

Enhancing Corporate Social Responsibility: A Legislative or Market-Based Approach?

By

John A. Purcell* and Janice A. Loftus**

October 2007

* John Purcell is a policy adviser corporate regulation, CPA Australia. The views expressed in this paper are those of the authors and not necessarily those of CPA Australia.

** Janice Loftus is a senior lecturer in accounting, Faculty of Economics and Business, The University of Sydney.
Corresponding author contact details:

Email: J.Loftus@econ.usyd.edu.au

Faculty of Economics and Business
Economics and Business Building, H69
The University of Sydney
NSW 2006 Australia

Key Words: corporate social responsibility, directors' duties, regulation, disclosure

Enhancing Corporate Social Responsibility: A Legislative or Market-Based Approach?

Abstract

While the corporations law, when considered in conjunction with extraneous social and environmental laws, may promote corporate social responsibility (CSR) in the context of an enlightened understanding of the interests of the company, it does not, nor should it, compel corporate decision-making towards overriding social and environmental ends. Corporate disclosure provides a more appropriate avenue of stakeholder engagement, and as such, an alternative basis for advancing CSR. We advocate principle-based CSR reporting over prescriptive mandatory reporting regulation in light of the limitations of reporting capacity and the absence of a shared understanding of how desired reporting outcomes are best achieved.

1. Introduction

With the topic of this paper dealing as it does with regulation it is appropriate at the outset to highlight the activities of two bodies that are instrumental in advising the Australian government on the evolving reform of corporate law. First, the Parliamentary Joint Committee on Corporations and Financial Services (PJC), established under the ASIC Act 2001, in June 2005 initiated an inquiry into Corporate Responsibility taking submissions from over 140 individuals and groups across a wide range of professions and interests as well as conducting a total of nine public hearings. Meanwhile the Corporations and Markets Advisory Committee (CAMAC), also established under Part 9 of the Australian Securities and Investments Commission Act 2001, in responding to a Ministerial Referral, issued in November 2005 a discussion paper titled "Corporate Social Responsibility". These two Inquiries in combination canvass views on just about the full gamut of issues at play in the contemporary debate as to the role in society of the now ubiquitous corporate form. Necessarily, this paper concerns itself with those narrower, but nonetheless complex, elements arising at the interface of directors' duties and corporate social responsibility, along with identifying emerging understanding of the alternative modes and degree of direction contained in regulation that would fall appropriately short of a legislatively embodied positive duty.

Also by way of introduction, it is appropriate to identify both the critical events and wider underlying contexts seen as giving impetus to these Inquiries. The distinction between response to alleged abuse of the corporate form and more benevolent issues around contemporary expectations as to the participation of corporations in the redressing of social and environmental issues, serves to illustrate the complexity of matters at play, and the need thus for clearly thought through and well articulated targeted responses.

In considering the emerging corporate social responsibility debate we are compelled, at least in Australia, to turn to the behaviour of James Hardie Industries and its treatment of mass tort liability arising out of its manufacture and distribution of asbestos products. Whilst the PJC's terms of reference do not refer to James Hardie Industries, the Parliamentary Secretary to the

Treasurer, the Hon Chris Pearce MP, does so in his announcement of a referral to CAMAC¹ seeking their consideration and advice in relation to directors' duties and corporate social responsibility. To place the issues in context, the following extracts from a speech by Rob Hulls, the Victorian Attorney-General, are presented as worthwhile background (Hulls 2005):

“... I am forced to come back to James Hardie as a case in point because the James Hardie scandal has thrust the corporate social responsibility of directors into the spotlight. James Hardie made money from products that contained harmful, lethal substances causing terrible suffering to its employees, the families of its employees and the members of the public who were exposed to it”.

The PJCCFS and CAMAC in their respective Inquiries into corporate social responsibility focused more directly in relation to the evolving understanding or expectations of the role of the corporation within a wider social context. The terms of reference of both Inquiries specifically contemplate the law of directors' duties as a potential instrument of government policy directed at advancing social and environmental outcomes. However the 'momentum towards broadening the duties of directors', reflected in the CAMAC enquiry, is based on three false assumptions (McConvill 2005, p. 88):

1. Company directors do not already take into account stakeholder interests;
2. Taking into account stakeholder interests is contrary to the best interests of the company; and
3. Emphasising a stakeholder-oriented approach to corporate governance necessitates legislative intervention.

As concluded by McConvill, amendment to the corporations law to require directors to consider a wider range of stakeholder interests is redundant because the law of directors' duties permits consideration of such concerns within an enlightened understanding of the interests of the company. In drawing this conclusion, McConvill makes reference to two of four matters referred by the Parliamentary Secretary to the Treasurer for consideration by CAMAC. These matters centred on the legal aspects of director / stakeholder relationships and the need for legislative reform. Consistent with McConvill's conclusions, this paper argues that an extension of directors' duties to a broader set of stakeholders would additionally cause harm by introducing uncertainty into the law.

¹ Press Release No. 009 22 March 2005.

More particularly this paper directly addresses the remaining two aspects of the Parliamentary Secretary's referral: should Australian companies be encouraged to adopt socially and environmentally business practices and, if so, how?; and should the Corporations Act require certain types of companies to report on the social and environmental impact of their activities?

We argue that instead of mandating particular types, objectives or modes of director behaviour in relationship to non-member stakeholders, enhanced corporate disclosure is advocated to advance corporate social responsibility through managerial voluntarism and stakeholder empowerment. Alternative approaches to corporate reporting regulation are considered in light of the current state of reporting capacity and understanding of users' information needs and how such information is used.

The next section outlines concepts and definitions drawn on in the ensuing discussion. This is followed by a discussion of the capacity of directors to consider non-shareholder stakeholders interests within an enlightened understanding of the interests of the company. The inappropriateness of a formalised embodiment of social responsibility into directors' duty of care is considered in the fourth section. The utility of regulation aimed at promoting corporate disclosure as a strategy for advancing corporate social responsibility is considered in section five, followed by concluding remarks in the final section.

2. The corporation, corporate social responsibility and decision making

2.1 Theories of the corporation and concepts of corporate social responsibility

Various theories have emerged to either explain or provide a context of corporate regulation and the behaviour of participants therein. These serve as a useful basis to consider the contrasting demands or stresses being placed on the assumed role and functioning of the corporation in the economy and wider community. Without attempting to describe and reconcile the merits of the contrasting contractarian² and state-conferred privilege³ theories of the corporation and limited liability, the latter at least provides an applied framework useful to the Australian legal system. Possibly allied to concession theory is the 'doctrine of separate

² Also referred to as 'nexus of contracts'.

legal entity' which views "the company as a legal being in its own right [so that] an act committed in the name of the company is regarded as its own act" rather than regarding the company as a convenient abstraction (Anderson 2004, p. 77).

Arising as it does out of an instrumental function provided for in the Corporations Act⁴ "parliament has made limited liability available to those who incorporated as a company limited by shares"⁵ and "that [this] policy decision can be vindicated on economic grounds" (Whincop 1997, p, 417). The aspect of state concession does not however grant an unfettered freedom to incorporators and their companies (Bratton 1988-89, p. 445).

While not pursued in this paper, a comparatively radical 'communitarian' perspective would, in contrast, deny the presumed primacy of shareholder interests and further disregard the notion of corporate legal personality central to the development of company law in common law jurisdictions (Hill 1998, p. 24).

