PNG, the company controlled the Government. The Government of PNG followed Rio Tinto's instructions and carried out its requests. BCL was also directly involved in the military operations on Bougainville, and it played an active role. BCL supplied helicopters, which were used as gunships, the pilots, troop transportation, fuel, and troop barracks.<sup>63</sup>

Somare's affidavit declares that without Rio Tinto's activity on Bougainville, 'the government would not have been engaged in hostilities or taken military action on the island.'<sup>64</sup>

*Dateline* interviewed former Brigadier-General and now PNG businessman Jerry Singirok, who shared Sir Michael Somare's interpretation of events, said that Rio

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<sup>59</sup> Ibid.

<sup>60</sup> *SBS Dateline*, above n 23.

<sup>61</sup> Ibid.

<sup>62</sup> See for example 'Sir Michael Somare interview', *The Diplomat* (Tokyo) 2 February 2009.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

Tinto had great influence in the decision-making process. Former PNGDF soldiers interviewed by Dateline felt their suspicions justified about Rio Tinto involvement in the blockade and hostilities as during the fighting around the mine Bougainville Copper Ltd's vehicles were being used by the security forces.<sup>65</sup> This recent disclosure brings serious allegations as to the actions of Rio Tinto overseas, and calls into question the company's assertions that the action by Bougainvillean landowners under in *Sarei v Rio Tinto* is both untrue and defamatory.

(ii) *Result of Bougainville Peace Process*

Moves to a permanent cease-fire in Bougainville were marred by the October 1996 assassination of moderate Premier of the Bougainville Transitional Government (BTG), Theodore Miriung, by the PNGDF and elements of pro-PNG rebel forces. The BTG sought to continue with Miriung's efforts to find an acceptable compromise with the various Bougainville factions after Miriung's death.<sup>66</sup> The following July Bougainville factions met to discuss a peaceful settlement, agreeing to an immediate truce by October 1997. A permanent ceasefire agreement was signed on 30 April 1998.<sup>67</sup> An Australian led Peace Monitoring Group was deployed and complemented with a United Nations Observer Mission on Bougainville (UNOMB).<sup>68</sup>

Of issue was independence for Bougainville, which was successfully negotiated by Australian Foreign Affairs Minister, Alexander Downer. Downer convinced mistrusting Bougainville leaders that PNG would not renege on a deferred referendum for independence, privately citing Australian aid to PNG and East Timor's referendum from Indonesia as forces driving PNG to honour such commitment.<sup>69</sup> The Bougainville Peace Agreement was signed in August 2001, providing for inter alia autonomy and a constitutional guarantee of referendum on independence 10 – 15 years after the election of an Autonomous Bougainville

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<sup>65</sup> Ibid.

<sup>66</sup> Anthony Regan, Resolving two dimensions of conflict: the dynamics of consent, consensus and compromise – Building differences - within Bougainville, Accord 12, Conciliation Resources (2002) <<http://www.c-r.org/our-work/accord/png-bougainville/resolving.php>>

<sup>67</sup> Department of Foreign Affairs and Trade, Bougainville Peace Process, <[http://www.dfat.gov.au/geo/png/bougainville\\_peace\\_process.html](http://www.dfat.gov.au/geo/png/bougainville_peace_process.html)>

<sup>68</sup> Ibid.

<sup>69</sup> Braithewaite and Charlesworth, above n 44.

Government, which occurred in June 2005.<sup>70</sup>

It is rather remarkable that the dismissive and arrogant actions of the state of PNG and Rio Tinto towards the Bougainvillean peoples and their environment prompted a civil war and caused the unlikely outcome of closure of a major corporate asset and the real prospect of Bougainvillean secession from PNG. The actions of the PNG government to secure the mine through the engagement of international mercenaries brought both international condemnation and domestic strife within PNG when social programs including health and education were defunded to pay the costs of Sandline International,<sup>71</sup> conversely forced the peace process to begin ultimately leading to a looming referendum.

*(d) Rio Tinto, Bougainville And Panguna Mine Post-Hostilities*

In 2009 the Bougainville president invited BCL to send a representative to Bougainville.<sup>72</sup> The Bougainville government recognizes the need for economic security if Bougainville is to have autonomy and independence from PNG. The Panguna mine still contains a billion tonnes of payable ore, and an Order of Magnitude Study supported mining and processing at a rate of 50 million tonnes per year producing about 450 000 ounces of gold and 170 000 tonnes of copper per annum for twenty years.<sup>73</sup>

While the male dominated parliament and many Bougainvilleans are supportive of moves to reopen Panguna,<sup>74</sup> many former fighters and women are opposed to any future opening. The former fighters believe Rio Tinto has a blood debt to the people of Bougainville that cannot be compensated with money.<sup>75</sup> Bougainville women are the traditional decision-makers, and they too have been consistently left out of negotiations. The BCL Chairman assured the company's AGM that landowner

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<sup>70</sup> Department of Foreign Affairs and Trade, above n 67.

<sup>71</sup> Journalist Mary-Louise O'Callaghan estimates Sandline was ultimately paid \$US43 million by the PNG government after it sued for breach of contract, without having even fired a shot, in O'Callaghan, *New Guinea, Australia, and the Sandline crisis. The inside story* (Doubleday, 1999).

<sup>72</sup> Bougainville Copper Chairman's Annual General Meeting Address (Crowne Plaza Port Moresby, 29 April 2010).

<sup>73</sup> Bougainville Copper Limited Chairman Peter Taylor (Speech delivered at the Australia PNG Business Council conference, Madang, PNG, 17 May 2011).

<sup>74</sup> Ilya Gridneff, 'Panguba locals want PNG mine to re-open' *Sydney Morning Herald* (Sydney) 14 May 2010.

<sup>75</sup> SBS Dateline, above n 23.

groups would be major stakeholders in any negotiations regarding the reopening of Panguna<sup>76</sup> but Bougainville women's landowner groups have never been a part of the decision-making process. The Bougainville Indigenous Women Landowners Association does not want the mine to re-open and will not agree to allow Rio Tinto back to Panguna due to its destruction of their land, environment and culture.<sup>77</sup> Rio Tinto's commitments to tenets of CSR and stakeholder engagement will be tested by the matrilineal nature of Bougainville society. The Panguna mine fractured the unique matrilineal culture and mine operators negotiated only with men in decision-making without considering the views of the major decision-making sector of Bougainville society. If the mine is to re-open following landowner consent, Rio Tinto should engage thoroughly with until now disenfranchised women landowners.

### *B Grasberg Mine In West Papua*

In 1995 Rio Tinto began its involvement in one of the most contentious and environmentally destructive mines in the world, while at the same time its CEO in Australia was conceding the need for a social licence to operate large mines and supporting the tenets of native title. The mine Rio Tinto funded to stay in production at greatly increased rates of extraction, PT Freeport McMoRan's Grasberg gold and copper mine in the equatorial jungles of the Indonesian province of Papua, has a history steeped in the blood and dispossession of the Indigenous peoples. The mine is by all credible accounts the cause of extreme environmental disaster and is the cause of credible human rights abuses that in some cases are tantamount to war crimes. Throughout this section the words 'West Papua' are used instead of 'Papua' (the Papuan province of Indonesia) to reflect the illegality and farce of Papuan integration into Indonesia. This section begins with a brief description of 'ecocide' and its example of the Grasberg mine. The background to the mine is examined in the context of Indonesian and United States efforts to secure integration of West Papua into Indonesia against the wishes of the West Papuan peoples.

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<sup>76</sup> Peter Taylor, above n 73.

<sup>77</sup> Mohammed Bashir, Women oppose mine bid, *Post Courier* (Port Moresby) 27 April 2010.

## 1 Introduction – *Ecocide In The Equatorial Mountains*

### (a) *What Is Ecocide?*

'Ecocide' is mass destruction of the ecosystem. The term is attributed to Barry Weisberg in his book *Ecocide in Indochina*, which detailed the United States strategy of intensive environmental destruction during the Vietnam War. The use of 77 million litres of defoliant destroyed almost 20% of the total territory of South Vietnam and continues to have long-term effects upon biota.<sup>78</sup> Weisberg attributed the term 'ecocide' to Professor Arthur Galston at the 1970 Conference on War and National Responsibility.<sup>79</sup> It was at this conference that Galston proposed a new international agreement to ban Ecocide - 'the wilful destruction of the environment'<sup>80</sup> - relating the intense chemical warfare of the United States and against Vietnam to the international crime of genocide.

The origins of the term and concept of ecocide are found in modern warfare<sup>81</sup> but the definition has expanded to include excessive exploitation of ecosystems such as the collapse of Easter Island and other civilizations due to resource depletion<sup>82</sup> through to gross negligence and indifference of both TNCs and states. Examples of the latter include negligence that resulted in such environmental disasters as the Deep Horizon Gulf of Mexico oil leak, the poisoning and retreat of the Ural Sea, the north Pacific gyre ('garbage patch'), mass clearing in the Amazon and other ecological catastrophes. Ecocide is described as a 'crime against peace' by Polly Higgins in her book *'Eradicating Ecocide'*, and defines it as

the extensive destruction, damage to or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of the territory has been severely diminished.<sup>83</sup>

Higgins proposed the United Nations Law Commission add the international crime

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<sup>78</sup> Barry Weisberg, *Ecocide in Indochina – the ecology of war* (Canfield Press, 1970).

<sup>79</sup> Washington DC, February 1970.

<sup>80</sup> Weisberg, above n 78.

<sup>81</sup> In particular mass defoliate use in Indochina, and include the use of depleted uranium in Iraq in 1991 and the 2003 invasion, the former Yugoslavia in 1999, and the use of weapons of mass destruction.

<sup>82</sup> Jared Diamond, *Collapse, how societies choose to fail or succeed?* (Viking Press, 2004).

<sup>83</sup> Polly Higgins, *Eradicating Ecocide* (Shepherd-Walwyn (Publishers) Ltd, 2010).

of ecocide to the international crimes against peace in April 2010. She makes the nexus between indiscriminate resource extraction and threats to international peace that becomes a vicious cycle when the conflict derived from resource depletion leads to armed conflict, which in turn often leads to war and large-scale conflict.<sup>84</sup> This is no better exemplified than in Iraq, but is encapsulates the secret war of Indonesia against West Papuans primarily due to the Grasberg mine. Violent warfare, crimes against humanity and severe and extensive destruction of the environment are hallmarks of Freeport-McMoRan and Rio Tinto's operations in West Papua and are detailed below.

*(b) Norway's Sovereign Wealth Fund Invested In Rio Tinto Withdrawn – Ecocide By Description*

In 2008 Norway announced it was banning its sovereign wealth fund from investing in Rio Tinto because company's severe environmental damage amounted to 'gross unethical conduct' caused by the Grasberg mine in West Papua.<sup>85</sup> The Grasberg mine is one of the largest single producers of both copper and gold, and contains the largest recoverable reserves of copper and the largest single gold reserve in the world.<sup>86</sup> It is owned and operated by Freeport Indonesia, the 91 per cent owned subsidiary of Freeport-McMoRan Copper & Gold Inc, while the Indonesian government owns the remaining 9%. Rio Tinto was a 13% shareholder of Freeport from mid-1995 (when Rio financed Freeport McMoRan's huge expansion) until March 2004, and remains a joint venture partner.<sup>87</sup> The joint venture gives Rio Tinto a 40% share of production above 125,000 tonnes of ore a day until 2021, and then 40% of all production after 2021.<sup>88</sup> Rio Tinto's injection of capital into Freeport in 1995 enabled the mine to not only remain open for another 55 years, but also greatly accelerated mining and production of toxic tailings that are disposed of by riverine disposal – direct dumping into river systems. The practice of dumping untreated waste rock and tailings into rivers is banned in Australia and the United States

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<sup>84</sup> Ibid.

<sup>85</sup> Norwegian Ministry of Finance, 'The Government Pension Fund divests its holdings in mining company' (Press Release No. 43/2008, 9 September 2008).

<sup>86</sup> Freeport MacMoRan Copper & Gold, <http://www.fcx.com/operations/asia.htm>.

<sup>87</sup> Joanna Kyriakais, 'Freeport in West Papua: Bringing corporations to account for international human rights abuses under Australian criminal and tort law' (2005) 31(1) *Monash University Law Review* 95

<sup>88</sup> Rio Tinto, Operations and Financial Report, Grasberg Joint Venture, <[http://www.riotinto.com/annualreport2007/operationsfinancialreview/copper\\_group/operations/grasberg/index.html](http://www.riotinto.com/annualreport2007/operationsfinancialreview/copper_group/operations/grasberg/index.html)>.

(home state of Arizona based company Freeport McMoRan) and all western nations,<sup>89</sup> and is recognized by experts as the 'least sustainable' tailings disposal practice.<sup>90</sup>

The Grasberg mine is located in the Ertsberg district of equatorial mountains, forests and glaciers in the glacial south-western highlands of West Papua. Although geographically and ethnically New Guinea, West Papua was fraudulently subsumed to formal sovereignty by Indonesia after the now widely discredited UN mandated *Act of Free Choice in 1969*.<sup>91</sup> This is discussed below.

## *2 Freeport's Operations And Precursor To Rio Tinto*

### *(a) Ertsberg Mine*

Freeport's Contract of Work (COW) at Ertsberg was the first foreign investment entity initiated under Indonesian Army General Suharto's New Order 1967 foreign investment laws.<sup>92</sup> As an engineering marvel the operation excelled, but the COW was agreed between Freeport and Suharto, a man whose epitaph is one of the world's worst dictators. The COW was itself drafted by Freeport, and provided Freeport with broad powers over the population and resources, including the right to compulsorily take land and remove and resettle the indigenous people living in the vast mining lease.<sup>93</sup> It disregarded the Kamoro and Amungme people's customary land rights and forced them to malaria ridden lowland settlements resulting in hundreds of malarial deaths.<sup>94</sup> The dispossessed people received no compensation for loss of food gardens, water, hunting and fishing grounds, forest products, sacred sites and other elements upon which their culture depended. Freeport was given the right 'to take and use' water, timber soil and other materials in the concession area, all on a tax-

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<sup>89</sup> Abigail Abrash and Danny Kennedy, 'Repressive mining in West Papua', in Geoff Evans, James Goodman and Nina Landsbury (eds) *Moving Mountains* (Oxford Press, 2001).

<sup>90</sup> D.V. Boger and B.C. Hart, 'Making an unsustainable industry more sustainable' (Keynote address Paste 2008, Proceedings of the Eleventh International Seminar on Paste and Thickened Tailings, Kasane, Botswana, 5-9 May 2008).

<sup>91</sup> Elizabeth Brundige, Winter King et al, 'Indonesian Human Rights Abuses in West Papua: Application of the Law of Genocide to the History of Indonesian Control' (prepared for the Indonesian Human Rights Network by Allard K. Lowenstein International Human Rights Clinic, Yale Law School, 2004).

<sup>92</sup> Abigail Abrash, 'Human rights abuses by Freeport in Indonesia: Development Aggression Observations on Human Rights Conditions in the PT Freeport Indonesia Contract of Work Areas With Recommendations', Robert F. Kennedy Memorial Center for Human Rights, July 2002.

<sup>93</sup> Ibid.

<sup>94</sup> Brundige et al, above n 91.



free basis.<sup>95</sup> The COW renegotiated in 1991 with Freeport and President Suharto again exempted West Papua from Indonesia's environmental laws.<sup>96</sup>

Ertsberg was constructed at 4100 metres above sea level and involved immense foreign capital and technology to create what was considered an engineering marvel.<sup>97</sup> A 116 km road and pipeline, port, airstrip, power plant and new town were developed in the forest to facilitate the huge influx of foreign and Indonesian workers. Ertsberg began operation in 1972, and due to the high altitude terrain, ore was dropped 600 metres from the mine, mixed with water to become slurry, and then pumped along a 166 km pipeline to the coast where it was dried and shipped.

*(b) The Grasberg Mine*

By the mid-1980s the Ertsberg mine was largely depleted, but in 1988 Freeport identified reserves valued at \$40 billion at Grasberg, three kilometres from Ertsberg. Freeport began excavating the second largest open cut mine in the world with the world's largest recoverable reserves of copper and gold.<sup>98</sup> The enormous scale of Grasberg makes it the biggest single tax payer in Indonesia,<sup>99</sup> generating half of the nation's GDP.<sup>100</sup> Environmental effects of the mine are discussed below.

Grasberg mine can be observed on Google Earth, adjacent to World Heritage listed Lorentz National Park and equatorial glaciers. A massive scar is cut into the equatorial rainforest.

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<sup>95</sup> Abrash, above n 92.

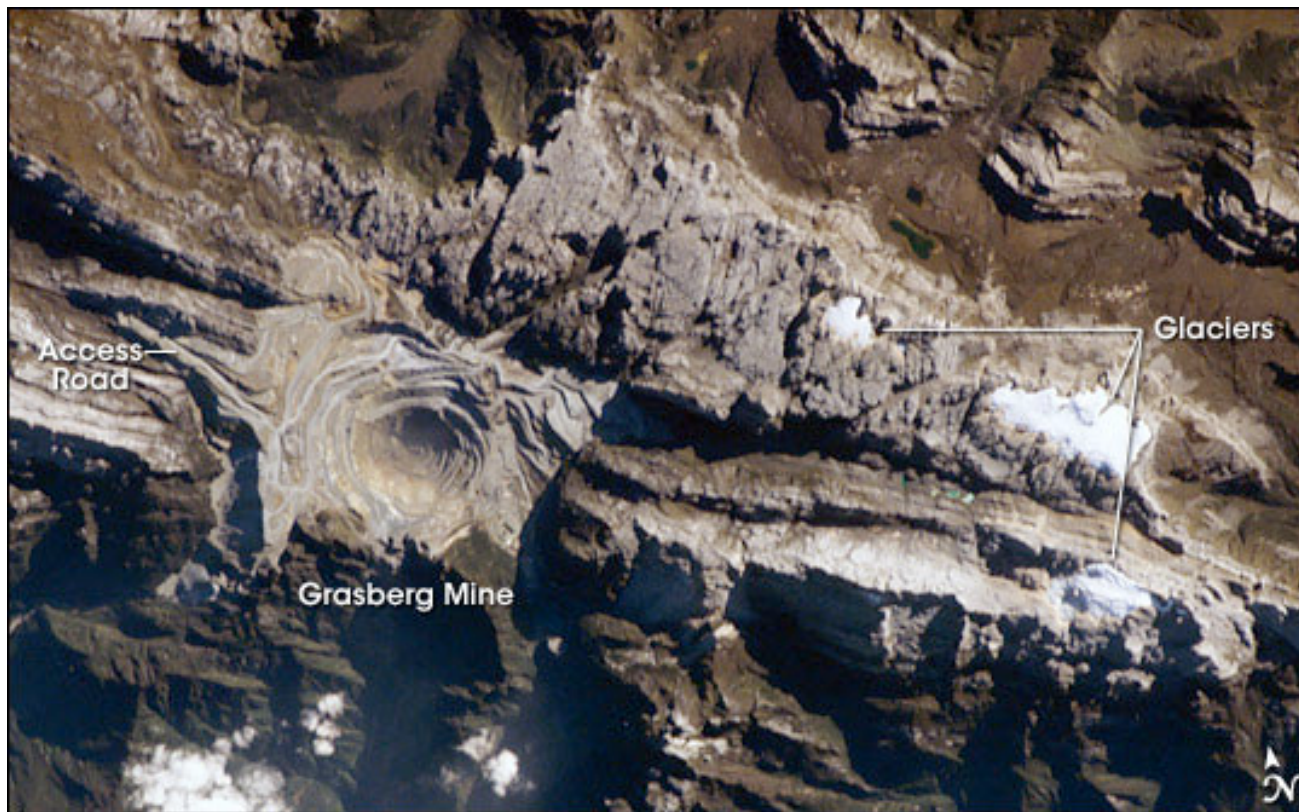
<sup>96</sup> Ibid.

<sup>97</sup> Mark Cloos, Newsletter 1999, The University of Texas at Austin Department of Geological Sciences, 1999.

<sup>98</sup> Nicholas Taylor, 'Mining companies funded Indonesian abuses' Al Jazeera (online) 2 October 2011, extract from Carl Krosinski, Nick Robins and Stephen Viederman, *Evolutions in Sustainable Investing: Strategies, Funds and Thought Leadership* (Wiley, 2011).

<sup>99</sup> Cloos, above n 97; Freeport McMoRan Copper & Gold Inc, Annual Report 2006.

<sup>100</sup> Paul Kingsnorth, 'The penis gourd revolution' (2003) *The Ecologist*, September.



NASA Earth Observatory <http://earthobservatory.nasa.gov/IOTD/view.php?id=5718>

The presence of the mining company has left permanent damage to the lives of the West Papuans, and includes the impacts of mass transmigration of Indonesian workers such that West Papuans are now a minority in their own land.<sup>101</sup> By the 1990s, the area around the mine had exploded with over 60,000 people, making it the fastest growing region in Indonesia.

*(i) Enter Rio Tinto*

In 1995, as Rio Tinto CEO Leon Davis was making remarkable strides recognizing Australian Aboriginal native title, Rio Tinto announced three deals that secured access to Grasberg and accelerated mining output as the mine extended its life an extra 40 years. Initially Rio Tinto invested \$500 million into Freeport for a 12% stake in the business and then financed a \$184 million expansion of the mine. In return, it received 40% of post -1995 production revenue above 125, 000 tonnes per day<sup>102</sup> and from 2021 will receive 40% stake in all production.<sup>103</sup> The third deal was

<sup>101</sup> Brundige et al, above n 91.

<sup>102</sup> Mining Minerals and Sustainable Development, "Mining for the Future, Appendix J: Grasberg Riverine Disposal Case Study" (MMSD IIED World Business Council for Sustainable Development, 2002).

that Rio Tinto would receive 40 percent of all production from any new excavations in West Papua.<sup>104</sup> Operations from Block A, the 10 000 hectare mining lease currently and solely in operation, dispose 230 000 tonnes a day of overburden (rainforest, soil, rocks), waste rock and tailings directly into the Aghawagon River which flows into the Ajkwa River system and out to the Arafura Sea.<sup>105</sup>

The joint venture operates under a deal with the Indonesian government which allows the joint venture to conduct explorations in a 200 000 hectare area<sup>106</sup> including a further option to mine in the UNESCO listed World Heritage Lorentz National Park and to the border with Papua New Guinea.<sup>107</sup> Former President Suharto, now recognised as one of the most corrupt and tyrannical leaders in history<sup>108</sup> renewed Freeport's mining rights in 1991 to include this 2.6 million hectare option.<sup>109</sup> Rio Tinto bought into Freeport in 1995, and has the right to 40% of the exploration potential of all minerals discovered in the 200 000 hectare lease. Rio Tinto and Freeport also have joint ventures in other mining entities outside of the Grasberg mine which have exploration rights to 630 000 hectares, of which Rio Tinto has a 40% share.<sup>110</sup>

(i) *The Truth Comes Out - OPIC Loses Confidence In Grasberg*

In the same year Rio Tinto was entering into negotiations with Freeport and the Australian CEO was talking about 'social licences to operate,' the US independent government overseas investment agency cancelled Freeport's overseas political risk insurance. The insurer, Overseas Private Investment Corporation (OPIC) cancelled the risk insurance primarily on the grounds of 'unreasonable or major environmental, health and safety hazards' and severe degradation of surrounding rainforests caused

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<sup>103</sup> Rio Tinto, Operations and Financial Report, above n 88.

<sup>104</sup> Taylor, above n 98.

<sup>105</sup> Mining Minerals and Sustainable Development, above n 102.

<sup>106</sup> Rio Tinto, above n 88.

<sup>107</sup> Taylor, above n 98.

<sup>108</sup> General Suharto stole as much as \$35 million from his impoverished country during his 30 year dictatorship, and is responsible for the massacre of over a million Indonesians in 1965, 200 000 East Timorese during the 24 year Indonesian occupation and 100 000 West Papuans since 1967. See Charlotte Denny, 'Suharto, Marcos and Mobutu head corruption table with \$50 billion scams', *The Guardian*, 26 March 2004; Brad Simpson, 'Suharto: A declassified documentary obit' *National Security Archive Electronic Briefing Book No 242* (Princeton, 28 January 2008).

<sup>109</sup> Taylor, above n 98.

<sup>110</sup> Rio Tinto, above n 88.

by mining operations at Grasberg.’<sup>111</sup> The OPIC letter to Freeport accused the company of dishonesty and breach of contract in declaring the magnitude of tailings dumped into the Ajkwa River would be 52,000 tons per day, when OPIC’s monitoring revealed Freeport was dumping 100,000 tons per day and the company was openly planning to increase their tonnage to 160,000 tonnes per day.<sup>112</sup> OPIC noted that these volumes of waste were significantly beyond what was anticipated by the corporation when it underwrote the insurance, and had it been aware of these facts it would never have issued the policy. OPIC further noted that Freeport had misrepresented the actual environmental state of affairs in its 1990 Environmental River Study, and independent studies disclosed that tailings had been discharged into rivers other than the Ajkwa River, including massive sheeting and damage to the Minajerwu River system contrary to specifically assertions this system would not be impacted.<sup>113</sup>

Rio Tinto cannot claim it entered into negotiations with Freeport’s Grasberg Mine with its eyes shut to severe and irrevocable environmental damage. In March 2004 Rio Tinto sold its 11.9% shareholding in Freeport making \$518 million profit.<sup>114</sup> Rio Tinto remains a committed to mining Grasberg and continues to oversee its management through operational and technical committees, despite Grasberg mine being the site of serious human rights breaches including ‘torture, excessive use of force and unlawful killings by police and security forces’ confirmed by the United Nations Special Representative of the Secretary General on Human Rights Defenders,<sup>115</sup> Amnesty International<sup>116</sup> and the United Nations Committee Against Torture<sup>117</sup> as recently as 2008.

### *3 Background To The Grasberg Mine – A Brief History Of West Papua And The Papuans*

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<sup>111</sup> Letter from Overseas Private Investment Corporation to Freeport-McMoRan, obtained under FOI by UTWatch, <<http://www.utwatch.org/corporations/freeportfiles/opic-letter.html>>.

<sup>112</sup> Ibid. Grasberg now dumps 230 000 tonnes of waste and tailings per day into the river systems.

<sup>113</sup> Ibid.

<sup>114</sup> Nicholas Taylor, ‘Rio Tinto: A tale of rampant capitalism’, *The Punch* (online) 26 May 2010.

<sup>115</sup> Hina Jilani, *United Nations Human Rights Council, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Report of the Special Representative of the Secretary-General on the situation of human rights defenders, Addendum Mission to Indonesia, A/HRC/7/28/Add.2* (28 January 2008).

<sup>116</sup> Amnesty International, ‘Indonesia’, *The state of the world’s human rights, Annual Report 2011*.

<sup>117</sup> Committee Against Torture, *Concluding Observations of the Committee Against Torture*, 40<sup>th</sup> sess, UN Doc CAT/C/DN/CO/2 (2 July 2008).

(a) *Cosmology Of The Amungme And Kamoro Papuan People*

The Grasberg mine has destroyed the culture and the homelands of the Amungme and Kamoro peoples. In the cosmology of the Amungme, Jayawaiya is the sacred head of their mother and the rivers are her milk. The beliefs of the Amungme is that the mine has decapitated their mother's head and is now digging out her heart and strewing her entrails around the surrounding valleys. The mine has excavated the 'oesophagus' of the sacred mountain Jayawijaya Mountain.<sup>118</sup> Downstream of Jayawaiya Mountain is the ancestral home of the Kamoro people. These traditional peoples have been dispersed without compensation and prohibited from entering their ancestral lands.<sup>119</sup> The boomtown servicing the mine is the squalid and dirty Timika, home to at least 60 000 people - mostly Indonesians who have been lured from Java and other islands of the archipelago to make money.<sup>120</sup> Papuans literally walk down from their tribal lands looking for work that Freeport and Rio Tinto provide largely as a public relations exercise to a tiny percentage of Papuans.<sup>121</sup> Timika has all the hallmarks of a frontier mining town – alcoholism, violence, the highest crime *and* HIV/AIDS rate in West Papua and Indonesia, and an underclass of Papuans outnumbered many to one by *trasmigrasi* protected by Indonesian security forces.<sup>122</sup>

(b) *Brief History Of Papua, Integration With Indonesia And Effects Of Integration*

The West Papuans emigrated to the New Guinea islands from Asia nearly 50 000 years ago.<sup>123</sup> Indonesia claims a Javanese Hindu emperor included West New Guinea in his territory in 1293, though many historians doubt his rule extended so far to the east, nor is there any evidence he attempted to inhabit the island or befriend the natives.<sup>124</sup> It is upon this flimsy basis that Indonesia claimed sovereignty of West Papua seven centuries later.

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<sup>118</sup> Comment by Freeport McMoRan's CEO Jim Moffat, describing his company's operations.

<sup>119</sup> Abrash and Kennedy, above n 89.

<sup>120</sup> John Martinkus, 'Paradise betrayed: West Papua's struggle for independence' (2002) 7 *Quarterly Essay*.

<sup>121</sup> Martinkus, above; Abrash and Kennedy, above n 89.

<sup>122</sup> Martinkus, above n 120.

<sup>123</sup> Brundige et al, above n 91.

<sup>124</sup> Robin Osbourne, *Indonesia's Secret War: The Guerilla Struggle in Irian Jaya* (1985) cited in Brundige above n 91.

Europeans explorers found the island while navigating the Spice Route and a Spanish trader claimed it for his king in 1545 but never returned. The British attempted settlement in 1793 but found the region infested with malaria and inhospitable, and left after two years, paving the way for Dutch settlement. The Netherlands declared sovereignty over the western half of New Guinea in 1828, and due to the difficulty of maintaining a colonial presence, the Dutch appointed the Sultan of Tidore to administer West New Guinea and other islands on their behalf.<sup>125</sup> The Dutch were mostly interested in resource exploitation, but also used West Papua as a penal colony during Indonesian nationalist unrest throughout the Dutch administered archipelago. Royal Dutch Shell tapped into the region's oil reserves in 1901, and in 1936 a Dutch geological expedition located a significant ertsberg ('ore mountain') deep in the equatorial highlands.<sup>126</sup>

*(i) Suharto's New Order And Integration With Indonesia*

During WWII the Japanese saw themselves as the liberators of West Papuans from Western imperialism, but they simply replaced Western with Asian imperialism. This in turn was replaced by Third World Fascism<sup>127</sup> and colonialism in the form of Indonesian sovereignty. After Japan's surrender in 1945, the Dutch administration returned to West New Guinea and by the mid 1950s began educating a Papuan elite to take over when they left with the view of West Papuan independence in 1972.<sup>128</sup> Soon after WWII Indonesian nationalists agitated against Dutch rule and proclaimed independence in August 1945, but the Dutch refused to cede control West New Guinea mainly because of Papuan resistance to Indonesian rule. The Dutch government forwarded a secession plan to the United Nations General Assembly and on 1 December 1966, the Papuan administrating authority agreed on the name 'West Papua' for their new nation and adopted the Morning Star flag.<sup>129</sup> Indonesia immediately sent a paramilitary offensive headed by General Suharto, and in response to the threat of civil war, US president John F Kennedy negotiated a peace agreement whereby the UN would take control of West Papua and a referendum in

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<sup>125</sup> Brundige et al, above n 91. The Dutch appointment of an administering sultan was another Indonesian claim to West Papua. The Sultan's administrative powers were stripped by the Dutch in 1901.

<sup>126</sup> Taylor, above n 98. In 1959, as the Dutch were preparing to hand West New Guinea to the Papuans, alluvial gold was discovered in the Arafura Sea, flushed down the mountains by the Ajkwa River.

<sup>127</sup> Stephen R. Shalom, Noam Chomsky and Michael Albert, 'East Timor Questions and Answers' (1999) *Z Magazine* October.

<sup>128</sup> Taylor, above n 98.

<sup>129</sup> Ibid.

which West Papuans could vote for independence or integration with Indonesia would take place in 1969.<sup>130</sup> General Suharto toppled the nationalist President Sukarno in a bloody coup 1966, in which up to a million 'communists'<sup>131</sup> were killed. The Contract for Work between Freeport McMoRan and the Army General Suharto to develop the vast ore body at Erstberg, three kilometres from Grasberg, was signed in 1967, two years before the West Papuan sovereignty referendum. With vast profits at stake and an uncanny prescience, the US Secretary of State Henry Kissinger advised US President Nixon that West Papuans would choose to integrate with Indonesia,<sup>132</sup> and was proven correct when 1969 the UN mandated referendum called the Act of Free Choice was held. In what is widely referred as the 'Farce of Free Choice',<sup>133</sup> and the 'Act of No Choice,'<sup>134</sup> 1026 Papuan leaders handpicked by the Indonesian military out of a population of 800 000 people voted unanimously for integration with Indonesia. Later it emerged the Papuans voted at gun-point and their efforts to alert the United Nations were thwarted when the two delegates were kidnapped by Australian authorities and detained at Manus Island in Papua New Guinea.<sup>135</sup> Post integration, the Indonesian military has conducted massacres and other actions tantamount to genocide. In 2004, the Indonesian Human Rights Centre commissioned the Allard K Lowenstein International Human Rights Clinic at the Yale Law School to consider whether the Indonesian government's conduct towards the people of West Papua constitutes genocide as defined by the *1948 Convention on the Prevention and Punishment of the Crime of Genocide*.<sup>136</sup> The paper could not come to a definitive conclusion as to whether genocide occurred, but found on available evidence strong evidence that the Indonesian government has committed genocide against the West Papuans, and that even if intention to commit genocide is lacking, the Indonesian government has clearly committed crimes against

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<sup>130</sup> Ibid.

<sup>131</sup> People with leftist leanings were denoted as 'communists' and killed. No accurate figures are available, but up to a million people were murdered in the dawn of Suharto's 'New Order', see John Pilger, *The New Rulers of the World* (Verso, 2002); Noam Chomsky, 'East Timor Retrospective' (1999) *Le Monde Diplomatique* October; Brad Simpson, 'Suharto: A declassified documentary obit', *The National Security Archives Electronic Briefing Book No 242*, <<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB242/index.htm>>.

United States Department of State, 'Indonesia: Background – The West Irian Question, July 10, 1969; Subject: Djakarta Visit: Your Meetings with President Suharto, July 18, 1969', INR/EAP Files: Lot 90 D 165, National Intelligence Estimate 55-68 (secret).

<sup>133</sup> Editorial, 'Free choice farce in 69 and now!' *PNG Post Courier* (Port Moresby) 17 November 2009.

<sup>134</sup> Jennifer Robinson, 'West Papua 40 years on' (2009) 98 *Inside Indonesia*.

<sup>135</sup> Taylor, above n 98; Martinkus, above n 120.

<sup>136</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, adopted by GA Res 260 (III)A, 78 UNTS 277 (9 December 1948)

humanity.<sup>137</sup> Further, the paper documents gross violations of human rights and humanitarian law, including the strafing of two Amungme villages on the Jayawaiya mountain, site of the Grasberg mine in 1977, causing the deaths of over 1000 villagers.<sup>138</sup> Following this massacre, West Papuans cut Freeport's copper slurry pipeline and thus incited massive and indiscriminate retaliatory action by Indonesia in an operation code named Operasi Tumpus (Annihilation) which included the use of "Daisy Cluster' bombs on defenceless villagers, leaving at least 3000 people dead.<sup>139</sup> The massacres continued in other parts of West Papua and are documented in the report, along with torture, murder and crimes against humanity.

