

Inquiry into the Provisions of the Corporate Code of Conduct Bill 2000

Submission to the Parliamentary Joint Standing Committee on Corporations and Securities

December 2000

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In her Second Reading Speech, Senator Bourne quite rightly pointed out that concerns exist in the Australian community in regard to:

- the increasing globalisation of business, its concentration within multi-national business structures and the capacity of these structures to operate 'above' the law of nation states;
- human rights, employment, health and safety, consumer and environmental protection practices experienced in some other countries;
- the varying standards being practiced by individual businesses within Australia; and
- the apparent growing divide between the poor and rich.

She notes:

- that generally, Australians desire that businesses practice good 'corporate citizenship'; and
- the general lack of guidance, encouragement and enforcement at the international and trans-national levels, though progress is being made.

It is appropriate for the Commonwealth Government, in serving the interests of the Australian people, to be introducing measures guiding the behaviour and practices of Australian entities operating overseas. However, the way in which this is done requires careful consideration.

Will the Proposed Law be Effective? - Is There a Better Way of Achieving the Objective?

SCOPE

The Second Reading Speech would indicate that the fundamental objective of the proposed law is to have Australian institutions applying Australian standards in their business undertakings overseas.

The proposed law will however have limited effect and is unlikely to address significantly the concerns alluded to by Senator Bourne.

- The Bill concerns only those Australian 'bodies corporate' that have significant numbers of overseas 'employees', i.e. generally big business and those Commonwealth agencies with major overseas operations. [Note: ss3, 4 and the definition of 'employees' (s6) leave ambiguous as to who is meant to be an employee for the purposes of determining the 100 person threshold - the distinction between 'employee' and 'contractor' is not made.]
- The proposed threshold applies to employment in a single country. A body corporate with 50 employees in each of three countries, or one that outsources its operations to a significant extent, would not be subject to the proposed law.
- The Bill does not address the practices of those Australian 'bodies corporate' that choose to rely significantly on overseas agents (whether they be suppliers, customers, 'arms-length' contractors, or affiliated businesses) who fall short of the proposed standards.

The following questions come to mind.

- Is there any estimate as to the number of Commonwealth and private sector bodies that are likely to be covered by this law?
- How much business activity would not be covered?

Might the number of organisations subject to the proposed law decrease over the next ten years as a result of:

- pressure to down-size and out-source,
 - control of domestic operations by foreign interests, which would then subsume the overseas operations and remove them from Australia's reach,
 - incentive that the proposed law would provide for businesses to adjust overseas operations in order to avoid compliance?
- Should not the proposed code apply to the overseas operations of all Commonwealth agencies and Australian corporate bodies?

METHOD

The Bill seeks to impose a compliance/enforcement regimen over certain overseas operations of Australian organisations. These are operations within foreign jurisdictions. Australia would acknowledge that the primary responsibility for what takes place in another country rests with the government of that country. Also, the capacity of the Commonwealth to effectively monitor and police overseas operations, at best, would be limited.

Business, and even government agencies, are likely to resent the imposition of requirements additional to those they must meet to satisfy the laws of the countries in which they are operating.

Imposition is not the answer. To be successful, any code that is desired must have the general support of those bodies to which it applies.

- Accordingly, would not a voluntary code, prepared in consultation with business and government (including State governments), be more likely to be accepted and be adhered to willingly?
- Would not such a code be better termed a 'Code of Practice', which distances itself from the notion of good vs bad behaviour sits closer to the notion of professional practice?
- Given the intent of the Bill, should not the wording of a code be tied as closely as practicable to provisions in existing law and be referenced to those provisions?

REPORTING

Public accountability is important, for what Australian organisations do overseas reflects on the Australian people as a whole. However, the mechanism proposed in the Bill duplicates what Commonwealth legislation already provides for.

- Should not the Bill be ensuring that reporting occurs under the existing reporting requirements of the Corporations Law, the ASX Rules, the Commonwealth Authorities and Companies Act, the Financial Management and Accountability Act etc?
- Are not the enforcement provisions in these other pieces of legislation adequate?

HOME AND ABROAD

As stated above, it appears that the fundamental objective of the proposed law is to have Australian institutions applying Australian standards in their business undertakings overseas. This is a commendable sentiment. However, as Senator Bourne notes, sometimes the domestic practices of local institutions fall short of what is desired.

Some Australian companies are coping well with the now greater access that groups of shareholders have to question the policies of those companies from the social and environmental perspectives. Some institutions have yet to learn how to be more accommodating.

- Could change be better brought about through encouraging an informed business community, even if this process takes time?
- Is it desirable at this stage to be extending the codification of business practice beyond our shores when the very foundations of our Corporations Law are under challenge?

Senator Bourne refers to the activity occurring elsewhere that may lead to a more integrated international approach. Australia can influence this process.

- Might it not better achieve this by directing the resources of its institutions towards developing (and adapting as required) and applying a consensually-derived set of standards which in themselves may contribute to the international effort?
- Might the code as prescribed by the Bill be used as a starting point?

CLASS ACTIONS

The opportunity for class actions is new in Australian law. Australian citizens, at large, have yet to know, understand and make use of the opportunity.

- Might it be prudent to hold back on extending, in the way that the Bill proposes, rights of class action to overseas citizens?

SPECIFIC MATTERS

The Bill contains a number of fundamental drafting errors and questionable provisions. Some are alluded to above. Examples of others follow:

- the definition of 'basic needs' - why is 'child care' included and 'personal security' not?
- the definition of 'body corporate' - does this need a note regarding the qualification in s5?
- the definitions of 'ecosystem' and 'environment' - even though these derive from the Environment Protection and Biodiversity Conservation Act, do they not appear to confuse when read together?
- the definition of 'executive officer' and term 'executive management' - why aren't the terms in the Corporations Law and the Commonwealth Authorities and Companies Act used?
- the definition of 'industrial undertaking' - why does this not accommodate the extraction of minerals from the air, from internal (non-sea) waters etc or the transport of minerals, e.g. by pipeline or conveyor-belt, or the distribution of fuel?
- S 7 - what is the meaning of terms such as 'environmental performance', 'control of environmental accidents' and at what stage in a new development would an 'impact assessment' occur?
- S 7 - what provisions should apply to the maintenance and operation of developments that are already in existence and what provisions should be made for contingency planning (to minimise impact of accidents on the environment) and for ongoing, reactive monitoring?

MANAGEMENT OF INFORMATION

The proper management of information is crucial if organisations are to operate accountably.

- Should not any code contain standards for the management and quality of information, including standards for ensuring privacy protection, effective disclosure and accuracy?