The nature of corporate social responsibility necessarily enters into the domain of political theory and potentially subjective views of the legitimate exercise of powers and the sanctity of property.⁶ In proceed at a relatively apolitical level, we adopt a comparatively non-controversial view of large companies, in particular, as *social enterprises*; a notion by which it is acknowledged that legitimate exercising of their extensive decision-making powers can and should be assessed from the perspective of a wider public interest and concern (Parkinson 1993, p. 24).⁷ The suggestion of this basis of 'assessment' does not of itself conclude any preferred means of compelling or directing corporate behaviour towards the 'public interest'.

It is appropriate also to commence with a definition of 'corporate social responsibility' as this concept is most synonymous with stakeholder interests. One of the more useful definitions of 'corporate social responsibility' is that provided by. Parkinson (1993, pp. 260-2):

³ Also referred to as 'concession theory'.

⁴ Chapter 2A – Registering a company.

⁵ section 112 Types of companies.

⁶ In the corporate context, famously described by Dixon J: "They vote in respect of their shares, which are property, and the right to vote is attached to the share itself as an incident of property to be enjoyed and exercised for the owner's personal advantage." *Peters' American Delicacy Co Ltd. v Heath* (1939) 61 CLR 457 at 504.

⁷ Parkinson's concept of corporate social responsibility adopted in this paper is sufficiently broad to encompass consideration of broader stakeholder interests, yet not so radically communitarian as to challenge those of shareholders.

“... behaviour that involves voluntarily sacrificing profits, either by incurring additional costs in the course of the company’s production processes, or by making transfers to non-shareholder groups out of the surplus thereby generated, in the belief that such behaviour will have consequences superior to those flowing from a policy of pure profit maximisation”.

Corporate social responsibility is far more than corporate philanthropy. While narrower than ‘corporate responsibility’, which embraces the further dimension of business ethics, corporate social responsibility moves beyond the narrow notion of a ‘rule of corporate conduct’ whereby companies strive to maximize profits within the law. It reflects a growing sensitivity to the impact of the corporation on third parties and external interests but does not necessarily infer a sustained divergence from a profit goal, as it may present opportunities to identify and pursue competitive advantage. As noted by Elkington (2006), the sustainability debate is shifting from public relations to competitive advantage and corporate governance. Further, the resolution of most corporate social responsibility issues depends heavily on one’s beliefs and convictions about how political processes do and should operate (Engel 1979-80, p. 1).

These descriptions are highly useful in the context of regulatory developments. They focus on the business decision perspectives of risk management and on balancing short- and long-term viability. Moreover, they highlight the complexity of interrelated factors at play in the corporate social responsibility ‘debate’. Finally, without wishing to present what might be interpreted as a ‘political’ view, there is some danger in allowing possibly subjective or extreme views to excessively impact upon the overwhelming positive economic contribution and commercial certainty that has historically been afforded by the corporation and limited liability.

A clear theme underlying these definitions and descriptions is the interrelationship between competing demands on the corporation and the manner, objectives and ‘beneficiary’ of corporate decision-making – and it is to these complexities that consideration is now given.

2. 2 Corporate decision-making powers and the public interest

In considering the corporation as a *social enterprise*, Parkinson presents two dimensions that can assist in an assessment of the scope and propensity of corporate decision makers to

have a regard for stakeholders other than shareholders. These deal respectively with the idea of profit sacrifice and requirements of disclosure (Parkinson 1993, p. 24):

“... no necessary finding that the root principle beneath the current rules of company law, that companies exist to make profits for the benefit of shareholders, is unsatisfactory. It is quite possible that the arrangement is the one that is most conducive to the public good. But the point is that making profits for shareholders must now be seen as a mechanism for promoting the public interest, and not as an end in itself.”

and further;

“... if we view the company as a public or social body, albeit under private control, then its directors and managers should be held to requirements of disclosure and standards of ethical conduct appropriate to those carrying out public functions”.

In a similar manner, Engel (1979-80, p. 9) defines corporate social behaviour as behaviour that is distinguishable from a “corporate action taken because of management’s belief that it will maximize profits in the long run even if it may damage them this week or this year”. Nonetheless, it is noted that at least within the narrow perspective of the operation of corporate law, this trade-off between the short- and long-term interests of members allows scope to acknowledge a capacity within the framework of directors’ duties, a regard for wider stakeholder interests. As Parkinson (1993, p. 279) observes:

“... the legal model will in practice accommodate a measure of profit-sacrificing responsibility notwithstanding the duty of management to maximize profits, given that the strict enforcement of that duty is not feasible”.

The contemporary reality of a number of industrial sectors within which large companies operate is the degree of market concentration (Parkinson 1993, p. 262) that affords participants the opportunity to pass on part of the cost of social expenditure to customers. However, within the pivotal sustainability dimension of corporate social responsibility, many of the decisions that are being made by managers are no longer single dimensional issues of either assessing the trade-off between short-term profit sacrifice and future returns or the capacity to shift the burden of incremental costs to customers. Rather, sustainability itself is

increasingly identified as a source of business success beyond merely enhancing reputation.⁸ While this trend is not universal amongst business, it provides a substantial base upon which future leadership and direction might be developed.

3. The decision-making powers and duties of directors

Directors' duties can be placed within two broad categories; first care, skill and diligence, and second, loyalty and good faith. The former is contained in s 180 and draws heavily on a negligence analogy of a duty of care in relation to acts and omissions applied in the context of harm arising out of decisions of a management nature. The second broad category of duty draws more from equitable principles and the notion of a fiduciary relationship giving rise to a complex series of rules which require the directors to act honestly, exercise their powers in the interests of the company, avoid misusing their powers and avoid conflicts of interest.

Heydon (1987, p. 120) offers a series of formulations of duty under the preface statement: "Directors must act bona fide for the benefit of the company as a whole."⁹ Commenting on the notion of "best interests of the company"¹⁰ Heydon (p. 123) remarks:

"... [it] does not mean the sectional interests of some, or a majority, or even all the present members, but of present and future members; a long-term view should be balanced against the short-term interest of present members. The 'future members' of a company are another reflection of the interests of the company as a distinct corporate entity, separate from the short-term interests of present shareholders. Apart from the interests of shareholders, advancing the interests of the company may require attention to the interests of creditors."

⁸ PJCCFS (2006, para. 3.3-3.56) identifies several drivers of corporate responsibility including competitiveness and profitability, attracting investment, attracting and retaining employees and risk management.

⁹ *Peters' American Delicacy Co Ltd. v Heath* (1939) 61 CLR 457 at 480 per Latham CJ. It is worth noting that the notion of bona fide action and for who's benefit was considered by his Honour under the relatively narrow context of the power to alter articles. The four formulations examined by Heydon are; a fiduciary power, "benefit of the company as a whole", "for the benefit of shareholders" and benefit of all persons connected with the company.

