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The Secretary
Parliamentary Joint Statutory Committee on Corporations and Securities
Suite SG 60
Parliament House
Canberra ACT 2600

SENT VIA FAX: 02 6277 5809
10 pages

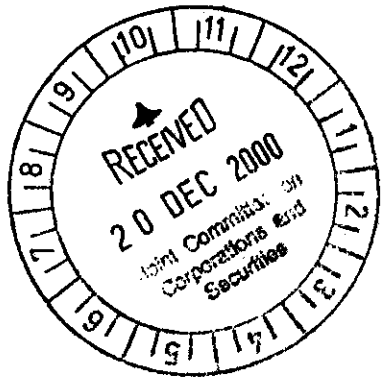
Dear Sir/Madam,

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

Please find attached this union's submission to the Inquiry.

Yours sincerely,

John Maitland



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Submission to the

Parliamentary Joint Standing Committee on Corporations and Securities

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

December 2000

1 Introduction

The CFMEU welcomes the opportunity to make a submission to the Committee on the Corporate Code of Conduct Bill 2000.

The Construction, Forestry, Mining and Energy Union is the principal trade union in the industries after which it is named. The union represents more than 120,000 workers in these industries. Together with their families and dependants, close to half a million Australians rely on jobs in which the CFMEU represents their interests.

All of the industries in which the CFMEU operates are characterised by the involvement of large corporations, many of them multinationals with operations in numerous countries. In respect of the forestry and mining industries, the Australian operations are highly exposed to international trade and must compete with similar activity in other countries. For these reasons that CFMEU is acutely aware of how companies operate not only within Australia but also in other countries. This is done not only by monitoring such companies through the media and commercial information channels, but through direct contact with trade unions and non-government organisations working within or nearby operations in other countries.

It is this direct experience which informs our submission.

2 The rationale for the legislation

The key issues in determining the merit and feasibility of the proposed legislation are:

- Is there a problem in the area the legislation seeks to address?
- Can an Australian public policy response deal with the problem, wholly or partially?
- Does the proposed legislation effectively and/or efficiently address the problem?

2.1 Is there a problem?

The proposed legislation seeks to monitor the overseas operations of companies that also operate in Australia in respect of their compliance with certain well-recognised minimum standards in regard to workplace rights, health and safety and

human rights. In respect of environmental management, the bill seeks greater transparency and accountability.

The bill is a response to a growing perception that many such companies do not comply with international minimum standards, and/or do not provide adequate transparency and accountability mechanisms in respect of their operations either to local communities or to the Australian public.

Australian mining companies figure prominently here, no doubt due to Australia's prominence as a major mining nation. This specialisation in mining has led to many Australian companies, or companies with extensive Australian operations (even if headquartered elsewhere), to engage in mining operations overseas.

In far too many cases particular operations have been subject to intense criticism in respect of the issues that the proposed bill seeks to address. There is not space here to engage in a detailed presentation of cases, but well-known examples include:

- The CRA (now Rio Tinto) Bougainville mine in PNG, which caused massive environmental destruction and ultimately contributed to a civil war.
- The BHP Ok Tedi mine in PNG, which operates without the tailings dam originally specified for the project, leading to substantial downstream pollution
- The Rio Tinto managed Lihir mine in PNG, which engages in ocean-dumping of its waste
- The Grasberg mine in West Papua / Indonesia (managed by Freeport McMoran of the USA, but with substantial Australian equity involvement), which is linked to substantial human rights abuses by the Indonesian military, and which caused massive downstream pollution, including to a level that has caused deaths
- The Emperor mine in Fiji, which has continuously sought to frustrate the right of its employees to organise, and has persecuted union activists.
- The Rio Tinto-managed Kelian mine in Kalimantan / Indonesia, which has had numerous disputes with the local community over river pollution, noise and dust, access to drinking water and just compensation for appropriated land.
- The Esmeralda tailings reprocessing operation in Romania that distributed a massive cyanide spill through Romania, Hungary and Serbia.
- The joint Rio Tinto / Normandy mine at Paracatu in Brazil which is alleged to have killed local people fossicking on the mine site, to have exposed workers to highly dangerous levels of toxic chemicals, and to have engaged in anti-union discrimination.

These cases demonstrate that there is a recurring rather than simply occasional problem. The problems also have key recurring features, including:

- The use of environmental practices, such as riverine and ocean dumping of waste which is not allowed either in Australia or other developed nations;
- Employment and occupational health and safety practices that prioritise cost-containment over accepted best practice
- Denial of the workers' right to organises into trade unions and collectively bargain
- Infringement of the rights of local people to adequate consultation, compensation and access to the benefits of mining investment. In the worst cases, mining operations are linked to serious human rights abuses, including torture and extra-judicial killings.