#### 4 *Environmental Destruction – Ecocide At The Lease Site*

Rio Tinto's lifeline injection of capital accelerated production of copper and gold - and accelerated production of tailings and wastes - from 100 000 tonnes per day to over 230 000 tonnes of tailings and 530 000 tonnes of waste dumped directly into river systems every day. The mine is operating as an open pit mine until 2015, when the mine will continue underground, resulting in 2.75 billion tonnes of overburden waste rock being dumped into the local river system.<sup>140</sup> Freeport and Rio Tinto maintain that due to the extremely rugged topography, high rainfall, and high seismic risk making more conventional forms of tailings management facilities technically infeasible, riverine disposal is the best and most efficient method of disposing of tailings.<sup>141</sup> Chemical engineers Briony Hart and Professor David Bogan note that Rio Tinto and Freeport McMoRan's use of the word 'best' with respect to methods of tailing disposal 'clearly means "most economical."' <sup>142</sup>

Rio Tinto justifies dumping its waste directly into a river system because the Indonesian government approves of the process, but acknowledges both the concern of many stakeholders including certain Indonesian government authorities and

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<sup>137</sup> Brundige, above n. 91, 1.

<sup>138</sup> Osborne, *Indonesia's secret war*, 69, cited in Brundige et al, above n. 91, 22.

<sup>139</sup> Brundige, above n 91, 23-5.

<sup>140</sup> Yuni Rusdinar, 'Long Term Acid Rock Drainage Management at PT Freeport Indonesia' Paper delivered at the 7th International Conference on Acid Rock Drainage (ICARD), St. Louis MO, March 26-30, 2006) R.I. Barnhisel (ed.) Published by the American Society of Mining and Reclamation (ASMR), 3134 Montavesta Road, Lexington, KY 40502.

<sup>141</sup> Rio Tinto, 'Non managed operations' <[http://www.riotinto.com/ourapproach/17203\\_non-managed\\_operations.asp](http://www.riotinto.com/ourapproach/17203_non-managed_operations.asp)>.

<sup>142</sup> Briony Hart and David Boger, 'Tailings Waste Minimisation, Rheology, and the Triple Bottom Line' (Keynote address, Proceedings of the Eleventh International Seminar on Paste and Thickened Tailings Address, Paste 2005, Santiago, Chile, 2005).



NGOs. Rio Tinto further acknowledges that riverine tailings disposal is criticised by the World Bank as poor industry practice in accordance with the International Finance Corporation's (IFC) 2007 Environmental, Health, and Safety Guidelines for mining.<sup>143</sup> The daily riverine disposal of waste the colour and consistency of cement has destroyed 90 square kilometres of what was once one of the richest freshwater habitats in the world, burying habitat deep in copper and sediment such that nearly all aquatic life has disappeared. The Grasberg mine is ecocide writ large and the following sections detail environmentally destructive processes engaged since Rio Tinto's shareholding stake in 1995.

(a) *Tailings*

Grasberg generates about 220 000 dry metric tonnes per day of fine particle tailings.<sup>144</sup> In comparison, most Australian mines would produce less than one week of Grasberg's production in a year.<sup>145</sup> Tailings are the ground rock and process effluents from mining and include fine clays, flotation tailings, chemical precipitates and slimes. They are the biggest source of heavy metal contaminants from gold mining.<sup>146</sup>

These tailings are dumped directly into Ajkwa River system and they flow into the Arafura Sea at rates of 20 000 tonnes of suspended solids, including sulphuric acid, entering the ocean every day<sup>147</sup>. This figure is a conservative estimate from a 1999 PT Freeport commissioned report, before production was greatly expanded and accelerated. The Mining, Minerals and Sustainable Development report into Grasberg's riverine tailings disposal expects the tailings and sediment discharge to the Arafura sea to reach 76 000 tonnes per day as the Ajkwa River system is filled with waste.<sup>148</sup> Independent scientific studies are rare as the Indonesian government has made it notoriously difficult to obtain visas for travel to Papua and independent

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<sup>143</sup> Ibid.

<sup>144</sup> R Brougham, A Supomo and M Simanjuntak, *Process Control and Flocculant Optimisation of Tailings Thickeners at PT Freeport* (Paper presented at the Proc Eighth Mill Operators' Conference, Townsville, Australia 22-23 July 2003) 245-250.

<sup>145</sup> Hart and Boger, above n 142.

<sup>146</sup> Danny Kennedy with Pratap Chatterjee and Roger Moody, *Risky Business – The Grasberg Gold Mine, An Independent Report on PT Freeport Indonesia* (1998).

<sup>147</sup> Montgomery Watson Indonesia, *PT Freeport Indonesia, External Environmental Audit* (1999) Jakarta, Indonesia, cited in Hart and Boger, above n 142.

<sup>148</sup> Mining Minerals and Sustainable Development, above n 102.

researchers and environmental assessors are routinely denied entry.<sup>149</sup> A 2004 study of sedimentation and trace element deposition in the Ajkwa estuary downstream from the Grasberg mine found copper enhancement forty times the background levels and elevated cadmium and mercury levels.<sup>150</sup> Riverine tailings disposal is banned in all developed countries<sup>151</sup> and the World Bank Group stopped financing projects that relied on submarine and riverine tailings disposal on precautionary principle grounds as scientific evidence clearly demonstrated the severe damage to water bodies and surrounding environments.<sup>152</sup> The dumping of tailings into the Ajkwa River has created a vast flood plain of toxic water that has impacted upon the Minajerwi River to the east. The mining company has built 130 km of levee banks to contain the tailings, creating a 130 square kilometre dead zone euphemistically called the 'Ajkwa Deposition Area'.<sup>153</sup> Sedimentation is expected to cause dieback to 230 square kilometres of lowland rainforest. The Freeport Rio Tinto Joint Venture has set aside \$100 million for eventual rehabilitation works,<sup>154</sup> however, this is not expected to commence until after the mine's closure<sup>155</sup> in 2041. Hart and Boger note that storing waste in tailings dams is analogous to buying a house and storing all the waste in the backyard for thirty years, deferring the cost associated with dealing with the waste until forced to do so by the desire to pass the property to another party. They cite Virk in 1960:

It is interesting to observe that many times more technical effort is devoted to ground water and toxicological studies for abandoned deposits than was ever allocated for the original design and operation

adding that the costs for such studies are invariably borne by government and not the private company that produced it.<sup>156</sup>

### *(b) Acid Mine Drainage*

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<sup>149</sup> Hart and Boger, above n 142; see also United Nations Human Rights Council (2008) above n 17, [70

<sup>150</sup> Gregg Brunskill, Irena Zagorskis, John Pfitzner and Joanna Ellison, 'Sediment and trace element depositional history from the Ajkwa estuary mangroves of Irian Jaya (West Papua), Indonesia' (2004) 24 *Continental Shelf Research* 2535.

<sup>151</sup> Taylor, above n 98; Kennedy et al, above n 146.

<sup>152</sup> World Group Bank, 'Striking A Better Balance', *The World Bank Group and Extractive Industries, The Final Report of the Extractive Industries Review*, December 2003, 34.

<sup>153</sup> Kennedy et al, above n 146; Mining Minerals and Sustainable Development, above n 102.

<sup>154</sup> Hart and Boger, above n 142.

<sup>155</sup> Mining Minerals and Sustainable Development, above n 102.

<sup>156</sup> Hart and Boger, above n 142, 7.

The Freeport McMoRan Rio Tinto mine is so profitable that the company can afford to waste about 14% of the lower grade copper in the ore as it pursues the higher grade ores in the underground mine that is being now being excavated as the open pit is phased out. This waste copper ore is dumped directly into the Ajkwa River. Throughout the life of the mine over three billion tonnes of tailings and four billion tonnes of overburden and waste are expected to be generated. The 53 000 tonnes per day of low grade copper is released as Acid Rock Drainage leachate into the river, and the rate of heavy metal pollution is over a million times worse than mines in Australia.<sup>157</sup> Acid Rock Drainage occurs when copper sulphide ores are crushed and exposed to air and water, becoming unstable and strongly acidic. Most of the 1.3 billion tonnes of potentially acid forming waste rock was dumped into equatorial alpine valleys and river systems from 1988 – 2003. The leachate has a pH of 3 and is entering the groundwater of the mountain and impacting springs in the immediately adjacent World Heritage Listed Lorentz National Park.<sup>158</sup> The potential effects of acid mine drainage are devastating, including destroying ecology of the entire river systems by raising acidity to dangerous levels and re-releasing dissolved heavy metals into the ecosystem. Bright green springs have been detected several kilometres away from the mine, indicating a high and toxic copper presence enough to kill aquatic life and estuarine life around the Ajkwa estuary.<sup>159</sup>

PT Freeport's commissioned environmental report claims there is no decrease in biodiversity has been identified, however the Mining, Minerals and Sustainable Development report pointed out that the biodiversity database was not extensive and conclusive statements about biodiversity loss could not be made.<sup>160</sup> As noted above, OPIC terminated its political risk underwriting of PT Freeport in 2000 on the grounds that its operations have severely degraded the rainforests surrounding the Ajkwa and Minajeri Rivers (the Ajkwa Deposition Area, or dead zone) and continue to pose unreasonable or major environmental, health or safety hazards within the rivers and the surrounding terrestrial ecosystem.

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<sup>157</sup> WAHLI, The environmental impacts of Freeport-Rio Tinto's Copper and Gold Mining Operation in Papua (2006), <[http://www.wahli.or.id/attachment/d016df1977a7c563cdlc99afe29c43a/01327b72b86341664c513225f7d9352/WAHLI\\_Freepor\\_Report\\_Part\\_1.pdf](http://www.wahli.or.id/attachment/d016df1977a7c563cdlc99afe29c43a/01327b72b86341664c513225f7d9352/WAHLI_Freepor_Report_Part_1.pdf)>.

<sup>158</sup> Ibid.

<sup>159</sup> Jane Perlez and Raymond Bonner, 'Below a Mountain of Wealth, a River of Waste', *New York Times* (New York) 27 December 2007.

<sup>160</sup> Mining, Minerals and Sustainable Development, above n 102, J-11.

## 5 Breaches of Indonesian Environment Law

Freeport McMoRan's 1967 Contract of Work (COW) allowed the company to operate with no environmental conditions, which is hardly surprising given the company largely devised its own COW. The COW was renegotiated between PT Freeport and President Suharto in 1991 with similarly lax or non-existent environmental conditions. After the fall of Suharto, the Indonesian government enacted the Indonesian Forestry Law No. 41 of 1999 to protect forests classified as 'forest area' from clear-felling and mining. This led to conflict with the mining industry, which ultimately secured favour under President Megawati who issued Law No. 19 of 2004 and validated mining leases issued before 1999 in protected forests.<sup>161</sup>

In 1999, a politician unusually sympathetic to the Papuans was appointed Indonesian Environment Minister. Sonny Keraf put pressure upon PT Freeport, particularly after an internal ministry memorandum from 2000 said the mine had killed all the life in the rivers and violated the criminal section of Indonesia's environment law.<sup>162</sup> Keraf put pressure on the governor of Papua to abide by Indonesian law, but despite his efforts at forcing PT Freeport and the governor to comply with national laws, Keraf was unable to effect change and was replaced by a more industry-compliant Minister after the August 2001 election.<sup>163</sup> The failure of even determined senior ministers to force Freeport-Rio Tinto to comply with Indonesian environment laws is due to the company's all pervasive financial and political influence.<sup>164</sup> The Indonesian Forum for the Environment, WAHLI (Wahana Lingkungan Hidup Indonesia) documented severe environmental damage and breaches of environmental laws based upon unreleased company and governmental reports. With respect to breaches of environmental laws, WAHLI reported that the Indonesian government stated Freeport-Rio Tinto:

- has been negligent in waste rock management and repeated slips of waste rock resulting in uncontrolled release of toxic waste (2000);

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<sup>161</sup> Carolyn Marr, 'Forests and Mining Legislation in Indonesia', in Tim Lindsay (ed) *Indonesian Law and Society* (Federation Press, 2<sup>nd</sup> ed, 2008).

<sup>162</sup> Perlez and Bonner, above n 159.

<sup>163</sup> *Ibid.*

<sup>164</sup> WAHLI, above n 157.

- Has failed to build tailings containment dams in compliance with legal engineering standards for dams (2001);
- relies on legally invalid permission from the governor of Papua province to dump tailings directly into the rivers, despite being asked by the Ministry of Environment to build tailings pipes to the lowlands (2001, 2006);
- is polluting the river and estuarine systems in breach of regulatory water quality standards;
- is discharging Acid Rock Drainage without a hazardous waste licence, fails to comply with industrial effluent standards and has failed to establish mandated monitoring points (2006);
- total suspended solids in the Ajkwa river system are 100 times the regulatory limit; and
- is disposing of billions of tonnes of tailings and waste rock into the Aghawagon-Otomona-Ajkwa river system despite riverine disposal of mine tailings being expressly prohibited under the *Indonesian Water Quality Management and Water Pollution Control Regulations 2001*.<sup>165</sup>

The government reports detailed by WAHLI show a company that is a law unto itself. The irreparable damage to ecosystems is matched and surpassed only by the grave and serious human rights abuses related directly to the Grasberg mine.

#### *6 Human Rights Abuses Since Rio Tinto Became Involved in Grasberg*

The Allard K Lowenstein International Human Rights Clinic, Yale Law School, has documented human rights abuses amounting to crimes against humanity and possibly genocide in West Papua and around the Grasberg mine site. While many actions tantamount to genocide occurred at Grasberg before Rio Tinto's involvement, further serious human rights violations have been documented since 1995. Amnesty International, the United Nations Human Rights Council, the Special Representative of the Secretary-General on the Situation of Human Rights Defenders, Amnesty International, the New York Times and Wikileaks have confirmed ongoing human-rights abuses connected to the Grasberg mining operations. PT Freeport has paid at least \$35 million on military infrastructure including barracks, headquarters, roads and mess-halls, and given commanders Land Rovers and Land Cruisers. Between

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<sup>165</sup> Ibid.

1998 and May 2004, the company reports viewed by the New York Times documented payments of \$20 million to Indonesian military and police to protect the mine and mine site, and unofficial payments to individual military and police commanders of \$10 million.<sup>166</sup> In 2003 PT Freeport gave the notoriously brutal Brimob (Mobile Brigade) \$200 000, and between 2001 and 2003 the company paid \$247,000 to the former head of the 1999 East Timor massacre, General Simbolon.<sup>167</sup> Brimob has been cited by the US State Department as having ‘continued to commit numerous serious human rights violations, including extrajudicial killings, torture, rape and arbitrary detention.’<sup>168</sup> The Jakarta Post said that:

for US\$5.6 million a year, soldiers deployed around Freeport may as well call themselves the Freeport Army ... Because this practice is condoned, you are just one step away from turning this affair into a racket. This makes TNI not all that different from the preman [thugs] who run most of the protection rackets in the country. Worse still, it raises the question about where TNI loyalty lies: with the people and the state, or with the financiers?

Not only has Freeport-Rio Tinto been funding the military, believed by many including Freeport employees to be responsible for the shooting deaths of three American citizens in 2002 as part of an extortion racket,<sup>169</sup> the Wall Street Journal found that between 1991 and 1997, the Freeport-Rio Tinto guaranteed more than \$500 million in loans for the Suharto family to purchase a stake in the mine. Freeport wrote much of this cost off in 2003.<sup>170</sup> The Indonesian Military is also believed to be responsible for the death of an Australian project manager in 2009, in a demonstration to foreigners of the need for their presence in the military’s ongoing dispute with Indonesian police for lucrative protection payments.<sup>171</sup> The Rio Tinto *Annual Report 2010* explains that the Indonesian government responded to the shooting incidents with *additional* security forces (emphasis added).<sup>172</sup> PT Freeport financed Indonesian police to contain a riot between Papuan and Indonesian transmigrasi in Timika in 1999 in which 14 people were killed. While the company was not the direct instigator of the riots, its sheer scale and influx of workers on

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<sup>166</sup> Perlez and Bonner, above n 159.

<sup>167</sup> Taylor, above n 98.

<sup>168</sup> 'TNI's credibility', *Jakarta Post* (Jakarta) 20 March 2003.

<sup>169</sup> Amnesty International USA, Business and Human Rights – The Environment, <<http://www.amnestyusa.org/business/environment/indonesia.html>>.

<sup>170</sup> Taylor, above n 98.

<sup>171</sup> William Lloyd-George, 'Spirit of Independence – William Lloyd-George takes a journey through West Papua' *The Monthly*, May 2011.

<sup>172</sup> Rio Tinto, 'Review of Operations', 2010 Annual Report, <[http://www.riotinto.com/annualreport2010/performance/co\\_operations.html](http://www.riotinto.com/annualreport2010/performance/co_operations.html)>

Papuan traditional lands has caused major poverty, upheaval and dispossession for the Papuans. Security personnel in PT Freeport funded police vehicles have quelled further rioting in Timika in recent years.<sup>173</sup>

Papuans live in a climate of fear.<sup>174</sup> The Special Representative to the Secretary-General heard 'credible reports of incidents involving arbitrary detention, torture, and harassment through surveillance.'<sup>175</sup> Human rights defenders who attempted to register complaints were threatened and peaceful demonstrations met with disproportionate force by security services. Human rights defenders who met with the Special Representative were later threatened with death threats to themselves and their families.

To enable the Freeport Mining operations and further expansion under Rio Tinto, the Amungme people were forced to move from the cool Highlands in Tembagapura to the hot and malarial coastal Timika region. Thousands of people died from malaria and other diseases for which they had no immunity.<sup>176</sup> The continued mine expansion under the capital of Rio Tinto has exacerbated forced removals and makes Rio complicit in ongoing forced removals. A series of damning international reports on human rights violations at the Grasberg concession area were released at the time Rio Tinto began its association with Freeport, including a report from the Australian Council For Overseas Aid (ACFOA),<sup>177</sup> the Catholic Church at Jayapura<sup>178</sup> and the National Human Rights Commission of Indonesia (Komnas HAM).<sup>179</sup>

President Suharto formally established Komnas HAM in 1993 in the wake of international condemnation following the Dili massacre of 1991. Despite fears about the Commission's impartiality<sup>180</sup> its 1995 report into human rights abuses at PT Freeport's mine is damning. The Commission's '*Results of Monitoring and*

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<sup>173</sup> Global Witness, 'Paying for Protection – the Freeport Mine and the Indonesian security forces' A report by Global Witness, July 2005.

<sup>174</sup> Jilani, above n 115.

<sup>175</sup> Ibid, [65].

<sup>176</sup> Brundige et al, above n 91.

<sup>177</sup> Australian Council for Overseas Aid, *Trouble at Freeport* (April 1995).

<sup>178</sup> Catholic Church of Jayapura, *Violations of Human Rights in the Timika Area of Irian Jaya, Indonesia* (August 1995).

<sup>179</sup> National Human Rights Commission, 'Statement by the National Human Rights Commission of Indonesia' (Press Release) 22 September 1995  
<<http://www.utwatch.org/corporations/freeportfiles/commission.html>>.

<sup>180</sup> Monika Talwar, 'Indonesia's Human Rights Commission – a step in the right direction?' *The Human Rights Brief* (1997) Center for Human Rights and Humanitarian Law at Washington College of Law, American University.

*Investigation of Five Incidents at Timika and One Incident at Hoesa, Irian Jaya (West Papua), During October 1994 - June 1995'* found clear and identifiable human rights abuses including:

- Indiscriminate killings of 16 Papuans;
- torture and inhuman or degrading treatment;
- unlawful arrest and arbitrary detention;
- disappearance of four Papuans detained at Timika whose fate was never determined;
- excessive surveillance; and
- destruction of Papuan property

that was inflicted on Indigenous Papuans by elements of security apparatus directly connected to the Freeport McMoRan mine.<sup>181</sup>

Along with these grave human rights abuses directly connected to Freeport-Rio Tinto's operations by the Indonesian Human Rights Commission, the Robert F. Kennedy Memorial Center for Human Rights' ("RFK Center") co-sponsored a joint Indonesian-international team which attempted to carry out an independent examination of human rights conditions in PT Freeport's COW areas in 1999 -2000. The team was largely stifled by non-cooperation of Freeport and intimidation by PT Freeport officials, and interrogation, threats and obstacles by Indonesian provincial Papuan police.<sup>182</sup> The report is a litany of human rights abuses including:

- torture, rape, indiscriminate and extrajudicial killings, disappearances, arbitrary detention, surveillance and intimidation;
- employment discrimination, and severe restrictions on freedom of movement;
- Interference with access to legal representation;
- Violation of subsistence and livelihood rights resulting from seizure and destruction of thousands of acres of rainforest, including community hunting grounds and forest gardens, and contamination of water supplies and fishing grounds;
- Violation of cultural rights, including destruction of a mountain and other spiritually significant sites held sacred by the Amungme;
- Forced resettlement of communities and destruction of housing, churches, and

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<sup>181</sup> National Human Rights Commission, above n 179.

<sup>182</sup> Abrash, above n 92.



other shelters.<sup>183</sup>

The 1995 ACFOA report documented Indonesian armed forces and Freeport security 'engaged in acts of intimidation, extracted forced confessions, shot three civilians, disappeared five Dani villagers and arrested and tortured thirteen people.'<sup>184</sup> These atrocities appear to be a violent and disproportionate response by Freeport and state security apparatus to Morning Star raising ceremonies in the concession area.<sup>185</sup> The Jayapura Catholic Church investigated these reports and interviewed survivors and witnesses to provide further evidence of a direct link between some of the abuses and Freeport. The Church reported that some of the torture was conducted in Freeport posts, including the detention and torture of four Papuan activists in a Freeport shipping container from 6 October until 15 November 1994, after which time they were disappeared and have never been seen again.<sup>186</sup>

More recently, and since Rio Tinto has committed to business ethics in its 'Business Integrity Guidance'<sup>187</sup> and CSR in '*The way we work*', the United Nations Committee Against Torture has heard ongoing credible and consistent allegations corroborated by the Special Rapporteur on Torture of

routine and disproportionate use of force and widespread torture and other cruel, inhuman and degrading treatment or punishment by members of the security and police forces, including by members of the armed forces, mobile police units ("Brimob") and paramilitary groups during military and "sweep" operations, especially in Papua, Aceh and other provinces where there have been armed conflicts.<sup>188</sup>

The role of Freeport-Rio Tinto is not made explicit by the Committee Against Torture, but general consensus of NGOs, leaked cable documents, reports, articles and documents referenced throughout this section clearly point to the major source of grave human rights abuses emanating from the Grasberg concession site. Leaked

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<sup>183</sup> Ibid, 7.

<sup>184</sup> Australian Council for Overseas Aid, above n 177.

<sup>185</sup> Kyriakakis, above n 87.

<sup>186</sup> Catholic Church of Jayapura, above n 178; Brundige et al, above n 91.

<sup>187</sup> Rio Tinto, *Business Integrity Guidance* (2005)  
<[http://www.riotinto.com/documents/ReportsPublications/CorpPub\\_Business\\_integrity\\_guidance.pdf](http://www.riotinto.com/documents/ReportsPublications/CorpPub_Business_integrity_guidance.pdf)>.

<sup>188</sup> United Nations Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Concluding observations of the Committee against Torture, CAT/C/IND/CO/2, 2 July 2008.

US diplomatic cables from the US Embassy in Jakarta reported PT Freeport's Senior Vice President Dan Bowman confirming company payments directly to the private bank accounts of commanding officers responsible for security at the mine.<sup>189</sup>

Bowman was confident that the company had the highest support from the Indonesian executive, which is borne out by continued militarism and human-rights abuses.

## 7 *Discrimination Against Papuans*

Widespread HIV/AIDS infection has been found in women around the Freeport service town of Timika, with PT Freeport providing medical assistance from its 1% royalty payment scheme only to employees of the mine. 40% of Indonesia's HIV/AIDS cases are in West Papua despite the province having only 1% of Indonesia's population. Several studies suggest the high rate of infection amongst Papuan people in West Papua compared with the much lower rate amongst Indonesian sex and bar workers is due to Indonesian health authorities discriminating against Papuans. The Papuan Department of Health is staffed almost exclusively by non-Papuans and target ethnic Indonesians while actively discriminating against Papuans.<sup>190</sup>

Since 1996, Rio Tinto and Freeport McMoRan have responded to West Papuan and supporters' representations to the United Nations, United States courts and Rio Tinto and Freeport shareholder meetings by injecting enormous sums of money into local communities as part of the company's 'One Per Cent Trust Fund Offer.'<sup>191</sup> Two new trust funds were established in 2001 for the Amungme and Komoro people. Rio Tinto spent an extra \$7 million (along with PT Freeport's \$36 million) on educational and training programs for Papuans to work in the Grasberg mine, and as at 2005, a quarter of the mine's employees were Papuan.<sup>192</sup> While these figures look impressive on Rio Tinto's website, Rio Tinto neglects to add that Papuan workers are paid vastly less than Indonesian workers and are paid the lowest wage of any

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<sup>189</sup> Wikileaks Cableviewer, 06JAKARTA1185,  
<<http://wikileaks.org/cable/2006/01/06JAKARTA1185.html#>>

<sup>190</sup> Leslie Butt, Gerdha Numbery, Jake Morin, 'The Smokescreen of Culture: AIDS and the Indigenous in Papua' (2002) 9(2) *Pacific Health Dialogue* 283.

<sup>191</sup> PT Freeport has designated 1% of its annual revenue to regional community development funds. The funds divided Papuan communities and caused interclan rivalry and bitterness.

<sup>192</sup> Rio Tinto, Grasberg Joint Venture,  
<[http://www.riotinto.com/ourproducts/218\\_our\\_companies\\_4372.asp](http://www.riotinto.com/ourproducts/218_our_companies_4372.asp)>

Freeport mining facility in the world at between \$US1.50- \$3 per hour.<sup>193</sup> Ethnic Indonesian workers are paid \$US15 an hour, and foreign nationals between \$35 and \$200 an hour. Resentment of race-based discrimination hit tenterhooks when workers staged a protracted strike demanding freedom to organise as workers, to strike and demonstrate without threats, intimidation or interference from PT Freeport management or local police.<sup>194</sup>

Both the Indonesian government and PT Freeport have sought to block efforts by local communities to seek redress for human rights violations, but where local communities have been unsuccessful on the ground, some international financial institutions are beginning take notice of the severe environmental and human rights violations perpetrated by the Joint Venture.

#### *8 International Action Against Rio Tinto Due To Its Involvement In Grasberg*

Norway divested its entire \$AUS 1 billion stake in Rio Tinto at the recommendation of the Norwegian Council on Ethics. Finance Minister Kristin Halvorsen said the

‘exclusion of a company from the Fund reflects our unwillingness to run an unacceptable risk of contributing to gross unethical misconduct. The Council on Ethics has concluded that Rio Tinto is directly involved, through its participation of its Grasberg mine in Indonesia, in the severe environmental damage caused at that mining operation.’

The Minister concluded that there was no indication the company's practices would change in the future and as such, the Government Pension Fund could not hold interests in the company.<sup>195</sup>

The Council on Ethics excluded Freeport McMoRan Copper&Gold Inc from its portfolio in 2006 due to unacceptable risk of contributing to severe environmental damage, and deemed Rio Tinto as likely to contribute materially to Freeport's operation of the mine. The 230,000 tonnes of tailings dumped into the river systems

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<sup>193</sup> Alex Rayfield and Claudia King, 'Freeport Strikes could help West Papuan cause', *New Matilda*, 7 October 2011.

<sup>194</sup> Ibid.

<sup>195</sup> Ministry of Finance (Norway) above n 85.

would only be increased with the expansion of the mine, facilitated by Rio Tinto's mine life-extending joint venture extending production from 2015 to 2041. The Council found there is a high risk of acid drainage from the waste rock and tailings causing lasting ground and water contamination, and there was no indication that Rio Tinto would change their practices at Grasberg in the future.

### *C PT Kelian Mine In Kalimantan*

#### *1 Brief Background To Kelian Mine*

Kelian Equatorial Mining (PT KEM) is a gold mining company registered under Indonesian law, 90% owned by Rio Tinto and 10% owned by PT Harita Jayaraya Inc. CRA reported significant gold deposits in 1976 and the company signed a Contract of Work with the Indonesian government in 1985 for a 236 233 hectare concession in rugged mountains of dense tropical rainforest in East Kalimantan on the island of Borneo.<sup>196</sup> The mine began operating in 1992 and a two year project to divert the Kelian river extended the life of the mine. The company claimed the river diversion had no significant impact upon the environment.<sup>197</sup> Over the life of the mine's operation more than 100 million tonnes of waste and contaminated rock were dumped into the environment without prior treatment, including acknowledged 'acid mine drainage' from the site.<sup>198</sup> Rio Tinto's open cut mine continued and the operation produced about 14 tonnes of gold and 11 tonnes of silver every year<sup>199</sup> until it ceased mining in 2003, but stockpiles of ore meant that production did not fully cease until 2005.<sup>200</sup> During operations KEM employed a permanent staff of

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<sup>196</sup> Pius Erick Nyomphe, 'Indonesia case study – The closure of the Kelian gold mine and the role of the Business Partnership for Development/World Bank' presented to the EIR's Eminent Person and participants meeting on Indigenous People's, Extractive Industries and the World Bank, Oxford, England, 15 April 2003.

<sup>197</sup> Chris Ballard, International Institute for Environment and Development and World Business Council for Sustainable Development, 'Human Rights and the Mining Sector in Indonesia: A baseline study', *Mining, Minerals and Sustainable Development*, October 2001.

<sup>198</sup> Mick Curtis, 'Fanning the Flames: The Role of British Mining Companies in Conflict and the Violation of Human Rights', *War on Want*, November 2007, 26, citing The closure of the Kelian gold mine and the role of the Business Partnership for Development/World Bank, Forest Peoples Programme, April 2003; WAHLI, 'Undermining Indonesia: Adverse social and environmental impacts of Rio Tinto's mining operations in Indonesia', Jakarta, 2003.

<sup>199</sup> *Ibid.*

<sup>200</sup> Rio Tinto, 'Kelian', 1 December 2004.

over 1000 and 500 contractors.<sup>201</sup>

*(a) The Dayak Peoples*

The Kelian concession was in the catchment area for East Kalimantan's major river, Mahakam, and home to the Indigenous Dayak community who traditionally depended upon the forests and small scale gold panning.

The Dayaks have traditionally practised a form of agroforestry agriculture whereby they cleared some forest to cultivate rice and vegetable crops. When the soil fertility dropped the land was used to grow rattan, fruit trees and palms, and after many years the soil was fertile enough to begin cultivating rice again. Under Dayak customary law some forest was never cleared, and people collected forest products such as honey and medicinal plants.<sup>202</sup>

Dayak peoples practised alluvial gold mining for generations. In 1949 a group of Dayak men found gold at Kelian starting off a small, localised gold rush. Initially all newcomers mined with the consent of the Dayak community leaders leading to peaceful interactions between different peoples.<sup>203</sup> By 1980 there were approximately 2000 small-scale alluvial miners in the Kelian region, along with 2000 residents. Prior to Kelian mine opening, 444 indigenous Dayak families were forcibly removed at gunpoint by the Indonesian police Mobile Brigade (Brimob), guns were fired through the walls of inhabited houses and homes and possessions burned down.<sup>204</sup> The actions of the government mimicked those of the Queensland government against the Aboriginal people of Marpoon three decades earlier.

*(i) Human Rights Violations At Kelian*

The mine caused loss of homes and livelihoods including loss of gardens, forests, fruit trees, forest resources and the right to mine for gold in the river. Prior to the mine lease, Dayak people were recognised as legitimate small-scale miner, but after

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<sup>201</sup> Ballard, above n 197.

<sup>202</sup> Nyomphe, above n 196.

<sup>203</sup> Ibid.

<sup>204</sup> Ballard above n 197.

the PT-KEM began exploring the area the Dayaks found their status had changed to illegal squatters and they were forcibly evicted from their gold panning sites.<sup>205</sup> In 1991, 1200 drums of gold extracting chemicals that were being transported to PT KEM's mine fell into the Kelian River, causing mass fish kills and swollen open wounds on people who waded or swam in the river.<sup>206</sup> These wounds are similar to those afflicting Bougainville locals swimming in the Panguna River nearly twenty years after mine closure. PT KEM security guards harassed, beat and shot at local people and some local women suffered sexual harassment including rape by PT KEM staff.<sup>207</sup>

*(b) Dayak Efforts Of Redress*

The affected Dayak communities continued to demonstrate against destruction of their traditional lands and lack of compensation. Rio Tinto referred the complaints to the Indonesian government, which has never sided with traditional peoples over land and mining disputes. In 1994 the government approved payments to about 25% of affected peoples.<sup>208</sup> This strategy of paying only some landowners caused further unrest, protests, and beatings so with the assistance of NGO Oxfam-Community Aid Abroad, two Dayak representatives met with Rio Tinto executives in Melbourne, January 1998, seeking redress for abuses. By this time Rio Tinto CEO Leon Davis was seeking new ways of doing business including reputation enhancement in a more globally connected world. Rio Tinto agreed to further negotiate and paid the 444 evicted families the monetary equivalent to lands they were promised but did not receive at the time of eviction. This amounted to \$AU2000 per family, with no liability admitted by the company.<sup>209</sup> Rio Tinto had agreed to negotiate with the community organised LKMTL<sup>210</sup> but in a tactic reminiscent of Freeport's actions in West Papua, the company bypassed the nominated representative body (the LKMTL) in favour of more 'amenable' representatives and met with them in 2000.<sup>211</sup> The 'more amenable' group of 500 individuals accepted compensation at a lower rate than

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<sup>205</sup> Oxfam Community Aid Abroad, *Mining Ombudsman Annual Report 2000-2001*.

<sup>206</sup> Nyomphe, above n 196.

<sup>207</sup> Ibid.

<sup>208</sup> Ballard, above n 197.

<sup>209</sup> Oxfam-Community Aid Abroad, 'Rio Tinto: blockades and strikes hit Kelian mine' (2001) 47 Down to Earth, November.

<sup>210</sup> Lembaga Kesejahteraan Masharikat Tambang dan Lingkungan (Council for People's Prosperity, Mining and Environment).

<sup>211</sup> Ballard, above n 197.

the LKMTL.<sup>212</sup> Delays in compensation payments caused more unrest, leading to blockades preventing mine access and seriously impeding mine production in April 2000. The blockade was lifted when PT KEM agreed to meet with LKMTL, but the successful divide-and-conquer technique meant that the LKMTL negotiated compensation for serious environmental damage on unfavourable terms.<sup>213</sup>

One result of negotiations was that PT KEM agreed to an independent investigation into allegations that PT KEM staff had sexually harassed and raped local women over a ten-year period until 1997. The Indonesian Human Rights Commission investigated the alleged sexual abuse and claims that two mine opponents had died in mysterious circumstances. The head of the Inquiry told Australian media that employees who reported sexual abuse were threatened with dismissal while others were given money or a promise for work at the mine for sex.<sup>214</sup> Despite the report being leaked to the media, Rio Tinto failed to disclose through its reports to shareholders that allegations of serious human rights abuses at their Kelian mine were being investigated.<sup>215</sup>

*(c) 'No Liability' – Priceless Official Statement*

Kelian mine closed in 2003 and all operations ceased in 2005. Rio Tinto now accepts some responsibility for human rights violations that occurred in the early development of the mine and has expressed regret. On its website Rio Tinto refers to the Indonesian Human Rights Commission's view that PT KEM has no legal liability for its abuses, and no claim could be successfully pursued either in a civil or a criminal court. Rio Tinto's website states that many of the claims related to failed relationships, without explaining PT KEM's actions in creating community discord to effect lower settlements.<sup>216</sup> The nature of traditional peoples' disempowerment by the state at the behest of transnational corporations is investigated in Chapters V and VI. The mine at Kelian has irrevocably damaged the environment of the traditional-living Dayak peoples, and caused community fracture and ill-will. Despite expressing regret for the human rights abuses, Rio Tinto promotes on its websites

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<sup>212</sup> Ibid.

