The Corporate Code of Conduct Bill 2000

Submission to the

Parliamentary Joint Statutory Committee on Corporations and Securities

By the Australian Institute of Corporate Citizenship

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1 Executive Summary

Australian-based multi-national businesses are at substantial risk of suffering international competitive disadvantage if they fail to respond to the current international trend for greater corporate social responsibility and sustainable development.

In the Northern Hemisphere, business is well versed with and already adapting to a commercial environment requiring greater social responsibility and transparency from business. The business rationale that this is in the best long-term interests of the company and all constituents is now strongly asserted by many business leaders.

There are international drivers for change from the market, society and government that have already begun to impact on Australian companies. Within the international business environment, these drivers are already pressuring Australian companies to adopt more sustainable business practices in the areas of environmental and social responsibility.

If ignored these drivers can potentially impact on the reputation and commercial performances of Australian corporations operating overseas. Indeed, the relatively recent cases of the Esmerelda spill in Romania and the BHP Ok Tedi project have already set the scene for what will be greater scrutiny and demands of Australian corporations.

Codes of conduct are an important tool for delivering changes in corporate behaviour. There has already been an enormous amount of work done internationally into how codes should be created and implemented to ensure they truly deliver the intended change in corporate behaviour. AICC examines the international business experience of delivering change through the use of codes in this area and consider the lessons that can be applied to the Bill being considered by this Committee. We shall also consider the lessons for the wider Australian business context.

We argue there are specific omissions in the current draft of the Bill that would significantly impact on the Bill's ability to realise the drafters' intentions.

Finally, while AICC believes the intentions of the Bill are honourable and necessary - especially considering the risk to Australian companies in not addressing wider corporate responsibilities - the current Bill is not the most appropriate method for creating the best possible environment that enables Australian-based multinationals to behave more responsibly. We believe a step-by-step approach is necessary and that our proposals represent this method.

Based on our research AICC recommends two alternative proposals. This will allow Australian businesses to be competitive internationally by adopting best practice in the area of sustainability and environmental and social responsibility. Significantly both these proposals are intended to create this environment without placing significant demands business for onerous financial and human resource investment. The two proposals are:

- **Proposal 1:** Mandatory public reporting on whether corporations choose to adopt environmental, social and ethical polices or codes for their overseas operations. The adoption is entirely voluntary but if corporations do adopt them they should make those policies or codes publicly available.
- **Proposal 2:** Mandatory adoption of environmental, social and ethical policies and codes and mandatory making of those policies and codes public.

2 Australian Institute of Corporate Citizenship

2.1 Who we are

The Australian Institute of Corporate Citizenship (AICC) is a center for excellence in corporate social responsibility. It is committed to leading Australia's corporate citizenship thought and practice by creating and supporting mechanisms for driving public debate and policy on corporate citizenship in Australia.

The AICC offers both learning networks and multidisciplinary consulting skills. It provides best practice solutions for all the corporate citizenship needs of business and other sectors who want to participate in, and advance, good corporate citizenship.

2.2 What we do

We maximize the value of companies as they strengthen their role as good corporate citizens. Our approach is based on the key guiding principles of:

- Balance
- Ethics
- Quality
- Diversity
- Non alliance
- Commitment
- Innovation

The AICC works with organizations globally to provide practical and commercial realistic advice across the range of corporate citizenship needs, including:

- Stakeholder management
- Partnership development
- Values integration
- Corporate citizenship management services
- Reputation management
- Education and training
- Research, assessments and evaluation

2.3 Where we operate

The AICC operates internationally in recognition of the global reach of today's businesses. It concentrates primarily in geographic Australia but operates in partnership with the African Institute of Corporate Citizenship and a range of local and international strategic partners.

The Australian Institute for Corporate Citizenship is currently represented in Adelaide, Melbourne and Sydney in Australia and in South Africa through its sister organization, the African Institute for Corporate Citizenship.

2.4 Contacting AICC

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3 Background on Corporate Responsibility

3.1 International Trends

In the past ten years there has been significant international movement towards more sustainable business practice. This began with the 'greening' of business from the early 1980s in most of the developed world. Since the 1990s these responsibilities have broadened to include social and community issues. The concept of sustainable development has been the foundation of this trend and with it the realisation that sustainable business practice is a combination of managing environmental and social impacts with a whole range of stakeholders.