Clearly, there is a problem, and not an isolated one.

2.2 Can an Australian public policy response deal with the problem?

In almost all cases the problems arise from the activities of private business (though usually from publicly-listed companies). In some cases there is public sector involvement through provision of assistance (eg. the Lihir gold mine benefited from assistance from the Australian government-funded Export Finance and Insurance Corporation).

2.2.1 Industry self-regulation?

The mining industry is intensely competitive. Many companies, in seeking a competitive edge for their projects, are tempted to seek advantage through "externalising" costs, such as environmental management and health and safety, that best practice would deem they "internalise' (ie. incorporate as part of their normal operating costs).

Particularly in developing countries, national and local governments are poorly equipped to monitor and regulate company practices. Further, large projects (which mining projects almost inevitably are) may lead to corrupt and/or distorted decisions by local and national governments because their sheer size relative to the local and even national economy creates opportunities for corruption and an incentive for distorted decision-making. (For example, a mine may produce a large short-term revenue stream for government that mitigates budgetary problems, but

at the cost of long environmental damage and/or abrogation of local people's rights.)

It is the need for a competitive edge – sometimes by whatever means possible – that means that voluntary industry efforts to achieve better practices and standards are an inadequate response.

The Australian Minerals Industry Code for Environmental Management is a major example of the poverty of industry self-regulation. The document is not standards-based, instead styling itself as a "principles-based" document. Unfortunately the principles cited are not based on any known internationally-agreed principles, leaving them as a set of noble-sounding statements. The principles lack the specificity that would make the Code useful to anyone seeking to monitor or evaluate the performance of a company. Even the Guidance notes that accompany the Code are remarkably non-specific, and it is firmly stated that not only is the Code voluntary, but compliance with the Guidance Notes by companies that are signatories to the Code is also not required. The overwhelming impression is that the Code is an exercise in "being seen to be doing something" in response to the mounting series of problems with Australian mining companies operating overseas.

It is also stating the obvious that the Australian Minerals Industry Code contains nothing with respect to company performance on human and workplace rights matters. That the industry has yet to develop even voluntary statements of principle in this area shows the inability of the industry to voluntarily seek to achieve better performance in these areas.

In making compliance with the Code entirely voluntary, the Code's promoters rely on the strategic vision of the signatories that it is in their long term interest to be seen to be improving standards. Unfortunately, many companies, either by choice or by necessity, operate on short term time frames. The voluntary nature of the Code makes it an optional accessory to their corporate profile. In a highly competitive industry, the voluntary nature of the Code is virtually an incentive to non-compliance (whether or not a company is a formal signatory).

2.2.2 The usefulness of legislation

Given the competitiveness of the mining industry, and of other industries that are heavily exposed to international trade, it makes sense to impose legislated requirements with respect to environmental management, occupational health and

safety, employment and human rights standards. The proposed legislation acts to ensure a 'level playing field" amongst Australian corporations in respect of their activities overseas.

Where voluntary codes provide an incentive to companies that seek to "free-ride" on the best practice of others, legislation provides a secure regime for companies who know that their competitors face the same requirements.

The chief fault with the legislation lies only in its inherent restriction as an *Australian* law. This fault is not fatal given the global trend to increasing regulation of multinational corporations in respect of their global operations. The examples cited by Senator Bourne in her second reading speech on the proposed legislation indicate that in both the USA and Europe – home to most of the world's large companies – there are moves underway to lift the requirements of major companies worldwide in these matters.

Given the global trend, the proposed legislation can be seen as a leading and innovative move. Its early adoption would give Australian companies valuable experience in coping with an international regime of improved performance requirements.

2.3 Does the proposed legislation effectively and/or efficiently address the problem?

The simple answer to this is that the proposed legislation is a beginning, not an end. The reporting regime that is proposed in the Bill will not of itself ensure that companies achieve what is required.

The Bill is not onerous in its reporting requirements nor in the minimum standards it seeks to be applied. What it seeks to do is novel, and international experience in the area is limited (although growing).

It can be expected that, over time, experience with the legislation would lead to further refinements and extensions. The question then arises as to whether, in its novelty, there is a risk of imposing burdens on companies that would affect their competitiveness and commercial viability.