¹⁰ The phrase "best interest of the company" is being considered here in the context of the formulation of company's interest based on "benefit of the company as a whole" and is drawn by Heydon from a statement by Megarry J in *Gaiman v National Association of Mental Health* [1971] Ch. 317 at 330. As a matter separate to these discussions, it would be worthwhile considering the extent to which these two expressions are directly interchangeable. The present statutory formulation of directors' duty and company interest is contained in s 181(1)(b) which can be paraphrased as "A director or other officer of a corporation must exercise their powers and discharge their duties in good faith in the **best interests of the corporation.**" (emphasis added)

3.1 Duties and in whose interest are powers to be exercised – balancing short and long term interests?

Whilst a line of case development¹¹ has arisen recognising either a reliance on or detriment basis of a directorial fiduciary duty owed to shareholders individually, “authorities have long accepted that ‘special facts’, such as the director’s possession of information ... may take a particular case outside of the general rule that directors owe no fiduciary duty to shareholders” (Goddard 2000, p. 197). Moreover, in the realm of statutory coverage of directors’ duties characterised by application of fiduciary principles¹², the type of matters dealt with are typically relationship-based dealing with matters such as the requirements to act in good faith and avoid misuse of powers. As such any development in the law of directors’ duties towards enforceable stakeholder interest potentially creates uncertainty in the conduct of a corporation’s affairs.

Resort to the notion of ‘future members’ contained in the above passage from Heydon is to a degree problematic when considering who is the company. Clearly advancement of corporate social responsibility would seem more readily accommodated within an understanding of ‘interest’ and ‘benefit’ that focuses on the corporation rather than the incorporator. However, there should be urged some caution in pursuing too far such disconnect between the interests of the corporation as a distinct commercial entity and those of members. A more tempered view is to regard the duty as not so much related to a nebulous or ill defined group of future members, but rather to act for the benefit of existing members’ present and future interests (Ford et al. 2003, p. 8.095).¹³ What is however clearly apparent is that present understanding of the interests of the company and its members allows ample scope for active consideration of non-shareholder interests within decision making powers.

¹¹ *Coleman v Myers* [1977] 2 NZLR 225 and *Brunninghausen v Glavanics* (1999) 32 ACSR 294.

¹² s 181 Good faith, s 182 Use of position and s 183 Use of information.

¹³ Renard (1987, pp 138-9) goes further to suggest that reference to future shareholders as a justification for the actions of directors would be contrary the principles of proper purpose established in such cases as *Ngurli v McCann* (1953) 90 CLR 425.

Both statute and general law reinforce the principle that a corporation is a separate legal entity¹⁴ and that directors are responsible for the management of the company.¹⁵ This division of powers is now embodied in legislation (s 198A). What then are the constraints that have evolved in relation to the exercise of powers of management? While s 180 signifies the primary statutory source, development of associated case law is insightful in describing a negligence-based duty of care. Prominent amongst the authorities is *Daniels v Anderson*¹⁶ in which the joint judgement of Clarke and Sheller JJA is significant in describing the broad sources of law (tort of negligence) and precedent developments (insolvent trading) which have shaped the law's expectation as to scope and parties affected under common law obligations. Their Honours make the following remarks:

“The source of the duty of care at common law rests in the relationship of proximity. ... We see no reason why the relationship of a director to a company should not, in accordance with the law as it has developed since *Hedley Byrne & Co Ltd v Heller & Partners* [1964] AC 465, satisfy the proximity test.”¹⁷

This perspective on the constraints placed on directors in the exercise of powers of management is examined further in relation to a presumed objective of profit and shareholder wealth maximisation.

3.2 Corporate profit and shareholder wealth maximisation

There is a prevalence of view fostered by neoclassic economists¹⁸, that the justification for the businesses' existence is a “single-minded pursuit of profit maximization” against which neither regard nor obligation exists to consider the social and environmental consequences of business (Lord Wedderburn 1985, p. 4). However, reflecting a lessening of the strict notion of management power being exercised for the sole benefit of the owners, and consistent with an understanding of the evolving implications of the extensive legal privilege granted through limited liability, management powers might be held “in trust for the entire community” (Lord Wedderburn, p. 6). While not endorsing of the communitarian perspective described above, his Lordship expressed a degree of comfort with the idea that (Lord Wedderburn, p. 6):

¹⁴ *Salomon v Salomon* [1897] AC 22 per Lord Halsbury.

¹⁵ *John Shaw & Sons (Salford) Ltd v Shaw* (1935) 2 KB 113 at 134, per Greer LJ.

¹⁶ (1995) 16 ACSR 607.

¹⁷ (1995) 16 ACSR 607 at 656.

“... modern management frequently declares itself a trustee for employees, consumers and stockholders and may even affirm a social responsibility to a wide variety of societal segments which have a stake in the continued health of the corporation”.

Therefore managers' pursuit of short-term profit maximization is realistically tempered by the need to ensure the future viability of the corporation.¹⁹ This, coupled with an understanding of a duty owed to future members, presents a substantial, but controlled latitude for a responsiveness to changing community expectations of corporate responsibility within management decision making powers (CAMAC 2006, pp. 78, 111).

Consideration of the concerns of non-shareholder stakeholders can form part of a strategy for long-term value creation and risk reduction, and as such can be accommodated within a duty to act in the interests of the company. This perspective recognises that stakeholder interests are 'an inevitable part of doing what is in the best interests of the company' (McConvill 2005).

3.3 Flexibility and adaptability of members' remedies

Given the division of corporate powers, it is also appropriate to give some consideration to the implications that may arise out of the limited, though targeted, basis upon which shareholders are able to challenge the decisions of directors.²⁰

Again there is potential merit in incremental development of the oppressive conduct remedy (s 232 of Part 2F.1). Subsection (d) provides a basis upon the application of a member²¹ for the court to make orders²² where the conduct or omission on behalf of the company is “contrary to the interests of the members as a whole”. Development in this direction could protect the directors from undue or disruptive challenge to decisions made within a widened ambit of ‘interests of the company as a whole’. Such development would leave unaltered the

¹⁸ For instance, Milton Friedman

¹⁹ “... it is proper to have regard to the interests of present and future members of a company, on the footing that it would be continued as a going concern” *Darvall v North Sydney Brick & Tile Co. Ltd & Ors* (1987) 12 ACLR 537 at 554 per Hodgson J, (affirmed (1989) 15 ACLR 230).

²⁰ Notwithstanding members' opportunity to ask questions and comment on the management of the company as a whole at annual general meetings (s 250S), “It is no part of the function of the members of a company in general meeting by resolution, ie as a formal act of the company, to express an opinion as to how a power vested by the constitution of the company in some other body or person ought to be exercised by that other body or person” *NRMA v Parker* (1986) 4 ACLC 609 at 614.

²¹ section 234

²² section 233

application of the further 'limb' of s 232; that dealing with acts and omissions which are "oppressive", "prejudicial" or "discriminatory" against members.²³ Support for development in the proposed direction can be found in Ford et al. (2003, p. 11.450):

"In balancing the interests the court comes close to determining the merits of a board decision. That is something courts have traditionally refrained from doing when the decision is a commercial one. Courts have expressed support for a similar approach in applying the oppression section".

On this basis, it is possible to conclude that environmental and socially oriented management decisions that are reconcilable with a wider perspective of the long term interests of the corporation, would be protected from unreasonable member challenge.

For completeness it is appropriate to consider the converse perspective - that of the capacity for approval of such initiatives, were the law as it relates to the ambit of business judgement not to evolve as envisaged in the above discussion. Again, the law currently provides scope for such accommodation without the need for legislative intervention. Such decisions on the part of directors would prima facie be contraventions of s 180²⁴ or the 'best interests of the corporation' limb of s 181²⁵ and may, it is suggested, be open to member ratification. Such powers reserved to the members in general meeting are relatively wide:

"The consequence of these limitations on the scope of ratification should not be overstated. Provided there has been full and frank disclosure of the nature of any particular breach and of the fact that absolution is being sought for that breach, a wide scope remains for valid ratification".²⁶

Moreover, the operation of s 1318 (Power to grant relief) may provide a further level of comfort for directors.