Sustainable development is a concept that has clearly established itself. Most major actors working with change, whether business, public or voluntary - in the developed or developing world - use the language of sustainable development. The clearest indicator of the corporate world's commitment to this area is the founding in 1995 of the World Business Council for Sustainable Development (WBCSD) - a coalition of over 150 international companies "united by a shared commitment to sustainable development, i.e. environmental protection, social equity and economic growth." (WBCSD 2000)

While the language of sustainable development is in common usage, vigorous debate continues about what the concept encompasses and, even more importantly, about whether sustainable development is actually achievable for certain business sectors.

That the debate continues suggests that this is a critical one. It is led as vigorously by the corporate sector as any other in recognition of the need to understand and proactively manage their social and environmental impacts as a central concern for long term sustainability of the business. This is particularly so with business located in or reliant on developing countries. Recent legal precedents in the United Kingdom and the United States illustrate the depth of this responsibility and consequent liability when responsibilities are not met.

In Europe, most major corporations must demonstrate some level of commitment to sustainable development to establish their 'license to operate'. The expectations of consumers are continuously rising. This was particularly evident in the enormous challenges that Monsanto faced when it attempted to introduce genetically modified food stuffs into the European Union and were met with perhaps the most aggressive anti-corporate campaigning of the 1990s.

Corporations addressing sustainability and greater corporate responsibility currently fall into the following areas:

1. Trailblazers who have made sustainability and greater responsibilities their point of difference - e.g. The Body Shop and Ben and Jerry's.

2. Companies that have suffered negative press or have PR disasters - such as natural resource companies like Shell.

3. Established corporations that are proactively seeking a continued 'license to operate', risk management and brand protection by adopting sustainability policies and greater transparency in their operations - such as BP.

The most successful companies today are those who are striving to balance the traditional shareholder-value business approach with the more complex stakeholder-value driven approach.

Corporate acceptance of a broader social responsibility has manifested itself in a number of major global business-driven initiatives; these include the World Council for Sustainable Development (WBCSD) and the Global Reporting Initiative (GRI).

The GRI in particular symbolizes a significant movement towards businesses looking to quantify and measure their social impacts in a transparent and accountable way. Major global corporations, such as Ford, Levi's, BP, Shell and BT, have already adopted social accounting and reporting. Yet here in Australia Western Mining Corporation and The Body Shop are still the only notable Australian companies to have adopted this international approach.

There is also recognition that these wider responsibilities need to be addressed through more channels than the corporate philanthropic tradition. Companies are increasingly looking to invest in social capital through company volunteering, community development projects and cause related marketing initiatives. These multi-faceted approaches reflect a deeper and more complex understanding of a company's stakeholders and their importance to business performance.

Finally there is a strong trend internationally to the creation and adoption of corporate codes of conduct. The most notable of these are the Sullivan Principles and the UN's Global Compact - a joint initiative between international business and the United Nations to encourage responsible business and universal values.

3.2 International Drivers

To help understand imperative for Australian businesses improve their sustainability capabilities a examination of the underlying drivers is vital. There are three key drivers for impacting on corporations:

- Markets and industry- changing customer demands as well industry pressure
- Societal - changing expectations of society and activists
- Legislative

3.2.1 Market-Driven Changes

3.2.1.1 The informed consumer

Today's consumer is more informed than ever before. The food and retail sectors have been strongest influenced by this the new type of consumer. This sector has responded in the UK by imposing strict conditions on their suppliers on a range of issues from child labor to the use of old growth forest. The sector has driven initiatives such as the UK's Ethical Trading Initiative - a coming together of business, NGOs and labor to develop best practice models for ensuring human rights are respected throughout the retail supply chain. Individual retailers across Europe and North America have adopted their own codes of conduct to address a whole range of social and environmental issues.