<sup>213</sup> Oxfam-Community Aid Abroad, above n 209.

<sup>214</sup> Tim Dodd, 'Rio Tinto miners face sex claims in Borneo', *Australian Financial Review* (Sydney) 30 June 2000, 1, 42.

<sup>215</sup> Bob Burton, 'Rio Tinto reports conceal Kelian scandal' (2000) 5(4) *Mining Monitor*.

<sup>216</sup> Rio Tinto, Kelian, 1 December 2004, <[http://www.riotinto.com/media/news\\_4414.asp](http://www.riotinto.com/media/news_4414.asp)>.

that there is no possibility of a successful claim against the company. The fact that successful claims cannot be maintained is worth millions of dollars on shareholder reports.

## *2 Rio Tinto's Activities With Indonesian Government Re: Kelian*

Rio Tinto claims to be non-political in its Business Integrity Guidance document, yet in Indonesia and other countries<sup>217</sup> Rio has been directly involved in state policy and the drafting of legislation to suit its agenda. The large Dayak demonstrations at PT KEM were used as evidence by then Mining Minister and now Indonesian President Susilo Bambang Yudhoyono as evidence that an 'international anti-mining movement' was stirring up old disputes.<sup>218</sup>

In 2000, Rio Tinto developed a partnership with Australian Legal Resources International (ALRI), a not-for-profit group chaired by now disgraced former Federal Court judge, Marcus Einfeld. The partnership was to assist in legislative drafting of Indonesia's environmental, human rights, constitutional, bankruptcy and corporate laws.<sup>219</sup> At the same ALRI was working with Rio Tinto, one of ALRI's directors was seconded to the PR arm of the company to develop partnerships with NGOs.<sup>220</sup> The World Business Council for Sustainable Business contracted a report about extractive industries in Indonesia. The report found 'surprising little documentation from Kelian about Dayak land claims' which suggested to the authors that the particular claims of indigenous communities had been 'largely ignored.'<sup>221</sup>

## D Conclusion

This chapter detailed Rio Tinto's practices at three mines in the Asia Pacific region, all close to Australia and in nations recipient to large proportions of Australian overseas aid. Documented human rights violations and irreparable environmental

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<sup>217</sup> See 'Rio Tinto as Anti-Union law Architects' chapter VI.

<sup>218</sup> Oxfam-Community Aid Abroad, above n 209.

<sup>219</sup> Bob Burton, 'When corporations want to cuddle', in Evans et al (eds) *Moving Mountains* (Oxford, 2001).

<sup>220</sup> Ibid. The director of ALRI, John Hall, later resigned from ALRI and now is the General Manager of Corporate Relations at Rio Tinto Diamonds and Manager of Corporate Relations, Rio Tinto.

<sup>221</sup> Ballard, above n 197.



damage are extensive and serious. Rio Tinto stands accused of encouraging and facilitating civil war in Bougainville to protect its Panguna mine, and entered into a business arrangement with the Freeport McMoRan mine in West Papua at a time when numerous reports documenting crimes against humanity and serious human rights violations were released. Reports of serious human rights abuses have not abated since Rio Tinto announced its code of business ethics and heavily promoted CSR in 'The Way We Work' and other company literature. Abuses at Kelian are acknowledged with the caveat for investors that there is no liability attached to these submissions. Environmental damage and destruction is monumental and amounts to ecocide at Grasberg. Here, as in Bougainville, Rio Tinto glosses over 'riverine disposal' as the best available technique of tailing disposal in the circumstances, whereas experts attest it is the worst and most unsustainable method, banned in all nations except Indonesia and Papua New Guinea. In spite of serious human rights violations and enduring irreparable environmental damage, Rio Tinto is part of the United Nations Global Compact and is consistently bestowed high praise by national and international CSR bodies and institutions. Rio Tinto appears to be well regarded by indigenous groups in Australia since its policy change in 1995, however still acts and apparently drafts legislation to suit its purposes at the expense of basic human rights in less developed and poorly governed overseas nations. The following chapter compares Rio Tinto's practises at Bougainville, West Papua and Kalimantan with human rights and environmental instruments used as a basis for CSR assessment.

## CHAPTER V – RIO TINTO’S HUMAN RIGHTS ADHERENCE

### INTRODUCTION

Rio Tinto's practices in three locations in the Asia-Pacific region were investigated in Chapter IV. This chapter compares Rio Tinto's corporate behaviour in Bougainville, West Papua, Kalimantan and Australia with human rights and environmental instruments used as the basis for CSR in Rio Tinto's own documents. The chapter compares, in particular but not solely, Rio Tinto's interactions towards indigenous peoples in these locations. Section A compares the company's activities in Australia, PNG and Indonesia with its stated principles in its 'global code of conduct,' *The way we work*. In this document, Rio Tinto espouses its commitment to complying with host nations' laws, respect for rights of employees and human rights consistent with the United Nations Declaration on Human Rights. The first part of section A discusses problems associated with compliance with host nation laws when the host nation itself suffers high levels of corruption and poverty, as is the case in many developing nations. The second part of section A draws from *The way we work's* principle of reputation management, and corporations' means of enhancing reputation when some operations are found to be lacking in human rights and environmental standards. Rio Tinto's commitment to respecting workers' rights is compared and discussed, as is its influence in government policy particularly in Australia, a nation with high transparency and regulation.

Section B compares Rio Tinto's corporate behaviour to the principles set out in the United Nations Global Compact. Rio Tinto is a foundation member of the Global Compact and as such holds itself out to being committed to the ten principles of the Global Compact wherever it operates. Revisiting transparency, section B establishes that even in the relatively transparent and democratic home state of Australia, Rio Tinto has acted against the public interest to stifle public calls for action on climate change at the highest levels of public office.

The final section C investigates Rio Tinto's activities with respect to international human rights and environmental laws. While corporations have no liability as private non-state actors in international law, Rio Tinto has agreed to comply with

international human rights and environmental laws through its commitment to *The way we work* and the Global Compact.

Chapter V overall compares the CSR behaviour of Rio Tinto in its home-listed nation and its host nations and on case studies in the Asia-Pacific regions and concludes that Rio Tinto engages in 'greenwashing' and 'blue-washing' of its offshore operations to enhance its reputation amongst increasingly concerned and socially aware shareholders and investors.

## PART ONE

### *A. Rio Tinto's Consistency With Its Own Stated CSR Principles*

*The way we work* is Rio Tinto's flagship code of business conduct, as detailed in Chapter III. Rio Tinto has also issued the 'Business integrity guidance' document to offer guidance to group managers implementing the policies on business integrity and political involvement set out in *The way we work*. The first tenet of *The way we work* is that Rio Tinto personnel are expected to comply with the host nation's laws, and ignorance of the law is not an acceptable reason for non-compliance.

#### *1 State Transparency Determines Strength And Compliance Of State Laws*

Rio Tinto states unequivocally that its personnel are expected to comply with host nation laws. A problem with this approach, as has been noted in previous chapters, is that transnational companies often assist in drafting nations' laws to facilitate lowest cost development of their projects. Other times the companies are the direct beneficiaries of legislation enacted to facilitate development of major projects against the wishes of traditional owners or communities. Rio Tinto (as CRA) was the direct beneficiary of the Queensland government's regressive *Comalco Act (Commonwealth Aluminium Corporation Pty Ltd) Act 1957 (Qld)*, and the company informed the Federal and Queensland governments that it would abandon plans for a major extension of its Gladstone smelter if it did not legislate for certainty after the *Wik* decision was brought down. The Hammersley Iron Ore mine was expedited by the Western Australian government by the *Iron Ore (Hamersley Range) Agreement*

*Act 1963* and permitted to mine in a national park with the passage of the *Marandoo (Aboriginal Heritage) Act 1992* (WA). After the heavy 2010-11 wet season, Rio Tinto lobbied the Northern Territory government to relax contaminated water disposal regulations so it could continue operating. The Northern Territory government responded by varying contaminated water regulations to enable ERA's water disposal to remain under the Territory regulations. Rio Tinto is further accused of being directly involved in the drafting of anti-union laws in Australia, and of improperly influencing policy in the case of greenhouse gas emission and mining superprofits tax policy. These accusations are addressed in the thesis below.

Australia has a strong regulatory system and ranks very favourably on Transparency International's Perceptions of Corruption Index.<sup>1</sup> Corruption thrives where states are unable to govern the bureaucracy or provide institutions that support the rule of law. Corruption is manifest when corporations exert influence on the state, and this may even tend towards misgovernance.<sup>2</sup> Transparency International ranks countries according to the perception of corruption in the public sector. 'Perception' is used because the nature of corruption is that it is hidden, however Transparency International states that over time perceptions have proven to be reliable estimates of corruption. Of 178 countries investigated, nearly three quarters had an index score below five on a scale from 10 (very clean) to 0 (very corrupt), indicating a serious global corruption problem.

The following table gives a list of the corruption index of Australia, Papua New Guinea and Indonesia, with a selection of countries for reference. The highest-ranking countries are Denmark and New Zealand, and the lowest ranking, most corrupt nation is the failed state of Somalia.

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<sup>1</sup> Transparency International, *Corruption Perceptions Index 2010*.

<sup>2</sup> Joel Hellman, Geraint Jones et al, 'Measuring governance, corruption, and State capture – how firms and bureaucrats shape the business environment in transition economies' (Policy Research Working Paper No. 2312, World Bank Institute, Governance, Regulation, and Finance and European Bank for Reconstruction and Development Chief Economist's Office, April 2000).

Table 1 Sample of Corruption Indices 2010

Ranking	State	Corruption Perception
1	Denmark, New Zealand	9.3
8	<b>Australia</b> , Switzerland	8.7
20	United Kingdom	7.6
22	United States	7.1
54	Kuwait, South Africa	4.5
78	China	3.5
110	<b>Indonesia</b> , Kosovo, Solomons	2.8
134	Zimbabwe	2.4
154	<b>PNG</b> , Russia, Central African Republic, Congo-Brazzaville	2.1
178	Somalia	1.1

The table above indicates the extreme corruption perceived in both Indonesia and PNG, and the high rate of public confidence in Australia.

Rio Tinto's assertions that its personnel must comply with host nations' laws belies the fact that companies operating in states with endemic corruption and weak, poorly governed institutions can either ignore laws or be in the position to influence the passage of lax or unenforceable laws. In Australia, Rio Tinto is seen to comply with laws, notwithstanding allegations that its lawyers drafted the Work Choices legislation (see page 129 below). Corruption in developing countries results in weak rule of law and causes citizens to suffer economic and social hardships because their countries resources are being diverted from serving the needs of the people to promoting the self-interest of corrupt officials.<sup>3</sup>

Rio Tinto stands accused of initiating the Bougainville civil war for the purpose of reopening Panguna copper mine. While there is no evidence yet that Rio Tinto contracted with the Sandline mercenaries, Sir Michael Somare's 2000 affidavit explicitly states that because of its influence, Rio Tinto 'controlled the Government' and the 'Government of PNG followed its requests and carried out its instructions'

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<sup>3</sup> Janelle Lewis, 'The Resource Curse: Examining Corruption in the Extractive Industries' (2007) 2(1) *Perspectives of Global Issues*, Autumn.

supplying helicopters that were used as gunships, pilots, troop transportation, fuel and barracks.<sup>4</sup>

Rio Tinto ignored Indonesian environmental laws and actions taken against the company at Grasberg Mine in direct contravention of its own policy. Dumping of waste rock and tailings directly into rivers has been expressly prohibited since the *Indonesian Water Quality Management and Water Pollution Control Regulations 2001*, yet the Grasberg mine continues to dump over 230,000 tonnes a day into the valley and adjacent river systems. The mine has encroached upon the Lorentz National Park, whose boundaries have already been truncated to facilitate further mining.

Rio Tinto and Freeport McMoRan have bribed security officials and escalated violence in West Papua. Security forces have killed dozens of Papuans around the Grasberg lease area, and have been implicated in the deaths of foreign nationals as the Indonesian military and Papuan province police forces vie for higher security payments from mine managers. This form of security is reminiscent of mafia-style 'security' – foreign mine employees are killed by unknown assailants armed with security issue weapons to force the company to pay more money for protection. Rio Tinto is accused of being directly involved in forming Indonesian state policy and drafting environmental and human rights laws at the same time it was facing a protracted and bitter dispute with the Dayak peoples near the Kelian gold mine. When the company declares its personnel must abide by host-state laws but either has a hand in drafting said laws or ignores said laws, the declaration is rendered nothing more than a PR exercise.

*(a) The Paradox of Resource Rich But Economically Poor States*

Australia, Indonesia and Papua New Guinea are all resource rich states, but only Australia is economically wealthy. Resource-rich developing states are plagued with the paradox of having highly valued commodities but very low levels of economic growth and poor human development indices. Australia ranks second on the UN Human Development Index and 14<sup>th</sup> on global GDP, while Indonesia ranks 124<sup>th</sup> and 19<sup>th</sup> respectively (Indonesia has divided West Papua into two provinces – Papua and

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<sup>4</sup> See Chapter IV, 10-11.

West Papua, ranking 30<sup>th</sup> and 33<sup>rd</sup> out of 33 Indonesian provinces for human development indices)<sup>5</sup> and Papua New Guinea ranks 153<sup>rd</sup> and 126 respectively, scoring even worse on education rankings.<sup>6</sup> Chapter IV outlines the wealth generated from Kelian, Panguna and Grasberg mines. Some of the proceeds of Panguna were intended to fund Papua New Guinea's independence and beyond, while in many years since development, Grasberg mine has been Indonesia's single largest taxpayer and contributor of up to a quarter of the nation's GDP. The paradox of the resource curse is that valuable natural resources create economic stagnation in developing countries rather than economic growth.<sup>7</sup> This is evident in the case of PNG and to the Indonesian province of Papua. The Global Forum Policy organization noted many academic studies have shown that countries highly reliant on natural resources for revenue score low in the UN HDI and exhibit higher levels of corruption.<sup>8</sup> Corruption is aided and abetted by transnational extractive industries who do not report payments or their close links to government in developing states, as evidenced by Rio Tinto's involvement in the Bougainville civil war, Grasberg security payment scandals and Kelian legislative drafting. Rio Tinto's policy that its personnel abide by local law appears disingenuous when host states have weak public institutions with poor rule of law, or do not or cannot enforce rule of law.

Further, as noted above in Chapter IV, developing resource-rich states are at risk of experiencing armed conflict, civil wars and large-scale conflicts as customary lands are appropriated by force with no rule of law to protect land claims. Serious civil unrest is continuing in West Papua, has killed thousands in Bougainville and caused displacement and discord in Kalimantan. These three mine sites have seriously degraded environments that continue to impact upon human health and subsistence living that may foment continuing and future civic unrest. For example, Bougainville's Panguna mine has lain dormant for nearly two decades and the rivers are still lifeless and cause lesions on children. Traditional owner groups, including women traditional owners, say they will fight to prevent the mine reopening.

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<sup>5</sup> Badan Pusat Statistik Papua (Statistics Papua) <<http://papua.bps.go.id/>> cited in David Adam Stott, 'Indonesian Colonization, Resource Plunder and West Papuan Grievances' 9 (37) *Asia-Pacific Journal*.

<sup>6</sup> Indonesia has slipped 23 points and PNG five points from 2008 – 2011. Data from United Nations Development Program, *Human Development Report 2011*, <[http://hdr.undp.org/en/media/HDR\\_2011\\_EN\\_Table1.pdf](http://hdr.undp.org/en/media/HDR_2011_EN_Table1.pdf)>

<sup>7</sup> Lewis, above n 4.

<sup>8</sup> Ibid.

## 2 Reputation Matters For Shareholders

*The way we work* offers Rio Tinto personnel guiding questions to answer before taking a course of action; beginning with the question 'is it legal?' Further questions are to be asked, including is the course of action consistent with company policies, will there be negative consequences for the company, what would family and friends think, and would the personnel want their actions to be reported on the front page of the newspaper?

### (i) *What Price Reputation?*

Corporations are finding reputation to be one of their most important assets.<sup>9</sup> Good reputations reap rewards of continuing trust and confidence of customers, investors, suppliers and regulators, whereas bad reputation can result in loss of customers, shareholder dissatisfaction and regulatory action. Reputation is an intangible asset and as intangibles often account for 75% of market value of corporations, reputation is their biggest asset.<sup>10</sup> A good reputation underpins a company's continued licence to operate, expand and create new partnerships and joint ventures. The growing and extensive global use of mobile camera phones and internet mean company malfeasance can be recorded and released on the world stage almost as it happens, and this can have deleterious impacts on reputation. Rio Tinto Chairman Jan du Plessis and CEO Tony Albanese understand the importance of reputation, and in particular Rio Tinto's reputation of acting responsibly, in the success of the business and ability to generate shareholder value.<sup>11</sup> Damage to a company's reputation can have the very tangible consequences of stock price decline, ratings downgrade, regulatory investigations and shareholder litigation.<sup>12</sup>

### (ii) *Greenwash*

Companies can and often do disguise activities that could lead to poor reputation by

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<sup>9</sup> 'What Price Reputation?', *Bloomberg BusinessWeek*, 9 July 2007.

<sup>10</sup> Sophie Gautier-Gaillard, Jean-Paul Louiset and Jenny Rainer, 'Managing risks to reputation – from theory to practice' in Joachim Klewes and Robert Wreschniok, *Reputation Capital* (Springer, Heidelberg, 2009).

<sup>11</sup> Rio Tinto, *The way we work, Our global code of business conduct*, December 2009, p 2.

<sup>12</sup> George Stansfield, 'Some thoughts on reputation and challenges for global financial institutions' (2006) 31 *The Geneva Papers* 470.



'greenwashing'. Oxford English dictionary defines greenswashing as

disinformation disseminated by an organisation so as to present an environmentally responsible public image.<sup>13</sup>

Greenwash is an industry response to the rise of environmental concern, particularly since the peak of environmental consciousness in the late 1980s.<sup>14</sup> Many polluting companies responded with green marketing campaigns to portray their products as environmentally friendly, thus spawning a lucrative public relations industry. Public relations companies advise how to counter negative perceptions of business, in most cases caused by their own poor environmental performance.<sup>15</sup> Engaging public relations experts to advise on reputation strategy is cheaper than making the substantial changes required to become more environmentally friendly.<sup>16</sup> Beder demonstrates how public relations experts enhance the images of their clients by emphasising positive actions no matter how trivial, and downplaying negative aspects, no matter how significant. Some companies make the most out of measures they have been forced into by government, giving the public the illusion the company is acting out of environmental concern and not because of governmental regulations or threat of regulation. The other way companies greenwash is by funding environmental programs or donate to environmental groups. The latter strategy carries with it the added benefit of co-opting environmentalists.<sup>17</sup> 'Greenwash' is also used to describe action where companies present themselves as champions of social justice while being complicit in human rights abuses.<sup>18</sup> Rio Tinto, for example, sponsors the annual Rio Tinto Human Rights Medal awarded by the Australian government agency the Human Rights Council.

### (iii) *Bluwash*

'Blue-wash' is a term used in recent lexicon, describing the actions 'companies use their association with the United Nations to project a good image while changing

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<sup>13</sup> Concise Oxford English Dictionary (10<sup>th</sup> ed, 2009).

<sup>14</sup> Sharon Beder, 'Greenwash' in John Barry and E. Gene Frankland, *International Encyclopedia of Environmental Politics* (Routledge, London, 2001).

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> K. Bruno, J. Karliner, and A. Srivastava,, *Exposing Corporate Greenwash: An Activist Toolkit for Earth Day 2000*, in Samantha Traies *Corporate Sustainability – Greenwash or a Path to Sustainable Capitalism* (PhD thesis, Deakin University 2005).

little by way of corporate policies and practices.<sup>19</sup> The 'blue-washing' term denotes corporations wrapping themselves in the blue flag of the United Nations to promote a positive image with respect to human rights and environmental stewardship. The Joint Inspection Unit<sup>20</sup> of the United Nations recognises the widespread concern amongst NGOs that the Global Compact is being undermined by some companies' 'reluctance to meet the challenge of in-depth commitment' while they 'use the Global Compact and the United Nations for their "bluewashing" benefits.' The Global Compact is discussed below.<sup>21</sup>

Rio Tinto's websites consistently promote its partnership with the Global Compact.<sup>22</sup> Chairman Jan du Plessis states that at the tenth anniversary of Rio Tinto's signing the Global Compact, the company 'remains committed to its ten principles and to promoting the Global Compact' wherever Rio Tinto operates.<sup>23</sup> Du Plessis emphasises on Rio Tinto's website that the company is a foundation member of the Global Compact, and that the Compact's principles are reflected in the company policies, standards and guidance are embedded in Rio Tinto's 'overall approach' to sustainable development'.<sup>24</sup>

### *3 Respect For Rights Of Employees?*

*The way we work* purports to respect the rights of employees at the workplace. It prohibits discrimination based on race, gender, national origin, religion, age, sexual orientation and respects the rights of employees to join or not join a union and seek to bargain collectively.<sup>25</sup> These laudable statements belie Rio Tinto's action against employees both in Australia and overseas.

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<sup>19</sup> Peter Utting, 'UN-Business Partnerships: Whose Agenda Counts?' (Paper presented at seminar 'Partnerships for Development or Privatization of the Multilateral System?', organized by the North-South Coalition, Oslo, Norway, 8 December 2000.

<sup>20</sup> The Joint Inspection Unit is a small, independent external oversight body to the United Nations mandated to conduct evaluations, inspections and investigations across UN agencies.

<sup>21</sup> Papa Louis Fall and Mohamed Mounir Zourin, United Nations corporate partnerships – the role and functioning of the Global Compact, Geneva 2010, JIU/REP/2010/9.

<sup>22</sup> See for example, Rio Tinto, Governance and Corporate relations, <[http://www.riotinto.com/ourapproach/752\\_governmental\\_political.asp](http://www.riotinto.com/ourapproach/752_governmental_political.asp)>; Rio Tinto, United Nations Global Compact, <[http://www.riotinto.com/ourapproach/752\\_united\\_nations\\_global\\_compact.asp](http://www.riotinto.com/ourapproach/752_united_nations_global_compact.asp)>; Rio Tinto. The Global Compact, <[http://www.riotinto.com/ourapproach/17285\\_the\\_global\\_compact.asp](http://www.riotinto.com/ourapproach/17285_the_global_compact.asp)>

<sup>23</sup> Rio Tinto, 'United Nations Global Compact' <[http://www.riotinto.com/ourapproach/752\\_united\\_nations\\_global\\_compact.asp](http://www.riotinto.com/ourapproach/752_united_nations_global_compact.asp)>

<sup>24</sup> Ibid.

<sup>25</sup> Ibid 12.

*(a) Rio Tinto And Employee Discrimination In The Region*

Chapter IV details Bougainvilleans claims in the US Court of Appeals that, inter alia, Rio Tinto engaged in racial discrimination against black (Bougainvillean) workers.<sup>26</sup> Rio Tinto's discriminatory actions against Papuans at the Grasberg mine have been long documented by human rights groups. Violent unrest and the temporary closure of the Grasberg mine in 2011 was directly a result of grossly discriminatory pay scales where Papuans are paid \$2.10 per hour<sup>27</sup> while ethnic Indonesians are paid \$US15 per hour for the same work, and foreign nationals receive between \$35 and \$200 per hour. Seven striking workers were killed in seven weeks by Indonesian security forces. Employee discrimination by Rio Tinto is not confined to third world countries, as demonstrated in the following section.

*(b) Rio Tinto as 'Union Busters' In Australia*

Rio Tinto has a reputation for deunionising its work sites.<sup>28</sup> The right to join a union and collectively bargain is an international human right and union membership has been a cornerstone of Australian workplace relations since Federation.

*(i) Unionism In Australia*

Unionism began in Australia in the mid 1800s. Strike action in 1856 by Melbourne building workers won eight hour days for all trades in the building industry and reduced the working week from 60 hours to 48 hours.<sup>29</sup> The Australian Labor Party was borne of the Labour movement, and by 1986 46% of Australian employees belonged to trade unions. By 2007, that membership had dropped to 19% of employees.<sup>30</sup> The decline is attributed to legislative changes moving away from

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<sup>26</sup> See *Sarei v Rio Tinto*, Chapter IV.

<sup>27</sup> Judith Reczek, 'Freeport Strikers Given Ultimatum' 3<sup>rd</sup> Degree (Edith Cowan University Communications Program), <http://3degree.ecu.edu.au/articles/4286>.

<sup>28</sup> See for instance, Roger Moody, *Rocks and Hard Places: The globalisation of mining* (Zed Books, 2007) and references below.

<sup>29</sup> Victorian Trades Hall Council, 'History of the Union Movement', <<http://www.vthc.org.au/inside-trades-hall/history/history-of-the-union-movement/index.cfm>>.

<sup>30</sup> Australian Bureau of Statistics, 'Trade Union Members', <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Chapter7202008>>.

centralised system of awards to enterprise agreements and individual bargaining at a workplace level, and growing employment in traditionally non-unionized industries.<sup>31</sup> In the decade between 1997 and 2007, the mining industry employed 1.1% and 1.5% respectively of workers, who dropped from 43.9% employees being members of unions to less than half that number at 21.5% in 2007. Part of the decline can be attributed to what some commentators describe as company pursuit of deunionization strategies to ‘enhance managerial hegemony.’<sup>32</sup>

*(ii) Rio Tinto Breaks Unions At Hamersley*

While not the first company to militantly deunionize its workforce, Rio Tinto’s Hamersley Iron (now Rio Tinto Iron Ore) adopted a militant deunionization strategy with no parallel in the history of Australian industrial relations. The prime motivation of Rio Tinto to clear its workplaces of unionism was cost minimization due to then-falling commodity prices. Deunionization allowed for more redundancies and a shift in income share from wages to profits.<sup>33</sup> Rio Tinto executives initially maintained union and non-union workers could co-exist on the same shop floor, but by the early 1990s management strategy changed such that workers were explicitly told they could only have one loyalty, and that loyalty was to the company. Hamersley Iron drew from Rio Tinto’s operations in New Zealand, where management became ‘friends’ to the workers by changing managerial tactics to promote egalitarian relations through sharing working space, car parking space and beer and cheese nights. Friendly management obviated the workers’ perceived need for unions, and once essentially deunionized through non-militant, friendly strategies, Rio Tinto NZ retrenched 190 workers and changed long-standing work-place conditions.<sup>34</sup> At Hamersley, and again at Rio’s bauxite and aluminium operations, Rio took on the appearance of bargaining with unions, while promoting its preferred ‘staff’ contracts as a way for workers to immediately receive pay increases and improved job security, all under the backdrop of then falling commodity prices. Under the circumstances, almost the entire workforce of 1400 chose to sign individual ‘staff’

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<sup>31</sup> Ibid.

<sup>32</sup> Bruce Hearn Mackinnon, ‘CRA/Rio Tinto in the 1990s: A decade of deunionization’ (2008) *Labour History: A Journal of Labour and Social History* November.

<sup>33</sup> Ibid.

<sup>34</sup> Pete Lusk, ‘How Comalco broke the unions at the Bluff Smelter’ (2000) *Metal* February, magazine of the NZ Engineering, Printing and Manufacturing Union.

contracts,<sup>35</sup> deeming union membership redundant.<sup>36</sup>

(ii) *Deunionization Continues Around Australia*

The success of managerial action at Hamersley Iron led to similar deunionisation-by-stealth campaigns at Rio's Bell Bay and Weipa operations. Non-unionized labour at Weipa received substantial wage rises, and a core group of 75 union members who refused to sign the agreements were paid thousands of dollars less than non-union workers doing the same work. Upon taking their case to the Australian Industrial Relations Commission (AIRC), Rio Tinto was found to be actively discriminating against workers on collectively bargained wages and conditions. The AIRC found

[t]he only way, based on the Company's clear and unequivocal policy, in which any award employee would be able to reach the same level of benefit as a staff employee is if he or she signs a staff contract. At that point, irrespective of how poorly the employee may have been performing his or her tasks, the act of signing the contract immediately brings improved benefits ... The policy, we conclude, is unfair and discriminates against the award employees concerned based solely on their choice to enter into collective bargaining through their respective union, rather than 'negotiate' one to one on the basis of the Company's two party staff system.<sup>37</sup>

The tactic of deunionization has had its success in that, according to the Australian Workers' Union (AWU), non-union workers' wages at Rio Tinto's aluminium operations in Queensland and Tasmania are between 30 and 50% lower than those of employees at unionized workplaces.<sup>38</sup> This claim is supported by the Australian Council of Trade Unions (ACTU) secretary Jeff Lawrence, who said Rio Tinto Alcan has 'systematically blocked workers access to unions and the benefits of collective bargaining', and workers at its Bell Bay smelter were paid about \$30 000 less per annum than workers in unionized workplaces.<sup>39</sup>

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<sup>35</sup> CRA 1993 Annual Report.

<sup>36</sup> Bruce Hearn Mackinnon, 'The Mythology of "Staff" Employment: A Weapon of Mass Construction' (2004) Deakin University, <<http://www.deakin.edu.au/dro/eserv/DU:30005369/mackinnon-mythologyofstaff-2004.pdf>>.

<sup>37</sup> Australian Industrial Relations Commission, Print No. M8600, 23 January 1996, 58-59.

<sup>38</sup> Ewen Hannon, 'Rio Tinto paying below the rate, union leader claims', *The Australian* (Sydney) 18 February 2011.

<sup>39</sup> Australian Council of Trade Unions, 'Workers at Rio Tinto Alcan deserve better rights at work and higher wages' (Media Release, 17 February 2011).

*(iv) Rio Tinto Prevents Union Activity At Bells Bay, Lands In Court*

Rio Tinto was in the firing line of AWU national secretary Paul Howes at the AWU national conference in February 2011. Howes was strident in speech when he said Rio Tinto did not ‘own the government’ or ‘own the country anymore’ and that the workers at Rio Tinto’s operations have a right to be represented.<sup>40</sup> Howes’ criticism came during a bitter and protracted dispute between Rio Tinto at Bells Bay refinery and the AWU. The dispute has been running since November 2010 in the Tasmanian legal system over union access to workers at the Bell Bay refinery. After refinery workers complained of safety issues to the AWU, the union attempted to gain access to workers. Rio Tinto sought an injunction in the Tasmanian Supreme Court to stop a union meeting in the underground crib room, but lost.<sup>41</sup> Rio Tinto appealed the decision, but lost again, and ignored rulings by the Tasmanian Inspector of Workplace Standards that the AWU was within its legal rights to conduct meetings.<sup>42</sup> Despite the ruling, Rio Tinto took the case to Fair Work Australia, where union lawyers told of management taking union and non-union members aside and questioning employees about their union activities, and even their involvement in the Fair Work proceedings.<sup>43</sup> Rio Tinto Alcan Bell Bay claimed it was unaware that any of its workers had been intimidated by ‘inappropriate discussions or questioning’ about union activities.<sup>44</sup>

*(iv) Rio Tinto's Inconsistencies - 'The Way We Work' Is To Deunionize The Workforce While Claiming To Uphold Collective Bargaining Rights.*

Rio Tinto’s anti-union actions have been masked by a public position that it respects the rights of workers to form and join unions and bargain collectively. The evidence shows that Rio’s company practices have been to deliberately deunionize workforces, to which a return to collective bargaining is nearly impossible. Evidence from Australian operations shows that once the workplace is deunionized, the company has wound back wages and conditions. Rio Tinto’s argument that workers

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<sup>40</sup> Paul Howes’ speech at AWU national conference, Gold Coast, 15 February 2011, reported by Ewen Hannon, ‘Paul Howes declares war on Rio Tinto’, *The Australian* (Sydney) 16 February 2011.

<sup>41</sup> Court clears way for union meeting’ *ABC News*, 5 January 2011.

<sup>42</sup> Australian Workers Union, ‘DVD voices AWU concerns in crib-room where Rio Tinto has banned union voice’, 14 April 2011, <[http://www.awu.net.au/227666\\_5.htm](http://www.awu.net.au/227666_5.htm)>.

<sup>43</sup> AWU demands Rio Tinto apology’, *The Sydney Morning Herald* (Sydney) 9 March 2011.

<sup>44</sup> Ewen Hannon, ‘Rio talks illegally excluded union’, *The Australian* (Sydney) 10 March 2011.

could return collective bargaining hollow when Comalco's former CEO, Terry Palmer, conceded that even at Robe River where another company had crushed unionism and imposed an authoritarian management style, unionism had failed to re-emerge after fifteen years.<sup>45</sup>

*(c) Rio Tinto As Anti-Union Law Architects*

The Coalition government introduced formalised individual Australian Workplace Agreements (AWA) through the *Industrial Relations Act 1996* (Cth) in its first year in 1996. AWAs were acknowledged by management consultants to the Australian Government as 'an important element in achieving management's aim of a non-union workforce.'<sup>46</sup> In March 1998 the ILO's Committee of Experts found that the Coalition's Industrial Relations laws were in breach of ILO Convention 98 in that they promoted individual bargaining over collective agreements.<sup>47</sup> It emerged that the government had seconded three key people from employer organisations to draft the new laws. One of the three was Mike Angwin, a senior Rio Tinto/CRA executive. While claiming to be non-political,<sup>48</sup> Rio Tinto was actively supplying resources and staff to the Australian government for the express purpose of changing laws to suit their own corporate policies.

*4. Respects Human Rights Consistent With The UDHR?*

Rio Tinto's *The way we work* states it supports and respects human rights consistent with the Universal Declaration of Human Rights<sup>49</sup> ('UDHR'), and actively seeks not to be complicit in human rights abuses committed by others. The UDHR was drafted and proclaimed in 1948 by the then 52 member states of the United Nations. There are now 192 states professing adherence to the UDHR.<sup>50</sup>

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<sup>45</sup> McKinnon, above n 37.

<sup>46</sup> World Competitive Practices, *OEA Case study--Peabody Resources (Ravensworth Mine)* (1999), Report of the Office of the Employment Advocate, Sydney, November, 26.

<sup>47</sup> *Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively*, (entered into force 18 July 1951).

<sup>48</sup> Rio Tinto, Transparency and Political Involvement, <[http://www.riotinto.com/ourapproach/7255\\_transparency\\_political\\_involvement.asp](http://www.riotinto.com/ourapproach/7255_transparency_political_involvement.asp)>

<sup>49</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UN GOAR, 3<sup>rd</sup> see, 183 plen mtg, UN Doc A/810 (10 December 1948).

<sup>50</sup> Rhonda K.M. Smith, 'Human Rights in International Law', in Michael Goodhart, *Human Rights – politics and practice* (Oxford University Press, 2009).

The UDHR has been dubbed the 'international Magna Carta of all mankind'<sup>51</sup> and its declaration was the first occasion on which the organised community of nations had made a declaration of human rights and fundamental freedoms.<sup>52</sup> The initial plan was that the UDHR would be a 'blueprint' for all nations to translate into international binding treaty obligations, but geo-politics and the Cold War intervened. The power blocs of the United States and USSR refused to accept all rights in the UDHR as equal, and unsurprisingly the US-camp, with its emphasis on individual freedoms, and the USSR-bloc with its emphasis on socialism and collectivism moved to split the UDHR into the two separate instruments of 1966. These are the twin International Covenants, the *International Covenant on Civil and Political Rights*<sup>53</sup> ('ICCPR') and the *International Convention on Economic, Social and Cultural Rights*<sup>54</sup> ('ICESCR'). The ICCPR promotes the immediate realisation of individual civil liberties (negative rights) and the ICESCR emphasises positive rights in the form of progressively realised participatory rights. The assumptions of the proponents of the UDHR and its twin International Covenants was that group rights would be taken care of automatically as the result of the protection of rights of individuals.<sup>55</sup>

The UDHR consists of 30 articles that are universal, interdependent and indivisible.<sup>56</sup> The Declaration was drafted after the horrors of World War II, when the international community realised that disregard and contempt for human rights resulted in 'barbarous acts which have outraged the conscience of mankind'<sup>57</sup> and aspired for 'the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want'.<sup>58</sup> Article 1 articulates the universality of human rights, that 'all human beings are born free and equal in dignity

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<sup>51</sup> Herbert V. Evatt, General Assembly, Official Records, 3rd Sess, 1st part, 181st Plenary Mtg, 10 December 1948, 875, cited in Norman Harper & David Sissons, *Australia and the United Nations* (Manhattan Publishing Company, 1959).