The above discussion deals exclusively with directors' actions and their interaction with members. As with a duty owed to creditors, recognition of a direct actionable duty under the

²³ section 232(e)

²⁴ Care and diligence

²⁵ Good faith

²⁶ *Miller v Miller* (1995) 16 ACSR 73 at 89 per Santow J, the 'limitation' on ratification referred to by his Honour relate to fraud on the minority, misappropriation of company resources, insolvent trading transactions or decisions to defeat a member's personal right.

corporations law owed to other stakeholders seems neither practical or desirable.²⁷ This should preclude any contemplated amendment to Part 2F.1 and Part 2F.1A²⁸ to accommodate these groups. Interestingly, Bielefeld et al. (2004, p. 40) do however advance the idea of the derivative action being applied to give *locus standi* to members to accommodate instances where the corporate controllers, as the wrongdoers, may be “inclined to dismiss environmental breaches as part of the cost of doing business”. Adaptation of minority shareholder protections in this manner, though valid, would seem perhaps at best a useful adjunct to rigorous enforcement of environmental laws themselves. Similarly, the notion of resort to the courts’ injunctive powers under s 1324, again discussed by Bielefeld et al. (p. 42), whilst prima facie offering a further corporate law-based avenue for members (and perhaps even third-parties²⁹) to compel responsible environmental behaviour, likewise needs to be considered in terms of an appropriate dichotomy between particular branches of the law - certainty and predictability are best served through enforcement of appropriately targeted laws.

The controversial and problematic aspects of the development of both the business judgement rule and member remedies is highlighted in the following statement from Ms Meredith Hellicar, James Hardie Group’s Chairperson made in the context of an assertion of an inability to make provision for future unascertained asbestos-related disease claimants:

“I think protection [for the directors seeking to act in the interests of stakeholders other than shareholders] would be beneficial because there is no doubt that the threat of a shareholder suit – even if we get majority shareholder support – a minority shareholder can still say, we don’t agree, so some protection would help ... it certainly might make us feel more comfortable.”³⁰

This argument is all the more contentious when considered in the light the Jackson QC Report, two brief quotes from which are included as an appendix to this paper.

²⁷ Similarly, the PJCCFS (2006, para. 4.78) concluded that “the Corporations Act 2001 permits directors to have regard for the interests of stakeholders other than shareholders” and that “amendment to the directors’ duties provisions within the Corporations Act is not required.

²⁸ Proceedings on behalf of a company by members and others

²⁹ See for example *Airpeak v Jetstream* (1997) 23 ACSR 715 where Einfeld J at 721 concluded that a creditor may have “a sufficient interest” to establish standing for the grant of an injunction in relation to breach of precursor legislation to the current s 180 duty of care and diligence.

³⁰ Cited in Buffini (2005, p.4).

Turning to the type of minority member activism contemplated by Bielefeld et al. (2004), it is useful to draw comparison with the law and rules that have evolved in relation to the requisitioning of members' meetings and their interaction with matters of management vested in the directors. Section 249N³¹, similar to other sections of Part 2G.2³², cannot be used to demand that a motion be put to a members' meeting if the subject is a matter of management (Ford et al. 2005, p. 7.123). While recognising the importance of these provisions as a basis for giving effect to the legitimate interest of members, Ford et al. nonetheless regard that in the balance it is highly appropriate to protect directors' powers from erosion.

4. Corporate social responsibility: should it be mandated through the corporations law?

The corporations law does not preclude the consideration of the interests of non-shareholder stakeholders, provided they are reconcilable within an evolving understanding of the interests of the company; nor does it explicitly require such consideration. The question then arises as to the appropriateness of the corporations law as an instrument for advancing corporate social responsibility. It is argued herein that the extension of directors' duties to formally recognise multiple stakeholders is inappropriate and potentially harmful.

4.1 Constraints on directors' and corporate behaviour: internal affairs and external interests

A perspective that seeks to explain the nature of corporate law on the basis of the relationship between the key participants, is that of *managerial theory* which suggests formal corporate law as the only meaningful constraint on managerial behaviour (Butler 1988-89, p. 102):

“... managers, freed from legal constraints, can abuse shareholders' interests without cost. Corporation law, according to this view, plays a pre-eminent role in maintaining balance in the large corporation characterised by separation of ownership and control”.

A substantial part of the statute which overlays the grant of limited liability with defined directors' duties and a structure of member remedies can thus be rationalised in this context.

³¹ Members resolutions

³² Meetings of members of companies

Nonetheless, objectives of corporate social responsibility may well evolve within this framework without attracting the need for any substantial amendment to the Corporations Act. Additionally, this perspective reinforces an understanding of corporate law as primarily concerned with government regulation of the internal affairs of the corporations it allowed to be created.

While, as noted above in section 2.1, the State does not grant unfettered freedom to incorporators and their companies, it does, however, reserves the right to modify the rules by which internal affairs of corporations are conducted and may choose to do so in the public interest. The question, then, arises as to whether the corporations law is an appropriate vehicle through which desirable environmental and social outcomes should be compelled or promoted. This approach to corporate social responsibility regulation can be challenged on several grounds.

First, the extension of directors' duties to accommodate broader stakeholder interests would introduce uncertainty into the law by imposing potentially conflicting obligations to multiple stakeholder groups. The neoclassic perspectives have contributed in part to the emergence, particularly in the United States, of *law and economics* scholarship that views the development of law from the perspective of a limited role of statute against which judicial decision would adopt an elevated role of "promot[ing] free markets and efficient use of resources" (Andrews 1998, p. 48). Whilst beyond the scope of this paper to describe the mixed fortunes of *law and economics* in shaping both statutory and judicial development, it is reasonable to conclude that this theory of legal development has not achieved its proponents' objective of a 'wealth maximization' concept through which certainty is engendered in the law (Andrews. p. 49).

A formalised embodiment of social responsibility into directors' duty of care creates a risk that it would be difficult to determine the obligations of directors and potentially render nugatory the premise of separate corporate personality. The duty of care as it exists in current

corporations law³³ is directed exclusively at a relationship between the directors and the company:

“The closeness of the relationship between the company and its directors and between the act or omission and the damage caused satisfied the requirements of the test of proximity discussed by the High Court in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424. There were no policy considerations disqualifying the relationship from giving rise to a duty of care; *Gala v Preston* (1991) 172 CLR 243.”³⁴

It is acknowledged that the proximity-based determination of reasonable foreseeability of harm is widely criticised³⁵, particularly in relation to economic torts. Nonetheless it is quite reasonable to suggest that alternative perspectives such as vulnerability³⁶ would likewise support a clear and unambiguous duty of care on the part of directors.

A further objection to the pursuit of environmental and social agenda through the corporations law is that legislation in relation to environmental and wider social needs potentially has more reach if addressed through the wider public law which regulates the conduct of all persons.

Two decades later, Sealy’s observations remain highly relevant (Sealy 1987, p. 176):

“... company law (at least as it stands, but probably in any form it could potentially take) must acknowledge that it has no mechanism to ensure the fulfilment of obligations of social responsibility. At most, it may impose disclosure obligations The interests of consumers, the environment, welfare and the cause of equal opportunity, good race relations and so on can only be furthered by positive legislation extraneous to company law.”