> 56% of people surveyed in 23 countries world-wide said their impressions of companies were formed primarily by such factors as labour practices, business ethics and environmental impact. This compared with only 34% citing 'business fundamentals' such as financial performance and company size. 51% of North Americans said that in the previous year they had 'punished' companies on grounds of failing to live up to social responsibility criteria. (Environics 1999)

This Millennium Poll put Australia at the top of the ranking in terms of the majority of respondents looking to business to set higher ethical standards and help build a better society. (Environics 1999)

3.2.1.2 International Business Leadership

Those showing leadership in the area of corporate social responsibility are also providing motivation for others to follow. Over the last ten years these have become many of the largest corporations on the planet. To provide just a sample of some of their visions:

> We want to find ingenious new ways to delight consumers, provide superior returns to shareholders and make the world a better place for us all. We can do well for employees, customers and shareholders, and we can do good for society.
>
> William C Ford Jr, Chairman, Ford Motor Company, 13 May 1999.
>
> ... multi-national companies must themselves indicate what they consider to socially responsible, by making their standards and values explicitly and by guaranteeing compliance with them in their policy and in their decision-making processes.
>
> Morris Tabaksblat, Chairman and CEO, Unilever, 17 October 1997

Within Australia there are now key business people also articulating a similar vision for international business.

> We believe that a company cannot succeed unless it is accountable to more than just its shareholders. The Co-operative Bank in the UK, in a report last year summed it up nicely: "We believe that in the years to come, the only truly successful businesses will be those that achieve a sustainable balance between their own interests, those of society and those of the natural world.
>
> Dr. David Morgan, Chief Executive Officer, Westpac Banking Corporation
>
> As a resources company, WMC requires "access to land" and a continuous "licence to operate" to grow shareholder value. In order to achieve this objective, we need to acknowledge changing societal values and expectations. The integration of economic, social and environmental decision-making has increasingly become recognised as the only acceptable way of doing business...
>
> Western Mining Corporation, Sustainable Development WMC web page

The increasing number of business alliances for corporate social responsibility is another indication of the direction international businesses are moving. These organizations include:

- World Business Council for Sustainable Development (International)
- Business Partners for Development (World Bank sponsored alliance - international)
- Corporate Social Responsibility Europe (Formerly European Business Network for Social Cohesion)

- Social Venture Network (Europe-wide)
- Prince of Wales Business Forum (UK)
- Business in the Community (UK)
- Businesses for Social Responsibility- BSR (USA)

3.2.1.3 Risk and Reputation Management

Other drivers of change include increasing understanding of the links between environmental and social impacts on reputation, risk assessment and employee retention and recruitment.

There is also growing recognition among mainstream investors and financial analysts in Europe that environmental and social issues have an important bearing on the assessment of risk. The London Stock Exchange has recently issued requirements that companies have until the 23rd of December 2000 to take account of ethical and environmental risks when developing company policy and considering relevant internal controls and risk management systems.

3.2.1.4 Socially Responsible Investment (SRI)

Generalising from a global perspective AICC research has identified the following key changes and trends in the financial and banking sectors;

Within the area of SRI:

- Explosion in the range of SRI products and services
- Shift from negative screening to positive screening and engagement
- Mission-based investing - at the cutting-edge of SRI activity

One in eight dollars under professional management is ethically screened in the US while in the UK it is a still impressive one in 15 pounds. In Canada demand is growing strongly, while in Australia it is an area that has only just being begun with environmental investment products having broken the ground in recent years.

The recent historical shift from work-based pensions to personal pensions with the massive down-sizing and redundancies of the 80s and 90s came with an increasing awareness that people holding pensions are in fact investors and shareholders. With this growing realisation came a greater interest in how pension funds are invested. Pension fund holders increasingly demand their money does much more than secure them financial security and are also looking to ensure their investments at the least do not contribute to social insecurity and at best contribute to making the world a better place. These trends have contributed to significant growth in mutual funds and the growth in social, environmental and ethical products offered by major institutions.

In the UK the 'Pensions and Ethical Policy Survey' undertaken by EIRIS and NOP Solutions in June 1999 concluded that:

- 83% agree that pension funds should make their approach to SRI clear in the annual statement given to all scheme members

3.2.2 Societal-Driven Changes

The movement for greater environmental responsibility that grew out of the 70s - as symbolised by the huge growth in membership for campaign groups like the Australian Conservation Foundation, Greenpeace and the US Sierra Club - now integrated greater social responsibility.

