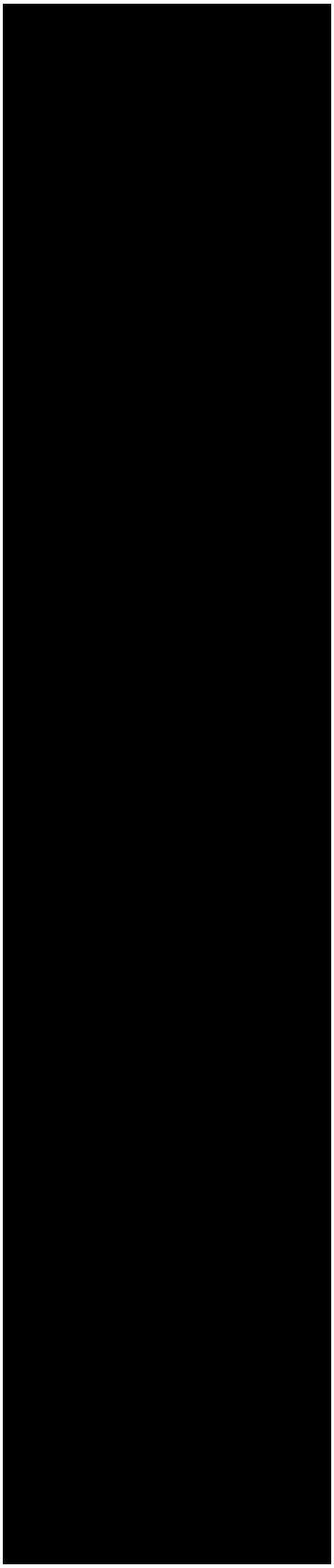

SUBMISSION TO THE PARLIAMENTARY JOINT STANDING COMMITTEE ON CORPORATIONS AND SECURITIES

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

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Introduction

The NSW Environmental Defender's Office (EDO) is a specialist community legal centre which is committed to assisting the community to protect the environment through law through the provision of legal advice, policy and law reform work, education and information. Over the years the EDO has been active in advocating for the extra-territorial regulation of Australian companies and has developed close links with environment organisations and individuals both in Australia and overseas which share this aim.

The Environmental Defender's Office strongly supports the enactment of the Corporate Code of Conduct Bill 2000 ('**the Code**'). In Australia, and internationally, human rights and environmental interests are increasingly being placed at risk by transnational companies as a result of the environmental and social impacts of their overseas operations. Existing initiatives to regulate these activities are inadequate. The requirement for greater corporate accountability on the part of Australian based transnational corporations is clearly overdue.

A number of recent incidents highlight the poor environmental performance of the overseas operations of some Australian companies. The Ok Tedi copper and gold mine in Papua New Guinea, majority owned by The Broken Hill Proprietary Company Ltd (BHP), continues to dump approximately 80,000 tonnes of mine tailings a day into the Fly River system, which it has done since it first commenced operations without a tailings dam in the mid-1980's. The Tisza River in Romania is still recovering some eight months later from a serious cyanide spill from the tailings dam of the Australian-operated Baia Mare gold mine, which also contaminated the drinking water of millions of people downstream in Hungary. In March this year, a helicopter accidentally dropped a tonne of cyanide pellets into rugged terrain 85 kms north of Port Moresby, while it was en route to the Tolukuma Gold Mine. The mine is operated by the Sydney-based company, Dome Resources.

Activities such as dumping mine tailings into a river system, and 'accidents' such as spilling cyanide into the drinking water of millions of people and dropping cyanide pellets into rugged terrain, would in no circumstances be acceptable in Australia. Condemnation and regulatory punishment of such incidents should not be absent simply because they have occurred in developing countries, which have less stringent environmental regulation and enforcement regimes.

The following comments are offered on the need for the Code:

The failure of self-regulation

The existence of ongoing human rights and environmental breaches highlights the failure of the various attempts at self-regulation by transnational companies. There is a clear need for legislated and mandatory standards rather than the current voluntary code of conduct approach.

Self-regulatory approaches suffer from a number of limitations. These include:

- Voluntary codes do not provide any protection against violations to people and the environment committed by individual companies that choose either not to sign on to or comply with relevant standards. An illustration of the weakness of a voluntary code of conduct is the incident involving the Australian mining company Esmerelda, which was recently involved in a cyanide spill in Hungary. Esmerelda was not a party to the Australian Mining Industry's code of conduct. Without a legally enforceable code, companies can simply refuse to implement environmentally sound industrial techniques.

- Voluntary codes usually lack accessible and reliable monitoring provisions, third party participation and penalties for non-compliance: mechanisms that would give *external* confidence that the company will abide by the standards of the code. These requirements are essential if such regimes are to be effective (OECD report, 1999);

- Self-regulation, to a large extent relies upon the market to respond critically to human rights and environmental shortcomings. In many cases the market cannot be relied upon. Often, economic imperatives will override ethical considerations. Moreover, markets work differently depending upon the type and structure of the company. While larger companies will often take action to avoid adverse publicity, smaller operations are not similarly responsive.

- Voluntary codes usually do not contain specific performance obligations. Even where performance obligations are present, industry-defined targets tend to only take into account the interests of industry rather than the public interest in general.