If these ‘extraneous laws’ are deficient in meeting evolving societal expectations, the primary avenue for redress should be through direct amendment or harmonisation of these laws,

³³ s 180 Care and diligence

³⁴ (1995) 16 ACSR 607 at 654 per Clarke and Sheller JJA.

³⁵ “Proximity is not irrelevant as a factor in determining the existence of a duty relationship. This is especially so if it is used as a synonym for the relationship of legal ‘neighbours’. Indeed, this was the essential defect of the use of proximity as a conceptual determinant of the existence of a duty of care. It was question begging. It did little more than offer a legal fiction designed to state, in shorthand, Lord Aitkin’s neighbour relationship. Proximity is not now accepted as a sole criterion for explaining when a duty of care exists at law, any more than other attempted short verbal formulae can do that job: whether ‘reasonable foreseeability’, ‘reliance’, ‘assumption of responsibility’ or existence of a ‘special relationship’.” *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16 per Justice Kirby at para 148.

³⁶ See for example *Perre v Apand Pty Ltd* (1991) 198 CLR 180 at 225 - 6 per McHugh J.

rather than adapting to an inconsistent or foreign purpose corporations laws which have evolved to meet fundamentally different needs.

Thus the aspect of care in relation to social responsibility-based matters is best pursued through directors ensuring compliance with laws outside the purview of corporations law within well defined environmental and social objectives (CAMAC 2006, p. 113). Any failure in these regards could potentially render the company subject to a harm that may, in turn, result in the responsible director being sanctioned within the better understood duty of care.

This approach is central to the rationale described by Bielefeld et al. (2004, p. 36):

“...directors of a company which has breached environmental statutes blatantly or continually may be acting in disregard of their duty of care under s 180”.

and further;

“The point that is being made ... is that in addition to any such obligations in the environmental statute, the Corporations Act (together with the common law) also contains remedies and penalties when directors fail in their duty to ensure corporate compliance with an environmental law”.

It is perhaps fair to observe that the matter at issue in the case cited³⁷ by Bielefeld et al. – a failure to follow authorised practices related to investments that were in breach of the law - is remote from either social or environmental law. As such, pending a more direct judicial testing, a limited number of related incremental developments might, as an alternative, result in a clearer recognition of a link between a breach of environmental law and a breach of a duty owed to the company, or conversely, ensuring directors’ actions, aimed at environmental protection and wider stakeholder interests within the evolving understanding of the company’s interests, are protected. Application of s 180 has tended overwhelmingly to deal with acts or omissions which directly give rise to corporate harm³⁸ typically in the form of loss or erosion of assets, rather than in relation to breaches of laws the penalties and reputation damage of which give rise to significant, though nonetheless secondary, corporate harm.

A further element of contentiousness in understanding the interaction of the law of directors’ duties and environmental and social law is the possibility that there may arise a ‘rational’

decision to deliberately be in breach where the gains outweigh the magnitude of the penalties. We suggest that this is more than a matter of mere speculation, particularly where it involves choice of location decisions influenced by a particular jurisdiction's comparatively weaker environmental laws. This conundrum is all the more apparent when considered in the further context of the use of the law of member remedies (s 232 of Part 2F.1) as a possible basis for compelling director behaviour.

4.2 Voluntary vs mandated approaches to corporate social responsibility

The notion of a 'threat of constraint', introduced above at 2.1, provides a useful perspective on determining where within the broad scheme of the law particular relationships or emerging ills and abuse are best addressed. It emphasises the imperative of cohesion and consistency both within the corporations law and in its interaction with other branches of the law.

Central to this issue are critical questions as to the direction, nature and weight of any mandated regulation that may emerge seeking conversely to either encourage or compel corporate behaviour and management decision-making towards consideration of stakeholder interests. If highly persuasive pressures compel sensitivity to the impact of business on external interests, supported by sound business rationale, a degree of proactive involvement by business is likely to generate better regulatory outcomes for itself (Sarre 2002, p. 13):

"... if corporations cannot accept responsibility for the consequences of their actions and decisions, then they will increasingly be obliged to play by rules that are progressively imposed upon them".

The critical question is whether corporate social responsibility and stakeholder engagement are types of behaviour that lend themselves to highly prescriptive regulation or a more principle-based set of solutions potentially expressed in guidance with a level of legislative weight or more decentred regulatory arrangements.³⁹

Dealing with political theories of corporate responsibility and with the strategic dimension to sustainable development respectively Engel (1979-80, p. 3) alludes to this complexity:

³⁷ *ASIC v Adler* (2002) 41 ACSR 72.

³⁸ See for example *ASIC v Adler* (2002) 41 ACSR 72 at 166 – 169 per Santow J.

³⁹ Black (2002) contrasts decentred regulation with 'command and control' regulation.

“It seems ... that the basic question of corporate social responsibility is not whether we wish to compel or forbid certain kinds of corporate conduct by legislative command ... but rather whether it is socially desirable for corporations organised for profit voluntarily to identify and pursue social ends where the pursuit conflicts with the presumptive shareholder desire to maximise profit”.

and further (Engel, p. 5, emphasis added);

“The social and economic desirability of these two subspecies of corporate voluntarism - disclosure, and abstention from interference with lawmaking – is an extremely complicated question and, again, **the answer may vary with different types of disclosure and different types of interference with lawmaking**”.

The significance of the strategic dimension in shaping corporate social responsibility is further noted by Goldsmith and Samson (2005, p. 7, emphasis added):

“... sustainability development practices are a sub-set of business practice engaged in to achieve sound strategy and performance outcomes. **There is no single set of sustainable development practices because every firm has a unique business strategy**”.

Further to the preceding arguments regarding the potential harm that may arise from any extension of directors duties to other stakeholders, and the inappropriateness of mandating approaches to corporate social responsibility, attention is given in the next section to what form of regulation might be useful in achieving desired social and environmental outcomes.

5. The role of corporate social responsibility reporting regulation

5.1 Managerial voluntarism and empowerment of stakeholders

Developing further the theme of building awareness of third-party interests, two avenues are identified by Parkinson (1993, p. 346): reliance on *managerial voluntarism*; and enabling an *empowerment of interest groups* to shape company conduct. The first strategy is predicated upon reorientation of managerial attitude, whilst the second more problematically, presents issues of balancing potentially unequal power.

Common to these perspectives is the notion of linkages between stakeholder engagement and the role of information by which the interests of third parties are balanced with those of

the company as part of decision-making processes within the context of corporate responsibility. Parkinson adopts a different perspective on the role of information as an 'external stimulus' to *managerial voluntarism*. The focus is primarily on inward flows of information and away from the frequent starting point in the debate around the meeting of wider stakeholder interests – that of disclosure requirements (Parkinson 1993, p. 372):

“the mere fact of being under a duty to disclose information is not in itself a reason for companies to change their behaviour”.

Strengthening competency to collect and analyse information about the impact of business operations on third parties can yield a range of benefits including increased capacity for compliance with substantive law, motivation for the establishment and scrutiny of compliance with risk management procedures/systems, and the facilitation of a greater degree of reasoned sympathy, and hence capacity for responsiveness, in relation to the impact of the conduct of business on the social and physical environment (Parkinson 1993, pp. 368-9).