Within the US and Canada, the impacts of NAFTA has increased sensitivity to the negative social impacts of globalisation. Across Europe WTO decisions against the EU on a range of disputes from preferential treatment for small Caribbean banana growers to the challenging of the Community's ban on US hormone treated beef, has resulted in similar impacts.

3.2.2.1 Growing Anti-Corporate, Anti-Globalization Hostility

The 'Battle of Seattle' was the climax of a decade of public frustration and hostility towards global corporations. This has resulted from a changing world order in which authority is perceived to be shifting from national governments to transnational corporations and supra national organizations such as the WTO. Australia recently witnessed its own Melbourne 'Seattle' in September 2000 with the protests during the World Economic Forum meeting.

3.2.2.2 Increasing NGO Power

A number of high profile cases have undermined business' traditional 'license to operate' and interestingly these cases have been against companies that have found themselves targeted by internationally co-ordinated NGO campaigns. They include Union Carbide in Bophal; McDonald's McLibel case; Shell, Brent Spar and human rights in Nigeria; Nike and sweatshop labor; and most recently Monsanto and its attempts to introduce GM food into Europe. While Australian-based corporations have yet to be targeted by such focused NGO-driven campaigns, companies such as BHP have under the spotlight for their Ok Tedi operations and behavior in Papua New Guinea.

3.2.2.3 Information Revolution

For global corporations, the communications revolution has meant an increasing scrutiny of their operations wherever they operate in the world. The risk to reputation and brand has increased as the feedback loops become faster and closer. It is this ‘fish-bowl world’ aspect of globalization that has driven the shift towards corporate responsibility for many companies.

3.2.3 Policy and Legislative Driven Changes

There is a significant trend reflected in the legislative and corporate governance approach of a number of developed countries relevant to this Committee's work. The general model is for a country's government, departments or agencies to develop legislation or regulations that encourage companies to develop codes of ethics that aim to deliver better corporate behavior. While promoting ethical behavior per se is not the intention of the Bill the approach holds relevant learning for the Committee.

This model is already in practice in:

- Canada
- Europe (European Commission)
- Australia (Trade Practices Act)
- USA

In the US the U.S. Federal Sentencing Guidelines for Organizations enacted in 1991 come closest to representing a broad sweep approach by focusing on the penalty stage of criminal law under federal jurisdiction. By reducing the penalty if a corporation could show they had a code of ethics and ethics program the law encouraged the adoption of codes as a preventative measure in the event that the corporate violated Federal Law.

In the UK there has been significant activity in the area of addressing the wider responsibilities of both company directors and companies. Three enquiries and subsequent reports represent this work:

- Cadbury
- Greenbury
- Hampel

All these have impacted significantly on the behavior of UK-based corporations yet they have not been incorporated into formal UK regulatory framework. There is a current Company Law Review that seeks to address the need for fundamental change in the Companies Act to address wider ethical and stakeholder responsibilities.

In general, these legislative trends have encouraged the adoption of corporate codes and policies for more responsible behavior. The legislative vehicles themselves have generally not been prescriptive in outlining the standards of particular behavior. Instead they have engendered an environment where corporations are encouraged to adopt positive codes and policies.

Perhaps the most dramatic legislative change in terms of its impact on corporate social responsibility has been the UK government's introduction of an amendment to the pension trustees' law which states that from July 3, 2000, pension fund trustees must disclose in their statement of investment principles:

I. The extent (if at all) to which social, environmental and ethical considerations are taken into account in the selection, retention and realisation of investments; and

II. The policy (if any) directing the exercise of the rights (including voting rights) attaching to investments.

The government has stated that trustees do not need to have a policy on these issues but that if they choose not to have a policy then this must be publicly reported.

While the primary legal obligation for trustees remains ensuring that the financial interests of the beneficiaries is paramount, the requirement introduced by the amendment has delivered as sea change within the UK pension funds community.

Thus, while permission has been given for many pension trustees to not adopt policies in these areas, many pension holders have asked their trustees to account for their social, ethical and environmental impacts as well as their financial success.