<sup>52</sup> Eleanor Roosevelt, speaking on behalf of the Declaration in the General Assembly when she called it 'the international Magna Carta of all mankind'. The Declaration was unanimously adopted later that night, 10 December, 1948.

<sup>53</sup> International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>54</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976)

<sup>55</sup> Ian Brownlie, 'The Rights Peoples in Modern International Law', in James Crawford (ed), *The Rights of Peoples* (Oxford Clarendon Press, 1988).

<sup>56</sup> Smith, above n 51.

<sup>57</sup> Universal Declaration of Human Rights, Preamble.

<sup>58</sup> Ibid.



and rights', while the 29 other articles have been separated into the Twin Covenants discussed below with reference to Rio Tinto and State responsibility of Australia, Indonesia and Papua New Guinea.

## PART TWO

### *B Rio Tinto's Consistency With The Global Compact Principles*

#### *1 The Global Compact*

The United Nations Global Compact was a direct initiative of former United Nations Secretary General, Kofi Annan, who launched it at the World Economic Forum in Davos in June 2000. The Global Compact was developed in effort to link globalization of business with social values. It was developed to be a voluntary initiative relying on public accountability, transparency and enlightened self-interest of companies, labour and civil society to realise its principles based on human rights and environmental law.<sup>59</sup> The Global Compact is 'soft law' or norms with no binding qualities and has come under criticism for 'bluewashing'<sup>60</sup> the actions serious corporate human rights abusers and environmentally degrading companies,<sup>61</sup> including its foundation member, Rio Tinto.<sup>62</sup> Two of the main criticisms are that there is no independent monitoring of companies' claims, and participating companies are required to uphold only three out of ten principles.

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<sup>59</sup> Ambassador S. Azmat Hassan, 'The United Nations in an Era of Globalisation, in James Muldoon Jnr, JoAnn Fagot Aviel, Richard Reitano and Earl Sullivan (eds), *Multilateral Diplomacy in and the United Nations* (Westview Press, 2005), 149.

<sup>60</sup> See Peter Utting, 'UN-Business Partnerships: Whose Agenda Counts?' (Paper presented at seminar on partnerships for Development or Privatization of the Multilateral System? organised by the North-South Coalition, Oslo, 8 November 2000).

<sup>61</sup> See, for example, the critique of Rio Tinto's membership of the Global Compact by the Asia-Pacific Human Rights Network, 'Associating with the wrong company – Rio Tinto's Record and the Global Compact' on Corpwatch website, < <http://www.corpwatch.org/article.php?id=623>> Rio Tinto is responsible for violent human rights abuses in West Papua. Corpwatch states that in 2000, the Indonesian government's National Human Rights Commission investigated allegations of abuses at the Rio Tinto's Kelian gold mine and found serious violations. Since the mine opened in 1992, the Commission revealed the Indonesian military and company security forcibly evicted traditional miners, burned down villages, and arrested and detained protestors. Local people have systematically lost homes, lands, gardens, fruit trees, forest resources, family graves and the right to mine for gold in the river, according to the Human Rights Commission.

<sup>62</sup> Danny Kennedy, 'Rio Tinto: Global Compact Violator – PT Kelian: A Case Study of Global Operations', Project Underground, 13 July 2001.

The Global Compact aims to use the 'power of collective action.... to promote responsible corporate citizenship' through purely voluntary initiatives.<sup>63</sup> It emerged from the UN Secretary-General's conversations with business executives, particularly the International Chamber of Commerce, and proposed nine principles (now expanded to ten) relating to human rights, labour rights, the protection of the environment and anti-corruption measures for businesses to incorporate into their practices.<sup>64</sup> These principles are universal values set out in the Preamble and Article 1 of the Charter of the United Nations, with the 'regrettable exception' of the pursuit of peace and development,<sup>65</sup> the UDHR, the International Labour Organisation's Tripartite Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development and the United Nations Convention Against Corruption.

The ten principles are:

### **Human Rights**

*Principle 1* Businesses should support and respect the protection of internationally proclaimed human rights;

*Principle 2* Businesses should make sure that they are not complicit in human rights abuses;

### **Labour**

*Principle 3* Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;

*Principle 4* Businesses should support the elimination of all forms of forced and compulsory labour;

*Principle 5* Businesses should support the effective abolition of child labour;

*Principle 6* Businesses should support the elimination of discrimination in respect of employment and occupation

### **Environment**

*Principle 7* Businesses are asked to support a precautionary approach to

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<sup>63</sup> See 'About the Global Compact', <[www.unglobalcompact.org](http://www.unglobalcompact.org)>.

<sup>64</sup> The 10<sup>th</sup> principle pertaining to anti-corruption was added in June 2004 at the Global Leaders Summit.

<sup>65</sup> Joint Inspection Unit (2010), above n 22.

environmental challenges;

*Principle 8* Businesses should undertake initiatives to promote greater environmental responsibility;

*Principle 9* Businesses should encourage the development and diffusion of environmentally friendly technologies.

### **Anti-corruption**

*Principle 10* Businesses should work against corruption in all its forms, including extortion and bribery.

#### *(ii) Rio Tinto And The Global Compact*

Rio Tinto was one of the founding members of the Global Compact. Its representatives were part of the 25 top corporate executives who met with the Secretary-General to devise the new UN-private sector partnership.<sup>66</sup> The Global Compact relies upon self-reporting and assessment, and does not have the mandate or resources to monitor participants' performance.<sup>67</sup> Rio Tinto's self-assessment and 'Communication on Progress Report' relies upon statements it has made to demonstrate its compliance with the Global Compact. For example, in demonstrating its commitment to Principle 1, Rio Tinto's outcomes were that it had revised and redistributed *The way we work* in 20 languages; produced a Human Rights Guidance document; have Codes of Conduct with reference to human rights; and participated in the UN Norms and Global Compact processes in 2004. Similarly, Rio Tinto's progress report on Principle 7 consisted of statements and tangible actions: finalising environmental standards and guidance documents; four yearly health, safety and environmental reviews of businesses; and environmental targets for greenhouse gas emissions, energy use and water.<sup>68</sup> Rio's 'goals and targets' are vague in that goals are set without any reference to emission level starting points or water usage. For example, Rio Tinto has a goal for a 'six per cent reduction in total greenhouse gas emissions' without reference to the total tonnes of greenhouse gas emissions released,

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<sup>66</sup> Ellen Paine, 'The Road to the Global Compact: Corporate Power and the Battle over Global Public Policy at the United Nations', Global Policy Forum, October 2000. Other companies represented were Coca Cola, Unilever, McDonalds, Goldman Sachs and British American Tobacco.

<sup>67</sup> The Global Compact, Integrity Measures, <<http://www.unglobalcompact.org/AboutTheGC/IntegrityMeasures/index.html>>

<sup>68</sup> Rio Tinto, Communication on Progress Report 2004.

or if that goal is for each plant or to be taken as an average the entire global operations. Another goal is to reduce freshwater use by six per cent per tonne between 2008 and 2013. No reference is provided as to how much water is actually used each day, or if that figure includes water in the form of rivers used to 'transport' tailings and waste rock away from mines.<sup>69</sup>

Table 2 shows Rio Tinto's compliance with Global Compact Principles referenced from Chapters III and IV.

<b>Principle</b>	<b>Australia</b>	<b>Panguna</b>	<b>Grasberg</b>	<b>Kelian</b>	<b>Comments</b>
<b>1</b> Businesses should support and respect the protection of internationally proclaimed human rights	Yes	<b>NO</b>	<b>NO</b>	<b>NO</b>	Stands accused of genocide in Panguna, human rights abuses at Kelian and crimes against humanity at Grasburg
<b>2</b> Businesses should make sure that they are not complicit in human rights abuses	yes	<b>NO</b>	<b>NO</b>	<b>NO</b>	Finances repressive Indonesian state security forces at Grasberg, sought civil war in Bougainville
<b>3</b> Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining	<b>NO</b>	<b>NO</b>	<b>NO</b>	<b>NO</b>	Worked on Australian anti-union laws, deunionized Australian workplaces
<b>4</b> Businesses should support the elimination of all forms of forced and compulsory labour	yes	Yes	yes	yes	
<b>5</b> Businesses should support the effective abolition of child labour	yes	Yes	yes	yes	
<b>6</b> Businesses should support the elimination of discrimination in	yes	<b>NO</b>	<b>NO</b>	unknown	Plaintiffs in <i>Sarei</i> alleging racial discrimination; Papuan workers at Grasberg

<sup>69</sup> Rio Tinto, Goals and Targets, <[http://www.riotinto.com/ourapproach/17212\\_goals\\_targets.asp](http://www.riotinto.com/ourapproach/17212_goals_targets.asp)>. The comments to the freshwater reduction target state freshwater usage has *increased* by 2.3% since 2008.

respect of employment and occupation					paid \$2/ hr compared with \$15/hr for ethnic Indonesian workers in same job
<b>7</b> Businesses are asked to support a precautionary approach to environmental challenges	yes	<b>NO</b>	<b>NO</b>	<b>NO</b>	Norway and OPIC withdrawn from Rio due to Grasberg; ecosystems biologically dead downstream of Panguna, Grasberg (extensive) and Kelian
<b>8</b> Businesses should undertake initiatives to promote greater environmental responsibility	yes	<b>NO</b>	<b>NO</b>	<b>NO</b>	See above
<b>9</b> Businesses should encourage the development and diffusion of environmentally friendly technologies	Qualified yes (Rio Tinto behind moves in Australia to discredit global warming science and stifle action against greenhouse gas emitter)	<b>NO</b>	<b>NO</b>	<b>NO</b>	Kelian, Grasberg and Panguna all open cut mines dumping waste and tailings into adjacent river systems
<b>10</b> Businesses should work against corruption in all its forms, including extortion and bribery	yes	<b>NO</b>	<b>NO</b>	unknown	Improperly coerced PNG government to wage war and blockage against Bougainville; pays Indonesian military and police inducements to protect Grasberg

Table 2 demonstrates Rio Tinto's poor commitment to Global Compact principles when operating outside of its home state.

The Global Compact is drawn from international laws and convention, addressed in Part II of this Chapter. The above table indicates that Rio Tinto's main departures are in countries with low transparency rates, but that even well governed states are not immune from Rio Tinto's inconsistency with Global Compact principles. The

following subsection highlights Rio Tinto's actions in Australia that inconsistent with Principles 1, 7, 8 and 9.

## *2 Rio Tinto Shaping Australian Law and Policy*

### *(a) Rio Tinto As Major Element In Australian 'Greenhouse Mafia'*

By the late 2000s there was a determined view in the Australian electorate that the government of the day should 'do something' about climate change. Climate change awareness was high, and the public was pressuring the government to sign the Kyoto Protocol and to take action to lower CO<sub>2</sub> emissions. Rio Tinto is a major contributor of greenhouse gas emissions in the mining industry as a whole, in the coal industry and in its smelting operations at Bell Bay (Tas, alumina), Gladstone (Qld, alumina), Boyne Bay (Qld, alumina), Gove (NT, alumina), Tomago (NSW, alumina), and Kwinana (WA, pig iron). Alumina smelters produce approximately 6% of Australia's greenhouse gas emissions, and in 2000, Rio Tinto operations produced 61% of all greenhouse gases from alumina smelters, indicating the high cost of a carbon price on Rio Tinto's carbon intensive industries.<sup>70</sup> Rather than accept international agreements and precautionary principle with respect to climate change, Rio Tinto worked on carbon reduction initiatives in Australia with the Pew Foundation while actively seeking to retain the then coalition government's policy of climate change denial.

### *(i) Climate Change And International Right To Health*

There is no defined 'Right to Environment' under International law, but an implied right exists under the guise of 'Right to Health' found in the *ICESCR* Art 12 and the Constitution of the World Health Organization.<sup>71</sup> It is now clear that the right to health as enshrined in international law extends well beyond health care to include basic preconditions for health, such as potable water, adequate sanitation and nutrition,<sup>72</sup> and includes the 'highest attainable standard of health', broadly defined

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<sup>70</sup> See Hal Turton, 'The Aluminium smelting industry: Structure, market power, subsidies and greenhouse gas emissions' (Discussion Paper No 44, The Australia Institute, January 2002).

<sup>71</sup> *Constitution of the World Health Organization*, opened for signature 22 July 22 1946, 62 Stat. 6279, 14 UNTS 185.

<sup>72</sup> Alycia Ely Yamin, 'The Right to Health Under International Law and Its Relevance to the United

as ‘a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity’.<sup>73</sup> A right to environment can be derived from the international right to health. The right to the highest attainable standard of health is at risk of human induced climate change, which is recognized by the International Panel on Climate Change (IPCC), the World Health Organization and the Millennium Ecosystem Assessment as a key threat to human health and well being. The IPCC’s Third Assessment Report concluded that

overall, climate change is projected to increase threats to human health, particularly in lower income populations, predominantly within tropical/subtropical countries.<sup>74</sup>

Climate change is expected to affect human health directly through thermal stress and weather events (floods, cyclones, storms), and indirectly through increased range of disease vectors (dengue and malaria mosquitos), water-borne pathogens, water quality, air quality and food availability.<sup>75</sup>

International human rights are universal, indivisible, interdependent and interrelated, and must be treated equally be they civil and political or social and economic rights.<sup>76</sup> This principle of indivisibility was enunciated in the 1993 *Vienna Declaration and Programme of Action*<sup>77</sup> and affirms that all human rights must be recognized if specific human rights are to have concrete meaning. A right to health in the face of climate change is indivisible from other human rights, and given the threats to human health and well-being from climate change’s potential for irreversible deleterious effects,<sup>78</sup> a right to health entails a right to a climate that can sustain human health and well-being. Head of the NASA Goddard Institute for Space Studies, James Hansen, has said that even the EU target of 550 ppm CO<sub>2</sub> – the most

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States,’ (2005) 95(7) *American Journal of Public Health*; Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August

2000, E/C.12/2000/4, <<http://www.unhcr.org/refworld/docid/4538838d0.html>>.

<sup>73</sup> Constitution of the World Health Organization, above n 72.

<sup>74</sup> International Panel on Climate Change, *Climate Change 2001: Third Assessment Report (Volume I)* (Cambridge University Press, 2001).

<sup>75</sup> Ibid; also World Health Organization, *Climate Change and Human Health – Risks and Responses: Summary*, 2003, <<http://www.who.int/globalchange/environment/en/ccSCREEN.pdf>>.

<sup>76</sup> Elinor D Kinney, ‘The International Right to Health: what does it mean for our nation and the world?’ (2001) 34 *Indiana Law Review* 1457.

<sup>77</sup> As adopted by the World Conference on Human Rights, Vienna, 14-25 June 1993, A/CONF.157/23.

<sup>78</sup> James Hansen, ‘How can we avert climate change’, revised and expanded from written testimony presented to the Select Committee on Energy Independence and Global Warming, U.S. House of Representatives, 26 April 2007. <<http://arxiv.org/pdf/0706.3720v1>>.

stringent target in the world – should be slashed to 350 ppm if ‘humanity wishes to preserve a planet similar to one on which civilization developed.’<sup>79</sup> If the global community committed to stabilizing emissions at 550 ppm CO<sub>2</sub>, most coral reefs including the Great Barrier Reef will disappear and be replaced by fleshy seaweeds and soft corals.<sup>80</sup> Clive Hamilton reports that Professor Garnaut agreed that 450 ppm may cause serious risks and a 2 degree rise in temperature, but settled on 550 ppm in his review<sup>81</sup> due to political realities of trying to effect more meaningful change.<sup>82</sup>

*(b) The Greenhouse Mafia*

Rio Tinto is implicated in what has been called the “Greenhouse mafia,”<sup>83</sup> a group of energy intensive big businesses and energy producer lobbyists in Canberra. The Greenhouse mafia was exposed in the PhD dissertation about the politics of climate change by former Liberal party speech-writer, Guy Pearse. The ABC’s Four Corners program broadcast a story on his findings.<sup>84</sup> Pearse’s research showed that climate change policy in at least a decade up to his thesis, was determined and actually written by a tiny cabal of powerful fossil fuel and energy intensive industry lobbyists representing the very corporations whose commercial interests would be affected by any government moves to limit greenhouse gas emissions.<sup>85</sup> Pearse found that almost all of the lobbyists had been plucked from the senior ranks of the Australian Public Service and wrote ministerial briefs, cabinet submissions and greenhouse policy. The Australian government had not only argued and won increased emissions at the Kyoto Conference, but alone in the world sent industry lobbyists as delegates to the conference.<sup>86</sup>

Rio Tinto’s ‘*The way we work*’ document champions the requirement and responsibility to conduct its operations within the laws of the host country. In first world Australia, the conduct of Rio Tinto as a part of the ‘Greenhouse Mafia’ and the

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<sup>79</sup> Ibid.

<sup>80</sup> Australian Government, ‘Carbon Pollution Reduction Scheme: Australia’s Low Pollution Future’ (White Paper, December 2008).

<sup>81</sup> Ross Garnaut ‘The Garnaut Climate Change Review’ (Final Report, 2008).

<sup>82</sup> Clive Hamilton, ‘What is the Future worth?’  
<[http://www.clivehamilton.net.au/cms/media/documents/articles/garnauts\\_tiny\\_costs.pdf](http://www.clivehamilton.net.au/cms/media/documents/articles/garnauts_tiny_costs.pdf)>

<sup>83</sup> According to Pearse, the lobby groups jocularly called themselves collectively the “Greenhouse Mafia.”

<sup>84</sup> ABC TV, ‘The Greenhouse Mafia’, *Four Corners*, 13 February 2006.

<sup>85</sup> Clive Hamilton, ‘The Dirty Politics of Climate Change,’ (Speech delivered at the Climate Change and Business Conference, Hilton Hotel, Adelaide) 20 February 2006

<sup>86</sup> Ibid.



Howard Government's 'Lower Emissions Technology Advisory Group' (LETAG) was that of a company *making* policy from which laws were derived. The LETAG consisted of the CEOs of the major fossil fuel companies including Rio Tinto, BHP Billiton, Alcoa and Orica, which according to Pearse and Hamilton are the companies behind the lobby groups that comprise the 'Greenhouse Mafia.' Private notes made by Sam Walsh (CEO of Rio Tinto's ore division) of a ministerial meeting between LETAG, the Industry Minister and Prime Minister were leaked and posted on the Internet.<sup>87</sup> The leaked notes show the Industry Minister cautioning the need for 'absolute confidentiality' of the meeting to prevent an outcry' by the renewable energy industry. They highlight the government's concern to be seen to be doing something about climate change because the Australian Labor Party opposition was benefitting in the polls after promising to ratify the Kyoto protocol. Walsh's notes show that the Prime Minister was concerned about the efficacy of the Tambling Review of the Mandatory Renewable Energy Target (MRET) because it was working too well, and the Government was looking for ways to dispense with the MRET and 'protect Industry'.

*(b) Rio Tinto As Corporate Bully*

On 26 September 2010, forty-one concerned community members shut down all three coal terminals in the world's largest coal port in Newcastle, New South Wales. The action was a non-violent protest drawing attention to the problem of climate change and industry recklessness in pursuing profit over planet. Coal miners Rio Tinto and Xstrata took the extraordinary move in seeking \$525 000 in 'victims compensation' for profits lost during the action. Port Waratah Coal Services (Rio Tinto and Xstrata) sued seven peaceful activists under the *Victims Support and Rehabilitation Act 1996* (NSW), legislation enacted for to assist victims of violent crime. The use of such action to silence activists was described by the defence as 'corporate bullying' and a 'gross abuse' of the Act. The activists won on technicality, because the mining giants did not provide sufficient evidence as to the exact amount of profitability they forewent due to the climate activists' action.<sup>88</sup> The magistrate did not rule misuse of Victims' Compensation laws, leaving Rio Tinto and Xstrata open

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<sup>87</sup> Notes of LETAG meeting with Prime Minister Howard taken by Sam Walsh (6 May 2004) <<http://www.tai.org.au/documents/downloads/WP56.pdf>>

<sup>88</sup> Rising Tide, 'We Won! Coal Giants' Compo Claim fails on technicality', <<http://risingtide7.wordpress.com/2011/03/03/we-won/>>.

to use it to stifle political discussion and non-violent action in the future. The Regional Vice-President of Rio Tinto India was evidently not thinking of his company's role in Australia's 'Greenhouse Mafia', or law suits against concerned Australian climate change activists claiming more than half a million dollars when speaking at the Sustainability Summit Asia. The Vice-President told the conference Rio Tinto was a founding member of the International Council on Mining and Metals, whose the first principle of its sustainable development framework is to 'implement and maintain ethical business practices and sound systems of corporate governance'. In articulating what Rio Tinto meant by sustainable approaches to mining, the conference was told Rio Tinto researches key expectations the public expect of it, with the final concern being climate change.<sup>89</sup> The message does not appear to have left the conference room doors.

### *C Rio Tinto's Consistency With International Human Rights And Environment Laws*

Rio Tinto's website says the company supports and respects international human rights consistent with the Universal Declaration of Human Rights and actively seeks to ensure it is not complicit in human rights abuses committed by others.<sup>90</sup> *The way we work* is supported by Rio Tinto's Human Rights Policy<sup>91</sup> to provide a framework for managers to build upon. Chapter III details ongoing relations between Australian Aboriginal people, past human rights abuses and reparations. The Argyle Diamond mine had a particularly sorry history with a facilitating state government, destruction of an important sacred site and forced removals. The company has spent time talking with traditional owners, hearing their pain and making reparations. Chapter IV, however, addresses issues of serious ongoing human rights abuses to indigenous peoples in Australia's near neighbours. War crimes, murder, forced removals, payments to security forces and security force use of Rio Tinto's vehicles are documented.

Rio Tinto's damage to ecological systems in tropical rainforests is similarly documented. The Kawerong River in Bougainville is still lifeless 20 years after the

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<sup>89</sup> Nik Senapati, 'Sustainable Mining, the Rio Tinto Approach' (Speech delivered at the Sustainability Summit Asia, New Delhi, India, 19 December 2006).

<sup>90</sup> Rio Tinto, Human Rights, <[http://www.riotinto.com/ourapproach/17216\\_human\\_rights.asp](http://www.riotinto.com/ourapproach/17216_human_rights.asp)>.

<sup>91</sup> Rio Tinto, Human Rights Guidance, October 2003.

last tailings were dumped by BCL; the Ajkwa river system includes a 130 square kilometre dead zone and extensive dieback of tropical lowland forest in West Papua, while the World Heritage listed Lorentz National Park's boundaries have been altered to accommodate the mining lease and acid leaching from the mine has been found within Park springs and waterways. Dense tropical jungles were cleared for the Kelian mine, whose tailings caused acid mine drainage, fish kills and open sores on people who swam in the river.

### 1 *Doctrine of State Responsibility*

State responsibility under international law mandates that the primary responsibility for promoting and protecting human rights lies with the State. Moves to attach international responsibility to private actors such as transnational corporations have been modified by the Special Rapporteur, who is promoting the 'Protect-Respect-Remedy' framework as an alternative to private actor responsibility. In drafting the Framework, the Special Rapporteur clarified that although States are not responsible per se for human rights abuses and serious environmental damage by private actors, they may breach their treaty obligations where they fail to take appropriate steps to prevent, investigate, punish and redress such abuse.<sup>92</sup>

### 2 *International Law – Customary and Treaty Law*

International law governs relationships between sovereign nations. The primary sources of international law are customary international law and convention law. Customary international law derives from long established customs and rules that by their international recognition have now become accepted as international law. Conventions and Treaties are clear and tangible manifestations of international law.<sup>93</sup> They are binding upon their signatories and are the source of most international human rights and all international environment law.

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<sup>92</sup> Human Rights Council, *Report of the Human Rights Council on its Eighth Session*, 8/7 UN Doc. A/HRC/8/2 <<http://www2.ohchr.org/english/bodies/hrcouncil/docs/8session/A.HRC.8.52.doc>> , see also Danwood Mzikenge Chirwa. 'The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights', (2004) 5(1) *Melbourne Journal of International Law* 1.

<sup>93</sup> Philip Alston, 'Reform of Treaty-Making Processes: Form over Substance', in Phillip Alston and Madelaine Chiam (eds) *Treaty Making and Australia: Globalisation versus Sovereignty* (Federation Press, 1995).

(a) Customary International Law

Customary international law was the main source of international law prior to the formation of the United Nations. 'Custom' is the 'evidence of general practice as accepted as law,'<sup>94</sup> with state practice and *opinio juris* the two requirements for the formation of custom. State practice refers to general and consistent practice by states, while *opinio juris* means that the practice is followed out of a belief of legal obligation.<sup>95</sup> Once customary laws are formed by state practice they are *erga omnes*,<sup>96</sup> although it is generally accepted that a State may opt out of an evolving rule of general customary law by being a persistent objector.<sup>97</sup> Kontou suggests that although time is normally necessary for a practice to gain general acceptance, it is conceivable that a single act involving a large number of states and revealing a clear *opinio juris* may at least constitute prima facie evidence of customary law.<sup>98</sup> Human rights and environmental norms are examples of modern custom that develops quickly as they are adduced from multilateral treaties and declarations in international fora.<sup>99</sup> D'Amato argues that treaties *are* actions,<sup>100</sup> while other academics disagree and argue that treaties and declarations are a form *opinio juris* as they are statements about the legality of action, rather than examples of that action.<sup>101</sup>

When modern custom is derived from statements (in the form of treaties and certain General Assembly Declarations)<sup>102</sup> rather than practice, it can crystallise relatively rapidly. Not all declarations and treaties can be considered customary international law, nor do they need the acquiescence of all states.<sup>103</sup> It is widely

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<sup>94</sup> Statute of the International Court of Justice art 38(1)(b).

<sup>95</sup> Anthea Elizabeth Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) *The American Journal of International Law*.

<sup>96</sup> *North Sea Continental Shelf Cases (Germany v Denmark/Germany v Netherlands)* [1968] ICJ Rep 38.

<sup>97</sup> Nancy Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law* (Oxford University Press, 1994).

<sup>98</sup> Ibid.

<sup>99</sup> Roberts, above n 96, 758.

<sup>100</sup> Anthony D'Amato, *The Concept of Custom in International Law* (Cornell University Press, 1971).

<sup>101</sup> Michael Akehurst, 'Custom as a Source of International Law' (1974) 1(2) *British Year Book of International Law* 35.

<sup>102</sup> For example, in the *Nicaragua case (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America (Merits))* 1986 ICJ 14, the ICJ deemed as customary international law the *Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, GA Res. 2625, UN GAOR, 25<sup>th</sup> Sess., Supp. No. 28 at 121, UN Doc. A/8028 (1970).

<sup>103</sup> See dissenting judgement of Judge Tanka in the *South West Africa cases (Ethiopia v South Africa; Liberia v South Africa (Second Phase))* 1966 ICJ Rep 291. Judge Tanka argued that it was not possible for a few protesting states to prevent the rule of custom coming into existence, otherwise they would

accepted that some articles of the United Nations Universal Declaration on Human Rights have become customary international law,<sup>104</sup> but it is unclear whether provisions relating to obligations of non-state actors have accrued this status.<sup>105</sup>

International environmental law is a recent addition to international governance and as such state practice in environmental law is limited. There is a customary norm prohibiting transboundary pollution and despite the regular occurrence of transboundary pollution, *opinio juris* represents what the practice should be and supports Principle 21 of the Stockholm Declaration.<sup>106</sup> Given this evidence, the best interpretation leans in favour of customary international law prohibiting transboundary harm.<sup>107</sup>

Human rights established as customary international law include:

- war crimes, crimes against humanity and genocide;<sup>108</sup>
- apartheid;<sup>109</sup>
- slavery and slave trading;<sup>110</sup>
- torture and cruel, inhuman or degrading treatment or punishment;<sup>111</sup>
- rights guaranteed by the four Geneva Conventions 1949.<sup>112</sup>

Professor Gillian Triggs includes 13 further human rights as having entered customary international law. These include prohibitions against systemic discrimination on grounds of race, religion or gender; prolonged arbitrary

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have veto over the formation of customary international law

<sup>104</sup> International Council on Human Rights Policy, 'Beyond Voluntarism: Human Rights and the Developing Legal Obligations of Companies' (2002).

<sup>105</sup> David Kinley and Junko Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) *Virginia Journal of International Law* 931, 949.

<sup>106</sup> Declaration of the United Nations Conference on the Human Environment, Stockholm, UN Doc. A/CONF.48/14/Rev.1 (16 June 1972). Principle 21 was reiterated (in slightly modified form) in Rio Declaration on Environment and Development, UN Doc. A/CONF.151/5/Rev.1 (1992), reprinted in 31 ILM 874 (1992).

<sup>107</sup> Roberts, above n 96, 756.

<sup>108</sup> *Rome Statute of the International Criminal Court*, A/CONF.183/9 (17 July 1998) art 5.

<sup>109</sup> *International Convention for the Suppression and Punishment of the Crime of Apartheid*, opened for signature 20 November 1973, 1015 UNTS 243 (entered into force 18 July 1976).

<sup>110</sup> The ICJ in *Barcelona Traction, Light and Power Company (Belgium v Spain)* [1970] ICJ Rep 44, 3 found that the 'prohibition against slavery has entered into the general body of international law'.

<sup>111</sup> *United Nations Convention Against Torture and Other Cruel Inhumane or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 112 (entered into force 26 June 1987).

<sup>112</sup> Theodor Meron, 'The Geneva Conventions as Customary Law' (1987) 81 *American Journal of International Law*.

detention; freedom to marry; and self-determination of peoples.<sup>113</sup> Due to widespread and overt state practice of such as discrimination against women in many middle-eastern states (for example), widespread arbitrary detention<sup>114</sup> and other rights ratified in international covenants, only those human rights subject to both *opinio juris* and widespread state practice are considered in this thesis as customary international law.

(i) *Jus Cogens*

*Jus cogens* stand at the apex of international law. *Jus cogens* are norms defined in the *Vienna Convention on the Law of Treaties* as those principles of law

accepted and recognized by the international community of states as a whole, ...from which no derogation is permitted and which can be modified only by a subsequent norm of general international law.<sup>115</sup>

The norms of *jus cogens* include the prohibitions against slavery, torture, aggression, piracy and genocide – those practices that ‘shock the conscience of mankind.’<sup>116</sup> There is some argument that *jus cogens* laws are not customary at all, because they are binding upon all states and exist irrespective of actual state practice.

(ii) *Liability For Corporations Under Customary International Law*

Rio Tinto argued in *Sarei* that it is not liable for genocide in Bougainville as it is not a state party to the Genocide Convention. Schoeder J upheld *Sarei et al's* appeal, stating that the ICJ has made it clear that a state may be responsible for genocide committed by groups or persons whose actions are attributable to states.<sup>117</sup> Schoeder

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<sup>113</sup> Gillian Triggs, *International Law – Contemporary Principles and Practices* (LexisNexis Butterworths, 2006).

<sup>114</sup> For a discussion of the widespread practice of arbitrary detention and the United Nations Working Group on Arbitrary Detention, see Jared Genser and Margaret Winterkorn-Meikle, 'The Intersection of Politics and International Law: The United Nations Working Group on Arbitrary Detention in Theory and Practice' (2008) 39 *Columbia Human Rights Law Review*.

<sup>115</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 53.

<sup>116</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep. 15, 23.

<sup>117</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Judgment)* [2007] ICJ Reports 43, 26 February 2007 ('*Bosnia and Herzegovina Case*').

J continued that ICJ's clarity about collective responsibility in the *Bosnia and Herzegovina* advisory opinion implies that organizational actors such as corporations or paramilitary groups can commit genocide.<sup>118</sup> The universal nature of the prohibition against genocide is so absolute that it is inconsistent with the *jus cogens* norm that an actor can avoid liability by incorporation. The ICJ further held

[i]t would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control.<sup>119</sup>

(iii) *Customary International Law And Rio Tinto*

Table 3 is a qualitative desktop analysis of Rio Tinto's adherence to customary environmental and international laws in Australia, PNG (Panguna), and Indonesia (Grasberg and Kelian). Rio Tinto's literature states that the company abides by the laws of the host nations,<sup>120</sup> so the host nations' adherence to customary international human rights and environmental law is included in the table.

Table 3 - Rio Tinto's Adherence to Customary International Laws in Indonesia, PNG and Australia

	Australia	Indonesia	PNG	Aus - Rio	Panguna	Grasberg	Kelian
Transboundary pollution							
War Crimes, against humanity, genocide.		<b>Breach</b> West Papua – crimes against humanity, war crimes	<b>Breach</b> War crimes, crimes against humanity, genocide in Bougainville		<b>Breach</b> Sarei v Rio Tinto – Somare blames Rio Tinto in court documents	<b>Breach</b> Documented by Jayapura Catholic Church, Aus Council for Overseas Aid – company finances paramilitary	
Apartheid		<b>Breach*</b>					

<sup>118</sup> *Sarei v Rio Tinto*, [22].

<sup>119</sup> *Bosnia and Herzegovina* (Judgement ICJ 26 February 2007), [166] cited in *Sarei v Rio Tinto*.

<sup>120</sup> Rio Tinto, Human Rights Guidance, October 2003.

Torture, cruel punishment		<b>Breach</b> – continuing ongoing torture and cruel and unusual punishment around Grasberg concession	<b>Breach</b> Documented at Panguna mine. PNGDF responsible for committing crimes		<b>Breach</b> Documented at Panguna, Rio Tinto implicated by various sources including former PM	<b>Breach</b> Continuing and ongoing torture and cruel and unusual punishment by Indonesian security financed by company	
Geneva		<b>Breach</b> Civilians targeted in civil war, assassination after hostilities ended	<b>Breach</b> Extrajudicial execution, humiliating and degrading treatment, mutilation, civilians targeted		<b>Breach</b> Civilians targeted in civil war, assassination after hostilities ended	<b>Breach</b> Extrajudicial execution, humiliating and degrading treatment, mutilation, civilians targeted	

\* while not a state policy, Indonesian state practice against West Papuans amounts to apartheid.

Rio Tinto stands accused of war crimes and crimes against humanity and genocide at Panguna Mine in Bougainville, discussed below. Genocide has the status of a *jus cogens* norm<sup>121</sup> and has been criminalized by all international tribunals<sup>122</sup> and its prohibiting instrument, the *Genocide Convention*,<sup>123</sup> has been ratified by more than 140 nations. The prohibition applies irrespective of peace or war and irrespective of States' ratification.

The prohibition against genocide is both customary and *jus cogens*. The plaintiffs in *Sarei v Rio Tinto* allege Rio Tinto has committed *inter alia* genocide in Bougainville, and after ten years have had the right to have their case heard under the US *Alien Tort Claims Act*. The 9<sup>th</sup> Circuit Court upheld the right to be heard, stating the prohibition against genocide is a specific, universal, and obligatory internationally accepted norm, and the *jus cogens* prohibition on genocide extends to corporations.<sup>124</sup> Schoeder J said the plaintiffs' allegation that 'Rio Tinto's worldwide modus operandi' of 'part of a pattern of behavior it has perpetrated throughout the world where it has regarded the non Caucasian indigenous people who live in the areas in which it is exploiting natural resources as racially inferior and expendable'

<sup>121</sup> *Bosnia and Herzegovina* (Judgement ICJ 26 February 2007).

