Australian Conservation Foundation
INC ABN 22 007 498 482
340 Gore Street, Fitzroy
Victoria 3065
Ph: 03 9416 1166
Fax: 03 9416 0767
reception@acfonline.org.au
www.acfonline.org.au

Australian Conservation Foundation

Submission to the Parliamentary Joint Statutory Committee on Corporations and Securities

Inquiry into the Corporate Code of Conduct Bill 2000

Prepared by
Michael Kerr
Legal Advisor
340 Gore Street
Fitzroy, Vic 3065
Tel: (03) 99266705
Fax: (03) 9416 0767
Email: m.kerr@acfonline.org.au

Endorsed By: **Friends of the Earth (Australia)**
Greenpeace Australia
Conservation Melanesia Inc.

1. Introduction

The Australian Conservation Foundation (ACF) welcomes the opportunity to make this submission in relation to the *Corporate Code of Conduct Bill 2000* ("the Corporate Code of Conduct").

ACF is one of Australia's leading non-government environmental organisations. For more than 30 years, we have voiced the desire of Australians to look after our natural heritage, uniting progress and environmental protection. Increasingly, ACF has become aware of the poor practices of some Australian Corporations and the harm that they are causing to the environment and communities of other countries.

ACF believes that the Corporate Code of Conduct is a means for the Commonwealth government to assume its rightful responsibility to ensure that such poor practices no longer continue by regulating the conduct of Australian companies when undertaking activities on foreign soil. This need is even greater when viewed in the context of increasing engagement by Australian corporations with the global community and Australia's responsibility as a good neighbour in the Asia/Pacific Region.

We note also that this submission is endorsed by Friends of the Earth (Australia), Greenpeace Australia and Conservation Melanesia Inc. Conservation Melanesia Inc. is an NGO based in Papua New Guinea and has an intimate knowledge of the environmental and social impacts Australian companies have had on their country.

We congratulate the Australian Democrats for the formulation of the Corporate Code of Conduct and support the enactment of the code.

2. The Corporate Code of Conduct Bill 2000

The proposed Corporate Code of Conduct seeks to regulate the conduct of Australian corporations, which undertake business activities in other countries.

The code does this by requiring Australian corporations to adhere to standards of conduct, accepted both internationally and domestically, when operating in other countries relating to such matters as the environment, health and safety, employment, human rights and consumer protection. Adherence to the code's standards will be enforced by monetary penalties that will be imposed on the company and/or it executive officers in the event the standards are breached.

The code also makes provision for persons who suffer loss and damage as a result of a contravention of the code to bring a civil action in the Federal Court of Australia.

3. Why is there a need for the Corporate Code of Conduct?

ACF believes the introduction of the Corporate Code of Conduct is both justified and necessary. Detailed below are the reasons why:

1. The need to address corporate exploitation

It is time to "stop beating around the bush." The Commonwealth government must acknowledge the fact that some Australian multinational corporations (MNC's) are exploiting developing nation states.

The pattern is becoming all too familiar. MNC's have become almost as large and wealthy as some of the nation states in which they operate, indeed in some cases

they far exceed this level. Some MNC's actively seek out for their investments developing nations where environmental, labour and human rights standards are virtually non-existent. In extreme situations the national governments of these States often collude with MNC's to bend or waive their own environmental and labour laws to allow MNC's freer reign. Many developing nations see little option but to engage in a "race to the bottom" as they compete with their neighbours in providing natural resource access to MNC's. At the same time, many of the international instruments devised to regulate the activities of MNC's are unenforceable or simply flouted.[1]

The pattern of exploitation is further exacerbated by the inability of those impacted by such exploitation, ordinarily local communities, to gain compensation or access to legal recourse or independent review. In most cases domestic legal avenues through which compensation may be sought are non-existent, whilst legal avenues in the home State of the MNC are often too costly and subject to intense legal debates about jurisdiction.

There is a clear need for Commonwealth legislation, such as the proposed Corporate Code of Conduct, to:

- regulate the behaviour of Australian MNC's that choose to exploit less onerous regulatory systems of developing nation States; and
- provide the individuals and communities impacted by this exploitation with a judicial forum through which to seek compensation.