Nearly all of the UK's major asset management houses are reviewing their policies to ensure that all their fund managers have a far greater awareness of the implications of company social, ethical and environmental conduct on the nature of investments.

The UK initiative has had a domino effect across Europe with similar legislation being enacted or considered in France, Germany and Sweden. There is even strong indication of support for a Europe-wide directive from Members of the European Parliament. 'It's certainly being talked about in Brussels and I think it will be transferred into a European directive within the next five years,' said Richard Howitt, UK Labour MEP. (Ethical Performance 2000)

On the policy side another significant initiative in the UK is the Company Law Review that is questioning the fundamental objectives of companies and the responsibilities of directors within a changing world where sustainability and stakeholders are business considerations. The Review is specifically examining the issue of whether companies and directors should be responsible only to shareholders or whether they should have a broader requirement of actively balancing the interests of a range of stakeholders.

The social and business forces described in foregoing pages suggests that the proper application of the first common law duty of Australian directors - to act in the best interests of the company - will require precisely this stakeholder approach, or at the minimum, thorough consideration of the implications of not doing so.

3.3 Australian Trends and Drivers

Australia has for years remained largely isolated from the mainstream corporate social responsibility debate and adoption occurring in the Northern Hemisphere. Inevitably geographical isolation has contributed. Furthermore a geo-political and trade alignment with the Asia-Pacific, a prevailing 1990's climate of economic rationalisation, massive public asset divestment and deregulation, the endurance of a conservative government and an economy that market commentators would describe as buoyant, have all contributed to a focus on market not social responsibility issues.

There is also a lack of understanding about what corporate social responsibility means. Many companies still equate it with philanthropy, sponsorships and modest community involvement. The stakeholder-driven model of corporate social responsibility commitment is not yet widely understood in the Australian business community.

Nonetheless, it is now a broadly held view that for Australian companies, the surge of interest in corporate social responsibility, and pressure to reform that has developed over the last 18 months will continue to escalate.[1] The view has been expressed that there has been phenomenal change even over the last six months. Before, "... the market was asking 'what is this?' Now, very sophisticated questions are being raised."[2]

There have been a number of public cases involving Australian companies that indicate a significant rise in public expectations of Australian companies operating overseas. Internationally, these would be BHP and its Ok Tedi operations and the more recent case of the Esmeralda mine in Romania.

Socially responsible investment has occupied a small niche market, but is now described as being on the verge of a transition to a mainstream investment option.[3] Nonetheless, recent research indicates a high level of social and environmental concern in the private and institutional investment market and the desire for more socially responsible investment products. The prediction has been made that "ethical investment will become a multi-billion dollar industry in Australia in the next five years".[4]

Two recent research exercises have provided strong indications of the social and environmental concerns of Australians and the direction for SRI.

1. KPMG conducted an open research study into social issues and SRI in August 2000. The key finding were:

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[1] Some companies are advanced in their thinking to the point of stating they do not expect to survive without a total commitment to "best practice" corporate social responsibility. Source: consultations.
[2] Source: consultation PricewaterhouseCoopers, October 2000
[3] Centre for Corporate Public Affairs, 2000
[4] Anne-Marie Darke, CEO, HESTA Superannuation Fund

- Environment and human rights were cited as the most important social issues. Nearly 70% of respondents said human rights were very important. Around 65% cited environment as very important. Less that 10% of respondents said these issues were not important.
- In descending order, identified as either very or quite important, were:
  - Labour relations
  - Community relations
  - Aboriginal rights
  - Defence/weapons
  - Animal testing
  - Nuclear power
  - Native title
- 88% of respondents said they would be very concerned if they found their superannuation included investments in multinationals using child labour.

An interesting finding was that 58% of respondents confirmed they would want to invest in a company (with 11% unsure) as a result of a commendation of a company's social/environmental performance by a well known environmental or community group.

2. PriceWaterhouseCoopers also recently researched social and SRI issues among superannuation members. The research showed that members were "overwhelmingly supportive" of screened funds:
   - 87% wanted to invest their superannuation in a screened investment
   - Of a range of social and environmental issues, superior environmental performance of companies achieved the greatest support. This was linked to expressed strong views over sustainability and "future generation" issues.
   - After environment, human rights, health and safety, labour relations and energy were the social issues respondents wanted their superannuation investment to support.
   - Respondents said they didn't want their funds invested in tobacco, weapons, animal testing, gambling and uranium, from 75% to 59% in descending order.

