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Submission to
the Joint
Statutory
Committee on
Corporations and
Securities

Corporate Code of
Conduct Bill 2000

The National Environmental Law
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Summary

**NELA
supports the
Bill**

The Victorian division of the National Environmental Law Association (**NELA**) welcomes the opportunity to make a submission to the Parliamentary Joint Statutory Committee on Corporations and Securities ("**the Committee**") inquiry into the *Corporate Code of Conduct Bill 2000* ("**the Bill**").

NELA commends the Bill and supports, in principle, the concept of Australian Companies being held responsible for their actions and conduct in their overseas operations.

**Summary of
Recommendations**

In summary, the main suggestions NELA offers the Committee are:

1. to broaden and define specifically the application of the Bill;
2. to strengthen the enforcement provisions of the bill by including alternative penalties, such as adverse publicity orders, as well as incentives for compliance;
3. to consider a concurrent amendment to the Corporations Law in regards to reporting obligations and directors duties concerning environmental performance; and
4. to include appropriate provisions in line with other Australian and international environmental laws to ensure a more comprehensive protection of the environment.

**Redefinition
of overseas
corporation**

To ensure that obligations are not too easily avoided by Corporations which might otherwise cause damage to the environment, a number of inclusions would be appropriate:

Section 6 of the Bill defines an **overseas corporation** as a body corporate which employs or engages the services of 100 or more persons in a country other than Australia.

It is submitted that Australia follow the recommendation of United States Congresswoman Cynthia McKinney (as outlined in Bill H.R.4596, the Draft Corporate Code of Conduct Act) and require that a body corporate which employs more than 20 persons in a foreign country comply with the Bill. The smaller number ensures that it would be more difficult for corporations to evade application of the legislation.

**Inclusion of
joint
ventures**

The Bill applies to corporations, holding companies and subsidiaries but does not expressly relate to the situation of a joint venture. A joint venture can take an incorporated or unincorporated form. It may be described as a situation where several participants are engaged in a particular project with a view to generate a shared product, rather than an indefinitely continuing enterprise.

The situation of a joint venture is common, for example, in the mining and petroleum industries. To ensure that the Corporations Code is comprehensive in nature it is recommended that the Bill cover the situation of the joint venture.

**Inclusion of
definition of
subsidiary**

The term subsidiary, as included in section 4 of the Bill is currently undefined. It is submitted that an appropriate definition of a subsidiary be

included to avoid confusion and to ensure that corporations do not evade the Code by establishing operations in other countries using the veil of a subsidiary.

It is recommended that the Bill adopt the Corporations law test of determining a subsidiary - which is a test of control:

- Section 46 of the Corporations Law provides that a body corporate will be a subsidiary of a body corporate if the other body corporate has control of the board, can cast more than half of the maximum number of votes at a general meeting or holds more than half the issued share capital; and
- Section 50AA which provides that an entity controls a second entity if the first entity has the capacity to determine the outcome of decisions about the second entities financial and operating policies.

This definition of subsidiary would help to ensure that Corporations which are substantially controlled by Australian Companies would not be able to evade application of the law due to a technical lack control in the form of a percentage of ownership.

P e n a l t i e s & E n f o r c e m e n t

Initiative based approach

To ensure that the Bill produces a regulatory regime which encourages compliance the following recommendations are put forward:

It is submitted that the Bill should incorporate initiative based measures as well as penalties to ensure corporate compliance. Positive encouragement should include measures such as:

- the awarding of government contracts on the basis of continuing compliance with the Code; and
- benefits attached to a continued compliance with annual reporting requirements, such as positive publicity.

Examples of effective current environment legislation which use initiative based compliance mechanism are evident in the Victorian *Environment Protection Act 1970*. Sections 26A-E relate to accreditation. While non-compliance with the sections involves the receipt of considerable fines the process is incentive based for those who do comply. Section 26B, for example, allows for a grant of accreditation if the Authority is satisfied that the licence holder:

- (i) has demonstrated a high level of environmental performance; and
- (ii) can demonstrate an ongoing capacity to maintain and improve environmental performance.

