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The Parliamentary Joint Statutory Committee on Corporations and Securities on the Provisions of the Corporate Code of Conduct Bill 2000

Submission from the Public Interest Advocacy Centre

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The Public Interest Advocacy Centre (PIAC) is an independent and non-profit legal and policy centre located in Sydney. Its charter is:

> To undertake strategic legal and policy interventions in public interest matters in order to foster a fair, just and democratic society and empower citizens, consumers and communities.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, PIAC was the first, and remains the only, broadly based public interest legal centre in Australia. Although located in New South Wales, the matters PIAC undertakes are often of national interest or importance or have consequences beyond state boundaries.

PIAC's work goes beyond the interests and rights of individuals. The Centre's clients and constituencies are primarily those with least access to economic, social and legal resources and opportunities. PIAC provides its services free or at minimal cost.

PIAC has been active in the policy debate about the regulation of the conduct of corporations for many years both at the local and international levels. PIAC's recent activities include a submission to the 1998 Joint Standing Committee on Treaties' Inquiry into the Multilateral Agreement on Investment. This year it has made submissions the review of the OECD guidelines on Multinational Enterprises conducted by Treasury.

The Bill aims to apply environmental, employment, health and safety and human rights standards to the conduct outside Australia of Australian corporations which employ more than 100 persons in a foreign country.

The Corporate Code of Conduct Bill 2000 requires corporations to report on their compliance with such standards, and provides for the enforcement of the standards.

PIAC supports this Bill because we believe there is ample evidence to suggest that voluntary codes of conduct for corporations are not effective, and that legislation is needed. The impetus for the Bill came in part from the BHP Ok Tedi environmental disaster in Papua New Guinea and the Esmerelda environmental disaster in Romania. Both of these were Australian companies which failed to implement overseas basic environmental standards which would have been legislative requirements in Australia.

The Bill addresses a regulatory vacuum which exists at national and international levels. The development over the last two decades of voluntary guidelines or codes at the international, industry and company level has proved ineffective.

Voluntary OECD Guidelines

The OECD Guidelines for Multinational Enterprises are the only internationally recognised standards for transnational corporations but are an example of the failure of self-regulation. They were devised in 1976 as a response to major scandals like the Lockheed bribery case in Japan.

The guidelines contained references to labour rights and the environment, but they were vague and essentially voluntary. There were no effective provisions for complaints or enforcement. Not until the furore over the OECD Multilateral Agreement on Investment (MAI) were the guidelines comprehensively reviewed. The new guidelines released this year have more detail in areas like the

environment and corruption, but, at the insistence of corporations and some governments, are still not legally enforceable. Clearly their existence had no impact on the behaviour of BHP or Esmerelda.

Voluntary Industry Codes of Conduct

Industry codes of conduct also exist. However they suffer from fundamental weaknesses. Firstly, there is no requirement for companies to sign up to such codes. Esmerelda was not a signatory to the Australian Mining Industry Code of Environmental Management. Secondly there is no evidence that the Code is effective for those who sign it. There are no specific standards in the code and no penalties for non-compliance.

Voluntary Corporate Codes of Conduct

Some corporations have developed their own codes of conduct, and argue that these are a substitute for legal regulation. However these codes seldom have specific standards by with performance can be measured. In most cases implementation is not independently monitored. The codes can be more of a public relations exercise than a real guide to practical conduct for managers.

The example of the NIKE code of conduct illustrates this point.

In response to criticism of the employment conditions in the factories of its sub-contractors, Nike developed a code of conduct which contains commitments on human rights and workers rights. The code is supposed to apply in its sub-

contracted manufacturing operations in Indonesia, China and Korea, and is monitored by PricewaterhouseCoopers.

A statement by Julianto, a worker at an Indonesian Nike factory who was brought to Australia by Community Aid abroad reveals the gap between the code and the practice.