Secondly, disclosure of Information about corporate social responsibility policies and performance provides capacity for stakeholder engagement and a means by which corporate social responsibility may be advanced through market transactions and the actions of civil society. Parkinson (1993, p. 373) presents a number of plausible arguments in favour of an obligation to disclose, the key rationale being that the discipline necessitates collection - improved information flows causing management to limit avoidable damage to third parties. The recognition of 'social monitoring'⁴⁰, which alludes to a widening array of formal and informal groups which interpret and critique information disclosed in the public domain, is also significant. Similarly, stakeholder empowerment through disclosure can interact with managerial decision making by influencing public opinion, investment decisions, regulatory enforcement activity and the company's own priorities (Gunningham and Prest 1993, p. 517).

In pursuing reporting regulation as a potentially more effective means of advancing corporate social responsibility through both managerial voluntarism and capacity for enhanced

⁴⁰ Development in this area has been significant with the emergence of, for example, a specific CSR category within the Australasian Reporting Awards and establishment of rating type approaches such as Reputex.

stakeholder engagement and empowerment, attention is now given to the appropriate form that regulatory intervention may take.

5.2 Mandatory vs voluntary regulation of corporate social responsibility reporting

While corporate financial reporting is subject to extensive mandatory regulation in Australia, consideration is now given to the appropriateness of 'command and control' type regulation and more voluntary approaches in the realms of corporate social responsibility disclosure.

A mandatory or 'command and control' approach assumes that in the absence of an obligation to report, entities will not provide disclosures or reporting will be incomplete (KPMG and UNEP 2006, p. 8). This ignores the incentives⁴¹ and pressures⁴² faced by many companies to provide disclosures report, evidenced by widespread voluntary reporting.⁴³ While concerns have been raised about the adequacy and credibility of corporate social responsibility reporting⁴⁴, these are not necessarily resolved by mandatory regulation.⁴⁵ Given that what is being dealt with in stakeholder engagement are matters very specific to the individual company and are a function of a more enlightened management, highly prescriptive approaches are potentially ineffective. Legalistic command-and-control regulation and overtly technical rules can be more prone to non-compliance through evasion and creative adaptation (Parker 2002, p. 10).

Whilst a widening scope of disclosure as a social good may seem intuitively appealing, its collection and dissemination comes at an often considerable cost (Engel 1979-80, p. 810). In adopting a command and control approach to regulation, the regulator's cost-benefit analysis of disclosure is substituted for that of the reporting entity. An understanding of the benefits of corporate social responsibility disclosures, and the nature and form that they should take, is complicated by the evolving state of social and environmental reporting, the diversity of

⁴¹ For instance, strategic competitive advantage, attracting and retaining staff. voluntary participation in corporate social responsibility-based rating indices, such as Reputex.

⁴² For instances, fund managers (both ethical investment and mainstream), analysts, NGOs.

⁴³ For instance, 57% of ASX 100 companies responded to the voluntary Carbon Disclosure Project, Investor Group on Climate Change, *Carbon Disclosure Project Report 2006 Australia and New Zealand* (CAMAC 2006, p. 153).

⁴⁴ Mitchell et al. (2006) found that entities with poor environmental performances, evidenced by prosecutions, provided positive environmental disclosures while often neglecting to report the breach of environmental regulation or its consequences, using annual report disclosures prior to the introduction of s 299(1)(f).

stakeholders and their information needs, and the uniqueness of a firm's stakeholder relationships. There is currently no satisfactory framework for gauging the information/decision value of corporate social responsibility disclosures amongst recipients.

A critical gap in enabling broader adoption of stakeholder-based disclosures and the capacity to define the nature and format of any mandated frameworks of disclosure in this domain is an appreciation of the extent and characteristics of current practices amongst what are largely 'early adopters'. More substantively, the absence of applied frameworks through which non-financial information is gathered, analysed and assimilated for reporting impedes both its wider adoption and essential verifiability. In concluding on whether the Corporations Act should prescribe social and environmental disclosures, the CAMAC (2006, pp 145-6) cautioned against premature and counterproductive legislative social and environmental reporting requirements while practice is still evolving, both internationally and locally.

5.3 Rules-based vs principle-based reporting regulation

Whether mandatory or voluntary, regulation can be considered along a continuum ranging from principles-based⁴⁶ to rule-based, or prescriptive regulation (Black 2007). A regulation is principle-based to the extent that the regulated party is given discretion in determining how the desired outcome should be achieved. In a strictly rule-based regulation, the regulator prescribes how the outcome should be achieved. For example, some of the Global Reporting Initiative (GRI) performance indicators are rule-based because they specify how the entity should report on areas of performance, such as water usage and bio-diversity.⁴⁷

A necessary, but insufficient, condition for effective rule-based regulation is that the regulator, whether a government body or more decentred regulatory body, has knowledge of how the desired outcome is best achieved. In the context of corporate social responsibility performance disclosure regulation, this means that the regulator would need an understanding of how best to serve information needs of the stakeholders of regulated entities, as a condition for implementing effective rule-based regulation. This is problematic in

⁴⁵ 83% of respondents to a survey commissioned by CPA Australia indicated corporate social and environmental reporting was only worthwhile independently audited (CPA Australia 2005, p. 23).

⁴⁶ Also referred to as 'outcome-based' regulation.

⁴⁷ For example, EN11: Percentage and volume of water recycled and reused.

the context of corporate social responsibility reporting because there are diverse stakeholder groups such that the 'one-size-fits-all' approach implicit in rule-based regulation is unlikely to be effective.⁴⁸

Rules vs principle-based regulation requires a trade-off between harmonisation and the scope and facilitation of dialogue with stakeholders. In light of the emerging state of corporate social responsibility reporting practice, dialogue with stakeholders is critical in identifying how best to achieve desirable reporting outcomes. Moreover, rule-based reporting regulation in this early stage of corporate social responsibility reporting, risks stifling experimentation and initiative that may enhance reporting practice.

It is reasonable to assert that an understanding and consensus on how best to achieve reporting outcomes can to a substantial degree be developed within the various non-financial information reporting frameworks. While progress is being made through frameworks, such as the GRI, continue to evolve⁴⁹, these practices are still in a state of relative infancy, particularly when compared with the formality of financial reporting.

5.4 Regulatory developments in corporate social responsibility disclosures in Australia

In concluding our discussion of social and environmental disclosure, regulatory developments in corporate social responsibility reporting in Australia are reviewed briefly.⁵⁰ The regulatory initiatives reflect both mandatory and voluntary approaches and varying degrees of discretion on the part of the regulated entity in meeting reporting outcomes.⁵¹

The most broadly applicable mandatory requirement for public disclosure of environmental performance is prescribed by s 299(1)(f) of the Corporations Act, which requires disclosure in the Directors' Report of performance in relation to any applicable significant environmental regulations under a law of the Commonwealth, a State or a Territory. Practice Note 68, issued by the ASIC subsequently clarified the requirements of s 299(1)(f), along with other accounting-related amendments that had been introduced into corporate law. In relation to s

⁴⁸ The GRI is progressively attempting to address this complexity by developing sector supplements.

⁴⁹ Version three (G3) of the GRI guidelines was released in October 2006.

⁵⁰ For brevity, the review is confined to legislative and broadly applicable non-government regulation. Other decentred regulatory initiatives, such as industry codes, are not considered.

