Submission to the Parliamentary Joint Statutory Committee on Corporations and Securities

Reference: Corporate Code of Conduct Bill 2000

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The moral ambition of this bill cannot be questioned or assailed by people of ethics. The goal; to ensure that Australian businesses operating overseas (particularly in countries yet to develop legal protections for indigenous workforces and environments) do not behave in ways that are oppressive, is a good one. Can we reach that goal through the *Corporate Code of Conduct Bill 2000*, as presently drafted? With respect, I doubt it.

What follows is an attempt, in no particular order of priority, to provide some substantiation of the point that the Bill falls short. I regret insufficient time to provide the Committee with a more fulsome response.

Head note & S.3 [Objects]

At the outset the bill offers its synoptic vision:

> A Bill for an Act to *impose* standards on the conduct of Australian Corporations…[emphasis added].

I have two objections to the use of the word "impose", more so as it is the Bill's lead-off concept. One does not find it hidden in some obscure section of the Bill. It is there in the head note and S.(3) (1) for all to see. My first objection is that imposed standards take much longer to be part of normal practice then standards freely embraced through a multi-layered change in the work culture. That is an optimistic view. A more pessimistic line says that imposed standards are only embraced because non-compliance carries penalties. I will return to this point shortly because there are ways of getting business to operate in an international ethical framework without relying on the strategy of imposition.

My second objection concerns the inferences released by the word "impose". In the business world this word has a pejorative meaning. It wakes up the dog of state regulation, and will get the usual response of resistance.

Recommendation 1: Abandon the usage of "impose" whenever it appears in favour of the word "develop".

4 Extraterritorial Operation

This section stipulates that Australian companies that employ 100 or more persons in a country other then Australia are caught by the Bill. I am concerned that companies in what I call the "middle range", employing around 100 nationals could keep the totals below the threshold for the sole purpose of avoiding the effect of the Bill.

Additionally this provision doesn't really capture the company that employs say 300 nationals across say three countries, but no more then 99 in each country. I was trying to come up with a replacement concept (eg company turnover) but I abandoned that in face of the question "why have a threshold at all"? There is certainly no moral rationale for a threshold; a company employing three nationals could obviously transgress ILO conventions as easily and willfully as the local branch of a multi-national.

Recommendation 2: Abandon the concept of a workforce threshold.

Part 2: Corporate Codes of Conduct

Part 2 sets five standards concerning:

- Environment
- Health and Safety
- Employment
- Human Rights

And two duties:

- To observe tax laws
- To observe consumer health and safety standards

These standards and duties are, as far as I can see, laudable, but not quite comprehensive enough.

I would add the emerging international standards for accounting, auditing, bankruptcy and corporate governance.

i) Accounting

A comprehensive set of international accounting standards (IAS) has been promulgated by the International Accounting Standards Committee. If these are endorsed by the International Organisation of Securities Commissions IOSCO they could be used in all global markets.

For the public sector the International Federation of Accountants (IFAC) is (according to the International Monetary Fund) currently formulating accounting standards based on IAS, which are expected to be completed next year.

ii) Auditing

International standards in auditing are currently being formulated by IFAC

iii) Bankruptcy

The United Nations Commission on International Trade Law (UNCITRAL) adopted a model law for bankruptcy in cross-border insolvencies in May 1997. This standard is now under consideration by a number of member countries. The World Bank and the International Bar Association are similarly involved in establishing guidelines for sound insolvency.

iv) Corporate Governance

We will hear more and more about this concept in the next decade. The *OECD Principles of Corporate Governance* were endorsed at the May 1999 OECD Ministerial meeting. The OECD and the World Bank have established a Global Corporate Governance Forum, a Private Sector Advisory Group and regional governance roundtables to promote the standardisation of a framework for ethical corporate management.

Recommendation 3: Part 2 remains as the centrepiece of the *Corporate Codes of Conduct Bill 2000*, with the addition of relevant international standards.

Part 3: Reporting

This appears to be the weakest part of the whole bill. The architecture for the data collection, self-assessment of compliance, transmission of reports to the Australian Securities and Investment Commission (ASIC), and then their on-forwarding to the Treasurer and eventually Parliament is too exposed to false reporting and incompetent oversight.

A) Self-Assessment.

Part 3 (14) requires companies to lodge annual code of conduct compliance reports to ASIC. While the S.14(2) list of matters companies must report on is comprehensive enough, the process is open to false or partial reporting simply because (with one exception) there is no in-built external oversight. The exception is to be found at S.14(2)(g), which provides for an independent auditor to prepare a report on the environmental impact of the companies operations in each country. Even this exception is flawed, but one point at a time.

