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20 December 2000

Mr Andrew Endrey
The Secretary
Parliamentary Joint Statutory
Committee on Corporations and Securities
Suite SG 60 Parliament House
CANBERRA ACT 2600
By Email: corporations.joint@aph.gov.au
And by Fax: (02) 6277 3580

Dear Mr Endrey

Corporate Code of Conduct Bill 2000

CPA Australia and The Institute of Chartered Accountants in Australia (the Accounting Bodies) appreciate the opportunity to make this submission on the Corporate Code of Conduct Bill 2000. The submission has been prepared by our Legislation Review Board under the administration of our Australian Accounting Research Foundation. The Board is appointed to advise on matters of legislative and regulatory policy.

The Accounting Bodies empathise with the intention behind the introduction of the Bill. Attaining high standards of corporate conduct is a desirable objective for Australian businesses operating within Australia as well as overseas. Appropriate corporate conduct can do much to demonstrate commitment to acceptable behaviour regarding labour relations, health and safety, environmental issues and other matters that business should have clear policies and guidance on. This will also demonstrate that business is operating to or above an acceptable standard of good practice.

However, notwithstanding the above, it seems premature to be setting a code for overseas business activities of corporations when a code does not exist for activities within Australia. Also, appropriate research into the matter should be undertaken before introducing legislation that may not take full account of the impact of codifying disparate areas of law. A code should consider the sovereignty of countries, business competition issues, international agreements and the regulatory and socio-economic environments of countries.

We believe that it is inappropriate to include under the Corporations Law matters such as health and safety, industrial relations and environmental issues. These matters should be considered under specific legislation which is dedicated to those areas.

It is worth noting that the corporate code of conduct bill introduced in the US Congress does not contain many of the provisions in the Bill before the Committee. The US bill requires the Secretaries of State for commerce and labour and the Administrator environment protection to report to Congress and does not link with legislation administered by their Securities and Exchange.

The Bill would expand the role of the Australian Securities and Investments Commission beyond its mandate of maintaining, facilitating and improving the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the Australian economy. The Bill clearly contains provisions incompatible with ASIC's role and the objectives and purpose of the Corporations Law.

The Bill could have a harmful affect on the competitive position of Australian business relative to other businesses not subject to the Bill both in Australia and overseas. Competitive information would have to be disclosed and compliance and business costs may increase as a result of the Bill's requirements. This will add a burden on to overseas corporations but not their competitors.

Regarding the Bill's reach, it is far beyond what we believe was its intention. For instance, if the foreign holding corporation of an Australian corporation employs more than 100 persons, then it is an overseas corporation and subject to the Bill. However, the Bill would not be enforceable in another country. Further, whilst section 4 makes the general statement that the Bill applies outside Australia, subsequent specific sections make it clear it would apply in Australia, for instance the reporting to ASIC, penalties and civil action before the Federal Court.

For the reasons mentioned above and in the attached detailed submission, we consider the Bill should not proceed without major changes and then only after interested parties are given another longer period to consider the redrafted Bill.

We would welcome the opportunity to discuss with you our submission or other matters on which you would like our views or additional input. Please direct any queries to Mr Stan Neild, Manager Legislation Review, on telephone (03) 9641 7439.

Yours sincerely

J C Morton FCPA
National President
CPA Australia

J B West FCA
President
The Institute of Chartered
Accountants in Australia

Submission on

Corporate Code of Conduct Bill 2000

Parliamentary Joint Standing Committee on Corporations and Securities

Introduction

The Bill seeks to impose environmental, employment, health and safety and human rights standards on the conduct of Australian corporations or related corporations employing more than 100 persons in a country other than Australia (sections 3, 4 and 6 refer).

Effect of the Bill

Section 3(2) states that a corporation is not required to take any action to meet the Bill's requirements in respect of operations in a foreign country that it would not be required to take in respect of its operations in Australia. However, on the basis that specific provisions overrule general provisions, section 3(2) would seem to have no effect as the Bill proposes specific requirements such as 7(1), 8(1), 9(1) and 14(1) that do not currently apply to a corporation's operations in Australia. Further, for instance, if a USA corporation (employing more than 100 persons in the USA) has an Australian subsidiary corporation then the USA corporation would be subject to the Bill. However, the Bill would not be enforceable in other countries.

