



AUSTRALIAN COUNCIL FOR OVERSEAS AID

**SUBMISSION TO THE PARLIAMENTARY
COMMITTEE ON
CORPORATIONS AND SECURITIES**

Inquiry into the Corporate Code of Conduct Bill 2000

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Inquiry into the Corporate Code of Conduct Bill 2000

SUMMARY

The introduction of a Corporate Code of Conduct Bill 2000 to impose standards on the conduct of Australian corporations operating overseas is a necessary step in the right direction and is strongly supported by ACFOA and its member agencies.

The necessity for greater regulation of the activities of Australian transnational corporations has been highlighted in recent months by reported environmental destruction and human rights concerns associated with the Esmerelda mine in Romania, BHP's Ok Tedi mine in Papua New Guinea, Rio Tinto's Freeport mine in West Papua and reported human rights abuses at Rio Tinto's Kelian mine in Kalimantan.

Generally, the international regulatory environment has failed to adequately address the rapid globalisation of business. The nature of today's corporations means that traditional national legal structures often no longer apply to a company whose head office is in one country but whose operations are in another.

To date the corporate sector's approach to these issues has emphasised the use of voluntary codes to raise standards. Whilst such regimes do have the effect of raising general awareness and industry discussion, there is little evidence that self-regulation or voluntary codes have ensured adequate corporate standards. More importantly, self-regulation has not delivered tangible outcomes for the people who need them - the poor.

ACFOA itself, as the peak body for the non-government aid and development industry in Australia, is responsible for the implementation of an industry code of conduct. This is an enforceable code which sets out clear standards on ethical practice and accountability and

supports the application of these standards with a rigorous compliance, monitoring and complaint investigation process. An independent investigation committee is able to apply a range of sanctions for breaches of the code including loss of accreditation and access to government funding.

The Australian community is entitled to expect at least the same level of accountability and monitoring of Australian based transnational companies as it does of its overseas aid charities.

Self-regulation, without adequate monitoring and enforcement procedures, generally leads to standards that reflect the lowest common denominator and inadequate accountability. In fact some companies do not even sign on to their own industry's voluntary code. The owners of the Esmerelda mine for instance were not a signatory to the Australian Mining Industry's Code of Environmental Management.

Public pressure for enforceable standards on TNCs is growing globally and similar legislation is under consideration in the USA, the EU and other parts of the world. ACFOA commends the steps that the Australian Government has already taken to introduce domestic legislation in line with the OECD Bribery Convention (1997) which obliges States Parties to exercise jurisdiction in respect of bribery offences committed abroad by their nationals.

This is a significant move in the direction of 'home state liability', which requires home states 'to enact and enforce legislation to impose human rights duties on their transnational corporations with regard to their overseas activities'.

We urge the Australian Parliament to similarly enact legislation to uphold the OECD Guidelines for Transitional Corporations as well as to support this Bill for legislation to impose standards on the conduct of Australian corporations that undertake business activities in other countries.

Some of the key benefits of TNC regulation as outlined in this submission can be summarised as follows:

- Improved benefits for poorer communities whose basic rights become protected through legislation in Australia
- Increased benefits for the Australian and international community as a result of safer and more sustainable environmental and development practices
- Significant cost savings for the Australian taxpayer who both directly through taxes or indirectly through product pricing pay dearly for the negative externalities of irresponsible Australian TNC operations
- Positive contribution to enhancing Australia's foreign policy objectives of building a more peaceful and stable Asia Pacific region worth investing in
- Increased profitability for individual TNCs themselves - smart companies in Australia realise that if they achieve credibility in the communities in which they operate, then it will be good for long term sustainable business profits elsewhere as their good reputation grows. By providing a clear set of guidelines, principles, accountability and monitoring mechanisms this Bill can allow individual companies to better understand, plan for and ultimately improve their credibility, consumer approval ratings and profitability
- Improve the reputation of Australian business generally overseas, particularly in the Asia Pacific region. By becoming more accountable and responsible the reputation of Australian companies will improve the long term comparative advantage and other factors being equal, our market share. Any short term loss to unscrupulous foreign TNC's exploiting resources or local communities will increasingly be exposed and discredited.