Results from both research exercises therefore indicate a strong direction for the SRI market, with considerable implications for corporate social responsibility agenda and so for Australian-based corporations operating overseas.

AICC believes that Australia will now move quite quickly to mainstream SRI adoption and by extension Australian companies will be increasingly compelled to address a wider corporate social responsibility agenda. These results show that the Bill's intentions have considerable support from the investing public. This should give strong support to the Committee in recommending some level of legislative change that encourages greater corporate responsibility.

4 Codes of Conduct

AICC believes a critical examination of the Corporate Code of Conduct Bill 2000 and recommendations for improvement and alternatives must be done in the context of existing research in this area.

For this purpose the following section is largely based on research conducted for the United Kingdom government's Department for Education and Employment and the Department of Trade and Industry on the effectiveness of codes of conduct in delivering behavioural changes in business practice. This report was presented in March 1999 based on a national survey of practitioners in the UK and an international survey of existing academic research into the effectiveness of codes of conduct. We accept that the Bill, if enacted, is a legislative instrument and therefore necessarily different in scope and structure from non-legislative codes. However we believe the findings are relevant to the Committee's consideration of the Corporate Code of Conduct Bill 2000 as the approach and aspiration of this proposed code has resonance with all other codes of conducts.

AICC strongly believes that any recommendation by the Committee must ensure an enabling environment is created for positive behavioural change for Australian-based corporations operating in other countries. Therefore a thorough understanding of what makes codes of conduct works is important to the committee's deliberations.

There are five key factors that the UK interview research with senior managers across all sectors determined were critical to success in the codes that they admired. They were:

- Simple and comprehensive
- Consultation/ownership
- Sanctions and benefits
- Wide acceptance
- Leadership

Not all of these factors are relevant to a legislative code of conduct so the following review against these factors is selective.

4.1 Simple and Comprehensive

A code needed to be clear, simple, not over detailed and readily explained. It needed to be comprehensive in the sense of addressing the basic challenges which managers face.

4.2 Consultation/ownership

Ownership by those involved was seen as vital to success. Creating codes through consultation at all levels was crucial.

4.3 Sanctions and benefits

The codes that worked the best were the ones where there were clear sanctions against those who failed to meet the standards. As an alternative to sanctions was the view that codes demonstrate clear benefits.

4.4 Wide acceptance

Wide acceptance by those implementing the code was the key factor for the most successful codes.

Communicating codes successfully was seen as vital to making them widely accepted. There were those that saw the government helping in creating a climate within which people realize these codes are important standards.

4.5 Leadership

Example setting by an organization's leadership and by leaders within sectors was seen as key to the success of codes.

Balancing the UK interview research was a global literature review on the topic of codes of ethics. Following are the key findings from this work.

In general:

- widespread prevalence of codes for large corporations
- code development (particularly in U.S.) was encouraged by scandals and legislation
- corporate codes exist amongst other ethics codes: international; industry; professional; and non-governmental organization codes
- codes are merely one component of an ethics program
- codes are the most popular, initial, and key component of an ethics program
- codes of ethics are difficult to distinguish from other ethics documents (e.g., codes of conduct; credos; values statements; mission statements)
- code definitions focus on a document which provides moral standards to guide employee behaviour
- primary reasons for codes: (1) economic; (2) ethical
- primary arguments against codes: (1) legal pitfall; (2) unnecessary
- criticisms of codes: (1) legalistic; (2) public relations document
- effectiveness not clearly established for: (1) economic; (2) legal; or (3) ethical performance
- corporate codes (particularly in North America) rarely discuss social responsibilities, environmental responsibilities, or commitment to learning.