The S.14(2) matters on which companies must attend to in their annual code compliance reports to ASIC can be divided according to whether the matter goes to the heart of code compliance or not.

Code-Relevant Matters

- S14(2)(g): A statement of the environmental impact
- S(14)(2)(h): A statement of any foreseeable risks
- S(14)(2)(I): A statement of any breaches of local law relating to environment, employment, health, safety and human rights.
- S(14)(2)(j): A statement of social, ethical and environmental policies of company.

Other Reporting Matters

- S(14)(2)(a): Financial data
- S(14)(2)(b): Constitution and remuneration of board of directors

- S(14)(2)(c): Executive list
- S(14)(2)(d): Shareholding details
- S(14)(2)(e): Workforce numbers
- S(14)(2)(f): Total remuneration paid in each country

These "other" reporting matters are not central to the question whether a company has complied or violated the code of conduct. Further the information required here is not that difficult to collect. This material could be prepared by the company.

However *all* code-relevant matters should be prepared by external auditors. That means reporting on whatever code-relevant matters eventually appear in Part 2. Further, we know from studies, and experience, that collusion is always possible between companies and auditors, particularly when a powerful motivation for the auditor is securing next years audit work. The improper and unethical auditing of the Maxwell accounts in UK by Price Waterhouse comes to mind here. I would suggest that the auditors be appointed and by ASIC and paid for by the company.

Recommendation 4:
a) A distinction be made between so-called code-relevant matters and not so relevant matters in Part 2.
b) That a report on all code-relevant matters in Part 2 be done by external auditors under ASIC control.
c) That external auditors not place full reliance on company information to prepare reports.
d) That companies pay for the external auditing service.

Action by ASIC

Under the current proposal ASIC simply uses the code of conduct compliance reports from companies to prepare an annual report, which it sends to the Treasurer. Given recommendation 4b, I would suggest a more active role for ASIC. I am also suggesting a role for Austrade in this scheme, and will talk to that point shortly.

I think that it is worth considering an involvement from ASIC with respect to external auditor reports that expose company code breaches. At present ASIC, if I understand their charter correctly, is a statutory watchdog on companies at home. Why not extend this charter so it becomes the watchdog for companies away? This done, the powers currently available to ASIC to investigate breaches of company law, facilitate remediation, and in bad cases, take court action, could be extended to Australian companies operating off-shore.

Recommendation 5: That ASIC's legislative base be extended to allow for the use of its powers with Australian companies operating outside Australia, found by external auditors to have breached the Code of Conduct.

Parliamentary Action

Under the current proposal the Treasurer causes the ASIC annual reports under this Bill to be tabled in both houses of parliament. I presume S243 of the ASIC Act would allow the Joint Statutory Committee on Corporations and Securities to inquire further and to take whatever action it deems necessary if the ASIC report under *the Corporate Code of Conduct Bill* disclosed a systemic problem in the operation of Australian companies overseas.

Further Role for Austrade?

Austrade has a network of offices in over 100 countries. This is a valuable resource that could be used to great effect within the framework of the *Corporate Codes of Conduct Bill 2000.*

I envisage 5 roles for Austrade:

a) At the initial contact between Austrade and companies wishing to expand their operations overseas. At this stage companies could be instructed via on-line tutorials, e-roundtables, booklets, seminars etc about the moral standards that they are expected to uphold in the countries they plan a presence in.

b) These programs of awareness development could be supported by changes to Austrade's Export Market Development Grants (EMDG), whereby company applications for these grants would have to spell out how businesses intend to meet the ethical protocols in the Bill.

c) Further into the experience of operating overseas, companies could be eligible for taxation relief on their operations back home if they are performing well as international corporate citizens.

d) Austrade sponsored or facilitated trade fairs could be important forums for the broadcast of the message that the government is serious about treading lightly in other peoples countries.

e) Finally corporate citizen awards should be considered

Recommendation 6: That serious consideration be given to involving Austrade in the operations of the *Corporate Code of Conduct Bill 2000.*

Whistleblower Protection

I can envisage that a common source of information about company wrongdoing with respect to violations under the Bill, would come from nationals of other countries who,

as company employees, had first hand intelligence on the alleged wrongdoing. These people are clearly exposed to victimisation if and when they come forward with their proof. Ways need to be found of protecting overseas whistleblowers. I would be happy to talk to the Committee further about this. A protected disclosure make s the job of the external auditor that much easier and credible.

I wish the Committee well in its important deliberations on this very important issue.

Dr William De Maria