ACFOA supports responsible and productive business investment and good corporate responsibility. ACFOA believes that developing countries and developed economies such as Australia can both be beneficiaries of increased trade and investment opportunities that are regulated by fair multilateral trade rules supported by appropriate national legislation. The lesson of the failed Multilateral Agreement on Investment, the lesson of post-Seattle, is that

confidence in business and investment will disintegrate unless the world's parliaments take responsible steps such as those proposed in this Corporate Code of Conduct Bill.

ACFOA recommends to the Parliamentary inquiry that the Corporate Code of Conduct Bill 2000 be supported along with direct binding international standards to regulate transnational corporations through an international treaty that would for example give power to an international tribunal to regulate transnational corporations globally.

1. INTRODUCTION

The Australian Council for Overseas Aid (ACFOA) is the peak body for 97 NGOs working in the field of overseas development assistance. Our members include aid agencies, human rights groups, environmental organisations, church groups and other civil society organisations concerned about international development issues. The common purpose of ACFOA member agencies is to promote sustainable human development so that all people can fulfil their needs, enjoy a full range of human rights and live a life of dignity.

ACFOA member agencies work closely with the poorest communities in developing countries, and are acutely aware that their development cooperation efforts need to be underpinned by sustainable and equitable global corporate and economic policies in these countries. Our members enjoy the support of a wide and substantial cross-section of the Australian community. Their work is made possible by the financial, moral and practical support of Australians who care deeply about the issues which this bill is addressing.

It is obvious that contact between the industrialised world and the developing world is increasingly through transnational corporations (TNCs). Currently the activities of multinational companies have limited regulation through a combination of voluntary codes, usually instigated by peak bodies or representative councils, as well as through international-level efforts such as the OECD guidelines, the recent European Union resolution, and regional initiatives such as the North American Free Trade Agreement's code.

While some transnational corporations have sought to comply with these codes and improve their environmental and sustainable development practices, there is a clear lack of incentive or compulsion for more accountable and professional corporate standards particularly for their operations in developing countries.

ACFOA itself, as the peak body for the non-government aid and development industry in Australia, is responsible for the implementation of an industry code of conduct. This is an enforceable code which sets out clear standards on ethical practice and accountability and

supports the application of these standards with a rigorous compliance, monitoring and complaint investigation process. An independent investigation committee is able to apply a range of sanctions for breaches of the code including loss of accreditation and access to government funding.

ACFOA and our members are still learning and discovering new ways to improve our own Code of Conduct and we would be the first to admit that we need to continue to further improve our efficiency and effectiveness in the field and to achieve higher standards of compliance and excellence. What is important though is that we have a code and are well progressed in training, monitoring and compliance systems. The Australian community is entitled to expect at least the same level of accountability and monitoring of Australian based transnational companies as it does of its overseas aid charities.

ACFOA wishes to underline that we are not anti-business nor anti-investment and that indeed a number of our members work closely in partnership with Australian business. ACFOA strongly supports increased international trade and investment that is responsible, accountable and which contributes to a more equitable distribution of wealth globally.

Our daily work is with the poor and often powerless. Unfortunately their basic rights and needs are too often ignored by some less scrupulous business enterprises able to take advantage of the poverty, local corruption or lack of national regulation in developing countries where the poorest live. Voluntary regulation has failed to check this and it is time for domestic and international regulation to ensure that all corporates are aware of their responsibilities and obligations.

The rest of our submission provides more specific evidence of the need for Australian legislation. It firstly highlights some of the major concerns of our members with irresponsible corporate behaviour and makes some specific recommendation with regards to the Bill itself.

