CHAPTER 4

CONCLUSIONS AND RECOMENDATIONS

Introduction

4.1 The Committee is grateful to those organisations and individuals who made submissions on, or testified regarding, the Corporate Code of Conduct Bill 2000.

4.2 The Committee noted that a number of submissions, such as those from the Australian Chamber of Commerce and Industry, and Community Aid Abroad were of particular assistance to the Committee because, as Senator Murray remarked, they contained "detailed commentary … on weaknesses and shortcomings in the bill".[1]

4.3 A number of submissions and witnesses had mostly negative criticisms. The Committee notes Senator Murray's statement regarding the usefulness of the "positive" criticisms, of which there were also a number, such as those by Mr Sean Cooney.[2] The Committee is assisted by negative criticisms in deciding whether to recommend rejecting a bill, but regards positive criticisms as helpful in devising ways to remedy deficiencies in proposed legislation.

4.4 The Committee is aware that no piece of legislation is perfect, and it aids the legislation process greatly to have potential flaws in draft legislation set out succinctly and have suggestions put forward as to how to remedy these flaws.

Summary of findings regarding the Bill

4.5 The current Bill may have been drafted with the best of intentions. The protection of workers and consumers is undeniably a laudable goal. The Committee's task was to determine if the current Bill would achieve this goal. Regrettably, for a variety of reasons discussed below, the Committee believes that the Bill is impracticable and unwarranted.

<u>100 employee threshold</u>

4.6 The Bill's scope, as noted by Mr Ross Cameron MP, encompasses "proprietary companies as well as public companies".[3] The Bill thus seeks to regulate a large number of corporate entities.

4.7 Several submitters and witnesses suggested lowering the current 100 employee threshold specified in the Bill.[4] This would have the effect of increasing the number of corporate entities subject to regulation by the Bill.

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1 Committee Hansard, 14 March 2001, p 63.

2 Committee Hansard, 8 May 2001, p 154.

3 Committee Hansard, 15 March 2001, p 79.

4.8 The Committee concludes that regulating the many corporations that would be covered by the Bill, even as currently drafted, presents, as Mr Bosch stated, a "heavy burden" for the Australian Securities and Investments Commission.

4.9 The Committee finds that this Bill may do more harm than good and therefore the extra regulation required by the Bill would constitute an unacceptable "burden" for the Australian Securities and Investments Commission. The Committee therefore concludes that the regulatory regime the Bill would create would be unworkable.

Threats to Public Health

4.10 The Bill requires corporations to "take all reasonable measures to prevent any serious threat to public health".[5]

4.11 The Bill does not apply to all Australian corporations operating overseas, however, but only to those with more than 100 employees. The Committee finds it unacceptable that any legislation should imply that only certain corporations should refrain from threatening public health.

4.12 Moreover, the Committee believes that this part of the Bill is unnecessary. Common Law rights relating to negligence would already allow foreign litigants in most circumstances to sue in Australian courts for damage suffered from negligent behaviour. The Committee considers it unwise to interfere with these Common Law rights.

Foreign holding companies

4.13 The Bill would regulate Australian corporations with over 100 employees overseas and

> (b) a holding company of such a corporation.[6]

4.14 Such a holding company may not be an Australian corporate entity. The Bill would therefore seek to regulate, for example, as Mr Benjamin McLaughlin of the Australian Institute of Company Directors testified, America's General Motors.[7]

4.15 It would be an unusual extension of the principle of extraterritoriality if the Australian Parliament enacted legislation that sought to regulate the activities of foreign corporations in foreign jurisdictions.

4.16 The Bill could be redrafted to remove this anomaly, but any such redrafting to remove foreign corporations from the purview of the Bill would allow Australian

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4 Corporate Code of Conduct Bill 2000, subclause 3(1).