2. Recent international incidents -part of a continuing pattern

Australian companies, particularly those in the mining and resources sector, are no strangers to controversy when it comes to their record of conduct on foreign soil. One only has to look at this past year and the startling number of international incidents involving Australian companies to highlight this point. For example:

- In January of this year a gold mine, which was half owned by the Perth based company Esmerelda Exploration Ltd, spilt 100,000 cubic metres of cyanide polluted water into the Tisza river in Romania. The discharge poisoned the water supply of 2.5 million Hungarians and devastated the ecology of the local river system – an outcome described by a Hungarian government official as the 'first environmental catastrophe of the 21st century' (quoted in The Age, 10 February 2000, p.1). See also the European Union report (Dec 2000) on the cyanide spill at http://europa.eu.int/comm/environment/enlarg/home.htm

- In March of this year Australian Company Dome Resources admitted to dropping a one tonne box of cyanide pellets from a helicopter in Papua New Guinea. Although 95 % of the cyanide was recovered, the company admitted that up to 150kg had been dissolved by rain into the local river system.

- In June of this year, BHP Diamond Inc, a subsidiary company of BHP, was charged with 8 violations of the Canadian Fisheries Act for disturbing fish habitat in the vicinity of its Ekati diamond mine in Canada's North West Territories (transcript from ABC's The World Today, 20/6/00).

These international incidents by no means represent a few isolated (albeit recent) incidents on a largely clean record. They are in fact a clear indication of a long established pattern of "poor practices" (based on Australian standards) undertaken by Australian companies when operating overseas. By far the most infamous

[1] Report of the international IRENE Seminar on corporate liability and worker's rights, University of Warwick, Coventry, UK, 20 and 21 March 2000 at p.2.

example of this pattern is the Ok Tedi mine in Papua New Guinea, over which BHP has majority control. BHP acknowledges the "significant" environmental impact of the Ok Tedi mine, which has been in operation since 1984. BHP environmental reports released in1999[2] report that the direct disposal of the mine's waste rock and tailings into the Fly and Ok Tedi river system:

- caused a reduction in baseline fish numbers in the river system of up to 90%;
- caused 470 square kilometres of forest die back, which is expected to increase to at least 1,350 square kilometres;
- has increased the "potential" for variability in copper levels in the river system, which is toxic to organisms in the food chain. Copper in the mine sediment is 30 times natural levels;
- has increased the risk of acid rock drainage which could have serious consequences for the down stream ecosystem; and
- resulted in a claim for compensation being brought against BHP by local communities in 1994. The case was settled in 1996.

In April of this year, legal proceedings were again issued against BHP by Fly River landowners and law firm Slater and Gordon. The proceedings were issued against BHP as the result of an alleged failure to take action to halt the continuing environmental disaster at the Ok Tedi mine.

Further, recent newspaper reports (the Australian 11/12/00) have revealed that a shipment of two thousand six hundred drums each containing 100 kg of cyanide were lost over board *en route* to the Ok Tedi mine in 1984. BHP has now admitted that the cyanide, which was spilt only 70km north of the Great Barrier Reef, was never recovered. Scientists believe that the cyanide is a ticking time bomb that could have a devastating effect on the reef's marine life.

On top of these devastating environmental impacts, there are adverse social impacts which are yet to be fully determined. In PNG and in particular, in the Western Province, almost all of its inhabitants are dependent on the natural environment for survival. Land and rivers have deep spiritual meaning for the local communities way beyond the comprehension of those of us living in a so-called "modern society". The damage caused by the Ok Tedi mine has so far affected the livelihoods of over 40,000 resident's living in villages along the Ok Tedi-Fly river system.[3] This impact will spread further downstream as approximately 200, 000 tonnes of tailings and waste rocks continue to enter the Ok Tedi river everyday. To date, no viable solution has been found to deal with the social and cultural impacts which will last for many decades to come.

Other cases where the environmental performance of Australian companies has come under intense international, criticism and response include:

- the activities of WMC Limited in the development of a controversial gold/copper deposit at Tampakan on the Philippine island of Mindanao;
- the environmental and social dislocation caused as a consequence of the operations of Bougainville Copper Ltd, a subsidiary of the then RTZ-CRA; and
- the environmental impacts and royalty flows arising from extensive exploitation of Nauru's phosphate reserves by an Australian-NZ-UK consortium.