2. THE COSTS OF IRRESPONSIBLE CORPORATE BEHAVIOUR

70% of capital inflows to developing countries at the beginning of the 1990s came from development aid agencies. By 1996 this had fallen to 25%, with 75% of capital inflows coming from private enterprise. In a world where foreign aid is now dwarfed by private investment in developing countries, ACFOA's priorities have moved to reflect the need to ensure that this private investment actually benefits the poor. In addition to creating new opportunities for developing countries, foreign investment is creating new risks and new needs for the poor.

Old Problems of Corporate Conduct

While the quantitative dimension of the ratio of foreign investment to foreign aid is new, Australian foreign investment having negative consequences for the poor in our region is not new. During the recent coups in Fiji (1987, 2000), that have caused so much hardship for its economy, how much of the Australian media commentary reflected critically on the role of Australian foreign investment in literally planting the seeds of this conflict long ago? Indian indentured labourers were brought to Fiji in huge numbers by CSR to work its sugar plantations and the plantation economy it ran there. The dual oppression of two peoples put in competition for the meagre resources of Fiji – one deprived of its traditional lands, the other having to find an economic niche from a position of deprivation of their basic human rights as indentured labourers – goes some way to explaining the tragedy of poverty in Fiji today.

We cannot explain why Australian troops are required for peacekeeping in Bougainville today without understanding that the environmental destruction of the CRA (now Rio Tinto) Bougainville mine deprived poor people of their livelihood. The investment practices of CRA rate high among the proximate causes of the Bougainville civil war which has so debilitated the PNG economy and cost Australian taxpayers dearly. Bougainville requires a continual peace monitoring presence and over \$100 million in Australian aid.

As the incidence of the kind of environmental destruction we saw on Bougainville increases, we must ask ourselves whether Australian taxpayers twenty years from now will be paying for peacekeepers to put out the fires of new civil wars caused by irresponsible investment practices.

New Levels of an Old Problem

Other member submissions to this enquiry¹ have documented some of the new disasters we know about:

- the ocean dumping of waste from the Rio Tinto Lihir mine in PNG;
- the river pollution of the Rio Tinto Kelian mine in Indonesia;
- the persecution of union activists by the Emperor mine in Fiji;
- BHP's Ok Tedi environmental disaster;
- the Freeport mine in West Papua and its connection to both downstream pollution and human rights abuses by the Indonesian military;
- the alleged toxic torts and killings of local people associated with the RioTinto/Normandy mine in Brazil;
- the massive cyanide spill by Esmerelda decimating the Danube river system through Romania, Hungary and Serbia;
- Dome Resources dropping cyanide pellets from a helicopter into PNG forests;

¹ The submissions referred to here are those by Community Aid Abroad, The Australian Conservation Foundation, the Construction, Forestry, Mining and Energy Union, Amnesty International Australia, the Public Interest Advocacy Centre, the Minerals Policy Institute and the Environmental Defender's Office and World Vision Australia - with the exception of the CMFEU, all are members of ACFOA.

- Ross Mining refusing to release an environmental impact study in contravention of its obligations under the Minerals Council of Australia Code on the contamination of rivers in the Solomon Islands

These are not minor incidents; Esmerelda poisoned the water supply of 2.5 million Hungarians alone. Some of the incidents can wash back to affect Australia directly. For example, the Australian Conservation Foundation submission discussed the loss overboard of 2,600 drums of cyanide in international waters *en route* to the Ok Tedi mine, a spill only 70 km North of the Great Barrier Reef. Perhaps it will take more than 20 years for the lost drums to rupture. But if they do it may be Australian taxpayers who will pay the price.