<sup>122</sup> *Rome Statute of the International Criminal Court*, A/CONF.183/9 (17 July 1998) art 6.

<sup>123</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, adopted by GA Res 260 (III) A, 7 UNTS 277 (9 December 1948).

<sup>124</sup> United States Ninth Circuit Court, No. 02-56256 D.C. No. 2:00-cv-11695- MMM-MAN, Filed 25 October 2011.



justified restoring the genocide claim to the case.<sup>125</sup>

The plaintiffs allege war crimes in the form of murder against the civilian population of Bougainville during the non-international armed conflict in violation of Common Article III of the *Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*.<sup>126 127</sup> The Ninth Circuit Court has upheld the plaintiffs' claims, and noted that multinational corporations may be liable under the *Alien Tort Claims Act* for war crimes<sup>128</sup>. In allowing the case to proceed, Schroeder J found the complainants adequately alleged war crimes claims, to wit:

[T]hat Rio Tinto induced the military action and intended such action, “to forcibly displace and destroy plaintiffs and members of the Class.” According to Plaintiffs, Rio Tinto “understood and intended” that their actions would “likely result in military action by the PNG and intended such action take place even if it meant the death and/or injury of residents.” Plaintiffs also allege that Rio Tinto “understood that it had a great deal of control over the situation” and “knew” that this was the only way it could reopen its profitable mine. Plaintiffs allege that Rio Tinto solicited the military action for its own private ends and directed the military response even “while reports of war crimes surfaced.”.....Plaintiffs allege that Rio Tinto issued the PNG government “an ultimatum”: displace the local residents interfering with its mining operations, no matter the means, or Rio would abandon all investments in PNG. When the PNG government employed military means to fulfil Rio's demands, Plaintiffs allege, Rio provided the PNG military helicopters and vehicles to carry out the operations even after reports of war crimes became public.<sup>129</sup>

Schroeder J upheld war crimes claims on Rio Tinto on grounds of PNG's naval blockade of Bougainville. Plaintiffs allege Rio Tinto senior managers encouraged the blockade to “starve the bastards out...” Rio Tinto allegedly assured the PNG government that continued maintenance of the blockade was enough to prevent the company withdrawing from PNG, while the company simultaneously tried to suppress reporting of the growing humanitarian crisis on Bougainville.<sup>130</sup> The Ninth Circuit Court did not uphold the complaint of crimes against humanity, except with

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<sup>125</sup> Ibid [25].

<sup>126</sup> Ibid [26].

<sup>127</sup> *International Committee of the Red Cross, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)* 12 August 1949, 75 UNTS 287.

<sup>128</sup> *Sinaltrainal v Coca-Cola Co.*, 578 F. 3d 1252, 1263 (11<sup>th</sup> Cir. 2009).

<sup>129</sup> *Sarei v Rio Tinto* [30].

<sup>130</sup> Ibid.

reference to genocide.

Some commentators argue that the right to a healthy environment has crystallized into customary international law.<sup>131</sup> This thesis asserts that the right to a healthy environment is a part of binding international treaty law, but not customary international law given widespread state practice of serious polluting events and the 'soft' nature of environmental treaty law (discussed below).

The Grasberg mine has long been the subject of allegations of serious human rights abuses. The Indonesian human rights commission, Komnas HAM, found clear and identifiable evidence of indiscriminate killings and torture in the period October 1994 – June 1995. The prohibition on torture is customary international law, and along with those acts of torture identified by Komnas HAM, the Australian Council for Overseas Aid documented torture by Indonesian armed forces acting as Freeport-Rio Tinto security 1995,<sup>132</sup> and in 2008 the Special Rapporteur on Torture documented new and further evidence.<sup>133</sup> While Rio Tinto is not explicitly mentioned as perpetrating crimes against humanity in Yale Law School's Human Rights Clinic, its Freeport mine and state security arrangements have been found to perpetrate crimes against humanity in and around the mine concession site. Rio Tinto's conduct at Kelian has constituted breaches of international human rights laws, but on evidence was not as grievous to constitute crimes against customary international law.

The collation of Rio Tinto's conduct with respect to customary law outside of Australia supports the contention of the plaintiffs in *Sarei*, that the company worldwide regards non-Caucasian indigenous peoples as racially inferior and expendable. Chapter III demonstrates that Rio Tinto's relations with Australian Indigenous people have been historically poor, but never inconsistent to customary international human rights law and norms.

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<sup>131</sup> See Rorque Romero, 'Using the US Alien Tort Claims Act for Environmental Torts: The Problem of Definability of the Right to a Healthy Environment' (2006) 16 *Centre of Energy, Petroleum Mineral Law & Policy Journal*, and Brief of Amici Curiae, Sierra Club and Earthrights International to *Beanal et al v Freeport McMoRan Inc* in the United States Court of Appeals (5th Cir. 1999).

<sup>132</sup> Australian Council For Overseas Aid, *Trouble at Freeport: Eyewitness accounts of West Papuan resistance to the Freeport-McMoRan mine in Irian Jaya (West Papua), Indonesia and Indonesian military repression* (April 1995).

<sup>133</sup> *Committee Against Torture Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Concluding observations of the Committee against Torture, Indonesia*, UN CAT, 40<sup>th</sup> sess, CAT/C/IDN/CO/2 (2 July 2008).

(b) *Treaty Law*

Most human rights and environmental laws are derived from treaties, and all of these have been drafted since the formation of the United Nations. This section looks at the human rights provisions of United Nations Charter, the major human rights and environmental law treaties, and the human rights and environmental protection provisions of the World Trade Organisation under the GATT Agreement.<sup>134</sup>

UN General Assembly established the International Law Commission in 1947 to promote the progressive development of international law and its codification. The General Assembly's specific interest was the development of binding human rights laws in an effort to prevent future world wars. The law of treaties was one of topics elected by the Commission at its first session as being suitable for codification, which resulted in the *Vienna Convention on the Law of Treaties 1969*.<sup>135</sup> Article 2(1)(a) defines a 'treaty' as 'international agreement concluded between States in written form and governed by international law'. A fundamental principle of the law of treaties is *pacta sunt servanda*:

Every treaty in force is binding upon the parties to it and must be performed in good faith.<sup>136</sup>

Contracting states cannot invoke internal law as justification for its failure to perform a treaty.<sup>137</sup> International law applies only to states, and moves to bind transnational corporations have not succeeded in international fora despite the fact that TNCs are now significant, of not dominant, global actors influencing state practise and international law.<sup>138</sup> Rio Tinto, as with many other extractive industry TNCs, commits to abide by international human rights law and the laws of host nations, as seen in *The way we work*. Reiterating the *Vienna Convention on the Law of Treaties* above, all treaties ratified by states are binding upon them and must be performed in good faith, and domestic law cannot be invoked as justification for non-performance

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<sup>134</sup> *General Agreement on Tariffs and Trade*, 55 UNTS 194 (1947).

<sup>135</sup> *Vienna Convention on the Law of Treaties 1969*, opened for signature 23 May 1969, 1152 UNTS331 (entered into force 27 January 1980).

<sup>136</sup> *Vienna Convention on the Law of Treaties 1969*, art 26.

<sup>137</sup> *Vienna Convention on the Law of Treaties 1969*, art 27.

<sup>138</sup> Philip Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalization' (1997) 3 *European Journal of International Law* 435.

of a treaty. The ratification status of key human rights and environmental treaties in Australia, Papua New Guinea and Indonesia, to which these countries have committed to abide by, is tabulated at section (vi).

The issue of rights, responsibilities and efforts to bind TNCs in international law in the age of globalisation is discussed in Chapter VI. International law can be characterised as 'hard' (binding) and 'soft' (non-binding) as discussed below.

(i) *Hard And Soft Law*

Hard laws are treaties that are binding on ratifying parties and have sanctioning bodies and enforcement mechanisms that may include the imposition of criminal law.<sup>139</sup> Hard law contains mandatory obligations using the words 'shall' and 'must' in the text. The human rights covenants and conventions stemming from the UDHR are binding on ratifying parties. The United Nations core human rights treaties are hard law. These are the:

- *International Convention on the Elimination of All Forms of Racial Discrimination* 1965 ('CERD');<sup>140</sup>
- *International Covenant on Civil and Political Rights* 1966 ('ICCPR');
- *International Covenant on Economic, Social and Cultural Rights* 1966 ('ICESR');
- *Convention on the Elimination of All Forms of Discrimination Against Women* 1979 ('CEDAW');<sup>141</sup>
- *Convention on the Rights of the Child* 1989 ('CRC').<sup>142</sup>

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<sup>139</sup> See for example *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994), art 216-218 & 220.

<sup>140</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

<sup>141</sup> *International Convention on the Elimination of All Forms of Discrimination Against Women*, Nations, adopted and opened for signature, ratification and accession by GA Res 34/180 of 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

<sup>142</sup> *Convention on the Rights of the Child*, adopted and opened for signature, ratification and accession by GA Res 44/25 of 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

International treaties are generally considered hard law, but the CRC is an anomaly in that it does not include an enforcement mechanism such as the right of action in an international tribunal or threat of sanctions, Jonathan Todres et al, *The U.N. Convention on the Rights of the Child: Analysis of Treaty Provisions and Implications of U.S. Ratification*. (Transnational Publishers, 2006). Australian defiance of the CRC is evidenced by mandatory sentencing of juveniles in some state jurisdictions, and mandatory detention of asylum-seeking children in onshore and offshore detention centres.

'Soft law' is a term in contrast to binding 'hard law' and signifies the lack of legally binding qualities of certain international instruments. Most United Nations Declarations fall into this category, including the UHDR and the *United Nations Declaration on the Rights on Indigenous Peoples*,<sup>143</sup> although as seen above, some of the articles reflect binding customary international law. United Nations General Assembly Resolutions are non-binding 'soft law' rules that may be later converted into legal rules.

Most international environmental conventions are soft law, as they are drafted with ambiguous or vague obligations. For example, Article 5 of the Convention on Biological Diversity<sup>144</sup> states

Each Contracting Party shall, *as far as possible and as appropriate*, cooperate with other Contracting Parties, directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity. (italics added).

Article 6 is similarly vague and ambiguous:

Each Contracting Party shall, *in accordance with its particular conditions and capabilities*:

(a) Develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which shall reflect, inter alia, the measures set out in this Convention relevant to the Contracting Party concerned; and

(b) Integrate, *as far as possible and as appropriate*, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies (italics added)

It is generally understood that 'soft law' creates and delineates goals to be achieved in the future and gives guidelines rather than strict obligations.<sup>145</sup>

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<sup>143</sup> *United Nations Declaration on the Rights on Indigenous Peoples*, GA Res 61/125, UN GAOR, 61<sup>st</sup> see, 107<sup>th</sup> plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).

<sup>144</sup> *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 142 (entered into force 29 December 1993).

<sup>145</sup> D'Amato, above n 101.

*(ii) International Human Rights Law And Generations Of Rights*

The modern human rights movement began after the atrocity of the Jewish Holocaust during World War II 'outraged the conscience of mankind'<sup>146</sup> While decisively drawn from a Western paradigm of natural law, most nations have signed to the major human rights instruments bestowing universality of human rights norms.<sup>147</sup> The modern concept of human rights places particular emphasis on equality, self-determination and universal peace. The 'Purposes of the United Nations' as set forth in the United Nations Charter are:

Article 1

- (2) To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
- (3) To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

*(iii) 'Generations' of human rights*

The international human rights framework has become more elaborate since its inception 60 years ago. The rights are often classed as first, second and third generation rights, drawing from the rallying cry of 'liberty, equality, fraternity' of the French Revolution.

Liberty rights are the first generation and are the core protection against excesses of State power, codified in the *ICCPR*. Second generation rights recognise that certain basic goods should be available to all people, such as economic subsistence, education, health and housing. These have been considered 'aspirational' by many

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<sup>146</sup> Universal Declaration of Human Rights, Preamble.

<sup>147</sup> The concept of 'Asian Values' is now seen to be a euphemism to justify the authoritarian regimes of China, Indonesia, Malaysia and Singapore in the 1990s, by both the Asian autocrats and Western chauvinists - Amartya Sen, 'Human Rights and Asian Values', Sixteenth Morgenthau Memorial Lecture on Ethics and Foreign Policy, Carnegie Council on Ethics and International Affairs, New York 1997.

States, and were refused ratification by non-socialist leaders of the Cold War. The third generation rights are those communal aspects of human being identified as the right to food, decent environment, right to development and right to peace.<sup>148</sup> Third generation rights are collective human rights and take in minority groups, social identity and environmental protection for human well being. They are the most controversial and least utilized,<sup>149</sup> but can be drawn from the well-established human rights and environmental instrumentalities ratified by most States over the past 45 years.

For example, the third generation Right to Food is found in the second generation *ICESR* and the initiating human rights instrument, the *UDHR*. The 'Right to Environment' is a third generation right invoking the *Stockholm Declaration* of 1972 and the *Right to Development*.<sup>150</sup> There is no explicit right to environment as this was considered to incompatible with the UN Declaration on the Right to Development during negotiations at the *UN Conference on Environment and Development in Rio de Janeiro* in 1992. An implied right to environment is found in the *ICESCR* as discussed in the paper. The third generation 'Right to Peace' derives from the United Nations Charter,<sup>151</sup> the *Kellogg-Briand Pact* of 1928<sup>152</sup> and the Declaration on Principles of Friendly Relations.<sup>153</sup> Minority and Indigenous peoples' rights are also part of the third generation rights. The UN General Assembly adopted the *Declaration on the Rights of Indigenous Peoples*<sup>154</sup> in 2007, which again draws from previous international human rights instruments.

### *(iii) The Right To Self-Determination And Indigenous Peoples – A Comment*

Extractive resources are found largely on indigenous people's land. All of the case studies written in this thesis have involved Rio Tinto and state impacts on traditional homelands of indigenous peoples.

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<sup>148</sup> Stephen Marks, 'Emerging human rights: a new generation for the 1980s', (1981) 33 *Rutgers Law Review* 435.

<sup>149</sup> Anthony Langlois, 'Normative and Theoretical Foundations of Human Rights', Box 1.4, in Michael Goodhart (ed) *Human Rights, Politics and Practice*, (Oxford University Press, 2009).

<sup>150</sup> *Declaration on the Right to Development*, UN GAOR, 41<sup>st</sup> see, Annex, Agenda Item 101, 97<sup>th</sup> plen mtg, UN Doc. A/RES/4/128 (1987).

<sup>151</sup> United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, art 1.

<sup>152</sup> *General Treaty for the Renunciation of War* 1928, UKTS. 29 (1929), Cmnd. 3410; 94 LNTS 57.

<sup>153</sup> *General Assembly Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations* 1970, G.A. Resn 2625(XXV), 24 October 1970, adopted by the General Assembly without a vote.

<sup>154</sup> G.A Res 61/295, adopted on 13 September 2007, signed by Australia on 3 April 2009.

Prior to the *Native Title Act*, Rio Tinto's relations with Aboriginal people were poor. Growing community and political demands for justice for Aboriginal Australians in the early 1990s saw a major policy shift in Rio Tinto's dealings with indigenous people in Australia. A similar groundswell of public interest and political will has not occurred at the site of case studies of Rio Tinto's operations in Papua New Guinea or Indonesia. States' and Rio Tinto's conduct in Papua New Guinea and Indonesia (and post-policy change, arguably in Australia) is inconsistent with one of the most fundamental tenets of international human rights law – that of the right to self-determination.

The first article of the United Nations Charter articulates the universality of equal rights and self-determination.<sup>155</sup> The right to self-determination holds prominence as common Article 1 in the twin Human Rights Covenants of 1966 as a result of the quest for sovereignty and autonomy in many third world countries struggling for freedom from colonial domination.<sup>156</sup> Common Article 1(1) reads:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Some scholars have viewed the right to self-determination as a crystallization of norms of customary international law,<sup>157</sup> however extensive states' practice does not support this view.

Self-determination has been described as *lex obscura*, because outside of the colonial context no-one is very clear as to what it means.<sup>158</sup> The ambiguity of the legal definition occurs due to the strong presumption in international law in favour of

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<sup>155</sup> *United Nations Charter*, art 1(2).

<sup>156</sup> James Crawford, 'The Right of Self-Determination in International Law: Its Development and Future', in Philip Alston (ed) *People's Rights – Their rise and fall* (Oxford University Press, 2001) 7-67, 19.

<sup>157</sup> Forest Peoples Programme and Tebtebba Foundation, 'Indigenous People's Rights, Extractive Industries and Transnational and Other Business Enterprises', Submission to the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, 29 December 2006, 62.

<sup>158</sup> Crawford, above n 157, 10.



territorial integrity and against secession.<sup>159</sup> Further, the UN General Assembly has obscured the concept of self-determination by its oversight of clear cases of 'third world colonialism', including Ethiopia's annexation of Eritrea and Indonesia's contentious annexation of West Papua.<sup>160</sup> Crawford's conclusion, supported by Alston, is that except in colonial and quasi-colonial settings, the right of self-determination is inherently non-self-executing and cannot per se dictate the outcomes of any international arrangements. This conclusion is a more accurate reflection of the current state of self-determination in both international and domestic law.<sup>161</sup> While the ICJ has recognized 'self-determination' as *erga omnes*,<sup>162</sup> most states continue to deny indigenous peoples the right to self-determination and therefore justify lack of international consensus on the matter.<sup>163</sup>

(iv) *International Environmental Laws – The Quest For Sustainability*

Almost all international environmental laws are soft non-binding laws, principles and declarations.

Sustainable development issues were outlined by the 1987 Report of the World Commission on Environment and Development (WCED), *Our Common Future* (the Brundtland report).<sup>164</sup> This report was commissioned by the United Nations to propose long-term environmental strategies for achieving sustainable development. The Brundtland Report defined 'sustainable development' as development that meets the needs of present generations while not compromising the ability of future generations to meet their needs.<sup>165</sup> Sustainable development is generally understood to require environmental protection as 'an integral part of the development process'<sup>166</sup> and was acknowledged as such by the ICJ in the *Case Concerning the Gabčíkovo--*

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<sup>159</sup> Ibid, 64.

<sup>160</sup> Ibid, 20.

<sup>161</sup> Philip Alston, 'Introduction' to *Peoples' Rights*, above n 157 at 3.

<sup>162</sup> *Case Concerning East Timor (Portugal v Australia)* [1995] ICJ Rep 90 at 120 (*East Timor case*).

<sup>163</sup> US Representative to the UN, UN Doc. E/CN.4/2000/84 (1999), para 49, cited by Philip Alston, 'Peoples' Rights: Their Rise and Fall', in Alston, above n 157, 278.

<sup>164</sup> Gro Brundtland, *Our Common Future: The World Commission on Environment and Development*, UN GAOR, 42nd Sess, Supp. No. 25, UN Doc. A/42/25 (1987).

<sup>165</sup> Ibid [27].

<sup>166</sup> Rio Declaration on Environment and Development, in *Report of the United Nations Conference on Environment and Development*, UN Doc. A/CONF.151/26 (Vol. I), 12 August 1992, Annex I. Principle 4.

*Nagymaros Project*.<sup>167</sup>

Owing to new scientific insights and to a growing awareness of the risks for mankind - for present and future generations - of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.<sup>168</sup>

In 1992, the need to develop policies and principles for effecting sustainable development was revisited at the United Nations Conference on Environment and Development (UNCED), the 'Earth Summit' at Rio in June 1992. The formal documents emerging from the Earth Summit were the Rio Declaration (statement of general principles),<sup>169</sup> Agenda 21<sup>170</sup> (an action plan), the *United Nations Framework on Climate Change*<sup>171</sup> and the *Convention on Biological Diversity*.<sup>172</sup> The Rio Declaration sets out 27 principles to guide the international community in achieving sustainable development. These principles include: states should recognize and duly support the identity, culture and interests of indigenous people to enable their effective participation in the achievement of sustainable development (Principle 22),<sup>173</sup> intergenerational equity (Principle 3), the reduction of unsustainable patterns of production and consumption (Principle 8) and the 'precautionary principle' (Principle 15). The overwhelming international acceptance of the Rio Declaration paves the way for its eventual inclusion into international customary law.

(vi) *International Human Rights Law, Environmental Law and Rio Tinto*

The ratification status of key human rights and environmental treaties in Australia,

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<sup>167</sup> *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep. 7.

<sup>168</sup> *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* (Judgement) [78].

<sup>169</sup> Report of the UN Conference on Environment and Development (Earth Summit), Annex 1 *Rio Declaration on Environment and Development* (Rio de Janeiro, 3–14 June 1992).

<sup>170</sup> *Ibid.*

<sup>171</sup> *United Nations Framework on Climate Change*, opened for signature 4 June 1992, 1771 UNTS 164 (entered into force 21 March 1994).

<sup>172</sup> *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 142 (entered into force 29 December 1993).

<sup>173</sup> Report of the United Nations Conference on Environment and Development; A/CONF.151/26 (Vol. I)(1992).

Papua New Guinea and Indonesia is shown below:

*Convention on the Prevention and Punishment of the Crime of Genocide*, Paris, 9 December 1948, entered into force 12 January 1951.

Australia	Signed 11 December 1948; ratified 8 July 1949
PNG	27 January 1982 (accession)
Indonesia	

*International Convention on the Elimination of All Forms of Racial Discrimination*, New York, 7 March 1965.

Australia	Signed 13 October 1966; ratified 30 September 1975
PNG	27 January 1982 (accession)
Indonesia	25 June 1999 (accession)

*International Covenant on Civil and Political Rights*, New York, 16 December 1966, entered into force 3 January 1976, entered into force 23 March 1976.

Australia	Signed 18 December 1972, ratified 13 August 1980
PNG	21 July 2008 (accession)
Indonesia	23 February 2008 (accession)

*International Covenant on Economic, Social and Cultural Rights*, New York, 16 December 1966, entered into force 3 January 1976.

Australia	Signed 18 December 1972, ratified 10 December 1975.
PNG	21 July 2008 (accession)
Indonesia	23 February 2006 (accession)

*Convention on the Elimination of All Forms of Discrimination Against Women*, New York, 18 December 1979, entered into force 3 September 1981.

Australia	Signed 17 July 1980, ratified 28 July 1983
PNG	12 January 1995 (accession)
Indonesia	Signed 29 July 1980, ratified 13 September 1984

*Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.* New York, 10 December 1984, entered into force 26 June 1987.

Australia	Signed 10 December 1985, ratified 8 August 1989
PNG	
Indonesia	Signed 23 Oct 1985, ratified 28 Oct 1998

*Convention on the Rights of the Child.* New York, 20 November 1989, entered into force 2 September 1990.

Australia	Signed 22 August 1990, ratified 17 December 1990
PNG	Signed 30 September 1990, ratified 2 March 1993
Indonesia	Signed 26 January 1990, ratified 5 September 1990

*International Convention for the Protection of All Persons from Enforced Disappearance.* New York, 20 December 2006, entered into force 23 December 2010.

Australia	
PNG	
Indonesia	Signed 27 September 2010

*United Nations Framework Convention on Climate Change.* New York, 9 May 1992, entered into force 21 March 1994.

Australia	Signed 4 June 1992, ratified 30 December 1992
PNG	Signed 13 June 1992, ratified 16 March 1993
Indonesia	Signed 5 June 1992, ratified 23 August 1994

*Convention on Biological Diversity.* Rio de Janeiro, 5 June 1992, entered into force 29 December 1993.

Australia	Signed 5 June 1992, ratified 18 June 1993
PNG	Signed 13 June 1992, ratified 16 March 1993
Indonesia	Signed 5 June 1992, ratified 23 August 1994

*United Nations Declaration on the Rights of Indigenous Peoples* (13 September 2007) (A/RES/61/295).

Indonesia and Papua New Guinea signed the General Assembly resolution at the time of the vote, Australia reversed its 2007 vote against the resolution in 2009.

*Rio Declaration on Environment and Development*,<sup>174</sup> Rio de Janeiro, 3-14 June 1992, endorsed without a vote at the UN General Assembly.

*Declaration on the Protection of All Persons from Enforced Disappearance*<sup>175</sup> (18 December 1992),

This declaration has not been signed by Australia, Indonesia or Papua New Guinea.

*Declaration on the Right to Development* (4 December 1986)

Articles 5 and 6 provide that states shall take resolute steps to 'eliminate the massive and flagrant violations' of peoples affected by apartheid, colonisation and all forms of racism and racial discrimination and cooperating with a view to promoting, encouraging and strengthening universal respect for the observance of all human rights.

As stated above, declarations are aspirational only, with no binding or enforcement mechanisms. Many indigenous groups hold the *Declaration of the Rights of Indigenous Peoples* to carry far more weight morally and legally than it does in fact.

The above tabulations indicate at the very least some states signed treaties without the political will or capacity to abide by them. This is particularly true with respect to Indonesia and PNG, as these states have accessed to treaties such as the *ICCPR*, *IECSR* and *CERD* yet state practice and state enforcement of human rights violations by transnational corporations has been poor to non-existent, while human rights defenders have been persecuted in West Papua.

(v) *Conclusion to Part 2*

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<sup>174</sup> *Rio Declaration on Environment and Development*, para 2.

<sup>175</sup> *Declaration on the Protection of All Persons from Enforced Disappearance*, A/Res/47/133 (18 December 1992).

This section demonstrates that although Rio Tinto has stated in its policy documents that it will abide by human rights as contained in the *UDHR* (and divided into the twin Covenants of 1966), its practice in the Asia-Pacific region is at odds with its rhetoric. Transparency International has found these states to have high levels of corruption and poor governance, suggesting Rio's adherence to human rights treaty and customary norms is dependent upon strong, non-corrupt government enforcing articles contained in treaties. While I have not conducted a comprehensive comparative study of all Rio Tinto's activities across the globe, a cursory glance at 'Rio Tinto' on the Google search engine demonstrates worldwide criticism for global human rights, environmental damage and regressive workplace relations, further supporting the thesis of CSR as rhetoric over substance.

#### D. Conclusion

Chapter V began by critiquing Rio Tinto's flagship policy document '*The way we work*' and inconsistencies with stated values with its practices in Panguna, Kelian and Grasberg mines. Corporate reputation is lucrative intangible asset to companies including Rio Tinto, and convincing shareholders and governments of its compliance to human rights and international environmental norms is an important component of reputation management. To achieve this end Rio Tinto engages in 'greenwash' and 'bluewash', projecting an international image of good corporate citizen while causing severe environmental damage and being both vicariously and, according to new evidence produced in *Sarei*, directly responsible for serious human rights abuses. Even in Australia, Rio Tinto has discriminated against unionists contrary to its claims of supporting freedom of association both in *The way we work* and in international human rights instruments. Rio's legal team, Freehills, helped draft the Coalition government's *Work Choices* laws, and it is apparent that in Australia, Rio Tinto works within the political system to the limited extent of changing workplace relations conducive to its interests. Rio Tinto has positive relationships with Aboriginal people in Australia in line with the public mood, whereas the public sentiment is more ambivalent with respect to unionism and workplace relations. Chapter V demonstrates that in its sphere of influence, Rio Tinto abides by its stated CSR commitments when operating in Australia, but departs from CSR when in remote and generally inaccessible regions in developing nations with poor

governance structures and high rate of endemic official corruption.

The following chapter extrapolates the conduct of Rio Tinto – a Global Compact founder and blue-chip transnational corporation – to the conduct of other transnational extractive industry corporations and discusses the competing interests of states and businesses under international law with a view to advancing human rights and environmental protection through international and home state law.







## CHAPTER VI – CSR IN THE GLOBALISED WORLD

Chapter V demonstrated that one of Australia's most celebrated socially responsible companies acts in a less than socially responsible manner in states with high levels of public corruption and low levels of domestic and international law enforcement. Even in Australia, the state is influenced by the power wielded by TNCs. This is evidenced, for example, by the mining industry's \$100 million 'war chest' to campaign against the proposed mining super profits tax, its fierce lobbying against the *Native Title Act*, and subsequent successful lobbying for the dilutory amendments in to the *Native Title Act* in 1998. The latter effectively removed native title groups' right to negotiate on pastoral estates that cover 40 per cent of Australia.<sup>1</sup> Rio Tinto's lawyers drafted Australian workplace relations anti-union laws and its executives were instrumental in the 'greenhouse mafia', whose intrusion into Australian politics was devised by the ruling classes to obfuscate action on greenhouse gas reduction initiatives. This discussion extrapolates Rio Tinto's commitment to stated CSR values in Australia and the region to other Australian-listed companies by virtue of Rio Tinto's standing as a blue-chip investment highly lauded by Australian CSR certifiers, the Australian Human Rights Commission and the Australian government for its commitment to CSR. As a high profile company seeking to maintain its valuable reputation for abiding by human rights and environmental stewardship approvals, Rio Tinto falls short on CSR when the spotlight of social and environmental accountability illuminates only the well-managed and regulated mines. Other Australian-listed companies have similar paucity of CSR commitment overseas, but unlike Rio Tinto, most of these companies do not have such a the incentive of such valuable and marketable reputations to uphold particular stringent human rights and environmental values. For example, in early 2000 the Australian joint venture Esmeralda gold mine accidentally released 100 tonnes of cyanide from its Romanian operations contaminating 400 km of rivers in Hungary and the former Yugoslavia. The release caused an extensive dead zone along the Serbian section of the Somes River and polluted the drinking water of 2.5 million Hungarians.

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<sup>1</sup> Jon Altman, 'Indigenous communities, miners and the state in Australia', Jon Altman and David Martin (eds) *Power, Culture, Economy – Indigenous Australians and Mining* (Research Monograph No. 30, Centre for Aboriginal Economic Policy Research, Australian National University, 2009).

Esmeralda's Australian mine operators denied all responsibility.<sup>2</sup> Australian companies Lihir and Newcrest (merged in 2011) engage in 'DSTP' – 'Deep Sea Tailings Placement' – the dumping of untreated tailings below 100 m of sea-water. This is the marine equivalent to 'riverine disposal' and is utilized as a cost effective<sup>3</sup> method of tailings disposal by the Ramu nickel mine (minority owned by Australian company Highlands Pacific)<sup>4</sup> and at the time of writing, contemplated by Australian copper and molybdenum miners, Marengo Mining.<sup>5</sup> The term 'cost effective' is used by Rio Tinto to explain dumping tailings directly into river systems, and is used by companies seeking to externalise their costs. These are but small set of Australian mines operating inconsistently with general CSR principles.

Evidence documented in this thesis demonstrates that the high profile mining company Rio Tinto fails to adhere to its stated CSR principles outside of Australia, a state with relatively low corruption and high participation in the political process. Evidence touched on above indicates low levels of adherence to environmental laws and by extension, human rights laws by smaller and less public companies. It is therefore logical to assume that lower profile Australian extractive industries operate at similar or poorer levels of corporate social responsibility in states with high levels of poverty (low HDI), high levels of corruption and few avenues for law enforcement if indeed human rights and environmental laws are part of those states' domestic law.

This chapter draws from the study of Rio Tinto and its adherence to CSR in Australia and its regional operations, and investigates the competing interests of states' obligations to human rights and environmental protection and business in international law to explain the discrepancies noted in the study. It begins by discussing sovereignty and globalisation, as these concepts are integral to state and international law. Globalisation has enabled transnational corporations to attain levels of power

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<sup>2</sup> Guy Gugliotta, 'A Gold Mine's 'Toxic Bullet' – Romanian Cyanide Spill Reaches the Danube', *Washington Post* (Washington) 15 February 2000, 1.

<sup>3</sup> The term 'cost effective' is used by Rio Tinto to explain dumping tailings directly into river systems, and used by companies seeking to externalise their costs.

<sup>4</sup> Highlands Pacific initially developed the Ramu nickel mine, and is now the 8.56% minority shareholder with Metallurgical Corp of China (85%) while the PNG government holds the remainder. The project is expected to yield 31,150 tonnes of nickel and 3,300 tonnes of cobalt a year for 20 years. Indigenous landholders recently lost an appeal to prevent sea tailings dumping, but the decision is under a cloud as one of the Supreme Court judges who found against the landholders is the former managing partner of Highland Pacific's law firm and was involved in the original waste dump litigation.

<sup>5</sup> Marengo Mining, 'Yandera Copper-Molybdenum-Gold Project, PNG Development Update (Media Release, 26 July 2011).

unanticipated by the founding members of the United Nations and caused a jurisdictional gap in international human rights and environmental law governance. However, community groups and NGOs have conversely been empowered by the extensive globalisation of communications technology. Controversial issues in remote lands can be uploaded onto the internet and displayed to a global audience that fuels public's discontent at ethically irresponsible business practices, making the globalisation of communications technology a powerful agent of change.<sup>6</sup> Public discontent then compels companies to act responsibly, or be *seen* to act responsibly and promotes growth of CSR industries helping companies to manage reputation.

The success of neoliberalism as an international governance model is critiqued as a driver of environmental degradation and human rights abuses, especially in third world states lacking organised and politically adept middle classes required to drive beneficial changes to business practices. A brief discussion of the World Trade Organisation provides a context to the success of neoliberalism and demonstrates how neoliberalism's intrusion into United Nations organs and agencies has enabled CSR to maintain the status quo of corporate human rights and environmental malfeasance while in some measure appeasing first world social consciences. The chapter then outlines international efforts to regulate transnational corporations addressing the scuttled UN Norms and concludes that the current international neoliberal paradigm has created a 'transnational historic bloc' ensuring business-as-usual for environmental and human rights transgressing corporations.

#### A. Globalisation And The Fractured Nation-State

Globalisation has changed the nature of Westphalian sovereignty that was the dominant international relations system since the *Peace of Westphalia* treaty in 1648 until the formation of the United Nations three hundred years later. Westphalian sovereignty is

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<sup>6</sup> S. D. Potts and I. L. Matuszewski, 'Ethics and Corporate Governance' (2004) 12(2) *Corporate Governance: An International Review* 177. Russia Today reported that another TNC, Apple, has patented a piece of technology which would allow government and police to block transmission of information, including video and photographs, from any public gathering or venue they deem 'sensitive' and 'protected from externalities.' 'No shooting at protest? Police may block mobile devices via Apple', *Russia Today* (online) 5 September 2012. This new initiative would be a useful tool to prevent the dissemination of incriminating corporate information.

predicated on states non-intervention in other states' affairs, but the predication is also 'organised hypocrisy' because states have never stopped interfering in the domestic affairs of other states, of which the powerful states have a long and continuing history.<sup>7</sup> Globalisation has advanced the power of non-state actors to the extent that they too are able to interfere in the domestic affairs of states as seen in the case study of Rio Tinto both in Australia and around the world. Interference is more overt in more disadvantaged or autocratic nations.

## 1 *The Diminution Of Sovereignty*

### (a) *Sovereignty*

Sovereignty is the defining feature of the State and of the United Nations sovereign equality.<sup>8</sup> The word 'sovereign' derives from the French '*souverain*', meaning a supreme ruler unaccountable to anybody, except perhaps, God.<sup>9</sup> The 16<sup>th</sup> Century definition of 'sovereignty as 'the state's supreme authority over citizens and subjects'<sup>10</sup> is still essentially valid today.<sup>11</sup> Sixteenth century Europe comprised of about 500 independent and uncoordinated political units, which was reduced to 25 by the turn of the twentieth century. The tiny feudal kingdoms, duchies and principalities were in constant civil war or religious conflict, and their primary political reference point was 'God.'<sup>12</sup> Thomas Hobbes expanded upon this idea of sovereignty with the social contract, in which citizens simultaneously surrendered their rights of self-government to a powerful single authority acting on their behalf and creating the conditions for effective political rule and long term peace. Beyond the State's sphere of influence was always the threat of constant warfare, but within its borders, social order could be maintained.<sup>13</sup> The *Peace of Westphalia 1648* entrenched the theories of sovereignty as its own

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<sup>7</sup> Stephen Krasner cited in Josef Joffe, 'Rethinking the Nation-State: The Many Meanings of Sovereignty' (1999) *Foreign Affairs*, November/December.