299(1)(f) Practice Note 68 states that: the requirements would normally apply where an entity holds a license or is otherwise subject to environmental legislation or regulation; accounting concepts of materiality do not apply because the requirements do not relate to financial disclosures; disclosure to a regulatory body does not eliminate or reduce requirements; and information provided should be more general and less technical than would normally be provided to environmental regulatory bodies.

The requirement to report on con-compliance with significant environmental regulation is quite prescriptive, in light of the myriad of ways in which a corporation could potentially report on its environmental performance. Nonetheless, the identification of 'significant' environmental regulation relies on the exercise of judgement by the regulated entity. Another mandatory, but less widely applicable, disclosure requirement is specified by the Financial Services Reform Act 2001, which requires product disclosure statements (PDSs); entities that provide financial products with an investment component are required under s 1013D(1)(1) to disclose the extent to which labour standards or environmental, social or ethical matters are considered in investment decisions. The disclosure requirement is supplemented by *Section 1013DA Disclosure Guidelines*⁵² issued by the ASIC in 2003. The approach adopted by the ASIC in the *Guidelines* is to compel responsible decision making by mandating information flows rather than to attempt to prescribe how labour standards, or environmental, social or ethical matters should be taken into consideration. Further, the reporting regulation is mandatory, yet principle-based, allowing the regulated entity flexibility in determine the extent of disclosure necessary to comply with the requirement (ASIC 2003, p. 3).

A further regulatory development, reflecting a voluntary approach⁵³, is the reference to a broader set of stakeholders in the *Principles of Good Corporate Governance and Best Practice Recommendations* issued by the ASX Corporate Governance Council in March 2003, "Establish and disclose a code of conduct to guide compliance with legal and other

⁵¹ For a review of regulatory developments and professional initiatives in sustainability reporting in the Asia Pacific region, refer Jones et al. (2005).

⁵² *Section 1013DA Disclosure Guidelines* are mandatory for issuers of product disclosure statements.

⁵³ The approach is not strictly voluntary, to the extent that specific disclosure is required. Wallace and Zinkin (2005, p. 339) describe the "balanced", or "hybrid" approach to corporate governance reform as drawing on both prescriptive and non-prescriptive approaches by providing leading practice guidelines and requiring a "comply or explain" reporting style.

obligations to legitimate stakeholders".⁵⁴ The preamble to Principle 10⁵⁵ acknowledges the growing acceptance of consideration of environmental and social challenges and opportunities as a source of business success, noting that the performance of companies is being scrutinised from a perspective that recognises natural, human, social and other forms of capital.

Rather than the prescriptive approach employed in the U.S.⁵⁶, the ASX in its corporate governance reforms adopted a 'comply or explain' approach, supported by disclosure requirements, leaving assessment of what constitutes appropriate objectives, policies and governance mechanisms to market participants and other stakeholders. A study of compliance in 2004 with corporate governance reporting requirements and best practice recommendations of the top 500 listed entities found less than 60% compliance with recommendation 10, compared with average compliance rates of 68% across all principles (ASX 2005). A study of users of corporate governance disclosures, comprising shareholders and financial and other professional advisers, found that while all corporate governance items were considered important, 49% of respondents were interested in information about shareholder/stakeholder management, which ranked fifth behind corporate governance disclosures about financial reporting, board structure/responsibilities, remuneration and risk management; and information about social and environmental impacts and accountability combined with information about directors and management (other than board structure/responsibilities and remuneration) were identified as of interest by 5% of respondents (ASX 2006, p. 4).

More recently consideration has been given to the appropriateness of the ASX Corporate Governance Council's potential consideration of sustainability / corporate responsibility reporting (ASX Corporate Governance Council 2006, Part B). The PJCCFS has recommended that the ASX Corporate Governance Council provide further guidance in relation to Principle 7 of the *ASX Principles of Good Corporate Governance and Best Practice*

⁵⁴ Recommendation 10

⁵⁵ The ASX Corporate Governance Council has since proposed a redistribution of Principle 10 across Principles 3 and 7, such that the material concerned with codes of conduct would be incorporated in Principle 3, to promote ethical and responsible decision making, and the material concerned with addressing the concerns of a wider set of stakeholders would form part of Principle 7, to recognise and manage risk ASX Corporate Governance Council (2006, p. 10).

Recommendations “to the effect that companies should inform investors of the material non-financial aspects of a company’s risk profile by disclosing their top five sustainability risks (unless they demonstrate having fewer); and providing information on the strategies to manage such risks”.⁵⁷

6. Conclusion

It has been argued that directors have scope to consider non-shareholder interests. Moreover, the corporate law-based duty might promote or compel, and even protect from challenge, compliance with separate laws falling under a broad banner of corporate responsibility, be they environmental or social. Amendment to the law of directors’ duties is thus, unnecessary. Moreover, the embodiment of a formal duty to multiple stakeholders is potentially harmful as it introduces uncertainty into the law.

Significant amongst the PJCCFS’ recommendations, and to which a separate series of Labor Party recommendations concurred and with which the CAMAC recommendations are in agreement, is the conclusion that the present structure and content of the law of directors’ duties permits appropriate regard to be given to the interests of stakeholders other than shareholders. As such, whilst no amendments to these provisions in the Corporations Act 2001 are recommended, a number the PJCCFS’ observations are noteworthy.

The PJCCFS in Chapter 4 (Directors’ Duties) of its report canvasses a range of interpretations that can be applied to the law of directors’ duties to determine the contrasting restrictions and permissiveness on directors making decisions from a ‘corporate responsibility’ perspective. Consequently, the Committee rejects the more narrow or polarised interpretations that rationalise directors’ decision making from either a constituency of interest centred on the company itself or a paramountcy of shareholder wealth maximisation, and that moreover there exists no undue impediment based upon the need to satisfy ‘interests’ primarily in the short term. The Committee concludes by suggesting that the most appropriate interpretation of the scope for accommodating a wider basis of corporate responsibility beyond a primarily short-term company or shareholder orientation afforded by

⁵⁶ Sarbanes-Oxley Act 2002

⁵⁷ PJCCFS (2006.), Recommendation 10.

the current structure of the law, is from the perspective of enlightened self-interest. Significantly, a critical feature of this will be in the realm of identifying and applying appropriate bases of stakeholder engagement, acknowledging as such that the way forward in encouraging greater corporate responsibility will primarily be through non-legislative means.

Our analysis of mandatory and voluntary approaches to corporate social responsibility concludes that desired social and environmental outcomes can be facilitated through enhanced disclosure of corporate social and environmental policy and performance. Corporate social responsibility reporting should be encouraged through voluntary and principle-based regulatory initiatives in the absence an applied framework through which non-financial information is gathered, analysed and assimilated for reporting purposes and gauging the information/decision value of corporate social responsibility disclosures to recipients.

In these terms the Committee observes elsewhere in its report the scope of both the ASX corporate governance guidance principles⁵⁸ and the evolving development of corporate Operating and Financial Review disclosures⁵⁹ as a basis of informing the market and wider stakeholders of non-financial performance. Additionally, the Committee whilst highly supportive of the development of the GRI, acknowledges the formative nature of non-financial reporting thus rejecting any suggestion that it form the basis of an 'endorsed' framework of reporting either at a mandatory or voluntary level.⁶⁰ Clearly, whilst the Committee has probably 'laid to rest' any suggestion of wholesale change or reinterpretation of directors' statutory and general law duties, its report nonetheless foreshadows a significant period of upheaval and elevation in the significance of non-financial reporting.