5 Corporate Code of Conduct Bill 2000, clause 12(2).

6 Corporate Code of Conduct Bill 2000, clause 4.

7 Committee Hansard, 15 March 2001, p 121.

corporations to avoid being subject to the Bill by having themselves incorporated in a foreign jurisdiction.

4.17 The Committee therefore unanimously finds that it cannot contemplate the Australian Parliament enacting a Bill that ostensibly regulates foreign corporations, if those corporations have Australian subsidiaries.

Generic nature of the Bill

4.18 The Bill would impose "environmental, employment, health and safety and human rights standards"[8] on some Australian corporations with 100 employees overseas.

4.19 The Committee accepts that the Parliament has enacted numbers of acts with extraterritorial application. The Committee, however, agrees with Mr Pragnell of CPA Australia that such existing legislation can be distinguished from the current Bill by the fact that it is "targeted and very focused", while the current Bill is "generic".[9]

4.20 The Committee concludes that as presently drafted the Bill is so "generic" as to be vague to the point of being unenforceable. One example in this context is the requirement that corporations provide their employees with "satisfactory sanitary conditions"[10].

4.21 The Committee is aware that regulations may be made under clause 18 of the Bill, which may define what is meant by terms such as "satisfactory". Nevertheless, the Committee finds itself unable to recommend a Bill, the provisions of which are so vague as to cause considerable uncertainty to industry.

Living Wage

4.22 The Bill requires an Australian corporation to pay its workers a "living wage".[11] This term is derived from a case decided in Australia's Commonwealth Arbitration Court in 1907.[12] The Committee finds it anachronistic to suggest that an Australian concept from 1907 should be applied extraterritorially in the twenty-first century.

4.23 The difficulties in determining the "living wage" would involve corporations in considerable expense and there is no certainty, despite a corporation's best efforts, that, in the event of litigation, an Australian court would find that it had been paying its workers a "living wage". Australian corporations would therefore always operate under the threat of litigation.

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8 Corporate Code of Conduct Bill 2000, subclause 3(1).

9 Committee Hansard, 14 March 2001, p 69.

10 Corporate Code of Conduct Bill 2000, subclause 8(2).

11 Corporate Code of Conduct Bill 2000, subclause 9(3).

12 *Ex parte H.V. McKay* 2 C.A.R. 1 (the *Harvester case*).

4.24 The Committee concludes that the Bill's requirement that a corporation be required to determine a "living wage" in all of the jurisdictions in which it operates is unreasonable and impractical.

4.25 Senator Murray agrees that the definition of a living wage is problematic, and either needs to be withdrawn or significantly amended.

Human rights standards

4.26 The Bill, at clause 10, would require Australian corporations operating overseas to avoid discriminating in its employment practices

> on the basis of race, colour, sex, sexuality, religion, political opinion, national extraction or social origin.[13]

4.27 The Committee in no way endorses discrimination. It is evident, however, from the submission of the Melbourne Practitioners of Falun Dafa,[14] that this clause of the Bill could be a source of friction with other nations. Friction could result from Australian corporations being required either to hire persons belonging to religions and political parties considered illegal in the jurisdictions in which they operate, or else face litigation in Australian courts.

4.28 The Committee finds itself unable to recommend a Bill that has the potential to unnecessarily damage Australia's foreign relations.

Duty to observe tax laws

4.29 Clause 11 of the Bill requires Australian corporations to obey the tax laws of the jurisdictions in which they operate. The Committee in no way condones tax evasion. Nevertheless, there are manifest difficulties in any legislation that would require Australian courts to adjudicate cases involving Australian corporations allegedly breaching foreign taxation laws in foreign jurisdictions to the detriment of the consolidated revenue of foreign nations. The correct place for such litigation is the foreign states concerned.

4.30 The Committee unanimously concludes that, as a matter of principle, it is inappropriate for the Australian Parliament to enact legislation requiring companies to obey the laws of sovereign foreign nations.