<sup>8</sup> *United Nations Charter*, art 2(1).

<sup>9</sup> Ivo Duchacek, *Nations and Men; An Introduction to International Politics* (Holt, Rinehart and Winston, 1966) 24.

<sup>10</sup> Jean Bodin, *Six Livres De La Republique* (1576).

<sup>11</sup> John Stoessinger, 'The anatomy of the nation-state and the nature of power' in 23-35.

<sup>12</sup> David Held, Anthony McGrew, David Goldblatt and Jonathon Perraton, *Global Transformation* (Stanford University Press, 1999) 34.

<sup>13</sup> *Ibid*, 41.

supreme authority and the autonomous equality of states.<sup>14</sup> These principles are articulated in Article 2(1) of the United Nations Charter. The core elements of sovereignty were codified in the *Montevideo Convention on the Rights and Duties of States 1933* to be: a) a core permanent population; b) a defined territory and c) a functioning government,<sup>15</sup> reflecting customary international law.

*(b) Weakening Of Westphalian Sovereignty*

Sovereignty has been challenged by globalisation and neoliberalism, whereby increasingly international forms of economic arrangements and networks have become the dominant paradigm of the international system. Transnational governmental networks have enabled powerful states to impose their regulatory models upon weaker states, challenging both Westphalian sovereignty<sup>16</sup> and the United Nations Charter for peaceable social and economic order. These multinational networks include bilateral treaties and multi-lateral treaties under both United Nations and World Trade Organisation entities. This diminution of states' sovereignty escalated after the end of the Cold War when neo-liberalism ascended to the dominant paradigm of global economic and political order.

*(i) Departure From The Charter To The Market*

The United Nations was predicated on the inviolable sovereignty of nations, with only the modifying Article 2(7) detracting from this tenet in the United Nations Charter.<sup>17</sup> The framers of the UN Charter did not anticipate the incredible rise in global power of transnational corporations when the Charter was adopted in 1948, and UN agencies worked amicably with transnational corporations until the late 1960s. During the 1970s the power of corporations increased dramatically as a

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<sup>14</sup> Ibid, 74.

<sup>15</sup> *Montevideo Convention on the Rights and Duties of States 1933*, signed 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934), art 1.

<sup>16</sup> Joshua Meltzer, 'State Sovereignty and the Legitimacy of the WTO' [2005] *University of Pennsylvania Journal of International Economic Law* 693.

<sup>17</sup> The special exception to sovereignty under Article 2(7) was negotiated by Australia's post-war external affairs minister, Dr Herbert Vere Evatt, an instrumental foundation member of the United Nations, and first President of the General Assembly. Article 2(7) reads '*Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.*' The word 'solely' was replaced by 'essentially', removing the Westphalian doctrine of state sovereignty from such events as intra-state crimes against humanity and other internal gross human rights violations.

series of flashpoints in many states created global insecurity that was conducive to the implementation of Milton Friedman's and the Chicago School of Economics 'shock doctrine' methods for opening markets.<sup>18</sup> Global insecurity in the 1970s was exacerbated by collapse of the Bretton Woods system of fixed exchange rates, the Vietnam War and OPEC oil shocks.<sup>19</sup> Friedman's advocacy of market capitalism free from government intervention or regulation and was adopted as economic policy by the international economic and trade institutions and eventually to the United Nations. These new policies fostered TNC expansion and power.

Before neoliberal ascendancy, international pressure compelled the United Nations Economic and Social Council to study the impacts of TNCs on economic development and international relations. The United Nations Permanent Committee on Transnational Corporations (UNCTC) was established in 1974 to study the feasibility of producing a binding multilateral agreement on TNCs. It provided pioneering documentation on global activities<sup>20</sup> until it was disbanded in 1993 and elements transferred to the TNC-friendly United Nations Committee on Trade and Development (UNCTAD).<sup>21</sup>

## 2 *Globalization And The Ascendency Of TNCs As Powerful Non-State Actors*

### (a) *Globalisation*

Globalisation has many definitions and many critiques. Where some commentators describe globalisation as a process embodying a transformation in the spatial relations and transactions generating vast transcontinental flows of activity, interaction and exercise of power,<sup>22</sup> Ulrich Beck provides a more succinct view. Beck describes globalization as

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<sup>18</sup> See Naomi Klein, *The Shock Doctrine – The Rise of Disaster Capitalism* (Knopf, Canada, 2007).

<sup>19</sup> United Nations Intellectual History Project, Ralph Bunche Institute for International Studies (Briefing Note, Number 17, July 2009).

<sup>20</sup> Ibid.

<sup>21</sup> Oliver Hoedman, 'Rio + 20 and the greenwashing of the global economy' Transnational Institute, January 2012 <<http://www.tni.org/article/rio20-and-greenwashing-global-economy>>. See also Diane Elson, 'The UN Global Compact: Part of the solution or part of the problem?' in Lourdes Berenia and Savitri Bisnath (eds), *Global Tensions* (Routledge, 2004).

<sup>22</sup> Held et al, above n 12.

the processes through which sovereign nation states are criss-crossed and undermined by trans-national actors with varying prospects of power, orientations, identities and networks.<sup>23</sup>

Globalisation has been defined in three waves by Shiva<sup>24</sup> all resulting in exploitation of the third world states for the benefit of first world economic powers. The activities of TNCs and capital in third world nations as demonstrated by the case study on Rio Tinto confirm globalisation as recolonisation of the third world by the first world. Shiva describes first wave of globalisation as the colonization of America, Africa, Asia and Australia by European powers over the 1,500 years until pre-WWII; and the second wave as post-World War Two-imposed Western concept of 'development' following the foundation of the Bretton Woods institutions, the United Nations and its organs. The third wave is 'free trade', which has elevated re-colonisation not only a mode of economic arrangement, but also 'the cultural hegemony of modernity.'<sup>25</sup> The ascendancy of TNCs in a neoliberal international paradigm has been brought about by recolonisation (or neocolonisation) in which third world and indigenous peoples' lives are subjugated by the institutions of economic globalisation and their human rights and livelihoods negatively impacted.

All organs of the State have been weakened by globalization and its accompanying neo-liberal agenda.<sup>26</sup> The infiltration has moved through the supra-governmental structure of the United Nations and its agencies, as demonstrated by the various market-led voluntary initiatives promoted by the United Nations to protect human rights and environment including the Global Compact, outlined in Chapter V. TNCs are now significant, if not dominant, global actors<sup>27</sup> setting the rules within the global arena and rendering Westphalian form of sovereignty essentially obsolete. The State has become a fragmented policy-making arena that can be threatened by TNC movement of finance and investment, giving TNCs powers normally asserted by States. TNCs can therefore hold power and play

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<sup>23</sup> Ulrich Beck, *What is Globalisation?* (John Wiley & Sons, 2000) 11.

<sup>24</sup> Vandhana Shiva, 'Food Rights, Free Trade and Fascism', in Matthew Gibney (ed), *Globalizing Rights: The Oxford Amnesty Lectures, 1999* (Oxford University Press, 1999).

<sup>25</sup> Ibid.

Phillip Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalization' (1997) 3 *European Journal of International Law* 435.

<sup>27</sup> Edward Kwakwa, 'Regulating the International Economy: What Role for the State?' in Michael Byers (ed), *The Role of International Law in Politics* (Oxford University Press, 2000) 229.



politics in a manner once reserved for State actors. For example, TNCs can use their power to play governments and communities against each other in order to maximize profits and achieve the lowest labour, consumer and environmental costs possible.<sup>28</sup> This was highlighted in the 1995 ECOSOC Sub-Commission Report<sup>29</sup> that found

increased locational mobility of TNCs and their monopolistic and oligopolistic tendencies have increased the bargaining power of TNCs and have been associated with a loss of decision-making capacity in States, especially in developing countries.

While the primacy of sovereignty has changed, TNCs' powers still reside largely in the industrialized States who continue to champion their interests at international bargaining fora because the interests of the TNCs coincide with the interests of ruling elites. These private interests often result in environmental degradation (or even ecocide), and human rights abuses, documented in Chapter IV through desktop studies of the Kelian, Grasberg and Bougainville mines. If the private interests of the ruling classes coincide with traditional owners – for example, where the neoliberal paradigm has convinced traditional owners that paid employment at mines in ancestral grounds is the appropriate and most rational use of resources and that sacred sites can be mined for at a negotiated compensatory price,<sup>30</sup> there is less intra-state discord at the activities. Monetary compensation cannot compensate loss of livelihoods in subsistence societies and can lead to tension and state sponsored or endorsed reprisals in conflict with CSR principles and international law.

#### *(b) Problems With Sovereignty – Creating International Financial Cohesion*

States are not islands and all states require interaction and trading blocs with other

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<sup>28</sup> Larry Cata Backer, 'Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Corporations as a Harbinger of Corporate Social Responsibility in International Law' [2005] *Columbia Human Rights Law Review*; see also Nicholas Connelly, 'Corporate social responsibility: A duplicitous distraction,' (2012) 16(8) *International Journal of Human Rights* 1228.

<sup>29</sup> Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Realization of Economic, Social and Cultural Rights: The Relationships Between the Enjoyment of Human Rights, in Particular, International Labour and Trade Union Rights, and the Working Methods and Activities of Transnational Corporations*, UN ECOSOC, art. 99, UN Doc. E/CN.4/Sub.2/1995/11 (24 July 1995).

<sup>30</sup> This is not to suggest that all traditional owners 'sell out' to capital. The Native Title Act provides for negotiations, but no right of veto, so indigenous groups must accept a mining development will occur, and be only in the position to negotiate compensation.

states or regional organisations. In the intertwined global economy, states' ability to govern unfettered to protect assets or people is further curtailed by 'sovereign risk' - the risk of 'adverse and unreasonable government action targeted at international trade or international business projects.'<sup>31</sup> Nations that expropriate property by legislative or executive action find it virtually impossible to attract foreign investment, and may face retaliatory trade sanctions.<sup>32</sup> This makes it very difficult for poor nations to take redress against large, polluting mining operations or remedy established poor corporate behaviour. The following section contains an account of mining laws in Indonesia and demonstrates the difficulties of legislating for environmental protection in resource rich third world states. The fall of dictator General Suharto in 1998 led to reforms of the mining sector, but despite the efforts of dedicated politicians, companies with existing mining permits continued unhindered in their operations under the same conditions as the Mining Law of 1967 (i.e. none) following intense and successful lobbying by TNCs and Australian embassy officials.

*(i) Mining Laws and Mining Law Conflict in Indonesia*

Most mining in Indonesia is open pit (open cut) mines. This is the cheapest and most cost-effective form of mining because environmental and social costs are externalized. Legislative conflict arose in Indonesia because a large portion of Indonesia's mineral wealth lies under 'protection forests,' those forests classified by the State as a 'forest area' and protected from clearfelling under the Forestry Law No 41 of 1999. Protracted struggles between forest protection and mining interests evoked international attention and action, and illustrated the divide between the interests of the international mining industry and the interests of communities who live and subsistence gather around mining leases.<sup>33</sup> The struggle was ultimately won by the mining industry when then-President Megawati issued Law No 19 of 2004 to validate mining leases in protected forests to thirteen companies issued with permits before 1999. The lobbying by the Mining industry for approval of extensive open cut mining leases in high biodiversity tropical forest belies their international claims of commitments to sustainable

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<sup>31</sup> Alan Preece, 'The Rise and Fall of National Sovereignty' [2003] *International Trade and Business Law Annual*.

<sup>32</sup> *Ibid*, 244.

<sup>33</sup> Carolyn Marr, 'Forests and Mining Legislation in Indonesia', in Tim Lindsay (ed) *Indonesian Law and Society* (Federation Press, 2<sup>nd</sup> Edition, 2008).

development.<sup>34</sup> In July 2003, it emerged that Australian embassy staff had been quietly lobbying for mining to continue in the protected forests upon the request of BHP Billiton, Placer Dome (Canada), Rio Tinto and Newcrest.<sup>35</sup>

Up until 2009, the Mining Law No. 11 of 1967 was a defining piece of legislation of General Suharto's 30 year dictatorship. Rio Tinto's operations at Kelian PT in Kalimantan and Grasberg/Freeport joint venture with Freeport McMohan were approved under the 1967 law. Both mines have grave human rights abuses levelled against them, including murder of opponents. Rio Tinto admitted to abuses at Kelian in its prospectus, but was quick to point out that no liability was attached to these.<sup>36</sup> The Mining Law was introduced by the then General Suharto shortly before he seized power in the 1967 coup and was aimed at opening up Indonesia to foreign investors.

The moderate and reforming president Dr BJ Habibe introduced the Forestry Law (Law No 4 of 1999) during the political and economic turmoil that followed the departure of Suharto. Habibe acknowledged international pressure to protect tropical rainforests and legislated to protect high biodiversity areas. Indonesian rainforests are biological hotspots. The nation has the third richest tropical forest after Brazil and the Democratic Republic of the Congo,<sup>37</sup> covering 120 million hectares and hosting around ten per cent of the world's plant and mammal species.<sup>38</sup> The forest is vanishing at an internationally alarming rate to the extent that an only an estimated 40% is still classified as primary forest in good condition.<sup>39</sup> The Forestry Law was initially drafted to ban open-pit mining in protected forests, but this progressive element was expunged from the final legislation at the lobbying of transnational mining lobbies.<sup>40</sup>

The preamble of the Mining Law of 1967 spoke of the need to 'mobilize all the funds and forces to process and develop the entire economic potential of mining into real economic potency.'<sup>41</sup> What the Law actually did, however, was attract foreign funds and expertise to enrich shareholders in foreign countries and line the pockets of the President, his family and entourage.<sup>42</sup> This, along with IMF loans helped to consolidate

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<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> John Pilger, *The New Rulers of the World* (Verso, 2000).

<sup>37</sup> Forest Watch International/Global Forest Watch, *The State of the Forest: Indonesia*, Forest Watch Indonesia, and Washington DC: Global Forest Watch (Bogor, Indonesia: 2002)

<sup>38</sup> <http://www.climatechange.gov.au/international/publications/pubs/indonesia-australia.pdf>

<sup>39</sup> Forest Watch International/Global Forest Watch, above n 37.

<sup>40</sup> Marr, above n 33.

<sup>41</sup> Law Number 11/1967 on the Basic Provisions of Mining, preface.

<sup>42</sup> Marr, above n 33.

Suharto's hold on power for three decades.

The Law assisted the Suharto dictatorship New Order's first big foreign investor, the US based Freeport Indonesia Inc. to open gold and copper mining on indigenous land in West Papua. At the time, West Papua's status had still not been decided.<sup>43</sup> The Mining Law of 1967 provided few obligations on corporations to minimize environmental damage or pay compensation to anyone but registered land-title holders. This move instantly excluded all indigenous peoples whose customary lands were rarely formally registered. Communities who tried to stop mining on their lands were liable for fines and prison sentences under Suharto's Mining Law.

It was under this backdrop that large-scale open cut mining and forestry concessions proliferated in Indonesia. Mindful of international concern with both human rights abuses and deforestation, the new President Habibie legislated for autonomy for the fractious provinces of Aceh and West Papua (including changing the name from Irian Jaya), and the Forestry Law to halt the annual two million hectare deforestation rate. International organisations and states including Australia also encouraged protection of the 'earth's lungs' under REDD (Reducing Emissions from Deforestation and Forest Degradation in Developing Countries) schemes.<sup>44</sup>

Under Forestry Law No 41 of 1999 a 'protection forest' is defined as 'a forest area having the main functioning of protecting life-supporting systems for hydrology, preventing floods, controlling erosion, preventing sea-water intrusion and maintaining soil fertility.'<sup>45</sup> Article 38 states that any activity that takes place in a protection forest must be done so without affecting the ecosystem functions (or services) of the forest. 'Mining' is included as an 'activity,' and open-cut mines were specifically included (cl 4). Some of the mining projects affected by this clause included the Freeport/Rio Tinto concession at Grasberg in West Papua, and Rio Tinto's concession at Kelian in Kalimantan. Mining companies threatened to take the matter of prohibitions on open-cut mining in forests protected under the 1999 Forestry Law to international arbitration. The Indonesian government gave way to these concessions, although legal opinion

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<sup>43</sup> The 'Act of Free Choice' referendum as to the status of West Papua was conducted in 1969.

<sup>44</sup> Helen Biangalen-Magata, Resource Material on Indigenous Peoples, Forest and REDD, Tebtebba, 2009.

<sup>45</sup> Forestry Law No 41 of 1999, article 1(8).

suggested the government could have beaten the Mining industry's claims at the preliminary stage, and certainly at the merits phase.<sup>46</sup> Developing nations and endemically corrupt States often have inadequate understanding of applicable laws, allowing investors to 'inordinately influence' host State decisions through threats of arbitration that have little chance of success. This appears to be the case with the international Mining Industry's threats with respect to the Forestry Law.<sup>47</sup>

Recent reforms in Indonesia include the Environmental Law No 32 of 2009 and the Mining Law of 2007. The Environmental Law requires every business that will have a substantial impact on the environment to hold an Environmental Impact Assessment (AMDAL)<sup>48</sup> that includes mining. The New Mining Law No 4 of 2009 permits the continued Contracts of Work issued under the old mining regime to be honoured until their expiry, therefore having no effect upon the operations of Freeport McMoRan/Rio Tinto.

### 3 *Bretton Woods And Beyond – A Brief Account To The Ascendancy Of Neoliberalism*

The globalisation of the international political economy began with the free-market led *General Agreement on Tariffs and Trade* (1948), which emerged from the official Bretton Woods institutions of the International Monetary Fund (IMF) and the World Bank, outlined below.

The IMF and World Bank (Bretton Woods Institutions) were founded post-World War II and parallel to the United Nations, ostensibly to provide rebuilding to war ravaged Europe and to prevent the economic position that led to Nazism and other forms of fascism. Some commentators suggest the Bretton Woods Institutions were implemented to garner United States economic hegemony<sup>49</sup> and act as a bulwark against socialism.<sup>50</sup>

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<sup>46</sup> Stuart G. Gross, 'Student Note: Inordinate Chill: BITS, Non-NAFTA MITS and Host-State Regulatory Freedom – An Indonesian Case Study' (2003) 24 *Michigan Journal of International Law* 893.

<sup>47</sup> Ibid.

<sup>48</sup> Environmental Law No 32 of 2009, article 22.

<sup>49</sup> See for example Faroumata Jawara and Aileen Kwa, *Behind the Scenes at the WTO – the real world of international trade negotiations* (Zed Books, 2003); John Pilger, *The New Rulers of the World* (2002) 115-6; Naomi Klein, *The Shock Doctrine* (2007).

<sup>50</sup> Delphine, Rabet 'Human Rights and Globalization: The Myth of Corporate Social Responsibility?' (2009)1 *Journal of Alternative Perspectives in the Social Sciences* 463.

United States hegemony is generally regarded to mean neoliberal freemarket policy and expansion of US corporate interests into new, previously protected markets<sup>51</sup> - a policy now replicated and hegemonic in international trading and governance institutions.<sup>52</sup> The Bretton Woods institutions were developed to oversee global rules governing currency relations. The World Bank (originally called the International Bank for Reconstruction and Development) was to make long-term investments in development to pull countries out of poverty, and the IMF was formed to provide stabilizing grants and loans to prevent crises before they occurred.<sup>53</sup> The IMF is a public institution established with taxpayers' money from around the world, but it now champions market supremacy with 'ideological fervour.'<sup>54</sup> Both the World Bank and the IMF allocate proportion of voting rights to economic power, giving the United States effective veto over all major decisions, with Europe and Japan controlling the rest. This means that the World Bank and IMF can and do impose economic and political standards of the wealthy North on the world's struggling nations.<sup>55</sup> The two institutions are centred in Washington and were subsumed by neo-liberal agenda in the Reagan-Thatcher years of the 1980s when both heads of state used their unequal voting power to usher in their neoliberal ideologies and corporatist ends.<sup>56</sup> This led to the 'Washington Consensus' – a consensus between the World Bank, IMF and the US Treasury about the 'right' policies for developing countries<sup>57</sup> - replacing the United Nations 'Decade of Development' of the 1960s with the economic policy of privatization, deregulation/free trade and cuts to government spending. International economic relationships now evade the influences of state law. Major states of multinational corporations have used their influence over negotiations before international organisations to protect and promote business investments<sup>58</sup> and circumvent domestic laws of other nations.

*(c) The WTO – The Success Of Neoliberalism In International Economic Institutions*

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<sup>51</sup> Paul G. Cerny, 'Embedding neoliberalism: The evolution of a hegemonic paradigm' (2008) 2(1) *Journal of International Trade and Diplomacy* 1-46.

<sup>52</sup> Ibid.

<sup>53</sup> International Monetary Fund, Article 1 – Purposes, *Articles of Agreement of the International Monetary Fund*, [www.imf.org](http://www.imf.org)

<sup>54</sup> Joseph Stiglitz, *Globalization and its discontents* (Norton, 2002) 13.

<sup>55</sup> Held et al, above n 12, 113. The IMF and World Bank each have 187 member nations, but because votes are allocated according to financial strength, seven countries hold 40% of the vote.

<sup>56</sup> Klein, above n 18 at 163.

<sup>57</sup> Stiglitz, above n 54, 16, see also David Harvey, *A Brief History of Neoliberalism* (Oxford, 2005).

<sup>58</sup> Peter Muchlinski, 'Global Bukinowa' Examined: Viewing the Multinational Enterprise as a Transnational Law-making Community', in Gunther Tuebner (ed) *Global law without a state* (Dartmouth, 1997), 79-108.

The IMF shares resources and 143 members nations with the World Trade Organization (WTO). The WTO is a separate supranational actor to the United Nations and operates independently of it with different and enforceable rules and trade sanctions. The IMF and WTO are complementary and work together. In 1996 the two bodies signed a Cooperation Agreement<sup>59</sup> to consolidate their relationship, formally share data and resources, and give the IMF access to the WTO's Integrated Data Base. This consolidation and institutionalisation of neoliberalism facilitated the global reach of corporations and coincided with the most rapid rate of ecosystem services and biodiversity loss in human history. TNCs are the driving forces of environmental harm, but measures to govern TNCs are met with resistance from home states. This resistance is effective because home states have the same organisational form within the ruling classes as that of corporations they are purportedly governing. Power and wealth of the ruling classes is directly linked to exploitation of humans and nature,<sup>60</sup> and directly linked to feel-good fluff measures espoused by CSR initiatives.

Rio Tinto's mining operations in West Papua, Kelian and Bougainville were predicated precisely upon state approval of any practices, and practises banned in Rio Tinto's home states of Australia and the UK. These include riverine tailings disposal, payment to security forces responsible for serious human rights abuses, and removal of traditional peoples from their homelands and livelihoods.<sup>61</sup>

### *B International Governance of Corporations*

Economically dominant governments and corporations favour neoliberal policies and free-market solutions to poverty reduction and thus endorse the WTO, IMF and World Bank's activities.<sup>62</sup> These institutions encourage economic structural adjustment, privatization and market liberalization (the 'Washington Consensus') in third world

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<sup>59</sup> International Monetary Fund, 'WTO and IMF Sign Cooperation Agreement' (Press release, 96/61) 9 December 1996, <<http://www.imf.org/external/np/sec/pr/1996/pr9661.htm>>.

<sup>60</sup> Rob White, *Crimes Against Nature* (Willan, 2008) 145.

<sup>61</sup> The situation is replicated in Rio Tinto's working mine in Madagascar. Loss of culture and human rights impacts were deemed unquantifiable, though likely to be catastrophic, and of less importance than the quantifiable elements of 'income and job creation,' in breach of Rio Tinto's own Code of Conduct, in Connelly, above n 28.

<sup>62</sup> Rajeesh Makwana, 'Decommissioning the IMF, World Bank and WTO', Share the World's Resources, December 2005, <<http://www.stwr.org/imf-world-bank-trade/decommissioning-the-imf-world-bank-and-wto.html>>.

nations that are in no position to refuse economic structural adjustment.<sup>63</sup> The United Nations attempts at regulating corporations' excesses has culminated in the 'Protect, Respect, Remedy Framework' that imposes the onus upon states to protect human rights and encourage TNCs to respect human rights and international environmental protection initiatives. The section above detailing Indonesian attempts to regulate serious damaging mines in areas of high biological diversity outlines the flaws in this approach due to the power of TNCs and corrupt governments to ignore international human rights and environmental treaties.

The following section outlines the dominance of the WTO over human rights and environmental treaties of the UN system, and explains that a rarely utilized GATT article may provide some relief against corporate excesses.

### 1 *The GATT Environmental And Human Rights Clause*

The General Agreement on Tariffs and Trade (GATT) was signed by 22 nations in 1944 as a forum for negotiation on trade liberalization, but was stalled for decades while the US prioritised containing the Soviet Union during the Cold War.<sup>64</sup> The GATT was successful in substantially lowering tariffs.<sup>65</sup> It was succeeded by the World Trade Organization in early 1995 as a result of the Uruguay Round of multi-lateral trade negotiations between 1986-94 and formally signed by ministers of 124 GATT member-nations at Marrakesh, Morocco to come into force on 1 January 1995.<sup>66</sup> The WTO is a supra-state organ distinct from the United Nations system, but is integrated as part of public international law by reference to interpretation of obligations annexed to the WTO Agreement. The Dispute Settlement procedures of Annex 2 specifically instruct members to clarify existing provisions of the Agreement in accordance with customary rules of interpretation of public international law.<sup>67</sup>

The Preamble to the Agreement is at odds with present day WTO practice, but lends

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<sup>63</sup> Ibid.

<sup>64</sup> Ngaire Woods, 'International political economy in an age of globalisation', in John Bayless and Steve Smith (eds) *The Globalization of World Politics: An Introduction to International Relations* (Oxford University Press, 2<sup>nd</sup> ed, 2001).

<sup>65</sup> Stiglitz, above n 54, 16.

<sup>66</sup> *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) ('WTO Agreement').

<sup>67</sup> WTO Agreement, Annex 2, art. 3.2, Dispute Settlement Understanding.



scope for sustainability and social responsibility:

The Parties...recognise that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living... and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to preserve the environment and to enhance the means of doing so in a manner consistent with their respective needs and concerns at different levels of economic development...

Article XX of the GATT Agreement,<sup>68</sup> as a part of the WTO Agreements, lends scope for human rights and environmental protection from catastrophic human-made harm, and contains some potentially powerful provisions.

Article XX "General Exceptions" for free trading:

"Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination ..., nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life and health;
- ...
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."

To date there have been no WTO dispute resolution decisions on Article XX that have been invoked to enforce human rights,<sup>69</sup> and few environmental decisions made have been upheld by the Appellate Body.<sup>70</sup>

## 2 *International Self-Governance of Corporations*

Transnational corporations wield great power at World Trade Organisation meetings,

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<sup>68</sup> *General Agreement on Tariffs and Trade 1947* (GATT) Article XX.

<sup>69</sup> David Kinley and Junko Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44 *Virginia Journal of International Law* 931.

<sup>70</sup> Environmental cases include Tuna-Dolphin I, GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS21/R (3 September 1991), unadopted, BISD 39S/155 Mexico v US (1991); GATT Panel Report, *United States Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R (15 September 2011); GATT Panel Report, *United States - Restrictions on Imports of Tuna*, GATT Doc. DS29/R (15 June 1994); Panel Report, *United States - Importation Prohibition of Certain Shrimp and Shrimp Products*, GATT Doc. DS58/AB/R (12 October 1998).

where as non-state actors, their representatives are constantly meeting with Geneva-based states' delegates and other officials in their capitals.<sup>71</sup> The interests of TNCs is at the heart of how first world states shape their policies on globalization and trade issues, thus further skewing the negotiating process away from developing nations and NGOs advocating for social and environmental justice. According to Chakravarti Raghavan of the Third World Network, the objective of the European Community and the United States at the Doha World Trade Talks in 2002 was to enlist WTO member governments to provide information for the benefit of, and to assist multinational corporations tendering for projects.<sup>72</sup>

The WTO has potential to promote environmental and human rights. Nowhere in its Agreements is it explicitly stated that they prevail over pre-existing law or that it is without derogation from pre-existing laws.<sup>73</sup> The Cooperation Agreement between the WTO and IMF states that GATT 1994 rules (incorporating the GATT 1947) prevail over IMF rules unless otherwise provided for in the GATT itself.<sup>74</sup> The WTO's Declaration on Trade and Environment<sup>75</sup> covers pre-existing environmental conventions, and one of its major tasks is to examine the relationship between the WTO and the multinational environmental treaties, although so far this has not provided any clear rules on conflicts. The WTO, however, is enmeshed in neoliberalism. Its contribution to sustainable development and protection of the environment – an important element in CSR – is in the form of furthering trade to promote economic development providing 'the efficient allocation of resources, economic growth and increased income levels that in turn provide additional possibilities for protecting the environment.'<sup>76</sup> This approach is criticised by many commentators who attribute third world environmental destruction with first world profligate consumption patterns and demand for goods.<sup>77</sup> The WTO assertion that liberalised trade provides higher incomes

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<sup>71</sup> Faroumata Jawara and Aileen Kwa, *Behind the Scenes at the WTO – the real world of international trade negotiations* (Zed Books, 2003) 53.

<sup>72</sup> Chakravarti Raghavan, 'Trade: Behind the Talks on Transparency in Government Procurement', *South-North Development Monitor (SUNS)*, Third World Network, No. 5250, 9 December 2002.

<sup>73</sup> Joost Pauwelyn, 'The Role of Public International Law in the WTO – How far can we go?' (2001) 95 *American Journal of International Law* 544.

<sup>74</sup> Ibid.

<sup>75</sup> The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts 6 (1995), 33 ILM 1144 (1995).

<sup>76</sup> World Trade Organisation, 'An introduction to trade and development', <[http://www.wto.org/english/tratop\\_e/envir\\_e/envt\\_intro\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/envt_intro_e.htm)>.

<sup>77</sup> See for example Carmen G. Gonzales, 'Beyond Eco-Imperialism: An Environmental Justice Critique of Free Trade' (2001) 78(4) *Denver University Law Journal*; Fred Magdoff and John Bellamy, *What Every Environmentalist Needs to Know About Capitalism* (NYU Press, 2011); Rob White, *Crimes Against Nature* (Willan, 2008).

and therefore more opportunity for environmental protection has not been borne out in reality. This is evidenced by the findings of the Millennium Ecosystem Assessment where scientific consensus holds that humans have more rapidly and more extensively degraded ecosystems in the past 50 years than at any other comparable time in human history due to growing demands for goods<sup>78</sup> – in the same time frame that corporatism and neoliberalism have become the dominant global organisational structure.

(a) *Failure Of 'The Rising Tide' Neoliberal Position On Environmental Protection*

Environmental protection is intrinsically linked to human health and as such is a human right, as demonstrated in earlier chapters. The WTO and United Nations predicate global environmental protection upon free-market capitalism, such that 'the rising tide lifts all boats'. This position conflicts with reality, in which the rising tide of globalisation threatens to burst the banks.<sup>79</sup> The WTO makes scant reference to human rights with the exception of minimal rebuttal to human rights advocates<sup>80</sup> that better working conditions and improved labour rights arise through economic growth<sup>81</sup> without offering proof of success of such policies. Indeed, this position is at odds with the UNDP Human Development Report 2005 that showed only nine countries (4% of world population) reduced the wealth gap between rich and poor, while 80% recorded increases in inequality.<sup>82</sup>

The UN and WTO's prescription for environmental and human rights protection is through liberalised trade, technology (a first world, largely corporate, monopoly) and market mechanisms which are purported to tend to efficient resource use. This approach ignores the causes of environmental and human rights abuses where subsistence dwellers' livelihoods and land use conflicts with corporations whose practices are guided primarily by profit dependent on increased consumption patterns and incessant growth.<sup>83</sup>

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<sup>78</sup> Millennium Ecosystem Assessment (2005).

<sup>79</sup> Wolfgang Sachs, Planet Dialectics: Exploration in Environment and Development (1999) cited in Gonzales above n 77.

<sup>80</sup> 3<sup>rd</sup> WTO Ministerial Conference: Top 10 reasons to oppose the World Trade Organization? Criticism, yes...misinformation no!, <[http://www.wto.org/english/thewto\\_e/minist\\_e/min99\\_e/english/misinf\\_e/03lab\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min99_e/english/misinf_e/03lab_e.htm)>.

<sup>81</sup> Ibid.

<sup>82</sup> UNDP Human Development Report 2005, <<http://hdr.undp.org/en/reports/global/hdr2005>>.

<sup>83</sup> Richard Welford, 'Corporate Environmental Management Means Business as Usual' (Paper presented at the International Workshop on Business Responsibility for Environmental Protection in Developing Countries, UNRISD and Universidad Nacional, Heredia, Costa Rica, 22-24 September).

Development policies and consumption patterns of the wealthy nations are the primary causes of resource depletion and global poverty, and the market-capitalism economic model has institutionalised third world poverty through international institutions that are placing additional stress on the environment.<sup>84</sup> Export-led structural adjustment policies imposed by the IMF and World Bank to repay loans have exacerbated third world environmental destruction and human rights abuses. Wealth from third world nations is transferred to wealthy shareholders and institutional shareholders in the first world while impoverished peoples bear the environmental and social costs such as those seen at Kelian, Grasberg and Bougainville mines. In some cases,<sup>85</sup> people pay with their lives.

First world industrialised nations drive third world mining operations because first world nations are the main consumers of minerals.<sup>86</sup> The issue of over-consumption by the first world is ignored by the WTO and UN, but is an issue that must be revisited if human rights violations and environmental degradation is to be curtailed. The current organisation of the global economy enables the first world to reap the benefits of expanded trade while imposing environmental costs of business upon the poor nations that cannot afford environmental protection or preservation of natural resources which subsistence peoples rely on for survival.<sup>87</sup>

*(b) Gramscian Analysis Of The Capture Of United Nations TNC Initiatives*

The United Nations was once a bulwark against corporatization, recognising the threats to human rights from globetrotting corporations that were shielded by limited liability. The late 1980s and early 1990s saw the rise of environmental consciousness amongst general populations. This period also saw the concurrent rise of neoliberalism and its adherents' faith on the free-market to allocate goods and resources while advocating minimalist government intervention. By the time of the Rio Earth Summit, public

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<sup>84</sup> Gonzales, above n 77.

<sup>85</sup> For example, thousands of people died as a result of the Bougainville civil war, and many hundreds have died since the Ertzberg and later Grasberg mines were developed. Highland peoples with no resistance to malaria were forcibly located to coastal plains where many succumbed to the disease. See Chapter IV.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

pressure was calling for decisive global action against environmental damage *and* for rights and respect for indigenous peoples. Simultaneous to the rise in public environmental awareness, corporations and their wealthy states were seeking more resources to extract and more markets to expand into. This dichotomous problem was solved by the co-option and capture of the Rio conference by big business. Business leaders rapidly set about obfuscating the meaning of the phrase such that 'sustainable development' became a euphemism for *economically sustainable development* and the concept of 'sustainable development' was rapidly watered down to a business-as-usual approach to organisation by conference participants. The capture of environmental consciousness can be regarded as a 'sustainable development historical bloc' whereby transnational corporations mobilized to neuter a 'threatening counter-culture organized around the powerful idea of the singular ecological crisis.'<sup>88</sup>

Antonio Gramsci viewed hegemony as the ongoing struggle of powerful state elites using institutions such as the church, media, education and academia to legitimize their power repositioning their relationships with the ruled. In order to maintain their dominance, the rulers must be sufficiently flexible to respond to the demands and wishes of the ruled. In order to do this, the dominant classes must be able to reach into the minds and lives of the subordinates to exercise power in what appears to be a free expression of the subordinates' own interest.<sup>89</sup> In much the same manner and Chomsky and Hermann views that states and corporations manufacture consent of society for their detrimental actions and policies.<sup>90</sup>

Gramsci's 'historic bloc' is the synthesis of state-civil society relations that become hegemonic through legitimacy and consent of the population.<sup>91</sup> Hegemony is contemporized by neo-Gramscians who argue that globalization has brought a neoliberal 'transnational historic bloc' into existence. The 'transnational historic bloc' of powerful multinational corporations now shapes international relations and states, which in turn establish the international institutions that support the hegemony.<sup>92</sup> The proliferation of free-trade agreements and organisations such as APEC and the WTO,

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<sup>88</sup> Leslie Sklair, 'The Transnational Capitalist Class and the Discourse of Globalization', *Global Dimensions*, <<http://www.lse.ac.uk/collections/globalDimensions/globalisation/theTransnationalCapitalistClassAndTheDiscourseOfGlobalization/Default.htm>>.