[2] BHP and Ok Tedi: Discussion Paper October 1999. BHP Environment and Community Report 1999
[3] BHP's Ok Tedi Discussion paper October 1999 reports over 40,000 local residents were a party to the legal dispute against BHP's subsidiary OTML

The Corporate Code of Conduct represents a clear and reasonable solution to rectify the "poor practices" of Australian companies when operating abroad by imposing base line standards comparable to those that would be expected had the company been operating in Australia. This in turn will minimise the likelihood of future damage to the environment and communities of other countries and help restore the tarnished international image of Australian corporations that has arisen particularly over this past year. We believe that such a clear legislative initiative would provide a significant benefit to Australian corporations operating offshore through the provision of greater certainty and increased confidence and goodwill in potential host nations.

3. Reduced risk of liability

Incidents such as those detailed above can result in the responsible company incurring substantial liabilities through clean up costs and, in some instances, as a result of legal proceedings. For example, Esmerelda was placed into administration following the huge clean up costs and compensation claims arising out of the cyanide spill. Similarly, BHP has been on the receiving end of two costly legal suits initiated by local landowners seeking compensation as a result of the environmental damage caused to their land by the near by Ok Tedi mine.

The Corporate Code of Conduct will raise the standards for Australian corporate activity overseas reducing the potential for corporate liability that will arise from environmentally and socially damaging activities. The proposed Code will therefore be of benefit to Australian Companies and their shareholders.

4. Remaining Competitive in Overseas Markets

Consumers in international markets, particularly those in Europe and USA, are now demanding higher environmental and social standards in the production of goods and services they purchase and the companies in which they invest. This is reflected in both the increasing international adoption of sourcing policies, which are based on environmental performance and impacts, as well as the growth of ethical investment in the USA and UK in recent years. In the USA socially responsible investment portfolios in 1999 were worth US$1,497 billion in comparison to US$529 billion in 1997. This represents a growth rate twice that of the general market. In the UK, the ethical investment market has seen similar growth, rising from $1.7 billion in 1998 to more than $7.2 billion in 1999(*Social investment forum, November 1999*).

Requiring Australian companies operating overseas to adopt higher environmental and social standards through the regulatory framework of the proposed Corporate Code of Conduct will assist Australian companies in remaining competitive in an increasingly demanding international market place.

5. The expectations of the Australian community

There is increasing evidence that the Australian community expects Australian companies to be good corporate citizens. For example, a recent poll published by the St James Ethic Centre and co-sponsored by Price Water House Coopers showed that 92% of Australian's think that the role of large companies is to go beyond the minimum definition of their role in society, which is to employ people and make profits.

It would be a foolish argument to suggest that the expectations of the Australian community regarding corporate citizenship do not apply to Australian companies operating abroad. Accordingly, the proposed Corporate Code of Conduct reflects

[4] reference to be inserted

community expectations that Australian corporations must behave as good corporate citizens both in Australia and overseas.

6. The Emerging International Trend of Corporate Codes

There is an emerging international trend towards the regulation of corporate conduct abroad by home States. Two such examples are:

- The 1999 European Union Resolution on *EU standards for European enterprises operating in developing countries: towards a European code of conduct.* The resolution requires the European Commission to draw up a model corporate code based on existing minimum standards for MNC's. Companies that breach the code will run the risk of loosing government funding and may be subject to public hearings where the cases of abuse will be presented under the glare of publicity.[5]

- The *Corporate Conduct of Conduct Bill* introduced in to the US Congress in June 2000 by Congresswomen Cynthia Mckinney. This US corporate code, which is not yet law, contains similar provisions to the proposed Corporate Code of Conduct, which is the subject of this current inquiry.

These above two examples emphasises the growing concern that governments of other countries now have in relation to the international conduct of Multinational companies domiciled within their jurisdiction. The proposed Corporate Code of Conduct would be an appropriate, measured and timely response by an Australian government and one that is entirely consistent with such growing international concern and trends.

7. Extraterritorial Precedents

Opponents to the proposed Corporate Code of Conduct are likely to raise an argument that extraterritorial Commonwealth legislation of this nature is unprecedented. This is untrue. The Commonwealth on at least three recent occasions has legislated to regulate the activities of Australian corporations when operating overseas. These include:

- The Child Sex Tourism provisions of part IIIA of the *Crimes Act 1914*;
- The Bribery of Public Foreign Officials provisions of division 70 of the schedule to the *Criminal Code Act 1995*; and
- The Slavery and Sexual Servitude provisions of division 270 of the *Criminal Code Act 1995.*

These examples highlight the fact that the Commonwealth has in the past been willing to regulate the conduct of Australian companies abroad. Such an approach represents a mature awareness of a corporation's responsibility to the society in which it operates and would enjoy broad community support. The proposed Corporate Code of conduct aims to impose standards on the conduct of Australian corporations that are as equally important as the standards imposed in the above three circumstances.