Duty to observe consumer health and safety standards

4.31 Clause 12 of the Bill requires Australian corporations, producing goods and services overseas, to simultaneously satisfy both Australian health and safety standards and the health and safety standards of the jurisdiction in which they operate.

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13 Corporate Code of Conduct Bill 2000, subclause 10(1).

14 Melbourne Practitioners of Falun Dafa, Submission No. 5.

4.32 Amending the Bill so that Australian corporations are required to adhere to Australian standards only could be equivalent to encouraging Australian corporations to flout the laws of foreign jurisdictions. Amending the Bill so that Australian corporations had only to observe the standards of the jurisdiction in which they operated would be tantamount to requiring corporations in foreign jurisdictions to comply with foreign laws, which is clearly a matter for the foreign jurisdiction.

4.33 The Committee does not however subscribe to the 'lowest common denominator' view. That is to say, if a foreign jurisdiction has less rigorous standards than Australia (say on mine safety, as an example), then the Committee would be surprised if an Australian corporation does not try to maintain the standards it maintained at home. However, the Committee finds that attempting to legislate this, as expressed in clause 12 of the Bill, is a fundamental defect in the Bill.

Duty to observe consumer protection and trade practices standards

4.34 Subclause 13 of the Bill requires that Australian corporations operating overseas refrain from "misleading or deceptive" [15] conduct. Considering the vast amount of litigation that a similar section in the *Trade Practices Act 1974* (Cth) has inspired, the Committee is concerned that Australian courts may be swamped by corporations bringing actions against each other. The Committee is not convinced that such litigation would be productive.

4.35 The Committee finds itself unable to recommend legislation, the effect of which would be to dramatically increase the caseload of Australian courts with corporations suing other corporations in order to gain a commercial advantage.

Reporting

4.36 The Committee acknowledges that reporting may be an essential part of ensuring compliance with some laws. The Committee notes advice from the Australian Institute of Corporate Citizenship that reports produced by corporations should be publicised, since publicity "encourages continuous improvement".[16]

4.37 The Committee concludes, however, that the reporting requirements required by the Bill would be both "onerous and expensive",[17] and are inconsistent with best practice. In addition the Committee accepts the contention of CPA Australia and the Institute of Chartered Accountants in Australia, that the deadline of 31 August for corporations to lodge Code of Conduct Compliance Reports, presents corporations with a "more onerous time frame than applies for other annual report information".[18]

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15 Corporate Code of Conduct Bill 2000, subclause 13(1).

16 Australian Institute of Corporate Citizenship, Submission No. 8, p 18.

17 Australian Institute of Company Directors, Submission No. 30, p 2.

18 CPA Australia and the Institute of Chartered Accountants in Australia, Submission No. 31, p 2.

4.38 The Bill would require the Australian Securities and Investments Commission to report on corporations' compliance with the Bill.[19] The Committee agrees with the assessment of Mr Sean Cooney that the Commission lacks the expertise to evaluate whether corporations have complied with the terms of the Bill.[20]

4.39 The Committee concludes that the reporting requirements of the Bill are unwieldy to the point of being impossible to implement without significant costs being incurred by both corporations and the Australian Securities and Investments Commission. The Committee finds that any supposed benefits to be derived from the reporting regime would not compensate for the loss suffered due to the imposition of associated costs.

Enforcement

4.40 The Bill requires corporations to report on their compliance with the Bill to the Australian Securities and Investments Commission, which in turn would prepare a report for the Commonwealth Parliament.[21] The Bill also will allow civil penalties to be applied to, and civil action to be taken against, corporations which breach the Bill's provisions.[22]

4.41 The Committee is grateful for the advice from the Environmental Defender's Office Ltd that the civil penalties to be imposed by the Bill differ from those specified in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) even where the offences are similar.[23]

4.42 The Committee believes that, as a general rule, similar offences should attract similar penalties. The Committee is unable to discern any rationale for the penalties specified in the Bill and unanimously concludes that enacting the Bill would lead to unwarranted confusion in the corporate world, unless the Bill's provisions were made consistent in these respects.