Another example is the proposed United States Code of Conduct (section 4) which

**Alternative
penalties**

requires Federal Agency heads to give preference in the award of contracts to entities adopting and enforcing the Code.

A further positive incentive could take the form of a public report outlining the companies with the best compliance records.

Use of such an incentive approach, coupled with penalties for non-compliance, would be an effective way to achieve the aims of the Bill.

Alternative penalties, for example the publishing of crimes committed under the act, is another effective way of achieving a greater level of compliance.

It is submitted that the Corporate Code adopt alternative penalties similar to the Victorian *Environment Protection (Enforcement and Penalties) Act 2000*, particularly Section 67AC which states that in the event that a court finds a person guilty of an offence the court may do one or more of the following:

- publicise the offence (67AC(2)(a));
- publicise the environmental consequences of the offence (67AC(2)(a));
- publicise the penalties imposed (67AC(2)(a); and
- to carry out a specific project for the restoration or enhancement of the environment in a public place or for the public benefit (67AC(2)(c)).

The above penalties encourage compliance because it is in the Companies best interest to avert the risk of adverse publicity which often has more of an impact on a Companies' bottom line than fines.

**Current
Corporations
Law**

It is recommended that the reporting requirements of the Bill be combined with the reporting requirements in the Corporations Law, namely Section 299(1)(f) of the Corporations Law.

Section 299(1)(f) states that the director's report for the financial year must outline details of the entity's performance in relation to environmental regulation. The section applies when the entity's operations are subject to any particular or significant environmental regulation at either a state or Commonwealth level.

To ensure that the Code is included as a significant environmental regulation consideration should be given to a concurrent amendment to the Corporations Law to strengthen and give more specificity to that provision and to expressly refer to the reporting requirements of the Code. Furthermore the Code should also include an express reference to adherence to the Corporations Law reporting requirements.

**Directors
Duties**

Tying the Code to the reporting requirements pursuant to the Corporations Law ensures that the general directors duties of acting in good faith apply to environmental reporting (as outlined in section 184(1) of the Corporations Law) The creation of a duty to report in good faith on the environmental performance of the company will ensure that a greater level of compliance can be achieved.

The existence of such a duty also provides directors with a legislative reason for supporting good environmental practices when needing to defend an action which may not provide maximum immediate profits (although invariably good environmental standards will help profits).

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P r o t e c t i o n
R e g i m e

It is important to consider the following points to ensure that the legislation does not contain any loopholes which may enable corporations to avoid compliance with environmental standards:

Religious exception

- While the religious exceptions may be required to ensure that corporations are not forced to break fundamental religious rules in countries other than Australia when adhering to the Code, NELA submits that the exception be narrowly defined so that the exception is not used to circumnavigate obligations.

Current law

- The Bill requires environmental impact assessments and has a limited requirement in relation to appropriate policies. It NELA's submission that, to be consistent with environmental laws currently in force in Australia, the Code should also require the implementation of a comprehensive Environment Management System for all corporations operating overseas.

EIA

- Similarly the standard of Environmental Impact Assessment for all new developments [section 7(2)(f)] should be stipulated to be equivalent to the highest level of assessment required in Australia.

Include a bribery clause

- To encourage environmental responsibility at a global level a section penalising instances of bribery should be adopted. Bribery offshore is often a daily part of business transactions and perhaps the only way

International benchmarks

to curb the use of it by Australian companies offshore is to tighten corporate governance rules in Australia.

- To ensure that the Code remains a flexible and current regulatory tool reference to the guidelines set out by international conventions may be important in the area of environmental regulation and standards. Using the Kyoto protocol as a benchmark, for example, of environmental expectations in the area of acceptable levels of greenhouse emissions is one way of ensuring the Code continues to be consistent with international trends.