He worked at the PT Nikomas Gemilang factory from 1997-April 2000, making outsoles for Nike shoes. Wages in the factory are $2 Australian per day. Twenty-three thousand workers work for 53-70 hours per week with unpaid overtime of several hours a day required to reach quotas. Workers are verbally abused and punished if they do not meet quotas. Accidents are very common.

Julianto and others formed a committee last year to discuss their working conditions began organising workers and approached management. They were threatened with physical violence if they continued to organise, and were then pressured to resign (Community Aid Abroad, 2000).

This personal account is supported by evidence from Dr Dara O'Rourke of MIT who in June this year accompanied and observed the monitoring process of PricewaterhouseCoopers in Nike Factories. He noted that management was notified of inspections well in advance, there was no opportunity to talk confidentially to workers and that some major issues were not included in the monitoring reports. The issues not included were hazardous chemical use and other serious health and safety problems, lack of freedom of association, violations of overtime laws, violations of wage laws and falsified time cards. The omission of these issues of course made the reports look more favourable. Dr O'Rourke recommended that monitoring be carried out by independent bodies

experienced in human rights monitoring and that it must involve confidential interviews with workers (O'Rourke, 2000).

The development of codes of conduct can be of some benefit if they have specific objectives, if management takes them seriously and trains staff to implement them, and if there are penalties for non-compliance. If there are no specific objectives, no independent monitoring of implementation and no penalties for failure then in many cases they will be ignored in practice and serve a public relations function only.

Regulation in Europe and the United States

The growing popular sentiment that the pendulum has swung too far in the direction of self-regulation has been reflected in legislative initiatives at the national level in Europe and the United States. These countries are the origin of most of the world's transnational investment (UNCTAD, 1999). Therefore these initiatives indicate there is a significant international trend to regulation. Standards developed in Europe and the United States are likely to be adopted by international funding and insurance bodies. Therefore the development of similar standards and means of enforcing them in Australia will not place Australian companies at a disadvantage. On the contrary, it will enable them to comply with global best practice in these areas.

In January 1999 the European Parliament passed a Resolution on Standards for European Enterprises. The Resolution calls for legally binding requirements on enterprises to comply with international law on human rights and the environment in developing countries, and proposes that compliance be monitored by a panel of independent experts. The resolution also calls for funding for business from the EU to be conditional on compliance with human

rights and environmental standards (European Parliament, 1999). This resolution faces a long and tortuous road through the EU institutions before it becomes law, but the fact that the process has begun is significant.

Similar legislation has been proposed by US Democratic Congress Representative Cynthia McKinney . This Bill requires US-based corporations to abide by a code of conduct with specific standards. Enforcement would be through preference in US government contracts and export assistance. Those harmed by non-compliance could also sue US companies in US courts (US Congress, 2000). This Bill has not yet received majority support, but its introduction is again significant.

The Corporate Code of Conduct Bill

The Corporate Code of Conduct Bill requires Australian-based companies with employees overseas to develop codes of conduct based on specific standards on the environment, human rights, labour rights and health and safety and to report to ASIC on these areas of conduct. There are also legal penalties for non-compliance and the provision for civil actions through the Federal Court by those harmed by non-compliance. Thus it combines both an internal education process for companies in development of the code and the reporting process with penalties for non-compliance (Parliament of the Commonwealth, of Australia, 2000).

The Bill follows the precedents of two other pieces of Australian legislation which address the issue of extraterritoriality . These are the Criminal Code Amendment (Bribery of foreign Public Officials) Bill 1999 and the Criminal Code amendment (Slavery and Sexual Servitude) Bill 1999. Both of these laws enable

the prosecution of Australian nationals for crimes committed outside Australian territory.

Conclusion

PIAC supports this timely and relevant piece of legislation. It addresses a gap in the regulatory framework which has resulted in disastrous consequences. It follows precedents set by other recent Australian and international legislation and will enable Australian companies to comply with emerging international best practice.

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