AICD SUBMISSION TO THE PARLIAMENTARY JOINT STATUTORY COMMITTEE ON CORPORATIONS AND SECURITIES ON CORPORATE CODE OF CONDUCT BILL 2000

The Australian Institute of Company Directors (AICD) has pleasure in enclosing its submission on the Corporate Code of Conduct Bill 2000.

At your convenience, AICD would be pleased to further discuss the matters we have raised in our submission.

Yours sincerely,

Ian T Dunlop
Chief Executive Officer

This submission addresses issues in relation to the Corporate Code of Conduct Bill 2000 ("the Bill").

1. **Background**
   The Bill was introduced into the Senate on 5 September 2000 and referred to the PJCCS on 6 October 2000. To our knowledge, the first advertisement by the PJCCS for submissions was on 17 November 2000, requiring submissions by 15 December 2000. We submit that this is too short a period within which to prepare a submission.
   The intention of the Bill is to impose environmental, employment, health and safety and human rights standards on the conduct of Australian corporations when undertaking business activities in other countries.
2. **Summary of Submission**

While the intentions underlying the Bill are commendable, we do not believe that the Bill is an appropriate means of improving standards in developing countries, nor would it be likely to be effective.
In particular:

- instead of implementing this Bill, Australian companies should be encouraged to adopt a voluntary Code of Conduct;
- impediments will be imposed upon Australian companies as a result of increased costs and legal exposure, thereby disturbing a level-playing field;
- the Bill attempts to usurp a foreign government's authority to legislate within its national boundary standards of corporate activities that differ from Australian standards; and
- unilateral action by the Australian Parliament will achieve little. This is an issue which requires international cooperation.

Each of these points is addressed below.

3. Voluntary Codes of Conduct

3.1 Like many members of the Australian community, we are concerned that Australian companies act appropriately when conducting business abroad. However, we consider that a government of a foreign country is primarily responsible for setting, and policing, the standards prevailing in that country. If a foreign country is to be brought into a standard international regime, that is a matter for diplomatic initiatives by concerned governments. We believe that unilateral legislation by the Australian parliament is not an appropriate or effective response.

3.2 We recommend that Australian companies be encouraged to adopt a voluntary code of conduct, which they can then disclose to the investment community. This code of conduct would address the matters raised in the Bill. This is the path which the EU is taking, and is in line with current international best practice. It allows that best practice to mature and consolidate, and would leave potential for corporations to *exceed* the standards set in the legislation, over time.

4. Australian Companies Disadvantaged

4.1 The Bill, if law, would place Australian companies at a disadvantage vis a vis other foreign companies when competing for and engaging in business overseas. We submit that it is not reasonable to expect Australian companies to operate by Australian standards in overseas countries, where differing standards, conduct, expectations, infrastructure and customs apply.

4.2 Compliance with the reporting requirements of the Bill is both onerous and expensive. The requirement that the Code of Conduct Compliance Report include the financial and operating results of the corporation potentially places public company reporting obligations upon private companies in contradiction to Clause 3(2) of the Bill.

4.3 Under the Bill, a corporation may be required to have an independent auditor prepare an environmental impact report, notwithstanding that the corporation is not obliged to comply with section 299 of the *Corporations Law*, again, in contradiction to Clause 3(2) of the Bill.
4.4 It would be difficult for an Australian corporation to identify the relevant legal requirements. Clause 9.3(f) of the Bill, for example, requires an Australian company to comply with minimum international labour standards. These standards are contained within numerous treaties. The requirements of the treaties are given effect when incorporated into the laws of countries signatory to the treaty. An Australian company firstly would be required to determine whether the countries in which it operates are signatories to the treaty and, if so, the particular requirements in each country. This illustrates the uncertainty of the proposed structure.
4.5 The reporting requirements as currently drafted, monitor an Australian company's operations abroad ex post. Until it is revealed that a local law has been breached, a breach of the proposed law is unlikely to be detected. Australian corporations could therefore be subject to a double penalty for the same act: penalties in the host country and then higher penalties under the proposed law. It is submitted that it is unfair and discriminatory to subject a company to two different legal regimes for the same act.
4.6 Australian companies would run the risk of the Bill being "policed" by non-Australian competitors free of such requirements. Such regulation may be "misused" by competing companies as part of their business strategy.
4.7 If this Bill were to become law, Australian companies may alter their operations accordingly. For example, Australian companies may be:

- discouraged from operating overseas;
- encouraged to restructure their operations to avoid compliance with the legislation;
- encouraged to shift domicile.

Such reactions are clearly inconsistent with the promotion of an efficient market.

5. Undermining of Foreign Government Sovereignty

5.1 International relations potentially may be undermined by the Bill as it suggests Australia does not consider the laws and standards applicable in foreign countries to be adequate. To mandate standards that are not required by the citizens of a nation is a form of economic and political imperialism. We believe that a number of countries would regard such an approach by the Australian government as arrogant and discourteous.
5.2 We anticipate that the proposed law would be primarily operational in developing countries, given developed nations would have local laws similar to the Australian standard. The Bill, in assuming that developing countries will benefit from the proposed legislation, undermines the choice of national governments. They have chosen to enact their respective standards for a reason.
5.3 Laws implementing international treaties may differ markedly between countries giving effect to those treaties, for example, with respect to human rights laws. Significant conflict of laws issues may result when an international standard is to be adopted as proposed by the Bill.
5.4 One of the principal aims of the Bill apparently is to improve conditions in developing countries. However, the Bill risks being counter-productive. Increasing the costs for Australian companies to carry on business in developing countries will not only tilt the business in developing countries towards companies from other developed countries that are not subject to such legislation, it may cause Australian companies to wind back their operations in developing companies. To the extent that this is not taken up by other countries, this will disadvantage developing countries, by reducing foreign investment. If developed nations all introduced legislation similar to the Bill, then developing countries will receive less foreign investment because, at the margin, the additional compliance costs will mean some projects will not go ahead. In our view, the proponents of the Bill should have the onus of demonstrating that the Bill will actually improve standards in developing countries.

6. Other Models

6.1 The proponents of the Bill refer to the 1999 European Union *Resolution on EU standards for European Enterprises operation in developing countries: towards a European Code of Conduct*, as well as the bill recently introduced by Congresswoman McKinney in the USA.
6.2 The EU resolution is a Resolution of the European Parliament. It makes a number of key points:

- it encourages voluntary initiatives by business and industry, trade unions and NGO's to promote codes of conduct, with effective and independent monitoring and evaluation;
- it stresses that the content of a code, and the process by which it is determined and implemented, must involve those in developing countries who are covered by it;
- it recommends that an "evolutionary approach" be weighted towards a continuous and gradual improvement of standards and takes the view that this must reflect enterprises' own obligations to make improvements;
- it recognises that a responsibility for applying internationally agreed standards rests with the governments of the developing countries themselves.

6.3 On 7 June 2000 Congresswoman McKinney introduced a Corporate Code of Conduct Bill which was referred to subcommittees of the House of Representatives on 17 July 2000. The Bill requires nationals of the United States that employ more than 20 persons in a foreign country to implement a Corporate Code of Conduct, principally with respect to the employment of those persons.