<sup>89</sup> Steven Jones, *Antonio Gramsci* (Routledge, 2006), p 4.

<sup>90</sup> See Edward S. Hermann and Noam Chomsky, *Manufacturing Consent: The Political Economy and the Mass Media* (Pantheon, 1988).

<sup>91</sup> Stephen Gill, 'Epistemology, ontology and the 'Italian School'', in Gill (ed) *Gramsci, Historical Materialism and International Relations* (Cambridge University Press, 1993).

<sup>92</sup> Robert Cox, 'Gramsci, hegemony and international relations: an essay in method', in Gill (1993), above n 89, 62.

and the growing importance of institutional organs in the form of the G9, IMF and World Bank are indicative of the influence of, and capture by, neo-liberals in the post Cold War period. The market relations are dominated by wealthy industrial societies of the north, who set their corporate regulatory systems to their benefit, and in turn set the international agenda and shape international and national laws.

The sustainable development historic bloc began in earnest leading up the Rio Earth Summit. The environmental arm of the International Chamber of Commerce - the Business Council for Sustainable Development - was successful as preventing criticism of transnational corporations appearing on the official agenda<sup>93</sup> and as a consequence, TNCs had considerable input into the formation of the UN Commission on Sustainable Development (CSD), the major institutional result of the Earth Summit.<sup>94</sup> This body monitors how states comply with indicators of sustainable development while deflecting any critique of TNCs or free-market capitalism causing environmental destruction and, by proximity, human rights abuses.

### *(c) Capture Complete*

Only a year after the Rio Earth Summit the Secretary-General of UNCED conceded the political will for implementing sustainable development was waning to the point where strong state support for environmental sustainability and protection had eroded considerably.<sup>95</sup>

Agenda 21<sup>96</sup> is the UN's non-binding environmental policy plan that came out of the Rio Conference. It encourages business and industry 'increase self-regulation' as it is deemed more flexible for business, and 'allows business to achieve desired goals in the most economically effective manner possible.'<sup>97</sup> Hegemon and capture became complete.

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<sup>93</sup> R.K.L. Panjabi, *The Earth Summit at Rio: Politics, Economics and the environment* (Northeastern University Press, 1997).

<sup>94</sup> Sklair. above n 88.

<sup>95</sup> Kerry O'Neill, 'Internetworking for Social Change: Keeping the Spotlight on Corporate Responsibility' (United Nations Research Institute for Social Development, Discussion Paper No. 111, September 1999).

<sup>96</sup> *Agenda 21*, UN GAOR, 46th Sess., Agenda Item 21, UN Doc A/Conf.151/26 (1992).

<sup>97</sup> Jeremy Barber, 'Responsible Action or Public Relations? An NGO Perspective on Voluntary Initiatives' (1998) 21 (21-2) *UNEP Industry and Environment*.

Corporations have been quick to espouse the case for self-regulation over binding obligations. In the 1980s and 90s, the UN Conference on Trade and Development (UNCTAD) came close to formulating an international Code of Conduct on TNCs, but the 16 year-long negotiations ended when UNCTAD was dismantled before the Rio Conference.

### 3 *Corporate Regulation - From Hopes Of Binding Initiatives To Soft Laws*

The Rio Tinto case study demonstrates that even blue-chip, highly regarded corporations renege on social responsibility if they can avoid negative publicity. A strong tradition of democracy and democratic participation coupled with separation of powers and very low levels of official corruption differentiates Australia from other states in the Asia-Pacific region (New Zealand excepted), and it is my contention that this is the reason why Rio Tinto and other transnational corporations conduct themselves in a more socially acceptable and responsible manner in this country. In less developed states transnational corporations like Rio Tinto either ignore local laws,<sup>98</sup> or contribute to the drafting of laws beneficial to their operations.<sup>99</sup> In some cases, transnational corporations are so powerful they can compel states to engage in armed conflict and civil wars to protect their assets against disgruntled and organised locals, as happened in Bougainville.

#### (a) *The Norms*

The 2003 draft of the *United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises* (Norms)<sup>100</sup> was a response to the ever-changing nature of international relations, global concern with human and environmental rights, and the changing nature of international law. In the wake of such scandals as the Union Carbide Bhopal disaster,<sup>101</sup> the destruction of the Ok Tedi river

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<sup>98</sup> See Rio Tinto in West Papua who along with Freeport McMoRan, ignored directives of Environment Minister and Indonesian environmental laws to stop riverine dumping into the Aikwa River system.

<sup>99</sup> See Rio Tinto at Kelian where Rio's lawyers drafted lax environmental legislation and indemnifying legislation.

<sup>100</sup> *United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises*, United Nations Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003).

<sup>101</sup> Dan Kurzman, *A Killing Wind: Inside Union Carbide and the Bhopal Catastrophe* (McGraw-Hill, 1987).

system by BHP,<sup>102</sup> and Freeport McMohan/Rio Tinto's human rights abuses and environmental bleitzkeig in the Indonesian annexed province of West Papua,<sup>103</sup> the Norms were drafted by the UN Sub-Commission on the Promotion and Protection of Human Rights as a statement on the human rights obligations of transnational corporations. Although directed at corporations, the Norms would have imposed the obligations by way of domestic laws of States.<sup>104</sup> The Norms caused heated debate amongst states, fuelled largely by Australia and the United States who combined with the corporate lobby argued that there should be no binding human rights standards for transnational corporations.<sup>105</sup> Australia and the US were the only states to vote against the Commission's Resolution to requesting the UN Secretary-General to appoint a Special Representative on the issue.<sup>106</sup> Some of the provisions of the Norms are found in the *Universal Declaration of Human Rights* and have already attained status of customary international law,<sup>107</sup> but the Norms themselves were never 'instant' custom, despite incorrect beliefs held by some NGOs that the Norms were a codification of customary international law. In their draft (and dead)<sup>108</sup> form, the Norms had no binding legal effect, although persistent State implementation of the Norms with necessary intention could have developed custom in this area.

(b) *Demise Of Hope For Binding Obligations*

Norms were an attempt to make big business accountable to its actions and effects and resulted in voracious business opposition. The Special Representative's 'Protect, Respect, Remedy' framework recommends corporations practise voluntary initiatives. Once again, the agents of the free market have won success against national and supra-national regulation of poor human rights and environmental practices. Official

<sup>102</sup> Peter Prince, 'Bhopal, Bougainville and Ok Tedi – Why Australia's *Forum Non Conveniens* Approach is better' (1998) 47(3) *The International and Comparative Law Quarterly* 573.

<sup>103</sup> Kenneth Davidson, 'What's wrong in Papua?' *The Age* (Melbourne) 26 June 2008.

<sup>104</sup> David Kinley, Justine Nolan and Natalie Zerial, 'The politics of corporate social responsibility: Reflections on the United Nations Human Rights Norms for Corporations' (Legal Studies Research Paper No. 07/10, Sydney Law School, The University of Sydney) 2006.

<sup>105</sup> David Kinley and Rachel Chambers, 'The UN Human Rights Norms for Corporations: The Private Implications of Public International Law.' (2006) 6(3) *Human Rights Law Review* 447, 459.

<sup>106</sup> Ibid. South Africa voted against the resolution for different reasons than Australia and the US, in that the resolution did not go far enough in promoting the importance of the issue.

<sup>107</sup> For example, the prohibition against torture under Article 5 of the Universal Declaration of Human Rights and art 7 of the ICCPR.

<sup>108</sup> Professor John Ruggie, Special Representative to the Secretary-General (SRSG) (remarks at a forum on Corporate Social Responsibility Co-Sponsored by the Fair Labour Association and the German Network of Business Ethics, Bamberg, Germany, 14 June 2006) cited in Kinley, Nolan and Zerial, above n 102, 31.



endorsement of voluntary initiatives and self-regulation in the form of CSR is widely understood to be an industry attempt to avoid binding governmental regulation.<sup>109</sup> The *Protect-Respect-Remedy Framework* acknowledges that many states are unable to stand up to big business enterprises, but continues to promote voluntary CSR initiatives while suggesting poorly governed states should simply govern better.

### C. Conclusion

The elevation of TNCs to powerful non-state actors was not anticipated by the framers of the UN Charter or contemplated in its initiating organs and agencies. The international success of market-capitalism and transnational corporations has made accountability for human rights and environmental breaches difficult to attach to the singularity causing these issues – that of development policies and consumption patterns of the first world. Neo-liberal policies entrenched in most first world nations and imposed upon or embraced by many third world nations are the driving cause of environmental destruction, ecocide and human rights abuses of impacted peoples (particularly indigenous) because first world peoples are demanding products with costs externalised to where extractive and other degrading<sup>110</sup> activities take place. International NGO efforts to constrain consumption and move from the neoliberal paradigm to date have been spectacularly unsuccessful, to the degree that some of the most serious human rights abusing and ecocidal corporations have cast a veneer of corporate social responsibility by involvement and engagement with UN bodies and institutions. Although barely mentioned in this chapter, Rio Tinto typifies the *modus operandi* of many large transnational extractive companies that do business differently in developed countries with strong democratic systems and robust civil sectors than in less developed nations with high corruption, weak (if existent) democracies and high international debt. Rio Tinto is not alone in dichotomous activity in home states and overseas, but is simply typical of many large corporations under the public spotlight – well behaved and socially responsible at home, socially irresponsible abroad and away

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<sup>109</sup> Third World Network, 'Battle for corporate accountability', <<http://www.twinside.org.sg/title/twr145c.htm>>; Barber (1998) above; Tapan Sakar and Nora Gotzmann (2009) 'A comparative analysis of voluntary codes of conduct in the Australian mineral and petroleum industries' Centre for Social Responsibility in Mining, Sustainable Minerals Institute; Organization for Economic Co-operation and Development (2003), *Voluntary Approaches for Environmental Policy – effectiveness, efficiency and usage in policy mixes*.

<sup>110</sup> By 'degrading' I mean jointly and severally degrading to humanity and degrading to environment.

from regulation. The final chapter concludes with a brief critique of the UN's *Protect, Respect, Remedy Framework* and offers suggestions for genuine CSR for Australian companies in a changing world.

## CHAPTER VII – CONCLUSION

### *A Introduction*

The results of the Rio Tinto case study are consistent with the thesis that CSR is a neoliberal construct to mute public concern for human rights and environmental damage by TNCs. Rio Tinto's activities in the Asia-Pacific region demonstrate a blatant gap between the rhetoric about Australia upholding international human rights and environmental laws through the actions of Australian-listed corporations. The Australian Department of Foreign Affairs and Trade advises companies of their international obligations, but has no investigative or enforcement role with respect to any breaches.<sup>1</sup> The case study demonstrates that the Commonwealth appears to tacitly accept breaches of these obligation and further, its agencies go no further than 'encourage' Australian TNCs to abide by laws and sustainability codes of conduct.<sup>2</sup> Another Commonwealth agency, the Human Rights Commission, utilises the sponsorship of Rio Tinto for its annual Rio Tinto Human Rights Medal, further legitimizing the serious breaches detailed in the case study.

This final chapter concludes that Australia's commitment to its international human rights and environmental obligations is deficient when an Australian-listed multinational extractive industry operates in poorly regulated states. Many transnational corporations (including Rio Tinto) are enlisting to self-regulating CSR initiatives such as the UN's Global Compact and the Global Reporting Initiative, yet retain operating practices that clearly breach Global Compact guidelines, themselves borne from international human rights and environmental laws considered universal. TNCs' less than socially responsible practices include forming lobby groups to effect policy change or inaction in first world states (e.g. 'Greenhouse mafia' in Australia) and extends to alleged genocide (Rio Tinto in Bougainville) and ecocide (Rio Tinto in West Papua). That companies responsible for such serious abuses in remote parts of the world can claim to uphold international human rights and environmental principles

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<sup>1</sup> Senator Scott Ludlum, Questions on Notice 25 March 2011, Question No. 331, < <http://scott-ludlam.greensmps.org.au/content/questions-notice/australian-mining-companies-operating-overseas>>.

<sup>2</sup> Ibid.

and remain part of the Global Compact is indicative of the paucity of this voluntary initiative, and ease of circumvention of binding international laws for companies shielded by the veil of CSR principles. The chapter concludes that corporate private actors are bound to adhere to home state's commitments to human rights and environmental laws, and in the event the host country is unwilling or unable to enforce its own customary and treaty obligations, the home state must step in with extraterritorial legislation to force compliance of international laws. The thesis concludes that the neoliberal transnational historic bloc has altered the development of international human rights and environmental law because the ruling classes of states are the same powers behind TNCs, and these ruling classes block vote accordingly at UN treaty negotiations. Transnational corporations and their ruling classes are major private non-state actors who influence the evolution of binding and non-binding international instruments, which have resulted in UN agencies departing from the former regulatory model of the UNTNC to soft and obfuscating 'feel good' documents such as the UN Global Compact relying on voluntary CSR and environmental treaties – none which challenge the single greatest cause of global inequality and harms, neoliberal market fundamentalism.

Finally, the thesis concludes that the Asia-Pacific host states of transnational mining corporations are unwilling or unable to protect human rights to the extent of serious allegations of genocide, and environmental protection to the extent of ecocide. The neoliberal transnational historic bloc has proven itself to be the major driver of human rights abuses and ecocide in the contemporary world, and the current UN paradigm appears co-opted by the same, as evidenced by the capture of the Global Compact, scuttling of the Norms and uptake of the SGSR's Protect Respect Remedy Framework that obviates TNCs from legal responsibility for serious corporate crimes. The UN Charter is the basis of international law and the international legal system. In order to uphold and adhere to the Charter, all states must cooperate for the preservation of peace, advancement of human rights and establishment of social justice for the international community, lest the UN become a redundant organ brandished as a legitimising sword by powerful interests. The Charter system of international relations would continue to uphold state sovereignty while providing for human rights and environmental justice, and correspondingly, national security inherent in stable states.

Recognising that social justice is the precursor to national security considerations,<sup>3</sup> it is incumbent upon home states of TNCs to impose the same standards upon TNCs both at home and abroad to mitigate against TNCs shielding under deficient host state human rights and environmental laws. As such, Australia should amend the *Corporations Act* by operation of the external affairs and corporation powers of the Australian constitution to hold Australian-listed corporations liable for wrongful acts overseas.

## B Responsibility For Private Actors' Wrongful Acts

International legal scholarly opinion differs as to state responsibility for private actors' wrongful acts. Some commentators are unequivocal that states *are* responsible for the actions of private actors;<sup>4</sup> others such as the legal positivist Crawford are equally unequivocal that states have no responsibility for the wrongs of private actors, or that TNCs have no binding obligations under international law.<sup>5</sup> In between are international legal scholars who believe there is scope for liability of non-state actors for wrongful acts, stemming from the *Reparations Case*<sup>6</sup> in the International Court of Justice in 1949<sup>7</sup> in which the United Nations was deemed a legal personality in international law. It follows that in principle other international entities may also have legal responsibility. The view that non-state actors may be liable for wrongful acts is seen as an emerging principle of international law<sup>8</sup> and finds authority in the Nuremberg trials. German industrialists who profited from human rights abuses through companies they owned or controlled were held responsible for their actions.

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<sup>3</sup> *International Labour Organization Constitution*, 1 April 1919, 15 UNTS 35 (entered into force 28 June 1919), preamble.

<sup>4</sup> Danwood Mzikenge Chirwa, 'The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights' (2004) 5(1) *Melbourne Journal of International Law* 1.

<sup>5</sup> See for example, Declaration of James Crawford S.C., *Presbyterian Church of Sudan v. Talisman Energy Inc., Republic of Sudan*, Civil Action No. 01-CV-9882 (AGS); Ian Brownlie (ed) *Principles of Public International Law*, (Clarendon Press, 4th ed, 1990); Karsten Nowrot, 'New Approaches to the International Legal Personality of Multinational Corporations Towards a Rebuttable Presumption of Normative Responsibilities' (2004), 79. *Philadelphia Law Journal* 563.

<sup>6</sup> *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174.

<sup>7</sup> David Kinley and Junko Tadaki, 'From Talk to Walk – the emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44 *Virginia Journal of International Law* 931.

<sup>8</sup> Ibid: see also Justine Nolan and Luke Taylor 'Corporate Responsibility for Economic, Cultural and Social Rights: Rights in Search of a Remedy?' (2009) 87(2) *Journal of Business Ethics* 433.

Recent US authority has been supportive of this view.<sup>9</sup>

### 1. *Recent Authority For Changing Notions Of Responsibility*

United States' legal authority is persuasive in Australian and international law. The High Court Justice Lionel Murphy considered US Supreme Court decision findings and often referred to US opinion in his judgements.<sup>10</sup> Murphy J's lead has been followed recent High Court decisions including the minority judgement in *Al-Kateb v Godwin*.<sup>11</sup>

In *Presbyterian Church of Sudan v Talisman Energy, Inc.*, United States District Judge Schwartz dismissed Crawford's contention that outside of the US *Alien Tort Claim Act* TNCs are not liable and are not 'subjects' of international law.<sup>12</sup> Schwartz J said the court approved of the invocation of the Universal Declaration on Human Rights in *Alien Tort Claims* cases, notwithstanding the UDHR is non-binding soft law and the relevant part is derived from its Preamble:

[e]very individual and every organ of society includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all.<sup>13</sup>

The court affirmed that TNCs are subject to *jus cogens* violations in at least some cases that hitherto determined by international legal positivists as being only the states' domain. The more recent and controversial US decision of *Citizens United v. Federal Election Commission*<sup>14</sup> conferred extended personality and rights upon TNCs. In the case of *Citizens United*, the rights of free speech were found by the US Supreme Court to apply to corporations under the US First Amendment. Scalia J admitted the First Amendment was originally intended to apply to individuals, “[b]ut the individual person's right to speak includes the right to speak in association with other individual

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<sup>9</sup> For example, *Kadic v Kardadzic* 70 F 3d 232 (2d Cir 1995); *Presbyterian Church of Sudan v Talisman Energy, Inc* 244 F Supp 2d 322 (SDNY 2003), cited in Nolan and Taylor, above n 5.

<sup>10</sup> Jocelyn Scutt, *Lionel Murphy – A radical judge* (Macmillan, 1987).

<sup>11</sup> (2004) 219 CLR 562 at 611-613 [135]-[146] per Gummow J (dissenting); (2004) 219 CLR 562 at 615 [146] per Kirby J (dissenting).

<sup>12</sup> Jose Alvarez, 'Are Corporations "Subjects" of International Law?' (2011) 9 *Santa Clara Journal of international law* 1.

<sup>13</sup> *Presbyterian Church of Sudan v Talisman Energy, Inc*

<sup>14</sup> 130 S. Ct. 876 (2010).

persons.”<sup>15</sup> Scalia J's additional comments that “to exclude or impede corporate speech is to muzzle the principle agents of the modern economy” accords further rights upon corporations, and it is but a small step in a logical progression to confer extra responsibilities in the modern economy and global system of laws.<sup>16</sup> Rights and responsibilities are complementary and are correlative. Rights in Western discourse are individualist and give rise to 'consumer absolutism and all forms of permissiveness'<sup>17</sup> without a sense of duty to the community, yet are recognized basic standards through all political and religious belief systems.<sup>18</sup>

To counter the lack of embedded responsibilities in the International Human Rights Bills, the UN General Assembly adopted resolution 53/144, the *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*.<sup>19</sup> Along with affirming the duty of states to protect rights, the declaration imposes affirmative duties on *everyone* towards and within the community, where 'everyone' is inclusive of individuals, groups, institutions and non-governmental organisations<sup>20</sup> – ergo, TNCs. This Declaration is one of increasing international recognition of responsibilities of non-state actors, and the trend to increasing rights bestowed upon non-state actors correspondingly commands increased responsibilities. Scalia J's call to celebrate more rights of corporations on the national level leaves more scope for imposing more responsibilities both on TNCs both on the domestic sphere in the US, and as a persuasive element in international fora. Legal personhood of TNCs has enabled TNCs to be sued in tort (particularly under the *Alien Tort Claims Act*) and contract. In 1995, Papuan New Guinea villagers sued BHP in a Victorian court for infringing their enjoyment of waters and lands adjacent to the Ok Tedi mine.<sup>21</sup> The

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<sup>15</sup> *Citizens United*, 928.

<sup>16</sup> Scalia J went as far to suggest the new addition to freedom of speech should be celebrated rather than condemned [929].

<sup>17</sup> Richard Falk, *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (Routledge, 2000).

<sup>18</sup> Malcolm Frazer, *A Declaration on Human Responsibilities?*, <<http://www.interactioncouncil.org>> cited in Mia Giacomazzi, 'Human Rights and Human Responsibilities: A Necessary Balance?' (Paper presented at the Human Rights and Human Responsibilities Symposium, Santa Clara University School of Law, 1 April 1, 2005), [2005] 3 *Human Rights and Human Responsibilities* 164.

<sup>19</sup> *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* UN GA Res 53/144, 53<sup>rd</sup> sess, Agenda Item 110(b), UN Doc A/Res/53/144 (8 March 1999).

<sup>20</sup> *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, art 18.

<sup>21</sup> *Dagi v BHP* [1995] 1 VR 495.

case was settled at the preliminary hearing,<sup>22</sup> and while having no precedent value, gives further leverage to the imposition of private actor responsibility for wrongs notwithstanding the difficulties of oppressed plaintiffs to make valid claims. Revisiting *Citizens United*, this case demonstrated that rather than remain a static museum piece, the First Amendment can accommodate the realities of modern globalisation and be approved as such by black-letter-law legal positivist judges. International legal scholars are of the same opinion that international law is living instrumentation to pursue stability and to avoid disputes and the arbitrary use of power,<sup>23</sup> and that international relations have expanded past post WWII notions of 'sovereigns defending quasi-patrimonial rights, privileges and immunities' over territories.<sup>24</sup> As domestic law changes with changing national circumstance, so should international law change to reflect the complex international power relations at play and maintain international peace and security in conformity with the principles of justice and international law.<sup>25</sup> This is the *raison d'etre* of the United Nations Charter, as is 'international co-operation in solving problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms.'<sup>26</sup> These cannot be achieved if major international actors are in the realm of a legal vacuum in the international order – a curious notion held by positivist legal scholars who acknowledge that many TNCs are more powerful and influential than many states *and* enjoy international legal status in WTO dispute settlement proceedings.<sup>27</sup> The case for legal personality for TNCs in an evolving international order is bolstered by the fact that TNCs have rights, possess duties (even if this duty is limited to paying slight taxes) and are empowered to vindicate their rights in international fora.<sup>28</sup> Legal personality is further anchored by the

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<sup>22</sup> Nolan and Taylor, above n 5.

<sup>23</sup> See for example Roslyn Higgins, 'International Law in a Changing International System' (1999) 58 *Cambridge Law Journal* 78, 95; Philip Jessup, 'The Subjects of a Modern Law of Nations' (1947) 45 *Michigan Law Review* 383, 384.

<sup>24</sup> Maria Fernanda Perez Solla, 'The Notion of International Responsibility: A 'Classic' in Times of Change?' (Paper presented at the 2004 Florence Founding Conference of the European Society of International Law, Florence, Italy, 13-15 May 2004).

<sup>25</sup> *United Nations Charter*, art 1(1).

<sup>26</sup> *United Nations Charter*, art 1(3).

<sup>27</sup> August Reinisch and Christina Irgel, 'The Participation of Non-Governmental Organisations (NGOs) in the WTO Dispute Settlement System' (2001) 1 *Non-State Actors and International Law* 127; Geoffrey Shaffer, *Defending Interests – Public-Private Partnerships in WTO Litigation* (Brookings Institution Press, 2003); Geoffrey Shaffer, 'The Blurring of the Intergovernmental: Public-Private Partnerships behind US and EC Trade Claims', in Mark Pollack and Geoffrey Shaffer (eds) cited in Karsen Nowrot, 'New Approaches to the International Legal Personality of Multinational Corporations Towards a Rebuttable Presumption of Normative Responsibilities' (2004) 79 *Philadelphia Law Journal* 563.

<sup>28</sup> Brownlie, above n 2, ('A subject of law is an entity capable of possessing rights and duties and having



transboundary nature and international effects of TNCs, coupled with their access to both domestic governments and international legal processes.<sup>29</sup> Drawing from the purpose of the United Nations, a dynamic organ whose agencies have deviated from their original mandates as changing international conditions have required, there is a compelling argument that the UN Charter is a not stuck-in-time museum piece and that international law binds powerful actors. This argument is supported by eminent international jurist Antonio Cassese<sup>30</sup> who said international law is no longer *jus inter potestates* as it embraces individuals and is moving towards *civitas maxima* (the ‘supreme state’ into which individual states have been combined ‘because they wish to promote the common good’<sup>31</sup>).<sup>32</sup>

Finally, the Human Rights Council (‘HRC’) has recognised the changing nature of responsibility international law towards TNCs. While stressing that the obligation and primary responsibility to promote and respect human rights lies with the State, the HRC emphasises that TNCs and other business enterprises also have a responsibility to respect human rights.<sup>33</sup> Although this resolution extended the tenure of John Ruggie as Special Representative to the Secretary-General (‘SRSG’) (see discussion below), it ultimately lead to Ruggie's exculpation of corporate responsibility in his final report of the 'Protect-Respect-Remedy Framework'.<sup>34</sup> The resolution's emphasis that TNCs must respect human rights is meaningless if 'respect' is not synonymous with 'protect'. Subsequent paragraphs in the Framework recognise governance gaps at all levels in national and international law with respect to state enforcement of international

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the capacity to maintain its rights by bringing international claims’) (citing *Reparations*).

<sup>29</sup> Cynthia Day Wallace, *Legal Control of the Multinational Enterprises* (1983) in Emeka Duruigo, 'Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges' (2008) 6(2) *Northwestern Journal of International Human Rights*.

<sup>30</sup> The late Antonio Cassese was Professor of International Law at the University of Florence; former President of the Council of Europe Committee for the Prevention of Torture; former Judge and President of the International Criminal Tribunal for the former Yugoslavia; Chairman of the UN International Commission of Enquiry into Violations of Human Rights and Humanitarian Law in Darfur; and member of the Institut de Droit International.

<sup>31</sup> Christian Wolff, *Jus gentium methodo scientifica pertractatum* (Vol II, The Translation, Oxford, Clarendon 1934) cited in Martti Koskenniemi, "'International Community'" from Dante to Vattel', in Vincent Chetail (ed), *Vattel's International law from a XXI Century Perspective* (Leiden, Brill 2011, to be published).

<sup>32</sup> Antonio Cassese, *International Law* (Oxford University Press, 2001).

<sup>33</sup> *Mandate of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises*, HRC Res 8/7, UN HRC, 8<sup>th</sup> sess, 28<sup>th</sup> mtg June 2008).

<sup>34</sup> Ruggie, John, *Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises*, John Ruggie; *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN HRC/17/31, 17<sup>th</sup> sess, Agenda Item 1, A/HRC/31 (21 March 2011). ('*Final Report*').

human rights and environmental obligations. The recognition of ‘governance gaps’ imposes positive international obligations upon TNCs to respect human rights, and by virtue of the nature of ‘respect,’ to protect human rights if language held to have plain and unambiguous meaning. A company cannot respect human rights while arming security and lobbying governments to suppress human rights, and if its obligation is to ‘respect’ human rights as per Framework, then the governance gaps of states require TNCs to actively respect human rights, *ergo* to protect human rights.

## 2. State Responsibility – Diminution And Devolution

The principle of state responsibility for wrongful acts is well established in international law. States must protect against human rights abuse within their territory or jurisdiction by third parties, which includes business enterprises. The doctrine of state responsibility is favoured by neoliberal ruling classes as it absolves responsibility for corporate abuses in economically vulnerable states, but as indicated in Part 3, can be expanded to incorporate state responsibility of home states for the wrongs of home-listed corporations.

### (a) The SRSG's 'Protect-Respect-Remedy' Approach To State Responsibility

John Ruggie, Special Representative Special Representative of the UN Secretary General on the issue of human rights and transnational corporations and other business enterprises, completed his Mandate on the issue of human rights and transnational corporations and other business enterprises in March 2011.<sup>35</sup> Despite the mandate specifically being

Concerned that weak national legislation and implementation cannot effectively mitigate the negative impact of globalization on vulnerable economies, fully realize the benefits of globalization or derive maximally the benefits of activities of transnational corporations and other business enterprises and that therefore efforts to bridge governance gaps at the national, regional and international levels are necessary<sup>36</sup>

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<sup>35</sup> John Ruggie, *Final Report*, A/HRC/31.

<sup>36</sup> *Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, HRC Res 8/7, UN HRC, 8<sup>th</sup> sess, 28<sup>th</sup> mtg, A/HRC/RES/8/7 (18 June 2008), para 8.

Ruggie absolved TNCs of liability with the statement, unsettled in international law, that 'States are not per se responsible for human rights abuses by private actors'.<sup>37</sup>

The United Nations Human Rights Council appointed Harvard Professor of Law, John Ruggie, to determine human rights obligations of states and transnational enterprises following the largely hostile reception of the *Draft Norms* by many states,<sup>38</sup> and the strong opposition from the International Chamber of Commerce and International Organisation of Employers.<sup>39</sup> Ruggie's Framework rejected key features of the Norms, specifically binding obligations upon corporations, and appears to assuage corporate concern on this issue by his specific denial that corporations have obligations to realise human rights. Instead of binding obligations to protect human rights, Ruggie offers only the fuzzy notion of corporate responsibility to encourage businesses to abide by social expectations.<sup>40</sup>

'Social expectations' differ between states, and developing states often have apparent social expectations for development over environmental protection or human rights standards well below those of first world nations. In corrupt and undemocratic states, 'social expectations' are often the prevailing views of the governing dictator or oligarchy, with contrary views silenced. A further criticism of Ruggie's report is his method of research. The UN's Office in Geneva announced Ruggie had obtained the voluntary services of fifteen international law offices specialising in counselling big corporations to review corporate law's effect in promoting a pro-human-rights culture in forty nations including Australia, Papua New Guinea and Indonesia. It is incongruent to think that these firms would perform objective and unbiased assessments that could cause loss to their wealthy clients.<sup>41</sup>

(i) *Embedded Neoliberalism Shaping International Law And Policy*

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<sup>37</sup> John Ruggie, *Final Report*, A/HRC/31, 7.

<sup>38</sup> Larry C. Backer, 'Multinational Corporations, Transnational Law: The United Nations: Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law' [2006] 37 *Columbia Human Rights Law Review* 287, 288.

<sup>39</sup> International Chamber of Commerce and International Organisation of Employers, Joint Views of the IOE and IC on the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (March 2004) at <<http://www.reports-and-materials.org/IOE-ICC-views-UN-norms-March-2004.doc>>.

<sup>40</sup> David Bilchitz, 'The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?' (2010) 12 *SUR International Journal on Human Rights* 199.

<sup>41</sup> Alejandro Teitelbaum, 'Observations on the Final Report of the Special Representative of the UN Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (2011) *Human Rights and Sustainable Human Development* (The Jus Semper Global Alliance).

Neoliberal policies have become embedded in state and supra-national agencies and regulatory regimes. Cern argues that in recent decades neoliberalism has transformed from a relatively closed doctrine associated with particular individuals, governments and institutions (for example, Milton Friedman, Thatcher's Britain and the Chicago School of Economics) into a hegemonic concept that has swept the world and co-opted all political life.<sup>42</sup> Neoliberal governments have deregulated many of the public services customarily filled by governments and supplanted the services to that of the market. CSR is one of those services – rather than regulate, governments and industry widely agree upon business self-regulation and CSR initiatives as a cost-effective means of protecting human rights and environment. As demonstrated in this thesis' case study of Rio Tinto, CSR fails to protect either in many states, while enabling invaluable public relations outputs in the first world for a small financial input. CSR is a creature of the market devised by neoliberal ruling classes to quell the conscience of the increasingly aware first world.

The market began as a function of states,<sup>43</sup> but has now become a hegemonic globalizing political paradigm and economic system of choice for the ruling classes of states as disparate as the US, China, India, Brazil, South Africa. Third World states are ubiquitously and ignominiously labelled as 'emerging markets' in the hegemony of the transnational historic bloc.<sup>44</sup> States have accepted the internationalization of production as a desirable condition for economic growth and have constructed market-promoting and enhancing policy measures that are rooted in the explicit integration of domestic and international neoliberal political organization,<sup>45</sup> and thus affected state practice and moulded the tenor of international negotiations to suit their embedded neoliberal policies and agendas.

*(b) Losing Sight Of Responsibility*

States must take appropriate steps to prevent, investigate, punish and redress human rights abuse through effective policies, legislation, regulations and adjudication.<sup>46</sup> The

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<sup>42</sup> Philip G. Cerny, 'Embedding Neoliberalism: The Evolution of a Hegemonic Paradigm' (2008) 2(1) *Journal of International Trade and Diplomacy* 1.

<sup>43</sup> Robert Keohane, *International Institutions and State Power* (Westview Press, 1989).

<sup>44</sup> Cerny, above n 39.

<sup>45</sup> Ibid.

<sup>46</sup> John Ruggie, *Final Report*, A/HRC/31.

SRSG's Final Report asserts that States are not per se responsible for human rights by private actors, but may breach their international obligations 'when they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse.<sup>47</sup> The SRSG apportions human rights violations to governance gaps in corporate and securities laws with respect to human rights. Ruggie proposes stronger laws and guiding policies<sup>48</sup> while neglecting to consider the overwhelming dominance of the 'marketocracy' over all aspects human life and most governmental agencies.<sup>49</sup> The SRSG acknowledges that some of the worst human rights abuses involving business occurs in the context of conflict over control of territory and resources but fails to go that one step further to connect TNCs and impoverished and/or corrupt Third World states as the genesis of abuse. Rather than apportion blame and rectification, the SRSG simply states that human rights cannot expect to function in those areas.<sup>50</sup> This statement is a failure of international human rights instruments and their agencies writ large. The SRSG suggests TNCs seek guidance from States to avoid contributing to human rights harms, while fully denying any culpability of TNCs for this state of affairs. The SRSG focuses his attention upon 'responsible businesses' notwithstanding that TNCs such as Rio Tinto are regarded by investors and governments as 'responsible' despite the facts painting a different story.

*(i) Officially Obfuscating Responsibility*

This thesis is that outside of first world states, TNCs do not act responsibly but instead establish veneers of good corporate citizenship through the use of the CSR chimera to pursue positive public relations and tradable reputation. CSR is a concept of neoliberalism and its ruling class drivers conceived and promoted to provide a friendly façade to their preferred 'business as usual' approach to profit making.

While refusing to countenance binding obligations upon businesses, the SRSG notes that home states have roles to play in assisting 'corporations and host states to ensure that businesses are not involved with human rights abuse', optimistically adding

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<sup>47</sup> John Ruggie, *Final Report*, A/HRC/31, 7.