If we take the example of the Australian mining industry again, most of the firms involved would claim to already achieve high performance in the areas the Bill seeks to regulate. Many such companies already produce environmental and

community reports on an annual basis. If these statements by the industry are true, and their reports genuine, then the additional requirements sought by the Bill are minor. Companies that claim to have high performance in these areas, and to already produce good reports on them, should have little problem in meeting the requirements of the Bill.

It is the poor performers that have the most to lose from the enactment of the legislation. We should all be happy to see such poor performers vacate their industry in favour of companies who are prepared to achieve the higher standards sought by Australian and overseas communities.

3 Comments on specific features

3.1 Threshold for application

In Sections 3 and 4 of the proposed Act there is a threshold of 100 persons employed by a corporation given as the level beyond which the Act would apply. Given the wide variations that exist with respect to the relationship between investors, managers, contractors and employers, a single employment criteria may be ineffective in regulating the targeted corporations.

For example, it is possible for an Australian corporation to be the major investor and even the manager of an overseas operation, but not to be the formal employer of most workers. This already happens in Australia so it is not unreasonable for it to happen elsewhere. Employee rights and entitlements are an area where unscrupulous companies frequently seek to avoid legal and moral obligations, so it is important to not rely on the legal formality of a direct employer/employee relationship in applying the Act.

It would be preferable for the criteria to be defined more broadly. A relevant example could be the Corporations Law, where a distinction is drawn (for reporting requirements) between large and small proprietary companies on the basis of three criteria – gross revenue, value of assets, and number of employees.

The Act would be improved by adding such criteria, with application to a corporation occurring when it met any one of the criteria. It is suggested that the criteria should be similar to that under the Corporations Law - gross operating

revenue of $10 million in a year, gross assets of $5 million at the end of the year, and 50 or more employees at the end of the year.

3.2 Health and safety standards

Section 8 of the proposed Act sets out extremely basic requirements including with respect to working hours. It is noted that the proposed limit on working hours per week is in accordance with the Working Hours Directive of the European Union. The Directive has not prevented the continued working of extreme hours and rosters in the EU and could usefully be more strongly worded. Rather than simply referring to working hours being not more than 48 per week except with the agreement of employees, it should specify that recruitment and continuing employment should not be conditional on employees consenting to working weeks of longer than 48 hours.

It is noted that compliance with the Occupational Safety and Health Convention of the International Labour Organisation is required under Section 9(3)(f) rather than Section 8.

3.3 Employment standards

The CFMEU, in accordance with the policy of the Australian Council of Trade Union and the International Confederation of Free Trade Unions (ICFTU), is strongly supportive of measures to improve compliance with the core minimum labour standards conventions of the International Labour Organisation.

These are Conventions 87 and 98 on freedom of association and the right to collectively bargain, Conventions 138 and 182 on abolition of child labour, Conventions 29 and 105 on abolition of forced labour, Convention 111 on non-discrimination and Convention 100 on equal pay.

The Bill also includes Convention 155 on Occupational Safety and Health, which is applauded.

The Bill omits Convention 182, a very recent convention on abolition of the worst forms of child labour. The Bill could usefully be extended to include it. Australia has ratified all the core minimum standards conventions with the exception of those on child labour.

3.4 Reporting and Enforcement

The provisions for penalties in Parts 3 (Reporting) and Part 4 (Enforcement) are specified in terms of penalty units rather than monetary amounts. Fines for breach of reporting requirements are 1,000 and 2,000 units in the case of individual corporation officers and corporations respectively. For companies that actually breach the requirements of Part 2 of the Act the maximum penalty is 10,000 points.

The scale of difference in the penalties for non-reporting versus non-compliance seems inappropriately small. The fines for non-reporting will be of a routine administrative size. It is arguable that the penalty for actual non-compliance with the core requirements of the Act should be more than 5-10 times the administrative fines for non-reporting.

Breaches of competition law in Australia attract heavy fines – many millions of dollars. The fines are of that scale because it is recognised that a breach of competition law creates substantial disadvantage for competitors and consumers, and that penalties need to be substantial if they are to have an effect on the decision-making of large corporations.

The same rationale should apply with respect to the proposed Act. Where a corporation fails to comply with the requirements of Part 2 of the proposed Act they are likely to be seriously infringing the rights and welfare of the workers they employ and the communities in which they operate. The fines should have considerable weight.

It is suggested that the appropriate scale of difference between the administrative fines of part 3 and the Enforcement fines of Part 4 should be in the order of 100:1 rather than 5:1 or 10:1.

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