

COMMENTS BY LABOR MEMBERS ON THE CORPORATE CODE OF CONDUCT BILL 2000

INTENT OF BILL

The Corporate Code of Conduct Bill 2000 seeks to have Australian companies, operating overseas, act in accordance with decency, rectitude, and high ethics. It contemplates they will do this while carrying on business in an efficient, profitable and professional way. It looks to the well being of workers, of residents, of the environment, and of the society generally in those foreign countries where Australian companies have a presence.

The objectives of this Bill are noble ones and need realisation with due dispatch. The issue in contention is the means by which they can be achieved.

PRESCRIPTIVE LEGISLATION

Legislation pertaining to the regulation of companies in Australia is extensive. Should further laws be enacted prescribing how they are to conduct themselves while operating offshore? If the present Bill is passed how effective will it be in gaining for people overseas what it seeks to accomplish?

Evidence given to the Committee told of the formidable problems to be encountered in enforcing prescriptive regulations on Australian companies in respect of their overseas operations. Submissions to the Committee recommended as an alternative that the objectives of the Bill be pursued by requiring companies to make public both the principles according to which they operate abroad, and an ongoing account of how they adhere to them. To ensure that corporations properly abide by these requirements an audit should be undertaken regularly by an independent body. If this strategy proves ineffective others can then be tried.

AUSTRALIAN CORPORATIONS AND PRINCIPLES

The principles according to which Australian corporations ought conduct themselves overseas is a fundamental issue for resolution in this matter. Should a company act solely in the interests of its shareholders? Should it take heed only of the law of the jurisdiction in which it operates? Should it, as the Bill requires, take account of the well being of its workers, of the environment, of consumers, and of people generally in the foreign country where it is carrying on business? Answers to those questions depend upon what responsibilities a company ought bear.

GROWTH OF CORPORATE POWER AND ITS CONSEQUENCES

Corporations began as a vehicle for economic gain. Their owners derived wealth through their operation. Since then a great deal of law has developed to ensure these owners a just return for their investments. Today people who manage companies are obliged to do so for the good of those organisations and accordingly for the benefit of shareholders. But there are other matters that ought be taken into account.

Adolf A Berle and Gardiner C Means first published “The Modern Corporation and Private Property” in 1932. They prepared a revised edition in 1967 from which the following quote is taken.

“The institution (the corporate organisation) here envisaged calls for analysis, not in terms of business enterprise but in terms of social organisation. On the one hand it involves a concentration of power in the economic field comparable to the concentration of religious power in the mediaeval church or of political power in the national state. On the other hand it involves the interrelation of a wide diversity of economic interests, - those of the ‘owners’ who supply capital, those of the workers who ‘create’, those of the consumers who give value to the products of enterprise, and above all those of the control who wield power.

Such a great concentration of power and such a diversity of interest raise the long-fought issue of power and its regulation – of interest and its protection. A constant warfare has existed between the individual wielding power, in whatever form, and the subjects of that power. Just as there is a continuous desire for power, so also is there a continuous desire to make that power the servant of the bulk of individuals it affects. The long struggles for the reform of the Catholic Church and the development of constitutional law in the states are phases of this phenomenon. Absolute power is useful in building the organisation. More slow, but equally sure, is the development of social pressure demanding that the power shall be used for the benefit of all concerned. This pressure, constant in ecclesiastical and political history, is already making its appearance in many guises in the economic field.

Observable throughout the world, and in varying degrees of intensity, is this insistence that power in economic organisation shall be subject to the same tests of public benefit which has been applied in their turn to power otherwise located”. (pp.309, 310)

The power and influence of corporations around the world has grown to the point where society needs to ensure that they operate for the true benefit of people globally. Accordingly, interests in addition to those of the shareholders must be looked to as a matter of equity, justice and societal well-being. The activity of companies is so vital to the well-being of nations that they must work and be seen to work in the legitimate interests of people in all those countries in which they have a presence.

NEED FOR RIGHT CONDUCT

Later in their work Berle and Means wrote the following paragraph.

“The rise of the modern corporation has brought a concentration of economic power which can compete on equal terms with the modern state—economic power versus political power, each strong in its own field. The state seeks in some aspects to regulate the corporation, while the corporation, steadily becoming more powerful, makes every effort to avoid such regulations. Where its own interests are concerned it even attempts to dominate the state.

The future may see the economic organism, now typified by the corporation, not only on an equal plane with the state, but possibly even superseding it as the dominant form of social organization. The law of corporations, accordingly, might well be considered as a potential constitutional law for the new economic state, while business practice is increasingly assuming the aspect of economic statesmanship". (p.313)

At this point in time, what is the best way of having an Australian company operating overseas act for the true well being of the people in those countries in which it is carrying on business? That it has a responsibility for doing so should not be in contention.