Benefits of a mandatory code

Imposing standards on Australian companies, and thereby enhancing their international reputation as companies ‘implementing good practice’, is also likely to produce several beneficial flow on effects. Primarily, an improved reputation will mean there will be an increase in the likelihood of project access and approvals. Studies have also found that clean production can result in win-win solutions; that is, more efficient industry and less pollution.

Consistency with Australia's international responsibilities

The Bill seeks only to implement internationally accepted basic human rights, health and safety and employment standards, which are consistent with Australia's international responsibilities under various treaties. The Bill does not seek to override national sovereignty.

Australia's international reputation

The necessity for such a Code also reflects increasing global pressure to hold transnational corporations accountable in their home jurisdictions for their environmental, labour and human rights performance. The international legal system has shown itself to be ill-equipped with adequate legislative or enforcement mechanisms to address the cross-border impacts of transnational corporations operating in the new global economy. The adoption of such a Code in Australia would be consistent with and supportive of similar European, US and Scandinavian initiatives (such as the *Resolution on EU standards for European enterprises operating in developing countries: towards a European Code of Conduct* and the McKinney Bill) and do much to overcome indifference to this issue.

Accessibility for foreign plaintiffs

Over the past decade there have been some significant developments in Australian case law which have had the effect of making Australian courts more accessible to foreign plaintiff claims (*Voth v Manildra Flour Mills* (1991) 65 ALJR 83; *James Hardie & Co Pty Ltd v Cameron* 12 NSWCCR 286; *James Hardie & Co Pty Ltd & Anor v Bruce* (1996) 12 NSWCCR 525; *James Hardie & Co Pty Ltd v Putt*, 22 May 1998, CA 40062/98). The Code of Conduct Bill clarifies and codifies these rights, thereby making justice more accessible for foreign plaintiffs who are affected by the activities of Australian-based companies.

Improvements to the Code

In relation to the specific provisions of the Code, the following improvements are suggested:

- Subclause 7(f) (Environmental standards), imposes a requirement upon overseas corporations to undertake environmental impact assessments of all new developments, including providing an opportunity for public comment on the assessment. Whilst this provision is supported, the current wording is vague and lacking in sufficient detail to ensure that environmental impact assessments which are undertaken meet minimum standards.

  Currently, many developing countries do not currently have environmental impact assessment processes which meet basic standards. The process of developing the Code is a key opportunity for the Commonwealth to set appropriate minimum standards of environmental impact assessment for overseas companies. In doing so, the Commonwealth should insist on a broad range of best practice public interest environmental benchmarks which will ensure real improvements to the environmental impact assessment practices which overseas companies currently employ.

A list of best practice requirements which could be adapted of the purposes of the Code has previously been specified in the National Environmental Defender's Office Network *Submission On The Consultation Paper Issued By Environment Australia: "Regulations and Guidelines under the EPBC Act 1999"* (November 1999, at pp. 28-29)]. I enclose a copy for your information.

- Subclause 7(g) (Environmental standards), requires overseas corporations to have regard to the precautionary principle in carrying out the various actions required under Clause 7 in order for overseas companies to meet environmental standards. Whilst this requirement is supported, the words 'have regard to' are likely have little effect in ensuring that adequate and genuine consideration is given to this principle. A more appropriate wording would be a requirement to 'act in accordance with'.

- Whilst reference is made in the Code at Clause 10 to human rights standards, specific provisions need to be included which address the concerns of Indigenous peoples. More often than not, the impacts of mining and other multinational companies result in violations of the cultural, social and economic rights of Indigenous peoples in their areas of operation. Provisions need to be included which will ensure freedom from exploitation and the protection and promotion of the fundamental rights of Indigenous peoples by overseas companies.

  Further guidance on this issue may be able to be obtained from United Nations Permanent Forum on Indigenous Issues, formerly the United Nations Working Group on Indigenous Populations, which has been working towards a Declaration on the Rights of Indigenous Peoples and has documented allegations of abuses of Indigenous rights committed by multinational corporations. The Indigenous Law Centre at the University of New South Wales may also be able to provide assistance.

- Reporting and enforcement: Under the Code, executive officers of corporations are exposed to personal civil liability for breaches of the provisions of Part 2 but only if:

  (a) The person knew that the contravention would occur, or was reckless as to that fact;
  (b) The person was in a position to influence the conduct of the company; and
  (c) The person failed to take all reasonable steps to prevent the contravention.

  The penalty for breaching this provision is a maximum of 10,000 penalty units.

  The Commonwealth's *Environment Protection and Biodiversity Conservation Act 1999* ('EPBC Act'), which defines the role of the Commonwealth in relation to the protection of certain environmental matters, contains a provision in almost identical terms (s.494). Under the EPBC Act, a breach such as an action that has, will have, or is likely to have a significant impact on the environment, will attract a pecuniary penalty of 5,000 penalty units for an individual, and 50,000 penalty units for a corporation. The same rationale that has been applied in the determination of penalties under the EPBC Act should also apply to the proposed Code. Accordingly, the fines should be commensurate.

Where a company fails to comply with the requirements of Part 2 of the Code, they are also likely to have caused significant damage to the environment. Likewise, the Code should contain provisions in terms similar to those provided for under s.499 of the EPBC Act, which provide for powers to require a company in breach of the Code to undertake remedial work to prevent, mitigate and repair any environmental damage caused as a result.

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