Australian companies also pay the price of their own lack of precautions. For example, in Community Aid Abroad's submission, Perth-based Aurora Gold's collaboration with the Indonesian military in respect of human rights abuses against traditional Dayak landowners of the Indo Muro area of Indonesia were documented. This included the knocking down of houses and mosques with bulldozers. There is a quote in an Aurora memo about the need for the Suharto regime to enforce the company's rights against local communities. When the Suharto regime fell two years later, Indigenous people swarmed back onto the mining lease area, bringing Aurora's operations to a halt. Community Aid Abroad make the case that if Aurora had complied with the requirements proposed in the Corporate Code of Conduct Bill 2000 they would not have suffered this loss, just as CRA would not have had to carry its huge loss in Bougainville, BHP at Ok Tedi, and so on.

These are not insignificant losses; Ok Tedi is an important reason for BHP tumbling permanently down the list of Australian stock market capitalisation.

It is worth noting that the London Stock Exchange has required from 2000 the same kind of formalised disclosure of environmental risk proposed in the Corporate Code of Conduct Bill. It is a win-win-win proposal for Australian business, the Australian taxpayer and the people and environment of developing countries. The London Stock Exchange can see the

new risks to its investors. The Australian government through this Bill should equally recognise the risk to its taxpayers many of whom are also at risk as shareholders in Australian companies they assume to be socially responsible.

3. CHALLENGES AND BENEFITS FOR AUSTRALIAN CORPORATES

TNCs invest heavily in resource extraction operations in many developing countries and Australian business is an international leader. This means Australia has the potential for ethical leadership which it can either honour or dishonour. If we choose the latter it may mean Australian business would suffer greatly as did American business from a backlash against foreign investment that saw the waves of expropriation against American business by developing countries in the 1960s and 1970s.

The Corporate Code of Conduct Bill does not impose Australian standards on the rest of the world. It imposes internationally accepted standards on Australian business worldwide. The standards in the Bill are derived from international human rights law and sustainable development targets which command wide respect among the community of nations. Unfortunately many of the global poor live in states with limited capacity to enforce these international standards, least of all against the more powerful transnational corporations.

The Australian Government does have the capacity and prides itself on its ethical and human rights leadership in the region. The Australian Parliament should therefore ensure that Australian business honours uncontroversial international standards wherever it invests abroad particularly in developing countries. It is vital that Australian business investing abroad understands its international obligation to be part of the solution to global poverty and environmental destruction rather than being part of the problem.

The World Economic Forum in Davos, Switzerland, January 2001, heard Mexican President Vicente Fox make a passionate plea for the fight against AIDS in developing countries while Microsoft chairman Bill Gates made a \$100 billion gift to AIDS research. Kofi Annan urged the delegates to do more than sugarcoat the present form of globalisation and to think of the 1.2 billion people living on less than \$2 a day.

The United Nations Secretary General urged business and political leaders at the forum to provide more generous debt relief and to open their markets to products from the developing world while encouraging large corporations to champion environmental and social causes.

If Australian business cannot meet these challenges it may well go the way of BHP and become less internationally competitive. As Michael Porter argues in *The Competitive Advantage of Nations*, states whose corporations struggle to meet international regulatory norms will become less rather than more competitive. It is no longer a prudent strategy to invest where standards or their enforcement are lowest. The prudent approach is a universal commitment to meet internationally accepted standards.

Smart companies in Australia realise that if they achieve credibility in the communities in which they operate, then it will be good for long term sustainable business profits elsewhere as their good reputation grows. Gold mining company Placer Dome for example has taken some important initial steps to try and improve its consultation and accountability mechanisms with local communities by formulating standards which are go well beyond those set out in the Australian Mineral Council's voluntary code of conduct. There is an understanding that ethical and responsible practice can lead to increased profitability.

Ultimately however there are at present no definitive standards, compulsion or independent monitoring mechanism that can assist and guide a well intentioned corporation in achieving acceptable global standards. The intense pressure for higher levels of profit and increased returns for shareholders can wear down even then most well intentioned company. Voluntary codes generally cannot withstand such competing demands.

Clear standards through domestic legislation can allow individual companies to better understand, plan for and ultimately improve their credibility, consumer approval ratings and profitability.