The *Status Quo*

4.43 Various submitters and witnesses stated that the *status quo* was unacceptable because it was tantamount to allowing Australian corporations overseas to degrade the environment and abuse the rights of foreign workers.

4.44 The Committee in no way endorses inappropriate behaviour on the part on Australian corporations. The Committee notes, however, that the evidence of inappropriate corporate behaviour which was presented to it almost invariably concerned the same incidents. The Committee therefore concludes that Dr Nahan of

19 Corporate Code of Conduct Bill 2000, clause 15.

20 Committee Hansard, 8 May 2001, p 156.

21 Corporate Code of Conduct Bill 2000, clauses 14 and 15.

22 Corporate Code of Conduct Bill 2000, clauses 16 and 17.

23 Environmental Defender's Office Ltd, Submission No. 14, p 5.

the Institute of Public Affairs was correct when he testified that such incidents were "few in number".[24] The Committee therefore concludes that there is no evidence of systemic failure regarding Australian corporate behaviour.

4.45 As a general rule the Committee believes that the Parliament should legislate only where there is a demonstrated systemic failure in the *status quo*. Since there is no evidence of systemic failure in the *status quo* the Committee questions the necessity of enacting such a wide-ranging and generic piece of legislation as the current Bill.

4.46 The Committee concludes that there is no demonstrated need for the current Bill.

Australia's Reputation and Extraterritoriality

4.47 The Committee does not accept that the Bill would enhance Australia's corporate reputation. The Committee is unable to see any way that the Bill's extraterritorial imposition of Australian standards on corporations operating within the territory of sovereign, foreign nations will be interpreted as anything other than implying that local standards are inferior.

4.48 Any kudos gained by Australian corporations appearing to adhere to high standards of behaviour will be lost if Australia is perceived as suggesting that the laws of other nations are deficient.

4.49 The Committee notes that Australians in the past have resented foreign nations applying their laws extraterritorially within Australia. It is probable that the governments and numbers of citizens of foreign nations will similarly resent any attempt by Australia to apply its laws extraterritorially within their jurisdictions. This is particularly so in relation to the current generic Bill as opposed to, for example, legislation which specifically targets child sex tourism. The Committee therefore agrees with Mr Bosch that there is reason to believe the Bill will be viewed overseas as "arrogant, patronising, paternalistic and racist".[25]

4.50 The Committee also notes that existing case law provides avenues for foreign plaintiffs to seek redress for wrongs committed by Australian corporations overseas.

4.51 The Committee therefore concludes that the Bill is not only largely superfluous from the viewpoint of protecting the environment and enhancing the conditions of foreign workers, but also has a very real potential for offending foreign nations.

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24 Committee Hansard, 8 May 2001, p 165.

25 Committee Hansard, 8 May 2001, p 159.

Conclusion

4.52 Mr Bosch reminded the Committee of the exchange between the Shakespearian characters Friar Laurence and Romeo

> Romeo: O, let us hence; I stand on sudden haste.
> Friar Laurence: Wisely and slow; they stumble that run fast.[26]

4.53 The Committee agrees with this assessment. The Australian Parliament should not move hastily to legislate in this area lest the result be more harm than good. The current Bill appears to have been drafted, in the main, as a reaction to unrelated incidents overseas of environmental damage. The Bill, however, would not necessarily result in fewer incidents of environmental damage and abuse of workers' rights, but rather could cause Australian corporations to incorporate outside Australia, withdraw from their operations overseas, and even involve Australia in acrimonious exchanges with other nations about imperialism.

Recommendation

The Committee recommends that the Bill not be passed because it is unnecessary and unworkable.

Senator Grant Chapman

Chairman

26 William Shakespeare, *Romeo and Juliet*, Act 2, scene III; referred to by Henry Bosch, Committee Hansard, 8 May 2001, p 160.