Appendix: Extracts from the Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation, D.F. Jackson QC, September 2004

Terms of Reference 2 of the 'James Hardie Inquiry' is as follows:

⁵⁸ Ibid.

⁵⁹ Ibid, Recommendation 8.

⁶⁰ PJCCFS (2006) Recommendation 9.

“The circumstances in which MRCF (Medical Research and Compensation Foundation) was separated from the James Hardie Group and whether this may have resulted in or contributed to a possible insufficiency of assets to meet its future asbestos-related liabilities.”

The essence of MRCF’s position is that it had been established to control two former companies of the James Hardie Group, Amaca Pty Ltd and Amaba Pty Ltd, which had previously been manufacturers of asbestos-based products. These companies thus had, and will continue to acquire, legal liabilities to many yet to be identified persons affected by James Hardie’s asbestos products. In his conclusions Jackson QC identifies the motive for the reorganisation, an essential part of which was also the relocation of the Group’s control to the Netherlands⁶¹:

“The principal purpose of separation was to enable the Group thereafter to obtain capital or loan funding or to use its own share capital for future acquisitions without the stigma of possible future asbestos liabilities.”⁶²

⁶¹ JHI NV

⁶² Ibid, 1.6 at p 8.

References

- Anderson, H. (2004) "The Theory of the Corporation and its Relevance to Directors' Tortious Liability to Creditors" *Australian Journal of Corporate Law*, Vol. 16, pp. 73-95.
- Andrews, N. (1998) "Bad Company? The Corporate Form in an Uncertain Law" *Australian Journal of Corporate Law* Vol. 9,, pp. 39-63.
- ASIC (2003) *Section 1013DA Disclosure Guidelines*.
- Australian Stock Exchange (2005) *Analysis of Corporate Governance Practices Reported in 2004 Annual Reports*, ASX.
- ASX (2006) *Corporate Governance (Market Research Project): Key Highlights*, ASX.
- ASX Corporate Governance Council (2006) *Review of the Principles of Good Corporate Governance and Best Practice Recommendations and Consultation Paper* (November), http://www.asx.com.au/supervision/governance/principles_good_corporate_governance.htm accessed 10/1/2007.
- Bielefeld, S., S. Higginson, J. Jackson and A. Ricketts, (2004) "Directors Duties to the Company and Minority Shareholder Environmental Activism" *Company & Securities Law Journal* Vol. 23, pp. 28- 49.
- Black, J. (2002) "Critical Reflections on Regulation" *Australian Journal of Legal Philosophy* Vol. 27.
- Black, J. (2007) "Principles based regulation", public lecture, University of Sydney, 28 March.
- Bratton, W. (1988-1989) "The 'Nexus of Contracts' Corporation: A Critical Appraisal" *Cornell Law Review*, Vol. 74, No. 3, pp. 407-465.
- Butler, H. (1988-1989) "The Contractual Theory of the Corporation" *Geo. Mason University Law Review* Vol. 11, pp. 99-123.
- Buffini, F. (2005) "Calls to Protect Corporate Conscience", *Australian Financial Review*, 23 November, p. 4.
- Corporations and Markets Advisory Committee (2006) *The Social Responsibility of Corporations*, <http://www.camac.gov.au/CAMAC/camac.nsf/0/3DD84175EFBAD69CCA256B6C007FD4E8?opendocument> accessed 27/10/2007.
- CPA Australia (2005) *Confidence in Corporate Reporting* CPA Australia, Melbourne.
- Elkington, J. (2006), "Governance for sustainability", *Corporate Governance: An International Review*, Vol. 14, No. 6, pp. 522-529.
- Engel, D. L. (1979 - 1980) "An Approach to Corporate Social Responsibility" *Stanford Law Review* Vol. 32, No. 1, pp 1-98.
- Ford, H. A. J., R. P. Austin and I. M. Ramsay (2003) *Ford's Principles of Corporations Law*, 11th ed., Butterworths, Sydney.
- Ford, H. A. J., R. P. Austin and I. M. Ramsay, (2005) *Ford's Principles of Corporations Law*, 12th ed., Butterworths, Sydney.
- Goldsmith, S. and D. Samson (2005) "Sustainable Development and Business Success: Reaching beyond the rhetoric to superior performance", Foundation for Sustainable Economic Development University of Melbourne.
- Goddard, R. (2000) "Percival v Wright: The End of a 'Remarkable Career'?" *The Law Quarterly Review*, Vol. 116, 197-200.
- Gunningham, N. and J. Prest, (1993) "Environmental audit as a regulatory strategy: prospects and reform" *Sydney Law Review*, Vol. 15, No. 4, pp. 492-526.
- Heydon, J D. (1987) "Directors' Duties and the Company's Interests" in *Equity and Commercial Relationships* (ed. P.D. Finn), LBC, Sydney.

- Hill, J. (1998) "Public Beginnings, Private Ends – Should Corporate Law Privilege the Interests of Shareholders?" *Australian Journal of Corporate Law*, Vol. 9, p. 21-38.
- Hulls, R. (2005) Workshop on the Social Responsibility of Directors, 16 March, Monash University.
- Jones, S., G. Frost, J. Loftus and S. Van Der Laan (2005) *Sustainability Reporting: Perspectives on Regulatory and Professional Initiatives across the Asia Pacific*, CPA Australia.
- KPMG Global Sustainability Services and United Nations Environmental Programme (2006) *Carrots and Sticks for Starters*, KPMG, South Africa, and UNEP, France.
- McConvill, J. (2005) "Directors' duties to stakeholders: A reform proposal based on three false assumptions" *Australian Journal of Corporate Law*, Vol. 18, pp. 88-102.
- Mitchell, J., M Percy and B McKinlay (2006) "Voluntary environmental reporting practices: A further study of 'poor' environmental performers", *Australian Journal of Corporate Law*, Vol. 19 at 182.
- Parker, C. (2002) *The Open Corporation: Self-regulation and Democracy*, CUP.
- Parkinson, J. E. (1993) *Corporate Power and Responsibility*, Clarendon Press, Oxford.
- Parliamentary Joint Committee on Corporations and Financial Services (2006) *Corporate Responsibility: Managing Risk and Creating Value* Commonwealth of Australia, http://www.aph.gov.au/senate/committee/corporations_cte/corporate_responsibility/report/ accessed 10/1/2007.
- Renard, A. (1987) Commentary on J D Heydon "Directors' Duties and Company's Interests" in *Equity and Commercial Relationships*, (ed P.D. Finn), LBC, Sydney, 1987.
- Sarre, R. (2002) "Responding to Corporate Collapse: Is there a Role for Corporate Social Responsibility?" *Deakin Law Review* Vol. 7 No. 1, pp. 1-19.
- Sealy, L. (1987) "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural" *Monash University Law Review* Vol. 13, pp. 164-188.
- Wallace, P. and J. Zinkin (2005) *Mastering Business in Asia: Corporate Governance*, Wiley, Singapore.
- Lord Wedderburn of Charlton (1985) "The Social Responsibility of Companies" *Melbourne University Law Review*, Vol. 15, pp. 4-30.
- Whincop, M. (1997) "Overcoming Corporate Law: Instrumentalism, Pragmatism and the Separate Legal Entity Concept" (1997) *Company and Security Law Journal*, Vol. 15, p. 411 at 417.