This new Bill can improve the reputation of Australian business generally overseas, particularly in the Asia Pacific region. By becoming more accountable and responsible the reputation of Australian companies will improve the long term comparative advantage and other factors being equal, our market share. Any short term loss to unscrupulous foreign TNC's exploiting resources or local communities will increasingly be exposed and discredited. The increased use of global communications by civil society advocacy networks internationally will increasingly expose irresponsible corporate behaviour and encourage punitive consumer retaliation.

In short this Bill creates the opportunity for the Australian Government to provide leadership in establishing a corporate commitment to universal standards that will improve the quality and success of our corporate sector.

4. CHANGES TO SUBSTANTIVE PROVISIONS OF THE BILL

ACFOA supports the substantive Environmental (Section 7), Health and Safety (Section 8), Employment (Section 9), Human Rights (Section 10), Tax (Section 11), Consumer Health and Safety (Section 12) and Consumer Protection and Trade Practices (Section 13) in the Bill.

ACFOA also supports annual reporting to the Australian Securities and Investments Commission of compliance with the code (Section 15) and ASIC reports to the Parliament on compliance (Section 16). Both institutions should be looking for continuous improvement in both the quality of reporting and in the level of compliance. To hear complaints, we think it would be wise for ASIC to set up a tripartite committee of government, business and NGO representatives (a development NGO for community and social complaints, an environmental NGO for an environmental complaint, a human rights NGO for a human rights complaint). This is the approach taken in the comparable Bill before the European Parliament.

ACFOA believes that good governance requires that the environmental impact assessments which must be prepared for new developments should be publicly released as a draft with a minimum of 28 days opportunity for public comment.

More generally, ACFOA believes that Section 14(1) should make it clear that Code of Conduct Compliance Reports lodged with ASIC should be public.

ACFOA would argue that penalties for environmental breaches should be increased to come in line with Australian domestic penalties for such offences and that penalties come in line with those of Australian competition law. This should be a minimum standard since Australian competition and environmental law penalties are lower than those that apply to North American and European corporations and their executives. Australian Parliaments have in a number of areas not been as strong on corporate crime as compared with the legislatures of other OECD countries. It would send a wrong signal to weaken domestic penalties even further with this bill.

ACFOA supports the recommendation from our member agency Community Aid Abroad that a new section should be added to the Bill on providing incentives for corporate compliance in relation to preference for Australian government contracts, through Austrade and Export Finance Insurance Corporation assistance.

The Community Aid Abroad submission states that Section 14(2) should include compliance reports for each country in which the company operates and that these reports be prepared by an independent auditor. ACFOA endorses the specific requirement that such reports should list any violations of the core UN Human Rights Covenants.

ACFOA and many of our members believe the Bill fails to adequately address the obligations of suppliers to and contractors of Australian companies. Serious loopholes could open up here. The approach adopted by Responsible Care in its international chemical industry code is commended. This imposes clear obligations on chemical companies for downstream and upstream compliance by its associates.

ACFOA expects that there may be other amendments to the Bill from other parties. However, the fundamental issue is that a high standard enforceable code of conduct for Australian TNCs is passed through the Australian parliament - a code which is based on international human rights law, multilateral environment agreements, and best practice in sustainable development.

5. CONCLUSION

ACFOA supports responsible and productive investment and good corporate responsibility. ACFOA believes that developing countries and developed economies such as Australia can both be beneficiaries of increased trade and investment opportunities that are fairly regulated by multilateral trade rules supported by appropriate national legislation.

The lesson of the failed Multilateral Agreement on Investment, the lesson post-Seattle, is that confidence in business and investment will disintegrate unless the world's parliaments take responsible steps such as those proposed in this Corporate Code of Conduct Bill. Global investment confidence requires investment rights to be balanced by investment responsibilities.

This Bill can be Australia's contribution to a more efficient and equitable global economy. It can equally benefit Australia's own investment interests in the longterm, inspire greater consumer and investor confidence while saving hard earned taxpayer dollars.