<sup>48</sup> John Ruggie, *Final Report*, A/HRC/31, 8.

<sup>49</sup> Alvaro J. de Regio, 'Business and Human Rights: Upholding the Market's Social Darwinism – As assessment of Mr John Ruggie's Report: "Protect, Respect and Remedy: a Framework for Business and Human Rights"' (2008) *Human Rights and Sustainable Human Development* (Jus Semper Global Alliance).

<sup>50</sup> John Ruggie, *Final Report*, A/HRC/31, 11.

'neighbouring States can provide important additional support'.<sup>51</sup> The reality of the era of globalisation and the freemarket is that neighbouring States are likely in competition with each other for foreign investment, thereby spearheading a race to the bottom and an unwillingness or inability to provide 'additional assistance' to errant states.

Some states and their neighbours are unwilling to enforce human rights and environmental obligations because governments from poor host states may collude with TNCs against communities and the environment, as documented in the Rio Tinto case study. OECD studies indicate that TNCs involved in extractive industries are particularly prone to complicity with host states,<sup>52</sup> diminishing the SRSR's assertions that host states retain the primary responsibility for corporate malfeasance. Even the governments of wealthy first nation states find themselves beholden to do the bidding of transnational mining corporations or face unprecedented backlash via multi-million dollar advertising campaigns and compliant media. In his final report, the SRSR does not even mention a duty of states to regulate errant TNCs or challenge the current market-centred ethos, nor does he question the supplantation of democracy by the marketocratic ethos of the ruling classes.

To appreciate the 180 degree departure of the Protect-Respect-Remedy Framework from the binding obligations proposed by the Norms and capture of international efforts to bring TNCs to account for human rights abuses and ecocide, one need only look at the companies commissioned or offering their services gratis to assist the SRSR in his ultimate findings. These have been touched upon above. The nature of the law firms' reports was to itemise each country's ratification status of human rights instruments and state reported adherence to these instruments.<sup>53</sup> Unsurprisingly, self-reporting states supplied positive assessments of their human rights' compliance, and unsurprisingly the author of the Asia-Pacific volume is a major legal firm with dubious socially irresponsible clientele including British-American Tobacco, Rio Tinto, BHP, ConocoPhillips, Chevron and Shell. The company, Allen Arthur

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<sup>51</sup> John Ruggie, *Final Report*, A/HRC/31, 11.

<sup>52</sup> Menno Kamminga, 'Corporate Obligations under International Law' (Paper presented at the 71<sup>st</sup> conference of the International Law Association, Berlin, 17 August 2004). The paper was also submitted to the Office of the United Nations High Commissioner for Human Rights as a contribution to the UN stakeholder consultation on business and human rights.

<sup>53</sup> See for example Allen Arthur Andersen, Brief on Corporation and Human Rights in the Asia-Pacific Region – prepared for Professor John Ruggie United Nations Special Representative of the Secretary-General for Business and Human Rights, August 2006.

Robinson also drafted PNG's now repealed anti-environmental laws permitting marine tailings dumping<sup>54</sup> and is an associate member of the Minerals Council of Australia – corporate interests at odds with corporate social responsibility. Capture complete.

*(c) Another Critique Of The SRSG's Report*

The SRSG's final report has been criticised for failing to address the primary cause of corporate human rights and environmental abuses, that being the free market agenda pushed by neoliberal governments and corporations. Rather, Ruggie blames 'governance gaps' in domestic law as the root cause of corporations' abuses, as if stronger governance in cash-strapped Third World nations tied into foreign debt and globalisation have a choice in their policies and enforcement. Given the power exercised by business interests over the economy, state and media it is extremely difficult to effect national and international change opposed by corporations. The SRSG recognises this fact, yet ultimately obviates responsibility to states that clearly are unable or unwilling to abide by international principles and laws when foreign investment is at risk of moving to a state with even lower regulations.

The embedded and hegemonic neoliberal policies in state and supra-national agencies are unquestioned and unaddressed by the SRSG, and beg the question raised by de Reglia – how can governments fulfil their democratic mandate if they allow the market to determine how resources will be allocated?<sup>55</sup> Markets cannot allocate resources according to equitable principles and welfare of all ranks of society because they utilise the most efficient practices for accumulation of capital and increasing shareholder returns. This is seen in the 'most efficient' practise of riverine tailings dumping at Grasberg and Bougainville mines, because constructing tailing dams to western standards would have reduced profits markedly, or even made the mines unprofitable. Markets have no morals and accede only to laws and regulations. As discussed in Chapter VI, neoliberalism paradoxically includes an active role for the state in designing, promoting and guaranteeing the 'free and efficient operation of the market'. The SRSG's solution to the identified 'governance gap' is for business to seek guidance from States on how to avoid contributing to human rights harm in conflict

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<sup>54</sup> 'Breaking news: Parliament dumps Env Act amendments', Papua New Guinea Mine Watch, 12 January 2012, <https://ramumine.wordpress.com/2012/01/19/breaking-news-parliament-dumps-env-act-amendments/>

<sup>55</sup> de Regio, above n 46.

situations using 'innovative and practical approaches.'<sup>56</sup> He posits that home states should foster closer cooperation among their development assistance agencies, trade ministries and export credit agencies to assist businesses in such situations, while ignoring the role TNCs play in shaping contributing to campaigns for their favoured political partners, shaping domestic policies and in turn, governmental agendas on the international stage.<sup>57</sup> In this way governments and states have increasingly become agents of the market, and the market has become a major shaper of international law and policy.

### 3. Home State Hypocrisy – Scope Of Extraterritoriality

There is a nexus between states' ratification of international principles and treaties and disregard of these same principles by state-listed companies. Private actors are compelled to abide by domestic laws at home, and many domestic laws are enacted to comply with home state international obligations. For example, the *Racial Discrimination Act 1975* (Cth) was enacted to comply with Australia's obligations under the *United Nations Convention on the Elimination of All Forms of Racial Discrimination*. Elements of the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) import the *Convention on Biodiversity Conservation 1992* and the *Convention Concerning the Protection of the World Cultural and Natural Heritage 1972*. Since Rio Tinto changed its policy with respect to native title in 1992, other mining companies have followed suit and respected the *Native Title Act 1993* (Cth) notwithstanding allegations of coerced and improper negotiations by some companies. Some of the same companies that are so quick to present a positive spin on their commitment to addressing Indigenous disadvantage in Australia perpetuate and exacerbate Indigenous disadvantage in neighbouring conflict-ridden and corrupt states, as is demonstrated by the Rio Tinto case study in Bougainville and West Papua. Indigenous Australians are only accommodated if they accept the neoliberal agenda of individualism and profit. Aboriginal Australians concerned for their traditional way of life and respect for sacred sites are not served by mining companies whose goal is to negotiate the price that peoples can be bought off. While not condemning Aboriginal people who wish for a career in the mining industry or are happy to receive mining royalties, those Aboriginal traditional owners who refuse to ascribe to neoliberalism

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<sup>56</sup> John Ruggie, *Final Report*, A/HRC/31.

<sup>57</sup> de Regio, above n 46.



and the seductive power of consumerism find themselves wedged out from the Native Title and big development negotiations.

*(a) Applying Extraterritoriality*

Current international legal opinion is hotly divided as to the responsibility of corporations to protect human rights and abide by environmental conventions, as noted above, but the doctrine of state responsibility is unequivocal. While TNC responsibility is an emerging concept, the fact of extra-territorial legislation of states against private persons is well established both in Australia and overseas. Ruggie's "Protect-Respect-Remedy" Framework places responsibility for upholding human rights and environmental laws with states, and there is nothing but political will that prevents states from enacting extra-territorial legislation to enforce basic human rights and environmental standards to Australian listed companies operating off-shore. States can and do legislate extra-territorially. Human rights abuses and environmental damages by Australian persons and corporate persons overseas can, given political will, be legislated against.

The Australian government has legislated to act extra-territorially and even retrospectively on a number of occasions. These include causes of action in both criminal and civil jurisdictions in over 40 legislative instruments including regulation of trade practices overseas and tariffs for aircraft.<sup>58</sup> The politically charged Australian case of World War II war criminal Ivan Polyukhovic is authority for not only retrospective extra-territoriality, but retrospective extra-territoriality enacted specifically to criminalise the actions of one person in a particular geographical location in a narrow temporal window.<sup>59</sup>

*(b) Retrospective Extra-territoriality*

The Australian Constitution allows the Commonwealth to make laws extra-territorially under s 51(xxix). The High Court case of *Polyukhovic v Commonwealth* concerned issues of extra-territoriality whereby the *War Crimes Act 1945* (Cth) was amended in 1988 to provide for retrospective domestic criminalisation of war crimes committed in

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<sup>58</sup> Justin Gleeson, 'Extraterritorial application of Australian statutes proscribing misconduct' (2005) 79 *Australian Law Journal* 296.

<sup>59</sup> *Polyukovich v The Commonwealth* (1991) 172 CLR 501.

Europe from the 1 September 1939 to 8 May 1945. The High Court held that section 51 (xxix) of the Constitution gives the Commonwealth the power to enact laws to implement obligations under treaties to which Australia has ratified, regardless of the content of the treaty; and that although the Act is retrospective and operates on people who at the time had no connection to Australia, it is still a law with respect to 'external affairs.' *Polyukhovic*'s case sets a precedent for Commonwealth extra-territoriality jurisdiction to try activities of persons committing international crimes. The ease of which Parliament amended the *War Crimes Act* to cast a net wide enough to charge and try one person, Mr Polyukhovic, of war crimes in a narrow period of modern history in a specific small continent is authority that legislating for Australian companies' international criminal acts is not impossible.

*(c) An Extra-territorial Law Attached To A Human Rights Treaty*

An existing example of the Australian parliament enacting an extra-territorial law attached to a human rights treaty is found in laws to criminalising extraterritorial child sex crimes by Australians overseas. In 1994 the Australian government passed the *Crimes (Child Sex Tourism) Amendment Act 1994* (Cth) that introduced a new Child Sex Tourism into the *Crimes Act 1919* (Cth) covering sex acts with children under 16 years old committed overseas. The government invoked the *United Nations Convention on the Rights of the Child* as the originating treaty for this amendment, acknowledging the laws were enacted to fill the gaps when states were unwilling or unable to take action against known offenders.<sup>60</sup> This law targeting individuals who prey on children outside of Australia's jurisdiction was enacted pursuant to s 51(xxix) of the Constitution. It is a small bow to draw that the Australian government could enact laws to protect non-Australian citizens from abuse and destruction of homes and livelihoods by TNCs by virtue of the same provisions of the Constitution, but the longer bow to draw is extra-territorial social-responsibility laws that threaten the profits of TNCs.

*(d) State Responsibility For Extra-territorial Corporate Human Rights And Environmental Violations*

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<sup>60</sup> Fiona David, 'Child Sex Tourism' *Trends and Issues in Crime and Criminal Justice* (Australian Institute of Criminology, June 2000).

All private persons, including transnational corporations, have the obligation to respect the law, and if they do not they must suffer the consequences of civil or penal sanctions at international level.<sup>61</sup> While international human rights instruments generally bind only states, non-state actors can be bound by state responsibility to ensure that all rights contained therein are guaranteed to the people in the state because under treaties states agree to oblige themselves to take the necessary legislative measures to do so.<sup>62</sup> As part of this obligation states are required to ensure third parties do not violate the rights of individuals and this is *incontrovertible* in international law.<sup>63</sup> The Human Rights Council has held that art 2(1) of the ICCPR may have extraterritorial applications, and that

it would be unconscionable to interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.<sup>64</sup>

As states are obliged to regulate the actions of third parties to ensure they comply with human rights requirements, it follows that third parties themselves are obligated to comply with these requirements. As Bilchitz points out, if third parties were not required to comply with these requirements there would be no reason for states to ensure that they do so.<sup>65</sup>

This thesis demonstrates that many states *are* unwilling or unable to take action against known corporate human rights violators and environmental polluters even when they have signed major human rights and environmental treaties. In some cases, errant states have incorporated the treaties into domestic law but are still unwilling or unable to enforce these laws against TNCs. If the action being legislated for or against has sufficient political will and concentrated public opprobrium (for example, against child sex predators and Nazi war criminals), states *can* and do act extra-territoriality.

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<sup>61</sup> Teitelbaum, above n 38.

<sup>62</sup> David Kinley, 'Human Rights as Legally Binding or Merely Relevant?' in Stephen Bottomley and David Kinley (eds) *Commercial Law and Human Rights* (Ashgate: Aldershot 2002); also Bilchitz, above n 37.

<sup>63</sup> John Ruggie, *United Nations 'Protect, Respect and Remedy' Framework for Business and Human Rights*, UN CCPR/C, 8<sup>th</sup> sess, Agenda Item 3 A/HRC/8/5 (7 April 2008), see also the existence of this responsibility outlined in *Velasquez Rodriguez v Honduras case 28 ILM 291* (1989), cited in Bilchitz above n 37.

<sup>64</sup> Human Rights Committee, Communication No 56/1979, 13<sup>th</sup> sess, U.N. Doc. CCPR/C/OP/1 (29 July 1981) 92 [10.3] ('*Lilian Celiberti de Casariego v. Uruguay*').

<sup>65</sup> Bilchitz, above n 37, 22-23.

#### 4 State Responsibility, Transnational Corporations And The Right To Health

The right to health is considered in Chapters I and V of this thesis. The right to health encompasses the right to a health-promoting environment, and as such forms an oblique right to environment under art 12 of the *ICESCR*. The *General Comment of the Committee on Economic Social and Cultural Rights on the right to the highest attainable standard of health in the International Covenant on Economic, Social and Cultural Rights*<sup>66</sup> makes it clear that non-state actors have the responsibility to fulfil these responsibilities and failure to realise these responsibilities constitutes a violation of the right to health.<sup>67</sup> These responsibilities stem from customary international law which Clapham and Rubio<sup>68</sup> find through wide international acceptance of non-binding instruments, participation by states in multi-lateral treaties dealing with the right to health (146 nations have signed the *ICESCR*), wide state practise in the form of domestic right-to-health and healthy environment legislation and the implementation of this right before municipal courts.<sup>69</sup>

The international right to health, and by extension, a healthy environment and functioning ecosystem services is a responsibility of state and non-state actors, as demonstrated by the General Comment at [42]:

While only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society - individuals, including health professionals, families, local communities, intergovernmental and non-governmental organizations, civil society organizations, as well as the private business sector - have responsibilities regarding the realization of the right to health. State parties should therefore provide an environment which facilitates the discharge of these responsibilities.

A right to health implies a right to ecosystem services provisioned by humans for well-

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<sup>66</sup> UN CESCR, *General Comment of the Committee on Economic Social and Cultural Rights on the right to the highest attainable standard of health in the International Covenant on Economic, Social and Cultural Rights*, 22<sup>nd</sup> sess, Agenda Item 3, General Comment No 14, E/C.12/2000/4 (11 August 2000).

<sup>67</sup> Ibid, [44]; Andrew Clapham and Mariana Garcia Rubio, 'The Obligations of States with regard to Non-State Actors in the Context of the Right to Health' (Working Paper Series No 3, Health and Human Rights, 2002).

<sup>68</sup> Clapham and Rubio above n 67..

<sup>69</sup> Ibid, 20-26.

being. This includes subsistence livelihoods of Papuans downstream from Grasberg and Bougainvilleans who suffer illness swimming in polluted waterways. The ecosystem service of climate regulation is affected by clearfelling forests for mines in Indonesia and Papua New Guinea; digging coal in the NSW Hunter valley and smelting alumina in refineries around the coastal regions. The right to health in the form of environmental psychology and aesthetics is challenged by open cut operations in once pristine regions and national parks, while many traditional people feel genuine despair and depression when their cultural lands and sacred sites are bulldozed for minerals lying underneath. The General Comment demonstrates the universality of non-state actors' obligations to realise the right to health borne, which has elements of binding customary international law.

## *C Reforming The Corporations Act To Mandate Human Rights Protections?*

### *1. Introduction*

This thesis demonstrates through the example of Rio Tinto and its operations in the Asia-Pacific region that CSR is a chimera utilised by corporations. CSR is deployed as a public relations exercise to avoid supra-national and national regulation of business, to add value to corporate reputation and thus value to share price, to capture the market of concerned consumers and to a lesser extent make employees feel comfortable with the activities of their employers. CSR as a corporate cost of business became somewhat of a necessity for companies after the 'Battle for Seattle' riots surrounding the World Economic Forum held in Seattle when business leaders realised they needed to find a means for a social licence to operate to 'help ... prevent the unfolding backlash against globalisation and reverse the recent erosion of trust.'<sup>70</sup>

The thesis has shown that a founding member of the United Nations Global Compact complies with few of the Global Compacts' stated principles and seriously breaches many. Self-reporting of adherence to Global Compact principles is shown by the Rio

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<sup>70</sup> SustainAbility, 'Gearing Up, from Corporate Responsibility to Good Governance and Scalable Solutions', 2004.

Tinto case study to be devoid of baseline studies and meaningless. For example, Rio Tinto has no concrete figures in its CSR documentation and relies on vague statements such as 'reduced greenhouse gas emissions by 5%' without providing reference to how many greenhouse gases their operations released into the atmosphere, if the statements apply to discrete operations or if they are globally averaged out.

This final section outlines the need to amend corporations legislation to bring Australian listed companies' activities in line with ratified human rights and environmental treaties. It is limited to the national scale because the most effective change comes from domestic legislation with ensuing enforcement provisions for non-compliance. The current regulatory scheme optimistically pre-supposes corporations will 'do the right thing' in their operations, but the thesis demonstrates that even famous companies well respected by the ruling classes do not do follow their own corporate social responsibility rhetoric when regulation and enforcement is deficient or lacking.

#### *(a) A Comment On Human Rights*

Human rights are universal, and are inherit in our common humanness. It is sometimes suggested that there is no unified definition of 'human rights' due to diverse and differing cultures and political systems. This is the view proffered by Asian dictators and their famous phrase of 'Asian values' and by liberal scholars anxious not to impose Western views on others. As former President of the International Court of Justice, Rosalyn Higgins notes, the above view is 'rarely advanced by the oppressed, who are only too anxious to benefit from perceived international standards.'<sup>71</sup>

#### *2 Senate Joint Committee Inquiry Revisited*

The Parliamentary Joint Committee on Corporations and Financial Services held an inquiry into CSR and Triple-Bottom-Line reporting in 2005. The terms of reference was for the committee to determine the extent that companies have regard, and *should* have regard to the interests of stakeholders other than shareholders, if the directors' duties in the *Corporations Act* encouraged or discouraged regard to other stakeholders,

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<sup>71</sup> Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1995).

and if the directors' duties should be amended to enable regard for other stakeholders.<sup>72</sup> The terms of reference failed to incorporate the *UN Norms* or Special Representative's '*Protect, Respect, Remedy*' Framework, nor were the extraterritorial impacts of Australian companies addressed.

#### *(a) Reasons For Standardisation Of CSR*

The discrepancy between corporations' actions in Australia and offshore in the climate of weak or corrupt host state regulatory systems suggests a need for CSR standardization and regulation for a number of reasons. One of these is that CSR has developed into a practical mechanism for companies to manage and assess risk and reputational risk, which in turn determines their long-term financial value. Companies in Australia self-assess on their sustainability and social programs and are ranked accordingly. Given the recognized institutional value a positive CSR score sheet provides for a company, independent auditing would provide certainty to investors as to potential future risk and reputational risk of a company. An independent audit at standardized-for-industry benchmarks is necessary as some companies hold simultaneous praise for socially and environmentally responsible operations in Australia and condemnation for their activities overseas. These companies include blue-chip titans of minerals and mining, Rio Tinto and BHP-Billiton. Government regulation of auditing processes and CSR benchmarks will provide certainty for investors and certainty to communities living in the shadow of operations. Setting aside state responsibility to prevent human rights breaches under international environmental laws, a regulated approach to CSR (as opposed to the current 'enlightened self-interest' favoured by the Parliamentary Joint Committee on Corporations and Financial Services<sup>73</sup>) would bring Australia into line with international standards on implementing and reporting on corporate responsibility, an area in which it currently lags.<sup>74</sup>

### *3 Reform Of The Corporations Act For Consistency With International Obligations*

International human rights and environment law oblige contracting states to implement

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<sup>72</sup> Australian Government, Parliamentary Joint Committee on Corporate and Financial Services, *Corporate Responsibility: Managing risk and creating value* (2004), Terms of Reference.

<sup>73</sup> Ibid, Executive Summary, p xiv.

<sup>74</sup> Ibid, p xiii.

the provisions of covenants and conventions in their domestic jurisdictions. As the Special Representative of the United Nations Secretary General (SRSG) has stressed, most States have adopted policies and implemented regulation in core areas of human rights such as labour rights and non-discrimination in the workplace, but they have been slow to foster rights-respecting cultures and practices. In fact, the SRSG noted ‘substantial legal and policy incoherence’ and gaps with ‘significant consequences for victims, companies and States themselves’. The SRSG identified the most widespread gap is non-enforcement of existing rules, while legal and policy incoherence stemmed from governmental departments and agencies shaping business policy – including corporate and securities regulation, export credit agencies, and trade – working in isolation from, and uninformed by, their governments own human rights obligations and agencies.<sup>75</sup> The SRSG pointed out one avenue to increase policy coherence in this area and to ‘highlight their expectations of businesses’ can be through the creation and implementation of CSR policies that include a focus on human rights. Already a growing number of States are adopting these, including Canada, Denmark, India, the Netherlands and Norway. Canada, in particular, released the policy *Building the Canadian Advantage: A Corporate Social Responsibility Strategy for the Canadian International Extractive Sector* that has as two of its four main elements: host government resource capacity building and promotion of voluntary CSR performance guidelines (comprising of the International Finance Corporation’s Performance Standards on Social and Environmental Sustainability; the Voluntary Principles on Security and Human Rights; and the Global Reporting Initiative). The Policy also appoints an Extractive Industry Counsellor to report the CSR practices of Canadian extractive companies overseas to the Minister, and advise on implementing performance guidelines.<sup>76</sup> This approach, while being a start, fails to mandate a certain code of conduct and merely encourages corporations to act in a certain manner – policy means little with no enacting legislation or enforcement mechanisms, and CSR without mandated baselines and standards is meaningless and illogical.

Reform of domestic law in the form of the *Corporations Act* to amend directors’ duties and strengthen the provisions of s299A is a method to create coherence with inter- and intra-national law and policy in the business and human rights realm.

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<sup>75</sup> United Nations, Mandate of the Special Representative of the United Nations’ Secretary- General (SRSG) on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, *Survey of State Corporate Social Responsibility Policies – Summary of Key Trends* (June 2010) p 2.

<sup>76</sup> Ibid.



#### 4 *Possible Regulatory Reforms*

A number of reforms to standardize regulatory laws in the Australia have been identified as feasible in the current political economy.<sup>77</sup> Standardisation of incoherent laws and policy provides certainty for corporations, regulators and the public, and in the case of CSR regulation, could prohibit practices causing serious damage to humans and the environment. Middleton identifies a) regulatory formalism; b) command and control; and c) responsive regulation as possible modes of regulation of the fiscal markets, underscoring the role played by ‘principles, rules, actors and mechanisms.’<sup>78</sup> These models have extensive literature attached to their development and efficacy, and as such they are appropriate to apply with respect to bringing coherence and bridging governance gaps to business and human rights laws. However, as I argue below, the potential for these reforms is limited because the primacy of neoliberal international and national governance policy privileges deregulation, the removal of obstacles to free trade and devolution of decision-making from government to business.

The ascendancy of neoliberalism through almost all national and international institutions renders any state-based or international legal regime unlikely to effect change in the sphere of human rights and environment protection

##### *(a) Regulatory formalism*

Regulatory formalism is the approach where problems are identified and rules are written to respond to these problems. These problems are amenable to black letter law reform responses and provide certainty to business. Formalism is less appropriate for laws pertaining to poorly understood environmental processes such as pollution that may have far reaching effects that are yet to be understood by science. With respect to Rio Tinto, the effects of tailings from its 40% venture at Grasberg Mine in West Papua are in dispute, not least in part by the secrecy involved in the world’s largest gold and copper mine by the mine’s owners and the Indonesian military. The mine generates 700 000 tons of waste per day, dumped directly into the adjoining valley, in a region that experiences 4000 mm of rain a year, and travels down the valley to the Arafura

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<sup>77</sup> Tom Middleton, ‘A Proposal for a Uniform Australian Regulatory Model’ (Doctoral Thesis, James Cook University, 2007).

<sup>78</sup> Ibid, subtitle [1.3.4], 15.

Sea.<sup>79</sup> The Indonesian Environment Ministry tried to compel the mine to abide by Indonesian environmental laws make reparations for riparian destruction but Freeport-Rio Tinto has refused to comply with governmental regulations.<sup>80</sup> Regulations of Australian listed companies must include the precautionary principle and be reflexive to take into account the effects of advances in scientific understanding of ecosystem service provisioning and the effects of environmental degradation on human well-being. The growing awareness of human rights violations due to advances in modern communications and real time reporting of human rights abuses through multi-media mean that companies can no longer hide behind veils of secrecy in remote and repressed lands.

*(b) Command and Control*

The command and control approach to regulation imposes standards of behaviour that are backed by sanctions.<sup>81</sup> The term 'command and control' is pejorative and was brought into lexicon by neoliberal, mostly United States, economists who were strong critics of environmental regulatory laws established by the US federal government.<sup>82</sup> Market-led environmentalism pre-supposes that private property owners can be relied upon to manage natural resources under their control in a sustainable manner because it is in their long-term interests to do so.<sup>83</sup> There is little in Australia's history of land and vegetation management to support this theory,<sup>84</sup> nor support in extractive industry practices in the region. Command-and-control is defined in respect to Australian environmental law as 'a law and state-centred process of legislative action combined with administrative enforcement.'<sup>85</sup> While being criticised for potentially leading to over-regulation, excessive legalism and intrusion of managerial freedom,<sup>86</sup> command and control regulation has proven 'far more flexible and innovative' than the claims of

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<sup>79</sup> Jane Perlez and Raymond Bonner, 'Beneath a Mountain of Wealth, a River of Waste', *The New York Times* (New York) 27 December 2005.

<sup>80</sup> Ibid.

<sup>81</sup> Middleton, above n 74, 13.

<sup>82</sup> Neil Gunningham, Peter Grabosky and Darren Sinclair, *Smart Regulation: Designing Environmental Policy* (Oxford University Press, 1998) 39, cited in Lee Godden and Jacqueline Peel, *Environmental Law: Scientific, Policy and Regulatory Dimensions* (Oxford University Press, 2010) 146.

<sup>83</sup> Godden and Peel, above n 79, 145.

<sup>84</sup> Christine Parker and John Braithwaite, 'Regulation' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2003) 119, 127.

<sup>85</sup> Godden and Peel, above n 79.

<sup>86</sup> Rob Baldwin and Martin Cave, 'Understanding Regulation Theory Strategy, and Practice,' (Oxford University Press, 1999) 29.

the neoliberals would credit.<sup>87</sup> On the negative side, command-and-control regulation relies on government's ability to solve complex problems, which are at risk of being compartmentalised and examined in isolation by specialised experts.<sup>88</sup> I favour a regulatory model that has been shown to be the most successful model in the era of self-regulation promotion, described by Middleton and Braithwaite as 'responsive regulation.'<sup>89</sup>

### (c) *Responsive Regulation*

Responsive Regulation utilises persuasion and punishment to achieve compliance.<sup>90</sup> The idea behind responsive regulation is that governments should be responsive to the conduct of those they seek to regulate in deciding whether a more or less interventionist approach is needed.<sup>91</sup> Responsive regulation requires government to develop good relations with the regulated so that they will voluntarily perform most of the compliance work. Community commitment and compliance to legislation is enhanced through respectful treatment, deliberative dialogue and genuine willingness to address weaknesses in the regulatory system. Non-compliant behaviour is sanctioned by an enforcing agency with the capacity to escalate regulatory intervention in the face of continuing non-compliance.<sup>92</sup> Regulation has been found most effective when it works within the naturally occurring systems in business, as laws that go 'against the grain of business culture risk irrelevance.'<sup>93</sup> A problem arises when business culture is entrenched to place profit imperative above human rights and environmental protection, as has been demonstrated in the case study of Rio Tinto ignoring Indonesian environmental laws. In ignoring the state environmental laws, Rio Tinto (along with Freeport McMoRan) has destroyed of the sacred Jayawijaja mountain range and thus the cultural, social, political and civic human rights of the Amungme people of West Papua.

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<sup>87</sup> Godden and Peel, above n 79, 147.

<sup>88</sup> Ibid, 148.

<sup>89</sup> Middleton, above n 74; John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002).

<sup>90</sup> Braithwaite, above n 86.

<sup>91</sup> Ian Ayres and John Braithwaite, *Responsive regulation: Transcending the deregulation debate* (Oxford University Press, 1992).

<sup>92</sup> Responsive Regulation, Micro Foundations of Democratic Governance, RegNet (2009), <<http://demgov.anu.edu.au/regulate/index.html>>.

<sup>93</sup> John Braithwaite, 'Responsive Regulation and Developing Economies' (2006) 34(5) *World Development* 884.

Short and Toffel's research shows that the threat of a big stick approach in regulation is imperative for the realisation of businesses' self-regulatory commitments. Effective enforcement tools in the form of heavy surveillance can foster industries' normative motivations to self-regulate.<sup>94</sup> This form of responsive regulation is reflexive to changing circumstances and a necessity for complex environmental and human rights scenarios.

*(d) A Chimeraic Reform*

In 2006 the British Parliament amended the *Companies Act* to impose duties on directors to consider stakeholders as well as shareholders interests. Section 184 of the *Australian Corporations Act 2000 (Cth)* compels directors to have duties solely to shareholders' interests. The British Act appears innovative, and it was moves in the British regulatory environment that initiated the Australian Inquiry into CSR. The particular section of the UK Act reads:

172 Duty to promote the success of the company

A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so must have regard (amongst other matters) to –

the likely consequences of any decision in the long term;

the interests of the company's employees;

the need to foster the company's business relationships with suppliers, customers and others;

the impact of the company's operations on the community and the environment;

the desirability of the company maintaining a reputation for high standards of business conduct; and

the need to act fairly as between members of the community.

Where the extent that the purposes of the company consist or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the

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<sup>94</sup> Jodi Short and Michael Toffel, 'Making Self-Regulation more than merely symbolic: The critical role of the legal environment' (2010) 55 *Administrative Science Quarterly* 361.

company for the benefit of its members were to achieving those purposes.

The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the in the interests of creditors of the company.

This amendment caused enough angst amongst big business that the Australian government held the aforementioned Inquiry into CSR to ascertain if Australia should consider similarly amending its *Corporations Act*. The aphorism of Australian politics that a government should never hold an inquiry unless it already knows the results rang true – despite widespread stakeholder support to amend the Act to permit corporations to consider stakeholders as well as shareholders, the government decided corporations were benign, job-providing entities who would act ethically for the purpose of self-interest and thus declined any proposed amendments.

Given that Rio Tinto is a joint Australian-UK listed mining company, it remains to be seen if the British legislation makes any difference. British regulators have no powers to enforce any rights adduced, and as the amendments rely upon enlightened shareholder values, only those companies that place high value upon reputation abide by them. Even so, the Rio Tinto case study has shown that ‘enlightened shareholder values’ can be assuaged with some well-managed mines in countries where the company was obliged to comply with stringent laws and a good public relations company. Voluntary corporate reporting has resulted in misleading and meaningless green- and blue-washed reports devoid of baseline studies or comparisons with opportunity costs to human rights and environment if the mines were not in operation. The London Mining Network investigated the operations of eight London listed mining companies in Africa and found appalling human rights abuses and ecocide, and no discernable difference in UK company operations since s 172 was enacted.<sup>95</sup> This view is supported by the Corporate Responsibility Coalition (CORE), who note that the amendments do not require directors to compromise the interests of the company for human rights and environmental impacts or promote a particular social or environmental objective.<sup>96</sup> CORE points to the dearth of case law on s 172 and the fact that it relies solely on enlightened self-interest.<sup>97</sup> For an Australian equivalent to have teeth, any amendment must provide for independent auditing of companies’

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<sup>95</sup> London Mining Network, ‘UK-listed Mining Companies and the Case for Stricter Oversight – Case Studies and Recommendations, (February 2012).

<sup>96</sup> Hannah Ellis and Kate Hodgson, ‘Directors, Human Rights & The Companies Act: Is the new law any different?’ (Corporate Responsibility (CORE) Coalition, March 2011).

<sup>97</sup> Ibid.

adherence to universal human rights and environmental laws, and sanctions for non-compliance. Any other form of law, including the present s 172 in the UK is only a chimera – enacted to placate concerned shareholders with fluff while continuing business as usual. The ascendancy of neoliberalism through almost all national and international institutions renders any state-based or international legal regime unlikely to effect change in the sphere of human rights and environment protection.

Neoliberalism and its attendant corporatocracy have become effective regulatory captors, ensuring glossy corporate sustainability reports and obfuscation through misinformation allow for maintenance of the business status quo.

#### *(e) Reforms To International Legal Framework Outside Scope Of Paper*

Reforms to the International legal frameworks are outside the scope of this section, which concerns itself with the current corporations laws and laws affecting the actions of private actors in overseas territories.

#### *5 Conclusion*

Transnational corporations are the driving agents of the global economy and exercise dominant control over global trade and investment.<sup>98</sup> The social power of TNCs is another matter, being global and enormous, and as shown in chapters of this thesis, capable of influencing State decision-making to serve themselves.

States have tensions between promoting foreign investment and encouraging business and trade while upholding their obligations under international human rights laws. Business is a major source of investment and wealth creation, and markets can be an efficient means of allocating scarce resources. At the same time, rapid industrialisation and global aspiration for commodities has caused business to continue expanding and impacting on the environment so highly that in the past 50 years, more biodiversity has declined at a more rapid rate than at any time in human history.<sup>99</sup> Human health and well-being is linked to biodiversity and the many ecosystem services it provides.

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<sup>98</sup> Kinley and Tadaki, above n 4, 933.

<sup>99</sup> Millennium Ecosystem Assessment, *Ecosystems and Human Well-being: Biodiversity Synthesis* (2005).

The *Millennium Ecosystem Assessment (MA) – Biodiversity Synthesis* finds with high certainty that biodiversity loss and deteriorating ecosystem services contribute both directly and indirectly to worsening human health, higher food insecurity, increasing vulnerability, lower material wealth, worsening social relations and less freedom for choice and action.<sup>100</sup> Not only are second generation rights favoured by the former totalitarian states impacted by worsening social conditions, so too are risks to the first generation rights favoured by first world states with high emphasis on individual freedoms over collective freedoms. Worsening social conditions and resource stress and inequality foment the social conditions that give rise to fanaticism in some states, and large-scale rioting in others. Given the impasse with business vis-à-vis binding human rights and environmental protection, and the general weakness of third world host states to regulate or enforce regulations,<sup>101</sup> this thesis finds that policy cohesion and binding regulatory reform in the form of mandated CSR complying with the universal standards found in international laws, combined with sanctions for non-compliance, must come from home states. The thesis recognises home state enactment of laws to protect human rights and environment are extraordinarily unlikely or impossible at this point in history due to the triumph of neoliberalism through almost all national and international institutions. The neoliberal beguilement of government and capture of government and agencies has fostered the placatory construct of CSR to provide a distraction from corporate misdeeds. The utility of CSR is its success in distracting us away from serious human rights abuses and ecocide with well-managed visible operations where regulation is strong and corruption is minimal. The multi-billion dollar a year costs to public relations firms pales in significance to the costs corporations would incur if they took their CSR claims seriously.

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<sup>100</sup> Ibid, 30.

<sup>101</sup> Ibid, [14].

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