POLITICS AND CORPORATE GOVERNANCE

In a free and democratic society it is usual and befitting for political action to be taken to see to it that the affairs of corporations are properly ordered. In 1994 Mark J Roe wrote "Strong Managers Weak Owner: The Political Roots of American Corporate Finance". In his preface the author says:

"I show that politics – democracy in general, and American democracy in particular – affected the organisation of the large firm. The interaction between firms and financiers was, and still is, mediated partly by politicians, and that mediation in a democratic society is a central – and neglected – explanation for the organisational forms we observe. Were the title not already taken, a good one for this book would have been "The Visible Hand", because the visible hand of politics affected the structures of financial intermediaries, which in turn affected the structure of the large public firm". (p.x)

And again:

"I have a good focus for this book – the interaction between politics and corporate governance – and people with a focus can exaggerate their subject's importance. While corporate governance is one of the matters on the list of what determines economic success or failure, it is only one, and it is probably a good way down the list of importance. Similarly, while politics is one of the determinants of corporate governance, it is only one, although, as it turns out, an important one". (p. xi)

It is open to Parliament to legislate about the way Australian companies should comport themselves overseas. Should it do so?

CODE OF CONDUCT

Companies carrying out their functions in a foreign place should conduct themselves decently and in a manner that does good and not harm to the people living there. They should have a code of conduct aimed at achieving this. Such a code needs to be developed and then adhered to in a way which is both apt and beneficial to the host country. It would be difficult, and perhaps impracticable, for an Australian legislature to effectively institute specific and prescriptive laws for companies to obey as a means of achieving this end. On the other hand, Parliament could appropriately and usefully pass legislation requiring corporations operating overseas to publish a code of conduct by which they are to act, and, then to furnish a periodical account of how they have measured up to that code.

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O.E.C.D. GUIDELINES

The Organisation for Economic Co-operation has set out guidelines for multinational enterprises. These provide a basis for a code of conduct for Australian companies operating in other countries. They are appropriate principles for good corporate behaviour, both at home and overseas. They are advanced here in the context of a discussion about the way multinational enterprises should behave abroad.

NEED TO ACT WELL AND ACCORDING TO CODE

Once companies establish their codes of conduct they need to operate in accordance with them to achieve their purpose: that is to act not only profitably but also with decency, with efficiency, with energy, with rectitude, and to the benefit of the society within which they work.

Corporations will operate in this way if the people running them are men and women of ability, informed with a culture of integrity, and determined to have their companies succeed both economically and ethically. Government regulation would not be an issue were this the situation throughout the corporate sector: where it is not the question arises.

In any event Australian companies operating overseas ought report at home on how they adhere to their codes of conduct. This allows the community here to ascertain the way in which they go about their tasks in a world where this nation is not only a participant in trade and commerce but a global citizen.

Corporation ought give an account of the profits and losses they make, of the wages and conditions they provide, of the impact they have on the environment, of whether they have advantaged or disadvantaged the civil life in the foreign countries within which they work.

AUDIT BY GOVERNMENT

The reports provided by corporation ought be regularly audited by a Government department or departments (for example the Department of Employment, Workplace Relation and Small Business) as determined by ASIC having regard to the content of the code and the competencies of the department.

AUSTRALIA'S RESPONSIBILITIES AND AUSTRALIAN'S STANDING AND GOVERNMENT INVOLVEMENT

Government represents society and society is entitled to know how a company based in Australia is conducting itself when carrying on business abroad. The various parts of the world community are more and more impacting on each other and governments are incurring increasing responsibility for how their citizens and organisations conduct themselves overseas. Australia as a leading exponent of the rule of law, both at home and abroad, and accordingly needs to look to the way its companies comport themselves in other countries. Moreover it is right and proper that Australians seek to ensure that their international standing is high.

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RACE TO THE TOP

The phrase “race to the top” may well be used to encapsulate the thought that were Australian companies operating overseas obliged by law to develop codes of conduct, and to give a regular account to a government authority about how they adhered to them, the competition which would thereafter develop to become the best would lead to a marked improvement in the comportment of such corporations generally.

GOVERNMENT ACTION

The intent of the Corporate Code of Conduct Bill 2000 is right and proper. In so far as its strategy is to establish a set of prescriptive regulations as a means of realising this intent, its time has not yet come. At this stage the best way for Parliament to deal with the matter is to:

1. require Australian companies operating overseas to develop appropriate codes of conduct which are to encompass in them the relevant O.E.C.D. guidelines.
2. require those companies to give a regular account of how they adhere to those codes.
3. have the codes developed by the companies and the accounts given by them of how they adhere to those codes audited by a relevant government department.

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