Considering the literature there are some core recommendations to be drawn for those approaching the creation of a corporate code of conduct. These recommendations include:

Creation:

- senior management support/industry leaders support
- involvement of employees/industry representatives
- based on consensual values

Content:

- easy to understand
- goes beyond law
- avoid negative tone
- avoid legalistic language
- contain sufficient details
- comprehensive
- pertinent to company & industry
- realistic
- sanctions
- sign-off

Implementation:

- widespread distribution
- sufficient training

Administration

- appoint administrator
- set up reporting mechanism
- enforce
- monitor
- revise periodically

4.6 Government and Codes of Conduct

The literature review also focused on the role of government and codes of conduct. There may be several ways to categorize the different approaches of government's involvement with codes. In some cases, the government initiates the approaches, in other cases the government plays only an indirect role, or no role at all. Rather than categorizing the approaches based on the level of involvement of the government, they are categorized based on their distinctiveness. The approaches include:

1) Regulatory-based/governance-based
2) Advocacy-based
3) Role modeling-based
4) Incentives-based
5) Partnerships-based
6) Education and training-based

For the purposes of this submission the critical area to examine is the regulatory-based/governance-based approach. There are a series of variations of this approach currently operative around the world. However, the general model is for a country's government, departments or agencies to develop legislation or regulations that encourage companies to develop codes of ethics that address a range of ethical behaviors from anti-corruption to environmental and social impacts (typically within the framework of a compliance or ethics program).

Currently, a number of jurisdictions around the world are engaged in what might be referred to as a 'step-by-step' approach. For example, Canada, Europe (European Commission), Australia (Trade Practices Act) all utilize this approach by encouraging self-regulation through the development of compliance programs in relation to one legal subject matter, namely anti-competition law (Izraeli and Schwartz, 1998).

The U.S. Federal Sentencing Guidelines for Organizations enacted in 1991 come closest to representing a broad sweep approach by focusing on the penalty stage of criminal law under federal jurisdiction. The Guidelines provide that a company being sentenced under federal law can have the fine reduced if the company is deemed to have in place an 'effective compliance program.'

In terms of the impact of the Guidelines, hundreds of companies have been sentenced under the guidelines, and studies have indicated that the Guidelines were one of the factors which influenced the enhancement of already existing ethics programs (U.S. Sentencing Commission, 1995:134). One survey found that 38 percent of the 203 companies surveyed significantly improved their ethics compliance environments following the enactment of the Guidelines (U.S. Sentencing Commission, 1995:178).

Australia might be identified as moving towards a 'broad sweep' approach through the amendments to our *Criminal Code* (1995). It is now the case that the existence of a compliance program can be taken into account in determining the criminal liability of a corporation. This is significant for the Committee in considering its recommendations and how AICC's recommended regulatory amendments may compliment existing law. Canada is considering amending its *Criminal Code* in a similar fashion (Schwartz, 1996:7).

Another regulatory or quasi-regulatory approach is for governments or professional associations to require that the direct legal or moral responsibility fall upon directors or senior managers to ensure that their organization has an appropriate ethical culture, one aspect of which would include a code of ethics. In Canada, for example, the Canada Deposit Insurance Corporation, which regulates Canada's financial institutions (e.g., banks, trust companies, loan companies), states in its "Self-Assessment Criteria - Internal Control" (1993) that management must develop a 'comprehensive code of conduct.' The Canadian Competition Bureau's "Bulletin on Corporate Compliance Programs" (1997) indicates that companies which have in place 'relevant policies and procedures' (i.e., a code of ethics) will be better situated with respect to alleged violations of the Competition Act. The common law in cases such as R. v. Bata Industries (Ontario Reports, 1992 cited in CSSE/METO 2000) continue to emphasize that directors and officers can defend themselves from personal liability only if they demonstrate due diligence, which would include relevant corporate policies such as a code of ethics (Schwartz, 1996:6).

In the U.S., the influential Delaware Court of Chancery decided in 1996 that directors could be held liable for not taking appropriate steps to ensure that that the firm has an effective corporate compliance program in place (*In re Caremark International Inc. Derivative Litigation*) (Kaplan cited in CSSE/METO 2000).