Key competitive information is required to be disclosed (e.g. total remuneration paid, refer section 14(2)(f)) that corporations would not otherwise reveal as it represents important business information that could be used to the disadvantage of the corporation by competitors.

No cost/benefit analysis has been provided to demonstrate that the Bill's corporate conduct requirements on corporations' overseas conduct are necessary relative to existing legislative provisions and whether the Bill will provide a net benefit to Australia and other countries.

Comments on some of the specific requirements in the Bill

Detailed below are comments on certain specific provisions in the Bill.

Definitions

A number of key terms are not defined (e.g. significant in section 14(2)(c)). Other definitions are considered unsatisfactory (e.g. employee in section 6 does not distinguish between full and part time equivalent persons/employees).

The Bill does not cover unincorporated bodies.

The use of overseas employment and contracting firms would also seem to allow corporations to avoid the more than 100 employees threshold and so avoid coverage by the Bill.

Section 9 - Employment standards

Sub-section (3) imposes a "living wage" requirement on overseas corporations that competitors may not be required to match and takes no account of other services and supports available to employees within the countries the overseas corporations operate.

Section 11 - Duty to observe tax laws

This section is unnecessary. When operating in a country its laws must be observed.

Section 14 – Reports to Australian Securities and Investments Commission (ASIC)

Sub-section (1) requires lodgment of a Code of Conduct Compliance Report with ASIC before 31 August each year. This is a shorter and thus more onerous time frame than applies for other annual report information to ASIC. Sub-section (3) does not provide any relief because, notwithstanding that it purports to exclude from the Compliance Report information included in another report to ASIC, it relates to information that "... has (been) provided ...". Effectively the Bill requires Australian based corporations covered by the Bill to lodge their annual financial statements no later than 30 August.

Sub-section (2)(a) refers to results for 12 months without stating which 12 months. It has been assumed that it was meant to be the financial year to 30 June preceding the 31 August in sub-section (1). Otherwise any 12 month period results might meet the Bill's requirement. Also, the Bill has made no allowance for corporations operating on different balance dates such as 31 March.

Sub-sections (4) and (5) provide for penalties for contraventions of the Bill however no information has been provided on the rationale for the penalty levels.

Section 15 – Reports to the Parliament

The section requires an annual report to be produced by ASIC on compliance with the Bill's requirements and forwarded to the Treasurer before 31 December in each year. It is interesting to note that ASIC is granted 4 months to produce its report, basically a collation of the section 14 reports, whereas reporting corporations have only 2 months to produce their reports. The Treasurer is given 14 sitting days to table the ASIC report before each House of the Parliament. This is likely to be sometime in February. A rescheduling of the reporting periods seems warranted.

Section 17 – Civil actions

Section 17 grants any person, including a corporation and non-residents, the right to bring an action for an injunction and/or compensation against an overseas corporation in the Federal Court of Australia where they suffer or are likely to suffer loss due to the overseas corporation contravening a provision of Part 2 of the Bill. (This is additional to the penalties provided for in sections 14(4), 14(6) and 16(3).) The overseas corporation and the competitor seeking redress could both be say subsidiaries of Australian based corporations. The overseas corporation would be subject to the requirements of the Bill whereas its competitor corporation would not be. The overseas corporation may therefore be at a disadvantage in terms of rights and obligations. This potential situation should be carefully considered along with other potential situations to ensure there is no inequity in the treatment of parties to a section 17 action.

Also, where a competitor seeks compensation from an overseas corporation that breached the Bill, it is unclear how an award of damages and an injunction would be enforced if the overseas corporation is a foreign corporation and thus based outside Australia. Further, would action be enforceable against the overseas corporation via its related overseas corporations in Australia and, if so, it is unclear what consideration has been given to the effect on those corporations, their shareholders, creditors, employees and other interested parties.