8. The Ineffectiveness of Self Regulatory Regimes

Opponents of the proposed Corporate Code of Conduct are likely to argue that Australian companies operating overseas are capable of regulating their own behaviour and can be trusted to adhere to self regulatory regimes such as the

[5] Report of the international IRENE Seminar on corporate liability and worker's rights, University of Warwick, Coventry, UK, 20 and 21 March 2000 at p.7.

Minerals Council of Australia's *Code for Environmental Management*. We have heard such claims emerging from Australian companies and the industry bodies that represent them for a considerable period of time.

It is true that self-regulatory regimes can have benefits. Some of these include:

- the potential to raise industry standards above legal compliance;
- the potential to raise general industry awareness about specific environmental, labour or human rights issues;
- providing for a new fora for the discussion of specific issues and enhancing communications within an industry sector; and
- providing a focus for management to improve the performance of company in general.

On the other hand, self-regulatory regimes are hampered by a number of limiting factors. These include:

- standards are set by the industry itself and often appeal to the lowest common denominator;
- poor enforcement mechanisms (if any at all) for breach.
- limited transparency or involvement of third party stakeholders effected by the corporate activity;
- inadequate monitoring and verification;
- a preoccupation with process rather than outcomes;
- the failure of some corporations within a given industry sector to sign up to a self-regulatory regime. For example, Esmerelda Exploration (responsible for the cyanide spill in Hungary) was not a signatory to the Minerals Council of Australia's *Code for Environmental Management.*

However, the reality is that the startling number of recent international incidents involving Australian companies (as highlighted above) can only point to the simple conclusion that the claim self regulatory regimes are an effective or appropriate solution to corporate Australia's "poor practices" overseas can no longer be substantiated. The proposed Corporate Code of Conduct is a far superior solution to remedy the problems that ineffective self-regulatory regimes have failed to mend.

4. Improvements to the Corporate Code of Conduct

Turning to the specific provisions of the code. Two small improvements are recommended:

Firstly, sub section 7(2)(f) of the Corporate Code of Conduct requires that an Australian "overseas corporation" must undertake environmental impact assessments (EIA) of all new developments, including providing an opportunity for public comment on assessment. Whilst, agreeing with the intent of this provision, it fails to set any minimum standards or benchmarks which the EIA must meet.

To rectify this shortcoming, ACF recommends that the following standards be incorporated within sub section 7(2)(f):

- mandatory public notification of the draft assessment once it has been completed, and a minimum of 28 days for public comments on the draft assessment
- public notification through national and relevant local newspapers as well as the Internet
- all relevant EIA documents to be made available to the public

- specifically require that the potential impacts on the ***environment*** (as defined in the code) posed by the new development be assessed
- require alternatives, including the no project alternative, to be assessed
- specifically require impacts on threatened species to be assessed
- require public comments received within the comment period to be taken into account when undertaking the final assessment
- require the principles of ESD to be taken into account when undertaking the assessment
- require cumulative impacts to be taken into account when undertaking the assessment[6]

Secondly, subsection 16(3) of the code provides for the imposition of a pecuniary penalty of up to 10,000 penalty units for a contravention of part 2. Such a penalty maybe imposed on both the corporation and, in certain circumstances, an executive officer of the corporation. In the case of a penalty that maybe imposed on an executive officer, we believe that a maximum penalty of 10,000 penalty units is appropriate and provides an adequate disincentive against potential breach. However, in the case of a corporation that has superior resources to that of an individual executive officer, a penalty of 10,000 will not provide the disincentive against potential breach nor an appropriate punitive measure in the event of a breach actually taking place. We note that the newly enacted *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the EPBC Act) makes provision for the imposition of a penalty up to 50,000 penalty units for a breach of the Act by a corporation. We believe that the EPBC Act, in this instance, provides an appropriate model in relation to punitive measures. Accordingly, we recommend that the penalty for a breach of the code by a corporation be increased to a penalty not exceeding 50,000 penalty units.

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END

[6] Based in part on the list included in 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