In the UK, there has been significant recent activity on issues of corporate governance and the duties of directors to ensure ethical good practice. The Cadbury, Greenbury and Hampel Codes, now amalgamated as the 'Combined Code', do link to London Stock Exchange Listing Rules and to general understanding of best practice in the UK. However, although this area may be subject to future regulatory attention within the context of the Company Law Review (Company Law Review Steering Group, 1999 cited in CSSE/METO 2000) it is not currently part of the formal UK regulatory framework. It remains to be seen whether the current UK Government will wish to formalize ethical responsibility in this way; clearly if it did there would then occur a significant boost to the formalization of ethical codes within British companies.

For the moment the UK Government is reserving its position pending the outcome of the independent review process, but Secretary of State for Trade and Industry Stephen Byers did say in March 1999 "Good corporate governance matters. It matters to business because it contributes to sustainable long-term success. It matters to shareholders - and others interested in the company - because it ensures them a transparent and productive relationship with the enterprise concerned".

5 The Corporate Code of Conduct Bill 2000 - Recommended Changes

Considering the international experience in delivering better corporate behavior through regulatory means, AICC is of the opinion that the approach of the current Corporate Code of Conduct Bill 2000 is not the preferred approach. However, if the Committee was to recommend proceeding with the Bill, AICC would recommend a number of improvements in the context of the above cited success factors of codes of conduct.

5.1 Comprehensive

The Bill is not comprehensive. It fails to address a number of key areas such as corruption and the use of security forces.

Internationally the use of security forces is a difficult and delicate area for foreign corporations operating in developing countries and conflict zones. Amnesty International cites this as one of the key areas where corporate activity can led to violations of human rights. Indeed large companies such as Shell International have given this area priority in their commitment to human rights and in their operations.

AICC believes the reporting requirements of the Bill are onerous and are out of step with international best practice in this area. Six monthly reports require an enormous commitment - both financially and in terms of human resources. Current best international practice focuses on cycles of one to two years.

We believe that the reporting element of the Bill also misses an opportunity by not requiring reporting corporations to make public their reports. Best international practice in this area shows that public reporting through avenues such as the world-wide-web, demonstrates greater transparency and improves the virtuous stakeholder cycle. It allows the company's stakeholders to engage directly on the company's performance - again a factor that encourages corporate continuous improvement.

5.2 Consultation/ownership

While AICC has not researched this area, we believe the Committee should ask the originators of the Bill the extent to which business has been consulted on this initiative. For such an initiative to have substantial business impact it would be appropriate for there to be a level of business support. Certainly the key Australian businesses that are leaders in this field should have been consulted.

5.3 Sanctions and benefits

We believe the sanctions are clearly defined. In terms of guidance and information to accompany the Bill - should it become law - there should be appropriate communication about the business benefits from meeting the Bill's requirements.

6 Alternatives to the Corporate Code of Conduct Bill 2000

Considering the current international trends in government regulatory-based approaches to the creation of codes where enabling environments are created AICC recommends that the Committee examine the two suggested legislative alternatives below. We believe both proposals offer excellent approaches for delivering the improved performance by Australian-based corporations operating in other countries by focusing companies on broader commitments through establishing codes and policies. However we believe Proposal A should be the primary route for the Committee to follow.

Proposal A is directly modeled on the experience of the UK pension fund trustees law change and we believe it can be as successful in the Australian context as it has been in the UK. We believe its voluntary and transparent nature will enable an environment where Australian corporations will consider whether adopting environmental and social considerations will benefit their business. This voluntary adoption is the best route for ensuring that a culture of continuous improvement is the foundation of Australian corporate behavior rather than a compliance-driven culture that the current Bill would encourage.

6.1 Proposal A - Mandatory reporting of possession of policies or codes

The first requires Australian-based corporations operating overseas to report whether or not they have ethical, environmental and social policies or codes of conduct. This would be a voluntary requirement - only the reporting of whether or not they have these policies would be mandatory. If they did possess these considerations then it should also be mandatory for them to publicly make them available in both Australia and the countries within which they operate.

This could be extended to all Australian corporations over a certain size operating only within Australia.

6.2 Proposal B - Mandatory possession and reporting of policies or codes

The second alternative is not as preferred by AICC but would involve the mandatory possession of policies or codes of conduct addressing ethical, environmental and social considerations. These policies and codes would then need to be made publicly available.

7 References

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